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Islamic Headscarves: The Other-Religion Effect and Religious Literacy at the European Court of Human Rights

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ABSTRACT

Islamic headscarves continue to be one of the most controversial issues concerning Muslims across Europe. In order to analyse how the headscarf is evaluated through the prism of human rights values and moral principles in Europe, this article revisits some headscarf cases heard at the European Court of Human Rights (ECtHR). The weaknesses in the rulings have been widely examined but this article will focus on the religious individual, her agency, and the link between her and her associated group, which have been less discussed in the literature. The article highlights that the modern socio-political structure of the Council of Europe countries is strikingly different from that of their pre-modern counterparts. Thus, the contours of religious groups, the link between an individual and her associated group, and the positioning of various religious groups vis-a-vis the state require a set of approaches to a religious claim centred on the individual believer. This can be clearly observed in the theoretical underpinnings of the European Convention on Human Rights, which, however, are not pursued adequately in practice because the actual rulings not only involve logic but also include perception.

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Introduction

Court rulings often include significant explicit or implicit assertions about religion, religious symbols, and religious freedom. Since these assertions come with social, historical, and political underpinnings, legal formulas alone cannot adequately scrutinize them. Some scholars of religion have called for interdisciplinary discussions on the various contexts in which religious freedom is conceptualized and delivered.¹ This article hopes to contribute to these interdisciplinary discussions on religious freedom.

This contribution revisits the headscarf cases at the European Court of Human Rights (ECtHR) through *Dahlab v Switzerland* (2001), *Sahin v Turkey* (2005), *Kurtulmuş v Turkey* (2006), and *Ebrahimian v France* (2016). These cases provide a more comprehensive treatment of Islamic veiling² than do the rest of the Court's case law on the subject as

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¹See Sullivan et al., *Politics of Religious Freedom*; Sandberg et al., *Research Handbook*; Cranmer, et al., *Confluence of Law and Religion*.

²This article uses 'Islamic veil' as a general term referring to all kinds of Islamic modesty choices that Muslim women practise such as headscarves and face veils. The article refers to the particular items (headscarf or face veil) in their respective cases. The four main cases that the article examines involve the headscarf.

the applicants are adults³ and the pivotal focus in the decisions is the rights of others and the proper ordering of society – and thus, the perception of the headscarf by others.

The cases of *S.A.S v France* (2014), *Dakir v Belgium* (2017), *Belcacemi and Oussar v. Belgium* (2017), and *Lachiri v Belgium* (2018) also deal with adult applicants. However, the applicants in these cases were ‘ordinary citizens’;⁴ Lachiri was a civil party in a criminal case and the other applicants wore face veils in the street. As the ordinary citizens were not bound by a public duty of discretion in expressing their religious beliefs,⁵ they enjoyed a stricter proportionality review in their cases. In the cases of the face veil, the Court approved the general burqa ban by pointing out ‘the barrier raised against others by a veil concealing the face’.⁶ According to the Court, the face may play an important role in social communication, so concealing it might violate the minimum requirements of ‘living together’ in a society. On the other hand, the Court ruled in favour of Lachiri on the basis of her behaviour towards the judge and her decorum in the courtroom.⁷ So, wearing her religious clothing did not on its own constitute a sign of disrespect towards the court or danger to the order of the courtroom.

The question of whether or not the judgements in the aforementioned cases persuasively align with the main objectives of the European Convention on Human Rights (ECHR) is beyond the limits of the present article. This article highlights that the Court provided concrete reasons (namely, barrier and behaviour) relevant to the particular aspects of Article 9(2) in the cases of ordinary citizens, whereas what the headscarf represented was of the utmost importance in the decisions of *Dahlab v Switzerland*, *Sahin v Turkey*, *Kurtulmuş v Turkey*, and *Ebrahimian v France*. These decisions did not examine the interactions of the applicants with their fellow citizens or the conduct of the applicants with regard to the fundamental aims underpinning the principle of secularism. Rather, how the headscarf was interpreted as a religious symbol eventually determined whether the ban was ‘necessary in a democratic society’. In other words, while the concrete impact of the Islamic veil was at issue in the cases of the ordinary citizens, the mere existence of the headscarf itself remained the central theme in the second group. This article therefore examines them closely in order to discuss the ways in which a Muslim woman and her headscarf are assessed at the ECtHR.

Şahin, Dahlab, Kurtulmuş, and Ebrahimian all argued that their respective governments violated their rights to religious freedom as protected by Article 9 of the ECHR. Article 9 reads as follows:

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

³The following ECtHR cases involve pupils in middle and high school: *Doğru v France* (2008), *Köse and Others v Turkey* (2006), *Kervanci v. France* (2008), *Aktas, Bayrak, Gamaleddyn and Ghazal v France* (2009).

⁴*S.A.S v France*, para. 135.

⁵*Ibid.*; *Lachiri v Belgium*, para. 46; see Ringelheim, ‘Lachiri v. Belgium’.

⁶*S.A.S v France*, para 122. Similarly, the inadmissibility decision in *Al-Morsli v France* (2008) concerns only the physical entity of the headscarf in the context of identity checks.

⁷Kaushik, ‘Lachiri v Belgium’, 51.

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

Leyla Şahin was studying medicine at Istanbul University, where she was denied access to her classes and exams because she wore a headscarf.⁸ The second and third applicants were involved in public teaching. Lucia Dahlab, was a primary school teacher in Geneva, where she was allowed to teach wearing her headscarf for four years before she was dismissed.⁹ Sevgi Kurtulmuş was an associate professor at Istanbul University, where she was deemed to have resigned from her post due to the non-compliance of her headscarf with the dress code for public officials. Christiane Ebrahimian was a social worker in the psychiatric department of a public health establishment in Paris. Her contract was not renewed because she refused to stop wearing a headscarf. In all these cases, the Court's fundamental concern was how to balance the applicants' need to wear a headscarf and the rights and freedoms of others who were exposed to them.¹⁰ This concern is essential to promote a climate of pluralism and tolerance in the member states of the Council of Europe.

