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Article abstract

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NATIONALISM, SECULARISM AND LIBERAL NEUTRALITY: THE DANISH CASE OF JUDGES AND RELIGIOUS SYMBOLS

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ABSTRACT

In 2009, a law was passed in the Danish parliament, according to which judges cannot wear religious symbols in courts of law. First, I trace the development of this legislation from resistance to Muslim religious practices on the nationalist right to ideas in mainstream Danish politics about secularism and state neutrality – a process I refer to as ‘liberalization’. Second, I consider the plausibility of such liberal justifications for restrictions on religious symbols in the public sphere and, in particular, for the ban on the wearing of religious symbols by judges. I argue that such justifications are flawed and so are not plausible corollaries of anti-Islamic justifications originating on the nationalist right.

RÉSUMÉ

En 2009, le Parlement danois a voté une loi qui stipule que l’interdiction pour les de porter des signes religieux dans les tribunaux. Dans ce texte, je retrace en premier lieu le développement de cette législation, depuis la résistance aux pratiques musulmanes de la droite nationaliste jusqu’aux idées répandues dans la politique danoise à propos du sécularisme et de la neutralité d’État – un processus que je qualifie de « libéralisation ». En second lieu, je considère la plausibilité de telles justifications libérales en ce qui concerne les restrictions sur la présence de symboles religieux dans la sphère publique et, en particulier, l’interdiction faite aux juges de porter des signes religieux. Je défends l’idée que de telles justifications sont déficientes et ne constituent pas des corollaires plausibles des justifications antimusulmanes en provenance de la droite nationaliste.

1. INTRODUCTION

With increasing levels of diversity in liberal European states, religion is increasingly becoming politicized. In particular, the influx of Muslims has been a cause of controversy and heated debates over Muslim practices and Muslim symbols in the public sphere, and even over the compatibility of Islam and liberal values.¹ Not least in Denmark, where unusually restrictive policies have furthermore been implemented, by European standards, in terms of for example immigration, naturalization, permanent residence and possibilities for work for asylum seekers.² In part, this can be seen as an expression of the real political influence of the nationalist, right-wing *Danish People's Party*.

In this article, I focus on political controversies regarding religious symbols in the public sphere in Denmark, and the ways in which ideas originating on the nationalist right are becoming part of mainstream politics and legislation by means of a transformation of justifications. Thus, ideas about inherent problems in Islam are transformed into ideas about the requirements of secularism and the ideal of state neutrality.

To illustrate this process, I focus on a new law that renders it impermissible for Danish judges to wear religious symbols in courts of law. While the ideas behind this legislation were originally put forward by the *Danish People's Party* in terms of a general resistance to Muslim headscarves in the public sphere, motivated by thoughts about the oppression of women and even about the (alleged) totalitarian connotations of Muslim headscarves, the new law is explicitly motivated by a concern for state neutrality and the impartiality of courts.

First, then, I trace the development of this legislation from resistance to Muslim religious practices on the nationalist right to ideas in mainstream Danish politics about secularism and state neutrality. I shall refer to this transformation of justifications as a process of 'liberalization'. Second, I consider the plausibility of such liberal justifications for restrictions on religious symbols in the public sphere and, in particular, for the ban on the wearing of religious symbols by judges in courts of law. I argue that such justifications are flawed and so are not plausible corollaries of anti-Islamic justifications originating on the nationalist right. In other words, while liberalization may sweeten the pill, it does not add plausibility to opposition to judges' wearing Muslim symbols.

The case of religious symbols in courts of law is particularly interesting, compared to other cases regarding religious symbols in the public sphere, for two reasons. First, what originally sparked the resistance to judges' wearing religious symbols was a concern about a specific such symbol, namely the Muslim headscarf. However, there are in fact no female Muslim judges in Denmark wearing headscarves, and nor is there any indication that this would occur in the near future. In that respect, the law may be said to have more symbolic value than to ad-

dress an imminent problem (insofar as we consider judges wearing headscarves a problem). Second, the case of judges wearing religious symbols is interesting because at least some liberals, who are otherwise rather sceptical about restrictions on religious freedom in the public sphere may feel that this is a special case. After all, courts are particularly endowed with notions of neutrality and impartiality, as symbolized by goddess *Justitia*, blindfolded and carrying the weights of justice.

2. THE DANISH POLITICAL DEBATE ON RELIGIOUS SYMBOLS

In Denmark, a liberal-conservative coalition, consisting of the liberal party *Venstre*³ and the *Conservative People's Party*, came into power in 2001 and they have won two consecutive elections since then. They have in various ways tightened immigration policies, reduced social benefits for immigrants, and introduced more restrictive rules for citizenship and permanent residence (including more difficult language tests and knowledge tests of Danish politics, history and culture). It is generally acknowledged that such policies, as well as a “tougher” terminology when addressing the crime, educational underachievement, unemployment, and (allegedly) illiberal practices of (some) immigrants and their descendants have played a significant role with respect to winning three consecutive elections.

