WOMEN'S RIGHTS AND RELIGION - THE MISSING ELEMENT IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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INTRODUCTION

> "Wearing the headscarf is considered . . . to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. **However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say.**
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> . . . **What is lacking in this debate is the opinion of women**, both those who wear the headscarf and those who choose not to."
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> Judge Tulkens of the European Court of Human Rights[1]

Many countries have recently experienced vibrant and heated internal discussions on religion and state issues. The nature of these issues tends to be exceptionally poignant, touching the very essence of peoples' private beliefs and generally generating intense social and political tensions. One of the most controversial debates involves the tension between women's equality and religious freedom. A rigorous expression of it takes place in the European context, much of it surrounding the wearing of veils, headscarves, and other *modest* garments by Muslim women in the public sphere, all

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[1] Sahin v. Turkey, App. No. 44774/98, 2005-XI Eur. Ct. H.R. 220, ¶ 11 [hereinafter *Sahin*] (Tulkens, J., dissenting) (emphasis added). The European Court of Human Rights' Grand Chamber opinion gave rise to one dissent, authored by Judge Tulkens from Belgium, one of the five female judges on the seventeen-judge panel.

of which are claimed to be manifestation of Muslim religious beliefs.

In recent years, many states across Europe have legislated prohibitions on wearing Islamic garments,[2] putting forward various justifications such as: (a) preserving state secularism at the public sphere, (b) ensuring state's religious neutrality, (c) promoting gender equality (as these garments are often seen as an oppressive practice), (d) protecting the public order from the perceived threat of radical political Islam, and (e) the need to protect school children from religious influences.[3]

The debate over banning headscarves has spawned a vast Feminist literature laying out robust arguments of both opponents and proponents of the bans. Both sides make many claims. On the one hand, some introduce sharp criticism of European courts' decisions to endorse the bans, claiming that the rulings violate women's right to manifest their religion and other rights (such as the right to personal autonomy, the right of access to education and the right to employment).[4] On the other hand, some assert that the secular approach of the courts is vital for the protection and implementation of women's human rights and equality in democratic socie-

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[2] Mainly on Islamic headscarves in educational settings.

[3] For an extensive overview of the European bans on religious garments see ERICA HOWARD, LAW AND THE WEARING OF RELIGIOUS SYMBOLS: EUROPEAN BANS ON THE WEARING OF RELIGIOUS SYMBOLS IN EDUCATION 30 (2012) (exploring the arguments for and against the bans in the literature and in the case law of both the European Court of Human Rights and national courts across Europe on the topic); *see, e.g.*, Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L L. 367 (2006–2007) (claiming that secularism is vital for the implementation of women's human rights).

[4] *Id.* In addition, as women were banned from wearing the headscarves at work or at educational institutions, the bans were viewed as putting obstacles to their participation in these places. *See, e.g.*, Christine Chinkin, *Women's Human Rights and Religion: How Do they Co-Exist?*, *in* RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW: A CRITICAL EXAMINATION OF ISLAMIC STATE PRACTICES 53 (Javaid Rehman and Susan C. Breau eds., 2007) (examining "the tensions" arising from claims regarding women's human rights and those rights pursued in "the name of religion"); Carolyn Evans, *The 'Islamic Scarf' in the European Court of Human Rights*, 7 MELB. J. INT'L L. 52 (2006) (discussing the European Court of Human Rights' treatment of Muslim women "who were denied the right to wear headscarves"); Gila Stopler, *Rights in Immigration: The Veil as a Test Case*, 43 ISR. L. REV. 183, 183-85 (2010) (providing a brief account of immigration issues in Europe surrounding the Muslim community); Ghada Hashem Talhami, *European, Muslim and Female*, 11 MIDDLE EAST POL'Y 152, 167 (2004) (positing that bans on veiling in Europe "fail to protect the rights of Muslim women to education and religious freedom").

ties.[5]

Notably, this clash between gender equality principles and freedom of religion is especially common in democratic states where minorities constitute a significant part of the population and are "of different religious persuasion[s] from that of the majority population."[6] For this reason, many scholars have seen relevance to the multicultural debate. In a nutshell, this is a debate on states' recognition and respect of minority groups' traditions and the inevitable collision with democratic values. The issue raises questions of whether and how states should accommodate or set limits to religious, cultural, ethical and other beliefs. The complexity deepens as democratic countries protect conflicting ideals; for instance, freedom of religion and freedom to manifest one's religion versus freedom from religion, secularism and gender equality. Current scholarship struggles to settle these contrasting interests, many times understood in general as the religious-secular conflict.[7]

It is in this context that I wish to discuss and explore the way in which the European Court of Human Rights (ECtHR or the Court) has dismissed the claims of women who were denied the right to wear headscarves in educational institutions or other public places. The discussion revolves around three recent cases brought before the ECtHR.[8] This paper examines the Court's assessment in the cases (Part 1), the feminists' arguments laid out to settle the conflict

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[5] *See e.g.*, Bennoune, *supra* note 3, at 370-71 (arguing that the European Court of Human Rights ruled correctly in its recent decisions, and introducing the focus of the paper—the context that supports secularism regarding women's human rights and religious expression).

[6] Chinkin, *supra* note 4, at 56 (addressing the pressure placed on "women's compliance" due to the religious persuasion of the community they're placed in, specifically in Europe).

[7] *See, e.g.*, Chinkin, *supra* note 4 (discussing tension between women's rights and religion); Michael M. Karayanni, *Living in a Group of One's Own: Normative Implications Related to the Private Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel*, 6 UCLA J. ISLAMIC & NEAR E. L. 1 (2006-2007) (exploring the "religious-secular conflict" in Israel); Gila Stopler, *Countenancing the Oppression of Women: How Liberties Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 155 (2003) (arguing that religion and cultural norms serve as "justifications for discrimination on the basis of sex," specifically against women); Donna J. Sullivan, *Gender Equality and Religious Freedom: Towards a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 795-804 (1991-1992) (offering framework for resolving conflicts between women's human rights and freedom of religion).

[8] *See generally* Dahlab v. Switzerland, App. No. 42393/98, 2001-V Eur. Ct. H.R. 447 [hereinafter *Dahlab*]; Dogru v. France, App. No. 27058/05, Eur. Ct. H.R. (Apr. 3, 2009) [hereinafter *Dogru*]; *Sahin*, *supra* note 1.

between gender equality and women's religious liberties missing in the rulings (Part 2), and finally, the questionable absence of comprehensive legal analysis of these issues in the Court's judgments and its failure to fully engage with the complexity of the debate (Part 3).

More specifically, in Part 1 of this article, I provide the framework of the current legal debate in the ECtHR, describing the decisions and the legal analysis put forward by the Court. It also considers the contextual background in which these rulings were issued, as it was brought by the Court, in an attempt to provide due and comprehensive consideration to the matrix of factors underlying the decisions.[9] In Part 2, I turn to explore women's voices, which I consider as the missing element in the Court's decisions. Feminist scholarship offered numerous arguments and theories to reconcile the conflicting rights and find solutions addressing the complexity of the debate on religious freedoms, gender equality, and women's rights. In this article, I wish to unveil the considerations that should have been taken into account, at least in part, and map the ways in which such considerations affect women's rights. Finally, Part 3 confronts the Court's approach in these cases. I claim that despite the extensive and heavy feminist arguments and scholarship written in response to the bans spread around Europe (which were upheld by European courts long before the ECtHR), the Court failed to develop any substantial case law on women's equality, human rights and religion or any methodology to tackle these conflicts. Inspired by recent scholarship,[10] I argue that the Court's approach stems from the current construction of religion as

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[9] For an extremely extensive contextual analysis, see Bennoune, *supra* note 3 (claiming that the ECtHR ruled correctly in its recent decisions and asserts that secularism is vital for the implementation of women's human rights).

[10] *See* David Kennedy, *Images of Religion in Legal Theory*, *in* RELIGION AND INTERNATIONAL LAW 145 (Mark W. Janis & Carolyn Evans eds., 1999) (discussing the history of religion and international law); David Kennedy, *Losing Faith in the Secular: Law, Religion, and the Culture of International Governance*, *in* RELIGION AND INTERNATIONAL LAW 309, 313 (Mark W. Janis & Carolyn Evans eds., 1999) (analyzing the possibility of religion "act[ing] as arm of the law" as secularism becomes less apparent); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1401–02, 1417 (2002–03) (describing religion as "the 'other' of international law"); *see also* Christina M. Cema & Jennifer C. Wallace, *Women and Culture*, *in* WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 623 (Kelly D. Askin & Dorean M. Koenig eds., 1999) (detailing the discrimination of human rights women face due to culture); Joan Scott, *Symptomatic Politics: The Banning of Islamic Head Scarves in French Public Schools*, 23 FRENCH POL. CULTURE & SOC'Y 106, 108 (2005) (discussing the oppression and treatment of women wearing headscarves).

law's "other", i.e. as an extralegal field, irrational and incontestable in the conventional sense.[11] This construction is obstructing any comprehensive judgment and discussion over religious issues and human rights in the legal arena. In simple words, the law to fails to properly handle religion, religious claims and religious aspirations in the public sphere. I claim that it is not only that religion is constructed as law's other, but in the context of women's rights and religion, the otherness is exacerbated. Legal demands involving religion and women's rights create a legal field so 'sensitive', controversial and different from their norms that conflicts between women's religious rights and the legal system is virtually unavoidable. With respect to the ECtHR, such a course of rulings is troubling and even dangerous, particularly in light of the wide effect of the ECtHR judgments on national courts, as well as on international human rights tribunals and institutions.[12]

1. THE LEGAL FRAMEWORK

1.1. Religious Freedoms in the European Human Rights Convention

Freedom of thought, conscience and religion is enshrined in the European *Convention for the Protection of Human Rights and Fundamental Freedoms* under Article 9.[13] The requirements set out in Article 9 of the European Convention, to which all European States are parties, set the framework for the arguments in this debate.

Article 9(1) provides that:

> 9.1. Everyone has the right to freedom of thought, conscience and religion; this right includes . . . freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, prac-

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[11] Sunder, *supra* note 10, at 1401-02, 1417-25 (detailing the treatment of religion as law's "other" and the transition of its construction).

[12] Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843 (1998-1999) (examining the effect of the doctrine of the margin of appreciation on the "protection and promotion of human rights.").

[13] European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. For similar analysis of the convention provisions and the ECtHR cases, see Evans, *supra* note 4 (criticizing the ECtHR's reliance on stereotypes and generalizations about Muslim women).

tice and observance.[14]

Article 9 distinguishes between two aspects of religious freedom: (a) the right to freedom *of* religion, which is considered absolute as it encompasses the right to have or not to have a religion, and cannot be subject to limitations; and (b) the freedom to *manifest* one's religion, which is the external dimension of the freedom of religion allowing for the exercise of religion.[15]

Yet, the Convention does not protect every act motivated or inspired by a religion or belief. Specifically, Article 9(2) subjects the manifestation of religion or belief "only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[16] These limitations are set in light of the concern that the public manifestation of religion can potentially interfere with the rights of others or otherwise stand in contrast to state laws (as was the exercise of wearing of the Islamic headscarves perceived by some states).[17]

In its case law, the ECtHR emphasizes the pluralistic aspect of religious freedom, stressing that it is fundamental to a "democratic society," and though it is "one of the most vital elements that go to make up the identity of believers," it is also "a precious asset for atheists, agnostics, sceptics and the unconcerned."[18] Furthermore, according to the Court, in democratic societies where several religions coexist, "it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[19]

Nevertheless, when a certain act or measure that is prescribed by law and pursues a legitimate aim constitutes interference with

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[14] *Id.* at art. 9.

[15] Claudia Morini, *Secularism and Freedom of Religion: The Approach of the European Court of Human Rights*, 43 ISR. L. REV. 611, 613 (2010) (focusing on the ECtHr's approach to issues regarding secularism, religion and the margin of appreciation doctrine).

[16] European Convention, *supra* note 13, at art. 9(2).

[17] Morini, *supra* note 15.