The Court's decisions relied on Article 9(2) of the ECHR and granted the states a wide margin of appreciation. In doing so, the court rulings reflected abstract concerns about underlying beliefs concerning Islamic clothing rather than providing concrete evidence of proselytism, incompatibility with neutral state conduct, or harm inflicted upon others. These weaknesses in the rulings have been extensively examined elsewhere by scholars of legal and religious studies.¹¹ This article will therefore focus on the religious individual, her agency, and the link between her and her associated group, which have been less discussed in the literature. This discussion raises the question of whether the ECtHR evaluates the contested practice of wearing a headscarf in these cases as an individual religious practice or simply regards veiling as a communicative symbol of a Muslim communal norm that can be either confirmed or subverted. In other words, can a Muslim woman stand in front of the Court as both authentically religious and independent of the totality of her associated religious group, and unconnected with social categories or even the judges' cognitive categories? These questions lead to the thorny issue of determining the religious authenticity of an individual's practices, commitments, and beliefs. To put it differently and more generally, this discussion touches on the fundamental issue of whether the ECHR protects individual religiosity that rises to a cogent, coherent, and important level or whether religious freedom is necessarily a group right in practice as opposed to the rights related to privacy and freedom of expression.

This article argues that the ECtHR cannot identify headscarf wearers as 'individuals' and so holds them responsible for the actions of fundamentalist religious movements as well as being associated with various negative potentials through the fixed category of the headscarf regarding proselytism, intolerance, and gender inequality. As Eva Brems's

⁸*Sahin v. Turkey*, para. 17.

⁹*Dahlab v Switzerland*, 7

¹⁰*Ebrahimian v France*, para. 52; *Dahlab v Switzerland*, 11; *Sahin v Turkey*, para. 115; *Kurtulmuş v Turkey*.

¹¹See, for example, Evans, 'Islamic Scarf'; Elver, *Headscarf Controversy*; Brems, 'Hidden under Headscarves?'; Vakulenko, 'Islamic Headscarves'; Evans and Petkoff, 'Separation of Convenience'; Bleiberg, 'Unveiling the Real Issue'; Mahmood and Danchin, 'Immunity or Regulation?'; Gunn, 'Religious Symbols in Public Schools'. See also Judge Tulken's dissenting opinion in *Sahin v Turkey* (2005). For a more conciliatory perspective, see Howard, *Law and the Wearing of Religious Symbols*; McGoldrick, *Human Rights*.

research on women and religion at the ECtHR shows, the applicants themselves are barely present in the Court's discourse in the headscarf cases; rather, their headscarves are personified to embody the fundamentalist threat.¹² The personified headscarf in the Court's reasoning erases the individual wearer and appears as a collective sign and communal norm that can be either confirmed or subverted. Thus, the Court disregards the applicants' actions and religious interpretations regarding the headscarf. Although the spirit of Article 9 of the ECHR is primarily and directly to protect individuals, the application of religious freedom and pertaining practical challenges divert the Court's attention from the individual to the body of her associated group. This article calls this diversion 'the other-religion effect', through which the individual is evaluated not solely on the basis of individual circumstances but with her associated group in the background.

This article presents its argument in two main sections. The first section, 'Dress as a way of being vs. dress as a boundary marker and symbol', highlights that, while clothing was a crucial tool by which to establish and reflect an individual's religious, social, and political rank and status in the pre-modern societies of Europe, no such sartorial regulations exist to mark out one group of people from others in modern societies, where each citizen is directly connected to the state with equal rights and responsibilities. Pointing out this absence of legal regulations and communal ordinances, the article discusses the differences between religious dress as a way of being and religious dress as a boundary marker and symbol. The second section, 'Personally-held ideas vs. individual interpretations of religious tenets and practices', discusses individual meanings associated with the headscarf and their implications in the ECtHR's jurisprudence. Carolyn Evans explains the widespread perception of the headscarf as follows:

Veils, it seems, are very revealing. As soon as a Muslim woman covers her head there are large numbers of people – from journalists to politicians, academics to talkback radio callers – who know exactly who she is and what she stands for.¹³

This section highlights that, contrary to this widespread perception, Muslim women display a wide range of approaches to veiling and stand for various and even contradictory positions.

Discussing the intersection between philosophy, law, and religion, Daniel Whistler and Daniel Hill state that there are two approaches to examining religious freedom in philosophy. On the one hand, the 'top down' approach applies preexisting philosophical frameworks to examine religious freedom; on the other, a 'bottom up' approach presents detailed and close analysis of the court cases themselves.¹⁴ In a similar vein, I use the 'bottom up' approach in order to get to the specificities of the legal reasoning and juxtapose the way in which religious ideas, norms, and practices are portrayed in the jurisprudence of the ECtHR and the presentation of these religious ideas, norms, and practices in other environments, such as the disciplines of anthropology and sociology.

¹²Brems, 'Hidden under Headscarves?', 19.

¹³Evans, 'Islamic Scarf', 52.

¹⁴Whistler and Hill, 'Philosophy, Law, and Religion'.

A Brief Overview of the Cases

Sahin v Turkey (2005)

According to the narrative of the ECtHR, the Turkish headscarf debate ‘concerned not just the question of individual liberty but also the political meaning of the Islamic headscarf.’¹⁵ Indeed, Turkish secularists regarded the headscarf as a threat to laicism in the belief that it was manipulated and used as a political tool by Islamists.¹⁶ While the headscarf was the banner of Islamism, the sight of bare-headed women was an essential part of Turkish modernity. When İhsan Doğramacı, the head of the Higher Educational Council, was questioned in 1987 regarding the meaning of ‘modern clothing’ mentioned in the campus regulations, he answered, ‘Go and look at Europe, whatever you see there is modern clothing.’¹⁷

In *Sahin v Turkey*, the government argued that the Islamic headscarf was a symbol frequently used by religious fundamentalists to achieve political objectives. In this context, the government saw the headscarf as a threat to the fundamental principles of secularism and the rights of women guaranteed by the laic republic.¹⁸ Students with beards and veils were banned in university premises as a preventative measure following complaints by students of pressure from their fellow students affiliated with fundamentalist religious movements in Istanbul University. In order to preserve the institution’s neutrality and the campus’s peaceful atmosphere, the university regulated the wearing of religious symbols.¹⁹

