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**COVERNANCE: FEMINIST THEORY, THE ISLAMIC VEIL  
AND THE STRASBOURG COURT'S JURISPRUDENCE ON RELIGIOUS  
DRESS-APPEARANCE RESTRICTIONS**

Amina Haleem

***Abstract***

*This paper explores how the human right of religious freedom has been conceptually and pragmatically developed under international law within the European Court of Human Rights as applied to veiled Muslim women. This paper analyzes the application of human rights guarantees as established in the European Convention on Human Rights and case law established by the European Court that has interpreted international documents to determine the religious freedoms of veiled Muslim women in the public sphere. The analytical framework identifies the divergence between liberal and third wave feminist approaches to the Islamic veil, and identifies the feminist approaches to international human rights.*

*The European Court has staunchly upheld governmental restrictions on Islamic veiling across Europe under Article 9 of the European Convention. This has disparately impacted religious freedom of Muslim women and their ability to manifest religion through their dress-appearance. Challenging the Court's normative application, and discriminatory outcomes, of Article 9 jurisprudence through postmodern and postcolonial feminist interpretations of religious freedom may provide an opportunity to strengthen and elevate diverse female voices, like those of veiled Muslim women, in the review of dress appearance restrictions. Challenging Article 9 jurisprudence will help break the institutionalization of a harmful stereotype of the Islamic veil that relegates religious women to the darkest corners of European society. Women who have made a conscious choice to wear the Islamic veil need governmental and judicial protection of their religious freedom and of the ability to embrace the dynamic aspects of their*

*gender, religion, identity, and autonomy in a secular Western society. Without this protection, veiled women will continue to live under a restrictive form of governance - a discriminatory system of governance that restricts the way they manifest their religious belief by covering their bodies in the public sphere.*

## I. INTRODUCTION

“Does the scarf- in and of itself- threaten society?”<sup>1</sup> This simple question, posed by Amos N. Guiora, in his article “The Threat of Religious Extremism,” is at the heart of an ongoing and transformative European debate on the role of Islam in European secular democracy. Islamophobia is defined as “irrational hostility, fear, or hatred of Islam, Muslims, and Islamic culture, and active discrimination against these groups or individuals within them.”<sup>2</sup> While Muslims of all races, genders, and age groups have been victims of Islamophobia, noticeably, veiled Muslim women are increasingly direct targets of Islamophobic political rhetoric and legislative measures.

A growing anti-immigrant and anti-Islamic trend is expanding across Europe. Decolonization, labor programs, and refugee migration have led to an increasing Muslim presence in western and northern Europe, but one of the most contentious social issues centers around the Islamic veil.<sup>3</sup> It is more so an issue in these parts of Europe as opposed to Eastern and South East Europe where “headscarves are part of the normal female dress . . . and are not at all typical of Islamic countries alone.”<sup>4</sup>

Conservative politicians who propagate a divide between “Islam and the West” benefit immeasurably by conflating radicals with all other Muslims citizens in Europe. This type of fear mongering has increased since September 11, and can be highlighted by the January 2015 *Charlie Hebdo* attack where the French newspaper,

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<sup>1</sup> Amos N. Guiora, *The Threat of Religious Extremism*, 50 S. TEX. L. REV. 743, 767 (2009). Guiora is a law lecturer and co-director of the Center for Global Justice at the University of Utah.

<sup>2</sup> *Islamophobia in Europe*, OPEN SOCIETY FOUNDATIONS, (April 2015), <http://www.opensocietyfoundations.org/explainers/islamophobia-europe>.

<sup>3</sup> The term “Islamic veil” is used to describe all methods of veiling and hereinafter will be used to include the hijab, the niqab, and the burqa.

<sup>4</sup> Peter Antes, *Islam in Europe*, in RELIGION IN EUROPE: CONTEMPORARY PERSPECTIVES 51, 46-61 (Sean Gill, et al. eds., 1993).

in its raucous, vulgar and sometimes commercially driven effort to offend every Islamic piety, including the figure of the Prophet Muhammad, became a symbol of an aggressive French secularism that saw its truest enemy in the rise of conservative Islam in France, which is estimated to have the largest Muslim population in Europe.<sup>5</sup>

The attack was undoubtedly inexcusable, but Islamophobia and xenophobia have taken center-stage in the socio-political effort to marginalize Islamic influences as “the main threat to a so-called European identity.”<sup>6</sup> They have also influenced the direction of international human rights law in Europe.

European regulations on variations of the Islamic veil are a noticeable trend in France, Belgium, Turkey, Denmark, and towns in Switzerland, Russia, Italy, and Spain.<sup>7</sup> Arguments supporting Islamic veil bans are centered on the importance of secular democracy to a well-functioning European society. However, states have been selective in enforcing secular values when confronting Islamic cultural and religious traditions. For example, in the 1980s, French politicians, feminists, and members of the public decried the *hijab* in public schools, but at the same time, “the French government quietly permitted immigrant men to bring multiple wives into the country.”<sup>8</sup> Thus, the concern about the *hijab*’s non-Western and negative influence a liberal and secular society falters when compared to polygamy in the same secular society. Both aspects of non-Western culture have, in the eyes of universal liberalists, undesirable implications on gender equality, but only the veil is more noticeably featured in the West as a distinctive marker of female subservience.

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<sup>5</sup> Steven Erlanger & Katrin Bennhold, ‘*Dangerous Moment*’ for Europe, as Fear and Resentment Grow, N.Y TIMES (Jan. 8, 2015), at A1. Available at [http://www.nytimes.com/2015/01/08/world/europe/paris-attack-reflects-a-dangerous-moment-for-europe.html?\\_r=0](http://www.nytimes.com/2015/01/08/world/europe/paris-attack-reflects-a-dangerous-moment-for-europe.html?_r=0).

<sup>6</sup> *Islamophobia and the Next European Parliament*, EUROPEAN COUNCIL ON FOREIGN RELATIONS, (May 22, 2014), [http://www.ecfr.eu/article/commentary\\_islamophobia\\_and\\_the\\_next\\_european\\_parliament262](http://www.ecfr.eu/article/commentary_islamophobia_and_the_next_european_parliament262).

<sup>7</sup> *The Islamic Veil Across Europe*, THE BBC, (July 1 2014), <http://www.bbc.com/news/world-europe-13038095>.

<sup>8</sup> Susan Moller Okin, *Is Multiculturalism Bad for Women*, in CURRENT ISSUES IN LAW AND RELIGION 331, 331-47 (Rinaldo Cristofori et al., eds., 2013).

The regulations on the Islamic veil have been the subject of increased international litigation in recent years. The European Court of Human Rights' (the "Strasbourg Court") religious dress-appearance jurisprudence has established that restrictions, and even outright bans, on the Islamic veil in public forums do not violate the freedom of religion if they are necessary in a democratic society and are proportionate to a legitimate state goal.<sup>9</sup> This issue is most prominently illustrated in the 2014 case of *S.A.S. v. France* where the Strasbourg Court applied a wide margin of appreciation to a French law that prohibited concealing one's face in public, except under certain circumstances.<sup>10</sup> In upholding the ban, the Court deferred to the French goal of "living together" and promoting uninhibited interaction between individuals.<sup>11</sup> The Court accepted France's argument that "the barrier raised against others by a veil concealing the face . . . breach[es] the right of others to live in a space of socialisation which makes living together easier."<sup>12</sup>

The normative structure of European secularism indulges in discriminatory cultural and religious assumptions about the Islamic veil. It compounds the conflict between gender equality and religious freedom. The consequences of failing to harmonize these rights within the European interpretation of human rights law disproportionately forces veiled Muslim women to sacrifice an aspect of their religious identity and individual autonomy. Further, the Strasbourg Court's jurisprudence upholding these dress-appearance restrictions perpetuate the liberal

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<sup>9</sup> *S.A.S. v. France* [GC], no. 43835/11, Eur. Ct. H.R. ¶¶ 157-62 (2014). Available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466>. (The Court dismissed the argument by the applicant, a French Muslim woman, that the law indirectly discriminated against Muslim women. The Court reasoned that although the law clearly affected some Muslim women negatively, the law did not target the religious element of the veil and therefore it had an objective purpose. Unfortunately, the Court's dismissal of the law's indirect discriminatory effects on veiled Muslim women underlies the liberal feminist framework, which preserves religious and cultural discrimination in favor of Western imperialism. By placing more value on the rights of others to freely interact in society, the Court is effectively condoning France's marginalization of Islamic practices in its public sphere.)

<sup>10</sup> *Id.* at ¶ 129, ¶ 155.

<sup>11</sup> *Id.* at ¶ 142, ¶ 157.

<sup>12</sup> *Id.* at ¶ 122.

feminist presumption that the veil, and its meaning in Western society, are fundamentally incompatible with secular democracy and modern gender equality.

Part II of this paper provides background on the Strasbourg Court and explains the Court's evaluation process of claims of religious discrimination. It also provides the provisions of Article 9 of the European Convention and notes the bifurcation of religious freedom into two categories: the freedom of conscience and the manifestation of religious belief.<sup>13</sup>

Part III identifies liberal feminism and postmodern/postcolonial feminism as competing theories through which to understand the Islamic veil's significance in the European public sphere. It critiques liberal feminism's perpetuation of the "false consciousness" theory and victimization of veiled Muslim women in a patriarchal religion. It further identifies postmodern/postcolonial feminism as alternative agency-based theories that denounce the liberal feminist "othering" of Muslim women and that account for the various facets of a woman's identity and religious agency.