However, the liberal-conservative coalition does not have a majority in the Danish parliament and they have relied systematically for parliamentary support on the *Danish People's Party*. In this respect, the *Danish People's Party* has had more real and sustained influence on state policy-making than most other right-wing nationalist parties in Western Europe. And they have consistently pushed for more restrictive immigration policies and for policies of assimilation as a condition for providing the parliamentary support needed by the government.

In particular, Muslims in Denmark have been targeted by the *Danish People's Party*. Recurrent themes are that Islam and liberal values are incompatible and that Islam is an aggressive, expansionist ideology. For example, Mogens Camre, former member of the European Parliament has stated: “Islam cannot be integrated,” “Islam wants to dominate Europe,” “they [the Muslims] are here because expansion into, and domination of, the West is on the agenda of Islam,” and “Muslims belong in Muslim-land, and that ain't here.”⁴ Likewise, Kristian Thulesen Dahl and Søren Espersen, prominent MPs, have said, respectively: “In many ways we are anti-Muslims”, and “I think Islam is the largest problem in the world.” Louise Frevert, former MP, has compared Islam to a “cancer”, and Pia Kjærsgaard, MP and chairman of the party, has suggested that “Islam is, in essence a religion that cherishes violence.”

While these are some of the more extreme statements made by representatives of the *Danish People's Party*, they are also suggestive with respect to conceptions

of Islam on the nationalist right. Thus, ideas of Islam as a totalitarian, oppressive, sexist, violent ideology are recurrent themes. Also, as we have seen, the suggestion that Muslims are scheming to conquer the West and that Muslim immigrants constitute a vanguard is a common figure of thought.

Indeed, some of these ideas about Islam and Muslims are also to be found as motivations for resistance to Muslim religious institutions and symbols, including opposition to mosques, minarets, burial grounds, and headwear and clothing in the form of *hijabs*, *niqabs* and *burqas*. The *Danish People's Party* has proposed that headscarves should be removed from the public sphere, and should thus not be worn by MPs, teachers, students, doctors, nurses, policemen, social workers, soldiers and judges. Indeed, Pia Kjærsgaard has stated that: "Islamic headscarves, and all that they represent, do not belong in Denmark."⁵ This is because they are distinctly "un-Danish."⁶ In fact, the idea that practices or policies are unfitting (in Denmark) because they are 'un-Danish' has spread from the nationalist right to mainstream and (even) leftist politics, and is now a term commonly used to discredit ideas and policies with which one disagrees.

The particular ways in which headscarves are considered un-Danish pertain to ideas about them being oppressive towards women, expressions of a totalitarian ideology and signs of lack of will to integrate. In fact, Søren Krarup, MP, declared in 2007 that: "Islam is not a religion, but a totalitarian system, and so of the same kind as the totalitarian systems of the 20th Century – Communism and Nazism", and so "insofar as one says that the swastika is a symbol of Nazism, it is of the same kind as the headscarf of Islam."⁷ Pia Kjærsgaard, who herself considers the headscarf a symbol of political Islam,⁸ later confirmed this interpretation: "I completely agree with Søren Krarup that it is the exact same symbol – a headscarf and a swastika."⁹

The *Danish People's Party* has succeeded in bringing Muslim religious symbols on the political agenda, such that worries about Muslim symbols are increasingly also being raised by individual members of the liberal-conservative coalition and individual *Social Democrats*. However, the new law, from June 2009, prohibiting judges from wearing religious (as well as political) symbols in courts of law,¹⁰ indicates a novel strand, in that a parliamentary majority has passed a law to prevent religious symbols in (a particular part of) the public sphere.

The debate, leading up to the proposal of the law, was triggered by a statement by the Courts of Denmark implying that judges should be allowed to wear Muslim headscarves. The *Danish People's Party* opposed this decision and accused the government of being indecisive on the issue, and after some hesitation a law proposal was drafted by the government and eventually passed with the votes of the liberal-conservative coalition, the *Danish People's Party* and the *Social Democrats*.

However, the ideas that have been used to motivate the law have undergone a transformation in the process. More precisely, there are two sets of justifications at work at the same time. One pertains to the headscarf as an Islamic symbol – a concern that has repeatedly been raised the *Danish People's Party*. And it is interesting that the public political debate leading up to the drafting of the law focused almost exclusively on Muslim headscarves rather than on religious symbols more generally. Notably, this was the case not just for *Danish People Party* MPs, but also for MPs from the liberal-conservative coalition. Indeed, religious symbols in courts of law simply had not been on the agenda until the question of Muslim headscarves surfaced in the debate.

However, even though the debate focused on headscarves, it also increasingly began to address issues of impartiality and neutrality. For example, Lene Espersen, who was Minister of Justice at the time when the debate took off, stated that she feared headscarves would threaten the neutrality of the courts.¹¹ And in the law proposal that followed, the focus was on religious symbols quite generally. It was pointed out that it is essential that judges are independent and impartial, and it was explicitly stated that the purpose of the law is that judges shall appear religiously and politically neutral in courts of law.¹²

Indeed, focus on secularism and state neutrality illustrates another strategy in contemporary Danish politics for tackling issues of religious and cultural diversity. It has been voiced by, among others, former Prime Minister and leader of the liberal-conservative coalition, Anders Fogh Rasmussen, who publicly suggested that there should be less religion in the public sphere. This was a call for a further secularization of society. However, while it may seem reminiscent of French conceptions of *laïcité*,¹³ it is also in important ways different. Thus, among Danish politicians it has in general not been accompanied by a desire to abandon the Danish established church, and in this respect, Rasmussen is no exception. In fact, he explicitly supports the existence of an established church in Denmark. Furthermore, he specifically justifies his call for less religion in the public sphere in terms of a Lutheran conception of the separation of religious and worldly affairs,¹⁴ which, again, constitutes a departure from French *laïcité*.

