

DOMESTIC LEGISLATURES AND INTERNATIONAL HUMAN RIGHTS LAW: LEGISLATING ON RELIGIOUS SYMBOLS IN EUROPE

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Abstract:

This article examines the dynamics of domestic legislatures' application of international human rights law. Specifically, this article asks: what factors shape how domestic legislatures apply international human rights law while they enact national law and policy? Lawmakers have a variety of motives for invoking and deliberating international law. Given these motives, the article identifies two factors – civil society actors and legal experts' and the flexibility of international law – that are likely to contribute to if and how national legislatures interpret and apply international human rights law while legislating. These factors are examined through case studies on religion in schools in the UK, Germany and France. This article argues civil society actors and legal experts and the flexibility of international law inform lawmakers' estimation of political costs related to compliance and thus how they apply international human rights law to domestic legislation.

INTRODUCTION

Between 2004 and 2006, eight of the sixteen German federal states enacted bans prohibiting public school teachers from wearing religious symbols in schools. These legislative measures appear to fly in the face of German international legal commitments, especially those stemming from the European Union (EU) and the Council of Europe (CoE), to recognize the right of individuals to be protected against discrimination on grounds of religion and to manifest one's religion. These bans raise questions concerning the application and effects of international human rights law in domestic law and policy making. For example, were the EU and CoE laws addressed by legislatures while they enacted these pieces of legislation? Did the European laws constrain lawmakers? How did the European laws affect the content of the final legislation that was enacted?

This article explores the application of international human rights law by domestic legislatures. The domestic legislative politics of human rights is important for several reasons. First, the domestic politics of human rights are little understood, and further research is needed to understand how domestic politics intervene to give effect to international human rights law. Second, when previous research has studied the domestic politics of human rights, attention is most often given to litigation and national courts. Yet, national legislatures are equally relevant to human rights domestically because they are central lawmaking institutions within the state that contribute to the governance of rights. Third, the application of international human rights law to domestic lawmaking through legislatures has implications for broader concerns about the effectiveness of international human rights law. For these reasons, this article examines international human rights law in domestic legislating. Specifically, this article asks: what factors shape how domestic legislatures apply international human rights law while they enact national law and policy?

This article argues that indeed domestic legislators are engaged in the politics of human rights. Lawmakers deliberate international human rights law when they legislate on issues related to their international legal commitments. Yet, legislatures interpret and apply international human rights law differently. Civil society actors and the flexibility of international law contribute to the variation in how lawmakers apply international human rights law by affecting lawmakers' estimations of long-term political costs related to compliance. These factors are examined in three case studies – British, German, and French legislation concerning religion and schools.

To begin, this article discusses why lawmakers might deliberate and apply international human rights law while legislating. Then it expands on how civil society actors and the flexibility of international law shape the application of international human rights law by legislatures. The article then illustrates how these two factors contribute to the application of human rights law in three cases. Last, the article ends with a discussion of the main findings and the implications for research on international human rights.

DOMESTIC LEGISLATURES AND INTERNATIONAL HUMAN RIGHTS

Increasingly domestic institutions and politics have been viewed as critical to human rights. Most notable, scholars have illustrated that national judiciaries are critical human rights institutions (Hathaway 2007; Powell and Staton 2009; Simmons 2009; Volcansek and Lockhart 2012; Lupu 2013). Nevertheless, legislatures are also likely to be important human rights institutions that influence the domestic application of international human rights law.

Legislators have several motivations for addressing international human rights law while they legislate in the domestic arena. First, lawmakers may invoke international law in order to justify their policy positions. Unpopular decisions can be justified by shifting blame to the state's international legal commitments, and lawmakers can tell their audiences that the

law has tied their hands. For example, Kelley (2004) illustrates that when the Baltic and East European lawmakers enacted laws to protect minorities, which went against popular opinion, they shifted blame by claiming that international commitments mandated the new laws. Similarly, international law can be used by lawmakers to delegitimize the opposition's position (Cortell and Davis 1996). Second, legislators may promote international human rights while legislating because they embrace the principles espoused in international human rights law. Checkel (1999), for instance, shows that some German politicians embraced legal norms on nationality, minorities and citizenship of the CoE. Third, legislators have motivations to reconcile legislation with a state's international commitments in order to avoid sanctioning by courts. Lawmakers often adapt their behavior in anticipation of costly judicial oversight (Stone Sweet 2000; Slagter 2009) and rulings that would find noncompliance. By annulling legislation or requiring states to remedy wrongs caused by noncompliance, judicial oversight may cause legislators to lose the support of constituents. Legislators may therefore seek to ex ante make laws compatible with international legal commitments. Fourth, lawmakers also seek to reconcile legislation with international human rights law in order to avoid potential punishment costs that can be incurred by noncompliance. These costs can come from international audiences, such as international organizations or other states, through mechanisms like membership conditionality (e.g., Kelley 2004) or funding and trade (e.g., Hafner-Burton 2005). Fifth, similar costs that legislators could face can also come from private actors, such as non-governmental organizations (NGOs) through mechanisms like shaming and social mobilization (e.g., Hafner-Burton 2008; Murdie and Davis 2012).

Thus, lawmakers have several motivations for addressing their international human rights commitments as they legislate. Less clear, however, is what determines how lawmakers interpret and apply international law, and why they can come to various understandings on the applicability of international law. The following discussion identifies how two factors— civil

society actors and legal experts and the flexibility of international law – may contribute to the application of international human rights law by domestic legislatures. These two factors are the focus of the analysis, yet as will be elaborated in a later discussion they are not intended to account for all aspects of the legislative output or the public debate on legislation.

Civil Society Actors and Legal Experts

Civil society actors and legal experts are likely to influence how legislatures apply international human rights law as they legislate. I define civil society actors as non-state actors such as NGOs, advocacy groups, philanthropic organizations, trade unions, academics, private individuals, among others. Civil society actors and individuals with legal expertise (such as lawyers, judges, legal academics) have unique information for lawmakers about the potential noncompliance costs of enacting the legislation. Specifically, these actors can signal whether mobilization against the law on the basis of international legal commitments is likely and to what extent such mobilization might be successful.