The Turkish Constitutional Court had previously ruled that allowing the headscarf would put pressure on students who preferred not to wear it. Those who chose not to dress according to religious codes could be looked down upon as irreligious. Allowing religious markers such as the headscarf would divide students along religious lines and erode the laïcité that was the true protector of individual conscience.²⁰ Thus, freedom for the headscarf would create compulsion, social cleavages, and an unmodern outlook. The decision became an important legal precedent for the cases that followed in Turkey²¹ and abroad.²²

On the other hand, Şahin stated that, being discerning adults, university students enjoyed full legal capacity and the ability to decide what was appropriate for themselves. Therefore, the accusation that her practice had threatened the rights and liberties of her fellow students by trying to influence them or by implying a lack of respect for their beliefs and practices was completely baseless. She highlighted that her practice was grounded on her choice inspired by her religious belief, which was safeguarded by pluralistic, liberal democracy as one of the most essential constitutional rights. All religions placed some restrictions as appropriate dress guidelines, but people were free to choose whether or not to comply with them. For Şahin, it was unreasonable to say that the mere

¹⁵*Sahin v Turkey*, para. 55.

¹⁶Öztiğ, ‘Turkish Constitutional Court’, 595.

¹⁷Quoted in Çınar, *Modernity, Islam and Secularism*, 81.

¹⁸*Sahin v Turkey*, para. 93.

¹⁹*Ibid.*, para. 90–96.

²⁰*Turkish Constitutional Court*, D. 7/3/1989 (1989).

²¹Note that the Constitutional Court of Turkey reversed this decision in 2014 with the Tuba Arslan decision. TCC 2014/256.

²²Elver, *Headscarf Controversy*, 18.

wearing of a headscarf contradicted the fundamental principle of equality between men and women.²³

Hilal Elver points out that the ECtHR's reasoning closely followed the rationale of the Turkish government.²⁴ According to the Court, the Turkish notion of secularism was in line with the values promoted by the ECHR that safeguarded gender equality and pluralism in a democratic society.²⁵ In this respect, the headscarf ban protected women from pressure to obey religious and societal rules in Turkey, a Muslim-majority country where Islamist political movements were on the rise.²⁶ The Court recalled that, although freedom of thought, conscience, and religion is an essential element in a democratic society as enshrined by Article 9 of the ECHR, it is not there only to protect believers but also to safeguard the rights of atheists, agnostics, sceptics, and the unconcerned. As pluralism is inextricably linked to democratic society, restrictions on freedom to manifest one's religion might be necessary to ensure a lawful social order in which everyone's beliefs are respected.²⁷

Citing *Dahlab v Switzerland*, the Court concluded that democratic states were entitled to place restrictions on the wearing of religious clothing if the aim of the restrictions was to protect the rights and freedoms of others, public order, and public safety.²⁸ In this context, preventative measures against certain fundamentalist religious movements to protect students from pressure from them did not constitute undue interference in contravention of Article 9 because the aim of such restrictions was to ensure gender equality and peaceful coexistence between students of various faiths and practices.²⁹ The headscarf ban was considered a proportional measure for the aim pursued by the state to protect everyone's rights in society.

Dahlab v Switzerland (2001)

In the case of Dahlab, the Swiss Federal Court ruled that her headscarf was a 'manifest religious attribute' with the potential to result in proselytism and conflict in the pluralistic school atmosphere. Dahlab's canton, Geneva, had adopted the implementation of separation between church and state, which created a distinctly secular ethos in the education system. Furthermore, the headscarf was incompatible not only with the secular nature of the state but also with the constitutional principle of gender equality in Swiss society.³⁰

The Geneva cantonal government dismissed Dahlab's case on the basis of denominational neutrality because her clothing, regardless of her intention, was, according to the government, a means of conveying a religious message. Even though there were no complaints about Dahlab from parents or pupils, the Swiss Federal Court concluded that the absence of complaints did not mean an absence of violation by her headscarf. Although Dahlab was never accused of proselytizing, the Swiss Federal Court was concerned that, if her pupils asked about her headscarf, she would have to state her beliefs in order to

²³*Sahin v Turkey*, para. 101.

²⁴Elver, *Headscarf Controversy*, 78.

²⁵*Sahin v Turkey*, para. 114.

²⁶Hoopes, 'Leyla Şahin v. Turkey', 722; Ringelheim, 'State Religious Neutrality', 38.

²⁷*Sahin v Turkey*, para. 115.

²⁸*Ibid.*, para. 111; *Dahlab v Switzerland*, 27.

²⁹*Sahin v Turkey*, para. 111–15.

³⁰*Dahlab v Switzerland*, 6–7.

answer their questions properly without evading the issue. According to the Swiss Federal Court, Dahlab's religious freedom had to be balanced against the broader public interest in the religious neutrality of schools; thus, Dahlab's interest in fulfilling a religious duty had to be weighed against the interests of pupils and their parents in not being influenced or offended in their own beliefs.³¹

In contrast to the Swiss government, Dahlab argued that the secular nature of state schools meant that teaching had to be independent from any religious influence but that this did not necessarily prevent teachers from wearing religious clothing. She stated that she had taught for four years, during which her teaching never raised a problem between students, parents, and herself because her teaching was always secular in nature. Far from establishing that her clothing had an unacceptable impact on pupils, there were no complaints from students or parents against Dahlab.³²

The inadmissibility decision of the ECtHR confirmed the findings of the Swiss Court highlighting that wearing a headscarf might have a proselytizing effect and hence, that it undermined state neutrality in public education.³³ The Court also agreed with the Swiss Court that reconciling the headscarf with gender equality was difficult, given the fact that veiling was a precept laid down by the Qur'an.³⁴ In a nutshell, the Court delivered the Sahin and Dahlab decisions on the basis of three key elements that are attributed to wearing a headscarf: proselytism, gender inequality, and incompatibility with the secular nature of the state.³⁵ In doing so, the Court relied on its own interpretation of the headscarf without providing any evidence that Şahin's and Dahlab's own practices displayed such contrariety. The Court interpreted the meaning of the headscarf as follows:

... 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, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.³⁶

Kurtulmuş v Turkey (2006)

The Kurtulmuş decision expanded the scope for lawful interference in the right to wear the headscarf in the public education sector by including teaching at the level of higher education. As in the Şahin case, the Court highlighted that the principle of secularism was essential to the Turkish state. And as in the Dahlab case, the Court stated that the headscarf ban was intended to ensure neutrality in public services. According to the Court, Kurtulmuş's headscarf was an ostentatious expression of her religious beliefs and, therefore, contradicted the principle of secularism and its corollary, the principle of neutrality that the Turkish state espoused. In short, imperatives related to the principle of secularism and its corollary, the principle of neutrality, justified the ban in terms of the state's

³¹Ibid., 5.