Part IV critiques European secular governance as a restrictive and discriminatory norm that diminishes the cultural and religious autonomy of veiled Muslim women. It asserts that the Strasbourg Court's interpretation of secular governance as applied to dress-appearance restriction claims inhibits Islamic veiling in the public sphere through a stereotypical and harmful understanding of the veil's role in shaping a Muslim woman's religious and gender identity. The Strasbourg Court's jurisprudence endorses a particular normative European governing structure

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<sup>13</sup> There are several relevant issues regarding contemporary religious freedom that are beyond the scope of my thesis and will not be the subject of analysis in this paper. These issues include the impact of legal and social restrictions within Muslim-majority non-Western countries on gender inequality, the effects of religious freedom jurisprudence out of international tribunals on men who manifest their religious beliefs through dress-appearance like Sikh and Jewish men, and the comparison of the European form of secularism and democracy to other Western structures. This paper will only address the rights of, and restrictions on, Muslim women to wear Islamic veils in European societies.

that views Islamic veiling as an unfavorable religious practice in secular democratic society.<sup>14</sup> Part IV will also explain that a critical shift in the theoretical analysis of the Islamic veil, from a liberal feminist approach to a postmodern/postcolonial approach, in the context of gender equality is necessary to achieve greater religious freedom under international law because it allows Muslim women to embrace their identity and culture in different settings. Part V will conclude and highlight the implications of a shift in feminist theoretical analysis of dress-appearance restrictions for the future of international religious freedom law.

## **II. BACKGROUND ON THE STRASBOURG COURT AND ARTICLE 9 OF THE EUROPEAN CONVENTION**

The European Convention on Human Rights and Fundamental Freedoms (European Convention) is a regional human rights instrument that requires member states of the Council of Europe to protect individual rights.<sup>15</sup> It entered into force in 1953 and established the European Court of Human Rights, based in Strasbourg, France.<sup>16</sup> The Court has jurisdiction to hear claims arising under the Convention against state parties.<sup>17</sup> The Court functions to uphold the “subsidiary” principle ensuring that sovereign states are the primary vehicle to protect human rights under the Convention at the national level and in domestic courts.<sup>18</sup> The European

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<sup>14</sup> See generally Carolyn Evans, *The ‘Islamic Scarf’ in the European Court of Human Rights*, 7 MELB. J. INT’L. L. 52, 59-60 (2006) (Evans discusses the contradictory stereotypes that the Court perpetuates of veiled Muslim women and girls, namely that they are on one hand, oppressed victims in desperate need of liberation and protection from religious oppression, and that they are simultaneously aggressors perpetuating fundamentalist values by proselytizing by simply wearing the veil. In both instances, these women are somehow a threat to the liberal, egalitarian order).

<sup>15</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, 213 U.N.T.S. 230 [hereinafter European Convention on Human Rights].

<sup>16</sup> *Id.* at art. 19.

<sup>17</sup> *Id.* at art. 32.

<sup>18</sup> Jilan Kamal, *Justified Interference with Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine Under Article 9(2)*, 46 COLUM. J. TRANSNAT’L L. 667, 669 (2008).



Convention bifurcates religious freedom in Article 9.<sup>19</sup> Religious freedom, in a broad sense, encompasses specific rights including:

[t]he right to freedom of thought, conscience, and religion, the right to equal protection of the law, including the prohibition of discrimination on the basis of religion, the right of persons belonging to religious minorities to profess and practice their religion, and the right to protection from incitement to discrimination, hostility, or violence.<sup>20</sup>

However, while freedom of conscience is absolute, the right to manifest religion is not. This distinct categorization of rights has practical implications in the lives of religious adherents, especially because the theoretical underpinnings of human rights have “failed to harmonize freedom of religion . . . or to confront the consequences of this failure.”<sup>21</sup>

The Strasbourg Court has interpreted the Convention to be a “living instrument” that decides modern social issues including but not limited to “assisted suicide, strip searching, domestic slavery . . . adoption by homosexuals, the wearing of the Islamic headscarf in schools and universities . . . and environmental concerns.”<sup>22</sup> The Court has focused on fundamental civil and political rights claims, and in the particular context of this paper, claims arising under the freedom of expression, freedom of thought, conscience and religion.

Article 9 of the European Convention states<sup>23</sup>

- (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in

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<sup>19</sup> European Convention on Human Rights, art 9 at 10-11.

<sup>20</sup> Peter G. Danchin, *The Tangled Law and Politics of Religious Freedom*, 10 SANTA CLARA J. INT'L L. 73, 89-90 (2012).

<sup>21</sup> 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, 397-98 (2007).

<sup>22</sup> *The ECHR in 50 Questions*, COUNCIL OF EUROPE. Available at [http://www.echr.coe.int/Documents/50Questions\\_ENG.pdf](http://www.echr.coe.int/Documents/50Questions_ENG.pdf).

<sup>23</sup> European Convention on Human Rights, art. 9 at 10-11.

the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The Convention's language grants individuals an absolute right to freedom of belief under 9(1), but 9(2) curtails the individual's right to "manifest" that belief in the public sphere. Article 9(2), also known as the limitations clause, provides the threshold test for restrictions on the freedom to manifest a religious belief externally as an act of religious observation. Article 9(2) requires that the state legislation must be "(1) directed toward a legitimate aim; (2) carried out pursuant to domestic law; and (3) necessary in a democratic society."<sup>24</sup>

The third prong is also known as the democratic necessity test. According to the Strasbourg Court's jurisprudence, the democratic necessity test splits into a balancing examination of "whether the state action is "necessary" and whether it is "proportional" to its stated goal."<sup>25</sup> First, the state must prove that the action or observation is truly a manifestation of religious belief.<sup>26</sup> Second, the law in question must in fact constitute an interference with the particular manifestation.<sup>27</sup> Finally, the Strasbourg Court's inquiry turns to whether the state's interference is justified under the test of Article 9(2).<sup>28</sup>

The European Convention is a legal instrument through which to protect individual freedoms of conscience and belief but, as will be discussed later, can also be used to legitimize state laws that curtail those freedoms in order to meet a particular social and secular standard.

### **III. FEMINIST THEORY AND THE ISLAMIC VEIL**

Feminist theory began as marginalized discourse, but years of advocacy have culminated in a "noticeable installation of feminists and feminist ideas in actual legal-institutional power,"

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<sup>24</sup> *Id.*

<sup>25</sup> Kamal, *supra* note 18 at 681-82.

<sup>26</sup> *Id.* at 677.

<sup>27</sup> *Id.* at 678.

<sup>28</sup> *Id.*

something Janet Halley, Royall Professor of Law at Harvard Law School, calls governance feminism.<sup>29</sup> Governance feminism refers to, “feminism that seeks not only to analyze and critique the problem, but to devise, pursue and achieve reform to address the problem in the real world.”<sup>30</sup> Governance feminism incorporates feminist theory in the creation of law and policy within non-feminist structures of power.<sup>31</sup>

This section will discuss the roles of liberal and postmodern/postcolonial feminism in relation to Islamic veil restrictions in the public sphere. Halley principally refers to governance feminism as a tool for international policing and criminalization of forms of sexual violence, but it also plays a role in the way the Strasbourg Court maintains a particular normative and liberal European social order that marginalizes Islamic veiling as an unfavorable and incompatible religious practice.

Religious and cultural practices from many faiths have clashed with Western secular governance in the past, especially in the area of women’s rights. In 1993, the U.N. Vienna World Conference on Human Rights focused on the process of eradicating harmful practices against women including sexual violence and sex trafficking by “fram[ing] the conflict between the rights of women and culture.”<sup>32</sup> This conference significantly contributed to the debate on international women’s rights by aiming to distinguish between “authentic” and “extremist”

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<sup>29</sup> Janet Halley et. al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 2, 340 (2006).

<sup>30</sup> *Id.* at 348 (Halley’s definition here is applied to the increasing feminist involvement in shaping the text and the enforcement of international law criminalizing against sex trafficking; however the definition of governance feminism can also be applied broadly to other aspects of feminist advocacy that influences the norms of legal norms and structural governance.)

<sup>31</sup> *Id.* at 340 (The term is described as the “incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power.”)

<sup>32</sup> Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT’L L. 1, 15-16 (2000) (*citing* the Vienna Declaration and Programme of Action of the World Conference on Human Rights, art. 38, U.N. Doc. A/CONF.157/23 (1993)).

cultural and religious values.<sup>33</sup> Unfortunately, the Conference could not resolve the disagreement between zealous liberal women’s rights advocates and cultural relativists who defended exceptions to universal applications of human rights principles.<sup>34</sup> One such issue is the religious dress of Muslim women.

Due to the complexity of feminist theory, there is no “single global perspective through which to criticize flawed international legal constructs and to suggest methods for change” of gender inequality.<sup>35</sup> This creates a division between feminists and prevents a comprehensive understanding of the Islamic veil’s influence on female identity. Although two distinct human rights, the freedom of conscience and the freedom to manifest belief are interconnected and carry practical meaning for veiled Muslim women.

#### **A. Liberal Feminism and False Consciousness**

The practice of wearing the Islamic veil is viewed as a direct contradiction to liberal feminist values. Liberal feminism is based on the fundamental principle that all persons must be treated equally under the law, irrespective of individual and unique characteristics.<sup>36</sup> In particular, the emphasis was on women’s equality to men and the attempt to overcome established sex-based discrimination against women. Cyra Akila Choudhury, assistant law professor at Florida International University, describes the liberal feminist approach to the Islamic veil and the idea of *false consciousness*, stating, “a veiled woman is by the very fact that she wears a veil oppressed. In order to be free, the veiled woman must progress out of the veil.

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<sup>33</sup> *Id.* at 16.

<sup>34</sup> *Id.*

<sup>35</sup> R. Christopher Preston & Ronald Z. Ahrens, *United Nations Convention Documents in Light of Feminist Theory*, 8 MICH. J. GENDER & L. 1, 4-5 (2001).

<sup>36</sup> *Id.* at 7.