When civil society actors participate in legislative proceedings (e.g., by providing testimony or contributing to consultations) they can present their views on the legislation's compatibility with international law. On the basis of these views, lawmakers can infer whether these groups are possible "procompliance constituencies" who are likely to mobilize against the legislation once enacted and demand greater compliance in the long run. Legal experts provide lawmakers with information about whether the proposed legislation is at risk of being in noncompliance and how it could be formulated to comply with international human rights commitments. If these actors signal strong opposition to the legislation, lawmakers are likely to perceive potential long-term noncompliance costs.

Based on civil society actors' and legal experts' views on the legislation's compatibility with international law, lawmakers are likely to adapt the legislation to avoid

noncompliance costs and political backlash. Specifically, when civil society actors and legal experts suggest that the legislation is incompatible with international law, lawmakers are likely to exercise more caution, take broad interpretations and apply the international law to be in general compliance. Conversely, when civil society actors and legal experts do not signal potential compatibility problems, lawmakers are likely to adopt narrow interpretations that minimally apply the international law to be in compliance to least degree possible.

The Flexibility of International Law

The flexibility of international human rights law, conceived as the degree to which an international agreement provides leeway in what constitutes compliance, is also likely to shape how lawmakers interpret and apply it to domestic legislation. Existing research shows that the characteristics of international law affect its domestic implementation and compliance (Lutz and Sikkink 2000; Squatrito 2012). The flexibility of law is likely to affect the application of international human rights law because flexibility widens the scope of compliance, making the range of policy options for lawmakers broader.

Flexibility enters into international law through three mechanisms: imprecision, rules of deference and flexibility provisions (for example, escape clauses). First, imprecision, defined as lack of clarity and specificity (Chayes and Chayes 1995; Abbott et al. 2000), leads to indeterminacy of a rule and expands the range of plausible interpretations and applications of it. As Conant (2002) explains in the case of the EU, ambiguities in the law “generate few obvious policy guidelines for Member State officials. Uncertainties that arise from indeterminate judicial principles dissuade general policy responses” (Conant 2002: 70). Instead, she argues, members states will seek to avoid “overimplementation.”

Second, rules that govern deference to the state, such as a margin of appreciation or subsidiarity, contribute to the flexibility of the law. When such doctrines grant more

discretion to the state, the law is more flexible. In fact a common critique of the European Court of Human Rights (ECHR) is that its use of the margin of appreciation increases “the leeway for discretion and flexibility” for states (Gross and Ní Aoláin 2001: 629).

Third, explicit flexibility provisions, or “escape clauses,” also bring flexibility to the law. An escape clause is “any provision of an international agreement that allows a country to suspend the concessions it previously negotiated without violating or abrogating the terms of the agreement” (Rosendorff and Milner 2001: 830). Escape clauses reduce state legal obligation (Abbott et al. 2000: 411), and thus provides greater flexibility.

Flexibility is determined by what is codified (such as in treaties), as well as the jurisprudence of international and supranational courts. As scholars have shown, international courts and adjudication reconstitute and redefine the law (Trachtman 1999; Sandholtz and Stone Sweet 2004; Danner 2006), which can affect its flexibility. Even though international court decisions generally are not binding on states other than the direct parties to a dispute, state implementation of the law may be influenced by this jurisprudence (Helfer and Voeten 2014). As courts’ jurisprudence may affect lawmakers’ understanding of the flexibility of law, lawmakers operate in the shadow of these courts.

Flexibility in the international human rights law minimizes the constraints that the law places on states, giving lawmakers a wider range of options of how to apply the law while still complying. Given a broader range of alternatives lawmakers will tend to do that which is minimally required and act according to their preferences. Thus, when the law lacks flexibility lawmakers are likely to exercise more caution, take broad interpretations and apply the international law to be in general compliance. Conversely, if the law is flexible legislators are likely to adopt narrow interpretations that minimally apply the international law.

RESEARCH DESIGN AND METHODOLOGY

The remainder of the article examines how the above theoretical expectations bear out empirically, looking at how legislatures apply and interpret European human rights law pertaining to religious discrimination in schools in the UK, Germany and France. If there is any place where legislators will have motivations to deliberate and apply human rights, Europe is arguably this place. Europe has what is widely accepted as the most successful human rights regime and national constitutional systems with entrenched human rights protections, and European states generally have very good track records in terms of human rights. Selecting European cases and looking at European human rights law is a good starting point for examining human rights in domestic legislatures.

I focus on religious discrimination because it is among Europe's most pressing human rights problems. Religion in schools has been at the forefront of political debates related to religious discrimination. France, Germany, and the UK are states where these debates have been prominent, leading to legislative measures. These cases are selected for a most-similar cases research design. In contrast to other possible comparisons, these three states share relative similarities on several social, political, legal and cultural dimensions (e.g., global power politics, religion, state capacity, civil society activity, judicial effectiveness, respect for international law, etc.), which often affect human rights, and thus can be held constant for the sake of this analysis.¹

Official legislative records and materials, including parliamentary debates, committee hearings, legislative and government reports, and testimony by societal actors and public officials are the primary data for this analysis. The relevant legislative records and material were identified and collected through the states' parliamentary websites, public depositories

¹ Whether or not France, Germany and UK together are appropriate for a most-similar case design may be disputed by some. While these three countries are not perfectly similar, they are more alike than not on several key factors concerning the empirical focus at hand. There are, however, some notable differences between France, Germany, and the UK (such as constitutional review and the structures of their judiciaries, and state-church relations). Where differences do seem to be important, I elaborate on them in the analysis and discussion. Other candidates for a most-similar design also suffer from similar challenges because no two countries are identical.

and direct requests to the appropriate authorities. Using content analysis of this material, I examine if and how civil society and lawmakers engage European law. A few additional resources such as jurisprudence and secondary literature supplement the primary data as background material.