³²Dahlab v Switzerland, 7–8, Evans, 'Islamic Scarf', 59.

³³McGoldrick, 'Muslim Veiling Controversies', 461.

³⁴Dahlab v Switzerland, 13.

³⁵Evans, 'Islamic Scarf', 62–9.

³⁶Dahlab v Switzerland, 13.

aim and proportionality.³⁷ On these grounds, the Article 9 aspect of Kurtulmuş's complaint was deemed manifestly ill-founded.

Ebrahimian v France (2016)

The Ebrahimian decision expanded the scope for lawful interference in the right to wear the headscarf by including all public sector workers.³⁸ The applicant emphasized that she had a simple headcovering, which was anodyne in appearance. She insisted that her headscarf alone did not amount to an act of proselytism. She submitted several reviews praising her professional skills by doctors in the same unit and argued that her practice did not cause any disruption in the workplace. She had not faced any problems during the course of her work with the patients.³⁹

The French Government, on the other hand, pointed out that some patients had refused to meet Ebrahimian because of her headscarf, which ultimately disrupted the work environment, creating problems for both Ebrahimian's colleagues and the patients in the unit.⁴⁰ More importantly, the Government emphasized that public employees had a professional duty of neutrality to ensure equal treatment of citizens, regardless of their convictions and beliefs. The French principle of state neutrality meant that.

the authorities and the public services must [not only] provide all the guarantees of neutrality; they must also give every appearance of that neutrality so that the user can be in no doubt of it. It follows that every employee of public service is subject to a particularly strict obligation of neutrality. (National Advisory Commission on Human Rights, Opinion on Secularism, Official Gazette no. 0235 of 9 October 2013)⁴¹

Furthermore, the state highlighted that, as patients were fragile and impressionable, their freedom of conscience needed protection by the state.⁴²

The Court ruled that the state's interference to ensure strict neutrality pursued the legitimate aim of protecting the rights and freedoms of others. The principle of neutrality imposed on Ebrahimian was all the more pressing in the context of the fragile and impressionable situation of the patients.⁴³ According to the Court, the interference was proportionate, given the ostentatious nature of the veil and the French concept of secularism in the public services.⁴⁴

Neutrality in Conduct vs Neutrality in Appearance

The removal of the headscarf was deemed proportional in the cases presented above because the pursued aim was to safeguard everyone's right to equal state services, regardless of their religion or gender. This aim to provide everyone with equal state service emerges in different forms of state neutrality. Julie Ringelheim explains that the Court's case law presents a fragmented and incoherent approach to the state's duty of

³⁷Kurtulmuş v Turkey.

³⁸Garahan, 'Right to Discriminate?', 352.

³⁹Ebrahimian v France, para 37.

⁴⁰Ibid., 44.

⁴¹Ibid., 25.

⁴²Ibid., 44.

⁴³Ibid., 61–4.

⁴⁴Ibid., 72.

religious neutrality in the public sphere. Three conceptions of neutrality appear within this approach: neutrality as the absence of state coercion, neutrality as the absence of state preference, and neutrality as the strict exclusion of religion from the public sphere. While the first two types of neutrality are imposed on states, the last model of neutrality, which leads to the ultimate judgements in the cases in this article, is permitted to be adopted by states. Thus, states enjoy a wide margin of appreciation if they prefer strict neutrality in state institutions and exclude religion therefrom.⁴⁵

In the cases in question, the principle of strict neutrality espoused by the Turkish and French states and the Geneva canton requires state agents and students to be neutral not only in their conduct but also in their appearance in public institutions. The Court's assessment of proportionality in these decisions does not appear to be well-founded, as the notion of strict neutrality removes the headscarf simply for being religious without demonstrating the causal link between wearing a headscarf and violation of the rights of others in the context of the cases. To put it differently, in this reasoning, the headscarf possesses certain fixed meanings and various potentials that render it self-evidently incompatible with the values underpinning the principle of secularism that states pursue. Within this reasoning, whoever wears a headscarf is associated with a certain category and hence creates a divisive threat to peaceful coexistence in society. As the Court cannot treat the practitioners as 'individuals', it holds them responsible for fundamentalist religious movements' actions as well as various negative potentials, through the category of the headscarf, regarding proselytism, intolerance, and gender inequality.

The failure of the ECtHR is two-fold. First, the Court holds that the headscarf has a singular meaning; it articulated this singular meaning in Dahlab (cited above) which has informed the following cases. Second, the Court interprets the headscarf as a collective sign without examining the diverse meanings of individuals' religious practices and experiences. For example, some Muslim women describe their headscarf as a 'second skin'.⁴⁶ An individual's practice with regard to the headscarf does not have to be understood as a sign meant to communicate one's religiosity to others. The practice may be the means of both being and becoming a certain kind of person.⁴⁷ The wearing of the headscarf can become an integral part of the wearer's being rather than a sign intended to communicate a religious message.⁴⁸ In this context, the crucial question is whether the values underpinning the ECHR can allow states to impose neutrality in appearance or neutrality in conduct. Do we all have to look alike as state agents so that no one would feel threatened or doubt the equality of public services? Or do citizens all have to act neutrally in their official capacity? After all, is it even possible for all to look alike as state agents? For example, there are tensions related to racial differences across the countries of the Council of Europe. For instance, some civil rights organizations in France contend that racial profiling by the police causes systemic discrimination

⁴⁵Ringelheim, 'State Religious Neutrality', 32–3.

⁴⁶Mirza, 'Second Skin', 10.

⁴⁷Mahmood, 'Feminist Theory', 15.