Now, the move from the initial debate about Muslim headscarves, and the legitimacy of judges wearing them, can be described as a process of *liberalization*, where concerns about state neutrality end up motivating the law proposal. Not in the sense that the initial scepticism towards specifically Muslim symbols no longer plays a role, but in the sense that a second, more liberal justification is complementing it, and indeed constitutes the official motivation for the law. That Muslim symbols are nevertheless still considered special – and especially problematic – is suggested by the following considerations: 1) the political debate focused almost exclusively on headscarves; 2) it was only when the Courts of Denmark stated that headscarves would be permitted that religious symbols in

courts even became an issue; and 3) while the official motivation for the law was to ensure that courts appear religiously neutral to citizens, no efforts have been made to get rid of a logo, used by the Danish courts, that includes a Christian cross.

It is also worth stressing that the drafting of the proposal in terms of a general ban on religious symbols may serve a strategic purpose, namely to rule out conflicts with anti-discrimination legislation. This strategic advantage may also have been the *Danish People's Party's* reason for adopting the neutralist justification for the law proposal,¹⁵ while also pushing the agenda of discrediting Muslim symbols. As an example of the latter, in response to the Courts of Denmark decision, they launched a campaign with posters portraying a *niqab*-wearing judge, with the word 'submission' written underneath (although *niqabs* had not been part of the debate and were not what the Courts of Denmark had opened up for).

A more recent development, which illustrates resistance in parts of the liberal-conservative coalition to at least some Muslim symbols, is a proposal from the *Conservative People's Party*, according to which *burqas* and *niqabs* should be banned in the public sphere (literally, from the moment one steps out on the sidewalk).¹⁶ This proposal, which mirrors proposals in Belgium and France, was motivated by a concern for Muslim women, who were claimed to be forced to wear them, and the idea that such clothing is oppressive. On this basis, the government commissioned a report on the use of *burqas* and *niqabs* in Denmark. The report concluded that between 100 and 200 hundred women wear *burqas* or *niqabs* (the report did not distinguish, because the number of women wearing *burqas* is estimated to be very low; the authors of the report afterwards suggested two or three). About half of these 100-200 women are ethnic Danes who have converted to Islam.¹⁷

The authors of the report did not find a case for claiming that women are forced to wear *burqas* or *niqabs*. And while the conservative proposal did originally gain support from the *Social Democrats* (besides the *Danish People's Party*), *Venstre*, the other party in the liberal-conservative coalition, ended up not supporting it and it was eventually dropped.

In this section I have argued that ideas about Muslim symbols in the public sphere, originating on the nationalist right, have made it into mainstream politics, but have also undergone a transformation in the form of liberalization. More specifically, two kinds of justifications are at work at the same time, namely both the initial scepticism with respect to Muslim symbols, but also a secular one, urging state neutrality. In particular, I have suggested that the emergence of the ban on religious symbols, worn by judges in courts of law can be understood in this way, but I believe that this case is an instance of a more general pattern.

Since secularism and state neutrality thus become official justifications, for example for the new Danish law, it is of course worth asking whether they are plausible justifications. In the rest of the paper, I consider this question in relation to the Danish law. Another way of putting this is whether resistance to Muslim symbols in courts of law can be justified by transforming such resistance into an issue of state neutrality and general opposition to religious symbols in this setting.

3. STATE NEUTRALITY

While the new Danish law was officially motivated by the idea that courts should appear neutral to citizens, it is not entirely clear how this is to be understood and in the following, I shall consider and assess various interpretations. According to the traditional liberal ideal of state neutrality, the state should not favour any particular conception of the good at the expense of other such conceptions. There are various ways of understanding this but usually, contemporary political theorists have in mind the ideal of *neutrality of justification*, that is, the idea that the state should not justify its policies on the basis of a specific conception of the good.¹⁸

State neutrality thus relies on a distinction between political conceptions and conceptions of the good.¹⁹ While both include value judgements, the former includes only ‘thin’ claims about liberal justice, whereas the latter may include ‘thick’ judgements about virtually any aspect of how we should go about living our lives. Thus, religious claims constitute a conception of the good and so cannot legitimately be invoked to justify state policies.

