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At the Intersection of Law, Gender and Religion: Qualifying the Right to Manifest a Religious  
Belief

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## Abstract

The right to manifest a religious belief is enshrined in the European Convention on Human Rights and has been under some attack lately in a number of Contracting Party States. In response to increasingly visible religious pluralism, a number of States have created legislation which limits this right in certain instances through the criminalisation of religious manifestations.

This thesis considers the representation of women, their right to manifest their religious belief and inclusion in policy by the European Court of Human Rights (ECtHR), employing a doctrinal analysis within a law in context approach. It will therefore include extensive case law analysis of the jurisprudence of the ECtHR and examine the language, content and legal concepts integrated in the areas of religious manifestations and gender equality. It also draws on the quantitative and qualitative research that has been conducted by researchers across Europe who have evidenced that women are disproportionately affected by such bans and documents the experiences and motives of the women affected. Using intersectional feminism, feminist judging and gender mainstreaming as a form of critical scholarship it concludes that the bans are based on outsider experiences and views and proposes a more inclusive framework for qualifying the right to manifest a religious belief.

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**France**

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**United Kingdom**

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Equality Act 2010

**Sweden**

Govt. Bill 1993/94:147, Jämställdhetspolitiken: Delad makt – delat ansvar [Gender Equality Policy: Shared Power—Shared Responsibility]

Govt. Bill 2005/06:155, Makt att forma samhället och sitt eget liv - nya mål i jämställdhetspolitiken [The Power to Shape Society and Your Own Life: Towards New Gender Equality Policy Objectives]

# 1. Introduction

In the last two decades, public discussion on the role of religion in the public sphere has been spreading across a number of European countries. Recent data from the Pew Research Centre illustrate that this is because religious diversity within the continent is increasing, resulting in the increasing visibility of veiled women who practise the Islamic faith.<sup>1</sup> As a result, there has been a disproportionate focus placed by the media, academic community and politicians on the practice of veiling. This is a practice adopted predominantly, but not exclusively, by Muslim women for a variety of cultural and religious reasons. Veiling practices include the covering of women's hair and bodies and, in more limited situations, the covering of women's faces. To illustrate the various symbols attributed to veiled women, I shall give a very recent example. In early 2016 the United Kingdom's Prime Minister announced a policy to introduce a £20m fund to educate Muslim women in the English language in order to tackle segregation and extremism.<sup>2</sup> He also announced that women who failed to learn English within 2 and a half years could face deportation. Major newspaper outlets printed this story often accompanied with stock photos of fully veiled Muslim women, thus feeding the stereotype that Muslim women are both victims of a special category, having been singled out for their inability to speak English. This is a problem which assumedly does not affect Muslim men and makes Muslim women the gateway to Islamic extremism. This feeds into the victim/perpetrator stereotype which will be discussed in more detail in the following chapter, but consists of the fact that Muslim women are considered to be both victims of gender oppression and perpetrators of proselytism.<sup>3</sup> Furthermore, the visibility of veiled women makes them easier to target as outsiders within European communities.<sup>4</sup>

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<sup>1</sup> Pewforum, 'The Future of World Religions: Population Growth Projections' (*Pew Research Centre* 2015) accessed 26 June

<sup>2</sup> BBC, 'Muslim Women's Segregation in UK Communities Must End- Cameron' (*BBC*, 2016) accessed 16 April

<sup>3</sup> C M Jacobsen and D Stenvoll, 'Muslim Women and Foreign Prostitutes: Victim Discourse, Subjectivity, and Governance' (2010) 17(3) *Social Politics: International Studies in Gender, State & Society* 270

<sup>4</sup> Haleh Afshar, 'Can I see your hair? Choice, agency and attitudes: the dilemma of faith and feminism for Muslim women who cover' (2008) 31(2) *Ethnic and Racial Studies* 411

This thesis is inspired by the case of *Leyla Sahin v Turkey*, which was heard in the Grand Chamber of the European Court of Human Rights (ECtHR) over a decade ago, but still holds importance today. *Sahin* questioned whether a ban on Islamic clothing practices, including the Islamic headscarf worn by Muslim women is a breach of international human rights law. In this case a young 25-year-old Turkish medical student who wore a headscarf challenged the prohibition of the religious practice in Turkish universities. The Court held that such a ban, while it did constitute an interference with the applicant's rights under the European Convention on Human Rights (henceforth 'ECHR' or 'Convention' rights), could still be justified by reference to, amongst other legitimate aims, the legitimate aim of gender equality. When I read this case, I found it counterintuitive that the language of gender equality and human rights, which usually respects the right to personal autonomy, was being used in a way which undermines them.

At first glance, the legal discourse centres on controversial topics such as the integration or assimilation of Muslim immigrants and its assumed causal link with Islamic extremism. However, a deeper examination shows that at the heart of the debate lie two important identifiers: gender and religion. Anastasia Vakulenko has written an excellent piece on intersectionality and veiling, in which she analyses the construction of the headscarf in three leading cases of the ECtHR, two admissibility opinions of the Chamber and one judgment deciding on the merits.<sup>6</sup> She concludes her article by stating that intersectionality is a productive way for the Court to reconceptualise the cases related to the headscarf. Although the Court no longer accepts gender equality as a justification for the right to manifest a religious belief, as a result of the case *SAS v France* where a young woman challenged France for criminalising the face veil, the Court did hold it to be justified under the principle of living together, despite the third party evidence put forward that highlighted the disproportionate effect this would have on Muslim women.

This thesis builds on Anastasia Vakulenko's analysis on intersectionality and the veil by critically engaging with the jurisprudence of the Court in more detail through placing it in its

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<sup>5</sup> *Sahin v Turkey* App no 44774/98 (ECtHR, 29 June 2004)

<sup>6</sup> Anastasia Vakulenko, 'Islamic Headscarves' and the European Convention On Human Rights: an Intersectional Perspective' (2007) 16(2) Social & Legal Studies 183

social and political context. It uses intersectionality to highlight that the way in which the Court has interpreted Article 9 ECHR, which sets out the right to religious freedom, has led to the double discrimination of Muslim women who are disproportionately affected. The thesis also uses gender mainstreaming and feminist judging as forms of critical scholarship in order to put forward a more inclusive framework for the right to manifest a religious belief.

## RESEARCH CONTEXT

Restrictions on religious freedom across Europe include preventing civil servants, school teachers and students from manifesting their religious belief.<sup>7</sup> The different types of veiling practises that have been restricted across Europe are the wearing of the headscarf and the wearing of the niqab. Both practices of Islamic veiling have been described as ‘identifiers’, since they signal belonging to the Islamic faith.<sup>8</sup> The diversity of veiling and the differing of interpretation as to whether it is a requirement within the Islamic faith was discussed in the case *Leyla Sahin v Turkey*, as Turkey put forward the argument that it was difficult for it to accommodate such religious practices:

“Turning to the applicant’s argument that the Koran imposed a duty to wear the Islamic headscarf, the Government argued, firstly, that religious duty and freedom were two different concepts that were not easily reconciled. The former notion required, by definition, submission to divine, immutable laws, while the notion of freedom presupposes that the individual enjoyed the widest possible ranges of opportunities and choices. As to the headscarf, the form it took for Muslim women varied according to the country and regime. The bandanna, which left the hair partly visible, was worn by modern women at funerals or by women at rural areas. The burqa (full veil covering the entire body and face) worn by Afghan women was an obligation imposed by the Taliban when in power and on the basis of their interpretation of Islam. The chador or abaya (a black veil which covered the entire body from head to ankles) was also worn in Arabic countries and Iran. It was difficult to reconcile all those different forms of dress derived from the same religious rule with the principle of neutrality in State education.”<sup>9</sup>

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<sup>7</sup> *SAS v. France*, App no. 43835/11 (ECtHR, 14 July 2015), *Sahin v Turkey* App no 44774/98 (ECtHR, 29 June 2004), *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011), *Dahlab v Switzerland* App No 2346/02 (ECtHR, 29 April 2002).

<sup>8</sup> Dominic McGoldrick, *Human Rights and Religion : the Islamic Headscarf Debate in Europe* (Hart Pub. 2006), 4

<sup>9</sup> paragraph 92



While it is true that there is a difference in opinion amongst Muslims as to whether veiling is an Islamic requirement, and if so, to what extent a Muslim woman should veil, it is important to note at this state that the legitimacy of such a precept should not be decided by the state. The Strasbourg Court has held in its case law that the interpretation of religious texts lies with the believer and not with the State. This was explained in the case of *Eweida v UK*<sup>10</sup>, where the ECtHR rejected the United Kingdom’s argument that only “an act of practice of a religion in a generally recognised form” would be protected under Article 9(2).<sup>11</sup> Instead the Court, relied on the test in *Cambell and Cosans v UK*<sup>12</sup> and held that in order to fall under the protection of Article 9(1) a religion has to attain a certain level of cogency, seriousness, cohesion and importance.”<sup>13</sup> Once this threshold is met, the State cannot assess the legitimacy of the manifestation of the religious belief as this would be a breach of the Contracting Party State’s neutrality. Instead the Strasbourg Court clarified that an act is considered a “manifestation” if it is “intimately linked to the religion or belief” in the sense that there is a “sufficiently close and direct nexus between the act and the underlying belief”.<sup>14</sup> They highlighted that the religious act should not be “remotely connected to a precept of faith” but it is immaterial whether the manifestation is mandatory or not by a religion or belief which falls under the protection of Article 9.<sup>15</sup>

One of the key dimensions in this research is the level of restrictions of religious manifestations which can be found across Europe. The countries which have the highest level of restriction on religious manifestation have the highest number of complaints under Article 9 ECHR. Both France and Turkey fall under what Sauer and Rosenberger call the established restrictive bans categories. Their research project, which was funded by the EU, classifies the restrictions on regulating Islamic veiling in three categories: ‘established restrictive bans’, ‘soft

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<sup>10</sup> *Eweida and others v the United Kingdom App No 48420/10, 59842/10, 51671/10 and 36516/10* (ECtHR, 15 January 2011)

<sup>11</sup> *Ibid.*

<sup>12</sup> *Campbell and Cosans v UK, App No 7511/76 and 7743/76* (ECtHR, 25 February 1982)

<sup>13</sup> *Ibid.* para. 36.

<sup>14</sup> *Eweida and others v the United Kingdom App No 48420/10, 59842/10, 51671/10 and 36516/10* (ECtHR, 15 January 2013), para. 82

<sup>15</sup> *Ibid.*

selective regulations’ and ‘no restrictive regulations.’<sup>16</sup> Established restrictive bans are countries which have a ban on a known religious practice, soft selective restrictions are countries which have regional restrictions and no restrictive restrictions are countries which have no current bans on religious manifestations.

Two further cases on the legitimacy of niqab bans have been communicated to the ECtHR in June and July of 2015.<sup>17</sup> It is important to note that current academic discussions on the rise of religion in Europe focus specifically on Islam and its seeming incompatibility with western values and, more specifically, with the value of gender equality.<sup>18</sup> The headscarf in

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<sup>16</sup> Sieglinde Rosenberger and Birgit Sauer, *Politics, religion and gender : framing and regulating veil* (Routledge 2010)

<sup>17</sup> *Belkacemi and Oussar v Belgium App no application No 37798/13 and Dakir v Belgium Application No 4619/12*

<sup>18</sup> Shahrough Akhavi, ‘Islam and the West in World History’ (2003) 24(3) *Third World Quarterly* 545 ;Aziza Al-Hibri, ‘Islam, Law and Custom: Redefining Muslim Women’s Rights’ (1997) 12(1) *American University International Law Review* 1 ;Alia Al-Saji, ‘The racialization of Muslim veils: A philosophical analysis’ 36(8) *Philosophy & Social Criticism* 875 ;Talal Asad, *Formations of the Secular : Christianity, Islam, Modernity* (Stanford University Press 2003) ;Michelle D. Byng, ‘Symbolically Muslim: Media, Hijab, and the West’ (2010) [2010] 36(1) *Critical Sociology* 109 ;Imen Gallala-Arndt, ‘The Islamic Headscarf: An Example of Surmountable Conflict between Shari’a and the Fundamental Principles of Europe’ (2006) 12(5) *European Law Journal* 593 ;Jacobsen and Stenvoll, ‘Muslim Women and Foreign Prostitutes: Victim Discourse, Subjectivity, and Governance’ (2010) 17(3) *Social Politics: International Studies in Gender, State & Society* 270 ;Y Jansen, ‘Postsecularism, piety and fanaticism: Reflections on Jürgen Habermas’ and Saba Mahmood’s critiques of secularism’ (2011) 37(9) *Philosophy & Social Criticism* 977 ;Cécile Laborde, *Critical republicanism : the hijab controversy and political philosophy* (Oxford University Press 2008) ;J Mabro and C F El-Solh, *Muslim Women’s Choices: Religious Belief and Social Reality* (Berg 1994) ;Jill Marshall, ‘Freedom of Religious Expression and Gender Equality: Sahin v Turkey’ (2006) 69(3) *The Modern Law Review* 452 ;Jill Marshall, ‘Conditions for Freedom - European Human Rights Law and the Islamic Headscarf Debate’ (2008) 30 *Hum Rts Q* 631 ;McGoldrick, *Human Rights and Religion : the Islamic Headscarf Debate in Europe* (Hart Pub. 2006) ;H Moghissi, ‘Islamic Feminism Revisited’ (2011) 31(1) *Comparative Studies of South Asia, Africa and the Middle East* 76 ;N Othman, *Citizenship Rights for Women in a Modern Islamic State* (Joanne R. Bauer and Daniel Bell eds, Cambridge University Press 1999) ;I Radacic, ‘Gender Equality Jurisprudence of the European Court of Human Rights’ (2008) 19(4) *European Journal of International Law* 841 ;Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford University Press 2004) ;O Roy, *Secularism confronts Islam* (Columbia University Press 2007) ;S Silvestri, ‘Faith intersections and Muslim women in the European microcosm: notes towards the study of non-organized Islam’ (2011) [Routledge] 34(7) *Ethnic and Racial Studies* 1230 ;Vakulenko, ‘‘Islamic Headscarves’ and the European Convention On Human Rights: an Intersectional Perspective’ (2007) 16(2) *Social & Legal Studies* 183 ;D M Varisco, ‘Marnia Lazreg: Questioning the veil: open letters to Muslim women’ (2012) [Springer Netherlands] 6(2) *Contemporary Islam* 215 ;Jenny B. White, *Islamist mobilization in Turkey : a study in vernacular politics* (University of Washington Press ; Chesham : Combined Academic 2002)

particular has been seen as an instrument of oppression of women by the West, most notably because it is enforced only on women and not on men. The issue of Islamic veiling restrictions has been subject to strong substantive human rights critique at both the domestic and international level. Some authors argue that the debates surrounding the bans are so heated because the manifestation represents the Islam Europe does not want to see. As explained by Amnesty International:

“In the last decade or so some stereotypical views on Muslims have been voiced by some political leaders and have been reflected in public opinion polls across Europe. In this discourse the establishment of Muslim places of worship and the wearing of religious and cultural symbols and dress are seen to illustrate “unwillingness by Muslims to integrate” or an intention to “impose values at odds with European identity”. On some occasions issues such as forced marriage, perceived as a Muslim practice, have similarly been cited to corroborate these ideas. At times public opinion and political parties do not distinguish between practices clearly violating human rights, such as forced marriage, and other practices relating to the exercise of freedom of expression and religion or belief, such as the choice to wear a headscarf or other forms of religious and cultural symbols and dress.”<sup>19</sup>

It is unsurprising therefore that across Europe, religious issues have taken centre stage in recent years. The wearing of the Islamic headscarf brings about many challenges because it is not solely seen as a manifestation of a religious obligation, but as an instrument of the oppression of women, a sign of religious extremism, a political symbol and as evidence of failed integration.

In the last few years, empirical research on the experiences of women who wear the headscarf and/or the niqab has been conducted by a number of researchers across Europe. This thesis bases its claims on a number of these studies which cover the following countries: Turkey, France, Belgium, Netherlands, Belgium, Germany and the United Kingdom. The case studies highlight the way in which women use the rhetoric of autonomy and choice to protect their right to wear their religious clothing, which is at odds with the legal discourse surrounding the bans. Indeed, the latter assert that the practice of veiling is synonymous with gender oppression and domination. In popular discourse, there is a paradigmatic image of

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<sup>19</sup> Amnesty international, 'Choice and Prejudice: Discrimination against Muslims in Europe' (*Amnesty International*, April 2012)11-12. <<http://www.amnesty.eu/en/news/statements-reports/council-of-europe/0609/#.VuEzdvmLSUk>> accessed 10 March 2016

oppressed Muslim women, who are penalised for failing to wear a headscarf in countries such as Iran, Saudi Arabia and Afghanistan. This is further highlighted by the fact that there is a strong patriarchal element in countries where women wear the headscarf. As highlighted by McGoldrick: “women veil because men in general and male religious leaders in particular tell them that they have to.”<sup>20</sup> The Muslim headscarf has become synonymous with the patriarchal symbol to identify and mark women and their bodies.<sup>21</sup> This is not the only connotation that the headscarf inspires within Western states. Academics such as Tahir Abbas find that “Muslim minorities in the West face a whole host of issues in relation to identity, the adaptation of religio-cultural norms and values, and issues of everyday citizenship.”<sup>22</sup> Furthermore, current literature specifies that in the Muslim headscarf in particular symbolises that Muslims “are a problematic minority refusing to integrate.”<sup>23</sup>

Many European states possess sizeable and increasing Muslim populations and what is considered integration differs in each European state depending on the communities’ origin, the existence of a colonial history, the existence of national churches, the existence of a state-church relationship, commitment to multiculturalism, national policies towards immigration and “the tone and language of public discourse.”<sup>24</sup> Therefore, there is a range of different policies used across Europe, most of which include a language criterion. As Schnapper puts it:

“Integration is foremost a value *per se*, insofar as it rests on the fundamentally democratic notion that, in spite of divergence of their beliefs and their experience and their allegiances, people who have respect for what is right and, in particular, for human rights can live in harmony.”<sup>25</sup>

According to certain commentators, despite the fact that it is the State’s responsibility to ensure that its nationals are sufficiently integrated socially, culturally and politically, Muslim

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<sup>20</sup> McGoldrick, *Human Rights and Religion : the Islamic Headscarf Debate in Europe* (Hart Pub. 2006), op.cit., page 13

<sup>21</sup> N J Hirschmann, ‘Western Feminism, Eastern Veiling, and the Question of Free Agency’ (1998) 5(3) *Constellations* 345, 354

<sup>22</sup> McGoldrick, *Human Rights and Religion : the Islamic Headscarf Debate in Europe* (Hart Pub. 2006)page 13

<sup>23</sup> Ibid.

<sup>24</sup> Ibid. page 18

<sup>25</sup> D Schnapper, ‘Muslim Communities, Ethnic Minorities and Citizens’ in B Lewis and D Schnapper (eds), *Muslims in Europe* (London, Pinter, 1994), 148-60, 159-60

communities must do more in order to contribute to their own integration.<sup>26</sup> From this perspective the headscarf does not only become a symbol of a religious manifestation, but also a symbol of the failure of integration.

Some observers point out that the headscarf is a visible manifestation of religious extremism and is associated with religious fundamentalism and proselytism.<sup>27</sup> It refers to a political context which can be traced back to colonialism, as certain Islamic states have seen the act of veiling as anti-colonial and anti-imperial. It has morphed from a mere religious symbol to a positive symbol of their Eastern values and cultural identity and, in the case of Iran, a protest against what they perceive as the ‘Western dolls’. The headscarf in Turkey is not only considered an article of faith, but a reflection of extreme Islamic ideology and politics which according to some has no place in the West.<sup>28</sup> As a result, an increasing number of European States see the restriction of religious manifestations as conducive to a liberal pluralistic society. However, rapid changes in law and policy are having a serious effect on women’s human right to practise and manifest their religious beliefs.

For the purpose of this thesis, the ‘headscarf’ referred to is not the same as *hijab*. The most widely accepted definition of *hijab* refers to the physical separation between men and women and focuses specifically on modesty and privacy between the two sexes.<sup>29</sup> Instead, the term ‘headscarf’ shall refer to a piece of clothing which covers the hair of a Muslim woman, and can be instantiated in a variety of different styles, shapes and colours. The headscarf can be accompanied by veiling which is much more extensive than a headscarf, covering not just the hair, but also some or most parts of the body. The most extensive form of veiling is the wearing

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<sup>26</sup> McGoldrick Ibid. page 18

<sup>27</sup> J Martínez-Torrón, ‘The (Un)protection of Individual Religious Identity in the Strasbourg Case Law’ (2012) 1(2) Oxford Journal of Law and Religion 363 ;R McCrea, ‘The Ban on the Veil and European Law’ (2013) 13(1) Human Rights Law Review 57 ;McGoldrick, *Human Rights and Religion : the Islamic Headscarf Debate in Europe* (Hart Pub. 2006) ;Michel Rosenfeld, *Can Constitutionalism, Secularism and Religion Be Reconciled in an Era of Globalization and Religious Revival Symposium: Constitutionalism and Secularism in an Age of Religious Revival: The Challenge of Global and Local Fundamentalisms: Introduction*, vol 30 (2008)

<sup>28</sup> M Sunder, ‘Piercing the Veil’ (2003) [The Yale Law Journal Company, Inc.] 112(6) The Yale Law Journal 1399

<sup>29</sup> Aziza Al-Hibri, ‘Who Defines Women's Rights? A Third World Woman's Response’ (1994) 2(1) Human Rights Brief 9

of a niqab, which is a multi-layered headscarf covering the female form completely, except for her hands and a slit for the eyes. Throughout the thesis there will be some differentiation between veiling in the form of a headscarf or through the wearing of a niqab.

## RESEARCH QUESTIONS

### **When can Article 9(2) be legitimately limited?**

In order to answer this research question, there will be assessment of the Court's Article 9(2) ECHR jurisprudence and an evaluation of its judgments in relation to the restrictions on the manifestation of religious beliefs. This thesis will consider the importance of religious pluralism and equality and unpack some of the intuitively held assumptions on the relationship between religious pluralism and individual religious freedoms. It will also build on the current literature on the margin of appreciation and question whether the Court's role needs to be reconsidered in light of the fact that the Court is routinely deferring to Member States in its Article 9 case law.<sup>30</sup>

The thesis suggests that it can be seriously argued that the repercussions of the approach taken by the Court have led to the weakening of the right to manifest a religious belief. This is because this qualified right can be limited provided that a Contracting Party State is able to minimally justify itself by using the argument according to which the practise goes against some communal interest. The overarching argument here is that the European human rights system fails insofar as it does not reconcile the right to freedom of religion and belief with the importance of pluralism, since one the former aimed primarily at individuals and the latter at

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<sup>30</sup> Aernot Nieuwenhuis, 'European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey, Decision of 29 June 2004, Application Number 44774/98' (2005) 1(03) *European Constitutional Law Review* (EuConst) 495 ;George Letsas, 'Two Concepts of the Margin of Appreciation' (2005) 26(4) *Oxford Journal of Legal Studies* 705 ;G Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case' (2013) 13(2) *Human Rights Law Review* 287 ;Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17(1) *European Law Journal* 80 ;ibid ;Letsas, 'Two Concepts of the Margin of Appreciation' (2005) 26(4) *Oxford Journal of Legal Studies* 705 ;Nieuwenhuis, 'European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey, Decision of 29 June 2004, Application Number 44774/98' (2005) 1(03) *European Constitutional Law Review* (EuConst) 495

groups.<sup>31</sup> Communal interests are important, but they cannot always take precedence over the right of the individual, especially if such precedence would contradict the equality jurisprudence of the ECHR and lead to the double discrimination of women. There needs to be a reconsideration of the balancing exercise employed by the Court with respect to the decisions made by Contracting Party States.

**To what extent has the Court’s justification of gender equality for limiting the right to manifest a religious belief led to the double discrimination of religious women?**

Chapter Two will highlight that the approach taken by the Court in its Article 9(2) jurisprudence relegates women to the private sphere. Through the evaluation of its case law on veiled women it will argue that the Court needs to be sensitive to intersectional identities when using gender equality as a legitimate justification for limiting a woman’s right to manifest her religious beliefs.

There will then be an evaluation of the Court’s equality jurisprudence which will argue that the Court has failed in its Article 9(2) jurisprudence to consider the intersectional identities of women. The main thrust of the argument is that the Court in its equality jurisprudence has stated that in order to ensure the advancement of equality Contracting Party States have to consider not only that those in similar situations should be treated alike, but individuals who are differently situated should have their differences recognised.<sup>32</sup> It is important to note that despite Article 14 being historically considered a weak right<sup>33</sup>, it has become increasingly more robust through the development of its jurisprudence in indirect

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<sup>31</sup> Aernot Nieuwenhuis, ‘The Concept of Pluralism in the case law of the ECtHR’ (2007) 3(03) *European Constitutional Law Review* 367 ;ibid 373

<sup>32</sup> See for example the case of *Thlimmenos v Greece App No 34369/9* (ECtHR, 6 April 2000). This case involved a Greek National who was refused a job as a chartered accountant due to his criminal conviction which he received for disobeying, on the basis of his religious belief, an order to wear a military uniform. The Commission held that there was a breach of Article 9 in conjunction with 14 as the right to freedom of discrimination does not only involve treating people in similar situations alike, but by also to treat people in different situations differently. Therefore, a person who has a criminal record for failing to wear a uniform as a result of their religious beliefs cannot be treated the same as an individual who has a criminal record for other serious crimes. This conviction does not imply that he is morally unfit to work as a chartered accountant.

<sup>33</sup> Rory O’Connell, ‘Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR’ (2009) 29(2) *Legal Studies* 211

discrimination, segregation, anti-stereotyping and in the recent case of *BS v Spain* its recognition of the vulnerability faced by women with intersecting identities.<sup>34</sup>

**To what extent can intersectional feminism and gender mainstreaming overcome the problem faced by religious women in Europe?**

The above question will provide the foundation for a more worked out theoretical approach which will be considered in Chapter Five. Both intersectionality and gender mainstreaming fit in the sphere of feminism, and the feminist metanarrative within my dissertation is based on two premises. Firstly, the argument that women are differently situated in relation to the limitation of manifesting religious beliefs does not mean that men are not affected by it, or that men don't wish to manifest their religious beliefs. This is incorrect, as evidenced by the number of cases where men have argued before the Court that their Article 9(2) has been disproportionately violated. The argument instead is that women are affected disproportionately, and in different ways, especially since evidence suggests that women are more likely to manifest their religious beliefs than men and women are evidenced to be more devout than men.<sup>35</sup> My second premise is that the management of plurality is gendered in terms of where women are located in the debate and is derived from the public-private dichotomy which has defined inter-state decision making and politics in liberal thought. When forced to make the decision between manifesting religious beliefs and remaining in the public sphere thousands of women may choose to remain in the private sphere and become disconnected from public life.

It is important to place these judgments within their context, which is why this thesis employs a doctrinal analysis within a law-in-context approach. As mentioned above, the

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<sup>34</sup> *BS v Spain App No 47159/08* (ECtHR, 24 July 2012)

<sup>35</sup> Casanova J, *Public Religions in the Modern World* (1 edn, Chicago University Press 1994), Davie G, *Religion in Modern Europe: A Memory Mutates* (1 edn, Oxford University Press 2000), Davie G, *Europe - the exceptional case : parameters of faith in the modern world* (Darton Longman & Todd 2002), Davie G, *the Sociology of Religion* (1 edn, Sage Publications 2007)



headscarf has been seen as an instrument of oppression of women by the West, most notably because it is a religious duty of women and not of men.<sup>36</sup>

## RESEARCH METHODS

The case law of the European Court of Human Rights is available online, through the HUDOC (Human rights Documents) database. This can be accessed through the Council of Europe website. Through HUDOC it is possible to search for cases against any selected country and/or any terms of interest. I searched for all cases written in the English language which allege a violation of Article 9(2). This search returned 69 court judgments. These 69 cases were all analysed, with special focus places on Islamic veil cases. I found it especially interesting that in all the Islamic veil cases, the State used the protection of gender equality as one of the 'legitimate' reasons for limiting the right to manifest a religious belief and more importantly in all the cases the applicant lost.

Although I had attended qualitative research methods courses during the course of my PhD, I did not find these very useful when it came to analysing cases. Academic literature on qualitative research focused more on research methods and its limitations than the way in which data should be analysed. However, I found from an epistemological perspective that the way in which the data is analysed and, more specifically, the person behind the analysis, can be just as important and indeed more interesting than the actual methods employed. Bearing this in mind, I intend in the next section to describe exactly how I analysed the law reports.

I interpreted the case law using intersectionality as a form of critical scholarship. In her analysis of feminist politics and anti-racist political action, Kimberlé Crenshaw explains that the experiences of black women are often erased within both feminist and antiracist theory.<sup>37</sup>

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<sup>36</sup> This was the legitimate justification proffered by Switzerland, which was accepted by the ECtHR in *Dahlab v Switzerland App No 2346/02 (ECtHR, 29 April 2002)*.

<sup>37</sup> Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241 ; Kimberlé Crenshaw, *Critical Race Theory: the Key Writings that Formed the Movement* (New Press 1995) ; Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1) *U Chi Legal F* 139 Patricia Hill Collins, *Black sexual politics: African Americans, gender, and the new racism* (Routledge 2004)

As a result, the double oppression experienced by black women remains undiscussed within both feminist and anti-racist theories and political organizations.<sup>38</sup> Crenshaw uses the example of violence against women to argue that relying on one identity category (such as gender) as the basis of analysis obscures the ways in which other identity markers (such as race) impact women's experiences of violence. Crenshaw proposes a theory of intersectionality to account for this complexity, explaining that it accounts for the interplay of identities at the intersections of race, sex, class, sexual orientation, or other characteristics.<sup>39</sup>

Intersectional feminism is not just a theoretical framework, but since its conception has been a political strategy created to make visible women who have been rendered invisible as a result of their multiple identities. It highlights the interaction of multiple identities and experiences of exclusion and subordination of women. Crucially, intersectional feminism recognises that anti-racism often fails to interrogate patriarchy and that feminism often reproduces racist practices.<sup>40</sup> This thesis will use intersectional feminism to highlight the double discrimination of women as a result of their multiple identities and will indicate in Chapter Two that there is in fact a problem in the way in which Article 9(2) jurisprudence is being dealt with in the ECtHR. A solution that I shall propose consists in claiming that judges should consider gender equality in a holistic manner which is sensitive to the intersectionality of women. Intersectional feminism is not only an unveiling exercise of the paternalism in the judicial reasoning of the ECtHR. Chapter Five will also examine intersectionality as a theoretical framework which could potentially overcome the problems faced by the current interpretation of Article 9(2).

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;Patricia Hill Collins, *Black feminist thought : knowledge, consciousness, and the politics of empowerment* (1st ed. edn, Routledge 1999) ;Patricia Hill Collins, *Fighting words : black women and the search for justice* (University of Minnesota Press 1998) ;Patricia Hill Collins, *Black feminist thought : knowledge, consciousness, and the politics of empowerment* (Unwin Hyman 1990)

<sup>38</sup> Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241 ;Crenshaw, *Critical Race Theory : the Key Writings that Formed the Movement* (New Press 1995) ;Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1) *U Chi Legal F* 139

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

## RESEARCH ETHICS

This research uses data that is in the public domain and as a result thereof raises few ethical issues as it was not necessary to anonymise data or gaining informed consent from the applicants. However, it is important to highlight the importance of interpreting the cases in a way in which is respectful of the lives and experiences of the applicants.