⁴⁸Asad, 'Trying to Understand', 501. I should note that I cite Talal Asad and Saba Mahmood as I find that their accounts of how practices can be an integral part of the practitioner very illuminating. However, I do not agree with Asad's treatment of individuals in his narrative of 'discursive tradition'. While Asad's and Mahmood's seminal work on agency, religion, and the secular is a valuable scholarly contribution in many ways, I also find their analysis limited to a certain type of Muslim experience.

against black people and people of Arab descent.⁴⁹ The concept of strict neutrality in appearance would become distorted when confronting problems involving racial differences in state institutions. It is not the appearance but the actions of the state agent that should determine the quality of neutral state service. In short, it is crucial to distinguish between a religious item as a way of being and a religious item as a boundary marker and symbol. The following two sections will elaborate on these two points.

Dress as a Way of Being vs Dress as a Boundary Marker and Symbol

In pre-modern societies in Europe, clothing was a crucial tool by which to establish and reflect an individual's social and political rank and status. Various social distinctions were legally established by the use of colours, fabrics, and decorations that were permitted in various items of clothing.⁵⁰ In 1215, the Fourth Lateran Council stated that Muslims and Jews had to wear a visible marker to indicate their faith. The Council decreed that 'such Jews and Saracens of both sexes in every Christian province and at all times shall be marked off in the eyes of the public from other peoples through the character of their dress'.⁵¹ Throughout the medieval period, legal statutes were replete with such regulations and discussions on how minority faith groups would appear in public. Not only did the political power of majority religions regulate minority religious communities in order to consolidate their superiority, but also minority faith groups themselves delivered ordinances on dress codes in order to distinguish their community from the surrounding majority.⁵² Distinctive dress codes for clergy were also an important matter in pre-modern European societies. Protestant reformers criticized the dress codes of the Catholic Church and introduced different dress codes for their own clergy.⁵³

Similarly, until the Tanzimat reforms, the Ottoman Empire had rules for clothing distinction that separated the official from the subject classes and the various religious communities from one another. Daily street attire was regulated to affirm the superiority of Muslims in the order of the hierarchical millet system.⁵⁴ After the late fifteenth century, the obligation to dress in distinctive colours and wear particular head coverings became more apparent. Muslims were to wear yellow shoes, Armenians were assigned red; Greeks had to wear black head coverings and shoes, and Jews blue clothing, although implementation of the dress codes was not consistent from the rule of one sultan to another.⁵⁵

The classical secularization theory, as formulated by the founding fathers of sociology and followed by prominent sociologists until around the 1980s, posited the decline of religion in modernity. As scientific knowledge improved and industrialization accelerated, it was assumed that religion would lose force and currency, but the secularization theory lost its appeal as religions proved to be alive and well in modern societies.⁵⁶ Although religions did not disappear in the private and public realms, the structural

⁴⁹Ganley, 'Racial Profiling'.

⁵⁰Murdock, 'Dressed to Repress?', 180.

⁵¹Baumgarten, 'Minority Dress Codes', 289.

⁵²Ibid., 290–1.

⁵³Murdock, 'Dressed to Repress?', 180–93.

⁵⁴Quataert, 'Clothing Laws', 403–7.

⁵⁵Argit, 'Clothing Habits', 81.

⁵⁶See Gorski and Altınordu, 'After Secularization?'.

differentiation and emancipation of the secular spheres from traditional religious institutions remained intact in modern societies, separating them from the premodern ones.⁵⁷ Modern political institutions showcase different legitimizations of power, political actors, and dynamics, as well as patterns of relations between individuals and the state.

Studies on secularization derive their arguments from comparisons between two specified periods.⁵⁸ In contrast to pre-modern times, as explained above, each individual member of society in contemporary Turkey, France, or Switzerland is directly tied to the state on the basis of the fundamental notion of citizenship. There are no such sartorial regulations to demarcate religious/legal communities that could constitute subunits in the political order, nor do legally recognized hierarchical distinctions based on clothing exist. Whereas an item of clothing worn by a Muslim or Christian in pre-modern European societies had a representative communal meaning on top of other layers of its meaning, there is, in the cases cited in the present article, only individual choice, practice and context. The individual's headscarf does not have a representative communal or hierarchical connotation. Although the applicants explain that they are meeting a qur'anic requirement, they certainly do not conform to any communal ordinances the like of which can be found abundantly in pre-modern societies. Muslim individuals, whether members of the European minorities or of the Turkish majority,⁵⁹ are politically tied to each other via their citizenship. Two hijabi women in the same university classroom might not have the same religious or political ideals; they might not be even friends. While they may or may not have closer social ties, they certainly do not belong to a political subunit simply by virtue of being Muslim hijabis. In short, given the absence of communal ordinances, what the wearing of the headscarf signifies in the light of the qur'anic precept depends on the individual's thought processes.

Because of the qur'anic precept on correct clothing, the agency of a Muslim woman is often denied, or at best she is described in the popular perception as complying with wearing the headscarf. Common stereotypes paradoxically portray veiled Muslim women as both victims of patriarchy and an aggressive threat to liberal democracies.⁶⁰ However, the agency and thought processes of a Muslim woman should be analysed within the context and influence of communal ordinances rather than by magnifying the requirement aspect of the qur'anic instruction. When there is no single authoritative exegesis of the qur'anic guidance, the meaning of the headscarf is constructed through individual thought processes, which makes it impossible to speak of 'Muslim women' as an inextricable plurality in modern societies. The religious symbolism of the headscarf and alleged self-evident proselytism that comes along with it should be examined against this backdrop.

The ECtHR bodies have described the headscarf as a 'symbol', 'a powerful external symbol', and 'a conspicuous religious symbol'.⁶¹ In this respect, the headscarf is seen as 'a manifest religious attribute', which reads the practice of veiling as a way of

⁵⁷Casanova, *Public Religions*, 212.

⁵⁸Ertit, *Endişeli muhafazakarlar çağı*, 101.

⁵⁹For a similar discussion of accommodation of American Muslim individuals, see Moore, 'Visible through the Veil'.

⁶⁰Malik, 'Complex Equality', 129; Brems, 'Hidden under Headscarves?', 1.