Whatever plausibility this ideal of state neutrality has, it is clear that it does not in itself rule out much religion in the public sphere.²⁰ Thus, it is quite compatible with a policy that allows employees in public institutions to express their religion in the form of religious symbols, as long as this policy does not appeal to a conception of the good. So if a state policy permits judges to wear religious symbols on the basis that it should respect their freedom of religion, this is quite compatible with state neutrality, because freedom of religion is a political doctrine. In fact, neutrality of justification is even compatible with the existence of an established church, as long as it is justified politically, say, as a way of promoting social cohesion in society.²¹

There are of course other ways of understanding state neutrality, including the idea of *neutrality of consequences*. According to this doctrine, all conceptions of the good should fare equally well in society – no matter how expensive or unattractive they are. Will Kymlicka remarks that this doctrine in fact seems quite illiberal, as it does not respect freedom of choice and does not hold people responsible for the costs of their choices.²² However this may be, it is difficult to see how it could be used to justify the prohibition on judges wearing religious symbols in courts. In fact, it seems to be a doctrine better equipped to argue the

opposite, since religious judges may point out that, unlike other conceptions of the good, their conceptions are being restricted by the Danish law.

It may be suggested that we need to distinguish between ‘civilians’ and representatives of the state when considering religious symbols in the public sphere. Thus, it could be argued that unlike for example children in schools, civil servants and other state employees – especially those with whom citizens are confronted – *represent* the state and therefore particularly stringent rules apply to them with respect to what symbols they employ. Insofar as they wear a religious symbol, they will be signalling state affiliation with this religion. However, note first that neither of the two conceptions of state neutrality considered so far implies that policies should be more restrictive for state employees. With respect to neutrality of justification, permissive policies for state employees may still be justified in terms of freedom of religion, and with respect to neutrality of consequences, a policy that hinders the expression of religion through symbols will still be easier to comply with under some conceptions of the good than under others, even if it applies only to state employees.

Second, it is not clear that for example judges wearing religious symbols can be said to be expressing anything about state affiliations to religions. After all, no one is suggesting that female judges wearing make-up are expressing anything about state attitudes to gender roles, or that male judges with long hair are expressing a state commitment to hippie culture. A different question, however, is whether people are likely to perceive judges wearing religious symbols as biased rather than impartial, and I return to this issue in Section 5.

4. EQUALITY OF OPPORTUNITY

State neutrality can be said to express an ideal of equality in the sense that state policies should not favour some individuals over others by promoting their particular conception of the good. Thus, one way of understanding the concern for state neutrality is as a concern that state policies should imply equal opportunities for individuals to live according to their particular such conception. In fact, when the new Danish law was proposed to the parliament by Brian Mikkelsen, who had by then replaced Lene Espersen as Minister of Justice, he emphasized that the law is compatible with a principle of equal treatment of persons, irrespective of their gender, race, language, religion, political views, national or social affiliation etc., although this was not explicitly used to motivate the law, but rather to emphasize that it does not conflict with the European Convention on Human Rights.²³ The reason given was that the law applies to *all* religions (and political views).

Political theorists have likewise stressed the relation between state neutrality and some form of equality of opportunity. For example, one of Robert Audi’s prin-

ciples for the separation of state and church – what he calls the ‘equalitarian principle’ – is concerned with discrimination that limits the opportunities of people with specific religions,²⁴ and Veit Bader’s principle of ‘relational neutrality’ requires a state “equidistant to both religious and secular worldviews and practices”.²⁵

Interestingly, there are also interpretations of French *laïcité* that stress the relation between neutrality and equality of opportunity, and are furthermore taken to imply that state employees must not wear religious symbols.²⁶ Thus, Cécile Laborde writes:

More attention has been paid to the question of the legitimacy of the expression of religious faith by state agents. We have seen that *laïcité* postulates that only if the public sphere is kept free of all religious symbols can it treat citizens equally. This puts stringent limits on the expression of religious beliefs by public functionaries. Official republicans insist that a line be drawn between ‘freedom of conscience’ and the ‘expression of faith in the public sphere’. It is not always legitimate for citizens to ‘make use of a private right in public’: in the public sphere, the value of religious freedom must be balanced against other values derived from the principle of *laïcité* as neutrality.²⁷

The egalitarian principle to which Laborde alludes “requires that the state does not give preference to one religion over another: the equality referred to here is equality between believers of all faiths”.²⁸ She furthermore stresses the similarities between this conception and Brian Barry’s liberal egalitarianism in *Culture and Equality*, and indeed, Barry here characterizes neutrality as “a coherent notion that defines the terms of equal treatment for different religions”.²⁹

However, it is difficult to see how a ban on the wearing of religious symbols by ‘state agents’ can flow from an ideal of equal treatment, or for that matter from other ideals of equality of opportunity. Consider again the new Danish law. It is of course true that since all religious symbols are banned, there is a sense in which the law treats different religions, and the people affiliated with them, equally. However, it is by no means clear that it is the only way of doing so. Suppose, for example, that everyone was allowed to wear the religious symbols he or she happened to prefer. There is also a sense in which *this* rule would treat individuals equally. So even *if* we were to acknowledge that the ban on religious symbols is a way of treating people equally, it is not clear how the principle of equal treatment is supposed to *imply* such a ban.

This is important because, as Laborde concedes in the passage quoted above, there seem to be other important liberal principles that speak against a ban.