[18] Kokkinakis v. Greece, App. No. 14307/88, Eur. Ct. H.R., ¶ 31 (1993). In the context of the case, the Court itself avoided taking sides, emphasizing the failure of the domestic court to apply the domestic law properly since it had not spelt out sufficiently clearly how the applicant had committed the elements of the offense of improper proselytism. *See generally id.*

[19] *Id.* ¶ 33.

the right of a person to manifest her religion, the main question before the Court is whether or not such interference is "necessary in a democratic society."[20] In this regard, the Court applies the Margin of Appreciation doctrine, according to which "contracting States have a certain margin of appreciation in assessing the existence and extent of the need for interference."[21] In essence, this doctrine provides for a certain legal notion that the national authorities are best suited to decide how to fulfill their obligations under the European Convention.[22] Moreover, the Grand Chamber of the ECtHR's believes that "[w]here questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance."[23]

Subsequently, this approach creates a relatively wide margin of discretion, where states are given very strong deference in cases involving questions of religion and state. The Court however holds that the "margin of appreciation goes hand in hand with a *European supervision* . . . . The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate . . . ."[24]

1.2. *About Headscarves, Women and Rights in the ECtHR Jurisprudence*

Turning to the debated issue on women's rights and their religious freedoms, in three cases brought before it, the Court determined that the practice of wearing headscarves falls within the scope of the right to manifest one's religion.[25] Yet, applying the

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20 European Convention, supra note 16.

21 Dahlab, supra note 8, at 462.

22 Eyal Benvenisti, supra note 12, at 843 (citing HOWARD C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996); Eva Brems, The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights, 56 HEIDELBERG J. INT'L. L. 230, 240 (1996) (describing the lack of universal standards and the influence of nations in deciding how to apply the European Convention).

23 Dogru, supra note 8, ¶ 63; Sahin, supra note 1, at ¶ 109.

24 Sahin, supra note 1, ¶ 110 (emphasis added).

25 See Dahlab, supra note 8, at 463 (noting that when "weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore

above tests, the ECtHR upheld the different bans and forbade the wearing of the Islamic headscarf by Swiss elementary school teachers (*Dahlab*), Turkish university students (*Sahin*), and French school girls (*Dogru*).[26]

Underlying the majority's approach to this question is the application of the margin of appreciation doctrine, promoted by the notion that States are more suitable to reach these "internal" decisions on state and religion issues.[27] The ample margins led the Court to accept the bans put forward by the states by acknowledging two main reasons for such dress regulations: secularism (or state neutrality) and gender equality.

Characterizing the decisions is the very little discussion, if any at all, on what constitutes these "women's rights," how the bans are promoting gender equality, and in what manner women's rights are being protected by restrictions on their religious dress. The generality of the rulings shed light on the regrettable absence of women's human rights analysis.

Another issue to notice is the "thin European Supervision" applied by the Court, as a consequence of the wide margins recognized. Judge Tulkens, in the Sahin case, referred to this issue and said, "European supervision seems quite simply to be absent from the judgment."[28]

In addition, important elements in the Court's rulings, also linked to the width of the margin, include the appreciation granted to the cultural, social and legal diversity, as well as the historical background of each of the European countries when questions of religion and state are being confronted (whether by governmental,

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not unreasonable.").

[26] See generally Dahlab, supra note 8; Sahin, *supra* note 1; Dogru, *supra* note 8.

[27] *See, e.g. Sahin, supra* note 1, ¶¶ 109-10 ("Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance . . . . Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order . . . . Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context."). *See also* Evans, *supra* note 4, at 57 ("The margin of appreciation plays a role in deferring to the judgment of states whose democratically elected officials are said to be in closed contact with the particular needs of their populations.").

[28] *Sahin, supra* note 1, ¶ 3 at 221.

judicial or administrative authorities). The Court reiterated in this regard that its role is not to impose uniformity or to strive for the existence of this reality, but rather to take into consideration the European diversity (in the sense that several countries establish religion and others strive for complete separation and secularism).[29]

The next sections elaborate on these decisions and issues, and particularly the lack of proper consideration to the principle of gender equality and its conflict with women's religious freedoms (which I consider as the missing element in the Court's assessment).

1.2.1. Dahlab v. Switzerland

In *Dahlab v. Switzerland*, the Court upheld a Swiss court decision prohibiting a primary-school teacher from covering herself with a *hijab* in class.[30] As described by the Court, shortly after she was appointed as a teacher, and after a period of "spiritual soul-searching," the teacher converted to Islam and decided to wear an Islamic headscarf.[31] The Court described it as a religious practice whereby women are "enjoined to draw their veils over themselves in the presence of men and male adolescents."[32]

Four years after her conversion, the school authorities requested that the teacher stop wearing the headscarf while carrying out her professional duties in school.[33] They argued that domestic laws forbid the teacher's practice, stressing that the headscarf constitutes "an obvious means of identification imposed by a teacher

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[29] *See, e.g. Sahin, supra* note 1, ¶ 109.

> It is not possible to discern throughout Europe a uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to time and context. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context.

[30] *See generally Dahlab, supra* note 8. The *hijab* is the Arabic language term used to refer to the headscarf worn by some Muslim women that covers their head, hair, and neck.

[31] *Id.* at 451.

[32] *Id.*

[33] *Id.* at 452 (citing a decision by the Directorate General for Primary Education).

on her pupils, especially in a public, secular education system."[34]

The case was eventually appealed to the Swiss Federal Court. As its decision was endorsed by the ECtHR, it is worth mentioning a few parts of this opinion hearing at the Swiss Federal Court.[35] First, in its review of the case, the Swiss Federal Court found Ms. Dahlab's practice to be completely at odds with domestic laws and judged that her wearing of the Islamic scarf was against "the principle of denominational neutrality in schools, a principle that seeks both to protect the religious beliefs of pupils and parents and to ensure religious harmony."[36] It further stated that "schools would be in danger of becoming places of religious conflict if teachers were allowed to manifest their religious beliefs through their conduct and, in particular, their clothing . . . ."[37]

Second, the Swiss Court dismissed Ms. Dahlab's argument that no law explicitly prohibits the wearing of religious clothing, and held that conduct that "would be regarded by the average citizen as being of minor importance" does not require a law "too precise."[38] Nevertheless, it does not identify the "average citizen" including on its gender, religious beliefs, culture, belonging to a minority group or any other affiliation that can be of relevance.[39]

Third, the Swiss Court concluded its decision by pointing out the risk to the pupils of the possibility of the teacher's proselytizing her religion by wearing such a "powerful religious symbol."[40] Furthermore, it emphasized the importance of separation of church

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[34] *Id.* In this regard, it is important to note that the Swiss laws at issue were not explicitly banning religious wear, but rather included a general rule, under section 6 to the Swiss Public Education Act, according to which "the public education system shall ensure that the political and religious beliefs of pupils and parents are respected." *Id.* at 454.

[35] *See generally Dahlab* (the circumstances of the case).

[36] *Dahlab, supra* note 8, at 454.

[37] *Id.*

[38] *Id.* at 453. The Swiss Federal Court further stated that "[c]ivil servants are bound by a special relationship of subordination to the public authorities, a relationship which they have freely accepted and from which they benefit; it is therefore justifiable that they should enjoy public freedoms to a limited extent only. In particular, the legal basis for restrictions on such freedoms does not have to be especially precise." *Id.*

[39] Carolyn Evans criticizes this assessment that was affirmed by the ECtHR and states the problems to accept such general assertions in the field of human rights law. Evans, *supra* note 4, at 60. The most disturbing issue is that the "average man" assumption is based on convictions of majority groups. *Id.*

[40] *Dahlab, supra* note 8, at 452–53.

and state and the distinct secular nature of the education system.[41]

Only at the margins of its ruling, the Swiss Federal Court noted that "it must also be acknowledged that it is difficult to reconcile the wearing of a headscarf with the principle of gender equality . . . ."[42]

The above reasoning of the Swiss Federal Court was fully accepted and justified by the ECtHR. With regards to the absence of an explicit prohibition "prescribed by law" (required by the European Convention in order to set limits on a person's right to manifest religion), the Court noted that "the wording of many statutes is not absolutely precise."[43] It further held that the Swiss prohibition on wearing *hijab* pursued aims that were legitimate under Article 9(2) of the Convention seeking to protect the rights and freedoms of others, public safety, and public order.[44]

In addition, to answer whether the measure taken is "necessary in a democratic society," the Court applied the doctrine of the Margin of Appreciation, noting that States enjoy a certain margin of appreciation in assessing the existence and extent of the need for interference by the Court.[45] It stated that this margin is subject to the Court's supervision.[46] In exercising this supervisory jurisdiction, the Court determines "whether the measures taken at the national level were justified in principle–that is, whether the reasons adduced to justify them appear "relevant and sufficient" and are proportionate to the legitimate aim pursued".[47] The proportionality of the measure is decided when the Court weighs the need to protect the rights and liberties of others against the conduct of which the applicant stood accused.[48]

Applying these tests in the instant case, the ECtHR expressed its concern about the potential interference of the Islamic headscarf with the religious beliefs of Ms. Dahlab's pupils, as well as other

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41 *See Dahlab, supra* note 8, at 456 (noting the absence of religion from within the public school system).

42 *Id.*

43 *Id.* at 461.

44 *Id.* at 462 (finding a prohibition on the wearing of a hijab acceptable under Swiss law).

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.* (implementing the use of a balancing test, involving conduct and liberty interests).

pupils at the school and the pupils' parents.[49] It also referred to the breach of the principle of denominational neutrality in schools.[50] The Court then upheld the Federal Court's view that the interference with the teacher's freedom to manifest her religion was justified by "the need, in a democratic society, to protect the right of State school pupils to be taught in a context of denominational neutrality."[51]

Finally, the Court in *Dahlab* agreed with the Swiss Court assessment that the wearing of a headscarf by a primary-school teacher clearly indicates adherence to a particular faith and that such religious garments constitute a "'powerful external symbol."[52] It also adopted the final statement made by the Swiss Court that gender equality must also be protected, even though it was a mere statement without any conceptual reasoning.[53] In its ruling the Court concluded, bearing in mind the young age of the children concerned,[54] that:

> ... the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.[55]

In addition, the Court dismissed the final argument made by the teacher regarding discrimination.[56] According to the teacher, the prohibition violated Article 14 of the Convention and amounted to discrimination on the ground of sex, in that a Muslim man is not subject to the prohibition, whereas a woman with similar be-

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[49] *Id.*

[50] *Id.* at 462.

[51] *Id.*

[52] *Id.* at 463.

[53] *Id.*

[54] *Id.* ("The applicant's pupils were aged between four and eight, a period during which children wonder about many things and are also more easily influenced than older pupils").

[55] *Id.*

[56] *Id.* at 464.

liefs had to refrain from practicing her religion.[57] Ironically, and in contrast with its aforementioned conclusion on the impact of the headscarf on women's equality, the Court noted that the prohibition on wearing an Islamic headscarf was purely in the context of the teacher's professional duties, and "was not directed at her as a member of the female sex."[58]

The above reasoning about the potential effect of the headscarf has been applied in later decisions of the Court (and of other national courts) to justify state limitations on Islamic dress in educational establishments.[59]

1.2.2. Leyla Sahin v. Turkey

1.2.2.1. Facts and Judgment

Guided by *Dahlab*, in an extensive decision, the Grand Chamber of the ECtHR in *Leyla Sahin v. Turkey* ruled that Istanbul University's ban on headscarves did not violate freedom of religion of a Muslim Medicine student. [60] The case was ultimately decided in a rare split decision by the Grand Chamber, when Judge Tulkens decided not to vote with the majority on the question of Article 9 of the Convention regarding the interpretations of the freedom to religion.[61]

The facts in brief mention that Leyla Sahin was a fifth year medicine student at Istanbul University.[62] Sahin claimed to have worn the Islamic headscarf for the four years as a student at another Turkish university, while after only few months at Istanbul University, the Vice-Chancellor of the University issued a ban on headscarves and other religious expressions. His decision banned male students with beards and female students who wear the Islamic headscarf, from attending lectures, tutorials and examinations.[63] Accordingly, after refusing to remove her headscarf, Sahin

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[57] *Id.*

[58] *Id.*

[59] *See generally Dogru, supra* note 8; R. (Shabina Begum) v. Headteacher and Governors of Denbigh High School, [2006] UKHL 15, [2007] 2 WLR (H.L.) 719 (appeal taken from Eng.) [hereinafter *Begum*]. *See infra* Section 4.

[60] *Sahin, supra* note 1.

[61] *Id.* at 42 (Tulkens, J., dissenting).

[62] *Id.* at 3.