## CONTRIBUTION TO KNOWLEDGE

The current literature on the intersection of law and religion is very limited and focuses specifically on the compatibility of human rights and feminism with Islam.<sup>41</sup> It is important to note that literature which perceives non-western religion as antithetical to Western values can potentially justify not only the double oppression of women, but also double, or even quadruple oppression as a result of those women's ethnic background or sexuality.<sup>42</sup>

As mentioned earlier, this thesis builds on the work found in Anastasia Vakulenko's article on the legal construction of headscarves in the jurisprudence of the ECtHR using an intersectional perspective.<sup>43</sup> She considers that intersectionality is conducive to a rereading of the case law so that it is compatible with the gender equality argument used by the Court to justify headscarf bans. This thesis explores this in more depth and takes the argument a step forward, by arguing that intersectionality is to some extent already part of the jurisprudence of the ECtHR.

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<sup>41</sup> Al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights' (1997) 12(1) American University International Law Review 1 ;Othman, *Citizenship Rights for Women in a Modern Islamic State* (Bauer and Bell eds, Cambridge University Press 1999) ;Vakulenko, 'Islamic Headscarves' and the European Convention On Human Rights: an Intersectional Perspective' (2007) 16(2) *Social & Legal Studies* 183 ;Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19(4) *European Journal of International Law* 841 ;Laborde, *Critical republicanism : the hijab controversy and political philosophy* (Oxford University Press 2008) ;Al-Saji, 'The racialization of Muslim veils: A philosophical analysis' 36(8) *Philosophy & Social Criticism* 875 ;Moghissi, 'Islamic Feminism Revisited' (2011) 31(1) *Comparative Studies of South Asia, Africa and the Middle East* 76  
<sup>42</sup>M Rahman, 'Queer as Intersectionality: Theorizing Gay Muslim Identities' (2010) 44(5) *Sociology* 944 ;ibid

<sup>43</sup> Anastasia Vakulenko, 'Islamic dress in human rights jurisprudence and the surrounding debate [electronic resource] : a critical feminist analysis' (*University of Nottingham*, 2008)

## OVERVIEW OF CHAPTERS

The following chapter will locate this study within the broader context of the right to manifest a religious belief scholarship. It will highlight the problem by including a comprehensive analysis of the quantitative and qualitative studies that have been conducted on countries which ban manifestations of religious belief in order to provide support for the claim that women are disproportionately affected by such bans and document the experiences and motives of the women affected.

Chapter Three will include a doctrinal analysis of the case law of Article 9 and will critique the cases where the right to manifest a religious belief has been limited using gender equality as a justification. The chapter will also include a doctrinal analysis of the case law of Article 14 in order to argue that the way in which the Court has justified the breach to Article 9 runs counter to its gender equality jurisprudence.

Chapter Four will provide an analysis of the margin of appreciation doctrine. The purpose of this chapter is to evaluate, in the light of contemporary practices of the European Court of Human Rights, the current status of the margin of appreciation doctrine under international law. It addresses the role of judicial oversight and the degree of deference to standing state practices and questions whether the doctrine has been used correctly in the Court's Article 9(2) jurisprudence.

Chapter Five will introduce the theoretical framework. As already alluded to, intersectional feminism is a growing theoretical framework in socio legal studies and traces its roots to the work of Kimberle Crenshaw. Crenshaw's research in the U.S used this concept to highlight the interaction of multiple identities and experiences of exclusion and subordination of women. Crenshaw focused on how anti-racist and feminist critics often replicate the exclusion of other groups:

“The failure of feminism to interrogate race means that resistance strategies of feminism will often replicate and reinforce the subordination of people of colour, and

the failure of anti-racism to interrogate patriarchy means that anti-racism will frequently reproduce the subordination of women.”<sup>44</sup>

Thus, my starting point shall be Crenshaw’s contention that anti-racism often fails to interrogate patriarchy and that feminism often reproduces racist practices.<sup>45</sup> I have already insisted on the fact that intersectional feminism is simultaneously a theoretical framework and a political approach aiming at restoring visibility for women who, because of their multiple identities, have become invisible.<sup>46</sup> I will use intersectional feminism to highlight the double discrimination of women as a result of their multiple identities and to illustrate that there is in fact a problem in the way in which Article 9(2) jurisprudence is being dealt with in the ECtHR. A solution put forward is that judges should consider gender equality in a holistic manner which is sensitive to the intersectionality of women. I use intersectional feminism as an unveiling exercise in order to highlight the way in which outsider views have an impact on the jurisprudence of the Court.

The current literature on the intersection of law and religion is very brief and, as stated above, the authors confine themselves to the compatibility of human rights with Islam. However, some limited headway has been made when using intersectional feminism in examining the way the law has an effect on women from a certain religious background. For example, studies have been conducted in Canada with regard to religion, gender and family law<sup>47</sup>, where the author presents an empirical study of Jewish and Muslim women who seek divorce and highlights the struggle faced by women as a result of the complex relationships between the religious and civil spheres of divorce. The author in this study states that the legal system’s lack of knowledge of religious divorce resulted in men being able to utilise the civil and religious sphere to maximise their benefits, to the detriment of their wives and children.<sup>48</sup> Similarly, other studies suggest that the trend of politicians to equate religious insignia with

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<sup>44</sup> K Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43 Stanford Law Review 1241.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Pascale Fournier, ‘Calculating claims: Jewish and Muslim women navigating religion, economics and law in Canada’ (2012) 8(01) International Journal of Law in Context 47

<sup>48</sup> Ibid

religious fundamentalism and an inability to integrate is over-simplistic and needs to be pulled apart.<sup>49</sup> Furthermore, the literature which perceives non-western religion as antithetical to Western values can lead not only to the double oppression of women, but also to that of other minorities, such as religious homosexuals.<sup>50</sup> Therefore, it is important to widen our understanding of gender equality in order to take intersectionality into account. Likewise, it is important to go beyond feminism, which, at least in its traditional forms, was seen as “asking the woman question”, and to expose the institutionalised domination and oppression of minority women.<sup>51</sup>

One limitation which needs to be overcome within my thesis is that a number of feminist scholars have often assumed that religion is a social construct in which patriarchy is enforced. This often leads to the exclusion of religious women from forming part of the feminist “voice.” There is a small number of scholarship where religious women have attempted to reconcile their feminist beliefs with their religion but this discussion rarely makes its way into the mainstream narrative.<sup>52</sup> It needs to be noted that women with religious beliefs come from a wide range of different socio-cultural backgrounds and therefore a thematic framework of feminist religious, cultural and racial scholarship will be used to critically analyse the case law derived from the ECtHR and to establish whether their underlying assumptions is hindering legal development in the future.

Chapter Six will engage in the ‘real world’ exercise of judgment-writing, which takes into full account the various constraints placed on the judges of the ECtHR. As will be highlighted in the literature review section of the chapter, there are real methodological limitations when

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<sup>49</sup> Lila Abu-Lughod, ‘Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others’ (2002) 104(3) *American Anthropologist* 783

<sup>50</sup> Rahman, ‘Queer as Intersectionality: Theorizing Gay Muslim Identities’ (2010) 44(5) *Sociology* 944 ;*ibid*

<sup>51</sup> Rosemary Hunter, ‘The Power of Feminist Judgments?’ [Springer Netherlands] 20(2) *Fem Leg Stud* 135

<sup>52</sup> Othman, *Citizenship Rights for Women in a Modern Islamic State* (Bauer and Bell eds, Cambridge University Press 1999) ;Al-Hibri, ‘Who Defines Women’s Rights? A Third World Woman’s Response’ (1994) 2(1) *Human Rights Brief* 9 ;Jacobsen and Stenvoll, ‘Muslim Women and Foreign Prostitutes: Victim Discourse, Subjectivity, and Governance’ (2010) 17(3) *Social Politics: International Studies in Gender, State & Society* 270 Mary E. Hawkesworth, ‘Feminist Rhetoric: Discourses on the Male Monopoly of Thought’ [Sage Publications, Inc.] 16(3) *Political Theory* 444 ;Samia Bano and Jennifer L. Pierce, ‘Personal Narratives, Social Justice, and the Law’ (2013) 21(3) *Feminist Legal Studies* 225

it comes to the use of rewriting judgments as a critical tool. Be that as it may, it is important to note that these are offered in order to highlight an alternative to current dominant judicial reasoning, and, more specifically, a form of reasoning that is more inclusive of minority women. I will thus write a judgment within this dissertation to test in practice whether the current institutional structure is able to withstand a vigorous overhaul in the way in which minority religious women are represented in the law. As argued by Rosemary Hunter, the creator of the feminist judgments project, judgment-writing is premised on the proposition that, in many cases, the law is to some extent indeterminate. As a result, judges, and, more specifically, appellate judges or judges further up in the hierarchy of judicial institutions, have considerable scope to make choices between competing interpretations of the law.<sup>53</sup> The use of a feminist judgment is a form of critical scholarship which has flourished in recent years, precisely because it challenges the notion that “feminism in a judge is [...] evidence of judicial partiality and a threat to judicial independence.”<sup>54</sup> Building on the findings of Hunter McGlynn and Rackley, I will put forward the argument that it is important that all judgments incorporate feminist concerns in order to further advance gender equality. I shall also propose taking this argument one step forward, by arguing that all judgments should be intersectional in order to ensure that women are not facing multiple discriminations as a result of manifesting their religious beliefs. In so doing, I will put forward an intersectional framework to guide judgment-writing.

Chapter Seven includes an examination of gender mainstreaming within the ECHR. This is included in the thesis on the basis of a critique, inspired by the work of Carol Smart, which focuses on the need to overcome the Court’s shortcomings in its jurisprudence on the right to manifest one’s religion. Carol Smart indeed argues that solely using a human rights perspective leads to problems when using feminism as a critical tool.<sup>55</sup> This is because she considers it detrimental to demand rights

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<sup>53</sup> Rosemary Hunter, ‘Can feminist judges make a difference?’ (2008) 15(1/2) *International Journal of the Legal Profession* 7

<sup>54</sup> W Baker, ‘Women’s Diversity: Legal Practice and Legal Education- A View from the Bench’ (1996) 45 *University of New Brunswick Law Journal* 199,199

<sup>55</sup> Carol Smart, *Feminism and the power of law* (Routledge 1989), 135

“which are not intended (in an abstract sense) to create equal rights with men, but where the demand is for a ‘special’ right (e.g. women’s right to choose) for which there has been no masculine equivalent.”<sup>56</sup>

In this vein, the strategy of gender mainstreaming shall be considered, which has been described as being based on “the participation of women as decision makers”, thus resulting in women’s agendas being recognised. The premise is that “women participate in all development decisions and through this process bring about a fundamental change in the existing development paradigm.”<sup>57</sup> The Council of Europe has created an expert committee which deals with the rights of women: the Steering Committee for Equality between Women and Men (CDEG). It consists mainly of civil servants who work on gender equality in their domestic country. In 1995, the CDEG created a Group of Specialists on Gender Mainstreaming who defined mainstreaming as: “the (re) organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making.”<sup>58</sup> However, in Europe gender mainstreaming has mainly focused on reproductive gender bias and has not done much to tackle wider gender issues faced by women in Europe.<sup>59</sup> It has also presented gender mainstreaming as something optional, which Contracting Party can consent to or opt into only if they want to, and have failed to actively encourage States to take part in. Verloo in particular criticises it for being too “ambivalent” and failing to be critical.<sup>60</sup> Nonetheless, gender mainstreaming can be an important tool, since it allows to highlight and address gender differences. However, it is of vital importance that

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<sup>56</sup> Ibid, 139

<sup>57</sup> Jahan Rounaq, *The elusive agenda : mainstreaming women in development* (University Press 1995) 15 Council of Europe, Committee of Ministers. 1998. *Recommendation No. R (98) 14 of the Committee of Ministers to Member States on Gender Mainstreaming*. Adopted by the Committee of Ministers on 7 October 1998 at the 643<sup>rd</sup> Meeting of the Minister’s Deputies.

<sup>58</sup> Council of Europe, Committee of Ministers. 1998. *Recommendation No. R (98) 14 of the Committee of Ministers to Member States on Gender Mainstreaming*. Adopted by the Committee of Ministers on 7 October 1998 at the 643<sup>rd</sup> Meeting of the Minister’s Deputies. 15

<sup>59</sup> Mieke Verloo, ‘Displacement and Empowerment: Reflections on the Concept and Practice of the Council of Europe Approach to Gender Mainstreaming and Gender Equality’ (2005) 12(3) *Social Politics: International Studies in Gender, State & Society* 344, 361

<sup>60</sup> Ibid



the Council of Europe articulate more clearly the goal it seeks to achieve and the tools it should utilise to that end. A claim which will be considered is whether gender mainstreaming should be formally enforced upon all the Contracting Member States of the Council of Europe. The rationale for this is that states would be forced to reconsider their policy and laws on the manifestation of religion and the gender differences found therein. Thus, if all states reconsider the role of religion in the public sphere using an intersectional approach, Europe would come a step closer towards creating a legitimate pan-European consensus.

In the concluding Chapter I will summarise the research findings and consider what implications these have in this area of research. I will also include a section which critiques two cases in this area of scholarship, which are currently pending before the European Court on Human Rights, and discuss how the Court should approach them. Additionally, since the majority of scholarship in this area of law has, in the past, not been sensitive to the intersecting identities of the women who are affected the concluding chapter, I will also critique the relative strengths and limitations of the critical approach employed within this thesis. Finally, I conclude this thesis outlining my future research plans in this area.

## 2. Chapter Two: Context and Problem Overview

### INTRODUCTION

As mentioned in the introductory chapter, this thesis employs a doctrinal analysis within a law-in-context approach. This chapter provides the core context for the thesis. It will begin by discussing in detail the legal construction of the Islamic headscarf and situate it within its socio-political context. It will then provide an overview of the laws across a number of Contracting Party States which restrict practices involving wearing the Islamic veil and argue that a ban on religious manifestations undermines the gender equality goals these countries are allegedly trying to achieve. The chapter will argue in this direction without offering a fully comprehensive or exhaustive comparative analysis. This chapter will also include a literature review of the studies already conducted in this area, thus setting the scene for the following chapter, which will give a detailed analysis of Article 9 ECHR, which includes the right to manifest a religious belief and Article 14 ECHR, which sets out the right to non-discrimination.

Anastasia Vakulenko, whose paper on ‘Islamic Headscarves’ and the European Convention on Human Rights: An Intersectional Perspective’, as already observed, provided a major inspiration for the current thesis, opens her book *Islamic Veiling in Legal Discourse* with a contextual example.<sup>1</sup> In order to set the scene for her book, she reports a news story from 2010, when an ultra-Jewish community in Israel, decided to veil themselves in what was later described as the ‘Jewish burqa’ in order to advance the standards of modesty. Their spouses asked the rabbinical court to intervene, which subsequently decided that the practice was contrary to Judaism. Similarly, in her book *Do Muslim Women Really Need Saving*, Lila Abu Lughod, a Muslim anthropologist, contextualises her findings by discussing popular

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<sup>1</sup> Anastasia Vakulenko, *Islamic veiling in legal discourse* (Routledge 2012)

stories found in the media, such as Bibi Aysha, an Afghan woman whose Taliban husband and in-laws punished her by cutting off her nose, and whose picture was portrayed on the August 2010 cover of *Time* magazine.<sup>2</sup> By presenting this figure, Abu-Lughod considers the co-optation and manipulation of women's rights in the politics and justification of the War on Terror. Arguably, the use of the feminist vocabulary and grammar of "liberation" is an unfortunate appropriation or expropriation of the women's movement's well-intentioned ideals. In some sense it is. However, the academic feminist discourse on women from the Middle East has not effectuated an epistemological break away from the critique of religion paradigm. Instead, it has on the whole given greater credence to it and has sustained global feminism's portrayal of religion which rests of reductionism, reification, and the unending search for sensationalism.<sup>3</sup>

A considerable amount of the parliamentary debates which led to the restrictions on the right to manifest a religious belief was centred on the co-option of the gender equality movement. Some of this will be discussed in the following section.

#### OVERVIEW OF ISLAMIC VEILING RESTRICTIONS

In the history of developing human rights, the right to a religious belief has been considered to be one of the oldest rights enshrined in international law within Europe.<sup>4</sup> Nonetheless, it wasn't until 1993 that the first case in relation to Article 9(2) was heard by the ECtHR. This was arguably due to the fact that the right was sufficiently guaranteed within the constitutional legal framework of each of the Contracting Member States at the time.<sup>5</sup> Around the same time in the early 1990s, the act of wearing the headscarf was banned in schools across Turkey. This prohibition was followed by a similar ban on 'conspicuous religious signs' in France a decade later. As a highly visible religious sign, the wearing of the headscarf has been the subject of many disputes and debates across Europe. Consequently, and as a result of a

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<sup>2</sup> Abu-Lughod, 'Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others' (2002) 104(3) *American Anthropologist* 783

<sup>3</sup> Khaldoun Samman and Mazhar Al-Zo'by, *Islam and the Orientalist World-system* (Routledge 2008), 62

<sup>4</sup> L Gross, 'The Peace of Westphalia, 1648-1948' (1948) 42 *The American Journal of International Law* 20.

<sup>5</sup> *Kokkinakis v Greece App No 3/1992/348/421(ECtHR, 19 April 1993)*.

number of bans at state and regional levels, it has become a particularly contentious subject of legislation and litigation at both a national and at European level.

Since then, the debate over the headscarf has spread to also include the niqab, an Islamic form of veiling which also includes the covering of the face. Both France and Belgium have criminalised the face veil in what they define as the 'public sphere'. Public space as understood in the French and Belgian context has been defined as including any space outside the home, and despite devising a long list of exemptions, covering the face as a religious manifestation was not one of them.<sup>6</sup> A number of countries within Europe have introduced a regional ban and there is now a growing movement within a number of European countries towards a general ban on the face veil.<sup>7</sup> A research project funded by the EU and conducted by Rosenberger and Sauenberg classifies the restrictions on regulating Islamic clothing practices into three categories: 'established restrictive bans', 'soft selective regulations' and 'no restrictive regulations.'<sup>8</sup>

Another important element which was established in the significant research project conducted by Rosenberger and Sauenberg is that countries with strong equality legislation were less inclined to ban Islamic veiling practices, because such restrictive measures are viewed as an infringement on Muslim women's right to participate in the public sphere.<sup>9</sup> Rosenberger and Sauenberg use the example of the United Kingdom and the Netherlands at the turn of the century, whose antidiscrimination and equality commissions framed the headscarf and other forms of bodily coverings as an equal opportunity issue and hence supported Muslim women's right to wear these forms of garments.<sup>10</sup> However, Austria is an exception to this rule, insofar as anti-discrimination and gender equality have always taken a

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<sup>6</sup> Constitutional Council Decision of 7 October 2010, available at: [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/en2010\\_613dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en2010_613dc.pdf) [last accessed 01 February 2016]

<sup>7</sup> For a brief summary of a country by country situation, see Article 19, 'Legal Comment, Bans on the Full Face Veil and Human Rights, A Freedom of Expression Perspective' (Article 19, December 2010) <[www.article19.org/data/files/pdfs/publications/bans-on-the-full-face-veil-and-human-rights.pdf](http://www.article19.org/data/files/pdfs/publications/bans-on-the-full-face-veil-and-human-rights.pdf)> accessed 6 April 2016

<sup>8</sup> Rosenberger and Sauer, *Politics, religion and gender : framing and regulating veil* (Routledge 2010)

<sup>9</sup> Sieglinde Rosenberger; and Birgit Sauer, *Politics, religion and gender : framing and regulating veil* (Routledge 2010)

<sup>10</sup> Ibid

back seat; nevertheless, Austria has a tolerant approach to the accommodation of the Muslim headscarf.<sup>11</sup>

## EUROPEAN COURT ON HUMAN RIGHTS

The ruling in *Leyla Sahin v Turkey* is not the first ruling in relation to the headscarf, as there have been earlier cases in which the Court had concluded that the freedom to manifest a religious belief through the wearing of a headscarf can be limited. One example is the case of *Kalac v Turkey*<sup>12</sup>, in which the ECtHR held that the manifestation of religion of a public official can be legitimately limited, notably because it is incompatible with the functions that a public official should uphold. A public official according to the Court should be neutral when dealing with the public and should not publicly affiliate themselves to any particular religious belief. A similar ruling was held in the case of educators in primary school. Accordingly, in the case of *Dahlab v Switzerland*<sup>13</sup>, the Court upheld the Swiss ruling that a primary school teacher named Miss Lucia Dahlab should not wear the headscarf. According to Article 9(2) of the ECHR, state interference of the manifestation of religion can only be limited if when prescribed by law, pursues a legitimate aim and is necessary in a democratic society. The first two conditions weren't problematic, but the Court instead placed emphasis on the principle of proportionality. In so doing, it gave itself the power to judge the symbolic meaning of the headscarf and whether it was in harmony with the values of an educator. Accordingly, the Court held that the headscarf was "imposed on women" and, thus, that it becomes "difficult to reconcile the wearing of the Islamic headscarf with the message of tolerance, of respect for others and above all of equality and non-discrimination that, in a democratic society, every teacher must transmit to his or her pupils."<sup>14</sup> The Court did state, though, that this was not sufficient to limit the right of manifesting her religious beliefs, as there needs to be evidence of the head scarf having a "proselytizing effect".<sup>15</sup>

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<sup>11</sup> Ibid

<sup>12</sup> *Kalac v Turkey App No 20704/91 (ECtHR, 1 July 1997)*

<sup>13</sup> *Dahlab v Switzerland App No 2346/02 (ECtHR, 29 April 2002)*

<sup>14</sup> Ibid. at 463

<sup>15</sup> Ibid.

The Court held that the youth of the school pupils was an element to be taken particularly seriously in this case. In particular, the Court held that at their age they would be influenced by their school teacher. The Court's approach has been heavily criticised by a growing number of academics. Cumper and Lewis have helpfully broken down the criticism of the judgment into a number of distinctive points. Firstly, the Court heavily emphasised that the headscarf would have a proselytising effect, yet in the first four years during which Lucia Dahlab wore it no complaints had been made.<sup>16</sup> Secondly, Lucia Dahlab had no obvious political agenda and even the Swiss national courts held that she only wore the headscarf "in order to obey a religious precept."<sup>17</sup> According to Erica Howard, this shows that the court did not seriously investigate what the wearing of the headscarf meant to Lucia Dahlab personally.<sup>18</sup> This is an important factor in the case, as the Court did not research the impact and the value of the headscarf for the individual implicated; instead, it held certain assumptions which limited the personal autonomy of Lucia Dahlab and forced her to choose between her religious convictions and her job.

*Sahin v Turkey* and *Dahlab v Switzerland* are perfect examples of the way in which the Court tackles proselytism. A parallel can be drawn with the United Kingdom's Supreme Court decision in *R (on the application of Begum (Shabina)) v Denbigh High School Governors*<sup>19</sup>, which concerned a pupil at a secondary school in England who was refused to wear the jilbab in school, as the practice was contrary to a policy involving the school uniform. In this case, the school uniform policy did allow for the shalwar kameeze, a smock-like dress with trousers, with the headscarf. The case makes reference to the fact that the head teacher of Denbigh High School, herself a Muslim woman of Bengali descent, appointed a working party to re-examine the dress code. The school was extremely diverse, with a high number of Muslim, Sikh and

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<sup>16</sup> Peter Cumper and Tom Lewis, 'Taking Religion Seriously? Human Rights and Hijab in Europe- Some problems of Adjudication' (2008) [Journal of Law and Religion] 24(2) Journal of Law and Religion 599, 609

<sup>17</sup> *Dahlab v Switzerland* App No 42393/98 (ECtHR, 15<sup>th</sup> February 2001)

<sup>18</sup> E Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012), 60

<sup>19</sup> *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15

Hindu students, who Religious communities, faith leaders, teachers and the families of her pupils were consulted, all of whom were satisfied with the school uniform.

However, in her third year of secondary school, Shabina Begum entered puberty and decided that the school uniform was no longer appropriate. She, alongside her brother, argued that the salwar kameez was insufficient, as her interpretation of her faith made it mandatory for her to cover herself with a jilbab, a veil which is accompanied with a long loose garment which hides her silhouette. The Assistant Head teacher informed Miss Begum and her brother who was her litigation friend to return wearing the correct uniform. Subsequently, the head teacher wrote a letter addressed to Shabina's guardians explaining that the school uniform policy was created after the consultation of the local imams and the school's governors as the school strived to be as inclusive as possible. Nevertheless, Shabina refused to comply with the school uniform and alongside her brother who acted as her litigation friend, instituted judicial review proceedings against the school. Shabina sought a declaration that:

“She had been unlawfully excluded from the school since September 2002, contrary to sections 64-68 of the School Standards and Framework Act 1998 and/or section 52 of the Education Act 2002

She had been unlawfully demoed access to education in breach of Article 2 of Protocol 1 to the ECHR and section 6(1) of the Human Rights Act 1998

She had been unlawfully denied the right to manifest her religion in breach of Article 9 ECHR and section 6(1) HRA.”

These were all rejected by the High Court. Judge Bennet found that that she was not excluded as a result of her religious expression but because she did not comply with the school uniform.<sup>20</sup> He then moved on to argue that, whilst her right to manifest her religious belief had indeed been limited, there was no violation because the conditions of legitimate limitations under Article 9(2) were met. He reasoned that the school uniform policy was legal and that Shabina Begum was aware of it, as it was published on the school website. He also stressed that the policy pursued a legitimate aim consistently with the principle of proportionality:

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<sup>20</sup> Paragraph 74

"In my judgment the school uniform policy and its enforcement has, and continues to have, a legitimate aim and is proportionate. The legitimate aim was the proper running of a multi-cultural, multi-faith, secular school. The limitation was also proportionate to the legitimate aim pursued. The limitation was specifically devised with the advice of the Muslim community. Although it appears that there is a body of opinion within the Muslim faith that only the jilbab meets the requirements of its dress code there is also a body of opinion that the Shalwar Kameeze does as well. In my judgment, the adoption of the Shalwar Kameeze by the Defendant as the school uniform for Muslim (and other faiths) female pupils was and continues to be a reasoned, balanced, proportionate policy."<sup>21</sup>

Shabina appealed to the Court of Appeal and sought a declaration against the school on the basis of her unlawful exclusion and for breaching her right to an education and the right to manifest a religious belief. With regard to her right to education, the Court held the position that the school had in fact excluded her. Furthermore, the school failed to follow the correct statutory procedure that follows an exclusion, which in turn had an effect on Shabina's education. Secondly, the Court of Appeal held that there was no need to question the level of "cogency, seriousness, cohesion and importance" of Shabina Begum's minority belief within Islam. Instead it took this as a given, which meant that the school in turn had to justify the limitation it had placed on this freedom through its school uniform policy.

Moving on to the legitimate limitations to the right to manifest a religious belief, the Court held that the policy was in fact 'prescribed by law' in that the governors at the school had statutory powers to set the school uniform. Furthermore, the policy also met the requirements of having to be both clear and accessible in that the school uniform policy were readily available on the school website.<sup>22</sup> Judges then moved on to examine whether the measure had a legitimate aim and whether it passed the proportionality test. Firstly, the Court stressed the importance of contextualising in sensitive legal problems, they stated that they could not apply the same principles as those found in secular countries with a strong constitutional tradition as the United Kingdom is not a secular country and does not have a written constitution.<sup>23</sup>

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<sup>21</sup> *R (on the application of Begum (Shabina) v. The Head teacher and Governors of Denbigh High School* [2004] EWHC 1389 (Admin); [2004] *Education Law Reports* 274, QBD, paragraph 91

<sup>22</sup> *R (SB) v. Head teacher and Governors of Denbigh High School* [2005] EWCA Civ 199; [2005] *Education Law Reports* 19, paragraph 64

<sup>23</sup> Brooke LJ, *Ibid.* paragraph 49



The Court highlighted that the school argued Muslim and non-Muslim students had complained that the jilbab would be associated with Islamic extremism.<sup>24</sup> The Court did outline that the school should have considered the following criteria:

“Had the claimant established that she had a relevant Convention right which qualified for protection under Article 9(1) ECHR?

Subject to any justification that was established under Article 9(2) ECHR, had that Convention right been violated?

Was the interference with her Convention right prescribed by law in the Convention sense of that expression?

Did the interference have a legitimate aim?

What were the considerations that needed to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim?

Was the interference justified under Article 9(2) ECHR?”<sup>25</sup>

The school lost, because, according to Vakulenko, “it had approached the matter in this, pro-HRA way.”<sup>26</sup> The Court of Appeal was of the view that the school started with the premise that the school uniform is there to be obeyed, instead of attempting to justify its interference with the right to manifest a religious belief. The UK approach in this case provides an interesting contrast to the approach taken in both France and Turkey.

The Court of Appeal’s decision was later overturned by the House of Lords, who held that the interference with Shabina Begum’s right to manifest her religious belief under Article 9(2) was justified. The House of Lords was very critical of the Court of Appeal’s procedural approach:

“Quite apart from the fact that in my opinion the Court of Appeal would have failed the examination for giving the wrong answer to question 2, the whole approach seems to me a mistaken construction of article 9. In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But

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<sup>24</sup> Ibid. paragraph 51

<sup>25</sup> See Brooke LJ in *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15, para 75, as cited in Vakulenko, *Islamic veiling in legal discourse* (Routledge 2012), 27

<sup>26</sup> Ibid, 27

article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2? The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done. Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows. The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law.”<sup>27</sup>

The House of Lords criticised the formalistic approach of the Court of Appeal on the grounds that it wasn't a reasonable or convincing way of approaching the issue at hand. Instead, the focus should have been on whether the school uniform policy breached Shabina Begum's convention right. The Court referred to *Sahin v Turkey* and stated that the decision was best made at the local level, since local authorities were in the best position to navigate the right to manifest a religious belief and the school uniform policy. Furthermore, the House of Lords also held that the school was in the best position to consider to what extent the jilbab was a proselytising object. This was so especially in light of the fact that some students approached the school and argued that the dress was perceived to be a sign of a more extreme form of Islam. The Court further stated that:

“On the agreed facts, the school was in my opinion fully justified in acting as it did. It had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way. The rules laid down were as far from being mindless as uniform rules could ever be. The school had enjoyed a period of harmony and success to which the uniform policy was thought to contribute. On further enquiry it still appeared that the rules were acceptable to mainstream Muslim opinion. It was feared that acceding to the respondent's request would or might have significant adverse repercussions. It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision.”<sup>28</sup>

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<sup>27</sup>R (*Begum*) v *Governors of Denbigh High School* [2006] UKHL 15, Lord Hoffman, paragraph 56

<sup>28</sup>R (*Begum*) v *Governors of Denbigh High School* [2006] UKHL 15, paragraph 34

The Court also placed emphasis on the fact that Shabina Begum attended the school by choice despite being aware of the school uniform policy, a message reinforced by Lord Hoffman, who commented: “people sometimes have to suffer some inconvenience for their beliefs.”<sup>29</sup>

Baroness Hale had further considerations, including the right to gender equality when balanced with cultural diversity, autonomy and consent. She observed:

“Judge Tulkens, in *Sahin v Turkey*, at p46, draws the analogy with freedom of speech. The European Court of Human Rights has never accepted that interference with the right of freedom of expression is justified by the fact that the ideas expressed may offend someone. Likewise, the sight of a woman in full purdah may offend some people, and especially those western feminists who believe that it is a symbol of her oppression, but that could not be a good reason for prohibiting her from wearing it.”<sup>30</sup>

Three of the judges held that there was no interference with Article 9. Lord Nicholas and Baroness Hale dissented and argued that there was indeed interference with Article 9(2). They all agreed, though, that any interference was justified in that the school had a dress code after careful consideration, as they consulted local imams and parents and the decision was not arbitrary or unduly intolerant. Shabina Begum enrolled into school that did not enforce the same dress uniform policy.