Such reductionism imagines veiled Muslim women as being nothing more than victims of their circumstances.”<sup>37</sup>

Under the liberal feminist theory, states must create and apply gender-neutral laws, but this naturally assumes that “a state is a neutral actor, free from gender bias and able to enforce the law equally to both men and women.”<sup>38</sup> Peter Danchin explains that complete neutral governance<sup>39</sup> of religious freedom in a pluralistic nation-state is impossible because states are unable to truly decipher between religious and non-theistic practices.<sup>40</sup> Though this may be true, the liberal feminism approach still leaves both states and courts without concrete guidance to create and implement policies that identify particularized religious observances because it “cannot be done in a neutral way.”<sup>41</sup>

Liberal societies that relegate religion to the private sphere diminish the importance of engaging religion in the public sphere.<sup>42</sup> Liberal feminists are “highly critical in their interpretation of particular religious practices” and believe that efforts to reconcile religious freedom and secularism will compromise significant advances of gender equality as a state priority.<sup>43</sup> Under this theory, the Islamic veil contradicts the essence of gender equality because it is a marker of patriarchal control, female subordination, and sexual repression.

This sentiment is directly made clear in Phyllis Chesler’s piece, “The Burqa: Ultimate Feminist Choice?” criticizing another feminist author, Naomi Wolf, on her perception of the role

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<sup>37</sup> Cyra Akila Choudhury, *Empowerment or Estrangement?: Liberal Feminism's Visions of the "Progress" of Muslim Women*, 39 U. BAL. L.F. 153, 158-59 (2009).

<sup>38</sup> Preston & Ahren, *supra* note 35, at 7.

<sup>39</sup> Danchin, *supra* note 20, at 74. (States are required to be neutral “between religion and religion, and between religion and nonreligion”).

<sup>40</sup> *Id.* at 74-75 (citing *Lautsi v. Italy* [GC], no. 30814/06, Eur. Ct. H.R. ¶ 60 (2011). Available at [http://www.echr.coe.int/echr/resources/hudoc/lautsi\\_and\\_others\\_v\\_italy.pdf](http://www.echr.coe.int/echr/resources/hudoc/lautsi_and_others_v_italy.pdf) (A majority of the Grand Chamber held that the right to religious freedom under Article 9 imposes a duty on the State of “neutrality and impartiality.”)).

<sup>41</sup> *Id.* at 75.

<sup>42</sup> Choudhury, *supra* note 37, at 159-60 (citing Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399, 1402-05 (2003)).

<sup>43</sup> Ellen Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41 LAW & SOC'Y REV. 699, 723-24 (2007).

the veil in modest Islamic culture.<sup>44</sup> She identifies the veil as a marker of an unthinking, agency-less woman to be pitied by generalizing that, “[m]ost Muslim girls and women are not given a choice about wearing the chador, burqa, abaya, niqab, jilbab, or hijab (headscarf) and those who resist are beaten, threatened with death, arrested, caned or lashed, jailed, or honor murdered by their own families.”<sup>45</sup> She patronizingly overstates that, “Most Muslim girls and women are impoverished and wear rags, not expensive Western clothing beneath their coverings.”<sup>46</sup>

Finally, Chesler laments that “being veiled and obedient does not save a Muslim girl or woman from being incested, battered, stalked, gang-raped, or maritally raped nor does it stop her husband from taking multiple wives and girlfriends or from frequenting brothels.”<sup>47</sup> Chesler’s assertion that “most Muslim girls and women are not given a choice about veiling,” succinctly describes how liberal feminists feel about the veil, and how they believe “shrouded” Muslim woman to be “invisible. They cease to exist. They are literally ghosts.”<sup>48</sup> Chesler does not differentiate between Muslim-majority and Muslim-minority countries, nor does she distinguish veiled Muslim women living in the West from Muslim women living in Islamic environments. Noticeably, the spiritual aspect of the Islamic veil is acutely brushed under the rug by a liberal feminist understanding of Islam. It is not viewed as a belief system or a devout lifestyle, but as a culture that is incompatible with contemporary standards of freedom and gender equality.

Limitations on a woman’s ability to manifest religious beliefs through her dress-appearance “directly affects the choices . . . women may have to make about the public

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<sup>44</sup> Phyllis Chesler, *The Burqa: Ultimate Feminist Choice?* THE PHYLLIS CHESLER ORGANIZATION (Aug. 31, 2009). <http://www.phyllis-chesler.com/612/burqa-ultimate-feminist-choice> (Chesler, professor of psychology and women's studies at the College of Staten Island, attributes the veil, specifically the burqa, to ignorant cultural practices in foreign countries).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

presentation of their persons.”<sup>49</sup> Inflexible institutional mechanisms that restrict or ban religious dress to “protect the rights of others and in pursuit of other legitimate social goals”<sup>50</sup> preserve negative socially constructed meanings of the Islamic veil in European countries, which serves to “otherize” Muslim women, demonstrating that their rights are not prioritized. These misunderstandings are fueled by perceptions that, without exception, Islam perpetuates women’s inequality and oppression.<sup>51</sup>

The restrictive dress policies of European states maintain a closely held expectation, emerging from liberal feminist theory, that “Muslims, particularly women, will eventually value the same rights and social orderings as those of their benefactors in the West.”<sup>52</sup> This means suggesting, and frequently demanding, that Muslim women identify and change unfavorable cultural practices that are products of patriarchal interpretations of religion. Muslim women who reclaim their social power and personal autonomy are believed to have increased agency. However, this approach is riddled with Western cultural biases, especially when the Islamic veil is singled out as a particular “unfavorable” practice.

Muslim women who defend the hijab as compatible with liberalism are dismissed by liberal feminists as victims of false consciousness. Liberal feminists encourage Muslim women, especially those living in Western societies, to adopt secular Western values and they continue to measure the “progress” of a Muslim woman’s consciousness, education, and experience.<sup>53</sup> The concept of false consciousness perpetuates the idea that Muslim women only *believe* that they

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<sup>49</sup> Bennoune, *supra* note 21, at 392.

<sup>50</sup> *Id.* at 418.

<sup>51</sup> Choudhury, *supra* note 37, at 153.

<sup>52</sup> *Id.* at 153-54.

<sup>53</sup> *Id.* at 156.

are choosing to wear the Islamic veil for spiritual reasons but they are actually socially conditioned to wear it by “immediate family, friends, and socio-religious organizations.”<sup>54</sup>

Although liberal feminism was once championed as the unifying philosophy of the gender equality movement, it has been steadily critiqued for its “reliance on male-dominated institutions and its narrow conception of equality.”<sup>55</sup> The foundational argument against the Islamic veil is rooted in the belief that the veil is “inevitably damaging for women and for the cause of gender equality as a whole, even in societies where they are not a direct catalyst for violence against women or an element of a fundamentalist regime.”<sup>56</sup>

### **B. Third Wave Feminism and Religious Agency**

A competing strain of feminism, third wave feminism encompassing postmodern and postcolonial feminist theories, critiques Western feminism as homogenized Eurocentrism that fails to value, appreciate or justify the non-Western woman’s experience. Specifically, third wave feminism shifts the focus on important aspects of a woman’s culture and identity in relation to her gender.

Postcolonial feminism analyzes the “intersection of gender, nation, class, race, and sexualities in the different contexts of women’s lives, their subjectivities, work, sexuality, and rights.”<sup>57</sup> It seeks to remedy the victimization of non-Western women and the residual racism and oppression left from systemic colonization. Postcolonial feminism also accounts for the points of view and voices of non-Western women instead of overshadowing them with a Western woman’s authoritative say-so. Because the focus is on giving a voice to the voiceless, a postcolonial analysis of the veil would likely lead to better identification of coercive tactics used

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<sup>54</sup> Reuven (Ruvi) Ziegler, *The French "Headscarves Ban": Intolerance or Necessity?*, 40 J. MARSHALL L. REV. 235, 247 (2006).

<sup>55</sup> Preston & Ahren, *supra* note 35, at 7-8.

<sup>56</sup> Wiles, *supra* note 43, at 718-19.

<sup>57</sup> Raj Kumar Mishra, *Postcolonial feminism: Looking into within-beyond-to difference*, 4 INT. J. ENGLISH LIT. 129, 129-30 (2013).



by others to force a Muslim woman to cover, and highlight a woman's choice to veil of her own free will or religious conviction. The issues of choice and coercion will be discussed in section IV of this paper. Post-colonial feminism, even if imperfectly applied, would likely lead to less discrimination against veiled women because it actively seeks to hear their voices and understand their experiences.

Similarly, postmodern feminism addresses the blind pressure that liberal feminists place on Muslim women to embrace non-Western ideals, break free of patriarchal beliefs, and "reform culture or religion in a way that comports with liberal notions of history and progress."<sup>58</sup>

Postmodern feminism recognizes that "the headscarf is a garment that is used and valued by some women for subjective reasons upon which it is not for others to cast judgment."<sup>59</sup>

Postmodern feminists traditionally consider that the right to manifest religion in a context-specific way is necessary to account for the socially constructed meanings of religious expression and its impact on sex equality. Compared to liberal feminism, which presupposes sexist and oppressive hierarchies ensuring that women wear the Islamic veil, postmodern feminism creates space for veiled Muslim women to reclaim their agency through practicing and embracing their identity in different settings. Feminist literature has demonstrated that the veil is more than a controversial piece of cloth.

Particular verses in the Qur'an<sup>60</sup> have been interpreted in Islamic scholarship to establish the source of particular religious dress and to justify that the Islamic veil is a manifestation of

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<sup>58</sup> Wiles, *supra* note 43, at 718-19 ("False consciousness alters women's self-perception to make them believe that social roles, cultural traditions and religious practices are their own choice and not forced on them. The hijab is viewed as a symbol of oppression and female inequality.")

<sup>59</sup> *Id.* at 722.