[63] According to the ECtHR, the circular reads, in part, as follows:

> By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court

was denied access to medical exams and courses, and was finally suspended (though later granted an amnesty). Ultimately, Sahin abandoned her studies in Turkey, and enrolled in Vienna University in Austria where she completed her education.[64]

In her arguments, Sahin requested the Court to recognize the principles of pluralism and broadmindedness existing in democratic societies, and further submitted that the States should not be given a wide margin of appreciation allowing them to regulate students' dress.[65] She further advocated for her right to free choice and asked the Court to distinguish her case from previous similar rulings. Sahin claimed that university students "were discerning adults who enjoyed full legal capacity and were capable of deciding for themselves what was appropriate conduct."[66] Sahin mentioned that her choice to wear headscarf based on her religious conviction is one of the most fundamental rights in a pluralistic liberal democracy.[67] Furthermore, she argued that merely wearing the Islamic headscarf cannot be considered as against the principle of equality between men and women, "as all religions imposed such restrictions on dress which people were *free to choose* whether or not to comply with."[68] (emphasis added).

On the other side, it is clear throughout the decision that the Turkish authorities have had a genuine concern over women's rights and the value of State secularism. The Turkish government referred to the headscarf as "a sign that was regularly appropriated by religious fundamentalist movements for political ends and constituted a threat to the rights of women."[69] As mentioned in the

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> and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose 'heads are covered' (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students.

Id. at 3 (citing Vice-Chancellor of Istanbul University, Circular Regulating Students' Admission to the University Campus (Feb. 23, 1998)).

[64] *Id.* at 3-5.

[65] *See id.* ¶ 100, at 23 (arguing for a restriction in prohibition on student clothing in schools).

[66] *Id.* ¶ 101, at 24.

[67] *Id.* at 24.

[68] *Id.*

[69] Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. 220, Fourth Section (2004) [hereinafter *Sahin* (Fourth Section)]; see also Bennoune, *supra* note 3, for an

ECtHR's ruling, the Supreme Administrative Court in Turkey had consistently held that wearing the Islamic headscarf at university was not compatible with the fundamental principles of the secular Republic, since the headscarf was in the process of becoming the symbol of a political religious vision that was contrary to the freedoms of women and those fundamental principles.[70] In addition, in its pleading before the previous instance of the European Court of Human Rights,[71] the Turkish government claimed that "secularism was a preliminary requisite for a liberal, pluralist democracy,"[72] and argued that the protection of the secular state through the headscarf bans was a necessary element for the realization of human rights in the Turkish context.[73]

The ECtHR's assessment supported this vision and the arguments made by the Turkish authorities. The Court dedicated the first part of its ruling to an historical overview of Turkey's special secular character where it describes at length the Turkish history, state regulations on religious dress, and the value of secularism.[74] The Court noted the revolutionary reforms establishing the Turkish nation, from the abolition of the religious caliphate (1923), to the repeal of the constitutional provision declaring Islam the religion of the State (1928), and lastly the constitutional status to the principle of secularism (1924).[75] The Court also mentions that the "defining feature of the Republican ideal was the presence of women in public life and their active participation in society ... [and] the idea that women should be freed from religious constraints...."[76] The national bans on religious attire (including headscarves) were perceived only as a natural part of these devel-

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extensive review of the Turkish social context.

70 *See Sahin, supra* note 1, ¶ 93, at 22. In addition, the ECtHR cites a judgment of the Supreme Administrative Court of Turkey of 13 December 1984, in which the Court held that regulations banning headscarves in institutions of higher education were lawful, noting that "[b]eyond being a mere innocent practice, wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic." *Id.* ¶ 37, at 9.

71 *Sahin* (Fourth Section), *supra* note 69.

72 *Id.* ¶ 91, at 20.

73 *Id.* (linking the protection of human rights with secularity).

74 *Sahin, supra* note 1, at 7-13 (recounting the historically secular nature of Turkey and its emphasis on a separation between church and state).

75 *Id.* ¶ 30, at 7.

76 *Id.*

opments.[77]

Furthermore, the Court noted that wearing an Islamic headscarf (in particular) in school and university is a recent development in the Turkish society, known since the 1980s.[78] The Court linked this development to a more recent one at the political arena. It indicates that the new leading political party, as well as the former prime minister, expressed ambivalence towards democratic values and advocated the creation of new legal systems that will operate by religious rules.[79] Subsequently, the Court stressed that these developments are perceived in the Turkish society as "a genuine threat to republican values and civil peace."[80] The Court emphasized this political meaning of the Islamic headscarf specifically in Turkey,[81] as opposed to the issue regularly debated in most European countries in this context, which mainly revolved around the individual liberty to manifest religion or to be "free" from religion.[82]

In its ruling, the Court determined that the restrictions on the right to wear the Islamic headscarf in universities constituted an interference with the student's right to manifest her religion.[83] When considering the circumstances of the case and the decisions made by the domestic courts, the Court found that the interference with Sahin's rights pursued "the legitimate aims of protecting the

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77 As elaborated by the ECtHR of the ruling: "The first legislation to regulate dress was the Headgear Act of 28 November 1925 (Law no. 671), which treated dress as a modernity issue. Similarly, a ban was imposed on wearing religious attire other than in places of worship or at religious ceremonies, irrespective of the religion or belief concerned, by the Dress (Regulations) Act of 3 December 1934 (Law no. 2596)." *Id.* ¶ 33, at 9.

78 *Id.* ¶ 35, at 8.

79 *Id.*

80 *Id.*

81 *See id.* ¶ 115, at 28 ("Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated[,] . . . this religious symbol has taken on political significance in Turkey in recent years."). The ECtHR also mentions in this regard the State of Azerbaijan and Albania, as opposed to most European countries in which the debate has focused mainly on primary and secondary schools and the question of individual liberty. *Id.* ¶ 55, at 13.

82 Id. ¶ 55, at 13.

83 See id. ¶ 78, at 19 (citing Chamber's opinion in saying "the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion.").

rights and freedoms of others and of protecting public order."[84]

The Court then assessed whether these limitations are "necessary in a democratic society."[85] In its assessment the Court reiterated that, as enshrined in Article 9, freedom of religion does not protect every act motivated or inspired by a religion or belief.[86] It recognized that in democratic societies, in which several religions coexist, it may be necessary to place restrictions on certain practices of religion in order to reconcile the interests of the various groups.[87] However, at the same time, the Court noted that it is the States' duty to ensure mutual tolerance between opposing groups, not by removing the cause of tension or eliminating pluralism, but by ensuring that the competing groups tolerate each other.[88]

Ironically, though accepting the Turkish ban, the Court described in length the supposedly neutral and impartial role a state should have in relation to religious disputes, noting the importance of a State's duty not to interfere with the legitimacy of a certain religious belief or expression.[89]

It is also then that the Court cited a long list of precedents to explain the wide margin of appreciation allowing States broad discretion especially in questions concerning the relationship between State and religion, on which "opinion in a democratic society may reasonably differ widely."[90] According to the Court, given the European diversity of approaches on these issues, it becomes impossible to discern or to impose a uniform conception of religion in so-

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84 *Id.* ¶ 99, at 23 ("[T]he Court is able to accept that the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order, a point which is not in issue between the parties.").

85 *Id.*

86 *Id.* ¶ 105, at 25.

87 *Id.* ¶ 106, at 25.

88 *See id.* ¶ 107, at 25 ("The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed . . . and that it requires the State to ensure mutual tolerance between opposing groups."). The Court then continues to an extensive rationalization of the importance of principles of pluralism, dialogue and the spirit of compromise necessary in a democracy. *Id.* ¶ 107, at 25-26.

89 *See id.* (describing the Turkish ban).

90 *Id.* ¶ 109, at 26.

ciety.[91] Accordingly, the Court ruled that the choice of the extent and form such regulations on religious practice should take, will depend on the specific domestic context.[92]

Without providing any explanation on how the principle of gender equality is preserved by the ban on Islamic headscarf or otherwise at risk without such ban, the Court upheld the Chamber's (the lower instance at the ECtHR) observation in this regard. The Court adopted the Chamber's conclusion referring to the additional value recognized by the Turkish constitutional system to the protection of the rights of women, and its well-established principle of gender equality (which is also one of the key principles underlining the European Convention, and a goal of the member states).[93] In addition, it endorsed the Chamber's concern of the possible threat "such symbol" as the Islamic headscarf may have in the Turkish context on those who choose not to wear it. According to the Chamber, it may be of a compulsory nature, imposing religious duties on others.[94] Thus, for the Court, combating gender discrimination was an acceptable reason for the Turkish ban.

Finally, noting the decision in *Dahlab*, Turkey's historical background, and the above reasoning, the Court upheld the ban and concluded that it considers the notion of secularism in Turkey (not only as guaranteeing the values of liberty and equality, but also as a wall against extremist movements) to be consistent with the values of the European Convention.[95]

1.2.2.2. Judge Tulkens' Dissenting Opinion in Sahin

As stated above, Judge Tulkens of the ECtHR Grand Chamber issued a long and thorough dissenting opinion, which expressed

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[91] *Id.* (discussing the tension between one's freedom to exercise religion and another's freedom from any particular religion, as may exist in a diverse democratic state).

[92] *Id.*

[93] *Sahin, supra* note 1, ¶ 115 ("After examining the parties' submissions, the Grand Chamber sees no good reason to depart from the approach taken by the Chamber . . .").

[94] *Sahin* (Fourth Section), *supra* note 69, at ¶ 107-09. *See Sahin, supra* note 1, ¶ 115, at 28 (citing amply from Chamber's analysis). *See also* Bennoune, *supra* note 3, at 381 (concluding that because Turkey is ninety-nine percent Muslim, which removes the concern of certain types of discrimination, these measures taken to combat fundamentalist coercion of students were seen as justified in the context of the Turkish society).

[95] *Sahin, supra* note 1, ¶ 114 at 28 (laying out the Court's finding that secularism is in accordance with the spirit of the Convention).

some of the most common human rights-based critiques of the Sahin case, raised by both opponents and proponents of the headscarf ban.[96] Tulkens criticized almost every aspect of the majority's application of the tests set forth in the Court's case law, as well as its concluding observations. More specifically, she disagreed with the manner in which the Court applied the margin of appreciation doctrine, expressing her great concern for the wide latitude allowed on these issues, leading to what seemed as simply eliminating any judicial supervision on states' action ("European supervision seems quite simply to be absent from the judgment").[97] Furthermore, Tulkens strongly disagreed with the manner in which the majority applied the principles of secularism and equality, and interpreted them in relation to the practice of wearing the headscarf. In this regard, she accused the Court of relying exclusively on reasons cited by the national authorities and courts, and characterizing these as principles brought "in general and abstract terms," without stating on what grounds the interference was justified ("where there has been interference with a fundamental right, the Court's case-law clearly establishes that mere affirmations do not suffice").[98] Furthermore, Judge Tulkens pointed out that only recently, in the sphere of the right to freedom of expression, was the Court willing to protect a Muslim religious leader who had been convicted for violently criticizing the secular regime in Turkey.[99] Thus, while the right to manifest one's religion by peacefully wearing headscarf is prohibited under the Convention, incitements to religious hatred are fully covered by the freedom of expression.

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[96] *Id.* at 42-52 (Tulkens, J., dissenting). *See also* Bennoune, *supra* note 3, at 423-24 (discussing Judge Tulkens' dissent in detail).

[97] *See Sahin, supra* note 1, at 44 (Tulkens, J., dissenting) (criticizing the Court's deviation from a review conducted *in concreto*, by reference to three criteria: the appropriateness, restrictiveness, and proportionality of the measures taken).

[98] *See id.* at 44-45 (pointing out also that the Court has been much more willing to protect merely religious sentiments, thus its approach to religious practice seems surprising).

[99] The Muslim leader was convicted for calling for the introduction of the Sharia, and referring to children born of civil marriages rather than religious marriages as bastards. *See generally* Gunduz v. Turkey, No. 35071/97, 2003-XI Eur. Ct. H.R. (concluding that hateful and controversial remarks made by a Muslim religious leader nevertheless did not fall outside protected speech); *see also Sahin, supra* note 1, at 47–49 (Tulkens, J., dissenting) (noting the inconsistency in jurisprudence that would be created by the Court's opinion, and opining that the court's conclusion runs counter to existing case law while also being needlessly paternalistic).