It is clear that the starting point of the UK public authorities is that of the individual believer, whose values and beliefs were taken into consideration. Furthermore, as mentioned by McGoldrick: “the facts of the Begum case illustrates the lengths to which some schools and local education authorities in the UK have gone in pursuit of multiculturalism.”<sup>31</sup> As mentioned within this thesis, it is important for Courts to contextualise the legal problem within the wider socio-political landscape and to take the voice of the believer into account, which has happened in the case of *Begum*. It is important to distinguish the *Begum* case from

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<sup>29</sup> *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15 Lord Hoffman at paragraph 50.

<sup>30</sup> *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15 97-99

<sup>31</sup> McGoldrick, *Human Rights and Religion : the Islamic Headscarf Debate in Europe* (Hart Pub. 2006), page 190

that of the French and Turkish cases, in that the UK had managed to pass a judgment that is more culturally sensitive without accepting the concept of group rights which the French have rejected.<sup>32</sup> Furthermore, the dominant approach in the United Kingdom, when balancing public interests with the individual rights of the believer, is to take into consideration the views of the believer within the specific context of the situation.

Returning to the ECtHR, and the cases *Sahin v Turkey* and *Dahlab v Switzerland*, in comparison to *Begum*, the Court's definition of indoctrination is too broad. In *Sahin*, the act of wearing a headscarf is considered an attempt to indoctrinate others, despite the fact that it only involves adults interacting within an educational setting. Similarly, the approach in *Dahlab* is too wide, insofar as the Court does not clarify whether Lucia Dahlab's wearing of the headscarf in a primary school setting is considered an act of proselytism because of the age of her students, or whether this restriction would apply to older students. As outlined by Sylvia Langlaude: "The Court's position on the prevention of indoctrination and pressure is problematic for the individual believer. The absence of religious symbols or religious education may convey the idea that the school system is a bearer of majority values, such as Judeo-Christian ones, under the umbrella of impartiality."<sup>33</sup> I put forward the proposal that the ECtHR should have taken a similar approach to the UK House of Lords. Lady Hale and Lord Nichols accepted that despite the fact that the headscarf may be offensive to some commentators, this is not enough of a reason to ban it all together.

#### THE LAW IN CONTEXT

When the original judgment of *Leyla Sahin v Turkey* was delivered in 2005, the Court provided an examination of its previous jurisprudence. The most interesting of past cases examined is perhaps the *Dahlab v Switzerland* case, which was mentioned in the previous section.<sup>34</sup> As already observed, this case, unlike *Sahin*, involved a workplace employment situation with a primary school teacher wearing a headscarf in her state school teaching 5 year old pupils. The relevant Swiss ban on schoolteachers wearing religious symbols was upheld as

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<sup>32</sup> Ibid, page 204

<sup>33</sup> Sylvie Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR Shorter Articles, Comments, and Notes' (2006) 55 Int'l & Comp LQ 929, 933

<sup>34</sup> *Dahlab v Switzerland App No 2346/02 (ECtHR, 29 April 2002)*.

not violating the Convention. The Court had highlighted what they referred to as the potential proselytising effect of the Islamic headscarf. They found that wearing it ‘*was hard to square with*’ tolerance and pluralism.<sup>35</sup>

The *Sahin* Judgment was delivered after the 9/11 attacks in New York. In the summer of 2005 there had also been attacks on the London transport system with the death of 52 people and the injury of hundreds in the 7/7 bombings. There was a sense of a heightened atmosphere of disquiet in many quarters over the effects of the wars in Afghanistan and Iraq, an ever rumbling tension in the Middle East, and increasing numbers of refugees, asylum seekers and migrants into Europe. Riot fires were burning in Strasbourg when the Judgment was delivered, due to such unrest and racial conflict in France. Is this relevant and was this relevant to the Judgment delivered by the majority of the Court? In my view, the most relevant factor was that the country implicated was Turkey. Turkey has an overwhelming population of Muslims – about 99% of the population. Since the creation of the Republic, Turkey has sought to strictly separate public life from religion and is endowed with a Constitution that seeks to uphold equality between men and women and the secular nature of the Turkish state. Whilst Turkey has changed in many ways since 2005, including a reform which finally allowed the wearing of the Islamic headscarf on university campuses, the world we live in today is even more dangerous and difficult in terms of European responses to the conflicts, now much more widespread, within the Middle East and North Africa. Arguably, if there is any perceived link to Islamic fundamentalism, the Court is not likely to be particularly generous in any of its interpretations.

A more careful look at the context can be insightful here. Turkey has one of the lowest numbers of women in the workforce in comparison with mainland Europe with only 25% of women in employment as of 2006. 49% of these women work in agriculture in rural areas, 37.1% work in the service sector and 15% work in industry.<sup>36</sup> Many of these jobs are part time, temporary or seasonal and include no access to state benefits.<sup>37</sup> Certain claims have been

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<sup>35</sup> Ibid. at 463

<sup>36</sup> White, *Islamist mobilization in Turkey : a study in vernacular politics* (University of Washington Press ; Chesham : Combined Academic 2002) 29

<sup>37</sup> Fatma Nevra Seggie, *Religion and the State in Turkish Universities* (Palgrave MacMillan 2011)

made that the reason for such a low composition of women in the workforce is the result of the cultural structure of Turkey and more specifically the consequence of social norms to do with household and childcare duties. However, research on a national scale has proven this hypothesis to be incorrect.<sup>38</sup> Instead, it seems that one of the main reasons is to do with the headscarf ban in employment relations. Between 1998 and 2002 five thousand female civil servants were dismissed for wearing a headscarf to work without any offer of alternative employment. Moreover, this practice has spilled over to the private sector.<sup>39</sup>

As aforementioned, the ruling in *Leyla Sahin v Turkey* has led to women being unable to manifest their religious belief and enter higher education. In order to pursue an education, women have to make a choice between either pursuing an education or following religious doctrine. Notwithstanding the fact that violence against women can be found in all the Contracting Party States of the Council of Europe, in Turkey such violence is widespread despite women appearing to have equal legal rights with men. Furthermore, the issues in Turkey do not relate solely to that of gender, insofar as secular-oriented Turks consider themselves to be “liberal, progressive and individualistic” and view Islamists as “traditional, authoritarian, patriarchal, religiously fanatic and collectivist.”<sup>40</sup> The difference between secularists and Islamists is that secularists view Islam as a religion to be practised solely in the private sphere, whereas Islamists view Islam as a religion and a lifestyle to be practised in all aspects of their lives, both private and public. Up until the 1970s, a Turkish woman with a headscarf would be almost by default considered as an uneducated housewife from a working class background, whose worldview was unilaterally determined by her patriarchal family.<sup>41</sup> It was only in the 1980s, through the spread of second wave feminism combined with an increase of entry of women in universities, that women who wear a headscarf became

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<sup>38</sup> Ibid

<sup>39</sup> Ibid.

<sup>40</sup> Women's Rights Organization against Discrimination (AKDER), 'A Statistical Examination of the Conditions of Women in Turkey and the Impact of the Headscarf Ban on Turkey's Gender Equality Ranking' <<http://www.osce.org/odihr/39070?download=true>> accessed 10/02/2014

<sup>41</sup> Prior to the 1980s, there were only two cases where wearing a headscarf at university became an issue. One of which was in 1964 the student who graduated with the highest grade was not allowed to speak at her graduation ceremony, which was the usual practice, because she wore a headscarf. It was only after the 1980s where the headscarf became an issue, because of the increase of women seeking higher education.

university students and found a way to bridge the ideological gap between modernity and religion.

This led to the adoption of a wave of legislation in the 1990s, which led to women being unable to manifest their religious belief in higher education, and which moreover has permeated into the workplace. With regard to education, a real push has been made by the Turkish authorities and UNICEF in order to encourage girls to enter education, through the use of national and international projects. This endeavour was a reaction to research suggesting that in the years 2006-2007 the literacy rates for females throughout Turkey was 87.92%, whereas that of males was 99.21%.<sup>42</sup> The above figures seemed to fly in the face of the fact that all primary education became compulsory when the Turkish Republic was formed in the 1920s. The rate of women who have a university degree is merely 3% and there are real regional disparities with women in rural areas, which face a greater deal of poverty and illiteracy compared to their urban counterparts.<sup>43</sup> The headscarf ban has led to an even greater decrease of women who enter university education, although some women have managed to adapt to the ban through the wearing of wigs while in the public sphere.

One important aspect of gender equality, which has not been recognised by either the ECtHR in its *Sahin* judgement or by the Turkish government, is that of participation of both sexes in economic and social life. One way of promoting gender equality is through the education of women and by allowing them to become economically independent from their male counterparts. However, as already stated, Turkey continues to have one of the lowest numbers of women in the workforce in comparison with mainland Europe with only 25% of women in employment as of 2006. Many of these jobs are part time, temporary or seasonal and include no access to state benefits.<sup>44</sup>

The headscarf ban is not limited to the public sector, but professionals who work independently or are attached to a professional chamber are also unable to wear a headscarf

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<sup>42</sup> (AKDER), 'A Statistical Examination of the Conditions of Women in Turkey and the Impact of the Headscarf Ban on Turkey's Gender Equality Ranking' accessed 10/02/2014

<sup>43</sup> Ibid.

<sup>44</sup> Ibid. Sегgie, *Religion and the State in Turkish Universities* (Palgrave MacMillan 2011) See also *Sahin v Turkey App no 44774/98 (ECtHR, 29 June 2004)*

to work. Lawyers are prohibited from wearing a headscarf to court and the Istanbul Bar Association even forbids the wearing of wigs by interns as an alternative form of covering their hair. The Istanbul Bar Association has even taken this a step forward and forbade the wearing of a headscarf in contexts involving merely the private life of both legal interns and lawyers.<sup>45</sup> Similarly, as a result of the cultural representations circulated by mainstream Turkish media, private companies are less likely to be employed by private companies as a result of the marginalization of the headscarf. This according to the media and the Turkish government is because the Islamic headscarf is contrary to both gender equality and the principle of secularism as it is considered a political symbol as opposed to a religious one.<sup>46</sup>

The Women and Ethics Committee in Ankara organized a study amongst its health care professionals to try to ascertain the level of violence women faced at the hands of men. The study found that 58% of women in Turkey are subjected to physical beatings and violence occurs in 86% of Turkish families. 30% of women's husbands practice violence against them and 52% of women stated that their spouses are verbally abusive towards them.<sup>47</sup> This is not limited to the private sphere, since 75% of female physicians are victims of sexual harassment.<sup>48</sup> As of yet, research and documentation of violence against women and girls in Turkish societies is insufficient, which limits the action plans the Turkish government ought to take, if it is concerned with gender equality, as it has argued in *Leyla Sahin v Turkey*. The social tolerance for violence in police stations, public prosecution offices, courts and health care facilities is widespread. Specific violent acts towards women can include "virginity controls" and "honour killings" which occur in the private sphere as a method of controlling

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<sup>45</sup> 8<sup>th</sup> Section of the Council of State, D: 02.03.1994, E: 1993/843, K1994/686

<sup>46</sup> White, *Islamist mobilization in Turkey : a study in vernacular politics* (University of Washington Press ; Chesham : Combined Academic 2002), Seggie, *Religion and the State in Turkish Universities* (Palgrave MacMillan 2011)

<sup>47</sup> Behice Erci, 'Women's Efficiency in Decision Making and Their Perception of Their Status in the Family' (2003) 20(1) *Public Health Nursing* 65, Seggie, *Religion and the State in Turkish Universities* (Palgrave MacMillan 2011)

<sup>48</sup> Erci, 'Women's Efficiency in Decision Making and Their Perception of Their Status in the Family' (2003) 20(1) *Public Health Nursing* 65



social ethics and honour of women. The legal rights of women are not adequately enforced and both women and girls are exposed to cultural, sexual and psychological harassment.<sup>49</sup>

A number of Turkish studies have shown that women in Turkey do not have an important role in the division of responsibility within the family and that they experience difficulty in making difficult decision.<sup>50</sup> The status of a woman in Turkey is not dependent on her actions, but instead focuses on her level of chastity, the level of her education in relation to men, her age of first marriage and the length of her childbearing years.<sup>51</sup> Thus, her status can be found to be that of the virgin daughter, the dutiful wife and the status of a mother.<sup>52</sup> However women with lower levels of education are more likely to have poorer health, and are more likely to depend on a spouse to support them financially and therefore are more susceptible to male violence.<sup>53</sup> Women's educational and economic status and reproductive autonomy are important predictors to a woman's life expectancy. The levels of patriarchy is evident in Erci's study, in which 42% of the women stated that men were more intelligent and superior to women; 70.7% of them thought that way because of tradition, and 29.3% thought this way because they believed that men were physically and economically powerful.<sup>54</sup> Women's ideas about men as more intelligent were associated with men's high educational levels, which as discussed earlier, has become more difficult for women to attain to.<sup>55</sup>

Furthermore, women's experience of violence and their opinion of men affected their behaviour in decision making in the family. However, this was not the only influence, as Seggie suggests that religious and cultural influences also affect the gender roles of women.<sup>56</sup> It is important to note that at the core of these studies, women with lower levels of education

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<sup>49</sup> Ibid

<sup>50</sup> Seggie, *Religion and the State in Turkish Universities* (Palgrave MacMillan 2011)

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Erci, 'Women's Efficiency in Decision Making and Their Perception of Their Status in the Family' (2003) 20(1) *Public Health Nursing* 65

<sup>55</sup> Ibid

<sup>56</sup> Seggie, *Religion and the State in Turkish Universities* (Palgrave MacMillan 2011)

were more likely to be dependent on male relatives and therefore more likely to believe that her worth lies in her role as a home maker as this is one of the few choices she has in life. <sup>57</sup>

As argued throughout this chapter, human rights law seeks to be colour and gender blind, but as a result of the way in which it has been implemented many potential human rights violations go undiscovered. As a result of the public/private dichotomy, my argument remains that religious freedom is absolute insofar that it remains in the private sphere. This gendered dichotomy of rights leads to the layered oppression of women who wish to manifest their religious beliefs in the public sphere. This is not only because women are more devout, and more likely to manifest their religious belief in the public sphere, a theme which runs throughout this dissertation. It is also because women are more likely to dominate the domestic sphere as a result of their religious and cultural ideology.<sup>58</sup> This section shall outline this argument using as an example the prohibition of the headscarf in Turkish universities, after the case *Leyla Sahin v Turkey*.

## LITERATURE REVIEW

According to Evans, the Court has used two contradictory views of Muslim females, the first one being that of a victim: “the victim of a gender oppressive religion, needing protection from abuse violent male relates, and passive, unable to help herself in the face of male dominance.”<sup>59</sup> The second stereotype is that of an aggressor: “the Muslim woman as fundamentalist who forces values onto the unwilling and undefended.”<sup>60</sup> Furthermore, as stated by Evans, both Leyla Sahin and Lucia Dahlab of these were intelligent, strong-willed

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<sup>57</sup>(AKDER), ‘A Statistical Examination of the Conditions of Women in Turkey and the Impact of the Headscarf Ban on Turkey’s Gender Equality Ranking’ accessed 10/02/2014 ;Benjamin Bleiberg, ‘Unveiling the Real Issue: Evaluating the European Court of Human Rights’ Decision to Enforce the Turkish Headscarf Ban in *Leyla Sahin v. Turkey* Note’ (2005) 91 Cornell L Rev 129 ;Nüket Örnek Büken and Serap Sahinoglu, ‘Violence Against Women in Turkey and the Role of Women Physicians’ (2006) 13(2) Nursing Ethics 197

<sup>58</sup> Grace Davie, *The Sociology of Religion* (Sage Publications 2007)

<sup>59</sup> Malcolm D Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Martinus Nijhoff Pub. 2009), 15-16

<sup>60</sup> Ibid,

and educated women who wore the head scarf voluntarily and were willing to fight for their autonomy to wear what they wish.<sup>61</sup> Furthermore Evans argues that:

“The link seems to be the idea of a threat. The implicit threat in the woman who is too powerful, too intolerant too aggressive is easy to see. But the victim is a threat too. A threat to the liberal, egalitarian order. A threat to control by the state and the secular authorities because their coercion is less effective than that of the family and the subculture.”<sup>62</sup>

The voices of veiled women are rarely heard in the media; in fact, the object of discussion is disproportionately focussed on the veil instead of the veiled woman.<sup>63</sup> In the few instances where the discourse does take the veiled woman into consideration, the lexicon is usually focused on the coerced/ freely chosen binary, where women who insist they freely chose to wear the veil were accused of false consciousness.<sup>64</sup> This is incredibly naïve, because although coercion can be found in some communities, the assumption that all veiled women are coerced to wear the religious symbol in a number of research pieces, including a research comparative study funded by the European Union in all these studies participants stated that the veil made them feel emancipated and increased their levels of spirituality.<sup>65</sup>

The way to deal with such conflict has been discussed extensively by Pimor, who states that “rather than focusing on the Muslim applicants’ actual freedom to manifest their religion,

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Byng, ‘Symbolically Muslim: Media, Hijab, and the West’ (2010) [2010] 36(1) *Critical Sociology* 109 ;Cumper and Lewis, ‘Taking Religion Seriously? Human Rights and Hijab in Europe- Some problems of Adjudication’ (2008) [*Journal of Law and Religion*] 24(2) *Journal of Law and Religion* 599 ;Sonia Ghumman and Ann Marie Ryan, ‘Not welcome here: Discrimination towards women who wear the Muslim headscarf’ (2013) 66(5) *Human Relations* 671 ;Noemí Pereira-Ares, ‘The politics of hijab in Monica Ali’s Brick Lane’ (2013) 48(2) *The Journal of Commonwealth Literature* 201 ;Vakulenko, *Islamic veiling in legal discourse* (Routledge 2012)

<sup>64</sup> False consciousness is a Marxist theory which asserts that people are blinded to their own social oppressions. See Vakulenko, *Islamic veiling in legal discourse* (Routledge 2012), McGoldrick, *Human Rights and Religion : the Islamic Headscarf Debate in Europe* (Hart Pub. 2006).

<sup>65</sup> E Brems, Introduction. in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) 1-17, Seggie, *Religion and the State in Turkish Universities* (Palgrave MacMillan 2011), Rosenberger; and Sauer, *Politics, religion and gender : framing and regulating veil* (Routledge 2010), Irene Zempi, ‘It’s a Part of Me, I Feel Naked without it’: Choice, Agency and Identity for Muslim Women Who Wear the Niqab’ (2016) 39(10) *Ethnic and Racial Studies* 1738

national and European authorities diverted the dialogue towards political considerations.”<sup>66</sup> A second criticism made by Sylvia Langlaude, with regard to the Court’s approach on proselytism, is that the Court has also not made it clear whether evidence of indoctrination or proselytism should be actively sought, and how to balance Article 9(2) ECHR with the freedom of others.<sup>67</sup> Previous case law suggests that in past education cases which dealt with proselytism or indoctrination, a test was used by the Court which favoured the Contracting Party State and where the threshold of indoctrination was very high. The Court used to only rule in the favour of the applicant when there was evidence to suggest that a Contracting Party State actively attempts to indoctrinate children.<sup>68</sup> Now, however, the threshold is set much lower and works against the individual believer. Looking at the *Sahin* case, some behaviour may be considered indoctrination when the individual is merely expressing their religious belief. Furthermore, it is unclear what types of pressure the State should be looking for, since there was no physical pressure on the part of Leyla Sahin to compel other women to wear the headscarf. Or, as Sylvia Langlaude suggests, are we looking at the creation of two classes of Muslims, where the one who does not wear a headscarf is considered an inferior Muslim?<sup>69</sup> In any event, regardless of whether such communal pressure is in place, the solution should not be to restrict the wearing of the Islamic headscarf, since this approach will have negative repercussions on religious freedoms and the advancement of gender equality. It also suggests that the headscarf is a negative symbol which has no place in Western society and should be controlled by the State.

As discussed above, the Court’s current “one size fits all approach” to the management of plurality by limiting the wearing of religious symbols in university is insensitive to the intersectional identities of women. When using the term “one size fits all”, the argument is

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<sup>66</sup> M Pimor, 'The Interpretation and Protection of Article 9 ECHR: Overview of the Denbigh High School (UK) case' [2006] *Journal of Social Welfare and Family Law* 323, 333

<sup>67</sup> Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR Shorter Articles, Comments, and Notes' (2006) 55 *Int'l & Comp LQ* 929 933

<sup>68</sup> *Kjeldsen, Busk Madsen and Pedersen v Demark App no. 5095/71 and 5920/72; 5926/72 (ECtHR, 7 December 1976)*, *Martins Casimiro and Cerveira Pereira v Luxembourg App no. 44888/98 (ECtHR, 27 April 1999)*, *Jiminez Alsonso and Jiminez Merino v Spain App no 51188/89 (ECtHR, 25 May 2000)*

<sup>69</sup> Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR Shorter Articles, Comments, and Notes' (2006) 55 *Int'l & Comp LQ* 929 934

that despite the fact that the measure put in place by the university in the *Leyla Sahin* case is a universal one, as all students are unable to manifest their religious beliefs, this measure disfavours solely those who have a religion and who manifest it through the wearing of insignia. It is not tailored to meet the needs of those who may decide not to go to university as a result of an inability to manifest their religious beliefs. This would put women, who as we have discussed above are more devout and more likely to manifest their religious belief, and in this specific case Muslim women as Turkey has a majority Muslim population, in an impossible situation. The argument that is being made in this dissertation is that Turkey and the ECtHR should have considered whether the measure could have been tailored in order to meet the needs of those who would have been doubly discriminated against on the basis of their religion and gender.

Secondary factors which also have to be taken into consideration are that Miss Sahin was not only a woman, but one whose religion was central to her identity. She “comes from a traditional family of practising Muslims and considers it her duty to wear the Islamic headscarf.”<sup>70</sup> The wearing of the headscarf was her free choice which was based on religious convictions. She did not promote Islam, nor did she coerce other women to wear the headscarf. She stated throughout the case that she had no intention to protest, pressure, provoke or proselytize other university students into wearing the headscarf and by doing so she supports secularism.<sup>71</sup> She had spent four years at university studying medicine whilst wearing the headscarf and without being seen as causing “any disruption, disturbance, or threat to the public order.”<sup>72</sup> Furthermore, the fact that other universities hadn’t implemented a similar ban was evidence that order can be maintained without such a ban. Neither Turkey, nor the ECtHR acknowledged this and instead made several assumptions which led to the misapplication of Article 9. They both should have at some point addressed the arguments made by Miss Sahin in order to come to a conclusion, but they failed to do so.

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<sup>70</sup> *Sahin v. Turkey*. Application no. (44774/98) Judgment of 29 June 2004 ECHR, Paragraph 100

<sup>71</sup> *Ibid.* Paragraph 10

<sup>72</sup> *Ibid.* Paragraph 86

To further clarify: the argument, at least at this stage, is not that the outcome of the Court would differ if intersectional feminism and Miss Sahin's personal motivations for wearing the headscarf were considered, although this will be discussed in more detail in Chapter Five . Instead, the argument is that the Court had a responsibility based on its equality jurisprudence to consider the intersectional identity of Miss Sahin before deciding whether the advancement of gender equality is a legitimate reason for limiting Miss Sahin's freedom to manifest her religious beliefs. By failing to take into consideration the intersecting identity of Miss Sahin thousands of women in Turkey will have to choose between manifesting their religious beliefs and pursuing a university education. It runs counter to gender equality to create barriers for women who are already disenfranchised in Turkey. Although some promoters for equality will argue that multiculturalism is in fact bad for women in that it sanctions paternalism, it would be equally paternalistic to take away a woman's free choice to pursue her religious beliefs.

The legal justification the Court put forward in agreeing that the Islamic headscarf is indeed contrary to gender equality will be discussed in more detail in Chapter Five. However, the argument made within this chapter is that the Court has an overtly formalistic conception of gender equality. With regard to Miss Sahin's own personal choice to wear the hijab, the Court relied on its previous case law and agreed with the Turkish Constitutional Court that allowing women to wear the Islamic headscarf would be contrary to gender equality. The Court thus heavily relied on its judgment in *Dahlab v Switzerland* to come to this conclusion:

“It cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by the precept which is laid down in the Koran and which, as the Federal Court (in Switzerland) 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 hat all teachers in a democratic society must convey to their pupils.”<sup>73</sup>

The reliance on *Dahlab v Switzerland* was criticised by the dissenting Judge Tulkens, which will be discussed later on. However, the Court failed to recognise that hijab in the Quran does not solely relate to the veil worn by women; instead the Quranic term hijab is used to refer to

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<sup>73</sup> *Dahlab v Switzerland App No 2346/02 (ECtHR, 29 April 2002)*, p15

a “spatial curtain that divides or provides privacy”<sup>74</sup> and is used in modern times to describe the Islamic dress code in general and is applicable to both men and women.<sup>75</sup> The majority of Muslim scholars who write on hijab will examine themes such as modesty, privacy and the lowering of the gaze, as opposed to the actual clothes which women wear (the Arabic term for that is khimaar). These, at least to some scholars, are in fact a secondary or subordinate notion.<sup>76</sup> The Quranic passage often cited with regard to the headscarf is the following:

“And that to believing women that they should lower their gaze to guard their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must) ordinarily appear thereof; that they should draw their veils over their bosoms and not display their beauty except, to their sons, their fathers...their sons...their brother...or their women.”<sup>77</sup>

The argument that is put forward in this thesis is that it was formalistic of the Court to discuss the headscarf without researching what it symbolises to the women who wear it. This was criticised by a number of academics, particularly so because the Court held the view that the headscarf has a proselytising effect by default, albeit without engaging in the debate as to whether this is the best or even the standard interpretation of the practice.<sup>78</sup> As stated by

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<sup>74</sup> McGoldrick, *Human Rights and Religion : the Islamic Headscarf Debate in Europe* (Hart Pub. 2006), 5

<sup>75</sup> Tabassum F. Ruby, ‘Listening to the voices of hijab’ (2006) 29(1) *Women's Studies International Forum* 54 ;Cumper and Lewis, ‘Taking Religion Seriously? Human Rights and Hijab in Europe- Some problems of Adjudication ’ (2008) [*Journal of Law and Religion*] 24(2) *Journal of Law and Religion* 599 ;Byng, ‘Symbolically Muslim: Media, Hijab, and the West’ (2010) [2010] 36(1) *Critical Sociology* 109 ;Pereira-Ares, ‘The politics of hijab in Monica Ali’s Brick Lane’ (2013) 48(2) *The Journal of Commonwealth Literature* 201

<sup>76</sup> See Chapter 1 of McGoldrick, *Human Rights and Religion : the Islamic Headscarf Debate in Europe* (Hart Pub. 2006)

<sup>77</sup> *Ibid*, 4

<sup>78</sup> C McCrudden, ‘Religion, Human Rights, Equality and the Public Sphere’ [2011] *Ecclesiastical Law Journal* 26, A Nieuwenhuis, ‘European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey, Decision of 29 June, 2004, Application Number 44774/98’ [2005] *European Constitutional Law Review* 494, D McGoldrick, ‘Religion in the European Public Square and in European Public Life: Crucifixes in the Classroom?’ [2011] *Human Rights Law Review* 451, , C Jacobsen and D Stenvoll, ‘Muslim Women and Foreign Prostitutes: Victim Discourse, Subjectivity, and Governance’ [2010] *Social Politics* 270, L Gross, ‘The Peace of Westphalia’ [1948] *Am. J. Int'l L.* 20, J Köhrsen, ‘How Religious is the Public Sphere? A Critical Stance on the Debate about Public Religion and Post-Secularity’ [2012] *Acta Sociologica* 273

Gallala, the Court: “arrogated to itself the competence to judge the symbolic meaning of the Islamic headscarf.”<sup>79</sup> In the same vein, Cumper and Lewis argue that the ECtHR failed to recognise that the wearing of Islamic clothing shows a “positive message about the equality of different religious and cultural groups.”<sup>80</sup> Finally, they argue that “the Court attached little significance to the idea that a rational, autonomous adult, such as the applicant should (as a general rule) be free to wear the clothes of her choice.”<sup>81</sup> My argument is to the effect that allowing Miss Sahin to wear the headscarf in fact advances equality, as it shows that different religious groups are free to manifest their religious beliefs equally.

## CONCLUSION

By upholding the ban on headscarves in Turkish universities, the Court has forced thousands of women in Turkey to choose between following what they consider to be divine law and pursuing an education and the effect this will have on the manifestation of religion. It is important to highlight that like feminism, religious discourse uses a different language to that of the law<sup>82</sup> and by failing to consider the implications of the judgment under a reasonable construal of social conditions and practices, the Court has allowed women to be doubly discriminated against on the basis of gender and faith. Although the Court rejected the use of gender equality in the case of *SAS v France*, the problem nevertheless remains that the Court took outsider views into consideration.

Accordingly, the Court needs to recognise that there is an interrelationship between race, ethnicity and religion which combines into a communal identity. Europe is becoming increasingly more multicultural, which brings with it a multiplicity of different cultures and different faiths. As has been highlighted earlier in the chapter, the manifestations of religious belief lie at the heart of Article 9 ECHR, which the Court has held to be “a precious asset.”<sup>83</sup>

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<sup>79</sup> I Gallala, 'The Islamic Headscarf: An Example of [2006] European Law Journal 593, 601

<sup>80</sup> P. Cumper and T. Lewis, 'Taking Religion Seriously? Human Rights and Hijab in Europe- Some problems of Adjudication' [2008] Journal of Law and Religion 609, 609

<sup>81</sup> Ibid.

<sup>82</sup> Anthony Bradney, *Law and Faith in a Sceptical Age* (Routledge-Cavendish 2009)

<sup>83</sup> *Sahin v Turkey App no 44774/98 (ECtHR, 29 June 2004)*



It is therefore important for the Court to mediate between the interests of the individual to manifest its religious beliefs and the interests of wider society and in order to do so it needs to place the legal problem within its wider context. However, for the Court to continue to instil public confidence in its maintenance of the rule of law, and ability to adjudicate fairly, it must be seen to do so. Judges must be more proactive in exercising their supervisory role and challenge normative claims made by Contracting States Parties. This seems to be in some tension with the margin of appreciation doctrine, which will be discussed in more detail in Chapter Four; however, as has been noted earlier in this chapter, it will be argued that the role of the margin of appreciation is not an issue. Instead, its scope needs to be reconsidered insofar as the Court is responsible for European level supervision and, as highlighted by, among others, Gibson, its application to this case is tantamount to abdication of judicial responsibility to uphold human rights.<sup>84</sup>

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<sup>84</sup> Nicholas Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (2007) 66(03) *The Cambridge Law Journal* 657, 658

### 3. Chapter Three: The Legal Framework

#### INTRODUCTION

Thomas Hammerberg, the former Council of Europe Commissioner for Human Rights called attention to the persistent marginalization of women, minorities and those with a disability.<sup>1</sup> Arguing that there can be no complacency in human rights protection within Europe, his discourse highlights that the Court fails to take into consideration the ways in which international human rights law excludes women, specifically those who lie at the intersection of multiple disadvantages. This chapter criticises the Court, not for using gender equality as a justification to limit the right to manifest a religious belief, but for failing to define gender equality, or more importantly for not requesting that Contracting Party States justify their position when limiting religion in the public sphere when it has an adverse effect on a specific minority population.