NATIONAL LEGISLATURES AND EUROPEAN ANTI-DISCRIMINATION LAW

The primary human rights instruments in Europe come from the Council of Europe (CoE) and the European Union (EU). The CoE has developed an extensive body of human rights law, first and foremost, through the European Convention of Human Rights and Fundamental Freedoms (herein European Convention) and the ECHR's jurisprudence. CoE law protects against discrimination on grounds of religion through Article 14 of the European Convention in conjunction with Article 9, which provides:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The ECHR has found that some restrictions on the right to manifest one's religion can constitute a violation of the Convention (e.g., ECHR 1993). Nevertheless, the ECHR balances the free practice and manifestation of religion with other rights and national interests, giving heavy recognition to national considerations and paragraph 2 of Article 9 which functions as an escape clause. In *Dahlab v. Switzerland* (ECHR 2001), concerning a teacher who was denied employment for wearing a headscarf, the ECHR ruled that to maintain a democratic society, and in societies where religious diversity exists, "it may be necessary to place

restrictions on [the freedom of religion] in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected" (para. 83). In the Court's view, banning a teacher from wearing a headscarf served a legitimate purpose to protect the religious beliefs of others and was necessary for that aim, and thus the Court found no violation of the Convention. The ECHR later issues judgment on *Sahin v. Turkey* (ECHR 2005), where the complainant challenged a Turkish ban on Muslim head coverings at universities. The ECHR ruled against the complainant, stating "having regard to the Contracting States' margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued" (ECHR 2005: para. 122). The Court found that while there is likely to be stark contrast between countries on the relationship between state and religions, "the role of the national decision-making must be given special importance..." (ECHR 2004: para. 100). In all, the ECHR has placed great weight on paragraph 2 of the Article 9, granting states a wide margin of appreciation to determine the legitimate and proportionate limitations to religious freedoms, and upheld restrictions to religious freedoms in schools (McGoldrick 2006; Barras 2012).

EU law has evolved over the years to include an extensive body of human rights law. The EU competency over anti-discrimination law comes from treaty law, especially Article 13 of the EC Treaty. EU anti-discrimination law also includes the Charter of Fundamental Rights and the ECJ (currently known as the Court of Justice of the European Union). Also, secondary legislation prohibits discrimination. The Racial Equality Directive 2000/43/EC protects from racial and ethnic discrimination in employment as well as social protection, social advantages, and access to and supply of public goods and services, such as education. More relevant is the Equal Treatment in Employment Directive 2000/78/EC, which prohibits both direct and indirect discrimination on grounds of "religion or belief, disability, age, or sexual orientation" in the field of employment. The Equal Treatment Directive, similar to the European

Convention, provides an escape clause which allows states to derogate from the general obligation to prohibit discrimination. Article 4 of the Equal Treatment Directive acts as an escape clause, and states:

Member States may provide that a difference of treatment ... shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Article 2 (b)(i) of the Equal Treatment Directive also provides that indirect discrimination on grounds of religion is permissible if it “is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” The ECJ however had not decided any cases related to the Equal Treatment Directive and religious discrimination when the legislation was reviewed in the three cases under analysis.

Having introduced the relevant CoE and EU law, the remainder of this section examines the three case studies. As will be shown, legislators apply the relevant European anti-discrimination law differently. In addition, civil society actors and legal experts, and flexibility in the law shape its application.

The UK's Equality Act 2006

In 2006, the British Parliament enacted the Equality Act to create a single equality and human rights commission. The act prohibits discrimination in goods, facilities and services on grounds of religion or belief (part 2). This includes a provision that religion or belief cannot serve as the grounds for discrimination in school admission, pupil exclusion, or access to any school benefit, service, or facility (part 2, section 49) with exemptions for private religious schools (section 50). Part 2 of the Equality Act arose out of a growing dissatisfaction with the inadequate legal protections for religious minorities, especially the sizeable Muslim population across the Britain.

Lawmakers broadly applied CoE law to the Equality Act, seeking to avoid political backlash on the basis of European human rights law and other potential noncompliance costs. Lawmakers' application of CoE law was influenced by civil society actors who expressed their discontent with the initially proposed legislation and argued that it was incompatible with CoE law. Additionally, lawmakers found CoE law, absent flexibility, constrained their interpretation and application of CoE law to the legislation. Consequently, lawmakers molded the legislation so to be in general compliance with CoE law. EU law, on the other hand, was not applied because lawmakers found it irrelevant to the legislation.

Prior to the Equality Bill's introduction into Parliament, two public consultations were hosted to address a new human rights commission and equality issues (JCHR 2003; DTI 2004). During these public consultations some civil society actors argued that the UK's main anti-discrimination legal framework had a gap in protections for religious minorities. At the time, the UK's anti-discrimination law was based on the 1965 Race Relations Act, which protected against racial and ethnic discrimination only. Case law had extended protections against discrimination to religious minorities, so long as the religious group also constituted an ethnic group (UKHL 1983). This meant that British law protected Jews, Gypsies and Sikhs, but not Muslims, other minority religions, or Christians (Bourn and Whitmore 1996). Then in 2003, the UK transposed the Equal Treatment Directive's requirements on the grounds of religion, protecting all persons from religious discrimination within the field of employment.² The result was an anomaly which left persons of all religions protected from discrimination in employment, yet only religious, ethnic minorities in other sectors.