Laborde mentions freedom of conscience, but we might equally invoke freedom of expression. If both a ban on all religious symbols and a policy that allows people to wear the religious symbols of their choice are compatible with equal treatment, the basic liberties mentioned seem to tilt the balance in favour of the latter policy.

Furthermore, the claim that a ban on wearing religious symbols constitutes equal treatment may be challenged. This is particularly clear when we consider the interests not just of people with different religions, but also of atheists. For atheists, the ban on religious symbols is costless, which, obviously, it is not for people for whom wearing religious symbols to work is important. Equally, the law is costless for people who are religious but have no desire to wear religious symbols or are able to hide them under their clothing (and have no desire to wear them ‘openly’). Therefore, arguably, the ban on religious symbols does not treat people equally. In fact, this very complaint was raised by the largest organization for Muslims in Denmark (Muslimernes Fællesråd), who argued that while the ban on religious symbols is formally equal, it is only Muslim women who are prevented from wearing their religious symbols (because other symbols can be hidden under clothes or wigs).³⁰

To consider this argument in greater detail, we need to distinguish between different conceptions of equality of opportunity. After all, it may be suggested that while the law impacts differently on different individuals depending on their religious commitments, this is quite compatible with equality of opportunity. In fact, this is a point Barry stresses repeatedly in *Culture and Equality*. Thus, he argues that “if uniform rules create identical choice sets, then opportunities are equal”,³¹ and in particular this can be so even if some people derive more satisfaction from the rules than others. To illustrate: even if a law that prohibits drugs impacts differently on different people (depending on whether they would be inclined to take drugs or not), this does not imply that the law violates equality of opportunity. Likewise, even if a law that prevents judges from wearing religious symbols impacts differently on people, this does not challenge the claim that it creates equal opportunities.³²

Now, I have criticized this account of Barry’s in detail elsewhere,³³ but here I merely want to suggest that it cannot be used to discredit the claim that the new Danish law violates equal opportunities. It is true that there is a *sense* in which the law generates identical choice sets for everyone, because it gives everyone the same option: if one wants to be a judge, one must avoid wearing religious symbols in court. But even if the law gives rise to identical choice sets in *this* sense, this is not sufficient to guarantee equal opportunities. After all, a law that requires judges to *wear* Muslim headscarves would give people identical choice sets in the same sense. It gives everyone the same option: if one wants to be a judge, one must wear a Muslim headscarf in court. But clearly this latter law

would not give people equal opportunities. So the fact that a law gives everyone the *same* option does not guarantee equality of opportunity. In fact, it is neither a necessary nor a sufficient condition for such equality.³⁴

The reason a law requiring judges to wear Muslim headscarves does not give people equal opportunities, I suggest, is that it gives rise to different levels of advantages, depending on people's religious commitments.³⁵ And this, of course, is precisely the point of the claim that the new Danish law violates equality of opportunity. It gives rise to different levels of advantages for different individuals depending on their religious affiliation.

Of course, in order to assess levels of advantages, we need an account of the currency of egalitarian justice. Consider, first, equality of resources. Roughly, this account implies that a distribution of resources is equal if it would result from an auction in which individuals have equal purchasing power.³⁶ Now, access to wearing religious symbols need not directly affect people's purchasing power. Nevertheless, equality of resources implies that it would be wrong to gratuitously limit people's access to specific resources, and this would seem to include the resource of wearing a religious symbol. After all, Dworkin's auction is incompatible with arbitrary restrictions on the kinds of resources people can acquire. As Dworkin himself points out, if the auctioneer were to transform all the available resources into a large stock of plover's eggs and pre-phylloxera claret for which people could bid, then this would hardly result in a fair distribution of resources.³⁷ Everything else being equal, we should assume maximal freedom both with respect to the kind of resources people can acquire in the auction and the uses they are entitled to make of them, because this will allow people to maximally express their preferences in the auction.³⁸ So limiting judges' access to religious symbols in courts would be illegitimate, according to equality of resources, unless an appropriate independent reason could be given for doing so. And note that no such reason has surfaced in my discussion so far.

If, instead, we focus on welfare, or opportunities for welfare, as the currency of egalitarian justice, it seems clear that the Danish law will have different impact on people depending on their religious commitments. For example, it will frustrate the (self-regarding) preferences of Muslim women aspiring to be headscarf-wearing judges but not of, for example, atheists. So like equality of resources, equality of (opportunity for) welfare would seem to provide a case against the new Danish law, everything else being equal.

Of course, insofar as our focus is on *opportunities* for welfare, there is an issue of whether people should be held responsible for their specific religious preferences in such a way that, for example, they have no legitimate complaint if a law makes it more difficult for them to satisfy these preferences than it does for other people to satisfy *their* religious (or other) preferences.³⁹ I argue elsewhere that,

according to equality of opportunity for welfare, we should not in general hold people responsible for their religious preferences in this way, in part because such preferences are typically acquired as a part of childhood socialization and are often costly to abandon.⁴⁰ However, I shall not repeat this argument here.