Judge Tulkens made other references to instances in case law that would be inconsistent with the majority opinion, making the Court's reasoning to seem even more questionable. More of her observations are discussed in the next two parts of this paper.

1.3. Dogru v. France

Dogru v. France[100] is the most recent case brought before the ECtHR (2009) regarding the Islamic headscarf. The case's importance lies in the insight it provides into the application of past case law. It demonstrates how some of the critiques made in reference to the future of the case law regarding these issues have turned into a reality, especially with regard to the generality of the decisions and the absence of women's human rights analysis.

The principle of gender equality has received an even smaller place in this case, as it was simply absent from the Court's assessment, and was mentioned only as part of the description of the facts and ruling in the former case of *Dahlab*.[101] Furthermore, the doctrine of the margin of appreciation was even further extended, such that concurrently state authorities have almost full discretion when regulating religious freedoms.[102]

Dogru, an eleven-year-old French Muslim girl, had refused to take her headscarf off during physical education classes.[103] The

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[100] *See generally Dogru, supra* note 8 (discussing the judgment of the court in evaluating whether the rights of a French teenager had been violated after she was expelled from school for failing to take off her headscarf during school activities).

[101] *Dogru, supra* note 8, at 17–18.

> In the case of *Dahlab*, . . . [t]he Court stressed the 'powerful external symbol' represented by wearing the headscarf and also considered the proselytising effect that it might have seeing that it appeared to be imposed on women by a religious precept which was hard to square with the principle of gender equality. *Id.* (citation omitted).

[102] *Dogru, supra* note 8, at 19–20.

> Having regard to the margin of appreciation which must be left to the member States with regard to the establishment of the delicate relations between the Churches and the State, religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention. . . . [H]aving regard to the circumstances of the case, and taking account of the margin of appreciation that should be left to the States in this domain, the Court concludes that the interference in question was justified as a matter of principle and proportionate to the aim pursued.

[103] *Dogru, supra* note 8, at 1–2.

school's Pupil Discipline Committee decided to expel her from school, and Dogru's parents appealed the decision.[104] The appeal panel decided to uphold the Discipline Committee decision on several grounds, including the girl's failure to comply with the school's internal rules. The ruling was also based on a decision made by the *Conseil d'Etat.* [105]

It should be noted that at one stage of the proceedings, Dogru offered to wear a hat or balaclava instead of her headscarf. However, the school authorities dismissed her proposal, and the Government mentioned in its submissions to the Court that her proposal "did not in itself constitute proof of her willingness to find a compromise."[106]

For several years, the parents continued to appeal the decisions to domestic courts and their arguments were dismissed. Ultimately, the highest instance hearing of the case (the Nantes Administrative Court of Appeals) found that Dogru's behavior "overstepped the limits of the right to express and manifest her religious beliefs on the school premises."[107] An attempt to appeal this decision was rejected.[108]

The new panel of the ECtHR sitting as a Chamber (Fifth Section) (a lower instance) fully applied the previous case law though now the subject at issue was a young girl. The panel expressed its concern about the potential effect of the headscarf, and found that the values promoted by France justify the limitation on Dogru's dress, based on the margin of appreciation doctrine.[109]

More specifically, the Court emphasized the importance of the concept of secularism in France, established in its constitution and other founding national documents. Some of these documents specifically address limitations on the manifestation of religion in view of the public order. Additionally, according to the Court, the notion of the separation between church and state is deeply rooted

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104 *Id.*

105 The decision by the *Conseil d'Etat* found that "wearing a headscarf as a sign of religious affiliation was incompatible with the proper conduct of physical education and sports classes." *Id.* at 2.

106 *Id.* at 11.

107 *Id.* at 3.

108 *See id.* at 2-3 (noting that the local higher authorities rejected the plaintiff's appeal on the grounds that wearing a headscarf would not allow the girl to participate in physical education).

109 *Dogru, supra* note 8, ¶¶ 61-76 (emphasizing in length the wide margin of appreciation in these cases).

in the French history and among the majority population.[110] As the Court describes it, "in return for the protection of his or her freedom of religion, the citizen must respect the public arena that is shared by all."[111] The Court further noted that "only from the 1980s onwards . . . was the French model of secularism challenged, particularly in the public school context."[112]

Furthermore, since the Court adopted the government's assertions to uphold the ban, it is worth mentioning few of them.

In 2003, a decade after the first headscarf cases were introduced in 1989, and as a response to the new wave of immigration and its alleged resentment towards the Republic's principles, the President of France appointed the "Satsi commission" to study the issue.[113] The Satsi commission's findings, cited by the ECtHR, vividly demonstrate the immense tension between the Islamic minority and the majority population in France. The Satsi commission argued that "instances of behavior and conduct that run counter to the principle of secularism" are increasing.[114] Referring to the minority groups in the French society as "others," the Satsi commission enumerated several reasons for the deteriorating situation of the French secularism values, to include: the integrating difficulties experienced by "*those* who have arrived in France during the past decades," the living conditions in "our towns," unemployment, discrimination and the Islamic people feeling that they are being "driven out of the national community."[115] The Commission noted that it is for these reasons that "these people" claim to be driven to fight the values of the Republic.[116] Thus, the Commission concluded:

> It is with these threats in mind and in the light of the values of our Republic that we have formulated the proposals set out in this report. . . . [Regarding the headscarf, the report

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110 *See id.* at 3–4 (discussing the French civic history in which great value was placed on secularism, dating back to the Declaration of the Rights of Man and of the Citizen of 1789).

111 *Id.* at 3–4.

112 *Id.*

113 *Id.* at 4–5 (tracing the raison d'etre for the Satsi Commission and summarizing some of its results).

114 *See id.* (discussing the various findings of the Stasi commission and taking a negative view of the wearing of headscarves due to its religious connotations).

115 *Id.*

116 *Id.*

> states that] for the school community[,] . . . the visibility of a religious sign is perceived by many as contrary to the role of school, which should remain a neutral forum and a place where the development of critical faculties is encouraged. It also infringes the principles and values that schools are there to teach, in particular, equality between men and women.[117]

It was on the basis of this report and previous legal opinions, that the French ban was enacted.[118] The Act regulated the wearing of signs and dress manifesting a religious affiliation in State primary and secondary schools, in accordance with the principle of secularism.[119]

Similar to the previous cases, in the ECtHR decision of *Dogru*, the Court found the prohibition on Dogru's headscarf to be an interference with the right to manifest religion[120] that is prescribed by law and pursued a legitimate aim (of protecting the rights and freedoms of others and protecting public order).[121]

In assessing the necessity of the prohibition, the Court applied the margin of appreciation doctrine, and reiterated the previous holding in *Sahin* that in questions concerning the relationship between State and religions, member states' decisions must be seriously considered.[122] According to the Court, this is especially true when regulating the wearing of religious symbols in educational institutions.[123] The Court further addressed at length the importance of the principles of secularism and neutrality, and the specific justification in the instant case to protect the health and

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117 *Id.* at 5 (alteration in original).

118 *Id.* ("It is on the basis of these proposals that the Act of 15 March 2004 was enacted").

119 *Id.* at 9 ("Parliament enacted . . . the Law "on secularism," regulating, in accordance with the principle of secularism, the wearing of signs or dress manifesting a religious affiliation in State primary and secondary schools.").

120 *Id.* at 16 ("[T]he Court concludes that the interference in question had a sufficient legal basis in domestic law . . . . [T]he Court can accept that the interference complained of mainly pursued the legitimate aims of protecting the rights and freedoms of others and protecting public order.").

121 *Id.* at 13 ("The Court reiterates that, according to its case-law, wearing the headscarf may be regarded as "motivated or inspired by a religion or religious belief . . .") (citation omitted).

122 *See id.* at 17 (stating that the role of the national decision-making body must be given special importance in addressing questions concerning the relationship between the State and religions).

123 *Id.*

safety of the pupils.[124]

Regrettably, in this case the Court did not even stress the importance of the principle of gender equality in its assessment, but merely mentioned it in one line together with the facts and observations made by the Court in *Dahlab*.[125]

1.4. Critiques on the ECtHR Decisions

As expected, the restrictions on the Islamic veil in Europe and the judicial rulings affirming them (by the ECtHR or by other European Courts) have sparked sharp criticism from feminist scholars, human rights groups and other international human rights institutions.[126] The critique focused mostly on the narrow, superficial and racial viewpoints expressed by proponents of the bans, and on the oppression of women's religious liberties. It was claimed that women should be free to practice their religion as they so chose.[127] Some even offered feminist interpretations of the headscarves and indicated the positive effects of veiling on women's equality.[128] It seems that this strong opposition stems primarily from the absence of genuine and serious consideration of the contending opinions, whether from those supporting the bans or those against them.

Judge Tulkens, in her minority opinion in *Sahin*, rigorously ob-

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124 *See id.* at 19 (outlining certain circumstances in which upholding secularism is of particular importance, such as where secularism is a constitutional principle, while also noting that court was convinced by the assertion of health and safety issues as at least partial justification for a legitimate ban).

125 *See id.* at 18 (mentioning Dahlab in passing while listing a series of other cases of relevance, such as *Sahin*).

126 *See* Stopler, *supra* note 4, at 211–12 (arguing that wearing the veil in the public sphere of European countries is perceived as incompatible with the republican understanding of religious neutrality, which leads to unjustified restriction of religious freedom and discrimination of minority residents of the state); Jonathan Sugden, *A Certain Lack of Empathy*, HUMAN RIGHTS WATCH (July 1, 2004), http://www.hrw.org/english/docs/2004/07/01/turkey8985.htm (claiming that "the ECtHR judgment draws the conclusion that this abstract principle of secularism must take priority over the rights, future and welfare of an individual"). *See generally* Chinkin, *supra* note 4 (making similar points); Evans, *supra* note 4 (criticizing restrictions).

127 *Id.*

128 *See* Chinkin, *supra* note 4, at 72–73 (criticizing the decision of the Court, while noting that voluntary wear of headscarves could be considered emancipating, while discussing stereotypes about the effects of permitting women to wear the items in question). *See generally* Stopler, *supra* note 4 (offering interpretation and explaining the positive effects of the Islamic veil).

jects to the Court's assessment of the principle of sex equality. She criticizes the Court's inability to explain more precisely, or even just mention, the connection between the ban and equality.[129] In her view, nothing in the judgment could override the argument of the student that she wore the headscarf "of her own free will," and in an aspiration to follow her religious practice.[130]

Judge Tulkens further argues that "[e]quality and nondiscrimination are subjective rights which must remain under the control of those who are entitled to benefit from them."[131] She goes as far as to blame the Court for "'[p]aternalism' . . . [that] runs counter to the case-law of the Court"[132] regarding the right to personal autonomy, protected under Article 8 of the Convention.[133] She concludes that the ban violates Sahin's right to freedom of religion and cannot be considered as "necessary in a democratic society."[134]

The UN Human Rights Committee has also expressed its view on this debate, regarding a case in which a student claimed to be harassed by university authorities for wearing the headscarf. [135] In that case, the Committee commented on the application of Article 18 of the International Covenant on Civil and Political Rights (on religious freedom),[136] stating that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Fur-

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129 *See Sahin, supra* note 1, at 48 (Tulkens, J., dissenting) (discussing the issue of gender equality which Tulkens claims the Court overlooked in its majority opinion, noting that it did not state what the connection was between the ban and promoting equality between men and women, while also noting that member state courts had previously noted that such headgear could be worn for a variety of reasons).

130 *Id.* ¶ 12.

131 *See id.* at 48 (taking issue with the Grand Chamber's analysis of *Sahin, supra* note 1, in light of *Dahlab, supra* note 8).

132 *Id.*

133 European Convention, *supra* note 13, at art. 8. ("Right to respect for private and family life—1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").

134 Sahin, *supra* note 1, at 49.

135 *See* International Convention on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 171 (governing freedom of thought and religion).