<sup>60</sup> *See also* The Quran, ("Enjoin believing women to turn their eyes away from temptation and to preserve their chastity; not to display their adornments (except such as are normally revealed); to draw their veils over their bosoms and not to display their finery except to their husbands," (24:31); "Prophet, enjoin your wives, your daughters, and the wives of true believers to draw their veils close round them. That is more proper, so that they may be recognized and not be molested" (33.59)").

modesty, privacy, and morality.<sup>61</sup> Some Muslim women have expanded the veil's role to other aspects of their lives, including its facilitation of political statements. Nadiya Takolia, spiritual reasoning coordinator at the University of Cambridge, states that the *hijab* is a purely political tool used to empower her against the sexual objectification of modern society.<sup>62</sup> She says, "I firmly believe that a woman's dress should not determine how others treat, judge or respect her," and that any non-Muslim woman has an equal choice and opportunity to veil as well.<sup>63</sup> Ellen Wiles, British human rights attorney and legal scholar, explains that Islamic veiling serves as "a constant physical reminder of that value in the course of their daily life, and an inalienable part of their religious identity."<sup>64</sup> Wiles also identifies secular reasons for wearing the Islamic veil.<sup>65</sup> Wiles directly critiques the assumption that the Islamic veil, as a cultural and religious symbol, is incompatible with the principles of gender equality.<sup>66</sup> She admonishes liberal feminists who preach from a "pedestal of moral indignation."<sup>67</sup>

Sexuality is another aspect of the veil. Naomi Wolf, author and political activist, describes sexuality in Islam as "more conservatively directed" towards marriage, and speaks of the benefits of the *hijab* in a modest society.<sup>68</sup> She emphasizes a woman's choice to wear the veil as a literal and spiritual shield from "the intrusive, commodifying, basely sexualising

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<sup>61</sup> Wiles, *supra* note 43, at 717.

<sup>62</sup> Nadiya Takolia, *The Hijab has Liberated me from Society's Expectations of Women*, THE GUARDIAN (May 28, 2012). Available at: <http://www.theguardian.com/commentisfree/2012/may/28/hijab-society-women-religious-political>.

<sup>63</sup> *Id.*

<sup>64</sup> Wiles, *supra* note 43, at 717.

<sup>65</sup> *Id.* at 720-21 (Wiles explains that Muslim women wear the hijab to overcome sexual objectification, because they view it as a powerful political tool, and to project a particular cultural identity within society).

<sup>66</sup> *Id.* at 720.

<sup>67</sup> Elene G. Mountis, *Cultural Relativity and Universalism: Reevaluating Gender Rights in A Multicultural Context*, 15 DICK. J. INT'L L. 113, 150 (1996).

<sup>68</sup> Naomi Wolf, *Behind the veil lives a thriving Muslim sexuality*, THE SYDNEY MORNING HERALD (Aug. 30, 2008). Available at: <http://www.smh.com.au/news/opinion/behind-the-veil-lives-a-thriving-muslim-sexuality/2008/08/29/1219516734637.html?page=fullpage#contentSwap1>.

Western gaze.”<sup>69</sup> She continues to explain that “[c]hoice is everything. But Westerners should recognise that when a woman in France or Britain chooses a veil, it is not necessarily a sign of her repression.”<sup>70</sup>

Karima Bennoune, liberal feminist and associate professor at Rutgers School of Law, argues that interpreting the right to manifest religion through the veil in a context-specific way is necessary to appropriately consider the “socially constructed meaning(s) of the expression and its impact on sex equality” in any evaluation of restrictions on religious expression through dress-appearance.<sup>71</sup> Bennoune posits that the Islamic veil, as a recognized manifestation of religious expression under international human rights law, is rightly excluded from the European public sphere by dress-appearance restrictions in order to protect gender equality and female autonomy in secularly neutral societies.<sup>72</sup>

To support her position, Bennoune essentially asserts that religious freedom and the manifestation of religious belief which are established human rights, may, in certain instances, negatively deter international strides to achieve substantive gender equality, an equally important human right within a secular context.<sup>73</sup> Therefore, “[s]ome limitations are justified, but necessitate careful, contextual scrutiny.”<sup>74</sup> While Bennoune does note that broader debate surrounding religious-dress appearance and gender equality should not only focus on the Islamic veil, her analysis leads one to understand that an individual or collective right of women to dress based on spiritual and cultural convictions is necessarily overridden by social policies upholding secular human rights imperatives for women-kind.<sup>75</sup> Unfortunately, this approach undercuts the

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Bennoune, *supra* note 21, at 375.

<sup>72</sup> *Id.* at 374.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 375.

<sup>75</sup> *Id.*

cultural and religious complexities of the Islamic veil and the freedom of Muslim women to act on their religious beliefs in public life. It also fails to consider the importance of what Edith Wu, professor at the Thurgood Marshall School of Law, calls “dress-appearance diversity” that may be effective in achieving modern gender equality by combating dominant cultural, social or religious norms.<sup>76</sup>

By touting the conclusion that religious devotion is counterproductive to women’s agency,<sup>77</sup> universalist/liberalist feminism by all accounts has turned the Muslim woman “into an allegory for undesirable cultural difference.”<sup>78</sup> Veiled Muslim women are completely written off and are “[p]aradoxically portrayed both as a victim (passive) of her oppressive patriarchal culture/religion and male kin, and as a threat (active) to Western modernity and culture of freedoms.”<sup>79</sup> However, other theoretical feminist approaches like postmodern and postcolonial feminism, while not completely intersectional, have attempted to understand the Islamic veil as a transformative concept of self and account for values of morality, modesty and piety as important factors of a woman’s *religious* agency.<sup>80</sup>

Religious agency is conspicuously missing from liberal feminist thought on the Islamic veil, and instead religious devotion is viewed as counter to ‘rational-choice-oriented strategies.’<sup>81</sup> In fact, it is easier to wrongly generalize all veiled women’s experiences and oversimplify the nature of the veil as something contrary to gender equality, because “fighting for the acknowledgment of the nuances of Muslim women’s individual experiences of covering up is

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<sup>76</sup> Edith Y. Wu, *Cross-Cultural Patriarchal Demands on Women's Dress-Appearance*, 33 WOMEN'S RTS. L. REP. 169, 172-73 (2012).

<sup>77</sup> Sirma Bilge, *Beyond Subordination vs. Resistance: An Intersectional Approach to the Agency of Veiled Muslim Women*, 31 J. INTERCULTURAL STUD., 1, 21 (2010), DOI: 10.1080/07256860903477662.

<sup>78</sup> *Id.* at 10.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 21.

<sup>81</sup> *Id.*

still something of a suicide mission.”<sup>82</sup> However, postmodern and postcolonial feminism do not make unveiling a pre-condition for women to enjoy individual and religious rights like liberal feminism. Instead they attempt to expand the dialogue to include the most undervalued aspect of a woman’s dress-appearance: her choice. Perhaps no Western conception of feminism encapsulates the complexity of the Islamic veil in relation to gender equality and religious adherence, but as a tool to strengthen religious agency, postcolonial and postmodern feminism appear to confer a substantial deference to the rights of Muslim women to choose to veil in Western secular society.

#### **IV. EUROPEAN SECULAR LIBERALISM AND RELIGIOUS DRESS-APPEARANCE RESTRICTIONS**

The Strasbourg Court maintains secular liberalism as the dominant European social order by interpreting positive freedom through a Western understanding of individual autonomy and self-interest.<sup>83</sup> This framework ultimately manages culture and religion by relying on “certain substantive conceptions of both the scope of religious freedom and the nature of the public sphere.”<sup>84</sup> This normative structure preserves the kind of European liberalism that is so detrimental to the choice by Muslim women to veil in Europe.

The term “religion” and its scope are not formally defined by human rights instruments, which fail to enumerate accepted religious practices and methods of worship. This gives European states the capability to regulate manifestations of religion like dress-appearance because the structural concept of religious freedom relies on liberal neutrality as a substantive political value.<sup>85</sup> The Strasbourg Court’s Article 9 jurisprudence on religious dress-appearance

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<sup>82</sup> Tracy Clark-Flory, *Feminists face off over the veil*, SALON, (Sept. 5, 2009).

[http://www.salon.com/2009/09/05/veil\\_debate/](http://www.salon.com/2009/09/05/veil_debate/).

<sup>83</sup> Danchin, *supra* note 20, at 82.

<sup>84</sup> *Id.* at 86.

<sup>85</sup> *Id.* at 78.

regulations in Europe has established that statutory restrictions (couched in facially neutral terms) on the Islamic veil in public forums do not violate the freedom of religion if it is directed toward a legitimate aim, carried out pursuant to domestic law; and necessary in a democratic society. The consequences of these cases, however, seem to have a disproportionate and negative impact on Muslim women who are forced to remove their veils in the public space.

There are three important aspects of religious freedom jurisprudence on the Islamic veil that have led to an unjustifiable imposition on the rights of Muslim women to veil in Europe. First, religious dress-appearance restrictions, and the corresponding Strasbourg Court jurisprudence, are missing the critical distinction between choice and force of women as a factor of regulation schemes.<sup>86</sup> Instead, states justify these restrictions by purporting that the Islamic veil inhibits free democratic societies, infringes on the rights of other women, or serves as a symbol of male patriarchy and coercion.<sup>87</sup> Second, the wide margin of appreciation given to states by the Strasbourg Court used to assess individual claims unsatisfactorily addresses the socio-cultural and religious disadvantages imposed on veiled Muslim women in European secular societies enforcing these restrictions.<sup>88</sup> Third, religious dress-appearance restrictions, while seemingly neutral on their face, have a disproportionate impact on Muslim women who practice Islamic veiling in Europe because it is increasingly used to as a “powerful and overdetermined marker of difference” to shape their individual religious identities.<sup>89</sup>

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<sup>86</sup> Evan Darwin Winet, *Face-Veil Bans and Anti-Mask Laws: State Interests and the Right to Cover the Face*, 35 HASTINGS INT'L & COMP. L. REV. 217, 250 (2012).