Nevertheless, note that we would not in general want to hold people responsible for their religious preferences in the way considered above. For example, with respect to the imagined law that requires judges to wear Muslim headscarves, we would not want to excuse the differential impact of this law on the basis that this difference is due to differences in people's religious preferences, for which they should be held responsible. Therefore, like equality of resources, equality of opportunity for welfare would indeed seem to imply that the differential impact of the new Danish law implies a violation of equality of opportunity, everything else being equal.

Before I end this section, let me briefly point out that when considering equality of opportunity so far, I have been focusing on the extent to which specific rules (such as the new Danish law) have differential impact. Thus, I have been considering whether such rules *produce* inequality of opportunities. However, it may be (plausibly) argued that what matters is rather whether such inequalities will *exist* if the rules are implemented. To illustrate, a policy of giving to citizens an equal sum of money does not in itself produce inequalities of opportunity, but it may well maintain (or even increase) them, for example because some people with disabilities need to spend a certain proportion of this sum on medicine. However, even if we shift the focus and consider which inequalities exist once the law is implemented, this does not seem to alter the conclusion that the law violates equality of opportunity. After all, the individuals primarily targeted by the law are Muslim women, and since this is hardly a privileged group, it is also not a group that is compensated for the comparative disadvantage to which the law gives rise by other advantages to which they have access.

5. IMPARTIALITY

As pointed out above, it was stated in the proposal of the new Danish law that it is essential that judges are independent and impartial. While this was not explicitly used in the proposal to motivate the law, some politicians from the *Danish People's Party* have suggested that there is a real risk that judges wearing headscarves will not be impartial.⁴¹ However, there are at least three reasons why this concern seems misplaced. First, there is no empirical evidence to suggest that judges wearing headscarves or other religious symbols would be more prone to partial judgements than would other judges. Second, the real worry expressed here does not concern religious symbols as such, but rather the religious commitments that cause people to wear them. Removing the symbols therefore does not remove the real cause of concern, namely the underlying religious commitment.⁴² And third, there are already independence requirements for judges to se-

cure that a judge does not rule in a case where his or her independence may be questioned.⁴³

Nevertheless, as also pointed out above, there is another concern pertaining to impartiality – and one that *was* officially used to motivate the law – namely that judges should appear religiously neutral in courts of law. This concern is not with whether judges *are* impartial, but whether they are *perceived* to be impartial by the general public. The fear is that if people do not consider judges impartial, their trust in the judicial system will be undermined.⁴⁴

Here, however, we need to be careful. The issues raised by this argument for the law are in fact much more general than is conceded in the law proposal. After all, there can be all sorts of reasons why people do not have faith in judges. Men who are accused of rape may doubt they will be given a fair treatment by a female judge. Squatters may doubt they will receive a fair trial if the judge is a suit-wearing, conservative-looking ‘stiff’. Equally, it seems likely that when female judges first appeared, some people (and, presumably, mostly men) were concerned about their capacities for rational, impartial judgement.

This suggests that the mere fact that some people do not trust judges with specific characteristics can hardly constitute a sufficient reason not to allow judges to have these characteristics. For example, distrust in the rational capacities of women has of course never been a good reason to ban female judges. Rather than give in to discriminatory gender stereotypes, such stereotypes should be fought by allowing women to become judges and thus to show that they are equally capable of performing the job. And the overwhelming acceptance of female judges today indicates that this has indeed been a successful strategy.

Why should we then think differently of judges who wear religious symbols? Even *if* some people are inclined not to trust judges who wear such symbols (or, more specifically, Muslim headscarves, which was after all the particular symbol that raised the debate and paved the way for the law in the first place), why would we want to *accommodate* that concern by banning religious symbols? Unless, at least, there is reason to suppose that judges wearing religious symbols in courts will lead to a massive break down in trust in the judicial system, and there is no evidence to suggest that this would be the case.

In fact, the Danish Association of Judges expressed that it does not condone the new law, and argued that people already respect and trust the Danish courts, where the law will not contribute to such trust.⁴⁵ And another Danish judicial organisation even suggested that the new law is likely to diminish trust in courts, because apart from the ban on religious symbols it also includes a requirement that some judges should wear capes, which creates an impression of elitist judges, who do not reflect the society that surrounds them.⁴⁶ However this may

be, it seems that Danish judges have in general not shared the worries motivating the law, concerning a loss of trust in courts due to the presence of religious symbols.

Let me very briefly also mention another, less principled conception of ‘neutrality’, which also concerns the way in which judges appear to people. According to this conception, a person is neutrally dressed in so far as her clothes do not ‘stand out’ or ‘arouse attention’. However, what counts as neutral in this sense will of course vary across different cultural and religious groups in society. And to legally fix dress codes for judges simply on the basis of majority conceptions of what it is normal and appropriate to wear seems both moralistic and to plunge into the waters of what John Stuart Mill referred to as the ‘tyranny of the majority’.⁴⁷ This is hardly the way forward insofar as our concern is with *liberal* justifications.