During the public consultations, civil society actors, such as JUSTICE, the Discrimination Law Association (DLA), the British Humanist Association, and the Muslim Council of Britain (MCB), pointed to this gap in protections for religious minorities. For

² The Employment Equality (Religion or Belief) Regulations 2003. Statutory Instrument 2003 No. 1660.

example, the DLA stated that “[t]he current legislative framework fails to provide adequate legal protection from discrimination. It remains legal to discriminate on the grounds of religion or belief ... in relation to the provision of goods, services and facilities, in education, housing, criminal justice and delivery of local authority services” (DLA 2004: 6). The MCB also urged the Government to address the discrepancies in the existing legal framework that left some persons unprotected from religious discrimination outside of employment (MCB 2004). Some of these participants to the consultations invoked CoE law explicitly as reason to extend protections to include religious discrimination. The MCB, for instance, invoked CoE while challenging the existing legal framework, claiming that revisions to the law, “is recommended by the Council of Europe—see, for example, General Policy Recommendation No.7, ECRI, Council of Europe, Dec. 2002—and redresses our current position of standing in breach of Article 9 read with Article 14 of the ECHR” (MCB 2004: 9). Similarly, the National Secular Society (2004) stated that their previous pleas to close the gap in protections for religious minorities had gone unheeded and as a result it was “lodging a formal complaint with the EU Commission against the UK Government’s transposition of the relevant EU Directive.”

When the Government finally introduced the Equality Bill, it included protections from religious discrimination in the provision of goods, services, and premises and in public functions, including education. The Government explained in its response to the consultations that the need to extend protections was “felt particularly acutely by Muslims in Britain, and the case for extending the protections against religious discrimination was powerfully made in the response from the Muslim Council of Britain” (UK 2004).

When the bill was considered by Parliament, CoE law was discussed during the legislative debates, and further efforts to reconcile the legislation with CoE law were made. At this point, participation by civil society actors was limited, but some members of parliament

(MP) and the Government evaluated the legislation in light of the state's international legal commitments. They took the view that CoE law was minimally flexible, and they pressed for applications of CoE law that would put the legislation in general compliance.

First, the bill provided that faith schools would be exempted from the prohibitions on religious discrimination. The Joint Committee on Human Rights (JCHR) argued that the exemptions for faith schools, however, would conflict with the UK's international legal obligations. In its first report on the Equality bill, the JCHR expressed,

concern that a number of the exceptions to the duty not to discriminate ... on grounds of religion or belief are overly broad and mean that the obligations imposed by the Bill fall short of ... the State's positive obligation to protect the [European] Convention rights... faith schools are exempted from the Bill's prohibitions on non-discrimination...and the Committee concludes that this exemption... would breach Articles 3, 8, 9 and 14 of the Convention, is too wide to be justified... (JCHR 2005: 4)

The JCHR argued that CoE law constrained the legislature because Article 9 requires that any derogation serve a legitimate aim and be proportionate to that aim. The JCHR expressed concern that the bill's exemptions for faith schools were too broad to be justified. Still unchanged, the JCHR again noted concern about the exemptions' incompatibility with CoE law in its second report (JCHR 2005: 20-21).

In the parliamentary debates, the exemptions for faith schools were challenged on the basis of CoE law. One MP, Dr. Evan Harris argued, "[t]here is a strong case for saying that those exemptions go too wide. They go beyond what is required to maintain the character of faith schools...and it would be better if they were drawn more narrowly to prevent breaches of human rights and occasions of discrimination" (Hansard 2005: col. 168). Similar to the JCHR, Dr. Harris and a few others argued that the exceptions given to faith schools, which receive public funding and serve a public service, were not adequately justifiable in terms of the Article 9 of the European Convention. Following the pleas of the JCHR and Dr. Harris, Parliament modified the exemptions on January 16, 2006 so that faith schools could

discriminate based on religion when admitting students and providing them access to school services but not in exclusion from school or other detriments (Hansard 2006). The amendments to the legislation narrowed the exemptions, as lawmakers recognized that CoE law lacked flexibility and thus constrained their legislating on religious discrimination in schools.

Second, lawmakers also analyzed the application of CoE law when reviewing the definition of religion that was included in the bill. The bill provided for a definition of religion or belief that would reform the existing definition in British law. When the UK transposed the Equal Treatment Directive, it defined religion or belief as “any religion, religious belief, or similar philosophical belief” (Employment Equality (Religion or Belief) Regulations 2003, section 1 (1)). There was concern that this definition conflicted with CoE law, where religion or belief has been defined more broadly to include the lack of religion or belief. The bill widened the definition to include the lack of belief, Some MPs objected to the broader definition. In response, other MPs argued that the broader definition was preferred because of its compatibility with the definition within European law (Hansard 2005: cols. 143-145). As Paul Goggins (the Parliamentary Under-Secretary of State for the Home Department) explained, “[t]he definition of religion that we have adopted is necessarily broad. It accords with article 9 of the European convention on human rights” (Hansard 2005: col. 143). The JCHR also welcomed the broad definition because it reflected “the protection afforded to religion and belief under Article 9 ECHR” (JCHR 2005: 17). Additionally, civil society actors, such as the British Humanist Association and the National Secular Society supported the revisions to the definition of religion included in the bill. The final legislation maintains the broader definition of religion or belief, as CoE law constrained any narrower of a definition.

Germany's Bans on Religious Symbols in Schools

Eight of the sixteen German *Länder*, or federal states, in the early 2000s adopted legislation prohibiting public school teachers from wearing religious symbols in schools. The *länder* adopted these bans following a decision of the *Bundesverfassungsgericht*, the German Constitutional Court (BVerfG), in September 2003. The BVerfG ruled on a dispute between a Muslim woman, Ms. Ludin, who stated her intention to wear a veil as a public school teacher, and a school board that denied her employment because she lacked “personal aptitude” since her headscarf would interfere with the civil servant’s duty to protect school neutrality. According to the BVerfG, the school board had wrongly decided on Ludin’s employment because restrictions to constitutional rights (such as religious freedoms) cannot be denied without a statutory provision (BVerfG 2003). Moreover, the BVerfG affirmed that the *länder* had the authority to ban teachers from wearing the headscarf so long as it was constitutional, striking a balance between neutrality and religious freedoms. It also concluded that “the headscarf-hijab could not simply be considered a sign of the suppression of women and that the headscarf-hijab per se did not, in principle, impede the teaching of the values of the German Constitution” (McGoldrick 2006: 113).