<sup>87</sup> *Id.* (Arguments contravening these supposed rationales point out that there is no compelling state interest in prohibiting face coverings where there is no reasonable apprehension of an imminent crime by those individuals, that “there exists no positive right granted by national or international law (in France, in any case) to be allowed to see the bare face of another person” which negates the proposition that there is a duty owed to others to reveal faces in public, and that “States that have contemplated niqab bans have produced no evidence that veiling is coerced”).

<sup>88</sup> Peter Cumper & Tom Lewis, *“Taking Religion Seriously”? Human Rights and Hijab in Europe-Some Problems of Adjudication*, 24 J.L. & RELIGION 599, 601, 616 (2009).

<sup>89</sup> *Id.* at 600 (citing Claire Dwyer, *Veiled Meanings: Young British Muslim Women and the Negotiation of Difference*, 6 GENDER, PLACE & CULTURE 5, 5 (1999)).

### A. The Distinction Between Choice and Force In Religious-Dress Appearance Restrictions

Under the European Convention, states do not have discretion to determine the legitimacy of the means used to express religious beliefs. This was the holding in *Manoussakis and Others v. Greece*.<sup>90</sup> Under this principle, states should not have discretion to determine whether the Islamic veil constitutes a legitimate manifestation of a sincerely held religious belief. However, states have passed laws banning the veil on the assumption that it has a proselytizing effect and undermines secular liberalism.

In *S.A.S v. France*, a widely-publicized and highly controversial decision, the Strasbourg Court heard a Muslim woman's claim under Articles 8, 9 and 14 of the European Convention that she was forced to remove her *niqab* (full face veil) in public under a 2010 law.<sup>91</sup> In response to Court questioning, the applicant stated she was not forced to veil and she wore it at various times based on religious conviction.<sup>92</sup> Although she agreed to remove the *niqab* when undergoing an identity check or in a secure facility, the Court found that the French law prohibiting the concealment of the face in public spaces was proportionate to achieving the legitimate state aim of "living together" ("*le vivre ensemble*").<sup>93</sup>

The French Resolution, which was passed by the French parliament as Law no. 2010-1192, asserted that the *niqab* was a radical practice and that France must prevent individuals from relying on freedoms of expression, opinion or belief, which undermined the

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<sup>90</sup> *Manoussakis and Others v. Greece* [GC], Nn. 18748/91 Eur. Ct. H.R. ¶ 1365 (1996). (The Strasbourg Court found that the Greek legislation forbidding proselytism and establishing houses of worship without authorization by the Greek Orthodox Church was a violation of Article 9 because it was not proportionate to the state aim nor was it necessary in a democratic society.)

<sup>91</sup> *S.A.S. v. France*, no. 43835/11, Eur. Ct. H.R. at ¶ 3.

<sup>92</sup> *Id.* at ¶ 54.

<sup>93</sup> *Id.* at ¶¶ 157-59.

principles of French secular society.<sup>94</sup> Additionally, the Court examined an explanatory memorandum in the legislative history of Law no. 2010-1192 which stated, “the concealment of the face in public places brings with it a symbolic and dehumanising violence,” constituting a “public manifestation of a conspicuous denial of equality between men and women.”<sup>95</sup>

Analyzing coercion on women’s dress-appearance is a double-sided coin, especially in the public sphere. Women are forced to remove the Islamic veil in the public sphere through state regulations which, in turn, apparently aim to prevent the coercion of women to wear the veil by members of their own community.<sup>96</sup> For example, part of the rationale underlying the 2010 Parliamentary Assembly of the Council of Europe on Islam, Islamism and Islamophobia in Europe was to advocate that “member states take all necessary measures to stamp out radical Islamism and Islamophobia, of which women are the prime victims,” especially where the “social and cultural tradition” of the Islamic veil threatens women’s dignity and freedom.<sup>97</sup> The French Resolution unequivocally stated that “[n]o woman should be compelled to wear religious apparel by her community or family. Any act of oppression, sequestration or violence constitutes a crime that must be punished by law.”<sup>98</sup>

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<sup>94</sup> *Id.* at ¶ 24 (The May 2010 Resolution “on attachment to respect for Republic values at a time when they are being undermined by the development of radical practices” states the following:

“1. Considers that radical practices undermining dignity and equality between men and women, one of which is the wearing of the full veil, are incompatible with the values of the Republic;

2. Affirms that the exercise of freedom of expression, opinion or belief cannot be relied on by anyone for the purpose of flouting common rules, without regard for the values, rights and duties which underpin society;

3. Solemnly reaffirms its attachment to respect for the principles of dignity, liberty, equality and fraternity between human beings;

4. Expresses the wish that the fight against discrimination and the promotion of equality between men and women should be a priority in public policies concerning equal opportunities, especially in the national education system;

5. Finds it necessary for all appropriate means to be implemented to ensure the effective protection of women who suffer duress or pressure, in particular those who are forced to wear the full veil.”)

<sup>95</sup> *Id.* at ¶ 6, ¶ 25.

<sup>96</sup> *Id.* at ¶ 35.

<sup>97</sup> *Id.*

<sup>98</sup> *S.A.S. v. France*, no. 43835/11, Eur. Ct. H.R. at ¶ 35.



The main problem is that the state carries almost no burden to show that a woman was in fact coerced by another to veil or to show that her choice to veil somehow infringes on others rights in society; this is particularly true when legal and social norms are manipulated to restrict women's choices, "especially when that choice does not have an imminently harmful impact on society as a whole."<sup>99</sup> The consideration of a woman's capacity to consent to covering her body or face for her own moral, spiritual, or political purposes is absent from the multitude of discussions surrounding the veil at the domestic and international level.

Even if a Muslim woman were coerced to wear the veil, France advocated for, and the Strasbourg Court accepted, a justification for the ban based on protecting the rights and freedoms of others to live together under certain conditions, *not* the right of that woman to be free from coercion.<sup>100</sup> Therefore, the distinction between coercion and consent was of no consequence to the Strasbourg Court in *S.A.S.* Under Article 225-4-10 of Law no. 2010-1192, France criminalized the act of forcing, by duress or threats, another person to conceal their face in public.<sup>101</sup> As a French goal, this would be a perfectly acceptable state objective had the law only issued criminal penalties on those who coerced the women to veil, and not on the veiled women themselves. Instead the law does not necessarily make clear the difference of wearing the *niqab* to express and manifest a religious belief as a personal choice, and wearing the *niqab* under coercion by other members of a minority community.

This aspect of the French legislation clearly demonstrates the heavy liberal feminist influence on European misunderstandings of Islam and the endorsement of these misunderstandings in the Strasbourg Court's jurisprudence. Susanna Mancini, Professor of Public Comparative Law at the University of Bologna Law School, writes about universal

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<sup>99</sup> Wu, *supra* note 76, at 195.

<sup>100</sup> *S.A.S. v France*, no. 43835/11, Eur. Ct. H.R. at ¶ 121-22.

<sup>101</sup> *Id.* at ¶ 31.

liberalism's "orientalist" framework which "structure[s] the very object it speaks about and from its capacity to articulate a convincing discourse of the other, thus establishing the identity of the subject that characterizes the identity of the other."<sup>102</sup> By implying that coercion would necessarily be a factor in a woman's wearing of the *niqab* and that preventing such coercion is a legitimate state interest in justifying the *niqab* ban, both France and the Strasbourg Court condone the idea that an imagined Islamic patriarchy is fundamentally incompatible with European secular democracy. Muslim women require the state's protection against harmful subjugation embodied in the veil.

Instead, postmodern and postcolonial approaches recognize the way that universal liberalists decontextualize aspects of non-Western culture and religion, like the veil. These theories reject the universal liberalist method of highlighting key differences between it and non-Western society, leading to an institutional "othering" of Muslim women. This "othering" is defined by Islam's offensive patriarchal system where the Muslim woman holds "a masculine subject position."<sup>103</sup> Mancini articulates that this liberalist process of "othering" is crucial to maintaining its credibility when she states, "Western feminism (and the Western self, more generally) reaches its path to autonomy through engagement in a process of differentiation with its non-Western (Oriental) Other."<sup>104</sup> An agency-based theoretical approach can deconstruct the Western liberalist assumption that veiled Muslim women, as the "other", are passive victims of false consciousness or are in fact coerced in a systemic patriarchal culture.<sup>105</sup> Indeed, "[t]hey make choices about their religious practice, their professional activity, their family and so forth,

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<sup>102</sup> Susanna Mancini, *Patriarchy as the exclusive domain of the other: The veil controversy, false projection and cultural racism*, 10 INT'L J. OF CONST. LAW 411, 427 (2012).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Cécile Laborde, *Female Autonomy, Education and the Hijab*, 9 CRITICAL REV. OF INT'L SOC. & POL. PHIL. 3, 365 (2006).

and they do so within the particular contexts which make choices meaningful to them and to the community (or communities) to which they belong.”<sup>106</sup>

On the other hand, some scholars dismiss the distinction of choice and coercion as unpersuasive in the context of a secular state. Frances Raday, law professor and a member of the Working Group on Discrimination Against Women in Law and in Practice, writes:

For every woman in a liberal democracy who chooses the burkah there are other women who are compelled to wear the burkah in the context of family or community patriarchal control . . . Furthermore, globally, many millions of the women who wear burkhas do not choose to wear them but are forced to wear them in regimes where modesty police will impose corporal punishment for their failure to do so. The choice of a handful of women in democratic countries to wear the burkah is perhaps an ethnic and religious identification symbol but it is also a symbol of identification with women’s oppression. The justified fear of human rights protagonists that criticism of Moslem religious practices in Europe is an instrumentalist weapon of ethnic hatred should be addressed but cannot justify condoning practices harmful to women.<sup>107</sup>

Raday reduces the veil to a patriarchal symbol of oppression, even where Muslim women veil freely in Western democracies.<sup>108</sup> Their freedom to manifest and express their religious beliefs is restricted by laws that punish them for wearing a veil viewed as a harmful practice towards women by “human rights protagonists.”<sup>109</sup> This attitude is a direct reflection of the powerful belief of liberal feminists that Islamic veil is overwhelmingly a symbol of oppression and should be banned from the public sphere to promote gender inequality.<sup>110</sup>

The false consciousness theory posits that Muslim women do not willingly *choose* to wear the Islamic veil because agency simply does not exist in the form of religiously motivated submission to a spiritual authority.<sup>111</sup> Liberal feminist agency only exists in the form of one’s

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<sup>106</sup> *Id.*

<sup>107</sup> Frances Raday, *Professor Frances Raday Comments on SAS v France*, OXHRH BLOG (July 19, 2014), <http://ohrh.law.ox.ac.uk/?p=12163>.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Bilge, *supra* note 77 at 21.