This is not to suggest that ‘anything goes’ for judges in courts of law and indeed, the question of exactly where to draw the line is a difficult one. I have already pointed out that there are independence requirements for judges and this is, it seems to me, as it should be. So, for example, wearing a t-shirt for a company that is under trial would indicate that a judge should not be considered independent in the relevant case. For the same sort of reason, there may be cases in which judges wearing religious symbols should not be used, where these symbols may in one way or another suggest that a judge cannot be considered independent in a particular case. And presumably there are certain other symbols, for example, swastikas, that should not be admitted, at least in part because by wearing it, a judge would indicate a lack of commitment to the democratic basis for the state (including the judicial system), which may raise the suspicion that he or she would not feel committed to its laws.⁴⁸ Nevertheless, as suggested above, the issue of where to draw the line is a difficult one, and I do not pretend to have exhaustively dealt with it here.

6. CONCLUSION

I have argued that the values underpinning the new Danish law have gone through a transformation, originating in anti-Islamic concerns on the nationalist right and then gradually moving towards secular concerns with liberal neutrality. Not in the sense that the former values were replaced, but in the sense that the latter kind increasingly supplemented them and indeed formed the official justification for the law.

Furthermore, I have argued that the law cannot be justified in terms of liberal neutrality. This is so whether we conceive of such neutrality as neutrality of justification, neutrality of consequences, equality of opportunity, or real or perceived impartiality. In fact, several of these interpretations imply that the law is unjust. This is a worrying result, especially since there are also other liberal values that seem to imply that the law is dubious, including freedom of religion and freedom of expression.

While I have been specifically concerned with the ban on judges' wearing religious symbols in courts, I believe that this case illustrates a more general tendency of trying to liberalize anti-Islamic concerns that are, in fact, quite illiberal. Furthermore, the arguments I have employed have implications for a wider range of issues concerning religious symbols in the public sphere, both in Denmark and elsewhere. For example, many of them are equally relevant when assessing restrictions on religious symbols, including headscarves, in schools.⁴⁹

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NOTES

- ¹ Modood, 2007.
- ² Think Tank on Integration in Denmark, 2004.
- ³ Which means ‘left’, although the party is on the right in Danish politics, but it was considered left of the other main party at the time it was founded (incidentally, this other party was called ‘Højre’, which means ‘right’ – a predecessor of the *Conservative People’s Party*).
- ⁴ All the quotes in this paragraph can be found at <http://www.humanisme.dk/hate-speech/samlet.php>, where the original sources are also listed. All translations are by the present author.
- ⁵ Again, see <http://www.humanisme.dk/hate-speech/samlet.php> (my translation).
- ⁶ Pia Kjærsgaard, ”Tørklædets svøbe”, *Ugebrev*, 21.5.2007, http://www.danskfolkeparti.dk/T%C3%B8rkl%C3%A6dets_sv%C3%B8be_.asp (my translation).
- ⁷ See <http://www.humanisme.dk/hate-speech/samlet.php>, (my translation).
- ⁸ Pia Kjærsgaard, ”Tørklæder”, *Ugebrev*, 23.4.2007, <http://www.danskfolkeparti.dk/.asp>.
- ⁹ See <http://www.humanisme.dk/hate-speech/samlet.php>, (my translation).
- ¹⁰ Lov om ændring af retsplejeloven (Dommeres fremtræden i retsmøder), lov nr. 495 af 12.6.2009.
- ¹¹ See, e.g., the interview with Lene Espersen in ”Justitsminister i tvivl om dommere må bære tørklæde”, *Politiken* 29.7.2008.
- ¹² Dommeres fremtræden i retsmøder, lovforslag nr. L98, folketingsåret 2008/2009.
- ¹³ For further clarification of the implications of *laïcité*, in particular in relation to headscarves, see e.g. Joppke, 2009, and Laborde, 2005.
- ¹⁴ See the interview with Anders Fogh Rasmussen in ”Religionen i Foghs private rum”, *Kristeligt Dagblad*, 30.6.2006.
- ¹⁵ Pia Kjærsgaard, ”Neutraliteten i fare”, http://www.danskfolkeparti.dk/Pia_Kj%C3%A6rsgaard_Neutraliteten_i_fare.asp.
- ¹⁶ ”K kræver forbud mod burka”, *Politiken*, 17.8.2009.
- ¹⁷ *Rapport om brugen af niqab og burka*, Department of Cross-Cultural and Regional Studies, University of Copenhagen, 2009.
- ¹⁸ Kymlicka, 2002, p. 218; Rawls, 1993, pp. 193-4.
- ¹⁹ Rawls, 1993, pp. 11-15.
- ²⁰ Holtug, 2009a, p. 169.
- ²¹ Note that the point is not that this would be a plausible justification, only that it would be – in the relevant sense – a neutral one.
- ²² Kymlicka, 2002, p. 218.
- ²³ Dommeres fremtræden i retsmøder, lovforslag nr. L98, folketingsåret 2008/2009, under ”Bemærkninger til lovforslaget”.
- ²⁴ Audi, 2000, p. 36.
- ²⁵ Bader, 2007, p. 101.
- ²⁶ Let me, however, briefly reiterate the *ad hominem* point that *laïcité* cannot consistently be invoked to justify the new Danish law by politicians who support the continued existence of an established church.
- ²⁷ Laborde, 2005, p. 322.
- ²⁸ Laborde, 2005, p. 309.
- ²⁹ Barry, 2001, p. 29.
- ³⁰ Muslimernes Fællesråd, ”Høringssvar ifm lovforslag om kvindelige dommeres fremtræden under retsmøder”, http://www.mfr.nu/index.php?option=com_content&view=article&id=51:horingssvar-ifm-lovforslag-om-kvindelige-dommeres-fremtraeden-under-retsmoder&catid=1:seneste-nyheder&Itemid=29.
- ³¹ Barry, 2001, p. 32.