The purpose of this chapter is to illustrate the Court's approach in limiting the right to manifest a religious belief using gender equality. This will be achieved through a more detailed critical analysis of *Leyla Sahin v Turkey*<sup>2</sup> than the one already provided. The argument within this chapter is that the current "one size fits all" approach to gender equality sanctioned by the ECtHR in this case is based on essentialising women and that this leads to the double discrimination of women with religious beliefs. This is because the wearing of religious insignia, like the headscarf or the face veil is limited to those who have a religion. Furthermore, women are more likely to manifest their religious beliefs than men and are therefore more likely to be discriminated against as a result of their multiple identities.<sup>3</sup> This chapter will conclude that the ECtHR should envisage gender equality in a holistic manner, as it has done

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<sup>1</sup> Thomas Hammerberg, 'Human rights in Europe: no grounds for complacency: Viewpoints by Thomas Hammarberg Council of Europe Commissioner for Human Rights Council of Europe'

<sup>2</sup> *Sahin v. Turkey*. Application no. (44774/98) Judgment of 29 June 2004 ECHR

<sup>3</sup> Grace Davie, *Religion in Modern Europe: A Memory Mutates* (Oxford University Press 2000) ;Majella Franzmann, *Women and Religion* (Oxford University Press 2000) ;D M Juschka, *Feminism in the Study of Religion : a Reader* (Continuum 2001) ;Sunder, 'Piercing the Veil' (2003) [The Yale Law Journal Company, Inc.] 112(6) The Yale Law Journal 1399

in its Article 14 jurisprudence as opposed to the current conceptualization of discrimination in its jurisprudence.

#### THE DRAFTING OF ARTICLE 9

The European Commission and the European Court of Human Rights have both been central in delineating the scope of Article 9 ECHR; however, the resulting jurisprudence has not been very clear.<sup>4</sup> This according to Evans stems from two factors. The first is to do with the fact that there were no cases which dealt with Article 9 until 1993. The second pertains to the fact that the Court has been heavily influenced by background factors when analysing the cases relating to Article 9.<sup>5</sup> The Convention is often described by the Court as a “living instrument” which needs to be interpreted in an ‘evolutive’ manner.<sup>6</sup> One of the objectives of the Council of Europe was to promote European identity and values through standardising social and legal practises in order to further protect the fundamental freedoms and human rights of those on the territory of the Contracting Party States in order to become a “force for peace.”<sup>7</sup>

On the face of it, the Council of Europe was created as a direct response to the atrocities of the Second World War, but its actual roots can be found much earlier.<sup>8</sup> The condition for membership was codified in Article 3, namely that: “Every member of The Council of Europe must accept the principles of the Rule of Law and the enjoyment of all persons within its jurisdiction of human rights and fundamental freedoms.”<sup>9</sup> The intention of the original members was to go beyond the Universal Declaration on Human Rights by entrenching basic fundamental freedoms and human rights in an international treaty. However, it is important to take into consideration the intentions of the drafters of the Convention, when choosing the wording of Article 9, in order to see whether this is still relevant. Despite the fact that all the

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<sup>4</sup> Malcolm D Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997) 281

<sup>5</sup> *Ibid* at 282

<sup>6</sup> *Tyler v. the United Kingdom Application No. 5856/72 (ECtHR, 25 April 1978)*

<sup>7</sup> J.Donnelly, ‘Human Rights: a New Standard of Civilization?’ (1998) 74 *International Affairs* 1

<sup>8</sup> *Ibid*.

<sup>9</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3

founding members sought to protect the religious freedoms of individuals living in Europe, especially after the atrocities of the Second World War, the limits on the manifestation of religious beliefs was considered by Sweden and Turkey to be insufficient.

When drafting the Convention, the International Juridical Section of the European Movement sought to create a list of rights including the right of ‘freedom of religious belief, practice and teaching’ which could be limited provided that:

“such limitations as are in conformity with the general principles of law recognized by civilized nations and as prescribed by law for protecting the legal rights of others, meeting the just requirement of morality, public order (including the safety of the community) and the general welfare.”<sup>10</sup>

The Council of Europe sought to make this draft provision more precise, seeking to borrow from the Universal Declaration, as far as was possible in order to meet two objectives. Firstly, to protect the rights and fundamental freedoms of the people in Europe, especially in the face of the Cold War; secondly, to develop and define the relevant standards of protection.<sup>11</sup> A number of restrictions could not be agreed upon, especially since Sweden and Turkey sought to water down the right in order to prevent their current laws from being scrutinised under Article 9. This proved to be problematic as Turkey was in the process of restricting certain religious activities in order to push for ‘cultural recovery’:

“Legislative measures relating to.... the Muslim religious orders are in no way intended to place restrictions on the freedom of religion... It must, however, be pointed out that in the course of our history a number of attempts at reform and modernization have been frustrated by stubborn resistance on the part of certain persons or group of persons who wished to keep the population in ignorance for their own ends... Turkey has therefore been obliged to start by abolishing the Muslim orders and their archaic institutions.”<sup>12</sup>

The Netherlands and the UK objected to an alternative option, which was to allow adding a provision which would prevent the treaty from scrutinising current laws, as the fact that only two states would benefit would not justify the inclusion of a measure which had a

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<sup>10</sup> Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997)

<sup>11</sup> *Ibid* 266

<sup>12</sup> Reply of the Turkish Expert to the Comments of the Netherlands Comments (Addendum 2 to Doc. CM/WP 1(50) 15 a, 1280 of 27 May 1959)

discriminative potential. From their correspondence it was clear that Turkey and Sweden wanted to prevent members of certain religious institutions from occupying public official roles. Sweden soon compromised and informed the Committee of Experts that it would remove the discriminatory legislation.<sup>13</sup> Turkey similarly compromised, but placed a reservation on Protocol 2 of the Convention which deals with education, including the right to religious education; consideration of the legal effects of this reservation falls outside the remit of this dissertation.

What is interesting when looking at the intention of the drafters is that they envisaged that the legitimate reasons Article 9(2) can be limited and have defined this as much as they could within the time available. It is clear that the drafters sought to eliminate all the ways in which discriminatory practices in relation to religious beliefs can be sanctioned as can be seen in the number of drafts proposed in relation to Article 9. Despite the fact that no one objected to the spirit of Article 9, namely that the freedom of religion insofar as it was to do with belief should be absolute, it was decided that the freedom to manifest those religious beliefs had to be policed. Interestingly, the focus of the debate was on the membership and activity of religious institutions, as opposed to the activity of individuals. Similarly, no objection was made to barring individuals to public office roles if they were coming from a particular religious background, an example being the fact that Turkey barred Muslims from accessing public office roles as part of the ‘cultural recover’ that was taking place.<sup>14</sup> This suggests that the drafters of Article 9 envisaged that the manifestation of religious beliefs could be limited provided that it passes the criteria of Article 9(2). What discussion also suggests is that the Member States envisaged the need for a balancing exercise as evidenced by the United Kingdom’s response to Turkey and Sweden’s proposal and in some ways legitimises the need for pan European oversight. The interest of one state is not sufficient justification to limit the fundamental rights of Article 9(2); there is the need for some European oversight, which the Court is not taking into consideration in its Article 9(2) case law. There is no European consensus on the manifestation of religious beliefs in a higher education setting. As a result,

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<sup>13</sup> Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997), 271

<sup>14</sup> Seggie, *Religion and the State in Turkish Universities* (Palgrave MacMillan 2011)

the Court should have at least made some clarification as to the circumstances in which Article 9(2) can be legitimately limited.

#### FACTS OF THE CASE: LEYLA SAHIN V TURKEY

On February 1998, the Vice- Chancellor of the University of Istanbul issued a circular which stated that any “students whose heads are covered... must not be admitted to lectures, courses or tutorials.”<sup>15</sup> The circular stated that all women who wear the headscarf must be informed of the ban, and then asked to remove the headscarf prior to asking them to leave. A similar ban was placed on the manifestation of religious beliefs of male students too. Should the student refuse to leave, the teacher should not deliver the lesson; if the student insists on wearing the headscarf, the student may be expelled or suspended from the university. Furthermore, the circular outlined that university staff on campus should stop university students from accessing the university premises, including their lecture theatres and exam halls, veiled students were also prevented from registering for classes.

One month after the circular was issued, Leyla Sahin was barred from taking her fifth year medical exam for failure to remove her headscarf. Ms. Sahin was raised in a traditional Muslim household and considered it her duty to wear a headscarf. She had no other incidents or disruptions prior to the change in university regulations where she had been studying for four years. Nevertheless, the University started disciplinary proceedings against Leyla Sahin, for failure to comply with the ban. Leyla Sahin subsequently filed a complaint with the Istanbul Administrative Court and challenged the legality of the University’s dress code under the ECHR. The Administrative Court found that the university’s dress code was indeed lawful based on the case law of the Constitutional Court and the Supreme Administrative Court.

Sahin subsequently took the claim to the ECtHR and argued that Turkey’s ban on the Islamic headscarf in universities was in breach of her right to freedom of religion as it prohibits her from exercising her Article 9(2) right. In addition, she argued that the ban was in violation of Article 14 in conjunction with Article 9, the justification being that in forcing students to

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<sup>15</sup> *Sahin v Turkey App no 44774/98 (ECtHR, 29 June 2004)*, paragraph 78

choose between adhering to their religion or pursuing a university education the university was discriminating against students based on their religious beliefs.

#### WHAT IS A RELIGION OR BELIEF?

Before the law in relation to the manifestation of religion or belief and its implication on women can be discussed, there are a number of concepts which need to be defined, even if tentatively, given their complex nature. The most important concept is that of “religion or belief.” The Commission and the European Court on Human Rights have allowed for a wide definition of religion, recognising almost all Christian denominations<sup>16</sup> Judaism<sup>17</sup> Islam,<sup>18</sup> Hinduism,<sup>19</sup> Sikhism,<sup>20</sup> and Buddhism.<sup>21</sup> Other, less mainstream accepted belief systems include: atheism,<sup>22</sup> Druidism,<sup>23</sup> the Divine Light Zentrum<sup>24</sup> and the Church of Scientology.<sup>25</sup>

It is important in this respect to note that Article 9 is not limited to religious beliefs and affords protection to a wide range of beliefs and philosophies. The Court clarified that a belief must “attain a certain level of cogency, seriousness, cohesion and importance” in order to fall within the remit of protection.<sup>26</sup> However, religion and belief are considered to have a wide scope and the former Commission, for example, has opined that “pacifism as a philosophy... falls within the ambit of the right of freedom of thought and conscience.”<sup>27</sup> This attitude of pacifism may therefore be seen as a belief (“conviction”) protected by Article 9(1).<sup>28</sup>

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<sup>16</sup> *Knudsen v Norway* App No 11045/84 (ECtHR, 25 May 1993)

<sup>17</sup> *D v France* (Application 10180/82), 6 December 1983

<sup>18</sup> *Karaduman v Turkey* (Application 16278/90), 3 May 1993

<sup>19</sup> *ISKCON and others v United Kingdom* (Application 20490/92) 8 March 1994

<sup>20</sup> *X v the United Kingdom* (Application 8121/78) 6 March 1982

<sup>21</sup> *X V France* (Application 5442/72) 20 December 1974

<sup>22</sup> *Angelini v Sweden* (Application 10491/83) 3 December 1986

<sup>23</sup> *Chappell v United Kingdom* App no 10461/83 (ECtHR, 30 March 1989)

<sup>24</sup> *Omkarananda and the Divine Light of Zentrum v. Switzerland* App No 8118/77 (ECtHR, 5 May 1979)

<sup>25</sup> *Pastor X and the Church of Scientology v Sweden* App No 7805/77 (ECtHR, 5 May 1979)

<sup>26</sup> *Cambell and Cosans v the United Kingdom*, App No 7511/76; 7743/76 25 February 1982), paragraph 36

<sup>27</sup> *Arrowsmith v UK*, App No 7050/77 (ECtHR, 12 October 1978), paragraph 69

<sup>28</sup> *Ibid.*

Traditionally the Court has refrained from discussing whether a belief is religious in nature, which is considered to be a sensible approach. It is not necessary to distinguish religion from belief, as the law does not differentiate between the two.<sup>29</sup> However, due to the proliferation of different belief systems within Europe, the Court has laid boundaries as to what type of belief is religious in nature. One example is in the case of *Pretty v the United Kingdom*, where it rejected the rationale that preventing the applicant from accessing assisted suicide engaged her Article 9 right. The Court stated in this case that “not all opinions and convictions constitute beliefs in the sense protected by Article 9(1) of the Convention.”<sup>30</sup>

#### WHAT IS A MANIFESTATION OF RELIGIOUS BELIEF?

Article 9 protects those religious acts which are linked to the *forum internum* (the private sphere) as well as the *forum externum* (the public sphere). The ECtHR recognises that the freedom of religion and beliefs requires a form of expression, and defined religious freedom as being “freedom, either alone or in community with others and in public or private, to manifest [one’s] religion or belief, in worship, teaching, practice and observance.”<sup>31</sup> Thus, the manifestation of religious beliefs is at the heart of Article 9 ECHR. Such manifestation is also considered to be intrinsically linked to the freedom of expression or thought and conscience under Article 10 and can include both individual and collective action.<sup>32</sup> Article 8 is also often invoked when discussing the right to manifest a religious belief. This point is particularly well brought out by Professor Jill Marshall, who has written extensively on the interrelationship between the right to manifest religious belief and the development of ‘respect for one’s private life’ into a right to autonomy, identity and integrity more generally.<sup>33</sup>

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<sup>29</sup> MD Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Martinus Nijhoff Pub 2009) 10.

<sup>30</sup> *Ibid.* Paragraph 81

<sup>31</sup> Article 9(2)

<sup>32</sup> *Kokkinakis v Greece App No 3/1992/348/421 (ECtHR, 19 April 1993).*

<sup>33</sup> J Marshall “Conditions for freedom? European Human Rights Law and the Islamic headscarf debate” (2008) 30 *Human Rights Quarterly* 631-654; “Women’s Right to Autonomy and Identity in European Human Rights Law: Manifesting One’s Religion” (2008) 14 *Res Publica* 177-192; *Personal Freedom through Human Rights Law: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff 2009).



However, it is important to note that the ECtHR held in the case of *Arrowsmith*, that the term ‘manifestation’ “does not cover each act which is motivated or influenced by a religion or belief.”<sup>34</sup> In the cases *X v the United Kingdom*<sup>35</sup>, *Konttinen v Finland*<sup>36</sup> and *Stedman v the United Kingdom*<sup>37</sup> the Court decided that the applicants’ inability to perform tasks required of them by their private employers as a result of religious convictions was not a breach of their right to manifest their religious beliefs. In all these cases the employees could change their employment and thus the interference was not directly attributable to the State. This line of reasoning was overturned by means of a more stringent conception of positive state obligations in the case of *Eweida*, according to which States are no longer permitted to use the freedom to resign jobs as evidence that the freedom to religious beliefs was not infringed. This is a reasonable approach for the judges to take, since the previous doctrine placing emphasis on the ability to resign from private employers was not applied consistently to any other convention rights, such as those of Article 8 ECHR. Furthermore, in the case *Cha’are Shalom Ve Tsedek v France*<sup>38</sup> the Court held that the prohibition of religious slaughter was not an interference of the applicant’s right to manifest his religious beliefs, insofar as meat acquired through religious slaughter could still be imported from Belgium, resulting in no breach of Article 9. Moreover, the Court held that the right to manifest religious beliefs should not be derived from Article 9 considered in isolation, but can also be implied in other convention rights.<sup>39</sup>

## PROCEDURAL REQUIREMENTS

Access to justice is central to human rights law, but as can be seen in the previous sections, there is a disconnect between the number of believers affected by the Court’s approach to Article 9 and the number of cases that make it to the ECtHR. The Court deals with a high number of claims each year and are therefore quite stringent when deciding which individual

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<sup>34</sup> *Arrowsmith v UK*, App No 7050/77 (ECtHR, 12 October 1978). 5.

<sup>35</sup> *X v the United Kingdom* App No 8121/78 (ECtHR, 6 March 1982), *Konttinen v. Finland v Finland* App No Application No. 24949/94 (ECtHR, 3 December 1996)

<sup>36</sup> *Konttinen v. Finland* App No Application No. 24949/94 (ECtHR, 3 December 1996)

<sup>37</sup> *Stedman v the United Kingdom* App no 29107/95 (ECtHR, 9 April 1997)

<sup>38</sup> *Cha’are Shalom Ve Tsedek v France* App no 27417/95 (ECtHR, 27 June 2000)

<sup>39</sup> *Manoussakis and Others v. Greece* App No 18748/91 (ECtHR, 26 September 1996). 408-409.

applications to adjudicate on. The new Rules of Court are one of several recent and anticipated changes to the European Court's processing of individual complaints. Additional reforms to the European Court's procedures will further restrict victims' access to the tribunal when Protocol No. 15 enters into force. In particular, Protocol No. 15 will amend the European Convention on Human Rights to reduce from six months to four months the window of time during which an applicant may submit a complaint following exhaustion of domestic remedies; moreover, it will tighten the admissibility requirement that the applicant show a "significant disadvantage" by eliminating the exception for cases that have not been considered by a domestic court. Protocol No. 15 will enter into force once all States Parties to the European Convention (the 47 Council of Europe Member States) have ratified it.

Unless an application is declared inadmissible or struck at an earlier stage, it will be assigned to one of the Court's five sections and the Contracting Party State will be notified of the complaint. Then, both parties will be able to submit observations to the Court. These observations may contain specific information that the parties consider relevant, or they may be information that has been requested. Furthermore, the Chamber has the discretion to consider admissibility and merits concurrently or separately, but it must notify the Parties if it plans to consider admissibility and merits together. This highlights how central it is for Contracting Party States to understand the legal framework for Article 9 and the balancing exercise required when limiting this qualified right for one of the legitimate justifications.

#### WHAT ARE THE LIMITATIONS OF ARTICLE 9(2)?

Article 9(1) ECHR guarantees freedom of thought, conscience and religion. This includes the freedom to change one's religion or belief and the freedom to worship either alone or in community with others. The freedom of religion is absolute; the freedom to manifest a religion or belief can be legitimately limited under Article 9(2) of the ECHR. Thus, state interference of the manifestation of religion can only be limited if the limitation is prescribed by law, pursues a legitimate aim and is necessary in a democratic society.

When the Court considers whether there has been a violation of the right to hold a religious belief and the qualified right of manifesting that belief, it considers whether the matter relates

to a protected belief and if so, whether the individual's act is considered a manifestation of that belief. If these two are affirmed, the Court moves on to consider whether the measure imposed by the individual does in fact limit or interfere with the individual's ability to manifest their religious belief. If this is the case, the Court under Article 9(2) considers whether the prescribed measure is justified.

#### WHAT IS THE MARGIN OF APPRECIATION?

As will be discussed in the following chapters, in recent years the jurisprudence of the Court indicates a tendency for judges to defer to the margin of appreciation of member states ever more routinely in the application of Article 9(2), thereby affording states more discretion to control the public manifestation of religion and in turn disproportionately affect religious women wishing to manifest their beliefs. In this respect, and in anticipation of the more detailed analysis in the following chapter, we may make a number of brief remarks. The starting point for understanding the margin of appreciation doctrine is the fact that the ECtHR is an international human rights authority which has the power to make a legal or political decision binding on all states. It is suggested that, by virtue of that fact, the Court has to abide by certain rules. Firstly, all the Contracting Party States have agreed to respect certain fundamental principles; secondly, the European Court on Human Rights has to reasonably discharge its interpretive role by abiding by the margin of appreciation in certain kinds of cases, so as to leave some options open to Contracting States. This means, according to a traditional reading, that the ECtHR has to defer to national authorities if a legal and political issue is culturally sensitive and therefore better handled at the national level.<sup>40</sup> For this reason, and because there is no pan-European oversight in matters dealing with religion, national states are typically given a wide margin of appreciation in these matters. The issue will be discussed in more detail in the next chapter.

When dealing with the freedom to manifest religion cases, such as in the case of *Leyla Sahin v Turkey*<sup>41</sup>, the Court has to assess the doctrine of the margin of appreciation. This was

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<sup>40</sup> *Handyside v the United Kingdom App No 5493/72 (ECtHR, 7 December 1976)*

<sup>41</sup> *Sahin v Turkey App no 44774/98 (ECtHR, 29 June 2004)*

initially discussed at some lengths in the case of *Handyside v the United Kingdom*, which delineated it thus:

By reason of their direct and continuous contact with the vital forces or their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a restriction’ or ‘penalty’ intended to meet them.”<sup>42</sup>

Furthermore, the Court has held that the margin of appreciation works hand in hand with European oversight and that little appreciation is given to states’ choices in the event that there is a ‘pan-European consensus on some issue. As of yet, there is no such consensus with regard to Article 9, as outlined in *Otto Preminger Institut v Austria*. In that case the Court held that ‘it is not possible to discern through Europe a uniform conception of the significance of religion in society: even within a single country such conceptions may vary.’<sup>43</sup> Because of the diversity of different State approaches to the problem of the place of religion in the public sphere, the Court struggles to pass a judgment which may have legal ramifications on the other Member States and is more likely to allow the national state to deal with it under the margin of appreciation. This does not mean that the Court does not have any guiding principles that each Contracting Member State should adhere to. The current guiding principles the national courts should adhere to are that the state should have the role of a “neutral and impartial organiser” of the exercise of the different religions, faiths and beliefs as this is “conducive to public order, religious harmony and tolerance in a democratic society,”<sup>44</sup>

## WHEN CAN ARTICLE 9(2) BE LEGALLY LIMITED UNDER ARTICLE 9?

Article 9(1) ECHR guarantees freedom of thought, conscience and religion, which includes the freedom to change one’s religion or belief and the freedom to worship either alone or in community with others. As already stated, freedom of religion in the sense of belief is absolute; on the other hand, freedom to manifest a religion or belief can be legitimately limited under Article 9(2) of the ECHR. According to the criteria stated in that second part of Article 9, state

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<sup>42</sup>*Handyside v the United Kingdom* App No 5493/72 (ECtHR, 7 December 1976) Para 48

<sup>43</sup>*Otto-Preminger-Institut v. Austria* App No 13470/87 (ECtHR, 20 September 1994). Para 56

<sup>44</sup>*Refah Partisi (the Welfare Party) and Others v Turkey* App No 41340/98 (ECtHR, 13 February 2003). para 91

interference of the manifestation of religion can only be limited if it is prescribed by law, pursues a legitimate aim and is necessary in a democratic society.

### Prescribed by Law

There have been a number of cases in recent years where the Court has outlined when the freedom to manifest religious convictions and beliefs can be limited. There has been some clarification as to the limitation clause found in Article 9(2) which states that limiting the freedom to manifest one's religion is legitimate when it is 'prescribed by law' and 'necessary within a democratic society'. This means that there has to be a legal basis for the restriction, and that the limitation is proportionate to its aims.

According to the ECtHR's jurisprudence the interference with the Article 9 right has to be authorised by a legal rule and grounded within the Contracting Party States' legal order. The case of *Leyla Sahin v Turkey* is relevant here, as the applicant argued that the measure to ban headscarves in universities was not prescribed by law, inasmuch as there is no written law prohibiting students from doing so. She argued that the prohibition was merely the result of the circular issued by the Vice-Chancellor. The applicant acknowledged that the Vice-Chancellor of the university has powers, the scope of which is defined by the law, but she argued that this does not extend to refuse students from wearing a headscarf.

The Court held that the prescribed by law criteria had a two-fold purpose: firstly the measure should have a basis in the law and, secondly, the measure should be precise and accessible.<sup>45</sup> The Court held that this was in fact satisfied as the Vice-Chancellor based the circular on Turkish legislation.<sup>46</sup> According to settled convention case law, the 'prescribed by law' criterion should not be understood as a formal one, but encompasses a wide range of lower statute enactments and judicial law.<sup>47</sup> Furthermore, the Court held that it was down to the national courts to interpret domestic law, as opposed to the ECtHR. Thus, the Court found that the ban was indeed legal as there was a sufficient domestic legal basis for the ban, in the form of the Turkish Higher Education Act and the Turkish Constitutional Court rulings

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<sup>45</sup> *Ibid.* paragraph 84

<sup>46</sup> *Ibid.* paragraph 87

<sup>47</sup> *Ibid.* paragraph 88

which declared the Muslim headscarf in universities to be contrary to the Turkish Constitution.<sup>48</sup> Besides, the Court reasoned that “many years prior” to the extant case, the Turkish Administrative Court had held that the Islamic headscarf was incompatible with Turkey’s fundamental principles.<sup>49</sup>

The Court’s case law also outlines that the legal rule has to be both accessible and foreseeable. This was explained in detail in the case *Hasan and Chaush v Bulgaria*<sup>50</sup>. In this case, the ECtHR held that the refusal to register an elected leader of the Muslim religious community, did not meet the prescribed by law requirement. The Court held:

“For domestic law to meet these requirements [that is, of accessibility and foreseeability] it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.”<sup>51</sup>

Similarly, in the case *Kuznetsov and Others v Russia* the Court found that “the legal basis for breaking up a religious event conducted on the premises lawfully rented for that purpose was conspicuously lacking” and resultantly there has been a violation of Article 9(2) because the measure was not ‘prescribed by law.’

### Legitimate Aim

The second hurdle a measure has to overcome is that it has to have a legitimate aim. These aims can be found in the second paragraph of Article 9 ECHR, namely the interests of public safety, the protection of public order, health, or morals, or the protection of the rights and freedoms of others. The Court has held in its jurisprudence that these measures should be strictly interpreted.<sup>52</sup> This test is arguably the easiest for States to pass. There have been a

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<sup>48</sup> Ibid. paragraph para 78

<sup>49</sup> Ibid.

<sup>50</sup> *Hasan and Chaush v Bulgaria* Application number 30985/96 (ECtHR, 26 October 2000)

<sup>51</sup> Ibid. paragraph 86

<sup>52</sup> *Nolan and K. v. Russia* Application Number 2512/04 (ECtHR 12 February 2009)

number of cases where the Court doesn't take this criteria into consideration and instead moves straight to the proportionality test found in 'necessary in a democratic society'.<sup>53</sup> The Court has justified this by stating that it is their practice 'to be quite succinct when it verifies the existence of a legitimate aim within the meaning of the second paragraphs of Articles 8 to 11 of the Convention.'<sup>54</sup>

In the case *Leyla Sahin v Turkey* the Court did not discuss whether the measure had the legitimate aims of protecting the public order and the rights and freedoms of others. Instead, it agreed with the Turkish Constitutional Court's argument that the measure did have these legitimate aims. Sahin herself admitted that the headscarf ban "could be regarded as compatible" with the Turkish government's aims of "maintaining public order in the universities, upholding the principle of secularism, and protecting the rights and freedoms of others."<sup>55</sup>

Conversely in the case *SAS v France*, the French government used 'public safety' as well as 'respect for the minimum set of values of an open and democratic society.' It put forward the argument that that the second requirement contained three elements: gender equality, respect for human dignity and respect for the minimum requirements of life and society. The Grand Chamber dismissed gender equality and respect for human dignity as legitimate aims; however, it held that the last element could fall under 'protection of rights and freedoms of others'.

Interestingly, Articles 8, 10 and 11, the right to respect for private and family life, freedom of expression and freedom of assembly and association respectively, contain 'national security' as a legitimate purpose of the interference of the right. Article 9(2) does not recognize this legitimate aim, as the Court has explained that this is "far from being an accidental omission" and stated that this non-inclusion: "reflects the primordial importance of religious pluralism as 'one of the foundations of a democratic society' within the meaning of the

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<sup>53</sup> *Bayatyan v Armenia Application no. 23459/03* ( ECtHR, 7 July 2011) *Erçep v. Turkey* Application no. 43965/04 (ECtHR, 22/11/2011)

<sup>54</sup> *SAS v France* para 114

<sup>55</sup> *Ibid.* paragraph 82-83

Convention’ and the fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs.”<sup>56</sup>

### Necessary in a democratic society

Alongside legality and serving a legitimate purpose, the impugned measure also has to be ‘necessary in a democratic society’ for serving that purpose. This requires a twofold test. Firstly, that the action taken is in response to a pressing social need and, secondly, that the action does not go beyond that which is necessary to address the pressing social need. The objective therefore is to consider whether the authorities have “struck a fair balance between the competing interest of the individual and of society as a whole.”<sup>57</sup> The test for this can be found in the *Silver* cases:

“The adjective ‘necessary’ is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘reasonable’ or ‘desirable’;

The Contracting Party States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention;

The phrase ‘necessary in a democratic society’ means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a ‘pressing social need’ and be ‘proportionate to the legitimate aim pursued’;

Those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly construed.”<sup>58</sup>

The Court has emphasised in its case law that there is an important relationship between ‘necessity’ and ‘democratic society,’ of which the hallmarks are: pluralism, tolerance and broadmindedness.<sup>59</sup> The interference must also respond to an assessment of proportionality, which involves the balancing of the right of the individual against the interests of the Contracting Party State and the wider society. Examples of these are the protection of public

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<sup>56</sup> *Nolan and K. v. Russia* Application Number 2512/04 (ECtHR 12 February 2009)

<sup>57</sup> *Keegan v Ireland* Application Numbers 16/1993/411/490 (ECtHR, 26 May 1994)

<sup>58</sup> *Silver v United Kingdom* Application numbers 5947/72, 6205/73, 7052/75, 7107/75, 7113/75, and 7136/75 (ECtHR, 25 March 1983) paragraph 97

<sup>59</sup> *Keegan v Ireland* Application Numbers 16/1993/411/490 (ECtHR, 26 May 1994) paragraph 290



order,<sup>60</sup> public safety,<sup>61</sup> or the rights of others.<sup>62</sup> Where the Court is considering the positive dimensions of the right in question, in other words the actions the Contracting Party State has to take in order to enforce the right, it has to also take into consideration the effect this has on the rights of others. Restrictions may be considered necessary in Contracting Party States where there is religious diversity, in order to facilitate the peaceful coexistence of the different groups of religions.<sup>63</sup> The Court has “frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society.”<sup>64</sup> The Court also held that certain actions motivated by religion can be restricted in order to “protect key principles underlying the Convention” with examples including polygamous marriages, underage marriages and the use of force or coercive measures.<sup>65</sup> In a recent case actioned against the United Kingdom, where a counsellor had his contract terminated after refusing to provide counselling to a homosexual couple, the ECtHR found that:

“the most important factor to be taken into account is that the employer’s action was intended to secure the implementation of its policy of providing a service without discrimination. The State authorities therefore benefitted from a wide margin of appreciation in deciding where to strike the balance between Mr McFarlane’s right to manifest his religious beliefs and the employer’s interest in securing the rights of others.”<sup>66</sup>

The subject of this thesis is that of headscarves, and as aforementioned there have been a number of cases concerning religious clothing practices and jewellery. The Court has in the past overturned the decision of a State to prevent an airline employee from wearing a religious cross on the basis of neutrality, because other religious manifestations such as the headscarf

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<sup>60</sup> *Refah Partisi (the Welfare Party) and others v Turkey*, Application Numbers 41340/98, 41342/98, 41343/98 and 41343/98 (ECtHR, 13 February 2003)

<sup>61</sup> *SAS v France*

<sup>62</sup> *Refah Partisi (the Welfare Party) and others v Turkey*, Application Numbers 41340/98, 41342/98, 41343/98 and 41343/98 (ECtHR, 13 February 2003)

<sup>63</sup> *Kokkinakis v Greece* App No 3/1992/348/421 (ECtHR, 19 April 1993).