⁶¹*Karaduman v Turkey*, 108; *Dahlab v Switzerland*, 2–13; *Sahin v Turkey*, para. 111; *Dogru v France*, para. 63–4; *Aktas, Bayrak, Gamaleddyn, and Ghazal v France*, 2.

communication rather than as an integral part of one's being.⁶² The Guide to Article 9 states that.

an individual who has made religion a central tenet of his or her life must, in principle, be able to communicate that belief to others, inter alia by wearing religious symbols and items of clothing. Wearing such a symbol or item of clothing as motivated by the person's faith and his or her desire to bear witness to that faith constitutes a manifestation of his or her religious belief, in the form of worship, practice and observance; it is therefore an action protected by Article 9(1).⁶³

However, according to the applicants, their wearing of the headscarf is not meant as a sign to communicate their religiosity to others. Following their conscience to wear it, the headscarf becomes an integral part of their being rather than a means of communicating a religious message.⁶⁴ As stated above, some wearers might even see their headscarf as a 'second skin'.⁶⁵

In *The Manual on the Wearing of Religious Symbols in Public Areas*, Malcolm Evans states that 'the real significance of something being a religious symbol lies in the response of others to that symbol'.⁶⁶ Thus, the Court also has to assess the impact of religious symbols on others who are not believers. For example, in Şahin's case, the headscarf is associated with fundamentalist movements. Whether Şahin herself is involved in such a movement is not significant; it is how others may understand Şahin's headscarf that is the main reason behind the rationale for the state's ban. So, Evans suggests that the question we need to consider is not 'what is a religious symbol' but 'what is understood to be religiously symbolic'.⁶⁷ Although protecting the rights of individuals exposed to religion is congruent with Article 9, delivering a judgement based on perceived threats and fixed meanings of the headscarf indicates religious illiteracy on the part of the Court, and results in the other-religion effect, which emphasizes that the Court's reasoning cannot distinguish a particular Muslim woman from the next Muslim woman or man. The personified headscarf without the actual wearer can only appear as a collective symbol that represents all Muslims in the perception of others. Even if this perception might correspond to how some actual Muslims may understand the headscarf, building a reasoning based on this perception resembles accusing an innocent individual of a burglary committed by someone else of the same race.⁶⁸

Religious items may embody various meanings. Religious items in public spaces significantly differ from religious items on individuals. For example, a cross on a school wall and a cross on a chain round someone's neck bear two distinct meanings, despite both being crosses. In the first case, the cross is displayed on a public building with state authorization and there is only one representative message that the state aims to deliver to people who see it. Although the intended message of the cross on the school wall may

⁶²Gürsel, 'Distinction', 380.

⁶³ECtHR, *Guide on Article 9*, 31–2.

⁶⁴Asad, 'Trying to Understand', 501.

⁶⁵Mirza, 'Second Skin', 10.

⁶⁶Evans, *Manual*, 67.

⁶⁷Ibid., 68.

⁶⁸In a similar vein, some scholars suggest that the state should respond appropriately, employing the criminal law where necessary, in order to protect women against violence and coercion rather than imposing a blanket ban on headscarves. Although some Muslim girls/women might experience violence or might be coerced by their male relatives into wearing the headscarf, a blanket ban would not solve the problem effectively but rather would oppress autonomous women who choose to wear it. See Malik, 'Complex Equality', 143; Evans, 'Islamic Scarf', 73.

have one intended meaning, individuals who see it have their own personal engagement with the symbol. While the message may influence some students, others may not even recognize the message. In this context, although the cross on the school wall has passive proselytizing potential, it cannot be construed as an intrusive religious endorsement without accompanying further communication such as didactic speech or participation in religious activities. In active proselytizing, symbols and people are not left alone since people may not interact with the symbols at all, let alone receive the intended message. Thus, for there to be active proselytizing there must be an intervention to make sure that people are in a guided communication with the symbols and their religious meanings.

Whereas all crosses on school walls displayed by the same authority have the same meaning, crosses worn round the neck have different individual meanings as they are worn by individual choice rather than imposed by an authority. In short, in contrast to the passive proselytizing nature of the cross on the school wall, the individual who wears a cross round her neck has to explain its meaning in order to transmit her message, which can only be done through active communication, expanding on and teaching the meaning of the symbol. In other words, while the government display of a cross involves power relations between the symbol and those who are exposed to it, the individual display of such a symbol does not create similar power relations and so the latter does not have the same passive potential to proselytize as the former.

In contrast to the discussion above, the ECtHR described the individuals' headscarf as a 'powerful external symbol', while it characterized the government display of cross in Italian public schools a 'passive symbol'.⁶⁹ While the mere existence of the headscarf was deemed to create the threat of proselytism, the lack of further evidence in the *Lautsi* case proved that children were not under unacceptable influence because of the mere existence of a religious symbol.⁷⁰ Furthermore, in the case of *Lautsi and Others v Italy*, the Italian state argued that the cross symbolized a democratic heritage and human rights culture. As the cross was compatible with the historical development of the secular state, its existence did not contradict the state's responsibility to be neutral and pluralistic.⁷¹ The Court's final reasoning in the *Lautsi* case appears to uphold the arguments of the Italian state. Thus, juxtaposing the Court's reasonings in *Lautsi and Others v Italy* and the headscarf cases of this article, one can conclude that, while the cross is able to blend in with 'the secular', the headscarf stands out as an intolerant religious symbol that is incompatible with 'the secular'. Yet, there is no logical explanation for this discrepancy other than historical contingencies.

Personally-held Ideas vs Individual Interpretations of Religious Tenets and Practices

Various sociological and anthropological studies reveal that Muslim women who prefer to wear an Islamic veil display a broad spectrum of social and political attitudes.⁷² While some European veiled Muslim women see themselves as 'new

⁶⁹*Lautsi and Others v Italy*, para. 72.

⁷⁰Gunn, 'Religious Symbols', 113.

⁷¹*Lautsi and Others v Italy*; see the Administrative and Supreme Court's decisions quoted in para. 15–16 and para. 35–6, respectively.