The BVerfG’s decision elicited political reactions (Elver 2012: 135), and eight *länder* enacted legislation prohibiting public school teachers from wearing religious symbols while teaching. These bans were initiated in a complex context of desires to integrate a sizeable immigrant Muslim population, the principle of state neutrality, and political ideologies reflecting xenophobia and Islamophobia, among other issues. In five *länder*, the laws prohibit “religious symbols and clothes that could be regarded as dangers to the state’s neutrality, to the peace of the school, or to the principle of gender equality” and include explicit exception for Judeo-Christian symbols (Elver 2012: 142-143).³ In the three others, no exceptions are

³ These five *länder* are Baden-Württemberg, Bavaria, Saarland, Hessen, and North Rhine-Westphalia (see Elver 2012: 142-143).

made explicit.⁴ Taking one from each group of *länder*, the bans in *Niedersachsen*⁵ (Lower Saxony) and *Nordrhein-Westfalen*⁶ (North Rhine-Westphalia) are analyzed here.⁷

The legislatures in both Lower Saxony and North Rhine-Westphalia narrowly applied CoE and EU law to be in minimal compliance. This application of CoE and EU law was influenced by civil society actors and legal experts who generally suggested the bans were compatible with international human rights law, signaling there would be limited political backlash on the basis of European human rights obligations and noncompliance costs. The flexibility embedded within the relevant international law also signaled limited noncompliance costs, and encouraged the legislatures minimally comply with CoE and EU law by drawing on escape clauses and asserting that the ban was justified as a measure for maintaining state neutrality and school peace.

Lawmakers' deliberation of CoE and EU law differed across the two federal states. While European law was more prominently discussed in North Rhine-Westphalia, European law was almost entirely absent from the legislative process in Lower Saxony. In Lower Saxony limited mobilization of European law by civil society actors and legal experts suggested to lawmakers that constituents were not likely to lash back against an enacted law on the basis of European law. During the legislative hearings, only two societal participants invoked European law, both of which were vague references (Niedersächsischer Landtag 2004a; 2004b). For example, the representative of the Catholic Church (Katholisches Büro) invoked CoE law by referring to the ECHR's decision in *Dahlab*, saying that the ECHR has considered the effects a headscarf has on students (Niedersächsischer Landtag 2004a). Most surprisingly, neither of the two legal experts (judges) who participated mentioned EU or CoE

⁴ These three *länder* are Lower Saxony, Berlin, and Bremen (see Elver 2012: 143).

⁵ Gesetz zur Änderung des Niedersächsischen Schulgesetzes und des Niedersächsischen Besoldungsgesetzes vom 29.04.2004. Nds. GVBl. S. 140-142.

⁶ Erstes Gesetz zur Änderung des Schulgesetzes für das Land Nordrhein-Westfalen vom 13.06.2006. NW. GVBl. S. 270.

⁷ For feasibility, one from each group was examined. Data availability also informed the selection of North Rhine-Westphalia and Lower Saxony.

law (Niedersächsischer Landtag 2004b). Generally, the lack of deliberation, and thus application, of European law was influenced by the absence of mobilization of European law. Without active mobilization of European law by civil society actors and legal experts, lawmakers inferred that their constituents were not concerned with the legislation's compliance with European legal commitments, and thus gave it little deliberation.

Instead, civil society actors and legal experts emphasized constitutionality, signalling to lawmakers that this was the most significant concern of legal compliance for constituents. Specifically, the original bill provided an exception for appearances reflecting Christian and occidental values (Niedersächsischer Landtag 2004c). A large portion of participating civil society actors and legal experts questioned the constitutionality of such an explicit privilege being given to Christian-Judeo religious symbols. Many critics claimed this translated into unequal treatment of religions, which would go against the German constitution and the decision of the BVerfG in *Ludin*. In the end, the bill was amended to exclude the explicit exemption for Christian-Judeo symbols.

In contrast, lawmakers deliberated the relevance of EU and CoE law in North Rhine-Westphalia, even though they were also concerned with constitutionality. Civil society actors' and legal experts' testimony suggested to MPs that the legislation was compatible with European law (Nordrhein-Westfalen Landtag 2006). For example, some societal participants pointed to the ECHR's decision in *Sahin* as evidence that a headscarf can be a political symbol. The exception for Judeo-Christian symbols rested on the claim that a headscarf is a political symbol as well as a religious symbol, while Judeo-Christian symbols symbolize only religion. These participants invoked the ECHR's decision in *Sahin*, which asserted the political relevance of the headscarf in Turkey, to bolster their claims that a headscarf is a political symbol and to justify their demand that Judeo-Christian symbols be exempted from a ban.

Among those who offered testimony, most suggested that the proposed legislation would comply with both EU and CoE law. Legal experts testified that EU and CoE law posed no challenge to the bill. For example, Ferdinand Kirchhof, a professor of law, argued that the ECHR had decided similar prohibitions were legitimate (Nordrhein-Westfalen Landtag 2006). He also suggested that the bill would comply with the Equal Treatment Directive (Kirchhof 2006). Professor of law, Peter Huber, similarly suggested the bill would comply with both the EU directive and CoE law (Huber 2006). Also, a few civil society actors also suggested that the bill would conform to European law, such as the Katholischen Büros which referred to the ECHR's decision in *Sahin*, emphasizing how the Court found the Turkish ban on the headscarf in universities to be in conformity with the European Convention (Nordrhein-WestfalenLandtag 2006).