<sup>64</sup> *Refah Partisi (the Welfare Party) and others v Turkey*, Application Numbers 41340/98, 41342/98, 41343/98 and 41343/98 (ECtHR, 13 February 2003)

<sup>65</sup> *Khan v. United Kingdom* Application Number 47486/06 (ECtHR, 12 June 2010) and *Jehovah’s Witness of Moscow v Russia* Application Number 302/02 (ECtHR, 10 June 2010)

<sup>66</sup> *Eweida and others v the United Kingdom* App No 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2011), paragraph 109

and the Sikh turban were allowed. However, this can be contrasted with a case where the Court has upheld the decision to prohibit nurses working in a public hospital from wearing jewellery, including small crosses for health and safety purposes. The Court felt that the State did not go beyond that which is necessary in order to achieve its aim of health and safety.

Alongside this the Court has to take into consideration the margin of appreciation afforded to Contracting Party States, as they are best situated in enforcing Convention rights within their jurisdictions.

### Proportionality

As aforementioned, decisions concerning the application of Article 9(2) to infringements of the right to manifest a religious believe involves the assessment of whether the impugned measure is ‘necessary in a democratic society.’ The objective is to consider whether the authorities have “struck a fair balance between the competing interest of the individual and of society as a whole.”<sup>67</sup> In determining whether the test of proportionality is met the Court examines whether ‘the disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued by the Government’.<sup>68</sup> Clearly this will depend to a significant degree on the particular facts of the case and the perception of the Court as to the relative importance of the right and the severity of the restrictions.

The strict approach set out in *Handyside* is appropriate where fundamental rights are at stake (such as freedom of expression or intimate aspects of private life) and consists in a four questions test:

- is there a pressing social need for some restriction of the Convention?
- If so, does the particular restriction correspond to this need?
- If so, is it a proportionate response to that need?
- In any case, are the reasons presented by the authorities, relevant and sufficient?

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<sup>67</sup> *Keegan v Ireland* Application Numbers 16/1993/411/490 (ECtHR, 26 May 1994)

<sup>68</sup> *National Union of Belgian Police v. Belgium*, Application Number 4464/70 (ECtHR, 27 October 1975) paragraphs 578, 595

In *Leyla Sahin v Turkey* for example, a case which as mentioned above concerned the banning of religious manifestation in institutes of higher education, the Court held such a ban was proportionate to the aim pursued of gender equality and the principle of secularism.<sup>69</sup> The Court held that both gender equality and secularism are consistent with the values underpinning the Convention.<sup>70</sup> It asserted that “it is understandable in such a context where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women, **are being taught and applied in practice**, that the relevant authorities would consider that it ran counter to the **furtherance of such values** to accept the wearing of religious insignia.”<sup>71</sup> With regard to whether the measure was necessary in a democratic society, the Court stated that “the principle of secularism in Turkey is undoubtedly one of the fundamental principles of the State, which are in harmony with the rule of law and respect for human rights.”<sup>72</sup> The definition for secularism by the Turkish Constitutional Court is that of “the guarantor of democratic values, the principle that freedom of religion is inviolable... and... is the meeting point of liberty and equality.”<sup>73</sup> The Constitutional Court put forward the argument that the act of allowing women to wear headscarves within the university would equate granting preferential treatment to one religion and thus be a breach of the State’s neutrality. The Strasbourg Court agreed and found that the Turkish Constitutional Court’s interpretation of secularism is “consistent with the values underpinning the Convention,” and that upholding secularism is “necessary for the protection of the democratic system in Turkey.”<sup>73</sup>

The Court moved on to argue that the ban on the headscarf is also necessary in a democratic society, because the headscarf is a “powerful external symbol” and the Court feared it might have a potential proselytizing effect on other university students who chose not to wear the Islamic headscarf. Therefore, it may infringe the rights and freedoms of

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<sup>69</sup> Paragraph 122 *Leyla Sahin v Turkey*

<sup>70</sup> *Leyla Sahin v Turkey*

<sup>71</sup> Ibid. paragraph 106

<sup>72</sup> Ibid. paragraph 113

<sup>73</sup> Ibid. paragraph 114

others.<sup>74</sup> This was justified by reference to the view that in recent years the headscarf was considered by the ECtHR and the Turkish Constitutional Court to be a political symbol:

“The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of society founded on religious precepts...The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university.”<sup>75</sup>

Therefore, the Court held that measures like the headscarf ban, which prevent religious fundamentalists from exerting power, and in the interest of religious pluralism and the protection of the freedom of others are justified under the regulation.<sup>76</sup> It thus deemed it permissible under the Convention to tailor public education according to the precepts of secularism, even at the expense of individual claims of religious freedom. This was despite the arguments of the dissenting judgment of Judge Tulkens who considered this absolute approach to be disproportionate. Thus ultimately, the notion of proportionality will always contain some subjective element and needs to be considered in context with the circumstances of the case.

The Court has to some extent been criticised for being vague about the concept of proportionality and the role it plays in the Article 9(2) jurisprudence. For example, in the case *Laryssis v Greece* the conviction of a group of military officers for attempting to proselytize some of the men under their command was held to be proportionate to the end of preventing abuses of the rights and freedoms of others even though the conviction of the same men for attempting to proselytize civilians was held to be disproportionate to the end sought. In this case, the Court was willing to accept that any attempt at proselytism by senior officers was an abuse of power, despite the arguments in the dissenting judgment of Judge Van Dijk, who considered this absolute approach to be disproportionate. He felt that there should be a presumption of abuse in such cases but that it should be rebuttable. He decided that the presumption should have been rebutted in regard to one junior officer who claimed that he

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<sup>74</sup> Ibid. paragraph 98, 108

<sup>75</sup> Ibid. paragraph 115

<sup>76</sup> Ibid

first approached the senior officers, that they never pressured him, and that he converted to the Pentecostal Church of his own free will.

Another classic example often used to exemplify the way in which proportionality, is the case *Kokkinakis v Greece* where the Court expressly approved the anti-proselytism laws but held that Mr Kokkinakis's conviction under them was not necessary to preserve the rights and freedoms of others. Judge Pettiti found that the criminalising of proselytising was a disproportionate measure and the act of proselytism should only be deemed a criminal offence if the act itself was a breach of other laws such as: 'misrepresentation, failure to assist persons in danger and intentional or negligent injury.'<sup>77</sup>

### Margin of Appreciation

As already stated, once the ECtHR decides that an interference is necessary in a democratic society, emphasis is often laid on the role of the margin of appreciation. According to the Explanatory Report on Protocol No15:

'The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.'<sup>78</sup>

The margin of appreciation afforded to States varies, depending on right in question and the context in which it has been invoked. In determining the margin of appreciation, the Court usually distinguishes between breaches of the right that can be attributed to the State and those that result from other individuals, whose rights must also be considered in the balance.<sup>79</sup> Furthermore, the Court held that in order to determine the legitimate scope of the margin of

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<sup>77</sup> *Kokkinakis v Greece App No 3/1992/348/421*(ECtHR, 19 April 1993).

<sup>78</sup> Explanatory Report on Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. Paragraph 9.

<sup>79</sup> *Palomo Sanchez and Others v Spain (Applications nos. 28955/06, 28957/06, 28959/06 and 28964/06)* (ECtHR, 12 September 2011)

appreciation afforded to states, there must be a consideration of the right's importance, as well as the "nature" and "aim" of the "restricted activity."<sup>80</sup> The extent to which the Strasbourg Court should defer to the national authorities has been considered to be one of the crucial questions which arise when examining the regulating of religious pluralism across Europe.

In this respect, the Grand Chamber held that:

"A margin of appreciation is particularly appropriate when it comes to the regulation by the Contracting States of the wearing of religious symbols in teaching institutions, since the rules on the subject vary from one country to another depending on national traditions."<sup>81</sup>

This was central in the *Leyla Sahin v Turkey* case, as the Court felt that there is no "uniform European conception" the court held that there was no breach of Article 9. The concept of the margin of appreciation will be revisited in the following chapter, as it is a recurring theme in the Court's jurisprudence with respect to Article 9(2).

## EQUALITY FRAMEWORK

A core argument within this thesis is that the Court's limitation of Article 9(2) in cases related to the headscarf is at odds with the principles of gender equality.

Article 14 of the European Convention on Human Rights provides the following:

"The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

This right to non-discrimination is legally parasitic and requires the engagement of a substantive Convention right. However, it is not necessary to establish that there was in fact

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<sup>80</sup> *Ibid.* paragraph 101

<sup>81</sup> *Ibid.*

a violation of the substantive right invoked: provided that it falls within the remit of that right, the applicant could potentially succeed on the basis of a discrimination-centred argument.<sup>82</sup> In cases where the Court finds a violation of a substantive right, it is still theoretically possible to obtain a ruling that Article 14 has been infringed as well. In *Marckx v Belgium*<sup>83</sup> the Court concluded that the unfavourable treatment of illegitimate children under Belgian inheritance laws violated their right to a family life under Article 8 and breached the requirement under Article 14 that Convention rights should be secured without discrimination. Differential treatment may, in particular, result from direct discrimination: this happens when two persons or groups of persons in the same situation are treated differently. However, indirect discrimination is also prohibited under Article 14. In the *Thlimmenos* case the ECtHR recognised that a conduct may be discriminatory if two persons are treated alike while their situations are significantly different.<sup>84</sup> To identify discrimination, either direct or indirect, it is necessary to refer to a comparator in order to assess if other persons or groups in a similar situation have suffered the same negative effects.

Article 14 can be justified in limited situations; a differential treatment must have an objective and reasonable justification, pursue a legitimate purpose, as well as satisfy the proportionality test. The ECtHR distinguishes between cases where Member States are given a margin of appreciation and other cases that require a closer scrutiny. In some cases the Contracting States have a wide margin of appreciation which can mitigate the applicability of Article 14 ECHR.<sup>85</sup> Some grounds such as gender are more difficult to justify because of their nature. In those cases, only “very weighty reasons” can be advanced.

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<sup>82</sup> *'Belgium Linguistics'* App no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECtHR, 1 January 1970)

<sup>83</sup> *Marckx v. Belgium* Application No. 6833/74 (ECtHR, 13 June 1979)

<sup>84</sup> *Thlimmenos v Greece* App No Application no. 34369/97 (ECtHR, 6 April 2000)

<sup>85</sup> *Rasmussen v Denmark* App No. 52562/99 and 52620/99 (ECtHR, 11 January 2006) In the *Rasmussen*, case, the ECtHR found, concerning the right to contest one's paternity which was more favourable to the mother than to the alleged father, that Contracting States enjoy a wide margin of appreciation and are entitled to take measures allowing a longer period to the mother to contest the paternity of her child.

## RIGHT TO CULTURAL IDENTITY

Another pertinent argument, which has been put forward by Professor Jill Marshall, is the fact that Leyla Sahin also has a right to cultural identity.<sup>86</sup> Marshall argues, with respect to veil bans in general, in the following way:

“Legally banning full face veils, in liberal democracies in situations where an adult woman says she has freely chosen to wear such a garment, fails to respect and recognise the individual woman as a person in her own right. Legal bans misrecognise her and disrespect her identity: as a human being, as a member of a religious or cultural group and as an individual person capable of subjectively interpreting her own identity or personality as she sees fit.”<sup>87</sup>

There have been a number of cases in the jurisprudence of the ECtHR where the Court had to consider the right to cultural identity of minority groups, which falls under Article 8, to wit, the right to respect for private and family life. The case of *Chapman v. the United Kingdom*<sup>88</sup> concerned the difficulties gypsy families had in parking their caravans and thereby maintaining their way of life. The Court recognised that Article 8 of the Convention, which protects the right to private and family life extends the right to live one’s life according to one’s own cultural lifestyle. The Court held:

“The Court considers that the applicant’s occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures affecting the applicant’s stationing of her caravan therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.”<sup>89</sup>

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<sup>86</sup> Marshall, ‘Freedom of Religious Expression and Gender Equality: Sahin v Turkey’ (2006) 69(3) *The Modern Law Review* 452 ;Marshall, ‘Conditions for Freedom - European Human Rights Law and the Islamic Headscarf Debate’ (2008) 30 *Hum Rts Q* 631

<sup>87</sup> *Human Rights Law and Personal Identity* page 206

<sup>88</sup> *Chapman v. The United Kingdom Application no. 27238/95 (ECtHR, 18 January 18 2001)*.

<sup>89</sup> *Ibid.* at paragraph 76



The Court further found that “there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle...not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.”<sup>90</sup> The Court accordingly recognised that this would require a Contracting Party State, under their Article 8 obligation, to facilitate their cultural way of life, by taking into consideration the Gypsy way of life within their legal framework. According to the Court:

“... although the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment, it may have an incidence on the manner in which such laws are to be implemented”.<sup>91</sup>

The Court has used the same judicial reasoning in a case concerning a married Roma couple in Spain who were refused survivors pension. The Court held that the refusal to pay the pension to a member of the Roma community after the death of her partner of nineteen years was a breach of Article 14 in conjunction with Article 1 of Protocol No 1 (protection of property). This is especially in light of the fact that they had been married under specific Roma rites and the validity of the marriage, or indeed the validity of Roma marriages, had never before been disputed by the Spanish government. To this regard the Court stated: “The Court takes the view that the force of the collective beliefs of a community that is well-defined culturally cannot be ignored.”<sup>92</sup> Furthermore, an important factor which swayed the Court’s decision was that of the well-defined cultural identity of the Roma people in Spain: “For the Court, it is necessary to emphasise the importance of the beliefs that the applicant derives from belonging to the Roma community – a community which has its own values that are well established and deeply rooted in Spanish society.”<sup>93</sup>

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<sup>90</sup> Ibid. at paragraph 104

<sup>91</sup> Ibid at 96

<sup>92</sup> Ibid. Paragraph 59

<sup>93</sup> Ibid. Paragraph 56

The Court specifically referred to intersectional discrimination in the case *BS v Spain*.<sup>94</sup> In *BS* a female, migrant sex worker of Nigerian descent alleged that she had been physically and verbally assaulted by Spanish police officers on the basis of her intersectional identities:

“In the light of the evidence submitted in the present case, the Court considers that the decisions made by the domestic courts failed to take account of the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute. The authorities thus failed to comply with their duty under Article 14 of the Convention taken in conjunction with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events.”<sup>95</sup>

The ECtHR has strengthened its equality case law through the use of the concept of vulnerability. This concept has been covered in a number of literature and is summarised by Mary Neal in the following way:

“Vulnerability speaks to our universal capacity for suffering, in two ways. First, I am vulnerable because I depend upon the co-operation of others (including, importantly, the State) ... Second I am vulnerable because I am penetrable; I am permanently open and exposed to hurts and harms of various kinds.”<sup>96</sup>

The Strasbourg Court initially used this concept of vulnerability to strengthen the group protection of the Roma minority, by stating: “As a result of their turbulent history, the Roma have become a specific type of disadvantaged and vulnerable minority” who as a result thereof require protection.<sup>97</sup> The Court also held that people who suffer from mental disabilities as a “particularly vulnerable group in society, who have suffered from considerate discrimination in the past.”<sup>98</sup> This special set of protection has been extended to asylum seekers, people living

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<sup>94</sup> *BS v Spain* App No 47159/08 (ECtHR, 24 July 2012)

<sup>95</sup> *Ibid.* Paragraph 62

<sup>96</sup> Mary Neal, “Not Gods But Animals”: Human Dignity and Vulnerable Subjecthood’ (2012) 33(3) *Liverpool Law Review* 177

<sup>97</sup> *D.H. and others v. the Czech Republic* App. No. 57325/00, (ECtHR, 7 February 2006)

<sup>98</sup> *Alajos Kiss v. Hungary*, App. No. 38832/06 (ECtHR, 20 May 2010). 42.

with HIV and as demonstrated above, people who face acute intersectional discrimination as a result of their multiple identities.<sup>99</sup>

## CONCLUSION

This chapter evaluated the Court's Article 9(2) jurisprudence, through the worked through example of *Leyla Sahin v Turkey*. It highlighted that there is scope in the Court's Article 14 jurisprudence to consider the intersectional identities of women when restricting the right to manifest a religious belief. As highlighted above, the main thrust of the argument is that the Court in its equality jurisprudence has stated that in order to ensure the advancement of equality Contracting Party States have to consider not only that those in similar situations should be treated alike, but individuals who are differently situated should have their differences recognised.<sup>100</sup> This did not happen in the case *Leyla Sahin v Turkey*, which put forward a very basic conception of gender equality. As a result, the Court did not succeed in fully capturing the concept's complexity. It is important to note that despite Article 14 being historically considered a weak right, it has become increasingly more robust through the development of its jurisprudence in indirect discrimination, segregation, anti-stereotyping and in the recent case of *BS v Spain* its recognition of the intersecting identities of women.<sup>101</sup>

In light of this evaluation, this chapter laid the groundwork for the following chapter, by explaining the legal framework of both Articles 9 and 14. The following chapter will evaluate

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<sup>99</sup> For more a more comprehensive analysis of the Court's vulnerability case law, please see Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) International Journal of Constitutional Law 1056

<sup>100</sup> See for example the case of *Thlimmenos v Greece* App No 34369/97 (ECtHR, 6 April 2000). This case involved a Greek National who was refused a job as a chartered accountant due to his criminal conviction which he received for disobeying, on the basis of his religious belief, an order to wear a military uniform. The Commission held that there was a breach of Article 9 in conjunction with 14 as the right to freedom of discrimination does not only involve treating people in similar situations alike, but by also to treat people in different situations differently. Therefore, a person who has a criminal record for failing to wear a uniform as a result of their religious beliefs cannot be treated the same as an individual who has a criminal record for other serious crimes. This conviction does not imply that he is morally unfit to work as a chartered accountant.

<sup>101</sup> *BS v Spain* App No 47159/08 (ECtHR, 24 July 2012)

in more detail, the role of the margin of appreciation and European consensus in the Article 9(2) jurisprudence of the ECtHR.

## 4. Chapter Four: The Role of the Margin of Appreciation and European Oversight

“Where, after all, do universal human rights begin? In small spaces, close to home—so close and so small that they cannot be seen on any map of the world. Yet they *are* the world of the individual person: the neighbourhood he lives in; the school or college he attends; the factory farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning here, they have little meaning anywhere.”<sup>1</sup>

### INTRODUCTION

The purpose of this chapter is to evaluate, in the light of contemporary practices of the European Court of Human Rights, the current status of the margin of appreciation doctrine under international law. It addresses the role of judicial oversight and the margin of appreciation and questions whether they have been used correctly in the Court’s Article 9(2) ECHR jurisprudence in three parts. Firstly, it identifies the conceptual basis for the margin of appreciation and criticises the Court’s inability to articulate its purpose and whether it is in fact a doctrine of deference. The chapter then explores the use of the margin of the appreciation in two areas of its jurisprudence where the margin of appreciation was widely discussed, its case law involving religious manifestation and gender identity. Thirdly, this chapter then moves on to criticize the Court’s use of the margin of appreciation doctrine, which allows for a certain attitude for differential human rights approaches across states resulting in relativism about human rights across the Contracting Party States and, at least in these instances, betrays the universality of rights. Finally, it articulates how the margin of appreciation has been criticised for being not only a doctrine of deference but also a method used by the Court in order to sidestep human rights law, by failing to sufficiently engage with the relevant area of law. This chapter develops the argument that the Court has to exercise a transparent balancing exercise in order to accommodate citizen expectations of rights

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<sup>1</sup> Eleanor Roosevelt, “In Our Hands” (1958 speech delivered on the tenth anniversary of the Universal Declaration of Human Rights)

protection, state co-operation and democratic considerations within a cultural, moral and political setting.

#### DEFINING THE MARGIN OF APPRECIATION

As mentioned in Chapter Two, when the Court analyses whether a Contracting Party State has violated a right protected by the Convention, it constantly proceeds to perform a balancing exercise. This balancing exercise involves a balance between human rights, democratic values and diverse cultural beliefs in the Council of Europe region. The Court points out that the system of human rights protection established by the Convention is subsidiary to the national human rights machinery. It leaves to each Contracting State the responsibility of implementing the rights and liberties enshrined in the Convention. The human rights institutions of the Council of Europe add to the level of protection within Europe, but they only become involved through legal proceedings and only when all domestic remedies have been exhausted. This is reflected in Articles 1 and 35 of the Convention, which refer to the procedural prioritisation of domestic over international authorities. This has since developed to a normative conception of the margin of appreciation, which was initially used by the Court to allow Contracting Party States to derogate from convention rights.

Consequently, the margin of appreciation is designed to provide flexibility in resolving conflicts emerging from diverse political, cultural, religious, and legal traditions of Contracting Party States. Alongside the principle of subsidiarity, which will be outlined in more detail below, it strengthens the democratic principle of the separation of powers, as it prevents the Court from interfering in matters which are better dealt by the electorate. Furthermore, it is seen to protect the values of a culturally diverse geographical region. However, in order for these goals to be enhanced, as opposed to undermined, the Court has to apply the margin of appreciation consistently. It is important that this discretion be exercised in a manner that is fair and impartial and does not run counter to universal human rights standards.

The margin of appreciation is not only criticised for being a tool for deference but also because it is applied in an overly subjective and unprincipled manner which leads to the

dilution of the concept of legal certainty and undermines the European Convention system which relies on the co-operation of states.<sup>2</sup> On the other hand the doctrine of the margin of appreciation has been commended for legitimising the Court's authority, because of the flexible way in which it deals with human rights protection within Europe. Concurrently, it respects the diversity of legal systems in its jurisdiction. Nevertheless, the Court has been criticised for being a tool of deference, in the sense that, human rights protection ought to be universal. The Court has given a multitude of reasons justifying the use of the margin of appreciation, especially when used in the qualified rights found in Articles 8-11. One of which, is that in sensitive topics such as morality and religion, where there is no European consensus, the Court considers national authorities to be better suited to manage conflict between individual rights and communal ones. However, it is important to note that this margin is limited. The ECtHR has stated that the margin of appreciation is subject to European supervision, which varies depending on the sensitivity of the issue. Also, the right that has been limited and the extent to which the State's legitimate interest can be measured as objective, and progress of European consensus in the area concerned.<sup>3</sup>

The idea that the margin of appreciation is a doctrine of deference is most reflected in the concept of subsidiarity. Subsidiarity runs alongside the principle of universality. The principle of subsidiarity means that decisions should be made by the unit that is more efficient in taking them, which usually is the national unit.<sup>4</sup> In simpler terms, universality is about the normative status of rights, subsidiarity is about allocation of powers. The basic premise behind it is that decision making ought to be carried out as closely to the citizen as possible. One of the characteristics of subsidiarity is that of political participation. Decisions ought to be made at the grass root level, precisely because this enhances democracy by empowering citizens. Furthermore, the Court is not a final court of appeal; therefore, the main responsibility of ensuring that the rights protected by the Convention rest with the Contracting Party States. The Strasbourg Court's role is to ensure that the relevant authorities have remained within

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<sup>2</sup> Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17(1) European Law Journal 80

<sup>3</sup> *Handyside v the United Kingdom App No 5493/72 (ECtHR, 7 December 1976)*

<sup>4</sup> Alastair Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15(2) Human Rights Law Review 313

their limits in enforcing convention rights. As paragraph three of the Brighton declaration states:

“The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, *inter alia*, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court.”

As the result of the way in which the margin of appreciation has been developed, the function of the ECtHR is to examine whether a Contracting Party State has overstepped its margin of appreciation it carries out its human rights obligations under the convention. Concurrently, the Court takes into considering the legal, political and social landscape of the concerned state alongside its internal situation. This contextual examination allows the Court to rule differently in cases concerning the same convention rights, where the social structure in the State differ. This is most clear in the Court’s Article 9(2) jurisprudence, where the Court has allowed the State a wide margin of appreciation due to the different approaches of managing religious plurality across all contracting party states.

The freedom to manifest a religious belief is, as mentioned in previous chapters, not protected in absolute terms. Paragraph two of Article 9 ECHR empowers national authorities to restrict the exercise of manifesting religious beliefs “in so far as necessary in a democratic society” in order to achieve an exhaustive legitimate aim which includes the rights and freedoms of others, secularism, gender equality and more recently the right to living together. In any given society there is a diversity of opinion on what are the best policies in terms of limiting the right to manifest a religious belief. The law is amended from one Parliament to the next, depending on the social and political landscape and each Contracting Party State falls within the democratically legitimate range of different opinions. As Judge Paul Mahoney puts it:

“The convention norm sets a universal minimum standard which nonetheless incorporates recourse to a principle of subsidiarity, in that it allows some scope, albeit



not unlimited, for properly functioning democracies to choose different solutions adapted to their different and evolving societies.”<sup>5</sup>

#### COMPARATIVE APPROACH

This chapter argues that the legitimate exercise of discretion by states under the convention depends on the appropriate application of a framework of principles which allows for the correct interpretation of the Convention. Greer argues that the unpredictability of the margin of appreciation lies not with the unpredictable nature of the margin of appreciation itself, but as a result of the Court’s unwillingness to spell out all the stages of the argument from interpretative principles to conclusions about state discretion.<sup>6</sup>

However, the argument put forward in this dissertation is that the margin of appreciation is a judicial tool which navigates between accommodating citizens’ expectations of rights protection and the will of the States, without whom there would be no international human rights protection. The margin of appreciation allows the state to navigate the transitional period where there is no European consensus.

As mentioned in previous chapters, the wearing of religious dress, specifically female Muslim dress, has been the subject of intense debate in Europe. The wearing of religious clothing is covered by Article 9(2) of the ECHR, which is subject to the margin of appreciation. Some commentators may argue that the margin of appreciation is necessary, insofar as the Court operates within a political climate which is continuously changing and is not uniform. However, there is cause for concern if the Court is only deferential in some areas of European human rights and more active in others, as will be outlined in more detail below. The following section compares the use of the margin of appreciation in two areas of the Court’s case law, where the Court has held for a continuous period of time that there was no European consensus on the matter. Firstly, it outlines the move towards a European consensus in the gender identity cases against the UK. In the *Goodwin* case, the Court has held that the margin of appreciation was given in respect of “resolving within their domestic legal systems the

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<sup>5</sup> Paul Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism’ (1998) 19(1) Human Rights Law Journal 1, 5

<sup>6</sup> Greer, *The Margin of Appreciation: Interpreting and Discretion under the European Convention on Human Rights* (Human Rights Files No:17, 2011)

practical problems created by the legal recognition of post-operative gender status” and not in respect of securing the recognition in law of the new gender status.”<sup>7</sup> The following section then argues using Article 9(2) ECHR that this alternate approach to European consensus, subsidiarity and the margin of appreciation has potential for achieving a more inclusive jurisprudence which would respect the rights of members of vulnerable groups, including the subject of this dissertation, religious women.

## GENDER RECOGNITION

Gender identity is defined as an individual’s:

“deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body. This may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means, and other expressions of gender, including dress, speech and mannerisms.”<sup>8</sup>

There has been a series of cases in the area of transgender identity law where the Court has given states a wide margin of appreciation on the matter, due to a perceived lack of European consensus. A limitation of this dissertation which takes a very broad international human rights perspective is that the grass roots activists at state level are often not mentioned. It is precisely as a result of these grass root activities that these cases made their way to the Strasbourg Court.

As mentioned above, the margin of appreciation has been considered to be controversial by some commentators.<sup>9</sup> More specifically, the doctrine has been criticised for preventing the

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<sup>7</sup> Para 85

<sup>8</sup> Yogyakarta Principles, Principles on the application of international human rights law in relation to sexual orientation and gender identity - <http://www.yogyakartaprinciples.org>

<sup>9</sup> Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2011) 17(1) European Law Journal 80 ;Itzcovich, ‘One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case’ (2013) 13(2) Human Rights Law Review 287 ;Letsas, ‘Two Concepts of the Margin of Appreciation’ (2005) 26(4) Oxford Journal of Legal Studies 705 ;Dominic McGoldrick, ‘Religion in the European Public Square and in European Public Life—Crucifixes in the Classroom?’ 11(3) Human Rights Law Review 451 ;Nieuwenhuis, ‘European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v.

formulation of a universal human rights standard.<sup>10</sup> However, the argument put forward by this author is that the margin of appreciation is not so much a well-structured doctrine within the full meaning of this term, but rather a tool employed by the Court to navigate universal human rights law during the transitional period in which there is no common European consensus. This is specifically evidenced in the way in which the Court navigated the gender identity cases.

There has been a series of cases in the area of transgender identity law where the Court has given the matter a wide margin of appreciation, due to a perceived lack of European consensus. As mentioned earlier within this chapter, when there is a lack of a common approach amongst the Contracting Party States on an issue relating to sexual “morality” the Court defers to the State in order to implement the standards of the Convention right. Although the argument stands that when determining the standard, Contracting Party States ought to be guided by the values equality, autonomy human dignity and respect as enshrined in the Convention.<sup>11</sup>

The move towards a European consensus is most exemplified in the cases against the UK, challenging its failure to recognise in law the post-operative sex of a transsexual person. In the first case, *Rees v UK*, the Court gave the United Kingdom a wide margin of appreciation on the ground of there being little European consensus. Furthermore, the Court validated the criteria used by the United Kingdom to establish the sex of a person. This adopted criterion consisted of the “biological” determination of sex at the time of birth as established in the 1970 British case *Corbett v Corbett*. Judge Ormrod had stated:

“It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent’s operation, therefore, cannot affect her true sex. The

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Turkey, Decision of 29 June 2004, Application Number 44774/98’ (2005) 1(03) European Constitutional Law Review (EuConst) 495

<sup>10</sup> Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2011) 17(1) European Law Journal 80

<sup>11</sup> Letsas, ‘Two Concepts of the Margin of Appreciation’ (2005) 26(4) Oxford Journal of Legal Studies 705

only cases where the term ‘change of sex’ is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.”<sup>12</sup>

Using the same essentialist approach in deciding this case, the Court held that there was no violation of Article 8, the right to respect and family life, Article 12, the right to marry, and Article 14, the right to non-discrimination. Their view of gender as binary, sameness and uniformity can tend to ‘essentialism’ that treats all women and men as the same, and can coerce us into ways of being and living which are out of tune with other provisions of the Convention, especially Article 8. This latter Convention Article has been used to develop a right to personality or identity which former judge Loucaides refers to in his 1990 British Yearbook of International Law essay.<sup>13</sup> This harmonises with an idea of gender equality that acknowledges gender as a binary, as well as the differences amongst people, including their personal, cultural and religious identity and beliefs.