Europeans',⁷³ others join ISIS, rejecting the European identity.⁷⁴ Some veiled women consider themselves 'feminists by default',⁷⁵ while some others frown upon feminism.⁷⁶ Muslim women have expressed emancipation by wearing the veil⁷⁷ as well as by removing it.⁷⁸ It may be secular or religious and may represent tradition or create resistance.⁷⁹ It appears in multiple forms and fashion choices ranging from full length black khimars to colourful scarves, from traditional styles and materials to popular ones.⁸⁰

A large body of literature on veiling demonstrates that various motivations for wearing a headscarf exist among Muslim women. While some wearers do so for theological reasons or seeking spiritual fulfilment, some others highlight public performance of their identity via the headscarf.⁸¹ Believers in the practice usually refer to Q 24.30–1, which instructs both men and women to dress and interact modestly.⁸² Alongside proponents of veiling, there are also some Muslims who believe that Islam does not require women to wear headscarves.⁸³ Putting aside the Islamic theological/communal discussions on veiling, one needs to focus on the fact that the individuals in the cases addressed here assumed the veil as an obligation of their faith; they saw it not as a sign intended to communicate something but as part of a way of being.

The task of the ECtHR with regard to Article 9 is to protect the conscience of religious individuals, not to determine or protect orthodoxy in a religion. At this point the thorny issue arises of determining the religious authenticity of an individual's practices, commitments and beliefs. This leads us to remember the fundamentals of the ECHR and reconsider whether the ECtHR should protect individual religiosity that rises to a cogent, coherent and important level or whether religious freedom is necessarily a group right in practice, unlike the rights related to privacy and freedom of expression protected under Articles 8 and 10 of the ECHR.

Early ECHR case law interpreted Article 9 as protecting only the freedom of thought, conscience, and religion of individuals. Since *X and Church of Scientology v Sweden* (1979), this position has been abandoned and it is now fully established that religious organizations are also protected under Article 9.⁸⁴ The Court states that '... the right of believers to freedom of religion, which includes the right to freedom to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary state intervention'.⁸⁵ However, the ultimate purpose of this protection of religious organizations is directed to the individual's right to manifest his/her religion in a community with others; religious groups are

⁷²For a short literature review, see Bhowon and Bundhoo, 'Perceptions and Reasons', 33–4. For other accounts, see Mahmood, *Politics of Piety*; Fernando, *Republic Unsettled*; Keaton, *Muslims Girls*; Abu Odeh, 'Post-Colonial Feminism'; Abu Lughod, 'Do Muslim Women?'; Hoodfar, 'The Veil'; Almila and Inglis, *Routledge International Handbook*.

⁷³Mirza, 'Second Skin'.

⁷⁴Peresin and Cervone, 'Western Muhajirat'.

⁷⁵Al Wazni, 'Muslim Women', 329.

⁷⁶Rinaldo, *Mobilizing Piety*, 79; Albayrak, 'Compressed Identity'.

⁷⁷For example, see the veil as a symbol of resistance in the Algerian war of independence in El Guindi, *Veil*. See also, hijab poetry in which veiled women share their experiences of hijab: Amer, *What is Veiling?*.

⁷⁸For example, see Huda Shaarawi's decision regarding hijab in Lanfranchi, *Casting off the Veil*; Amer, *What is Veiling?*, 177.

⁷⁹El Guindi, *Veil*, 172.

⁸⁰Almila, *Veiling in Fashion*, 27 and ch. 1; Okutan, *Türkiye'de popüler kültür*.

⁸¹See Bhowon and Bundhoo, 'Perceptions and Reasons', 33–4; Furseth, 'Hijab'.

⁸²Hidayatullah, 'Veil', 702.

⁸³For example, see Read and Bartkowski, 'To Veil or Not to Veil?', 400. See also Mernisi, *Veil and the Male Elite*, 75.

⁸⁴Evans, *Manual*, 31.

⁸⁵*Metropolitan Church of Bessarabia and Others v Moldova*, para. 118.

not protected because they are able to accumulate political leverage based on their size or through political patronage.⁸⁶

In this respect, the challenging task before the ECtHR is to draw the fine line between personally held ideas and individual interpretations of religion (or personal convictions that may amount to a religion). The Court does not protect personally held ideas under Article 9 as they are protected under other provisions of the ECHR, but its protection does encompass non-orthodox religious convictions under Article 9. Freedom of religion does not fall within the ambit of other human rights in the ECHR such as freedom of expression or privacy; in other words, freedom of religion or of any non-religious belief that may amount to a religious conviction is represented in a separate category of its own.⁸⁷ Although the Court has avoided defining what forms of belief could be regarded as religious in nature, it does specify that ‘views that attain a certain level of cogency, seriousness, cohesion and importance’ are to be protected within the scope of Article 9.⁸⁸

In the case of *Pretty v UK (2002)*, the Court rejected Pretty’s claim that her right to believe in assisted suicide was breached. The Court ruled that not every opinion or conviction constitutes a belief within the meaning of Article 9. Pretty’s belief in assisted suicide did not include elements of ‘worship, teaching, practice or observance’.⁸⁹ Malcolm Evans explains that, even if taken seriously, personally-held ideas fall outside of the ambit of Article 9. Although other provisions of the convention may safeguard these ideas, they do not qualify for the particular protection provided for the manifestation of religion or belief by Article 9.⁹⁰

The ECtHR held that not only personally held ideas but also practices influenced or motivated by religions were not protected under Article 9. Taking *Arrowsmith v UK* as a precedent,⁹¹ the Court employed the manifestation and necessity test in order to differentiate a necessary manifestation of religious belief from an act simply influenced or motivated by religious belief. As Carolyn Evans puts it, if an applicant wants her claim to be protected under Article 9, she has to show that her religion or belief compels her to live and act in a certain way.⁹² If the manifestation/necessity test is not passed, the religious freedom claim fails in Paragraph 1 of Article 9 without there even being an opportunity for it to be evaluated under Paragraph 2.