Some participants, however, did express concern that the proposed legislation would be incompatible with European law. For example, Professor Thüsing questioned the conformity of the proposed legislation with the Equal Treatment Directive (Thüsing 2006). Islamrat, a religious association, also argued that the proposed legislation was at odds with the EU's directive because the legislation targeted and prohibited the Islamic headscarf specifically, not religious symbols in general (Islamrat 2006). Nevertheless, most mobilization of European law by civil society actors and legal experts suggested that the proposed legislation would be viewed as compatible with the EU and CoE law by constituents, which motivated lawmakers to adopt a narrow interpretation and application to the legislation.

Flexibility provisions in EU and CoE law also contributed to lawmakers' interpretation and application of EU and CoE law. To begin, while the bans on religious symbols in schools would affect the employment of teachers, and made EU law highly relevant, the applicability of the Equal Treatment Directive was ambiguous. The escape clauses of the Equal Treatment Directive were imprecise as to how the directive applied to an

occupational requirement to maintain religious neutrality, and whether a ban was legitimate and proportionate requirement. Absent any ECJ case law on the directive, lawmakers construed there was flexibility for them to determine what constituted legitimate and proportionate unequal treatment.

Lawmakers in North Rhine-Westphalia were also guided by the flexibility of relevant CoE law, produced by the escape clause of Article 9 and the deference granted to states by a wide margin of appreciation. The legislative deliberation over CoE law focused on the Article 9 escape clause and the margin of appreciation. Legal experts highlighted the ECHR's decisions to uphold bans (in *Dahlab* and *Sahin*) hinged on paragraph 2 of Article 9. They also claimed that the ECHR has asserted a wide margin of appreciation on Article 9 claims regarding religion, ruling in most cases that states retain discretion to determine what constitutes legitimate aims for restricting religious freedoms. Most important, the ECHR in *Sahin v Turkey*, dealing with a similar issue of a ban on the Islamic veil in Turkish universities, found no violation of the Convention on the basis of wide appreciation given to Turkey on Article 9. Lawmakers, and several civil society actors and legal experts, cited *Sahin* as evidence that the legislation would comply with CoE law.

France's 2004 Ban on Religious Symbols in Schools

On March 15, 2004, the French parliament enacted a law prohibiting students from wearing religious symbols in schools (Loi n° 2004-228), with the official aim of preserving *laïcité* (roughly understood as state neutrality or secularism). The law states that in primary and secondary public schools, wearing symbols or attire by which students ostensibly manifest a religious appearance is prohibited. Even though generally understood as intended for Muslim girls, the law was written to apply to religious symbols of all religions. Much like

in Germany, the ban was initiated in the context of policies aimed at integrating a sizeable immigrant Muslim population, the principle of state neutrality toward religion (*laïcité*), and political ideologies reflecting xenophobia and Islamophobia, among other issues.

Lawmakers deliberated international human rights law, although constitutional law and rhetoric was much more prominent in the legislative proceedings. The legislature narrowly applied CoE law to be in minimal compliance. Civil society actors and legal experts that were consulted by the legislature generally argued that the legislation was compatible with European human rights law, signaling that political backlash on the basis of European human rights obligations and noncompliance costs would be limited. Lawmakers also drew upon the flexibility provisions of the European Convention, and asserted that their aim was to enforce *laïcité*, preserve liberty and freedom of girls (which was a common frame in the arguments, see Joppke 2007; Adrian 2009), and to protect freedom of conscious of other students. Making this justification clear served to illustrate how the ban fell within the bounds of Article 9.

Prior to the enactment of this ban, religious symbols in schools were governed by the case law of the Conseil d'Etat, France's highest administrative court. The Conseil d'État adopted a liberal understanding of *laïcité*, where *laïcité* required the neutrality of teachers yet religious freedom for students (Joppke 2007). The veil was to be tolerated in schools when worn by students, and prohibition was to be the exception if it constitutes "an act of pressure, provocation, proselytism or propaganda" (Conseil d'État 1989). In most cases, the Court upheld a student's freedom of religion to wear the veil in schools (McGoldrick 2006: 70-73; Joppke 2007).

Growing dissatisfaction with the Conseil d'État's approach led to calls for legislative initiatives that would reform the law. In fact, between 2002 and 2003, six bills proposing a ban on religious symbols were introduced in the Assemblée Nationale. In addition, two

commissions were set up to review the issue, one led by Bernard Stasi and the other led by Jean-Louis Débre, before the 2004 ban was finally enacted.

The application of European law was shaped by signals sent to lawmakers by civil society actors and legal experts about how constituents would view the legislation's compatibility with European obligations. The Stasi commission and the Débre commission, especially, heard from a wide-range of civil society actors. Only a small portion of these participants invoked European law; of the 106 societal participants of the Débre commission only eight spoke of CoE law and two invoked EU law. Several of these references to European law suggested European law was relevant, but offered minimal information about compatibility or whether mobilization against the legislation would be likely. For example, Abdallah-Thomas Milcent, a doctor and author, argued that Article 9 of the European Convention guarantees the right to practice one's religion in private and public spaces (Assemblée Nationale 2003c: 38). Similarly, Khalid Hamdani of the Haut Conseil à l'Intégration stated that issues of integration concern the Article 13 of the Amsterdam treaty and the EU directives (Assemblée Nationale 2003d: 82). A few participants, however, did encourage lawmaker to think about compatibility of the ban with European law. Jean-Louis Biot, representing a teachers' union, rhetorically asked if the legislation would be compatible with the European Convention (Assemblée Nationale 2003d: 139-140). The president of the Grande Loge Mixte Universelle, Anne-Marie Dickele argued, "In legal terms, the French decisions must be in accord with European norms, such as the European Convention on Human Rights...A law on wearing religious symbols could be censored by...the European Court of Human Rights" (Assemblée Nationale 2003f: 115).

A few participants directly assessed the compatibility of a ban with CoE law, providing guidance to lawmakers on interpretation. Two participants suggested that a ban would conform to CoE law. For example, legal expert Michele De Salvia said, "if a state,

which espouses the principle of *laïcité*, were to legislate on *laïcité*, I think it would not incur sanctions by the European Court of Human Rights (Assemblée Nationale 2003e: 33).