“capacity to realize one’s own interests against the weight of custom, tradition, transcendental will, or other obstacles,” thereby locating “the political and moral autonomy of subjects in the *face of power*.”<sup>112</sup> Laws banning the Islamic veil exemplify this liberal feminist stereotype, ultimately detracting from Muslim autonomy over their bodies, appearance, and religion. On the other hand, postmodern feminism advocates moving past the belief that the Islamic veil is a threatening and undesirable symbol because female experiences of expression are socio-culturally relative but nonetheless subjectively meaningful.<sup>113</sup> It is one framework the Court may use to give credence to a Muslim woman’s religious agency by considering the context of her personal motivations and values of morality, modesty and piety. This can be done by examining the applicant’s capacity to consent to veil, and contextualizing the state’s interest in restricting personal religious observance through a preemptive deterrent against Islamic values in European society. These considerations were undervalued by the Court in *Sahin* and *S.A.S* where it deferred, through a wide margin of appreciation, to the state’s interest in eliminating the veil as a visual mark of Islam in secular educational and political environments.

France’s battle with, and fear of, the Islamic veil is legitimized through the Court’s one-dimensional ruling in *S.A.S*. to what is in fact a complex clash of human rights. The ruling brushes over the “othering” of veiled Muslim women by avoiding “confrontation with the competing set of rights, and did not develop any comprehensive legal assessment or methodology on the tension between women’s equality, human rights and religious freedoms to tackle these conflicts in a systemic manner.”<sup>114</sup>

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<sup>112</sup> *Id.* (citing Saba Mahmood, *THE POLITICS OF PIETY. THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* 112, 116 (Princeton University Press, 2005).

<sup>113</sup> Wiles, *supra* note 43 at 722.

<sup>114</sup> Cochav Elkayam-Levy, *Failing to Face the Gender Challenge- note on the European Court of Human Rights Jurisprudence*, (April 15, 2015), INTLAWGRRLS. Available at <http://ilg2.org/2015/04/15/failing-to-face-the-gender-challenge-note-on-the-european-court-of-human-rights-jurisprudence/>.

The Court has actively avoided frank and substantive discussions on the clash between religious freedom and women’s rights in its jurisprudence. To truly give meaning to religious freedom, the Court must discuss the Islamic veil’s “implications on women’s human rights and other contested considerations, such as state neutrality, equality and secularism” and “confront all aspects involving these cases and develop a legal methodology, as well as legal tests to unveil the true story of women’s liberties and religion.”<sup>115</sup>

### **B. The Strasbourg Court’s Deferential Approach to States’ Margin of Appreciation**

The Strasbourg Court exercises significant deference to states’ margin of appreciation in determining whether dress-appearance policies restricting the expression of religious beliefs is a violation of Article 9 of the European Convention.<sup>116</sup> The Court’s chosen approach also defers to the biased and anti-pluralistic rationales behind those policies.

In *Soile Lautsi and Others v. Italy*, the Strasbourg Court’s Grand Chamber found that the display of a crucifix in State schools fell within the state’s margin of appreciation and was not an Article 9 violation because it did not constitute a form of indoctrination.<sup>117</sup> Specifically, the Court found that displaying a crucifix did not constitute a demonstration of intolerance toward students of other religions or non-religious students, even though Christianity was the largest religion in Italy.<sup>118</sup> Grégor Puppinek, a member of the Committee of Experts on the Reform of the European Court of Human Rights, elucidated the chief principle of the *Lautsi* case: the requirement of a neutral approach by states toward citizens and religious freedom.<sup>119</sup> In *Lautsi*, the Court did not find that Italy’s preference to display a religious symbol – the crucifix- in

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<sup>115</sup> Cochav Elkayam-Levy, *Women's Rights and Religion--The Missing Element in the Jurisprudence of the European Court of Human Rights*, 35 U. PA. J. INT’L L. 1175, 1220 (2014).

<sup>116</sup> Cumper & Lewis, *supra* note 88 at 600.

<sup>117</sup> *Lautsi v. Italy*, no. 30814/06, Eur. Ct. H.R at ¶¶ 67-72.

<sup>118</sup> *Id.* at ¶ 74.

<sup>119</sup> Grégor Puppinek, *The Case of Lautsi v. Italy: A synthesis*, 2012 BYU L. Rev. 873, 873 (2012).

schools infringed on the religious rights of the students because it did not involve coercion to act or believe in a specific religious ideology.<sup>120</sup>

The *Lautsi* Court's perspective on coercion from religious symbols in schools was later revisited in *Dahlab v. Switzerland*, in which the Court determined that the coercive and indoctrinating effect of the *hijab* (a religious symbol expressed through dress-appearance) worn by female Muslim teachers was contrary to the principle of secularism; thus, Switzerland was permitted to ban the garment from schools.<sup>121</sup> In *Dahlab*, the Strasbourg Court concluded that a school regulation prohibiting teachers, as representatives of the state, from wearing the *hijab* while carrying out their professional duties did not constitute a violation of the right to manifest religion where that right was outweighed by the need to "protect pupils by preserving religious harmony" in the classroom.<sup>122</sup> The Court addressed the underlying perceptions of the *hijab* and explicitly stated:

It is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which . . . 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.<sup>123</sup>

The margin of appreciation doctrine as applied to religious dress-appearance restrictions under Article 9(2) of the European Convention has been criticized as unsatisfactorily subjecting

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<sup>120</sup> *Lautsi v. Italy*, no. 30814/06, Eur. Ct. H.R. at ¶ 74.

<sup>121</sup> *Dahlab v. Switzerland* [GC], no. 42393/98, Eur. Ct. H.R. ¶ 13 (2001). Available at <http://hudoc.echr.coe.int/eng?i=001-104040>.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

state actions to sufficient judicial scrutiny, which disadvantages Muslim who wear religiously inspired clothing for its spiritual importance.<sup>124</sup> A significant factor that contributes to the inconsistent interpretation of Article 9(2) by the Court is its varying application of the democratic necessity test to prove the State's response to a pressing social need under the contested legal restriction.<sup>125</sup> Bennoune supports state restrictions on the Islamic veil when the restriction's purpose and effect is to prevent female subordination in public education."<sup>126</sup> However, a major weakness in this supposed justification is the fact that states are not required by the Court to demonstrate an actual showing of female subordination. In *Dahlab*, the Court granted Switzerland a wide margin of appreciation in its determination that the restriction was necessary in a democratic society where it was proportionate to the state aims of "ensuring the neutrality of the State primary-education system" and of "protecting the rights and freedoms of others, public order and public safety."<sup>127</sup>

The Court's ready acceptance of the belief that the *hijab* as an Islamic symbol is incompatible with democratic secular values is concerning in *Dahlab*. Danchin writes,

It is very difficult to assess the impact that a powerful external symbol such as the *hijab* has on the teaching of Islam in schools. There is no detailed discussion of the teaching on clothing or of the different interpretations that it is given in different Muslim societies and by different Muslim scholars. The vague, broad-brush approach to the issue by the Court seems to rely on the popular Western view - that the Qur'an and Islam are oppressive to women and there is no need to be more specific or to go into any detail about this because it is a self-evident, shared understanding of Islam.<sup>128</sup>

Puppinck importantly identifies that both *Dahlab* and *Lautsi* concern the display of religious symbols in schools and the impressionability of students in schools.<sup>129</sup> The Court

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<sup>124</sup> Cumper & Lewis, *supra* note 88, at 601.

<sup>125</sup> Kamal, *supra* note 18, at 674 (*citing Serif v. Greece*, 1999-IX Eur. Ct. H.R. 73, 88-89; *Agga v. Greece* (No. 2), Nos. 50776/99 and 52912/99, Eur. Ct. H.R. ¶ 56 (2002)).

<sup>126</sup> Bennoune, *supra* note 21, at 392.

<sup>127</sup> *Dahlab v. Switzerland*, no. 42393/98, Eur. Ct. H.R. ¶ 13-14.

<sup>128</sup> Danchin, *supra* note 20, at 80.

<sup>129</sup> Puppinck, *supra* note 119 at 885-86, 908.

stated that there was no violation of the students' external liberty or freedom of conscience by displaying a crucifix in *Lautsi* because it did not project elements of indoctrination, coercion or proselytism that forced students to act against their conscience.<sup>130</sup> But according to the Court, the *hijab* restriction in the *Dahlab* case (constituting an interference of individual freedom to manifest one's beliefs under Article 9) was in fact justified because the *hijab*'s proselytizing effect in an Italian school was incompatible in a "non-confessional education system."<sup>131</sup>

The interpretations of religious symbols in schools from these two cases are inconsistent and have yet to be rectified by the Court. The liberalist interpretation of the *hijab* as a tool of indoctrination in *Dahlab*, especially among young students, enforces the presumption that the Islamic veil is incompatible with secular democracy whereas displaying a crucifix in a public school in a majority Catholic country does not have the same coercive effect. The Court must interpret the right to manifest religion in a context-specific way by accounting for the socially constructed meanings of religious expression and its impact on sex equality in Europe. A postmodern and postcolonial feminist analysis may shift the jurisprudential direction on Islamic veil restrictions by granting more latitude to personal and individual religious convictions and their value in a pluralistic society.