136 *Id.*

thermore, it considered that preventing a person from wearing religious clothing in public or private may constitute a violation of the Covenant.[137]

In this regard, in 2004, the UN Committee on the Rights of the Child, in its concluding observations regarding France's second periodic report, expressed concern over the new legislation adopted in France on wearing religious symbols and clothing in public schools.[138] The Committee noted that such legislation might be counterproductive, as it may eventually neglect the best interests of the children and limit their access to education.[139]

In addition, some feminists argue that the collective regulations on women's autonomy derive from stereotypes of Muslim women as oppressed and of Muslim men as overbearing and oppressive.[140] Carolyn Evans specifically criticizes the ECtHR's reliance on stereotypes and generalizations about Muslim women, and Islam more generally.[141] Christine Chinkin also points out the gross and erroneous generalization of all Muslims as belonging to one homogenous group, sharing the same norms, religious principles and beliefs, rather than as different individuals who may wish to adhere to religion from varied perspectives.[142]

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137 *See* Hudoyberganova v. Uzbekistan, United Nations Human Rights Committee, Communication No. 931/2000, at 6.2, U.N. Doc. CCPR/C/82/D/931/2000 (2005) (summarizing the facts of the case involving a student claiming that her freedom of thought and religion was violated as a result of the university's ban on headscarves).

138 *See* U.N. Committee on the Rights of the Child, Concluding Observations: France, ¶ 25, U.N. Doc. CRC/C/15/Add.240 (June 30, 2004) (expressing concern about recent legislative developments in France that restricting wearing of religious headgear as potentially counterproductive).

139 *Id.*

140 *See generally* Evans, *supra* note 4, at 54, 71-73 (providing critical analysis on the Court's general presumptions over Islam and Muslim women as victims of a gender oppressive religion, needing protection from abusive male norms, as well as fundamentalists who force Islam values onto the unwilling and engaged in dangerous proselytizing). *See also* Chinkin, *supra* note 4, at 71-72 (describing various stereotypes of Muslim women, and their potential use as arguments by state officials to justify bans).

141 *See generally* Evans, *supra* note 4, 56, 71-73 (exploring the way stereotypes and false images on Muslim women inform the Court's decisions stemming mainly from the Court's narrow view of the debate in terms of European Christianity or secularism).

142 *See* Chinkin, *supra* note 4, at 71-72 (explaining the gross generalization in detail, noting that such generalizations fail to account for the idea that not all Muslims agree on issues, or that they belong to a single homogenous group or manifest religious beliefs in identical fashion).

In this regard, it is also argued that the bans are a part of European states' efforts to protect the public order from the perceived threat of radical political Islam and from the danger of Islamization of Europe, as a consequence of Muslim immigration into Europe, rather than a protection on women's rights.[143]

Furthermore, as stated by Judge Tulkens and other feminists, the Islamic veil has many meanings.[144] Judge Tulkens cites the German Constitutional Court which recognized that veiling is a practice engaged in for a variety of reasons, and as opposed to the Court's generalization, it "does not necessarily symbolise the submission of women to men and . . . in certain cases, it can even be a means of emancipating women."[145] Similarly, others note that Muslim women freely choose to wear religious garments, not as a symbol of oppression, but rather "as a tool of identity, freedom, empowerment and emancipation."[146]

It is also claimed that the general resistance to and lack of ability to reconcile the Islamic headscarf with "the message of tolerance, respect for others and, above all, equality and non-discrimination,"[147] commonly belongs to people outside of the religion who are unable to understand the religious aspirations, and as a result themselves demonstrate intolerance, disrespect and inequality.[148] Carolyn Evans views the ECtHR judgments as demonstrating its "general reluctance to acknowledge the value and reli-

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143 *See* Stopler, *supra* note 4, at 207 (delving into other factors, such as fear of radicalism, that drives the ban on head scarves across European nations).

144 *See* Sahin, *supra* note 1, at 225 (Tulkens, J., dissenting) (discussing the issue of gender equality overlooked by the Court, while noting that the veil has been interpreted by other courts such as the German Constitutional Court to potentially be worn for a number of different reasons); *see also* Faegheh Shirazi, *Islamic Religion and Women's Dress Code: The Islamic Republic of Iran*, *in* UNDRESSING RELIGION: COMMITMENT AND CONVERSION FROM A CROSS-CULTURAL PERSPECTIVE 113, 118–19 (Linda Arthur ed., 2000) (describing the many meanings of the Islamic veil).

145 *Sahin*, *supra* note 1, at 225.

146 Chinkin, *supra* note 4, at 72–73. Muslim women are denied free choice and agency when they freely choose to wear it as a part of their identity, and there are a multiplicity of issues involved in wearing or refusing to wear the headscarf. *Id.*

147 *See Dahlab*, *supra* note 8, at 450 (characterizing the Islamic headscarf).

148 *See* Chinkin, *supra* note 4, at 73 (illustrating the point that non-religious people potentially demonstrate intolerance, disrespect and inequality as a result of their ideals about tolerance, respect and equality, by characterizing what may be at stake aside from religious freedom when wearers of hijabs protest against bans).

gious importance of many key religious practices outside Christianity."[149] She notes that the Court chose to rely on the popular western viewpoint that Islam is oppressive, without even discussing the different interpretations given to religious clothing by different Muslim societies and different Muslim scholars.[150]

Finally, another important argument of several scholars is that the bans will eventually lead to the exclusion of religious women from the public sphere and deny them of access to public places (e.g., schools, universities and other educational institutions, certain government positions, etc.).[151] One such scholar, Evans, views the bans as "a peculiar way to achieve gender equality," and stresses that this consideration has a potential to harm religious women's rights to work and to acquire education in the name of equality.[152]

2. WOMEN'S VOICES – THE MISSING ELEMENT IN THE ECTHR RULINGS

The debate over the Islamic headscarf is in its essence a story about women. It is a controversy about a social narrative that goes to make up the identity of women and their conception of life, on either side of the issue. The diverse voices of women seeking to protest, challenge and shape the positions in this discussion certainly exist. Women have articulated their opinions, views, aspirations and beliefs in numerous articles, exploring every possible aspect and theory related to the debate in extensive interdisciplinary research.[153]

Nevertheless, these voices were simply not given the weight they deserve at what may be the most important court in the world

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149 Evans, *supra* note 4, at 56.

150 *Id.* at 65.

151 *See* Chinkin, *supra* note 4, at 70 (discussing clashes between governments and how women expressing and manifesting their religious beliefs can and has led to conflict regarding what proper dress code for Muslim women are in various public institutions); Evans, *supra* note 4, at 68, 73. Ms. Sahin also claimed that her right to education was violated by the ban, as she was refused access to the university. *Sahin*, *supra* note 1, ¶ 125, at 208.

152 Evans, *supra* note 4, at 68–69.

153 *See generally* Chinkin, *supra* note 4; Bouthaina Shaaban, *The Muted Voices of Women Interpreters*, *in* FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 61, at 68-72 (Mahnaz Afkhami ed., 1995) (discussing in detail other literature discussing the history and rationalizations behind wearing the hijab from the perspective of women); Evans, *supra* note 4.

in the field of international human rights law—the European Court of Human Rights.[154] The difficulty in the absence of women opinions had been an issue of concern for women from both sides of the story on the veil.[155]

Before continuing to my argument on the importance of the elaboration of ECtHR jurisprudence on women's rights and religion, and the reasons for its absence, I dedicate this section to discussing and exploring a few of the feminist perspectives and viewpoints in this multifaceted debate. This section also includes a more general discussion on women's rights, gender equality and religious freedoms.

To better frame the discussion, following Susan Okin's definition, I would like to clarify that by *feminism*, I mean to address "the belief that women should not be disadvantaged by their sex, that they should be recognized as having human dignity equal to that of men, and that they should have the opportunity to live as fulfilling and as freely chosen lives as men."[156]

2.1. The Conflict Between Gender Equality and Freedom of Religion

The ECtHR's general assumption, repeated over the three cases, is that the wearing of the headscarf represents "a powerful ex-

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[154] In *Sahin*, the most extensive reasoning, the majority's Judgment, is spread over 40 pages and 166 paragraphs, of which approximately ten paragraphs mention the issue of gender equality and only three short paragraphs are the actual Court assessment. The three relevant paragraphs that constitute the Court's assessment of gender equality are paragraphs 113, 115, and 116. *See generally Sahin*, *supra* note 1. In *Dogru*, the Court simply cites the short general statement in *Dahlab*. *Dogru*, *supra* note 8, ¶ 64, at 18; *Dahlab*, *supra* note 8.

[155] *Sahin*, *supra* note 1, ¶ 11, at 225 (Tulkens, J., dissenting) ("What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to."); Bennoune, *supra* note 3, at 423 ("Notwithstanding the overall conclusion on *Sahin* here, it is regrettable that few women are even given voice in the debate.... This is not to disqualify male voices, but to hope rather that women of diverse views are more empowered in the discussion."); Evans, *supra* note 4, at 66, 60 ("The Court does not develop its reasoning in either case, merely stating that it is 'difficult to reconcile' the wearing of the headscarf and gender equality. It is not clear where this difficulty lies. There are certainly feminist arguments from both Muslims and non-Muslims that criticise the wearing of the headscarf as oppressive to women .... The determination of rights issues, based on assertions about the convictions of majorities about what is important and what is not, has serious implications for religious freedom which are insufficiently explored in the judgments [of the ECtHR]").

[156] Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 7 (Joshua Cohen et al. eds., 1999).

ternal symbol"[157] (thus, jeopardizing the beliefs of school pupils, their parents and university students), which also appeared "to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality."[158] It further ruled that it could not easily be reconciled "with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils."[159]

At first sight, it seems that this holding is fully consistent with feminist theories of gender equality. However, it missed the far complex reality and the heavy considerations brought by feminists to this debate. As articulated by Judge Tulkens in her dissenting opinion:

> Turning to *equality*, the majority focus on the protection of women's rights and the principle of sexual equality . . . . However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say. . . . [W]earing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women.[160]

Following Judge Tulkens' logic, many gender-specific human rights violations are grounded in religious practices, leading to the claim that democratic societies need to challenge religious conducts as means of ending gender inequality.[161] As women are traditionally deteriorated under some religious influences, some feminist scholars posit an inherent conflict between women's rights and religion directly affecting gender equality,[162] thus advocating

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157 *Dahlab*, *supra* note 8, at 463.

158 *Sahin*, *supra* note 1, ¶ 111, at 205 (repeating the ruling in *Dahlab*). In *Dahlab*, the Court referred specifically to the Islamic Koran stating that the wearing of the Islamic headscarf "appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality." *Dahlab*, *supra* note 8, at 463.

159 Sahin, *supra* note 1, ¶ 111, at 205.

160 Sahin, *supra* note 1, ¶ 11, at 225 (Tulkens, J., dissenting).

161 Sullivan, *supra* note 7, at 795.

162 *See, e.g.*, Cema & Wallace, *supra* note 10; Okin, *supra* note 156, at 17, 22-24 (Okin argues that multiculturalism and recognition of cultural rights poses serious threats to women's rights); Stopler, *supra* note 7; Sullivan, *supra* note 7, at 795-804 (addressing gender as basis for differentiation).

for secular democratic values to be applied in such cases.[163] However, believers themselves, including women, have contended that these practices are deeply rooted in their religious liberty and freedom of belief, and as such are entitled to full protection under international and national laws.[164]

More specifically, on one side of the debate over the Islamic headscarf the argument is made for: women's rights to manifest their religion; women's individual autonomy and their right to free choice; the threat of denying religious women access to public places by setting limitations on their ability to observe their religious duties in the public sphere (such as access to public positions, public education and high education institutions); and, finally, their rights to work, to education, and, in general, their right to full citizenship and equality within society.[165]

The other side puts forward claims for: women's rights and the protection of gender equality values (around the concept of emancipation of women from patriarchal oppressive traditions based in religion); protection of constitutional and social principles of secularism and religious neutrality; children's rights and the value of "best interests" of a child (both with regard to children affected by the headscarf as "observers" and Islamic girls required to wear the headscarf from a very early age); and, where applicable, avoiding political and religious fundamentalism.

In addition, another aspect of the debate is the extent to which some feminists agree to acknowledge religious liberty to wear the headscarf. Some differentiate between certain types of Islamic veils, such as between the *burqa* (the full-length garment that covers the entire body, including head and face)[166] and the *hijab* (that covers the hair, neck and sometimes the shoulders), and are willing to recognize the right to wear *hijab* but not *burqa*.[167] Others distin-

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163 *See generally* Bennoune, *supra* note 3 (asserting that secularism is vital for the implementation of women's human rights and that the ECtHR ruled correctly in *Sahin* when it upheld the ban on headscarves in the Turkish context).