Four years later, in *Cossey*<sup>14</sup>, the applicant made a complaint under Article 8 and Article 12. She argued that the registrar’s decision not to allow her birth certificate to reflect her gender identity was a breach in the right to her private and family life. Furthermore, this bar prevented her from marrying in her new gender, which she argued was a breach of her Article 12 right. The European Court of Human Rights, while considering these case developments in both international law and in the legal system of Contracting Party States. The Court noted that the Resolution on Discrimination against Transsexuals, calls on Contracting Party States to introduce a positive obligation within their state to support transgendered individuals in their transition. It also calls on Member States to provide them with legal protection against discrimination. However, the Court deferred to the margin of appreciation and held that the United Kingdom was in a better position to deal with balancing Mrs Cossey’s rights with external considerations, as there is no European consensus on the matter. Regardless of the evidence presented, the Court held that the statutory instruments reveal “the same diversity

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<sup>12</sup> *Corbett v Corbett (Otherwise Ashley)*; FD 1 Feb 1970

<sup>13</sup> Loukes Loucaides, ‘Personality and Privacy under the European Convention on Human Rights’ (1991) 61(1) British Yearbook of International Law 175

<sup>14</sup> *Cossey v the United Kingdom* App No (ECtHR, 27 September 1990)

of practice amongst Member States” and that “it cannot at present be said that a departure from the Court’s earlier decision is warranted in order to ensure that the interpretation of Article 8 on the point at issue remains in line with present-day conditions.”<sup>15</sup>

Eight years passed between *Cossey* and the case of *Sheffield and Horsham v the United Kingdom*<sup>16</sup>, where the Court examined a comparative piece submitted by Liberty:

“However, the Court is not fully satisfied that the legislative trends outlined by amici suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular, the survey does not indicate that there is as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender.”<sup>17</sup>

The Court held that there was no common European standard based on its finding that “transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States.”<sup>18</sup>

Two cases changed the way in which the ECtHR used the margin of appreciation in this area of law. These cases were *Goodwin* and *I. v. The United Kingdom*.<sup>19</sup> The facts of these cases are similar in that, both were regarding the right of transgendered people to both legal recognition and the right to marry in their new gender. The Court unanimously held that the UK legislation which prevented them from marrying in their new gender and/or obtaining birth certificates was in breach of Articles 8 (right to family life) and 12 (right to marry) of the ECHR. The Court linked in failing to recognise the applicants’ new gender.<sup>20</sup> The Court moved on to state that:

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<sup>15</sup> Ibid. paragraph 35

<sup>16</sup> *Sheffield and Horsham v the United Kingdom App no 31-32/1997/815-816/1018-1019 (ECtHR, 30 July 1998)*, paragraph 40

<sup>17</sup> Ibid. Paragraph 57

<sup>18</sup> Ibid. Para 58

<sup>19</sup> *Christine Goodwin v. the United Kingdom App no. 28957/95, (ECtHR, 11 July 2002)* *I. v. The United Kingdom App No (Application no. 25680/94) (ECtHR, 11 July 2002)*

<sup>20</sup> *Ibid.* paras 42-84; *and*, paras 59-104 respectively

“It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity [...] The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.”<sup>21</sup>

Furthermore, the Court held that there were no mitigating public interest justifications which could justify the UK's position of refusing to recognise the applicants' new genders:

“No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”<sup>22</sup>

The ECtHR also rejected the United's Kingdom's sole use of biological factors as a determinant for gender:

“There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender.”<sup>23</sup>

The Court further rejected the argument that transgendered individuals were technically not barred from marriage, as they were still able to marry an individual who is of their previous opposite sex”<sup>24</sup> Furthermore, the Court held that barring a transgendered individual from exercising their Article 12 right, within their new gender falls outside the UK's margin of appreciation:

“While it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid

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<sup>21</sup>Goodwin, para. 77 and I. v. The United Kingdom, para. 57.

<sup>22</sup>I. v. The United Kingdom, para. 71, 73 and Goodwin, para. 91, 93.

<sup>23</sup>Goodwin, para. 82, 100 and I. v. The United Kingdom, para. 62, 80.

<sup>24</sup>I. v. The United Kingdom, para. 81; Goodwin, para. 101.

and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.”<sup>25</sup>

The Court concluded by examining whether there was some form of consensus on the right of transgendered persons to legal. The fact that a growing number of countries accepted the rights of transgendered persons, swayed the Court to hold that while there was no European consensus as such, there was an international move towards legal recognition of transgendered individuals. The evidence showed that in 2002, four out of thirty-seven countries surveyed by the Court, did not allow for a change to be made to a person’s birth certificate to reflect their reassigned gender of choice.<sup>26</sup>

#### RELIGIOUS MANIFESTATION

The margin of appreciation doctrine is central to the understanding of the right to religious freedom recognized in Article 9 of the Convention.<sup>27</sup> In the area of religious freedom, the Court has granted Contracting Party States a very wide margin of appreciation to interfere with the right to manifest a religious belief in order to protect the freedoms of others. Some would argue that is this line with the type of legal reasoning that has allowed a number of Contracting Party States to ban Islamic manifestations of religious belief in schools, universities and in the public sphere introduced both civil and criminal penalties for wearing prohibited manifestations of religious belief; yet alongside this has rejected the challenge against state sanctioned crucifixes to allow crucifixes in public primary schools. In the following section I will focus on two lines of reasoning by the Court. The first is that of the

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<sup>25</sup> *Goodwin*, para. 103; *I. v. The United Kingdom*, para. 83.

<sup>26</sup> The countries were Albania, Andorra, Ireland and the UK. See joint partly dissenting opinion in *Sheffield and Horsham v the United Kingdom App no 31-32/1997/815-816/1018-1019 (ECtHR, 30 July 1998)*, cited in *I. v. The United Kingdom*, paras 64-65; *Goodwin*, paras 55-56. The countries outside of Europe that were moving towards legal recognitions of transgendered individuals were: Australia, Canada, Israel, New Zealand, Singapore, South Africa and the majority of states in the United States. The Courts in Australia and New Zealand took this a step forward by moving away from the biological view of gender.

<sup>27</sup> Itzcovich, ‘One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case’ (2013) 13(2) Human Rights Law Review 287

*Lautsi* case<sup>28</sup> where the presence of crucifixes in the classroom of primary schools was held not to be a breach of the convention right of school children, whereas in *Dahlab v Switzerland*, the wearing of a headscarf by a primary school teacher was considered proselytism. The second case is that of *SAS v France* where the Court held that a blanket ban on face veils, implemented by France in order to protect the rights and freedoms of others' right to 'living together.' In the next section I will outline how the margin of appreciation played a central role in the decision making process of the ECtHR.

Articles 8-11 of the ECHR which protects the qualified right to respect for private and family life, home and correspondence, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association are all written in similar form. Whilst the first part outlines the right, the second part outlines when these can be legitimately limited. As aforementioned, Article 9(2) ECHR states that:

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

The margin of appreciation available to national authorities is constrained by the above principles: that the limitation be prescribed by law, be necessary in a democratic society for the above reasons and thirdly, it needs to be proportionate to a pressing social need. A broad margin of appreciation has been given with respect to the “protection of health or morals” on the ground that there is no European consensus amongst member States.

As previously mentioned within this dissertation the Court has held that “pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic’ society.”<sup>29</sup> Although, at times individual interests must be limited in order to protect the freedoms of others, this does not mean that the views of the majority should always take precedence. It is important for the Court to ensure that a balance is achieved which ensures that the individual’s concrete

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<sup>28</sup> *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011),

<sup>29</sup> *Young, James and Webster v. the United Kingdom* App No. 7601/76; 7806/77 (ECtHR, 13 August 1981), paragraph 49



convention right is protected and to avoid the further marginalization of underrepresented groups.<sup>30</sup> As mentioned in earlier chapters the qualification of the right to manifest a religious belief requires a balancing exercise which respects both pluralism and the spirit of democracy. In order to achieve this there must be a dialogue between the affected individuals and groups combined with “a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society.”<sup>31</sup> Balancing the fundamental rights of the individual with the rights and freedoms of others is what is required of a pluralistic society and comprises the basis of a democratic one.<sup>32</sup> In delimiting the extent of the margin of appreciation in Article 9(2) cases, the Court must consider the rights and freedoms of individuals to practice their religion without being discriminated against and excluded from the public sphere. This is necessary if true religious pluralism is to reign supreme.

## Margin of Appreciation and Article 9

### The case of *Lautsi v. Italy*

In 2011, the Grand Chamber of the ECtHR reversed a Chamber ruling which unanimously held that the Italian regulation allowing for the placement of a crucifix in public schools had breached the Convention rights of Mrs Soile Lautsi’s children. The case concerned the question of whether crucifixes could be present in the classrooms of state schools, or whether this act was a breach of the rights to education and religious freedom under Article 9. Italy argued that the crucifix was in fact a “passive symbol” which the Court accepted, as it did not consider whether the presence of the crucifix was incompatible with the principle of

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<sup>30</sup> see, mutatis mutandis, *Young, James and Webster v. the United Kingdom* App No. 7601/76; 7806/77 (ECtHR, 13 August 1981) and *Chassagnou and Others v. France* App No 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999)

<sup>31</sup> See, mutatis mutandis, the *United Communist Party of Turkey and Others*, para 21, 22, and 45, and *Refah Partisi (the Welfare Party) and Others v Turkey* App No 41340/98 (ECtHR, 13 February 2003). para 91

<sup>32</sup> *Chassagnou and Others v. France* App No 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999)

secularism and neutrality. The Court further held that the question of whether crucifixes ought to be present in state schools falls within the States' margin of appreciation.

The Court accepted the applicant's argument that the State has a duty to ensure that the principle of neutrality extends not only to the school curriculum, but to the organisational structure of the school, including whether crucifixes ought to be present in classrooms. The Court distinguished this case from that of *Dahlab v Switzerland* and disagreed with the Chamber's line of argument that if the act of wearing a headscarf was deemed to be a "powerful external symbol" which breaches the principle of neutrality, then the same logic can be applied to a crucifix in the classroom. The Grand Chamber countered this, and held that there was no evidence of indoctrination based on three factors: firstly, the presence of the crucifix was not supplemented with compulsory Christianity classes,<sup>33</sup> nor was there any evidence of intolerance to other religious beliefs or in the case of Mrs Soile Lautsi's children, no religious belief.<sup>34</sup> Finally the Court held that the presence of the crucifix was in no way prohibiting Mrs Soile Lautsi from exercising her right as a parent by raising her children in the conviction of her choice.<sup>35</sup>

### *SAS v France*

As recently as last year, the Grand Chamber of the ECtHR upheld the French decision to criminalise face coverings in public spaces and contended that it did not breach Article 8 (family and private life), Article 9 (freedom of religion) and they unanimously held that it did not breach Article 14 (prohibition of discrimination) in tandem with Articles 8 or 9. The Court also held that the applicant's claim under Article 3 (inhuman or degrading treatment) and Article 11 (the freedom of assembly and association) were inadmissible.<sup>36</sup>

The applicant in *SAS v France* argued that the ban negatively impacted on her free choice to wear the Niqab in accordance with her religious beliefs, culture and personal convictions. She stressed that she had not been coerced to wear the veil by her husband nor any other

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<sup>33</sup> paragraph 74

<sup>34</sup> *Ibid.*

<sup>35</sup> paragraph 75

<sup>36</sup> *SAS v. France*, App no. 43835/11 (ECtHR, 14 July 2015)

member of her family had coerced her to wear the veil. She also argued that she was willing to take off her Niqab in limited circumstances, such as for the purpose of identification in order to comply with France's public safety argument. She also put forward the argument that the ban violated her Article 3, 8-11 and Article 14 rights. The Court in their judgment specifically focused on Article 9 and dismissed her claims under Articles 3, 10 and 11 of the ECHR.

The right to manifest a religious belief can be legitimately interfered with provided that it is 'prescribed by law' and 'necessary within a democratic society'.<sup>37</sup> This means that there has to be a legal basis for the restriction, and that the limitation is proportionate to its aims. In the last decade many Contracting Party States to the Council of Europe have enacted laws limiting Islamic dress on the basis of state secularism and neutrality, for the promotion of gender equality, for the purpose of public order and to protect both school and university students from religious influence.<sup>38</sup>

The Court agreed with the applicant in *SAS v France*<sup>39</sup> that there was interference to her freedom to manifest her religious beliefs, but that these restrictions were justified under the umbrella of public safety and 'respect for the minimum set of values of an open and democratic society'. The second category had been split further into three separate reasoning by the French State: gender equality, human dignity and 'respect for the minimum requirements of life in society' or 'living together'. Whilst public safety is covered in both 8(2) and 9(2) ECHR, 'respect for the minimum set of values of an open and democratic society' was interpreted by the Court to fall within the 'protection of the rights and freedoms of others.'<sup>40</sup>

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<sup>37</sup> Article 9 ECHR

<sup>38</sup> *Kalac v Turkey* App no 20704/91, (ECtHR, 1 July 1997), *Dahlab v Switzerland* Application number 42393/98 (ECtHR, 15 February 2001), *Sahin v. Turkey*. App no 44774/98 (ECtHR, 29 June 2004 ECHR)

<sup>39</sup> *SAS v France*

<sup>40</sup> *Ibid.* Paragraph 117

The judgment in *SAS v France* provides to some extent a departure from the ECtHR's jurisprudence in its freedom to manifest a religious belief cases. The rejection of France's justifications based on gender equality and public safety is a step towards a more legitimate approach of Article 9(2). However, what is concerning is the inclusion 'living together' as another restriction to the right to manifest a religious belief and having it prioritized over concrete individual rights guaranteed by the Convention.<sup>41</sup> This has been described by some to be a cause of concern, as 'living together' implies that the majority can force a minority group to assimilate to their way of life.<sup>42</sup> Interestingly, the ECtHR agrees with this to a certain extent, as they recognized that the concept of 'living together' as a justifiable ground for limiting Article 9(2) can lead to a 'risk of abuse.'<sup>43</sup> Nevertheless, by allowing France a wide margin of appreciation, the Court has undermined their own concerns and allowed the limitation. The concept of 'living together' has the potential to affect future judgments concerning the right to manifest religion, in a similar manner to use of gender equality and secularism in the *Sahin* case<sup>44</sup> which will be discussed in more detail later.

The Court held that in order to determine the scope of the margin of appreciation of states, there must be a consideration of the right's importance, the "nature" and "aim" of the "restricted activity."<sup>45</sup> The extent to which the Strasbourg Court should defer to the national authorities has been considered to be one of the crucial questions which arise when examining the regulating of religious pluralism across Europe. The ECtHR held that France had a wide margin of appreciation because the burqa ban had been adopted following a democratic process.<sup>46</sup> While it is perfectly legitimate to consider the legal, political, social and historical context in France, which feeds into their secular values which dates back to the French Revolution. As well as respect the fact that the law was adopted after an overwhelming political consensus, the view is that it still remains the task of the government to consider the

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<sup>41</sup> *SAS v. France*, App no. 43835/11 (ECtHR, 14 July 2015), paragraph 2 dissenting judgment

<sup>42</sup> This is also the view of the dissenting judges, see paragraph 2 of dissenting opinion of Judges Nussberger and Jäderblom.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Sahin v Turkey* App no 44774/98 (ECtHR, 29 June 2004)

<sup>45</sup> *Ibid.* paragraph 101

<sup>46</sup> paragraph 154

disproportionate effect such laws will have on small minorities and the task of the Court to protect them.<sup>47</sup>

## ANALYSIS

It is important to note that the doctrine of the margin of appreciation was first developed in the context of Article 15, which is the derogation clause to the Convention. Despite the fact that the Court has still not fleshed out when derogating from the Convention is justified, it has to some extent given an indication as to when it is necessary to interfere with a qualified right. Furthermore, in addition to the use of the doctrine as a method for reducing the Court's review, it has at times used it as a method for balancing between individual rights and communal interests which Letsas refers to as the substantive aspect of the margin of appreciation.<sup>48</sup> But it has been better described as the other side of the principle of proportionality<sup>49</sup> because of the weighing exercise involved as described in chapter two.

As described earlier within this chapter the width of the margin of appreciation depends on a number of factors: the nature of the right in question, the nature of the activity in question and their importance for the individual; the nature of the aims pursued and whether they concern general social and economic policies; the nature of the duty; the text of the Convention; the surrounding circumstances; and the existence of common grounds amongst Contracting Party States, or in comparative or international law, or in public opinion. The margin is narrower when the right is fundamental for democracy and the rule of law, such as freedom of expression, anti-discrimination, and the right to respect the most fundamental aspects of private life as enshrined in Article 8, whether they are moral or sexual, and when there is consensus on the matter. It is generally wider when it involves property, when the restrictions protect the rights and freedoms of others, whether national security, morality or religious feelings of others, where socio-economic policies are an issue and where there is a

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<sup>47</sup> para 20 of dissenting opinion of Judges Nussberger and Jäderblom

<sup>48</sup> Letsas, 'Two Concepts of the Margin of Appreciation' (2005) 26(4) *Oxford Journal of Legal Studies* 705

<sup>49</sup> Basac Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29(1) *Human Rights Quarterly* 251

lack of consensus. As outlined by several commentators, the lack of consensus is the most relevant factor.<sup>50</sup>

However, it is important to note that while the Court defers to national authority in terms of the rights and freedoms of others, whether that is for the purpose of religious freedom or identity, the Court imposes a dominant concept of morality enforced by the majority against the minority. More importantly it's a conception of morality, or a way of living which justifies the infringement of human rights of those who do not accept it. This runs counter to the Court's role as a human rights institution. Its task is to secure the respect for minimum standards which protect human dignity, autonomy and equality of all people under the jurisdiction of the Member States.

This does not mean that the doctrine of the margin of appreciation has no place in the international human rights system. However, it should not be applied in a manner that shields the conduct of the state from supervision and justifies the violation of the rights of minorities on the basis of majoritarian preferences. Nor does it mean that European consensus should have less significance in the human rights machinery. However, the Court should also take into consideration other international human rights instruments and progressive developments in comparative jurisprudence on the issue in question, as these are usually more sensitive to the disadvantage of vulnerable groups.

In an ideal world, the Court would take into consideration the impact of judicial decisions on vulnerable groups alongside European consensus. This would move human rights to their original purpose, that of placing the rights of the individual at the heart of the international order, whilst being sensitive to the principle of subsidiarity. Though, this would not fare well, as best exemplified in the public reaction in the United Kingdom, when the Court held on four occasions that the UK breached convention rights by denying all prisoners the right to

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<sup>50</sup> Letsas, 'Two Concepts of the Margin of Appreciation' (2005) 26(4) *Oxford Journal of Legal Studies* 705 Nieuwenhuis, 'European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey, Decision of 29 June 2004, Application Number 44774/98' (2005) 1(03) *European Constitutional Law Review* (EuConst) 495 Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case' (2013) 13(2) *Human Rights Law Review* 287

vote.<sup>51</sup> In these cases it is obvious that the Strasbourg Court were sensitive to the underlying political dynamic.

Furthermore, it is important to note as highlighted by the *Goodwin* case that these ECHR decisions are not the culmination of the campaign but the beginning of the end. A limitation of this dissertation which takes a very broad international human rights perspective is that the grass roots activists at state level are often not mentioned. It is precisely as a result of these grass root activities that these cases made their way to the Strasbourg Court. Similarly, in the case of *SAS v France*, there were a number of non-governmental organizations (NGOs) that took part in the case as amici curiae including Amnesty International and Liberty as well as the Human Rights Centre of the Ghent University Faculty of Law in which they openly engaged with the evidence provided:

The Court would first emphasize that the argument put forward by the applicant and some of the third-party interveners, to the effect that the ban introduced by sections 1 to 3 of the Law of 11 October 2010 was based on the erroneous supposition that the women concerned wore the full-face veil under duress, is not pertinent. It can be seen clearly from the explanatory memorandum accompanying the Bill (see paragraph 25 above) that it was not the principal aim of the ban to protect women against a practice, which was imposed on them or would be detrimental to them.<sup>52</sup>

The Court also took into consideration the fact that, ‘a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate.’<sup>53</sup> These include the Parliamentary Assembly of the Council of Europe and the Commissioner for Human Rights of the Council of Europe.<sup>54</sup> Yet the Court agreed with a blanket ban in this instance, solely because of the margin of appreciation. As demonstrated in the dissenting judgment:

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<sup>51</sup> *Hirst v UK App No 74025/01 (ECtHR, 6 October 2005)*

<sup>52</sup> Para 137

<sup>53</sup> Paragraph 147

<sup>54</sup> Paragraph 35-37

“... the blanket ban could be interpreted as a sign of selective pluralism and restricted tolerance ... It has not sought to ensure tolerance between the vast majority and the small minority, but had prohibited what is seen as a cause of tension.”<sup>55</sup>

Nevertheless, this willingness to receive evidence from various sources allows the Court to critically examine whether there is in fact a European consensus and thus puts the Court in a position to respond to more than solely the arguments raised by the litigating parties. This is especially important once we consider the fact that, as mentioned in earlier chapters and is most evident in *Leyla Sahin v Turkey* and *Dahlab v Switzerland*, there is a clear power dynamic between the individual and the state when petitioning to the European Court of Human Rights. Allowing amicus curiae briefs allows the Court to move beyond mere stereotypes, such as the headscarf running against gender equality. The Court in its previous case law had readily accepted this stereotype, but after examining the evidence put forward by third party interveners, the Court held that it was both chauvinistic and paternalistic to argue that the ban on niqab was based on gender equality.<sup>56</sup>

## CONCLUSION

This chapter evaluated, in the light of contemporary practices of the European Court of Human Rights, the current status of the margin of appreciation under international law. As previously mentioned, human rights have changed considerably in the mid twentieth century. However, one criticism has remained: that they fail to protect the rights of women.<sup>57</sup> Human

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<sup>55</sup> Paragraph 14

<sup>56</sup> Para 79-80

<sup>57</sup> Ibid. See also: Rachael Lorna Johnstone, *Feminist Influences on the United Nations Human Rights Treaty Bodies*, vol 28 (2006) ;Al-Saji, ‘The racialization of Muslim veils: A philosophical analysis’ 36(8) *Philosophy & Social Criticism* 875 ;Beverly Ackerly and Jacqui True, ‘Back to the future: Feminist theory, activism, and doing feminist research in an age of globalization’ (2010) 33(5) *Women's Studies International Forum* 464 ;Al-Saji, ‘The racialization of Muslim veils: A philosophical analysis’ 36(8) *Philosophy & Social Criticism* 875 ;Bartlett and Kennedy, *Feminist legal theory : readings in law and gender* (Westview Press 1991) ;Michele Byers and Diane Crocker, ‘Feminist cohorts and waves: Attitudes of junior female academics’ 35(1) *Women's Studies International Forum* 1 ;Hilary Charlesworth, ‘Feminist Methods in International Law’ [*American Society of International Law*] 93(2) *The American Journal of International Law* 379 ;Kimberle Crenshaw and Michel Rosenfeld, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics



rights related to gender, or human rights which disproportionately affect women have been interpreted in a way which, in the best case scenario, obscures the voices of women and in the worst case scenario excludes the voices of women. In many instances of violation of human rights of women, sex/gender is the primary basis of violation. In most types of violations, there is a complex interaction between gender and sex and other constituent elements of identity, such as sexual orientation, race, class, religion, and political affiliation.

The Court is a human rights institution whose task is to secure the respect for minimum standards which protect human dignity, autonomy, and equality of all people under the jurisdiction of the member states. The author contends that deference to the state's margin of appreciation in cases where the Court finds no consensus on the issue in question, or where the government invokes the protection of morality as the reason for interference with Convention rights, undermines the Court's duty to protect members of the vulnerable groups from majoritarian practices. The margin of appreciation runs alongside the principle of subsidiarity and strengthens the democratic principle of the separation of powers as it prevents the Court from interfering in matters which are better dealt with by elected representatives. Furthermore, it is seen to protect the values of a culturally diverse geographical region. However, in order for these goals to be enhanced, as opposed to undermined, the Court has to apply the margin of appreciation consistently and it has to be

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Can Constitutionalism, Secularism and Religion Be Reconciled in an Era of Globalization and Religious Revival Symposium: Constitutionalism and Secularism in an Age of Religious Revival: The Challenge of Global and Local Fundamentalisms: Introduction' 1989 U Chi Legal F 139 ;Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful' 9(1) Feminist Theory 67 ;Hawkesworth, 'Feminist Rhetoric: Discourses on the Male Monopoly of Thought' [Sage Publications, Inc.] 16(3) Political Theory 444 ;Sharlene Nagy Hesse-Biber and Patricia Leavy, *Feminist research practice : a primer* (SAGE 2007) ;Hunter, 'The Power of Feminist Judgments?' [Springer Netherlands] 20(2) Fem Leg Stud 135 ;Celia Kitzinger and Sue Wilkinson, 'Validating Women's Experience? Dilemmas in Feminist Research' 7(4) Feminism & Psychology 566 ;Janet A. Kourany, James P. Sterba and Rosemarie Tong, *Feminist philosophies : problems, theories, and applications* (Prentice Hall 1998) ;Joan B. Landes, *Feminism, the public and the private* (Oxford University Press 1998) ;Nash, 'Re-thinking Intersectionality' (2008)(89) Feminist Review 1 ;Frances E. Olsen, *Feminist legal theory* (Dartmouth 1995) ;Smart, *Feminism and the power of law* (Routledge 1989) ;Elizabeth V. Spelman, *Inessential woman : problems of exclusion in feminist thought* (Beacon Press 1988) ;Liz Stanley and Sue Wise, *Breaking out again : feminist ontology and epistemology* (2nd ed. edn, Routledge 1993)

guided by the values of equality, autonomy human dignity and respect as enshrined in the Convention.<sup>58</sup> It is important that this discretion is exercised in a manner that is fair and impartial and does not run counter to universal human rights standards. It is important that Contracting Party States are allowed the flexibility to implement human rights in a manner which suits their different cultural, religious and political landscape. It is also important for the purposes of consistency and transparency that the Court spells out all the stages of the margin of appreciation interpretative principles to conclusions about state discretion.

The following chapter will discuss the critical scholarship on intersectionality in more detail. The argument put forward is not only that the Court failed to consider Miss Sahin's intersecting identities when limiting her freedom to manifest her religious belief, but also that the repercussions of the approach taken by the Court have led to the weakening of the right to manifest a religious belief as well as the right to equality.

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<sup>58</sup> *Handyside v the United Kingdom App No 5493/72 (ECtHR, 7 December 1976)*

## 5. Chapter Five: Introducing Intersectionality

### INTRODUCTION

There has been a real concern that when examining the legitimate limitations of Article 9(2) ECHR the ECtHR fails to take into consideration the differences between women and their subsequent inequality as a result thereof. As stated in the introductory chapter, the Court's failure to take into account the intersectional identity of religious women in its Article 9(2) jurisprudence has led to the double discrimination of women in their respective home state. Despite the fact that the Court has proclaimed gender equality to be a central theme in the Convention, it has failed to understand that the advancement of gender equality involves challenging all forms of disadvantage, which can be both multiple and intersectional. The previous chapter examined the case law of the ECtHR when it comes to limiting the right to manifest a religious belief. It also suggested, albeit briefly, that in order to retain its legitimacy the Strasbourg Court ought to take into consideration the lived experience of the women whose religious manifestation they seek to limit. This chapter further elaborates on this suggestion and, moving further, examines the first part of my second research question: to what extent can intersectional feminism overcome the problem faced by religious women in Europe?

### RATIONALE AND AIMS

The previous chapters have shown the way in which the international community has been unable to successfully protect the human rights of women who are at the margins.

Multiple discriminations have been widely recognised for some time by those working in the field as a problem that needs to be addressed in equality paradigms. One aspect of the problem is to do with the fact that multiple and intersectional

discriminations are often ignored and are only solved, at least at the ECHR level, on an ad hoc basis, as and when cases are brought to the ECtHR under Article 14. Fortunately, the Court has made some headway in its identification as to when an individual requires extra protection because their multiple identities have made them 'vulnerable'.<sup>1</sup> Nonetheless, more work needs to be done to protect religious women and their right to manifest their religious beliefs.<sup>2</sup> This chapter will outline that religious women face intersectional invisibility as a result of their intersectional identity and has three main objectives. The first is to highlight and provide evidence that women who wish to manifest their religious belief have been rendered invisible as a result of where they are in the debate. Secondly, it will discuss the legal problems surrounding intersectional discrimination. Thirdly, it suggests changes to the law through the recognition of intersectionality as both a theoretical framework and a political strategy. The overall discussion progresses with a view to develop the law to ensure justice and to meet the needs of the diverse female population in Europe. The way in which this should be implemented at an institutional level will be further discussed in Chapters Six and Seven.

This chapter will also provide the foundation for a more worked-out theoretical approach, which will include both the epistemological and ontological commitments that this dissertation undertakes.

## THEORETICAL FRAMEWORK

Intersectionality as a concept can be found in feminist theory to convey that subjectivity is constituted by mutually reinforcing vectors of race, gender, class and sexuality.<sup>3</sup> It also signals a move away from what is described as an additive model

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<sup>1</sup> Lourdes Peroni; and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) *International Journal of Constitutional Law* 1056

<sup>2</sup> Vakulenko, 'Islamic Headscarves' and the European Convention On Human Rights: an Intersectional Perspective' (2007) 16(2) *Social & Legal Studies* 183 ;Vakulenko, *Islamic veiling in legal discourse* (Routledge 2012) ;Vakulenko, 'Islamic dress in human rights jurisprudence and the surrounding debate [electronic resource] : a critical feminist analysis' (University of Nottingham, 2008)

<sup>3</sup> J C Nash, 'Re-thinking Intersectionality' (2008)(89) *Feminist Review* 1Nash 2008

of analysis where identity is seen as independent strands of inequality and, rather: “views these vectors of inequality as overlapping and interacting to form complex configurations of subjectivity.”<sup>4</sup> Intersectional theory has become an increasingly popular theoretical approach within social research and is considered the key analytical tool in tackling disadvantage.<sup>5</sup> Interestingly, the main question within intersectionality theory is that of who embodies an intersecting subject position within identity politics.<sup>6</sup> In her analysis of intersectional theory Nash argues that, “this unresolved theoretical dispute makes it unclear whether intersectionality is a theory of marginalized subjectivity or a generalized theory of identity.”<sup>7</sup> Despite this intersectionality is still a useful theoretical approach for social scientists. One limitation however, is that there is no clear methodology for intersectional research.<sup>8</sup> Furthermore, there is no developed research design and methods that can be used universally to apply intersectional theory to research projects.<sup>9</sup> One justification for this can be attributed in part, to how difficult it is to construct a research paradigm which is attentive to “the complexity that arises when the subject of analysis expands to include multiple dimensions of social life and categories of analysis.”<sup>10</sup> Furthermore, as a result of limited research in the area, researchers often find that they have to apply an intersectional theoretical framework using trial and error, with emphasis on avoiding essentialising the experiences of marginalized groups.<sup>11</sup> Despite these difficulties, intersectionality continues to guide and enrich social

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<sup>4</sup>Hae Yeon Choo and Myra Marx Ferree, ‘Practicing Intersectionality in Sociological Research: A Critical Analysis of Inclusions, Interactions, and Institutions in the Study of Inequalities’ (2010) 28(2) *Sociological Theory* 129, 131; Stephanie A. Shields, ‘Gender: An intersectionality perspective’ (2008) 59(5-6) *Sex Roles* 301

<sup>5</sup>Nash, ‘Re-thinking Intersectionality’ (2008)(89) *Feminist Review* 1, 1

<sup>6</sup>Ibid

<sup>7</sup>Ibid, 10

<sup>8</sup>Stephanie A. Shields, ‘Gender: An intersectionality perspective’ (2008) 59(5-6) *Sex Roles* 301, 301 Nash, ‘Re-thinking Intersectionality’ (2008)(89) *Feminist Review* 1

<sup>9</sup>Ange-Marie Hancock, ‘When Multiplication Doesn’t Equal Quick Addition: Examining Intersectionality as a Research Paradigm’ (2007) 5(01) *Perspectives on Politics* 63, 74

<sup>10</sup>Leslie McCall, ‘The Complexity of Intersectionality’ (2005) 30(3) *Journal of Women in Culture and Society* 1771, 1773

<sup>11</sup>Lisa Bowleg, ‘When Black + Lesbian + Woman ≠ Black Lesbian Woman: The Methodological Challenges of Qualitative and Quantitative Research’ (2008) 59(5) *Sex Roles* 312, 313

research. As a result, it is important to consider what a methodology of intersectionality might look like, and to ask how researchers can develop and use a methodology which would not only account for the intersections of various identity markers such as race, class, and gender<sup>12</sup>, but also account for the fluidity of these identity markers.