³² Note, incidentally, that while Barry in his discussion focuses on the case for difference-blind rights and against group-differentiated rights, this is not what is at issue here. After all, the new Danish law is difference-blind, as it gives the same right to everyone, namely to be a judge only if one is willing to remove one's religious symbols in courts of law.

³³ Holtug, 2009b.

³⁴ Holtug, 2009b, pp. 84-6.

³⁵ An alternative explanation would be that such a law severely restricts the *number* of options open to people. The idea might thus be that what justice requires is that people should have an adequate range of (valuable) options to choose from (Raz, 1986, p. 408). However: 1) Even if we were to accept this alternative explanation, it is not clear that it gets the proponent of the ban on religious symbols off the hook. After all, just as the headscarf requirement rules out all options that involve not wearing religious symbols or wearing ones that are incompatible with headscarves, the ban on religious symbols rules out all options that involve wearing such symbols. It is not clear that the former rules out more (valuable) options than the latter (and how would we even assess this?). 2) It is not even clear that the alternative explanation can explain why the headscarf requirement violates equality of opportunity. After all, there are presumably many valuable options left, even if one cannot become a judge because one does not want to wear a headscarf. 3) In any case, equality of opportunity cannot simply be a matter of the range of valuable options. A law that requires judges not to be fans of Manchester United leaves the bulk of valuable options intact, including the option for judges of being fans of Manchester City, Arsenal, Chelsea etc. But clearly the law would nevertheless violate equality of opportunity.

³⁶ Dworkin, 2000, Ch. 2.

³⁷ Dworkin, 2000, p. 67.

³⁸ Thus, according to Dworkin, equality of resources presupposes (or implies) a conception of liberty; see Dworkin, 2000, Ch. 3.

³⁹ Arneson, 1989, p. 85.

⁴⁰ Holtug, 2009b, pp. 102-12.

⁴¹ Peter Skaarup, "Hovedtørklæder i retten", http://www.danskfolkeparti.dk/Peter_Skaarup_Hovedt%C3%B8rkl%C3%A6der_i_rettet_.asp.

⁴² Of course, the ban on religious symbols may prevent some Muslims from becoming judges, and preventing this may have been part of the motivation for the *Danish People's Party*, but presumably this justification would conflict with existing anti-discrimination legislation, and is in any case incompatible with the kind of liberal justification for the law I am presently considering.

⁴³ Dommerfuldmægtigforeningen, "Letter to the Ministry of Justice", 8.12.2008.

⁴⁴ Dommeres fremtræden i retsmøder, lovforslag nr. L98, folketingsåret 2008/2009.

⁴⁵ Den Danske Dommerforening, "Letter to the Ministry of Justice", 27.11.2008.

⁴⁶ Retspolitisk Forening, "Høringssvar fra Retspolitisk Forening vedrørende forslag til lov om ændring af retsplejeloven (Dommeres fremtræden i retsmøder)", 8.12.2008.

⁴⁷ Mill, 1962, p. 129.

⁴⁸ Of course, as we have seen, some members of the *Danish People's Party* consider headscarves morally *on a par* with a swastika. Less dramatically, headscarves are sometimes characterized as patriarchal, connoting female inferiority and expressing a desire to control women's sexuality. However, headscarves seem far more open to different interpretations than e.g. swastikas, where some interpretations of the former imply they are oppressive and others that they are liberating, including that of the 'autonomous veil' worn by young second-generation Muslims in France, signifying a protest against racism, and "the desire to be French and Muslim, modern and veiled, autonomous and dressed in the Islamic way" (Joppke, 2009, p. 13; Joppke attributes the quote to Gaspard and Khosrokhavar, 1995. For a similar variety of interpretations in a Danish context, based on interviews with Muslim women, see Tina Magaard's report, *At være muslimsk kvinde i Danmark*, 2009, Ch. 4). Given the variety of reasons Muslim women may thus have for wearing a headscarf, it would be problematic to uniquely privilege a par-

ticular interpretation and, in any case, a liberal state should be wary of ruling out headwear that *may* be considered sexist, whether it be headscarves or make-up. (However, for an argument to the effect that (one form of) liberalism may be compatible a ban on religious symbols in the public sphere, see Joppke, 2009.)

- ⁴⁹ For comments on an earlier version of this article, I would like to thank participants at the workshop on Religious Diversity in the Liberal State at Centre for the Study of Equality and Multiculturalism, University of Copenhagen, 2010, and especially Søren Flinch Midtgaard, Sune Lægaard, Daniel Weinstock and two anonymous referees for *The Ethics Forum*.