164 *See* Bonnie Honig, *My Culture Made Me Do It, in* SUSAN M. OKIN, IS MULTICULTURALISM BAD FOR WOMEN? 36 (Joshua Cohen et al. eds., 1999) (criticizing the limited view Okin holds on religion and culture - "And, contra Okin, culture is something rather more complicated than patriarchal permission for powerful men to subordinate vulnerable women"); Sullivan, *supra* note 7, at 795, 821-23 (attempting to resolve these competing claims of gender equality and religious freedom through a balancing process and application of a contextual approach).

165 *See generally* Chinkin, *supra* note 4, at 71.

166 Also referred to as the *"niqab"*.

167 Stopler, *supra* note 4, at 212-13 (claiming that "the full face *burqa* appears

guish between women of different ages, claiming that the standards should vary between girls wearing headscarves as opposed to young adults (such as students) and adult women.[168]

The conflicting claims set significant competing considerations that are difficult to balance and assess. In the absence of an international consensus over religion and State issues, attempts to resolve the conflict present serious philosophical, legal and political difficulties.[169] Nevertheless, it should be noted that the resolution of difficult contesting values is only a natural aspect of the legal scholarship and practice, and other contexts give rise to serious conflicting considerations as well.[170]

Balancing this range of rights, interests and considerations, some European countries offered accommodation to the Islamic headscarf and other religious garments (including in educational institutions), while others banned it.[171]

2.2. On Sex, Equality and Religion – The Feminist-Multicultural Dilemma

The contested situation where women seek to manifest their own religious beliefs according to a prohibited or otherwise unacceptable practice in a democratic society, usually arises in the context of multi-cultural societies with significant migrant communities or other minority populations.[172] Indeed, the restrictions on

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to have a single meaning, namely, a manifestation of the teachings of a highly patriarchal fundamentalist religious belief system in which women are fully subordinated to the authority of their husbands and other male relatives and must conceal themselves").

168 *See generally* Bennoune, *supra* note 3, at 406-07 (commenting on rights of girls to wear headscarves under international law standards). Furthermore, Judge Tulkens of the ECtHR argued that the ban on wearing religious symbols in educational institutions should not extend for young adults as students, "who are less amenable to pressure." *Sahin, supra* note 1, ¶ 3, at 221 (Tulkens, J., dissenting). It should be noted that the Court, in *Dahlab,* also referred to the professional position held by women wearing the scarf, suggesting that as a public servant, a teacher in the secular public education system is required to have certain values and obligations. *Dahlab, supra* note 8, at 463-64.

169 *Id.*

170 To mention only few: national security issues, abortions, citizenship, etc.

171 The ECtHR dedicates a section on comparative law in its decision showing the differences in the place of the Islamic headscarf debate across Europe. *Sahin, supra* note 1, ¶¶ 55-65, at 13-14.

172 Chinkin, *supra* note 4, at 70. Chinkin specifically addresses in this regard the public debate over religious dress. Interestingly, Chinkin also addresses issues arising with men's religious dress, which stand in contrast with State regula-

the Islamic veil have provoked litigation all over Europe, mainly involving women belonging to minority groups (for example, France, Switzerland and UK), and it can generally be asserted that the wearing of the Islamic headscarf is prohibited for decades by the dominant majority, and is a deeply socially controversial issue.[173]

It is for this reason that it seems inevitable to frame the following discussion through the lens of the feminist-multicultural dilemma, debating to what extent should traditional practices, considered oppressive to women, be accommodated by a democratic state. This question can be the defining variable in the debate surrounding the Islamic veil, struggling between accommodation and prohibition. The vast scholarship around this dilemma offers an in-depth consideration of the principle of gender equality and its conflict with religion, regrettably ignored by the ECtHR.

The multiculturalism argument framed by Okin, is that minority cultures (including religious ones) in liberal democracies should receive special protection, ensuring the individual rights of their members through "group rights" or other privileges,[174] exempting them from the majority domination and accommodating their practices.

However, while contemporary liberal scholars[175] portray granting minorities special cultural group rights as a way to preserve their traditions and cultures (including religious minorities), feminists pose a strong opposition to this concept, claiming that most cultures and religious groups are suffused with practices and traditions which stand in stark contradiction with women's rights and gender equality.[176]

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tions, such as in the case of Sikhs seeking to wear turbans in their position with the police force or Jews asking to wear yarmulke in the armed forces.

173 With regard to Turkey, it is not clear whether religious women wishing to wear the headscarf belong to the majority population. *Sahin, supra* note 1, ¶¶ 30-55, at 10 (giving the historical background).

174 Okin, *supra* note 156, at 10-11.

175 WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 76, 89 (1995). Kymlicka, also known as the foremost contemporary defender of cultural group rights, argues that groups should have their own "societal cultures", which provide their members "with meaningful ways of life across the full range of human activities, including social, educational, religious . . . life, encompassing both public and private spheres".

176 Okin, *supra* note 156, at 4, 12, 13; Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT'L L. & FOREIGN AFF. 339, 340-41 (2000-2001).

It is claimed that religious groups in particular hold norms and values that are inherently inconsistent with several fundamental liberal concepts of individual freedoms and are usually based on patriarchal traditions. As articulated by Hilary Charlesworth, there is a "fundamental inequality between women and men on which the major religious traditions operate."[177] Consequently, in such communities, women are denied various freedoms relating to their personhood, dress, and access to public places.[178]

An important aspect in differentiating religion from other types of cultures, is the fact that religious doctrines are less subject to change as they are based on sacred texts that impose restraints on outer influences. Yet, this resistance to change is claimed to also derive from religious aspirations and considerations of power over gender relations, leading to subordination of women.[179]

Linda Arthur notes that "in many of the most conservative groups[,] . . . dress codes are used as gender norms that reinforce the existing power system."[180] Okin expresses an even more radical position in this regard, stating "most cultures have as one of their principal aims the control of women by men."[181]

Indeed, in the context of the multicultural discourse, it seems that the religious variable in women's rights provokes the most intense arguments.[182] Tensions between gender equality and freedom of religion arise especially in states where there are significant minorities of a different religious persuasion from that of the majority population.[183] In this respect, as stated above, democracies

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177 Hilary Charlesworth, *The Challenges of Human Rights Law for Religious Traditions, in* RELIGION AND INTERNATIONAL LAW 401, 409 (Mark W. Janis & Carolyn Evans eds., 1999).

178 *See* Chinkin, *supra* note 4, at 60 ("[B]oth religion and culture are asserted to justify the subordination of women for a whole range of reasons . . . . This subordination manifests itself in . . . restrictive personal laws[,] . . . [e]specially potent through the claims made by religions to control women's bodies").

179 *Id.*

180 Linda Arthur, *Introduction: Dress and the Social Control of the Body, in* RELIGION, DRESS AND THE BODY 1 (Linda Arthur ed., 1999).

181 *See* Okin, *supra* note 156, at 13, 14 (admitting that the drive to control women has been softened in more progressive versions of Judaism, Christianity and Islam).

182 See, *e.g.*, Okin, *supra* note 156 (offering a collection of articles debating the feminist-multicultural dilemma in response to Okin's main article on the subject); Halperin-Kaddari, *supra* note 176, at 340-43 (describing at length the feminist-multicultural debate).

183 *See* Chinkin, *supra* note 4, at 56 (postulating that there is resistance by the religious minority of Western liberalism because it is seen as a new form of impe-

face crucial questions such as to what extent should one acknowledge freedom of religious minorities to hold their own beliefs, practices and internal norms? Should States encourage and respect religious convictions of minorities and allow wide appreciation for their values? What happens when these values stand in contrast with liberal principles? What premises or notions should prevail—those of the liberal majority or of the often—discriminated minority?

As seen, the problem occurs when religion and culture are asserted to justify oppressive practices against women especially in the context of liberal democracies aiming to accommodate these perceptions.[184] Okin notes that in the international arena, the link between culture and gender often leads to the rejection of women's rights by leaders and countries.[185] Thus, it is argued that claims made in the name of religion may lead to violation of women human rights, and the subordination of women's rights to religion in democratic states.

In addition, several arguments are made by feminists asserting that the general principle of secularism is the only way to promote democratic values, and that maintaining secularism is an essential step toward dismantling systemic gender inequality.[186] Karima Bennoune stresses that secularism is vital to the implementation of women's human rights. In assessing the meaning of religious garments and examining restrictions on them, Bennoune claims that the importance of secularism for women's human rights must be taken into account, as well as a more complex and contextual understanding of the issues underlining the debate.[187] She holds

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rialism, especially in light of its colonial history).

184 *See id.* at 60 ("[B]oth religion and culture are asserted to justify the subordination of women for a whole range of reasons").

185 *See* Okin, *supra* note 156, at 18.

186 *See* Bennoune, *supra* note 3, at 367, 373-74 ("Keeping religious doctrine out of law requires secularism, which must be recognized as a human rights value itself."). *See also* KHAWAR MUMTAZ & FARIDA SHAHEED, WOMEN OF PAKISTAN: TWO STEPS FORWARD, ONE STEP BACK? (1987) (discussing the women in Pakistan); Rashida Patel, *Pakistan: Muslim Women and the Law, in* EMPOWERMENT AND THE LAW: STRATEGIES OF THIRD WORLD WOMEN 110 (Margaret Schuler ed., 1986) (discussing women inequality in Pakistan); Nawal El Saadawi, *The Political Challenges Facing Arab Women at the End of the 20th Century* (Marilyn Booth trans.), *in* WOMEN OF THE ARAB WORLD: THE COMING CHALLENGE 10-11 (Nahid Toubia ed. & Nahed El Gamal trans., 1988) (explaining the challenges faced by Arab women).

187 *See* Bennoune, *supra* note 3, at 369-71 (discussing the requirement that women cover themselves as the result of introduction of religious fundamentalism into the realm of politics and law).

that the ECtHR rulings were correctly decided. In her view, in a reality where "religious contexts have become a serious challenge to efforts to secure women's human rights," it is most crucial to maintain secularism.[188] In discussing the bans on headscarves, Bennoune goes as far as claiming that in order to protect women's rights and to keep religion and law separated, secularism must be recognized as a human rights value itself.[189]

Another aspect of this critique involves the question of the free choice of women. It is very difficult to assess whether women members of religious communities can genuinely express free choice regarding their rights, or if they have enough *power* to convey their independent opinion. Women who are members of religious minority groups may be subject to internal pressures and often do not have a path to truly challenge their own communities, or are too afraid to be perceived as betraying their own background, and as being disruptive to their community.[190]

Moreover, assessing the free choice of women, it is also very important to give special consideration to cases involving religious young girls. The debate over the Islamic headscarf involved cases of schoolgirls wearing Islamic religious dress to primary and secondary schools, whether wearing only headscarves or more modest garments such as *jilbab* (a dark cloak, long coat-like garment).[191] It appears that this issue raises a double risk both in relations to women's rights and children's rights. In this case, the free choice to wear these garments is even more questionable when it comes to young girls, and the concern over coercion is further exacerbated.[192] As expressed by Bennoune:

> [w]omen and girls both may express themselves by wearing headscarves or other "modest" clothing, or they may both be subject to coercion to do so. However, girls may be

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188 *See id.* at 373 (citing U.N. Secretary-General Kofi Annan). *See generally* U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, ¶ 81, U.N. Doc. A/61/122/Add.1 (July 6, 2006).

189 *See* Bennoune, *supra* note 3, at 373-74 (arguing that secularism is fundamentally tied to the protection of human rights, particularly with respect to women).

190 *See* Chinkin, *supra* note 4, at 62 (making a similar point); *see also,* Okin, *supra* note 156, at 24 (arguing that older women often join voices reinforcing gender inequality).

191 *See, e.g., Dogru, supra* note 8 (involving an eleven-year-old French Muslim girl who had refused to take her headscarf off during physical education classes).

192 *See supra* note 150 and accompanying text.

> especially subject to pressure, including peer pressure, in regards to dress, and need extra protection from religious extremists and coercive family members.[193]

Furthermore, Judge Tulkens of the ECtHR based her argument on the applicability of the ban on students, saying that as young adults they are "less amenable to pressure," suggesting that younger girls' free choice is uncertain.[194]

Secondly, justifications expressed in the name of allowing the wearing of headscarf may seem irrelevant when it comes to young girls - what kind of argument can be made to justify the covering of girls' hair and bodies from modesty consideration? Is it also a way for them to achieve true emancipation from society influences? It seems that many of the claims take on a ridiculous dimension when it comes to girls.