Similarly, Patrick Gonthier, representing a teachers union, argued that some of the ECHR's decisions justify the ban, including "the case of judgments against Turkey in which the European Court ruled that because it considered that 'by choosing to study at a secular university, a student submits to the university regulations'" (Assemblée Nationale 2003d: 145).

While De Salvia and Gonthier suggested a ban would be reconcilable with CoE law, Jean-Michel Ducomte, who represented a teachers union, implied that the ban was potentially at odds with CoE law. Mr. DuComte said, "I have some doubts about the legal feasibility of such a law according to the European Convention on Human Rights" (Assemblée Nationale 2003d: 80). He questioned the added benefit of a ban and claimed, "it runs the risk of being considered unconstitutional or inconsistent with the principles of the European Convention on Human Rights" (Assemblée Nationale 2003d: 91). In all, the contributions by civil society actors and legal experts provided lawmakers with information about possible noncompliance costs, most of which suggested the ban would comply with CoE law and face little resistance on the basis of European legal obligations.

In addition to the cues sent to lawmakers by civil society actors and legal experts regarding potential noncompliance costs, lawmakers' deliberation and application of European human rights law was shaped by the flexibility of the CoE law. Many public officials, some with legal expertise, argued that legal imprecision, the escape clause of Article 9, and the margin of appreciate meant the ban would conform to CoE law. Rémy Schwartz of the Conseil d'État, for example, explained to the Débre commission that while the ECHR is quite clear on how Article 9 applies to prohibiting civil servants from wearing religious symbols, the Court has been much less clear on how Article 9 applies to users of public

services, such as students (Assemblée Nationale 2003h: 21). Schwartz reaffirmed this viewpoint again before by the Cultural, Family and Social Affairs Committee (Assemblée Nationale 2003a). During the Debré commission hearings, Debré himself concluded that there was no precise guidance from the ECHR on the matter. He said, “In the greatly expanded jurisprudence of the Strasbourg Court on religious freedom, there is nothing on the wearing of religious symbols in public schools by students” (Assemblée Nationale 2003g: 42). These officials highlighted the flexibility of the CoE law, arguing that CoE law remained ambiguous on how Article 9 applied to a ban on religious symbols for school aged children because precedent existed for primary and secondary schools.

Lawmakers also came to the conclusion that they faced minimal constraints from CoE law because the escape clause of Article 9, combined with a wide margin of appreciation, reduced French obligations, thereby making the ban conformant with CoE law. Both the Stasi commission and the Débre commission highlighted how the ECHR’s jurisprudence recognizes that paragraph 2 of Article 9 permits states to limit religious freedoms, and a margin of appreciation its granted to states to determine these limitations, so long as the restriction of religious freedoms are prescribed by law, serve a legitimate objective and be proportional to that objective. The Débre commission viewed the ban as compatible with Article 9 of the Convention because the first two conditions were met, and that the ECHR

“grants a wide margin of appreciation to national legislatures...has recognized the relative nature of religious freedoms ... [and] takes into account the existence of alternatives. It is possible to restrict certain religious freedoms, since the diversity of the educational system as a whole provides the opportunity for individuals to exercise their religion freely in another school...” (Assemblée Nationale 2003b: 41-43)

The Stasi commission came to similar conclusions, arguing that the ECHR’s jurisprudence supports limitations to religious freedoms for purposes of maintaining a secular state (Stasi 2003: 20-21). As Adrian explains, the Stasi commission highlighted ECHR decisions to reinforce the “idea that each country has a margin of appreciation to follow its own version of

separation of church and state and that the Court has strategically upheld not only each country's right to work within this margin, but the very concept of secularism itself" (Adrian 2009: 353). This was also the interpretation reached by the Assemblée Nationale's Cultural, Family and Social Affairs Committee (Assemblée Nationale 2004: 20). In all, the final interpretation given to CoE law by French lawmakers was that it did not constrain the adoption of the proposed legislation by virtue of the law's flexibility, produced by ambiguity, the escape clause and the margin of appreciation.

Lawmakers also determined that EU law did not apply, which was aided by the precision in EU law. When EU law was mentioned, its relevance was briefly discussed. For example, Jean Glavany expressed concern that the proposed legislation would not conform to EU law and could face scrutiny by the ECJ, stating "I do not want to have the pleasure of contributing to legislation that may in a few months be thrown out by the European Court. We will look clever!" (Assemblée Nationale 2003e: 14-15). Also, Debré pointedly asked a witness if the proposed legislation would surpass judicial scrutiny, including that of the European Court of Justice. Ronny Abraham, who served as a member of Conseil d'État, explained that ECJ jurisprudence was not relevant (Assemblée Nationale 2003g: 83). This view was accepted by the committee, as its final report made no mention of relevant EU law. Similarly, the Stasi report concluded EU law was not relevant (Stasi 2003: 20). Lawmakers thus concluded that EU law was a little consequence to the proposed legislation.

SUMMARY OF FINDINGS

These cases illustrate how European human rights law was addressed by national legislatures while they legislate. In the UK case, civil society actors and legal experts pointed to concerns of legal incompatibility and the CoE law was minimally flexible, resulting in a broad

application of CoE law. On the other hand, in France and the Germany, civil society actors and legal experts suggested that the bans would conform to CoE law and EU law, and lawmakers drew on flexibility provisions in the CoE and EU law to justify doing the least amount possible to comply. Five main findings can be made on the basis of the case studies.

First, lawmakers do consider the relevance to international legal commitments to national law as they legislate and mold legislation accordingly. The empirical cases illustrate that lawmaking entails legal analysis. They show that lawmakers' legal analysis involves the consideration of constitutionality as well as compliance with international legal commitments. The relative weight given to international law, in comparison to the national constitutional law, varies across the cases. In France and German, constitutional principles and rhetoric were central to legislative deliberations and international law less prominent, while international law was more present in legislative deliberations in the UK. This difference is largely expected because the European Convention has a special status in British law because of the Human Rights Act. Yet, even when constitutional law is dominant in deliberations, lawmakers still considered international obligations to some degree.