Significantly, the Court defers to a state's margin of appreciation where religious dress-appearance restrictions are enforced through laws of general applicability and are not unjustly targeting a specific religion. A famous Article 9 case decided by the Strasbourg Court was *Şahin v. Turkey*, which held that a student's religious freedom was not violated by a university's ban on religious clothing on its campus.<sup>132</sup> The Court recognized that particular deference is granted to

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<sup>130</sup> *Id.* at 907.

<sup>131</sup> *Id.* at 906.

<sup>132</sup> *Leyla Şahin v. Turkey* [GC], no. 44774/98 Eur. Ct. H.R. ¶¶ 163-66 (2005). Available at <http://hudoc.echr.coe.int/eng?i=001-70956>.



states giving weight to democratic social values “[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.”<sup>133</sup>

The Court invoked the margin of appreciation in *Sahin* because there is no “European consensus on how to address the role of ostensible religious symbols or attire in public schools.”<sup>134</sup> Turkey argued, and the Court accepted, that that Turkey’s aim to uphold secularism in the face of “fundamentalist groups . . . targeting women’s dress in higher education as part of a project to undo secularism” by prohibiting the hijab in universities was “necessary to achieve a legitimate aim.”<sup>135</sup> The predominantly male panel in *Sahin* determined that the restriction was not considered discriminatory because it did not single out the Islamic veil but instead prohibited all clothing that symbolized religion or political ideology.<sup>136</sup> Even though Turkey relaxed its hijab restrictions in 2013 for civil society workers in order to encourage conservative women to seek public employment and education, understanding Turkey’s original motivation’s for its hijab ban is important to realize the broader consequences for veiled Muslim women living under a European secular governing structure.

The “hands off approach” to religious freedom used by the Court in deferring to the states’ margin of appreciation in these cases “contradicts the necessarily counter-majoritarian nature of human rights, particularly where protection of minorities is concerned.”<sup>137</sup> Secular neutrality and liberal democracy are still ill-defined concepts according to Stephanie Berry, legal

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<sup>133</sup> *Id.* at ¶ 109.

<sup>134</sup> Kamal, *supra* note 18, at 691.

<sup>135</sup> Bennoune, *supra* note 21, at 370-71.

<sup>136</sup> Kamal, *supra* note 18, at 692.

<sup>137</sup> Julie Maher, *SAS v France in Context: the Margin of Appreciation Doctrine and Protection of Minorities*, OXHRH BLOG, (July 18, 2014). Available at <http://humanrights.dev3.oneltd.eu/sas-v-france-in-context-the-margin-of-appreciation-doctrine-and-protection-of-minorities/>.

adviser for the applicant in *S.A.S.*,<sup>138</sup> who emphasizes that the wording of Article 9 distinctly indicates a right to freedom *of* religion or belief, not a right to freedom *from* religion or belief.<sup>139</sup>

Even where the Court may consider the specific social context and history of France, the Court must still ensure that religious minorities can exercise their religious freedom, especially where states like France justify dress-appearance restrictions on the concept of “living together” which is ultimately a policy of forced integration and assimilation of veiled Muslim women.<sup>140</sup>

### **C. Facially Neutral Dress-Appearance Restrictions and Their Disproportionate Impact on Veiled Muslim Women’s Freedom of Religion**

Sovereign states like France and Turkey maintain national cultures that are proactively sheltered from foreign influence, including religion.<sup>141</sup> Interestingly, the historical movement in Europe to create secular nation-states is “premised on distinctive “Protestant” conceptions of the autonomous individual, freedom, and religion.”<sup>142</sup> Danchin argues that the movement to de-politicize religion and emphasize freedom of conscience in the public sphere has shaped modern religious freedom jurisprudence of the European Court of Human Rights.<sup>143</sup> But the Court’s adjudication of claims of religious freedom violations does not prominently emphasize the role

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<sup>138</sup> *S.A.S. v. France*, no. 43835/11, Eur. Ct. H.R at ¶ 154. (It is significant to note the Strasbourg Court’s deference to the state’s margin of appreciation to create a policy banning the full face veil in public spaces. The Court specifically expressed its duty to exercise a degree of restraint in its review of Convention compliance where the justification for a state law regarding the requirements of a democratic society emerged from an assessment made by domestic policy-makers. By deferring to the state’s margin of appreciation in such a way, the Court found that the infringement of pluralism in France by the ban on expressing religious beliefs through dress-appearance (the Islamic full face veil) was outweighed by the state’s determination that it was an incompatible practice within French society).

<sup>139</sup> Stephanie Berry, *SAS v France: Does Anything Remain of the Right to Manifest Religion?*, BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, (July 2, 2014). Available at <http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/>.

<sup>140</sup> *Id.*

<sup>141</sup> Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT’L L. 1, 4 (2000).

<sup>142</sup> Danchin, *supra* note 20, at 76.

<sup>143</sup> *Id.*

of religion in the cultural and historical context of European secular society and Western Christianity.<sup>144</sup>

The European approach to religious freedom is constructed within an existing legal and political order arising out of Protestant Christian values from which states “sought to remake [religion] through the agency of the law” rather than eliminating religion from the public sphere.<sup>145</sup> But the European divide between the public and private spheres restricts the ability of a Muslim woman to veil and thus manifest her religious beliefs in the “secularly neutral” public sphere.<sup>146</sup> Additionally, these secularist values uphold a particular understanding of human rights and gender equality that preserves the distinction between the freedom to manifest religion and the freedom of conscience and religious belief.<sup>147</sup>

Unfortunately this bifurcation of spheres demonstrates that Muslim women cannot truly practice religion freely in European society because they are subject to gender norms and cultural expectations.<sup>148</sup> This is made clear in European countries, which view the *hijab* as unwelcome because it embodies unacceptable degradation and subordination of women in a free society.

Europe’s unique conception of secularism and its historical relationship to the values of Western Christianity is illustrated by the French concept of *laïcité* (secularism). The country’s historical political struggle against the French Catholic Church reinforces the essential French position that the Islamic veil is incompatible with republicanism because it symbolizes religious indoctrination and undermines the basic freedom of conscience.<sup>149</sup> What ultimately makes the Islamic veil incompatible with French secularism though, is the underlying principle that French

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<sup>144</sup> *Id.* at 78.

<sup>145</sup> *Id.* at 84.

<sup>146</sup> *Id.*

<sup>147</sup> Bennoune, *supra* note 21, at 375.

<sup>148</sup> Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 Mich. J. INT'L L. 1, 5-6 (2000) (See Rosemary J. Coombe, *Contingent Articulation: A Critical Cultural Studies of Law*, in LAW IN THE DOMAINS OF CULTURE 21, 25 (1998)).

<sup>149</sup> Laborde, *supra* note 105, at 353.

democracy is an “an inherently benevolent, progressive and emancipatory institution” that liberates citizens from the formidable social forms of oppression embodied in “civil society and in particular in traditional identities and religions.”<sup>150</sup> Many French feminists therefore believe that the Islamic veil represents a denial of individual dignity, “legitimizing the oppression of vulnerable individuals in the name of tradition, culture or religion.”<sup>151</sup>

In its *S.A.S* decision, the Strasbourg Court examined the legislative history of the full-face veil ban (Law no. 2010-1192), which demonstrated a targeted objective of the French parliament to eradicate the practice of the *niqab* in France.<sup>152</sup> A French parliamentary commission published a 2009 report criticizing the *niqab* as a contrary practice to Republican values, as incompatible with secularism, and as “a symbol of a form of subservience and, by its very existence, negated both the principle of gender equality and that of the equal dignity of human beings.”<sup>153</sup> The parliamentary report advocated for a *niqab* ban and for enacting “legislation guaranteeing the protection of women who were victims of duress, which would strengthen the position of public officials confronted with this phenomenon and curb such practices.”<sup>154</sup>

The Court noted an opinion issued by the the National Advisory Commission on Human Rights (*Commission nationale consultative des droits de l’homme – CNCDH*) in 2010 which discouraged any general or absolute laws banning the full face veil under the guise of maintaining public order which would stigmatize Muslims and negatively affect women who

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<sup>150</sup> *Id.* at 354.

<sup>151</sup> *Id.*

<sup>152</sup> *S.A.S. v. France*, no. 43835/11, Eur. Ct. H.R at ¶ 10 (The law criminalized forcing other individuals to conceal their faces by inserting the following into the French Criminal Code: “Any person who forces one or more other persons to conceal their face, by threat, duress, coercion, abuse of authority or of office, on account of their gender, shall be liable to imprisonment for one year and a fine of 30,000 euros. Where the offence is committed against a minor, such punishment shall be increased to two years’ imprisonment and a fine of 60,000 euros.”)

<sup>153</sup> *S.A.S. v. France*, no. 43835/11, Eur. Ct. H.R at ¶ 18.