Notwithstanding the above analysis, the question still remains, from a feminist perspective, as to when may the claim that adult women freely choose[195] to wear the Islamic headscarf be rejected? Does women's free choice to practice religion *as is* truly stand in contradiction with feminism? And finally, should a woman's religious freedom be accommodated by the law and under what terms?

Christine Chinkin acknowledges all these difficulties and maintains that in order to resolve such conflicts of freedom of religion and equality, a number of considerations must be taken into account that would reveal the interests involved in each controversy over these issues, including who is claiming these rights, in what context, and are women voices heard when these arguments are made?[196] She further claims that human rights are indivisible and interdependent such that the consequences of claims made in the name of the right to freedom of religion cannot be discussed in a

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193 *See* Bennoune, *supra* note 3, at 406-07 (citing to an article by an Algerian journalist Rachida Ziouche, who has asked, "[D]o you really believe a four-year-old is wearing the headscarf by choice?" Rachida Ziouche et al., *Viewpoints: Europe and the Headscarf*, BBC NEWS (Feb. 10, 2004), http://news.bbc.co.uk/2/hi/europe/3459963.stm#Rachida).

194 *Sahin*, *supra* note 1, at 220 (Tulkens, J., dissenting).

195 *See id.* ¶ 12, at 48 (Judge Tulkens of the ECtHR in her dissenting opinion, for instance, insists that *Sahin* acted on her free will and that nothing in the Court's ruling suggests the opposite).

196 *See* Chinkin, *supra* note 4, at 61 ("The complex blend of religion, culture and political power means that arguments that women's equality is subordinate to religious requirements must be unpacked.").

vacuum separated from other rights.[197]

Ultimately, from this feminist perspective, it is argued that we ought to be more protective of women's rights when norms and practices of a religious group offend egalitarian ideas of equality between men and women. Okin claims that "[i]n the case of a more patriarchal minority culture in the context of a less patriarchal majority culture, no argument can be made on the basis of self-respect or freedom that the female members of the culture have a clear interest in its preservation."[198] Offering a solution to this conflict, Okin's strategy is to ensure representation of less powerful members of minority groups in negotiations about group rights and their interests, and to consult all parties involved.[199]

It is worth mentioning that these feminist critiques were followed by a wide range of responses of multicultural scholars pointing at possible middle ground solutions, or at the danger in these positions. Some offer recognition in only liberal cultures and legitimizing only certain forms of group accommodations.[200] Another branch in the group rights theory argues that it is possible to allow a group to prescribe norms even if they stand in contradiction to democratic values, if the individuals in the group are offered an option to "exit" the group (granting some form of relief from the internal restrictions).[201] Others think that the feminist perspective is intolerant and blind to cultural and religious differences, arguing that such an approach would lead to the extinction of any culture or religion rejecting egalitarianism,[202] and respecting

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197 *Id.*

198 *See* OKIN, *supra* note 156, at 22-23 (noting further that other considerations would need to be taken in account such as whether the minority group "speaks a language that requires protection" or whether the group is subject to prejudices and racial discrimination).

199 *Id.*

200 *See generally* Karayanni, *supra* note 7, at 27; *see also* KYMLICKA, *supra* note 175, at 37 (1995) (arguing that "liberals can and should endorse certain external protections, where they promote fairness between groups, but should reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices").

201 *See* Karayanni, *supra* note 7, at 27-28 (noting the proposal that an opportunity to exit a group can be a potential solution which allows religious groups to maintain their tenor while reconciling with more liberal values, but also discussing some of the complexities and difficulties in practice of this proposed solution).

202 *See* OKIN, *supra* note 156, at 22-23 (offering a positive answer, arguing that women from patriarchal minority cultures *"might* be much better off if the culture into which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably,

minorities only when they turn liberal.[203]

Lastly, though not directly relevant to the headscarf debate, while it seems in the context of this debate that the realization of women's rights require the inevitable choice between these two concepts (of secularism versus religion), other women (Muslim and of other religious affiliation) envisioned a third way, where they are pursuing religious freedom and equality *within* the context of their religion, not just *without* it – the "religious feminists."[204] Religious feminists strive to make internal change within their religious communities, offering new, more equal religious practices and interpretations, while embracing some of the existing traditions. Frances Raday explains that these women seek to realize their rights through finding "a path to equal religious personhood."[205] Madhavi Sunder challenges the existing construction of law (as will be discussed at length in the next chapter) that currently does not acknowledge these new religious activists, and claims that under current law there is no individual right to contest cultural or religious norms from within. Thus, the inevitable result is that the law requires women to choose between religion and rights.[206]

3. (THE ABSENCE OF) WOMEN RIGHTS IN THE REASONING OF THE EUROPEAN COURT OF HUMAN RIGHTS

My inspiration for writing this paper came from a genuine con-

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to be encouraged to alter itself so as to reinforce the equality of women.").

[203] *See* Halperin-Kaddari, *supra* note 176, at 343 ("The danger is clearly that such an approach would lead to respecting minority cultures only when they turn liberal.") (citing Bhikhu Parekh, *A Varied Moral World*, *in* SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? 69 (Joshua Cohen et al. eds, 1999)).

[204] *See* Sunder, *supra* note 10, at 1404 (claiming the rights of women seeking equality within religion. Sunder presents a close study of women's human rights activists working in Muslim communities and countries. She demonstrates that, despite law's formal refusal to acknowledge their internal dissenting claims, "women are nonetheless claiming their rights to challenge religious and cultural authorities and to imagine religious community on more egalitarian and democratic terms.").

[205] Frances Raday, *Claiming Equal Religious Personhood: Women of the Wall's Constitutional Saga*, *in* RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW 255, 256 (Winfried Brugger & Michael Karayanni eds., 2007) (claiming that women members of traditionalist cultural or religious communities seek to achieve equal personhood within their community).

[206] *See* Sunder, *supra* note 10, at 1410 (arguing that "[d]issenters have no right to stay within their communities and contest or reform them.").

cern about what I felt was the lack of jurisprudence in the field of religion and State in general, and more specifically women's religious freedoms and rights.

However, I was struck by the scale of the problem. The research on these issues unveiled a worldwide phenomenon relevant in many states and different jurisprudences. For example, though this paper does not look at states' jurisprudence, it is worth mentioning that the UK House of Lords, guided by the ECtHR decisions, had also upheld a prohibition of a public school on the wearing of a jilbab (described as long coat-like dress). What was seriously troubling in this ruling was Lord Bingham's leading opinion according to which the decision did not "and could not . . . rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country."[207] He stressed that such a decision "would be a most inappropriate question for the House in its judicial capacity."[208] Not only that, Lord Bingham further held it would be "irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this."[209] It must also be noted that although guided by *Sahin*, the judge did not refer in any way to gender equality nor women's rights.[210] Yet, in what or how this administrative decision of school authorities is different from any other decision that it deserves such a unique status of an 'untouchable' matter by the House of Lords, is simply not addressed. As will be discussed henceforth, this creation of an "extralegal" field is only

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[207] *Begum, supra* note 59, ¶ 2; also cited by Chinkin, *supra* note 4, at 72. Begum, a fourteen-year-old British Muslim schoolgirl, wore the jilbab in violation of the school's dress code.

[208] *Begum* ¶ 2.

[209] *Id.* ¶ 34.

[210] *Id.* In this regard, a dissenting opinion in the *Begum* case authored by Baroness Hale referred to the issue. While agreeing with the result, Baroness Hale's opinion attempts to provide a more extensive analysis of the gender-based considerations that should have been taken into account by the Court. Unlike the majority's opinion, Baroness Hale held that Begum's right to manifest her religion was indeed infringed. However, in her view, the interference was justified, especially in light of the girl's young age and in consideration of actions taken by the school. These actions reflected a proportionate response respecting cultural and religious diversity to some extent (e.g. by allowing girls to wear the less veiling religious garment, the *hijab). Id.* ¶¶ 93–98.

part of the special unjustified construction of religion and state issues at the intersection with gender equality in law.

Nevertheless, it was most surprising and unfortunate to discover, as an international law and human rights practitioner, that the very much appreciated and respected European Court of Human Rights has also failed to develop a legal methodology to address women rights in the religious context. As stated and demonstrated previously, the Court did not elaborate in any of its statements about the inherent and complex conflict of gender equality and religious freedoms, and merely stated that the wearing of headscarf is "difficult to reconcile" with the principle of gender equality.[211] Regrettably, the Court preferred to make use of the Margin of Appreciation doctrine to deem questions of religious aspirations of women as not fitting to its supervision and oversight.

These observations are extremely concerning especially in light of the special status the Court enjoys worldwide as a source of inspiration which resonate in numerous international and national decisions concerning human rights issues.[212]

As demonstrated in the previous section, there are certainly heavy feminist arguments from both those who criticize the wearing of the headscarf as an oppressive practice and therefore encourage restrictions on it, and those who oppose such restrictions. Regrettably, the ECtHR ignored both. Opening this paper is the quote of ECtHR Judge Tulkens from her powerful minority opinion in the case of Sahin asking "what, in fact, is the connection between the ban and sexual equality? The judgment does not say." [213] She further continues to denunciate the Court's ruling and refers to it as "general and abstract."[214] Tulkens mentions that the Court could have applied the extensive case law of the ECtHR on the right to personal autonomy on the basis of Article 8 of the European Convention, and points out to a long list of cases.[215] Her re-

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211 *Dahlab, supra* note 8, at 462.

212 *See* Benvenisti, *supra* note 12, at 843 (describing the Court's influence and tendency for praise).

213 *Sahin, supra* note 1, ¶ 11 at 48 (Tulkens, J., dissenting).

214 *Id.*¶ 12, at 48.

215 *See Sahin, supra* note 1, ¶ 12, at 48 (Tulkens, J., dissenting) (referring to Keenan v. United Kingdom, No. 27229/95, § 92, Eur. Ct. H.R. 2001-III; Pretty v. United Kingdom, No. 2346/02, §§ 65-67, Eur. Ct. H.R. 2002-III; and Christine Goodwin v. United Kingdom, No. 28957/95, § 90, Eur. Ct. H.R. 2002-VI).

flection on the Court's decision leads her to conclude that "what is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to."[216] As detailed previously in this paper, other feminists have expressed similar critiques on the Court's judgment.

Therefore, it seems that the Court failed, or wished to avoid, dealing with the complexity of this debate. Christine Chinkin mentions only a few of the considerations that should be taken into consideration when confronting claims that women's equality is subordinate to religious requirements:

> Searching questions should be asked such as: who is making the particular argument, for what reason, in what context and with what objectives? Are claims based on religion being used as a justification for maintaining existing power structures [between men and women- C.E.L]? Are women voices heard when such claims are determined? Or is it the voices of male elites, whether religious or political leaders, that predominate? Does a majority community essentialise minority communities by taking account of the views only of its male members thereby silencing other voices, including those of women?[217]

In addition, underlying the Court's approach in these cases is the notion that the decisions made by the national authorities in those issues must be given special importance.[218] In the cases of *Sahin* and *Dogru*, the Court went even one step further (compared to *Dahlab*),[219] and held that the width of the margin of appreciation is even greater than usual where questions concerning the relationship between State and religions are at stake, since opinion on religion and the values of a democratic society may reasonably differ widely.[220] Judge Tulkens specifically criticizes the ample manner in which the Court chose to apply the margin of appreciation doctrine, practically granting states full discretion to decide these is-

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216 *Id.* ¶ 11, at 48.

217 Chinkin, *supra* note 4, at 61.

218 *See Sahin*, *supra* note 1, ¶ 109, at 28 (showing the uniqueness of the preceding cases).

219 *See* Evans, *supra* note 4, at 57 (emphasizing that while the margin was only briefly mentioned in the *Dahlab*, *supra* note 8 decision, it was of great significance in *Sahin*, *supra* note 1).