Having said that, Daniel Hill and Daniel Whistler argue that *Dahlab v Switzerland* marked a turn in the ECtHR’s case law on religious freedom as the Court bypassed the preliminaries of Article 9(1) and focused directly on weighing the Swiss Government’s aims against Dahlab’s rights. Later, with the landmark decision in *Sahin v*

⁸⁶I wish to highlight that the essential reason for the protection of religious organizations under the ECHR is to protect individuals, not for other political reasons such as a special agreement between a religious group and the state. In this context, religious groups do not indicate fixed political ties as individuals have free movement in and out of religious organizations, being members by choice. However, I have not referred to possible conflicts between an individual member and her religious organization – a complex subject that is beyond the scope of this article. Depending on the particularities of the cases, the ECtHR recognizes the organizational autonomy and the doctrinal independence of religious organizations when such conflicts occur. See Ferrari, Wonisch, and Medda-Windischer, ‘Tying the Knot’, 689.

⁸⁷See Evans, *Manual*, 284–5.

⁸⁸*Eweida and Others v United Kingdom*, para. 81.

⁸⁹*Pretty v UK*, para 82.

⁹⁰Evans, *Manual*, 11.

⁹¹*Arrowsmith v UK*, para 19.

⁹²Evans, *Freedom of Religion*, 115.

Turkey, this change in evaluating religious freedom claims was firmly established. Since *Sahin v Turkey*, the Court has abandoned differentiating between manifestation of religion and motivation by religion.⁹³ For example, in *Jokobski v Poland* (2012), which was brought by a Buddhist prisoner about a religious dietary restriction, the Court did not enter into in any discussion about religious requirement or engage in any scrutiny of the manifestation of Jokobski's religious belief. Instead, the Court simply stated that 'observing dietary rules can be considered a direct expression of beliefs in practice in the sense of Article 9'.⁹⁴ Thus, the Court did not discuss whether or not vegetarianism was a religious dietary prescription in Mahayana Buddhism. Nor did it discuss whether vegetarianism constituted a religious manifestation. This insider approach enabled the applicant's religious experience to be the sole interlocutor in the case.⁹⁵

Although in *Ewiada and Others v UK*, citing the *Arrowsmith* decision, the Court referred to what counts as manifestation of religion in order to answer the arguments of the UK Government, it nevertheless downplayed the manifestation tests and hurriedly delved into evaluating the case under Article 9(2).⁹⁶ The UK Government argued that only generally recognized forms of religious practice are to be protected under Article 9; personalized or idiosyncratic practices cannot be regarded as manifestations of religion within the scope of Article 9.⁹⁷ However, the Court rejected the government's arguments and acknowledged the applicant's individual practice. The Court ruling reads as follows:

Not every act, even cogent and important, constitutes a manifestation of a belief. In order to count as a 'manifestation' within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognized form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case.⁹⁸

As the ECtHR does not limit the protected manifestation of religion to widely acknowledged practices or religious requirements, one can clearly conclude that it is not the task of the Court to determine what counts as orthodoxy in a religion. What matters is whether there is a bona fide motivation to manifest any cogent and serious religious belief as well as whether there is an intimate link between acts/practices and religion/belief. The Court's ruling with regard to 'generally recognized forms of practice' also reinforces the fact that Article 9 mainly and directly requires protection of the individual.

Although the evolution of the ECtHR's jurisprudence on manifestation of and motivation by religion further prioritized the individual, the headscarf cases at issue here presented a paradox. On the one hand, the Court bypassed Article 9(1) and started with motivation and the link discussed above. On the other hand, the Court could not recognize the actual motivation of the individual applicants and the link that they produced

⁹³Hill and Whistler, *Right to Wear Religious Symbols*, 49–51.

⁹⁴*Jakobski v Poland*, para. 45.

⁹⁵Chaib, 'Religious Accommodation', 33.

⁹⁶Hill and Whistler, *Right to Wear Religious Symbols*, 107.

⁹⁷*Ibid.*, 67.

⁹⁸*Ewiada v UK* (2013), para. 82.

between their belief and their practice. While the Court's concentration on applicants at the outset of the judgements can be considered progressive, it did not thereafter pursue the possibilities correctly.⁹⁹ Along the same lines, Jill Marshall argues that, in contrast to the headscarf cases, personal autonomy has become increasingly prominent in other ECtHR cases, such as those based on Article 8.¹⁰⁰

In short, in light of the discussions above, and considering the diversity and complexity concerning the wearing of the headscarf as well as the importance of individual motivation and the intimate link between practice and religious belief, the headscarf rulings demonstrate undue dismissal of the individual, which is inconsistent with the essence of Article 9. The judges reveal a lack of ability to capture the intricacies of the applicants' lived religion and hence evaluate their religious practice on the basis of perceived meanings of the headscarf, which are held to be representative. Through reliance on these representative meanings, the applicants were associated with fundamentalist movements, proselytism, intolerance, threats to pluralism, and disrespect for gender equality, even though some popular arguments state that these negative characteristics cannot be attributed to the majority of Muslims. Whether or not these perceived meanings accurately represent the majority of the Muslims is not an issue for this article because it is not a legal matter in the human rights jurisprudence at the ECtHR. What this article highlights is that it is the Court's duty to recognize the individual, her subjectivity, and her religious motivations.

Conclusion

As shown above, the ECtHR provided a singular meaning for the headscarf in *Dahlab v Switzerland* and this abstract meaning shaped the later cases that have been examined in this article. This abstract characterization also informs the alleged intolerance demonstrated by the headscarf and its incompatibility with secularism. Such reasoning demonstrates that the Court treats the headscarf as a communal religious symbol and norm rather than as an individual religious practice of the applicants. Delivering a judgement based on perceived threats and fixed meanings of the headscarf indicates religious illiteracy on the part of the Court, resulting in the other-religion effect, which makes it difficult to focus on the individual and her circumstances. Anthropology and sociology of religion scholars could assist the Court in achieving better religious literacy.

The modern socio-political structure of the Council of Europe countries is strikingly different from their pre-modern political counterparts and so the contours of religious groups, the link between a religious individual and her associated group, and the positioning of various religious groups vis à vis the state require a set of approaches to a religious claim centred on the individual believer, which can be clearly observed in the theoretical underpinnings of the European Convention on religious freedom. However, these theoretical values underpinning the Convention are not pursued adequately in practice because the application of values in practice involves not only one's logic but also his/her perception.

⁹⁹Vakulenko, 'Islamic Headscarves', 190–6.

¹⁰⁰Marshall, 'Conditions for Freedom?.'

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