<sup>154</sup> *Id.*

refused to remove their veils.<sup>155</sup> The CNCDH opinion “took the view, in particular, that the principle of secularism alone could not serve as a basis for such a general measure, since it was not for the State to determine whether or not a given matter fell within the realm of religion” and “emphasized the risk of stigmatising Muslims and pointed out that a general prohibition could be detrimental to women, in particular because those who were made to wear the full-face veil would additionally become deprived of access to public.”<sup>156</sup> But the Court did not find it significant that “the impugned ban mainly affects Muslim women who wish to wear the full-face veil” because the law was “not expressly based on the religious connotation of the clothing in question.”<sup>157</sup>

The *Conseil d’État* opined that it would be “impossible to recommend a ban on the full veil alone, as a garment representing values that were incompatible with those of the Republic, in that such a ban would be legally weak and difficult to apply in practice” under the principles of gender equality and personal freedom.<sup>158</sup> However, the *Conseil d’État* recommended that a more general legislation be enacted to restrict concealing the face in public based on public order considerations.<sup>159</sup> The legislative history demonstrates that although the law was written as an absolute ban on any concealment of the face in public, it was a targeted effort to cease the practice of the *niqab* by Muslim women in French territory as an unacceptable challenge to gender equality and secular neutrality.

The French law criminalizing the Islamic veil as a religious symbol by default criminalizes the manifestation of religion and has a particularly detrimental impact on Muslim

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at ¶ 151.

<sup>158</sup> *S.A.S. v. France*, no. 43835/11, Eur. Ct. H.R. at ¶ 22.

<sup>159</sup> *Id.* at ¶ 22-23.

women who choose not to conform to the ban and are thus confined to the private sphere.<sup>160</sup> Indeed, the French principle of *laïcité* ultimately implies a certain moral relativism and consequently a forced privatization of religion for veiled Muslim French nationals by the state through coercive dress-appearance restrictions. One can coherently argue that these liberal feminist restrictions amount to undue state infringement on a woman's freedom of religion and manifestation of belief. In the case of *S.A.S*, the universalist "liberation" of veiled Muslim women, justified by French *laïciste*, "unhelpfully dramatizes the stark choice faced by Muslim women: that between asserting their identity as women (against sexism and patriarchy) or as Muslims (against Western stereotypes and Islamophobia)."<sup>161</sup>

Contemporary postmodern and postcolonial theories identify the personal desires, religious beliefs, and even political statements women make by wearing the veil. These feminist theories, with their more complex approaches to the multifaceted identities of Muslim women, are better suited to overcome the "simple patterns of social domination that might, in the past, have justified paternalistic intervention in the interests of individual autonomy and emancipation."<sup>162</sup> Additionally, these theoretical dimensions may be more receptive to a multicultural approach in a democratic society which, if not embracing Muslim religion and culture, will certainly tolerate the different customs of veiling, because "tolerance demands that liberal cultures tolerate the existence of non-liberal cultures alongside their own culture."<sup>163</sup>

The Court's decision in *S.A.S* allowed the French government to segregate religious garb from the public sphere, in effect reducing the pluralistic composition of France's society and

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<sup>160</sup> Lucy Vickers, *Conform or be confined: S.A.S. v France*, OXHRH BLOG, (July 8, 2014). Available at <http://humanrights.dev3.oneltd.eu/conform-or-be-confined-s-a-s-v-france/>.

<sup>161</sup> Laborde, *supra* note 105, at 367.

<sup>162</sup> *Id.*

<sup>163</sup> Ziegler, *supra* note 54, at 264-65.

leaving the applicant's underlying claim without remedy.<sup>164</sup> Some states further restrict religious freedom from the public sphere "if it collides with the basic foundations of that given society, be that secularity, assimilation, or both."<sup>165</sup> The perception that Islam, especially in a women's rights context, is illiberal fuels arguments by liberal feminist scholars and academics that advocate interventionist approaches and undermine Muslim women's vision of progress within their own communities.<sup>166</sup>

The Court's analysis of religious dress restrictions' proportionality to the compelling interest of the state is critical where the evidence for undue state infringement on a woman's "knowing, informed, and un-coerced decision to wear her headscarf in the workplace" is strong and not counteracted by other factors including the employer's objectives and inherent job requirements of the employee.<sup>167</sup> If a woman has the ability to undercut the state's assertion that "wearing a headdress of this kind is a political symbol of female submission and therefore violates the religious and political neutrality required of all civil servants,"<sup>168</sup> she can bolster her claim of undue infringement on manifestation of belief. In a contextual approach, the female applicant should provide evidence of before the Court that answers the question "whether deployment of the symbol causes, magnifies, or otherwise constitutes discrimination against women in that particular locale."<sup>169</sup> But even so, as long as the Court maintains a purely liberalist perspective, it is unlikely to accept this type of claim by a Muslim female applicant. The liberalist approach comprises of a distinct intolerance toward certain overt practices of

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<sup>164</sup> Danchin, *supra* note 20, at 91.

<sup>165</sup> Ziegler, *supra* note 54, at 266.

<sup>166</sup> Choudhury, *supra* note 37, at 168.

<sup>167</sup> Bahia Tahzib-Lie, *Applying A Gender Perspective in the Area of the Right to Freedom of Religion or Belief*, 2000 B.Y.U. L. REV. 967, 978 (2000).

<sup>168</sup> *Id.* at 978.

<sup>169</sup> Bennoune, *supra* note 21, at 396-97.

religion and considers them to be extreme or oppressive. As such, this perspective fuels the position that gender equality can never be compatible with religious symbols like the veil.<sup>170</sup>

## V. CONCLUSION

European secular liberalism, as a governing framework, maintains the perception that the Islamic veil is a symbol that undermines democratic social values. It inherently contributes to the conflict between gender equality and religious freedom within human rights law. It fuels the liberal feminist “othering” of veiled Muslim women in Western countries and perpetuates the theory of false consciousness. The forced choice Muslim women make between gender equality and religious freedom is clearly insufficient to solve and implement the pluralistic rights of women in the twenty-first century.<sup>171</sup>

The Strasbourg Court’s Article 9 jurisprudence as applied to state regulations on the Islamic veil and as it stands now, “implies a strong possibility of over-identification with religion at the expense of (most relevantly, but not exclusively) gender.”<sup>172</sup> The Court does not discuss the effects of this kind of intersectionality in analyzing religious accommodations in European societies or even as a prevalent women’s issue. Without a critical analysis of gender and religious identities, the Court will never achieve a comprehensive legal understanding of how women, and especially Muslim women, practice and take ownership of their individual identities. Without a shift away from a liberal feminist theoretical structure that perpetuates existing stigmas, the Court will never provide appropriate remedies for institutionalized discrimination.

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<sup>170</sup> Madhavi Sunder, *Keeping Faith: Reconciling Women’s Human Rights and Religion*, in RELIGION AND HUMAN RIGHTS: AN INTRODUCTION 295 (John Witte, Jr. & M. Christian Green eds., 2012).

<sup>171</sup> *Id.* at 296.

<sup>172</sup> Anastasia Vakulenko, *Islamic Headscarves and the European Convention on Human Rights: An Intersectional Perspective*, 16 SOC. & LEGAL STUD. 2, 183, 191 (2007).



The Strasbourg Court must reconsider its approach to religious freedom jurisprudence to truly remedy claims of religious freedom violations. The Court's current neutral application of abstract international principles embodied in the European Convention have proven inadequate to remedy significant limitations on veiled Muslim women's autonomy and identity. The Court's absolutist approach to liberalism in international law through the margin of appreciation is more concerned with the sovereignty of states, procedural equality, and the maintenance of the public and private spheres than with substantive equality for religious observers and individual rights of citizens. At the very least, European states should be required under Article 9 to demonstrate that women have in fact been coerced to wear the Islamic veil, or to demonstrate that the choice to wear religious symbols has an imminently harmful impact on its democratic society before it enforces religious dress-appearance restrictions. This approach, using third wave postcolonial/postmodern feminist theory, would move beyond a mechanical application of the margin of appreciation into a socio-political and cultural discussion that seeks a more just outcome for veiled Muslim women, and all other spiritual women seeking to peacefully practice their faith identities in the public sphere.

The difference between liberal feminism and postcolonial/postmodern feminism lies in the assumptions about the legal system's application of international principles to gender equality and the Islamic veil. Liberal feminism assume that the law will achieve a neutral, impartial, and just outcome through a rational approach to clear violations of gender bias. However, it has been proven in many of the Strasbourg Court's religious dress-appearance restriction cases that the outcomes for veiled women are not in the truest sense of the word, just. The deference given to states that use biases, stereotypes, and political goals to target the Islamic

veil shrouded in neutrally worded statutes that prohibit all religious symbols in the public sphere has significant consequences for religious female identity in European society.

Although not completely without its own flaws, postmodern/postcolonial feminism accepts the Islamic veil as a manifestation of religious belief and means of worship instead of characterizing it as a one-dimensional symbol of patriarchal sexism. This school of feminism also recognizes the religious agency of veiled Muslim women, and considers the diverse socio-cultural contexts surrounding the debate over the veil.

The Strasbourg Court should recognize that its primary role is not to advance sovereign rights over individual human rights. As long as the Court upholds state bans on the Islamic veil, it continues to suggest that “women have only one way to exercise their rights correctly, and it regulates them accordingly.”<sup>173</sup> The one-dimensional operation of international law in the cases examined in this paper overshadows the complex and personal stories of veiled women by consistently embracing state narratives and priorities that marginalize the force of religion in its own societies in the lives of its citizens.

Challenging the Court’s normative application, and discriminatory outcomes, of Article 9 jurisprudence may provide an opportunity to strengthen and elevate diverse female voices, like those of veiled Muslim women, in the review of dress appearance restrictions. Challenging the Article 9 jurisprudence will help break the institutionalization of a harmful stereotype of the Islamic veil that relegates religious women to the corners of European society. Women who have made a conscious choice to wear the Islamic veil need governmental and judicial protection of their religious freedom and of the ability to embrace the dynamic aspects of their gender, religion, identity, and autonomy in a secular Western society. Without this protection, veiled women will continue to live under a restrictive form of governance - a discriminatory system of

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<sup>173</sup> Mancini, *supra* note 102, at 422.

governance that restricts the way they manifest their religious belief by covering their bodies in the public sphere.