Be that as it may, intersectionality draws on feminist theory, in particularly black feminism which is described by Bell Hooks as:

“Feminism is a struggle to end sexist oppression. Therefore, it is necessarily a struggle to eradicate the ideology of domination that permeates Western culture on various levels as well as a commitment to reorganizing society so that the self-development of people can take precedence over imperialism, economic expansion, and material desires....A commitment to feminism so defined would demand that each individual participant acquire a critical political consciousness based on ideas and beliefs. (24)...Feminism is the struggle to end sexist oppression. Its aim is not to benefit solely any specific group of women, any particular race or class of women. It does not privilege women over men. It has the power to transform in a meaningful way all our lives.”<sup>13</sup>

The feminist metanarrative within my dissertation is based on two premises. Firstly, the argument that women are differently situated in relation to limitations on their right to manifest religious beliefs does not mean that men are not affected by it, or that men don't wish to manifest their religious beliefs. This is incorrect, as evidenced by the number of cases where men have argued before the Court that their Article 9(2) has been violated. The argument, instead, is that women are affected disproportionately and in different ways, especially since evidence suggests that women are more likely to manifest their religious beliefs than men and women are evidenced to be more devout than men.<sup>14</sup> My second premise is that the

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<sup>12</sup> Crenshaw, *Critical Race Theory : the Key Writings that Formed the Movement* (New Press 1995)

<sup>13</sup> *Feminist Theory: From Margin to Center* p24-25

<sup>14</sup> Casanova J, *Public Religions in the Modern World* (1 edn, Chicago University Press 1994), Davie G, *Religion in Modern Europe: A Memory Mutates* (1 edn, Oxford University Press 2000), Davie G, *Europe - the exceptional case : parameters of faith in the modern world*

management of plurality is gendered in the specific sense of where women are located in the debate, and is derived from the public-private dichotomy which has defined inter-state decision making and politics in liberal thought. When forced to make the decision between manifesting religious beliefs and remaining in the public sphere, thousands of women may choose to remain in the private sphere and become disconnected from public life.

#### CRITIQUE OF INTERSECTIONALITY

Over three decades ago, authors such as Kimberlé Crenshaw<sup>15</sup> and Audre Lorde<sup>16</sup> emphasized the need to take into account the intersection between the multiples identities of individuals in order to understand social dynamics of exclusion and subordination. Over the years, academics have tackled the issue of intersectionality globally over a variety of different issues, including domestic violence, immigration law and policies, family life, the welfare system and institutional racism, sexism, homophobia, ageism, religious discrimination, transgender discrimination and disability discrimination.<sup>17</sup>

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(Darton Longman & Todd 2002), Davie G, *the Sociology of Religion* (1 edn, Sage Publications 2007)

<sup>15</sup>Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1) U Chi Legal F 139 ;Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) Stanford Law Review 1241 ;Kimberlé Crenshaw, *Critical Race Theory : the Key Writings that Formed the Movement* (New Press 1995)

<sup>16</sup>Audre Lorde, *Sister outsider : essays and speeches* (Crossing Press 1984)The scholar deliberately left out punctuation in-between the different identities in order to highlight her personal intersectional identity; where homophobia and racism would separate and privilege one identity over the other.

<sup>17</sup> Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) Stanford Law Review 1241 ;Llezzie L. Green, 'Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law Note' (2001) 33 Colum Hum Rts L Rev 733 ;Johanna E. Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 Emory LJ 71 ;Nira Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13(3) European Journal of Women's Studies 193 ;Anastasia Vakulenko, 'Islamic Headscarves' and the European Convention On Human Rights: an Intersectional Perspective' (2007) 16(2) Social & Legal Studies 183 ;Ange-Marie Hancock, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm' (2007) 5(01) Perspectives on Politics 63 ;'Intersectionality' 3(02) Politics & Gender 229 ;Ange-Marie Hancock, 'Intersectionality as a Normative and Empirical Paradigm' (2007) 3(02) Politics & Gender 248 ;Julia S. Jordan-Zachery, 'Am I a Black Woman or a Woman Who Is Black? A Few Thoughts on the Meaning of Intersectionality' 3(02) Politics & Gender 254 ;Evelyn M. Simien, 'Doing Intersectionality Research: From Conceptual Issues to Practical Examples' (2007) 3(02) Politics & Gender 264 ;I Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19(4) European Journal of International Law 841 ;J C Nash, 'Re-thinking Intersectionality' (2008)(89) Feminist Review 1 ;Kathy Davis, 'Intersectionality as Buzzword: A Sociology of science Perspective on what Makes a Feminist Theory Successful' (2008)

Intersectionality also plays a central role in empirical research in law and courts. In this field, there is a well-established tradition of analysis of certain socio-demographic aspects of individuals in the courtroom, such as race<sup>18</sup>, gender<sup>19</sup> or social class<sup>20</sup>. These aspects of individuals, however, do not run in parallel to each other, but instead they interact, forming specific intersectional categories of litigants which literature has increasingly investigated<sup>21</sup>.

Intersectionality as a concept can be found in feminist theory to convey that subjectivity is constituted by mutually reinforcing vectors of race, gender, class and sexuality.<sup>22</sup> It also signals a move away from what is described as an additive model of analysis where identity is seen as independent strands of inequality and, rather: “views these vectors of inequality as overlapping and interacting to form complex configurations of subjectivity.”<sup>23</sup> Intersectional theory has become an increasingly popular theoretical approach within social research and is considered the key analytical tool in tackling disadvantage.<sup>24</sup> Interestingly, the main question within intersectionality theory is that of who embodies an intersecting subject position within identity politics.<sup>25</sup> In her analysis of intersectional theory Nash argues that, “this unresolved theoretical dispute makes it unclear whether intersectionality is a

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9(1) *Feminist Theory* 67 ;M Rahman, ‘Queer as Intersectionality: Theorizing Gay Muslim Identities’ (2010) 44(5) *Sociology* 944 ;Michael Banton, ‘Religion, faith, and intersectionality’ (2011) 34(7) *Ethnic and Racial Studies* 1248 ;H P Nielsen, ‘Joint purpose? Intersectionality in the hands of anti-racist and gender equality activists in Europe’ (2013) 13(3) *Ethnicities* 276

<sup>18</sup> See, inter alia, A. Lizzote (1978) Extra-legal factors in Chicago’s criminal courts: Testing the conflict model of criminal justice. *Social Problems* 25:564-578; C. Spohn (1990) The sentencing decisions of black and white judges: some expected and unexpected similarities, *Law & Society Review* 16:71-88.

<sup>19</sup> K. Daly and R. Bordt (1995) Sex effects and sentencing: A review of the statistical literature. *Justice Quarterly* 12:143-177. B.A. Koons-Witt (2002) The effect of gender on the decisions to incarcerate before and after the introduction of sentencing guidelines, *Criminology* 40(2): 297-327.

<sup>20</sup> S.J. Dalessio and L. Stolzenberg (1993) Socioeconomic-Status and the Sentencing of the Traditional Ofender, *Journal of Criminal Justice* 21(1):61-77

<sup>21</sup> See, inter alia, T. Collins and L. Moyer (2008) Gender, Race, and Intersectionality on the Federal Appellate Bench, *Political Research Quarterly* 61(2):219-227; R. Kahm Best, L.B. Edelman, L. Hamilton Krieger, S. R. Eliason (2011) Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation, *Law & Society Review* 45(4): 991-1025; J. Szmer, R.K. Christensen, E.B. Jaheny (2015) Gender, Race, and Disensus on State Supreme Courts, *Social Science Quarterly* 96(2): 553-575.

<sup>22</sup> Nash, ‘Re-thinking Intersectionality’ (2008)(89) *Feminist Review* 1 Nash 2008

<sup>23</sup> Hae Yeon Choo and Myra Marx Ferree, ‘Practicing Intersectionality in Sociological Research: A Critical Analysis of Inclusions, Interactions, and Institutions in the Study of Inequalities’ (2010) 28(2) *Sociological Theory* 129, 131; Stephanie A. Shields, ‘Gender: An intersectionality perspective’ (2008) 59(5-6) *Sex Roles* 301

<sup>24</sup> Nash, ‘Re-thinking Intersectionality’ (2008)(89) *Feminist Review* 1, 1

<sup>25</sup> *Ibid*



theory of marginalized subjectivity or a generalized theory of identity.”<sup>26</sup> Despite this intersectionality is still a useful theoretical approach for social scientists. One limitation however, is that there is no clear methodology for intersectional research.<sup>27</sup> Furthermore, there is no developed research design and methods that can be used universally to apply intersectional theory to research projects.<sup>28</sup> One justification for this can be attributed in part, to how difficult it is to construct a research paradigm which is attentive to “the complexity that arises when the subject of analysis expands to include multiple dimensions of social life and categories of analysis.”<sup>29</sup>

In their recent work, Kahn Best *et al.*<sup>30</sup> identified two dimensions of intersectionality that are relevant to judicial studies: demographic intersectionality and claim intersectionality. Demographic intersectionality refers to the intersectional socio-demographic categories to which an individual belongs, even if the object of litigation is unrelated to such categories<sup>31</sup>. Claim intersectionality occurs when the very object of litigation is an expression of an intersectional group to which the individual belongs<sup>32</sup>. The authors theorize that both aspects of intersectionality can drive to different often less favourable treatment in the courtroom for certain intersectional categories as a result of mechanisms such as stereotyping or deficient legal regulation of intersectional situations.

Intersectional considerations play also a role with regards to the right to religious manifestation in the ECHR. From the perspective of Art.9(2) of the Convention,

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<sup>26</sup> Ibid, 10

<sup>27</sup>Stephanie A. Shields, ‘Gender: An intersectionality perspective’ (2008) 59(5-6) *Sex Roles* 301, 301  
Nash, ‘Re-thinking Intersectionality’ (2008)(89) *Feminist Review* 1  
Nash 2008, 4

<sup>28</sup> Hancock, ‘When Multiplication Doesn’t Equal Quick Addition: Examining Intersectionality as a Research Paradigm’ (2007) 5(01) *Perspectives on Politics* 63. 74

<sup>29</sup>Leslie McCall, ‘The Complexity of Intersectionality’ (2005) 30(3) *Journal of Women in Culture and Society* 1771, 1773

<sup>30</sup> R. Kahn Best, L.B. Edelman, L. Hamilton Krieger, S. R. Eliason (2011) *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, *Law & Society Review* 45(4): 991-1025

<sup>31</sup> R. Kahn Best, L.B. Edelman, L. Hamilton Krieger, S. R. Eliason (2011) *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, *Law & Society Review* 45(4): 991-1025, 994

<sup>32</sup> R. Kahn Best, L.B. Edelman, L. Hamilton Krieger, S. R. Eliason (2011) *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, *Law & Society Review* 45(4): 991-1025, 994.

there are three main dimensions of individuals whose intersections are relevant to understand the cases: religion, gender and nationality. The ECtHR always provides for information about these three dimensions in its rulings, they constitute some of the central elements of demographic intersectionality of the claimants, and very often they are a source of claim intersectionality.

Indeed, the social and academic salience of intersectionality has been paralleled by an increasing body of literature analyzing the decisions of the Strasbourg Court from an intersectional perspective. Examining the case of *B.S. v Spain*, Yoshida has recently argued that the ECtHR might be timidly opening to intersectional considerations<sup>33</sup>. However, analyzing case law on forced sterilization of Roma women, Rubio-Marin and Moeschel have underlined the need for the ECtHR to give further recognition to intersectional discrimination<sup>34</sup>. And with regards to the approach of the ECtHR to Islamic headscarf cases, Radacic has accused the court of being ‘insensitive to intersectionality of discrimination’<sup>35</sup>. While pieces on the topic vary in the assessments they make of the Courts’ case law and in the type of cases they cover, these works often have in common the focus only in one or a few cases of the Strasbourg Court, as well as the doctrinal, normative and/or qualitative approach. Although there are instances of works engaging in statistical description of the cases<sup>36</sup>, systematic reviews of intersectionality before the ECtHR are, largely missing.

However, as will be discussed in more detail later in the chapter, intersectionality does give rise to a set of legal problems. Firstly, it is important to recognise that as a legal theory, intersectionality seeks to create frameworks which consider the multiple identities that individuals possess, including ability, age, gender, race,

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<sup>33</sup> K. Yoshida (2013) *Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain*, *Feminist Legal Studies* 21(2): 195-204.

<sup>34</sup> R. Rubio-Marin, M. Moeschel (2015) *Anti-Discrimination Exceptionalism : Racist Violence Before the ECtHR and the Holocaust Prism*, *European Journal of International Law* 26(4): 881-899.

<sup>35</sup> I. Radacic (2008) *Gender Equality Jurisprudence of the European Court of Human Rights*, *European Journal of International Law* 19(4): 841-857.

<sup>36</sup> Silvio Ferrari, ‘The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law’ in Jeroen Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, vol 11 (Brill Online 2012)

religion and sexuality. When applied in this manner, intersectionality considers the connectedness of different components of identity which are often used separately in the anti-discrimination laws of Contracting Party States. Joanne Conaghan has posited that intersectionality has “reached the limits of its potential.”<sup>37</sup> While recognizing its importance in feminist theory and strategy, Conaghan argues that the theory of intersectionality is limited by its very creation; its basis in the law has created a frame of reference too uncompromising to fix the problems it highlights.<sup>38</sup> Conaghan posits that intersectionality’s basis in the law, which only recognizes a number of specific classes of discrimination, acts as a constraint. However, this critique fails to take into consideration the way in which law restructures and changes as society. Another critique which has been levied against the application of intersectionality in anti-discrimination legislation is, that if intersectionality is applied without constraint, it can result in subcategories ad infinitum.<sup>39</sup> Delgado argues that for intersectionality to work, there needs to be a form of essentialism, as the tool requires value judgment, through its comparison that one group is worse off than another. However, this can be criticized on the grounds that the tool needs to be applied in context with the given facts of the case. The experiences of say a Muslim woman, is not inherently worse than that of a Muslim man, or non-Muslim woman, instead; these experiences are different and different laws may apply differently.

It is important not to use the language of intersectionality to perpetuate the same oppressions intersectionality seeks to unveil. Scholars have been criticised for whitening intersectionality, by using Foucault’s work as a critical tool.<sup>40</sup> For those who argue that intersectionality began with Crenshaw, Collins and Sandoval, all of whose body of intersectionality work was rooted in postmodernism for their

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<sup>37</sup> Joanne Conaghan, *Intersectionality and the Feminist Project in Law*, in *Intersectionality and Beyond: Law, Power and the Politics of Location* 21, 22-23 (Emily Grabham et al. eds. 208)

<sup>38</sup> Ibid. 21

<sup>39</sup> R Delgado, ‘Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory,’(2011) 96 *Iowa Law Review*, 1247. 1264

<sup>40</sup> Ange-Marie Hancock, *Intersectionality: An Intellectual History* (Oxford: Oxford University Press, 2016).

formulations of power dynamics. Crenshaw, for example, drew on Derrida to examine racist ideology as a purveyor of oppositional power dynamics.<sup>41</sup> She later explicitly asserts that intersectionality is a “provisional concept” that links contemporary politics with postmodern theory.<sup>42</sup> Collins similarly draws upon Michel Foucault as a resource for her concept of the “matrix of domination,” and Sandoval relies on Derrida, Deleuze, Haraway, and Foucault in her body of work.<sup>43</sup> If we locate intersectionality’s moment of creation in 1989–1991 with these three authors alone, it is easy to conclude that intersectionality is indebted to postmodernism for its “original contribution” of introducing a complex understanding of power into gender studies, among other fields.

It is important however to note three things: firstly, that the concept of intersectionality predates these women who have been dubbed by some to be the foundational authors of intersectionality. Secondly, that while Foucault and others offer a compelling account of power’s complexity in the postmodern tradition, intersectionality offers a systemic and structural analysis of the complexity of both power and identity.<sup>44</sup> Thirdly, it is important not to fall “into the pitfalls of depoliticizing, whitening, or devaluing women of colour’s contributions to this burgeoning area of scholarship.”<sup>45</sup> In her most recent piece of work Anne Marie Hancock examines the way in which “a number of scholars have identified a troubling citation politics that leads to a very narrow, positivistic understanding of intersectionality” which can lead to what she refers to as the ‘whitening of intersectionality.’<sup>46</sup>

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<sup>41</sup> Crenshaw, K, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1989(1) U Chi Legal F 139

<sup>42</sup> Crenshaw K, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43(6) Stanford Law Review 1241

<sup>43</sup> Patricia Hill Collins, *Black Feminist Thought : Knowledge, Consciousness, and the Politics of Empowerment* (Unwin Hyman 1990)

<sup>44</sup> Cho, Sumi. "Post-Intersectionality: The Curious Reception of Intersectionality in Legal Scholarship." *Du Bois Review: Social Science Research on Race* 10, no. 2 (2013): 385, 385

<sup>45</sup> Ange-Marie Hancock, *Intersectionality: An Intellectual History* (Oxford: Oxford University Press, , 2016).

<sup>46</sup> Ibid.

## INTERSECTIONAL INVISIBILITY

Intersectional invisibility has been defined by Purdie-Vaughns and Eibach as:

“The general failure to fully recognize people with intersecting identities as members of their constituent groups. Intersectional invisibility also refers to the distortion of the intersectional persons’ characteristics in order to fit them into frameworks defined by prototypes of constituent identity groups.”<sup>47</sup>

It is important to note that one aspect of intersectionality theory examines whether those who face multiple forms of disadvantage as a result of race, religion, class, sexuality and so forth, face a greater degree of discrimination than those who only face one form of disadvantage. Purdie-Vaughns and Eibach move beyond a conceptualisation of intersectionality in terms of identity politics. Instead, their focus is on intersectional invisibility and specifies the distinctive oppressions faced by people with ‘multiple subordinate- group identities.’<sup>48</sup>

The basic idea behind intersectional invisibility is the notion that androcentric and ethnocentric values, which include religion, have allowed the perspectives of the dominant groups to form part of the societal standards. Thus, through this recognition as a starting point, intersectionality becomes a political strategy, which would aim at making visible women who have been rendered invisible as a result of their multiple identities.

The framework provides a particularly useful lens to make sense of the asymmetry between gender assumptions in the freedom of religion cases and the reality lived by women. The latter have been rendered invisible as a result of the Court’s inability to recognise their multiple identities as a result of its overtly paternalistic approach to gender equality. As discussed in the previous chapter, the Court has proclaimed in a series of cases that gender equality is a legitimate

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<sup>47</sup> Valerie Purdie-Vaughns and Richard P Eibach, ‘Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities’ (2008) [Springer US] 59(5-6) Sex Roles 377

<sup>48</sup> Ibid

limitation of the right to manifest one's religion, without considering the multiple identities of the women whose religious manifestations have been limited. The Strasbourg Court's inability to recognise the multiple identities of women who wish to manifest their religious beliefs has thus led to the "othering" of women who wish to manifest their religious beliefs, inasmuch as the latter do not fit the typical stereotypes of women, nor those of male religious believers.<sup>49</sup> The Court has inadvertently utilised male dominance in the public sphere and defined the in-group norms of the religious believer through the use of an androcentric and ethnocentric lens. It has to be noted, moreover, that for women, one of the most important aspect of religious freedoms consists in the freedom to manifest their religious beliefs.<sup>50</sup> Women see their equality within a religious community, as being given the personal autonomy to join the religion on equal footing to men.<sup>51</sup> While traditionally religion has been seen to be at odds to gender equality, the fact that women have access to a religious community, and are able to manifest their religious beliefs, has been an important aspect of their religious life.

Furthermore, some religious women also have other subordinate identities, including race and sexuality. These can lead to them being further marginalised members within marginal groups; therefore, some women are at even greater risk of intersectional invisibility. Some research has been done in relation to this issue,

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<sup>49</sup> Vakulenko, 'Islamic Headscarves' and the European Convention On Human Rights: an Intersectional Perspective' (2007) 16(2) *Social & Legal Studies* 183

<sup>50</sup> Seggie, *Religion and the State in Turkish Universities* (Palgrave MacMillan 2011), Rosenberger and Sauer, *Politics, religion and gender : framing and regulating veil* (Routledge 2010), Zempi, 'It's a Part of Me, I Feel Naked without it': Choice, Agency and Identity for Muslim Women Who Wear the Niqab' (2016) 39(10) *Ethnic and Racial Studies* 1738, Marshall, 'Freedom of Religious Expression and Gender Equality: Sahin v Turkey' (2006) 69(3) *The Modern Law Review* 452

<sup>51</sup> Ibid. See also Gallala-Arndt, 'The Islamic Headscarf: An Example of Surmountable Conflict between Shari'a and the Fundamental Principles of Europe' (2006) 12(5) *European Law Journal* 593 ;Ghumman and Ryan, 'Not welcome here: Discrimination towards women who wear the Muslim headscarf' (2013) 66(5) *Human Relations* 671 ;Marshall, 'Freedom of Religious Expression and Gender Equality: Sahin v Turkey' (2006) 69(3) *The Modern Law Review* 452

using the example of European Muslim women.<sup>52</sup> Their position of acute social invisibility as a result of their multiple identities will be highlighted next. It is important to note that for the purpose of this dissertation, the intersectional invisibility model will only be examining the intersect of religion, ethnicity and gender. Due to the scope of this thesis, the narrow focus will highlight the experiences faced by women who at times are marginalised, even within their marginalised groups. More research needs to be done in order to examine religious women who are at the margins as a result of their ability, class and/or sexual orientation, thus facing acute intersectional invisibility in different ways and can be at risk of an even greater degree of marginalisation within their marginalised groups. However, this will not be addressed in this dissertation, mainly because the research in this area is minute, but also because it goes against the tenets of intersectionality theory to generalise the experience of others based on research which does not consider all aspects of their identities.

#### DATA AND DISCRIMINATION EXPERIENCES

Through the examination of social hierarchies, there has been a proliferation of quantitative and qualitative research on women who find themselves marginalised within a marginalised group.<sup>53</sup> The basis of all of these examinations is that the

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<sup>52</sup> Abu-Lughod, 'Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others' (2002) 104(3) *American Anthropologist* 783 ;Afshar, 'Can I see your hair? Choice, agency and attitudes: the dilemma of faith and feminism for Muslim women who cover' (2008) 31(2) *Ethnic and Racial Studies* 411 ;Purdie-Vaughns and Eibach, 'Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities' (2008) [Springer US] 59(5-6) *Sex Roles* 377

<sup>53</sup> Nash, 'Re-thinking Intersectionality' (2008)(89) *Feminist Review* 1 ;H P Nielsen, 'Joint purpose? Intersectionality in the hands of anti-racist and gender equality activists in Europe' (2013) 13(3) *Ethnicities* 276 ;Purdie-Vaughns and Eibach, 'Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities' (2008) [Springer US] 59(5-6) *Sex Roles* 377 ;Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19(4) *European Journal of International Law* 841 ;Rahman, 'Queer as Intersectionality: Theorizing Gay Muslim Identities' (2010) 44(5) *Sociology* 944 ;Dagmar Schiek and Anna Lawson, *European Union non-discrimination law and intersectionality : investigating the triangle of racial, gender and disability discrimination* (Ashgate 2011) ;Dagmar Schiek; and Anna Lawson, *European Union non-discrimination law and intersectionality : investigating the triangle of racial, gender and disability discrimination* (Ashgate 2011) ;Evelyn M. Simien, 'Doing

world operates within a system whose structure favours, white, middle class, Christian, heterosexual, able and slim men.<sup>54</sup> In the academic literature, much work has been done on the way in which those who fit outside of the ideal social category have been “othered” in “the matrix of domination.”<sup>55</sup> Much of the focus in Europe has been on the victimisation of the Muslim woman, as a result of limiting the manifestation of religious belief and a realisation that in the past decade Muslims have been subjected increasingly to harassment and discrimination.

There is no doubt that the limited research done on Muslim women highlights that they face exclusion and subordination based on their religious belief and gender. In Sweden, studies suggest that the group which is the least integrated into the labour market and in education consists of Muslim women from Asian and African countries. Much more recently, research has been done in Greece, with regard to the State’s treatment of Muslim women as second class citizens despite a large proportion of them having Greek citizenship.<sup>56</sup> Empirical research done in Greece and based on the performance of courts suggests that the exclusion and subordination faced by Muslim women, like women in the rest of Europe, is distinct,

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Intersectionality Research: From Conceptual Issues to Practical Examples’ (2007) 3(02) *Politics & Gender* 264 ;Dorthe Staunæs, ‘Where have all the subjects gone? Bringing together the concepts of intersectionality and subjectification’ (2003) [Routledge] 11(2) *NORA - Nordic Journal of Feminist and Gender Research* 101 ;Stephanie A. Shields, ‘Gender: An intersectionality perspective’ (2008) 59(5-6) *Sex Roles* 301 ;Sylvia Walby, Jo Armstrong and Sofia Strid, ‘Intersectionality and the Quality of the Gender Equality Architecture’ (2012) 19(4) *Social Politics: International Studies in Gender, State and Society* 446 ;Walby Sylvia, Armstrong Jo and Strid Sofia, ‘Intersectionality and the Quality of the Gender Equality Architecture’ [Oxford University Press] 19(4) *Social Politics: International Studies in Gender, State and Society* 446 ;Vakulenko, ‘‘Islamic Headscarves’ and the European Convention On Human Rights: an Intersectional Perspective’ (2007) 16(2) *Social & Legal Studies* 183 ;Mieke Verloo and Sylvia Walby, ‘Introduction: The Implications for Theory and Practice of Comparing the Treatment of Intersectionality in the Equality Architecture in Europe’ 19(4) *Social Politics: International Studies in Gender, State & Society* 433 ;Nira Yuval-Davis, ‘Intersectionality and Feminist Politics’ (2006) 13(3) *European Journal of Women's Studies* 193

<sup>54</sup> Purdie-Vaughns and Eibach, ‘Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities’ (2008) [Springer US] 59(5-6) *Sex Roles* 377

<sup>55</sup> *Ibid*

<sup>56</sup> Schiek and Lawson, *European Union non-discrimination law and intersectionality : investigating the triangle of racial, gender and disability discrimination* (Ashgate 2011)



in that these women face discrimination on three grounds, on the basis of their ethnicity, as Muslims and finally as women.<sup>57</sup> This has been especially the case in Germany and Netherlands for people from Turkey and Moroccan descent, in France and Spain for those from North Africa and in the UK for people from the Indian subcontinent, the Middle East and East African.<sup>58</sup>

However, the current literature does not focus on the implications of the limitations of the manifestations of religion and how it affects other religious minorities. One example of law which has limited the manifestations of religious belief is the French prohibition against ostentatious religious symbols in 2004.<sup>59</sup> This has disproportionately affected religious minorities who also form part of an ethnic minority as the Circular's interpretation of the Act solely affects Muslims, Sikhs and Jewish school children as large crosses are rarely worn or carried.<sup>60</sup> However, no mention is made of other religious beliefs and data does not consider non-Muslim women who were unable to manifest their religious beliefs. In research carried out in France, some commentators have mentioned that a small number of school children wearing a cross were affected, but this was not followed up by qualitative research. Furthermore, the justifications of curtailments of the freedom to manifest religious beliefs focused almost entirely on Muslim women and the misconception that the manifestation of religious belief goes against the concept of gender equality. There was no consideration of the impact of limiting the manifestations of religious belief would have on minority women from other faith backgrounds.

According to the 2008 European Values Study the main religions found in Europe are Roman Catholic, Protestant, Orthodox, Muslim, Hindu, Jewish and

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<sup>57</sup> Vakulenko, 'Islamic Headscarves' and the European Convention On Human Rights: an Intersectional Perspective' (2007) 16(2) Social & Legal Studies 183

<sup>58</sup> Rosenberger and Sauer, *Politics, religion and gender : framing and regulating veil* (Routledge 2010)

<sup>59</sup> Loi no 2004-228 du 18 Mars 2004 encadrent, en application du principe de laïcité, le port de signes ou de tenues manifestant du appartenance religieuse dans la écoles, collèges et lycées publics.

<sup>60</sup> Ibid.

Buddhist.<sup>61</sup> When examining the research carried out by theologians all of these religions require some form of manifestation, which, similarly to the plight of Muslim women, also disproportionately affects women. All of these religious beliefs require women to dress in a modest manner and the levels of modesty are similar, depending on the level of religiosity of the individual. Orthodox Christian and Jewish texts both state that women should cover their hair and dress in loose clothing; similarly Catholic doctrine requires that women are required to cover their hair at mass.<sup>62</sup> It is important to note that dress is at the centre of identity of an individual, and as argued by the ECtHR the manifestation of religious belief lies at the centre of religious freedom.<sup>63</sup> Even in Buddhism and Hinduism there are conceptions of modesty which require women to manifest their beliefs in certain kinds of ways. Up to this date there has been a limited number of research which examined how women from other religions have been affected by the discourse on the manifestations of religious belief. These women are also facing intersectional discrimination in that they do not fit the prototype of Muslim women who wish to manifest their religious belief. This may result in them being worse off, because the multiple oppression of Muslim women has received some recognition, whereas non-Muslim religious women have been “othered” and ignored. One way in which non-Muslim religious organisations have tried to rectify this is by attacking the attention given to issues which pertain to the Islamic community or to directly attack the concept of secularism. This was evidenced by *Eweida and Chaplin v the United Kingdom*, where the applicants argued that the manifestations of minority religions in the United Kingdom are protected and the manifestations of a majority

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<sup>61</sup> 36.7% Roman Catholic, 30% Orthodox, 15% Muslim, 14.5% Protestant, 2.3% other, 0.6% free church/ non-conformist/evangelical, 0.2% Jewish, 0.1% Hindu and 0.1% Buddhist.

<sup>62</sup> Ilana S. Cristofar, ‘Blood, Water and the Impure Woman: Can Jewish Women Reconcile between Ancient Law and Modern Feminism’ (2001) 10 Southern California Review of Law and Women's Studies 451 ;Fournier, ‘Calculating claims: Jewish and Muslim women navigating religion, economics and law in Canada’ (2012) 8(01) International Journal of Law in Context 47

<sup>63</sup> *Eweida and others v the United Kingdom App No 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013)*

religion are not.<sup>64</sup> This can be seen in the United Kingdom where ministers intervened and argued that the Christian faith is being attacked by the Court. Bishop Nazir Ali submitted evidence about this:

“The right to manifest the Christian faith is central to belief; it is little succour to the believer to be free to believe, but not be free to live his beliefs. If the internal convictions are respected; so must be the external convictions: *Kokkinakis v Greece*. It is very understandable that Christians should want to be visible and the wearing of a cross around the neck is a time-honoured way to do this; this is a manifestation of faith as understood in Article 9 of the Convention.”<sup>65</sup>

Some cases at the national level have highlighted the interrelationship of racial and religious identities of Sikh and Jewish males, but there has been limited focus on the effect the limitation of religious belief has on women from other minority religions. This could be for a variety of reasons. To begin with, the number of cases scrutinising the manifestations of religious belief of women at the international level has been minimal and was dealt with at the domestic level, prior to reaching Strasbourg. Secondly, the fact that the monitoring of ethnic, racial and religious information by the state is forbidden in parts of Europe has added another layer of complexity, which will be discussed in further detail later on within the chapter.<sup>66</sup>

#### LEGAL ISSUES SURROUNDING INTERSECTIONAL DISCRIMINATION

Despite the fact that multiple and intersectional discrimination is increasingly discussed by scholars and policy makers in Europe, interest in the topic, the understanding of key concepts, dialogue with the target group, the compilation of evidence and policy making within this field are dealt with differently in the Contracting Party States of the Council of Europe. This has led to a number of legal

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<sup>64</sup> *Eweida and others v the United Kingdom App No 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013)*

<sup>65</sup> Bishop Nazir Ali, *Ibid.*

<sup>66</sup> For more information see Purdie-Vaughns and Eibach, ‘Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities’ (2008) [Springer US] 59(5-6) Sex Roles 377

issues surrounding multiple and intersectional discrimination which become manifest at both state and international level. The first of these problems is that anti-discrimination legislation has been implemented differently in the Contracting Member States, where the levels of protection can vary significantly.<sup>67</sup> Furthermore, all the Contracting Party States to the Council of Europe use a single ground approach in their approach to equality, which leads to intersectional invisibility among minorities.<sup>68</sup> A second problem is that not all the grounds under Article 14 ECHR are equally protected among the Contracting Party States. Half of the Contracting Party States to the Council of Europe are also members of the European Union, whose primary legislation only covers gender and nationality.