Second, the application of European human rights law was associated with testimony and consultations given by civil society actors and legal experts. When they expressed views that proposed legislation was incompatibility with international law, they signaled to lawmakers that they may in the long run mobilize for greater compliance. I have argued that these views then inform legislators' estimations of the noncompliance costs. The lack of mobilization is equally important. For example, as EU law was minimally mobilized in France and the UK, lawmakers perceived EU law was not politically consequential in terms of compliance. Two caveats merit mention. On the one hand, the influence that civil society actors and legal experts have is conditioned by the diversity of voices that participate in legislative proceedings. Where testimony has been strategically selected by MPs, we would

expect these actors to present views that conform to the majority's preferences. As a result, this testimony is not likely to give lawmakers an accurate depiction of the full range of societal and legal views on the legislation's legal compatibility with international law. In other words, lawmakers' assessments of potential backlash and noncompliance costs could be biased. On the other hand, civil society actors and legal experts are not the only individuals to bring international human rights law into the legislative process and to influence its interpretation. This was most illustrated by the UK case where the JCHR played this vital role.

Third, the flexibility of international law affects how legislatures apply international human rights law. If international law is understood by lawmakers to be flexible, they highlight the aspects of the law that generate flexibility in order to minimally comply with European human rights law. Moreover, lawmakers' application of international human rights law is not only informed by the original treaty law, but also by court jurisprudence. In all three cases, the flexibility of the European law, as well as how civil society and legal experts understand the law, hinges on decisions of the European courts. In the case of EU law, the absence of judicial interpretation of the law contributes to imprecision that lawmakers then interpret as flexibility. The ECHR's jurisprudence was essential to lawmakers' interpretation and application of CoE law, and was often invoked when discussing CoE law. These findings suggest that international courts and tribunals can play a significant role in the domestic effects of international human rights law (Helfer and Voeten 2014), and that lawmakers operate in the shadow of international courts.

Fourth, civil society actors' and legal experts' mobilization as well as the flexibility of international law apply to both EU and CoE law. This suggests that these two factors generally play an important role in determining how international law is interpreted and applied in domestic settings. Also, these factors played out in both national and subnational

legislatures, as was the case in Germany. While other sources of international law were not included in this analysis, there is no theoretical reason to assume that the two factors pointed to here would not similarly affect the application of other international human rights law by legislatures.

Last, the factors that I have looked at here may not be exhaustive. For example, in the UK, the Human Rights Act has incorporated the European Convention into national law, and brought about an institutional process in the Parliament of assessing the compatibility of legislation to the European Convention. In this sense, the domestic attitude and entrenchment of international human rights obligations appears to shape their prominence in legislative deliberation. On the other hand, the factors featured in this analysis appear to be more relevant to understanding how international law is applied. Also noteworthy, the origin of the legislation and its enactment is shaped by a much broader set of factors constituting the societal, political and constitutional setting. These factors are not examined here, but integration policies, electoral politics, state-church relations, xenophobic political ideologies and political elites, and other factors are likely to matter in any account of why these pieces of legislation were politically desired and enacted.

The question remains whether civil society mobilization and legal experts views on international law as well as the flexibility of international law is likely to shape the understanding of international law in the broader public debate and social arena. This falls clearly outside the scope of the analysis, but we might speculate on the basis of previous research that, among other factors, civil society mobilization as well as the content of the international law will affect how it is deliberated in general. Debates related to the ban of the burqa in France, admission to faith schools in the UK, and circumcision of children in Germany are instances where European and international human rights law have been integrated into public debates, albeit to varying degrees. The extent to which civil society

mobilization and the law itself shaped these debates requires more research. But this article suggests that indeed the deliberation of international human rights law plays out in arenas other than courtrooms.

CONCLUSION

Two main conclusions can be drawn about the dynamics of the domestic legislating of international human rights. First, domestic legislatures are indeed involved in the politics of human rights. While lawmaking, legislatures confront questions of domestic law and policy that concern international human rights law. These findings suggest that while previous research focuses on national courts, legislators can also be crucial to the politics of human rights. For this reason, research on human rights can take closer look at legislatures, and the factors that shape their participation in the politics of human rights.

Second, there is variation in how legislatures apply international human rights law. This variation can be understood in light of two factors – civil society groups’ and legal experts’ mobilization of the law and the flexibility of international law – that affect how legislators deliberate and apply international human rights law domestically. Previous research shows the effects of international human rights law often depend on mobilization by civil society actors (Keck and Sikkink 1998; Risse, Ropp and Sikkink 1999; Hafner-Burton and Tsutsui 2005; Cichowski 2006; Avdeyeva 2007; Simmons 2009; Murdie and Davis 2012). In contrast to existing literature that shows civil society’s impact on human right starts in courts, and then **received** follow-through in legislatures (Alter and Vargas 1998; Cichowski 2007), this article suggest that their mobilization through legislative politics may at times be a precursor to litigation, and perhaps even minimize the need for litigation if lawmakers

actually get the signals right. This article thus has implications for understanding how societal actors influence human rights within the state.

In addition, **the** international law itself determines how lawmakers apply it. Specifically, this article has implications for how we view the consequences of flexibility in international human rights law. Existing literature suggests that flexibility in international law can actually strengthen it (Rosendorff and Milner 2001; Kucik and Reinhardt 2008; Hafner-Burton et al. 2011). This article suggests that there are potential negative impacts of flexibility, as **they** can incentivize opportunistic behavior in compliance and the implementation of international human rights commitments. In this way, an important aspect of understanding the long-term effectiveness of international human rights law could hinge on its flexibility.

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