220 *Id.*; *Dogru*, *supra* note 8, ¶ 63, at 17.

sues, while abandoning the necessary European supervision.[221] Evans stresses in this regard that the oversight by the Court has lessened significantly by the development of the concept of the margin of appreciation, and notes that in Sahin it led the Court in what could be seen as deference to state authorities.[222]

No doubt, the adoption of a broad legal concept subordinating the Court to states' discretion when religious questions arise, comes at the expense of elaborating a human rights based approach to these cases. Moreover, stating the broad influence of the ECtHR jurisprudence, Eyal Benvenisti expresses a genuine concern for the future of universal aspirations for the protection of human rights, in light of the ECtHR use of the margin of appreciation doctrine in its jurisprudence.[223] Benvenisti argues that universal human rights standards are largely compromised by the doctrine of margin of appreciation. The notion that each society is entitled to certain latitude in resolving internal human rights conflicts, promoting moral relativism, stands at odds with the concept of universal human rights.[224] He further argues that the doctrine seriously undermines the promise of international enforcement of human rights that overcomes national considerations, and obstructs the external supervision required to ensure guarantees against human rights violation.[225] Benvenisti claims that the greatest danger in the wide margin of appreciation is for minorities who rely upon the judicial process to secure their rights among the majority population. Especially precious to them are international judicial tribunal and monitoring organs that are often their last resort. These arguments are most relevant to the three cases analyzed in this paper.

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221 *Sahin, supra* note 1, ¶¶ 2, 9, 12, at 44, 47–48 (Tulkens, J., dissenting) (Tulkens suggests that it has not always shown the same judicial restraint when required to settle conflicts between religious communities. Tulkens specifically notes the extensive case-law on freedom of expression and the possibility to use the current case-law developed regarding the right to personal autonomy). She expresses her concern on the 'thin' European supervision of the Court stating that it "seems quite simply to be absent from the judgment," while in her view "European supervision cannot . . . be escaped simply by invoking the margin of appreciation." *Sahin, supra* note 1, ¶ 3, at 44.

222 *See* Evans, *supra* note 4, at 57 (making the argument for deference to state legislature).

223 *See* Benvenisti, *supra* note 12, at 843 (elaborating on the relationship between the margin of appreciation doctrine and human rights protection).

224 *Id.* at 843-44.

225 *Id.* (pointing at the weakness of national institutions and the danger of entrusting them with supervision of human rights law, to such a large extent).

Turning to find explanations for the Court's approach, it is not very clear what underlies the Court's inability to engage in a more serious and vigorous discussion on human rights. One possibility for the avoidance of confronting questions of religion in the legal sphere, let alone with women and religion, might be that such restraint is essential to social and political stability of the Court and other judicial systems, as well as derived from the interest to keep a certain public order that prefers that such decisions be made by other authorities.

Since this is a feminist paper, it should also be noted that another argument is made blaming the lack of consideration of women's religious liberties on the male-dominated legal process and rulings.[226] Although supporting the ECtHR decisions regarding the bans, Karima Bennoune mentions with regret that only few women were given voice in the debate, while the majority of the judges, lawyers and advisers were male.[227] Evans expresses a similar concern, stressing that the ECtHR is a male-dominated Court and in the case of Sahin [the Grand Chamber], there were 12 male judges and five female judges of whom one dissented.[228]

Notwithstanding these arguments, this paper argues that, following Madhavi Sunder's inspiring article, "Piercing the Veil", that a deeper, much more stressing, problem is involved. It seems that the leading motif in between the lines of the ECtHR decisions, and other legal institutions, is the construction of religion as law's "other".[229] In simple words, the construction of religion as law's "other" relates to the legal understanding of religion as so irrational and distinct from law that it is simply 'unsuitable' for law and in-

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[226] *See* Evans, *supra* note 4, at 67 (expressing a discrepancy between the law as seen by men and a focus on women's rights).

[227] *See* Bennoune, *supra* note 3, at 423. ("It is regrettable that few women are even given voice in the debate. Seven ECtHR judges ruled in Sahin in the Fourth Section judgment [the lower instance that considered the case - C.E.L]; six were men. All of Ms. Sahin's lawyers and advisers at both levels were male. Oral argument in the Grand Chamber was made only by male advocates on either side of the issue . . . . This is not to disqualify male voices, but to hope rather that women of diverse views are more empowered in the discussion.").

[228] *Id.* at 67. *See generally* HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 4 (2000) (drawing attention to the male dominance in the creation of international law and its application and indicating that the absence of women in the development of international law has produced a narrow and inadequate jurisprudence that has, among other things, legitimated the unequal position of women).

[229] Sunder, *supra* note 11, at 1417.

capable of being tested or judged.[230]

Sunder generally refers to the construction of religion in international law and explores how it influences women human rights. However, I further claim it is not only that religion is constructed as law's "other", but that in the context of women rights and religion, religion's 'otherness' is even more exacerbated.

This notion takes many forms in judicial decisions[231] and legal theories, but generally it is the claim that legal demands involving religion and women's rights create a legal field so 'sensitive', distinct, controversial and different, it should just be generally avoided. Usually, cases involving women's rights and religion are left or referred by courts to be debated by other authorities, mainly in the political sphere. In addition, as Sunder's puts it, in our reality religion has become an "extralegal field" pushed to the private sphere.[232]

To better understand the origin of religion construction as law's "other", scholars go back to the historical background of international law.[233] David Kennedy suggests that religion is something we "used to have" in the far past of constructions of international law, and offers an historical understanding of the current construction of law.[234] According to Kennedy, international law has emerged from the ruins of the Holy Roman Empire, and is commonly dated from the Peace of Westphalia (1648). Coming after and as a result to religious wars, international law is seen as a response to inadequacies of religion.[235] Thus, the exclusion of religion, established as an extralegal field from the very beginning of

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230 *See also* Sunder, *supra* note 10, at 1417-19 (highlighting the incompatibility of law and religion).

231 For example, in the context of the ECtHR, I claim that it take the form of the wide margin of appreciation which constructs religion as "other".

232 *See* Sunder, *supra* note 10, at 1417; also citing Kennedy, *Images of Religion in International Legal Theory, supra* note 10, at 149; *see also* Cema & Wallace, *supra* note 10, at 646 (emphasizing that "states have used this distinction [between public and private] to the disadvantage of women by asserting that certain harmful practices are cultural traditions, and thus outside of the realm of human rights law").

233 *See generally* Kennedy, *Images of Religion in International Legal Theory, supra* note 10, at 145-46; Sunder, *supra* note 10, at 1415.

234 Kennedy, *Images of Religion in International Legal Theory, supra* note 10, at 145. Sunder refers to it as the "Law's 'Past'." Sunder, *supra* note 10, at 1415.

235 Kennedy, *Images of Religion in International Legal Theory, supra* note 10, at 146-47.

the law of nations, is understandable.[236] Seeking a clear break from the past, religion was constructed as law's "other".[237]

Sunder argues that this conception of religion, as distinct from public fields of law and later of science, further contributed to the belief that religion was not premised upon reason and thus could not be tested, challenged or questioned (unlike science).[238] Religion's irrationality and spirituality made it "unsuitable for law".[239]

It seems that the judicial restraint from confronting religion, and more specifically women's rights and religion, finds its traces in the European Court of Human Rights rulings in the cases discussed herein on the debate over the Islamic religious dress. Leaving a broad space for other authorities to fill-in the analytical and conceptual gaps created in questions involving religion, is only one aspect of the Court's construction of religion as the law's "other" in issues involving women's human rights.

Reflecting on the Court's unwillingness to provide a more thorough, inclusive and persuasive analysis, it appears its aim was to avoid in-depth examination of religion. The meaning of religion in people's and women's lives, the origin of religious practices, religious aspirations or lack of such, the different interpretations of religion conducts, women religious liberties and equality, all of these are only part of what the Court missed and is deemed to consider and reckon in its future judgments.

The Court's role is, at the very least, to understand and unpack religious endeavors, and discuss their implications on women's human rights or other contested considerations, such as state neutrality, equality and secularism.

For the Court to assume its proper role, it must confront all aspects involving these cases and develop a legal methodology, as well as legal tests to unveil the true story of women liberties and religion. It is in this context that Sunder offers to replace the traditional theories of religion and law, which are viewing religion as a sphere of injustice, and which hold religious beliefs to be unchanging, with contemporary theories.[240] These new theories argue that "religion is much more internally contested and subject to rea-

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236 *See* Kennedy, *Images of Religion in International Legal Theory*, *supra* note 10, at 149 (noting the initial separation of religion from international law).

237 Sunder, *supra* note 10, at 1417.

238 *Id.* at 1418.

239 *Id.*

240 Sunder, *supra* note 10, at 1423.

soned argument and change" than previously acknowledged.[241] Sunder argues that a key to understanding this new notion of religion as mutable is the observation that while the subject matter of religion is spiritual, it is human beings who interpret it to their lives.[242] Thus, these human aspects of religion can be subject to some level of rational and legitimate judicial review.[243] As articulated by Bhikhu Parekh, "Religion does involve faith, but it is not a matter of faith alone, which is why the two should not be equated. It involves judgment, choice and decision, and hence reason and personal responsibility."[244]

Finally, concurrently, the Court's approach seriously endangers women's human rights, as well as rights of other minorities or other individuals influenced by claims made in the name of religion or religious aspirations. As expressed by Sunder, truly securing human rights requires a brave deconstruction of religion. Therefore, the Court must identify that part of religion that is human or legal construction, and thus requires justification and accountability.[245] As simply put by Sunder, "human rights law, not religion, is the problem."[246] Accordingly, the solution lies at the hands of the ECtHR and other courts around the world. Certainly, such an assessment of religion and human rights issues should be only expected by a secular legal system.

In the case of the ECtHR, a special consideration must be made to its most influential jurisprudence, and the extent to which its rulings are applied worldwide. Numerous domestic institutions and courts (across Europe and beyond it) reach their judgments re-

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241 *Id.*; *see also* TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 27, 236 (1993) ("Religious traditions have undergone the most radical transformations over time.").

242 *See* Sunder, *supra* note 10, at 1423 (noting that religion and rationality need not be mutually exclusive).

243 *See id.* at 1423 n.116 (showing that religious beliefs can be scrutinized in a similar fashion as law). Sunder also quotes Bhikhu Parekh who writes that "[t]he divine will is a matter of human definition and interpretation, and requires [human beings] to show why they interpret their religion in one way rather than another and why they think that their interpretation entails a particular form of behavior . . . . No religion is or can be wholly divine in the sense of being altogether free of human mediation. Its origin and inspiration are divine but human beings determine its meaning and content." *Id.*

244 BHIKHU PAREKH, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY 334-35 (2000).

245 *See* Sunder, *supra* note 10, at 1404 (arguing that human-constructed aspects of religion should be given legal scrutiny).

246 *Id.* at 1403.

lying on ECtHR jurisprudence, but not just them.[247] This jurisprudence aspire prominent international human rights tribunals, judges and members of U.N human rights organs, and international institutions.[248]

Thus, for the Court to truly rise to these challenges and assume its role in the international human rights level, it must take a brave position and confront these complex issues, albeit with due legal sensitivity. This would involve, as an alternative, the elaboration of an extensive coherent legal framework, utilizing to its fullest extent international human rights theories, tests and analytical tools that have been applied by the ECtHR in other cases.

CONCLUSION

To conclude, the ECtHR's extremely cautious approach, when required to confront the conflict of gender equality and religious liberties, is reflected in its most recent jurisprudence explored in this paper.

Arguably, this approach, while presumably achieving ad-hoc solutions, ultimately fails to address, much less advance, the substantive issue of women's rights and religion. The Court appears to have abdicated its interpretative potential, and its role in providing vigorous legal analysis of human rights law, to assume the more modest role of generating acceptable middle-ground rulings.

This article advances the argument that the ECtHR position stems from its view of religion as a distinct and irrational discipline, unsuitable for legal judgment. Such an approach is particularly dangerous in light of the court's most influential jurisprudence and the extent to which its rulings are applied worldwide. Ultimately, the decisions made in the name of human rights have a potentially devastating effect on women's rights, religious freedoms, and equality.

In the era of multiculturalism and globalization, awareness to such risks is fundamental to the development of modern society and role that international human rights tribunals play in this complex ecosystem.

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[247] *See generally* Benvenisti, *supra* note 12; Eyal Benvenisti, *National Courts and the International Law on Minority Rights*, 2 AUSTRIAN REV. INT'L & EUR. L. 1 (1997); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994).

[248] *See* Benvenisti, *supra* note 12, at 843 (noting the immense influence of ECtHR jurisprudence).