This led to a proliferation of equality laws which focus primarily on sex/gender and race/ethnic origin. Concomitantly, it has spawned a hierarchy of equality rights with these two grounds at the top, whereas other grounds are only protected under employment legislation. The third problem is that of semantics, since the terms 'sex', 'gender', 'race' and 'ethnic origin' are contentious; this will be discussed in more detail below. One important note to make at this point is that not all the Council of

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<sup>67</sup> Michael Banton, 'Religion, faith, and intersectionality' (2011) 34(7) *Ethnic and Racial Studies* 1248 ;Lisa Garcia Bedolla, 'Intersections of Inequality: Understanding Marginalization and Privilege in the Post-Civil Rights Era' (2007) 3(02) *Politics & Gender* 232 ;Stephanie E. Berry, 'Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination—Square Peg in a Round Hole?' (2011) 11(3) *Human Rights Law Review* 423 ;Johanna E. Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 *Emory LJ* 71 ;Choo and Ferree, 'Practicing Intersectionality in Sociological Research: A Critical Analysis of Inclusions, Interactions, and Institutions in the Study of Inequalities' (2010) 28(2) *Sociological Theory* 129 ;Ange-Marie Hancock, 'Intersectionality as a Normative and Empirical Paradigm' (2007) 3(02) *Politics & Gender* 248 ;Patricia Hill Collins and Sirma Bilge, *Intersectionality* (Polity Press 2016) ;Verloo Mieke and others, 'Putting Intersectionality into Practice in Different Configurations of Equality Architecture: Belgium and the Netherlands' [Oxford University Press] 19(4) *Social Politics: International Studies in Gender, State and Society* 513 ;Verloo and Walby, 'Introduction: The Implications for Theory and Practice of Comparing the Treatment of Intersectionality in the Equality Architecture in Europe' 19(4) *Social Politics: International Studies in Gender, State & Society* 433

<sup>68</sup> Mieke Verloo and Sylvia Walby, 'Introduction: The Implications for Theory and Practice of Comparing the Treatment of Intersectionality in the Equality Architecture in Europe' (2012) 19(4) *Social Politics: International Studies in Gender, State and Society* 433

Europe members have signed and ratified the 12<sup>th</sup> protocol on anti-discrimination, which makes the harmonization and creation of a pan-European standard on non-discrimination laws difficult.

As aforementioned, intersectional discrimination ensues when discrimination occurs on more than one grounds based on certain identity-based categories, such as belief, ethnic origin or sex. However, because antidiscrimination law does not fully reflect the disadvantages faced by people with multiple identities, many victims fail to be compensated by the law because they do not fit the existing frameworks of identity groups. Therefore, the intersectional aspect of their claim is hidden. As a result, women who wish to manifest their religious belief are deprived of their Article 9(2) ECHR rights.

One way to avoid intersectional invisibility is for the Council of Europe to move away from a single-ground approach. In this vein, three contracting party states, Denmark, Ireland, Sweden and the United Kingdom have moved to single equality bodies, which Schiek and Lawson have argued is the first step to dealing with intersectional discrimination.<sup>69</sup> Other Contracting Party States, like Bulgaria, Spain and Romania have only recently introduced legislation on anti-discrimination measures and are still working towards tackling the inequalities within their countries. As of yet, no member of the Council of Europe has included anti-multiple and intersectional discrimination within their equality legislation. Germany is perhaps the closest to reaching this ideal. As a result of the single-discrimination-ground approach to equality legislation in Europe, the current legal framework does not address the multiple and intersectional discrimination faced by women who wish to manifest their religious beliefs. This is because the strongest form of anti-discrimination legislation within Europe is based on gender/sex and race/ethnic origin.<sup>70</sup> Furthermore, discrimination can still occur on those countries whose

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<sup>69</sup> Schiek; and Lawson, European Union non-discrimination law and intersectionality : investigating the triangle of racial, gender and disability discrimination (Ashgate 2011)

<sup>70</sup> Ibid

equality legislation follows the ‘colour blind model’, which will be discussed in more detail later within this chapter.

As already stated, one Contracting Party State which has been praised for moving away from a single ground approach is the United Kingdom.

Be that as it may, this does not mean that women do not suffer intersectional discrimination in the United Kingdom. A national study has highlighted that Muslim women from an ethnic minority face acute intersectional discrimination.<sup>71</sup> This study examined the position of Bangladeshi, Black Caribbean and Pakistani women at work and found that racism, sexism and anti-Muslim sentiment created a barrier for successful integration and progression in the workplace. It found that the workplace culture placed anyone who is not in the majority in a disadvantage and despite the fact that young women from these backgrounds had good school leaving qualifications; they were more likely to be unemployed and less likely to get ahead in the workplace in comparison to white women. However, in these instances, when compared as a social group, e.g. women in comparison to men, or Muslims in comparison to non-Muslims, the test cannot be satisfied because it would include all women, and both male and female Muslims, and even devout and non-practising Muslims as can sometimes be the case. Using such a test would mean that those with intersecting identities would be outside of the protection of the law.

Multiple discriminations were recognised in employment tribunals in the United Kingdom prior to 2004, when the *Bahl* judgment specifically prohibited discrimination claims on the basis of more than one, or a combination of grounds.<sup>72</sup> There had been a number of cases before *Bahl* where courts and tribunals were willing to accept intersectional discrimination, such as *Nwoke*, where a black female solicitor was unlawfully discriminated against on grounds of race and sex by the Government Legal Service when she was marked so low after an interview that she

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<sup>71</sup> EOC (2007) Moving On Up? The way forward: report of the EOC’s investigation into Bangladeshi, Pakistani and Black Caribbean women and work. Manchester: EOC.

<sup>72</sup> i.e. the judgment in *Bahl v Law Society* [2004] IRLR 799.

was effectively barred from applying for such a post again. The tribunal also recommended that the service, whose behaviour had been ‘dismissive and insulting’, interview the applicant for future vacancies, using a panel properly trained in issues of race and sex bias.<sup>73</sup> Furthermore, in the case of *Mackie*, an Indian female book-keeper was informed by her employer that he disliked having an Asian woman as his employee and had only hired her on the basis that her husband was a white Scottish man.<sup>74</sup> The ET found that she had been discriminated against on grounds of race and sex. In reaching this conclusion, it compared her situation to that of a hypothetical comparator who was a man with identical qualities to hers, but who had a racial origin that was not Indian.

As a result, cases involving the combination of two grounds were instantly struck out; and only in extreme, limited circumstances would tribunals and courts accept intersectional cases, for example, cases which involve prohibiting a Muslim woman from wearing a headscarf. Although these cases are dealt with under the umbrella of religious discrimination, there has been some recognition that this is an intersectional issue, as Muslim men wouldn’t suffer directly from such a prohibition.

### The distinction between gender and sex

One problem in the current way in which equality legislation is examined is the level of protection offered on the basis of sex.<sup>75</sup> The terms sex and gender are not mutually exclusive and are often used interchangeably by legal scholars and policy makers. It is important to understand the difference between these two from the onset in order to prevent intersectional discrimination on the basis of gender or

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<sup>73</sup> *Nwoke v (1) Government Legal Service and (2) Civil Service Commissioners* IT/43021/94

<sup>74</sup> *Mackie v G & N Car Sales n/a Britannia Motor Co ET case no 1806128/03*

<sup>75</sup> Margaret L. Andersen and Patricia Hill Collins, *Race, class, and gender : an anthology* (3rd ed. edn, Wadsworth Publishing Co. 1998)

sex.<sup>76</sup> The distinction between the two is that sex refers to the biological characteristics of a living being, whereas gender refers to socially constructed relations. The terms are interrelated in that gender relations are the result of the way in which social processes and relations are formed as a result of one's biological functions, yet differ in that the characteristics that society or a culture delineates as masculine or feminine may differ culturally, individually or depending on the religious belief of that individual.<sup>77</sup>

### The distinction between ethnic origin and race

When examining intersectionality scholarship in the United States the intersectional relationship that is usually examined is that of race and gender; in Europe the term 'race' has negative connotations and instead the term "ethnic origin" is preferred. This is because race became a biological term, which distinguished people's physical appearance in the 18<sup>th</sup> century when this biological distinction was hierarchized. Especially within Europe, it is difficult to discuss the term 'race' without considering the implications social Darwinism had during the Holocaust, when these concepts of biological inferiority justified exclusion, subordination and even mass extermination of groups of people.

Whereas the term "ethnic origin" delineates nothing other than common descent or ancestry, in fact the UN defined ethnic origin as:

"Broadly defined, ethnicity is based on a shared understanding of history and territorial origins (regional and national) of an ethnic group or community as well as on particular cultural characteristics such as language and/or religion...Ethnicity is multidimensional and is more a process than a static concept, and so ethnic classification should be treated with moveable boundaries".<sup>78</sup>

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<sup>76</sup> Katharine T. Bartlett and Rosanne Terese Kennedy, *Feminist legal theory : readings in law and gender* (Westview Press 1991)

<sup>77</sup> Patricia Hill Collins, *Black feminist thought : knowledge, consciousness, and the politics of empowerment* ([2nd ed.]. edn, Routledge 2009)

<sup>78</sup> The Principles and Recommendations for Population and Housing Censuses, Revision 2, Draft, United Nations, September 2006



Racism has been defined by the Council of Europe as follows:

“Racism’ shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.”<sup>79</sup>

This definition found in the ECRI’s General Policy Recommendation No.7 recognises that religious discrimination can overlap with racial discrimination, specifically so, because as discussed earlier race, or ethnic origin often determine an individual’s religious beliefs. Thus both race and ethnic origin encompasses religion, which makes religion an intersectional issue.

As argued throughout this chapter, human rights law seeks to be colour- and gender-blind. However, as a result of the way in which it has been implemented, many human rights violations go undiscovered. As a result of the public/private dichotomy, my argument remains that religious freedom is absolute insofar that it remains in the private sphere. This gendered dichotomy of rights leads to the layered oppression of women who wish to manifest their religious beliefs in the public sphere. This is not only because women are more devout, and more likely to manifest their religious belief in the public sphere, a theme which runs throughout this dissertation. This is also, because women are more likely to dominate the domestic sphere as a result of their religious and cultural ideology.

It is important to note that intersectional feminism is not just a theoretical framework, but since its conception has been a political strategy created to make visible women who have been rendered invisible as a result of their multiple identities. Muslims have been subjected increasingly to harassment and

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<sup>79</sup> European Commission against Racism and Intolerance General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racism Discrimination. Adopted on 13 December 2002

discrimination in the past decade.<sup>80</sup> When examining the intersections of gender and religion, race and ethnicity play a central role in the type of discrimination suffered, especially in the case of Muslims. This is the case in Germany and Netherlands for people from Turkey and Moroccan descent, in France and Spain for those from North Africa and in the UK for people from the Indian subcontinent, the Middle East and East African.<sup>81</sup>

Within these Muslim communities, women are subject to multiple discriminations on the basis of their gender and the manifestations of their faith.<sup>82</sup>

### Additive/ Compound/ Intersectional discrimination

It is also important to unveil the different forms of intersectional discrimination. Intersectional discrimination can be split up into intersectional, additive and compound discrimination.<sup>83</sup> As aforementioned, intersectional discrimination is when intersecting categories of identities can constitute a new category. Cases involving the headscarf discrimination can be seen as GenderReligion, as they would not constitute discrimination against non-Muslim women or Muslim men.<sup>84</sup> Similarly, age discrimination cases, where women are disproportionately affected could constitute a claim under AgeSex as they would only affect older women and would not fall under age or sex discrimination. Additive discrimination can be tackled by a single-ground approach, as it covers those who suffer from discrimination on more than one ground, but these grounds do not intersect. Thus, it would be possible to argue that there is discrimination on the basis of religion and

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<sup>80</sup> Ghumman and Ryan, 'Not welcome here: Discrimination towards women who wear the Muslim headscarf' (2013) 66(5) Human Relations 671 Byng, 'Symbolically Muslim: Media, Hijab, and the West' (2010) [2010] 36(1) Critical Sociology 109

<sup>81</sup> Schiek and Lawson, European Union non-discrimination law and intersectionality : investigating the triangle of racial, gender and disability discrimination (Ashgate 2011)

<sup>82</sup> Banton, 'Religion, faith, and intersectionality' (2011) 34(7) Ethnic and Racial Studies 1248

<sup>83</sup> Sheena Smith and Klaus Starl, Locating Intersectional Discrimination UN Doc ;Stephen Greer, *The Margin of Appreciation: Interpreting and Discretion under the European Convention on Human Rights* (Human Rights Files No:17, 2011)

<sup>84</sup> Schiek and Lawson, European Union non-discrimination law and intersectionality : investigating the triangle of racial, gender and disability discrimination (Ashgate 2011)

ethnic origin and the religion claim should not be affected by the ethnic origin claim, as the type of discrimination faced is on the basis of religion and ethnic origin, as opposed to a combination of both, which would in turn fall under intersectional discrimination. Finally, compound discrimination is aptly characterised by Sheena Smith and Klaus Starl, who use the example of a job which has two career paths to describe this type of discrimination. One career path is prohibited to women on the assumption that they are not physically strong enough to carry out the tasks and the second career path is prohibited to devout Muslims, whose requirement to pray may be considered too disruptive. Non-Muslim women and devout men will have limited choice of careers within the company, but Muslim women are left with no choice but to not work for the company, which appears as an extra component to the harm incurred, caused by their being both a devout Muslim and a woman.<sup>85</sup> In Austria, compound discrimination, which can also be described as aggravated discrimination, can be considered sufficient reason to allow for extra damages for the increased gravity of the harm.<sup>86</sup> It is important for the purpose of intersectionality theory to understand these three types of discrimination, in order to move on to the next stage which will be examined in the next chapter, namely, how to overcome these types of intersectional discrimination at international level.

### ‘THE IMPORTANCE OF CRITIQUE’

The purpose of this section is to illustrate using intersectional feminism that the Court’s approach to gender equality in the context of the manifestation of religion relegates women to the private sphere. It will underline, using the *Layla Sahin* case, that one aspect of political intersectionality is to do with critiquing the hierarchies of structural and political inequalities which are often perpetuated as a result of seeing women as one homogenous group, and failing to recognise the inter- and

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<sup>85</sup> Sheena Smith and Klaus Starl, *Locating Intersectional Discrimination* UN Doc ;Stephen Greer, *The Margin of Appreciation: Interpreting and Discretion under the European Convention on Human Rights* (Human Rights Files No:17, 2011)

<sup>86</sup> Section 12(13) of Federal Act Governing Equal Treatment (Equal Treatment Act), as amended on 01 January 2014)

intragroup differences amongst them. The wearing of religious insignia, like the headscarf, is limited to those who have a religion. Furthermore, women are more likely to manifest their religious beliefs than men and are therefore more likely to be discriminated against as a result of their multiple identities.<sup>87</sup>

This thesis highlights that the ECtHR should envisage gender equality in a holistic manner, as opposed to the current paternalistic conceptualization of discrimination in its jurisprudence. A good example of where the Court has used gender equality in a holistic manner can be found in the case of *BS v Spain*, where the Court has recognised that the appellant was especially vulnerable as a result of her multiple identities, namely that of a Nigerian female sex worker who was harassed racially and sexually on the basis of her national origin, gender and occupation.<sup>88</sup> Whereas in the case of *Leyla Sahin v Turkey*, the Court used a “one size fits all approach” to the management of plurality by limiting the wearing of religious symbols in university is insensitive to the intersectional identities of women which is contrary to their equality paradigm, as explained in the previous chapter. When using the term “one size fits all” the argument is that despite the fact that the measure put in place by the university is on its face universal, this measure solely affects those who have a religion and who manifest it through the wearing of insignia. It is not tailored to meet the needs of those who may decide not to go to university as a result of an inability to manifest their religious beliefs. This would put religious women in an impossible situation, especially considering as we have discussed above that women are more devout and more likely to manifest their religious belief. Furthermore, as Turkey has a large Muslim population, it is more likely that Muslim women would want to manifest their religious beliefs through the wearing of a headscarf. The argument that is being made in this chapter is that Turkey and the ECtHR should have considered whether the measure could have

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<sup>87</sup> Davie, *Religion in Modern Europe: A Memory Mutates* (Oxford University Press 2000) ; Franzmann, *Women and Religion* (Oxford University Press 2000) ; Juschka, *Feminism in the Study of Religion : a Reader* (Continuum 2001) ; Sunder, ‘Piercing the Veil’ (2003) [The Yale Law Journal Company, Inc.] 112(6) *The Yale Law Journal* 1399  
<sup>88</sup> *BS v Spain* App no. 47159/08, (ECtHR, 24 October 2012)

been tailored in order to meet the needs of those who would have been doubly discriminated against on the basis of their religion and gender.

Other factors which were not taken into consideration are that Miss Sahin was not only a woman, but one whose religion was central to her identity. She “comes from a traditional family of practising Muslims and considers it her duty to wear the Islamic headscarf.”<sup>89</sup> The wearing of the headscarf was her free choice which was based on religious convictions. She did not promote Islam, nor did she coerce other women to wear the headscarf. She stated throughout the case that she had no intention to protest, pressure, provoke or proselytize other university students into wearing the head scarf and by doing so she supports secularism.<sup>90</sup> She had spent four years at university, studying medicine, whilst wearing the headscarf and without being seen as causing “any disruption, disturbance, or threat to the public order.”<sup>91</sup> Furthermore, the fact that other universities hadn’t implemented a similar ban was evidence that order can be maintained without such a ban. Neither Turkey nor the ECtHR acknowledged this and instead made several assumptions which led to the misapplication of Article 9 ECHR. They should have at some point addressed the arguments made by Miss Sahin in order to come to a conclusion, but the Court failed to do so. Turkey and the Court also failed to provide evidence for their assumptions, namely that the Islamic headscarf is contrary to gender equality. Nor did they seek to interview women who manifest their religious belief in a similar manner in order to have their views represented in the debate, something which could have lent the decision some legitimacy.

There are some who would make the argument that the ban on the headscarf would empower women to compete in the work space on equal terms to men, free from patriarchal religious symbols which would remind them that the public space is not one in which they can compete. These arguments have a fundamental impact on many women, in that they suggest that, once their choice to take part in such an

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<sup>89</sup> *Sahin v. Turkey*. App no. 44774/98 (ECtHR, 29 June 2004) Paragraph 100

<sup>90</sup> *Ibid.* Paragraph 101

<sup>91</sup> *Ibid.* Paragraph 86

oppressive practice is taken away, insofar as veiling is deemed to be patriarchal, the ban would in fact be in their best interest. However, if these are the arguments that the Court, or indeed Turkey, are alluding to, then they need to change their equality paradigm, one that understands not only the similarities in the fight against patriarchy, but also how this fight differs significantly when it comes to considering religious women. Through the banning of a headscarf without taking into account the intersectional identities of women, the Court swaps what it deems to be one patriarchal practice for another. As argued by Judge Tulkens, the paternalism expressed by the majority of the Court goes against the equality case law developed by the same Court, which has developed the right to personal autonomy over the decades through a number of groundbreaking cases.<sup>92</sup> If the Court thinks that the headscarf is in fact deemed to be contrary to gender equality, then Turkey would have had to prohibit veiling in all places, in both public and private, but only after having taken into consideration the intersectional identities of women and the impact that symbols such as the headscarf may have.

In Europe, the headscarf is not only a common identifier for women, as well as adherents of Islam, but also tends to evoke assumptions as to an ethnic minority background. According to Cavanaugh: “Islam remains the religious identity of immigrants, creating a space between ostensibly “secular”, “modern” and “liberal” West and the “otherness” of Islam.”<sup>93</sup> Kumar and Berghahn add that forceful de-veiling represents not only a superiority complex but also a postcolonial fantasy which contrasts misogynistic and backwards Islam with progressive western

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<sup>92</sup> As discussed previously, Article 14 of the Convention not only requires that persons in a similar situation must be treated in an equal manner but also requires that persons whose situations are significantly different must be treated differently. *Hoogendijk v Netherlands* (2005) 40 EHRR SE22 at 206. See also, ECtHR, *Thlimmenos v Greece* (2001) 31 EHRR 15 at para. 47.

<sup>93</sup> Schiek and Lawson, European Union non-discrimination law and intersectionality : investigating the triangle of racial, gender and disability discrimination (Ashgate 2011)

ideology.<sup>94</sup> Research suggests that religious discrimination is often connected with race, ethnicity and immigration background.<sup>95</sup>

It is of vital importance that researchers, judges and policymakers seek to challenge the hegemonic discourses of sexism, racism and heteronormativity. This would involve challenging norms which are constantly in flux, such as the current legal definition of 'woman', and through the rejection of shock stories. In the Grand Chamber's judgment of *Leyla Sahin v Turkey* there were misconceptions which the ECtHR did not seek to challenge. These include a narrow definition of gender equality as well as the fact that the Court did not seek to explore the impact and the value of the headscarf to Miss Sahin. Instead, it held certain assumptions which resulted in a justification of limitations to the personal autonomy of the claimant and forced her to choose between her religious convictions and continuing her studies at the university.

## CONCLUSION

This chapter has highlighted the importance of re-conceptualising and re-contextualising the problems faced by the current system of anti-discrimination of the international human rights system within Europe. The jurisprudence of the Court and the way in which plurality is managed has left women at the margins, unable to exercise their rights in the public sphere depending on the quality of equality law in their national states. It is important to highlight that, like feminism, religious discourse uses a different language to that of the law.<sup>96</sup> Thus, by failing to consider the implications of their Article 9 jurisprudence, which departs from that of Article 14, the Court has allowed women to face intersectional discrimination on the basis of gender and faith. The Court needs to recognise that there is an interrelationship between race, ethnicity and religion which combines into a

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<sup>94</sup> Ibid

<sup>95</sup> Ibid.

<sup>96</sup> Bradney, *Law and Faith in a Sceptical Age* (Routledge-Cavendish 2009)

communal identity and can lead to the further exclusion and of religious women who face acute intersectional invisibility. Europe is becoming increasingly more multicultural, which brings with it a multiplicity of different cultures and different faiths. As has been highlighted earlier in the chapter the manifestations of religious belief lies at the heart of Article 9, which the Court has held to be “a precious asset.”<sup>97</sup> The following chapters will address the way in which these problems can be overcome.

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<sup>97</sup>*Sahin v. Turkey*. App no. 44774/98 (ECtHR, 29 June 2004) paragraph 104



## 6. Chapter Six: Implementing Intersectionality in Human Rights Law

“What if a group of feminist scholars were to write the ‘missing’ feminists judgment in key cases? Could we put theory into practice, in judgment form? What would these judgments look like? What impact would they have?”<sup>1</sup>

### INTRODUCTION

In previous chapters, the theories of intersectionality was discussed at length; this chapter highlights that it is important to note that theories alone will not provide a solution to the way in which Article 9(2) ECHR has been misapplied. This chapter will therefore engage in the ‘real world’ exercise of judgment-writing, which is subject to the various constraints placed on the judges of the ECtHR. This is done in order to test whether the current institutional structure is able to withstand a vigorous overhaul in the way in which minority religious women are represented in the law. As argued by Rosemary Hunter, the feminist judgments project is premised on the proposition that in many cases, the law is to some extent indeterminate, and therefore judges, specifically appellate judges have considerable scope to make choices between competing interpretations of the law.<sup>2</sup> Drafting feminist judgments is a form of critical scholarship which has flourished in recent years, precisely because it challenges the notion that “feminism in a judge is... evidence of judicial partiality and a threat to judicial independence.”<sup>3</sup> It also allows deflecting in practice another criticism, according to which “subjective decision – making based on political or social or philosophical beliefs leads to unpredictable and arbitrary results.”<sup>4</sup>

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<sup>1</sup> Rosemary Hunter, Claire McGlynn and Erika Rackley, *Feminist Judgments: From Theory to Practice* (Hart 2010)

<sup>2</sup> Ibid.

<sup>3</sup> W Baker, ‘Women’s Diversity: Legal Practice and Legal Education- A View from the Bench’ (1996) 45 *University of New Brunswick Law Journal* 199,199

<sup>4</sup> Ibid.

## ENGAGING WITH RIGHTS CLAIMS FROM MINORITY GROUPS

There has been a rise in the number of cases heard before the ECtHR which engage with minority groups. Despite the fact that at this moment in time there is no comprehensive count which documents the exact numbers, an overview of existing case law collections on HUDOC clearly indicates an upward trend in the last two decades. Both individual and group claims have been made by marginalised individuals to the ECtHR with compelling claims arising out of gaps in domestic rights protection which disproportionately affect the minority group. In an increasing number of cases minorities have challenged national laws, policies and practices on grounds of violating their rights under the convention.<sup>5</sup> This has enabled the ECtHR to assume a more visible role in protecting disadvantaged and to promote their legitimate claims in the public sphere of the member state.

However, as has been outlined in previous chapters, some fundamental rights including the right to manifest a religious belief can be legitimately restricted by national authorities. This is especially the case for the rights outlined in Articles 8-11 ECHR, which set out common criteria for limitation, including democratic necessity or a pressing social need. Assessment of the legality of limitations thus requires performing a balancing exercise in the form of a proportionality test. All limitations have to be proportionate to the legitimate aim pursued. This proportionality test has been characterized as “one of the most intrusive forms of judicial supervision known: it requires courts to stand in judgment of the policy choices of state officials.”<sup>6</sup> Furthermore, considering the flexibility in interpretation of Articles 8-11 ECHR as a result of the margin of appreciation (as discussed in Chapter Four), it comes to no surprise that proportionality is the very paradigm of an indeterminate legal norm, where there is considerable scope for the use of judicial discretion. In this respect, a number of criticisms

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<sup>5</sup> In the area of Article 9(2) alone, these cases include: *SAS v. France*, App no. 43835/11 (ECtHR, 14 July 2015), *Sahin v Turkey* App no 44774/98 (ECtHR, 29 June 2004), *Dahlab v Switzerland* App No 2346/02 (ECtHR, 29 April 2002), *Kokkinakis v Greece* App No 3/1992/348/421 (ECtHR, 19 April 1993), *Kalac v Turkey* App No 20704/91 (ECtHR, 1 July 1997), *BS v Spain* App No 47159/08 (ECtHR, 24 October 2012)

<sup>6</sup> Martínez-Torrón, ‘The (Un)protection of Individual Religious Identity in the Strasbourg Case Law’ (2012) 1(2) Oxford Journal of Law and Religion 363

on the alleged misuse of the proportionality test in relation to Article 9(2) ECHR have been discussed in previous chapters.<sup>7</sup> As asserted by Lady Hale:

“The business of judging, especially in hard cases, often involves a choice between different conclusions, any of which it may be possible to reach by facially respectable legal reasoning. The choice made is likely to be motivated at a far deeper level by the judge’s own approach to the law, as well as to the specific problem under consideration and to ideas of what makes a result just.”<sup>8</sup>

However, as argued by Bartlett, it is not enough for feminists, or indeed legal scholars, to critique the law and to make proposals for law reform. A method like feminist judgment writing is important because it “organises the apprehension of truth [...] determines what counts as evidence and defines what is taken as verification.”<sup>9</sup> This chapter is informed by the theoretical concern about the ways in which law constructs gender.

It is important to outline a critique of the Court’s use of the proportionality principle on grounds of its vagueness and impact on the margin of appreciation. The main issue discussed at length in Chapter Four, is that misuse of the proportionality test and the margin of appreciation allows for differential human rights approaches across states, which arguably results in a form of relativism about human rights across the Contracting Party States and, in many instances, betrays the universality of rights. Once it has been established that a restriction on a right has a legitimate aim, the measure has to pass the proportionality test.

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<sup>7</sup> Katayoun Alidadi, ‘Reasonable accommodations for religion and belief: adding value to art.9 ECHR and the EU’s anti-discrimination approach in employment?’ (2012) 37(December) *European Law Review* 693; Nicolas Bratza, ‘The ‘Precious Asset’: Freedom of Religion Under the European Convention on Human Rights’ (2012) [Cambridge Journals Online] 14(02) *Ecclesiastical Law Journal* 256; Cumper and Lewis, ‘Taking Religion Seriously? Human Rights and Hijab in Europe- Some problems of Adjudication’ (2008) [Journal of Law and Religion] 24(2) *Journal of Law and Religion* 599; Davie, *Religion in Modern Europe: A Memory Mutates* (Oxford University Press 2000); Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997); Malcolm D Evans, ‘From Cartoons to Crucifixes: Current Controversies concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights’ (2010) 26 *J L & Religion* 345; Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Martinus Nijhoff Pub. 2009); Farrior, ‘Human Rights Advocacy on Gender Issues: Challenges and Opportunities’ (2009) 1(1) *Journal of Human Rights Practice* 83; Silvio Ferrari, ‘Law and Religion in a Secular World: A European Perspective’ (2012) 14(03) *Ecclesiastical Law Journal* 355

<sup>8</sup> B Hale, ‘Maccabean Lecture in Jurisprudence: A Minority Opinion?’ (2008) 154 *Proceedings of the British Academy*, 319, 320

<sup>9</sup> Katharine T Bartlett and Rosanne Kennedy, *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991) 830

The first question is whether the measure is “suitable” for achieving its aim. The second is to do with whether it is “necessary” for achieving its aim, which includes whether a less stringent option is available. The third and final step asks whether the impugned measure is proportional, to wit, whether a balancing exercise has been undertaken which balances the impact on the individual with the collective interest of the Contracting Party State.<sup>10</sup> However, as will be outlined in later sections, the ECtHR has not followed this principled approach of the proportionality principle and in the most recent case concerning Article 9(2) ECHR, has allowed for a blanket ban on a specific religious manifestation in France, which appears to flout the proportionality principle. Finally, having articulated how the proportionality principle has been misapplied, this chapter argues that this practice cannot be justified and will offer guidelines for future application of the doctrine, which will better protect the human rights of minorities.

#### FREEDOM OF RELIGION AND PROPORTIONALITY

As mentioned in previous chapters, the right to freedom of religion has traditionally been regarded as the cornerstone of fundamental freedoms, with the right to manifest a religious to belief at the heart of it. However, in recent years it has been noticeable that the Court has misrepresented minority religious and cultural practices in its legal discourse and thus legitimised the invocation of a wide margin or appreciation for States in the area of freedom of manifestation of religious beliefs. The two most recent cases on the right to manifest a religious belief highlight the need for guidance in the way in which national authorities require more guidance in the way in which the weighing exercise is conducted.

#### ANALYSIS OF THE CASE LAW ON INTERSECTIONAL DISCRIMINATION

The acknowledgment that discrimination can occur at the intersections of identity categories can be found in the jurisprudence of a number of jurisdictions, including Canada and the United States. Both jurisdictions have allowed claimants to pursue claims on the basis

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<sup>10</sup> Martínez-Torrón, ‘The (Un)protection of Individual Religious Identity in the Strasbourg Case Law’ (2012) 1(2) *Oxford Journal of Law and Religion* 363

of multidimensional discrimination in a number of cases. The recognition of intersectional discrimination highlights the reality for individuals who face discrimination as a result of the interaction of multiple identities and experience exclusion and subordination as a result of this.<sup>11</sup>

In the case of a number of U.S. Courts, this was usually done in order to protect women who were discriminated against on the basis of gender and race. These courts have recognised within their case law that the use of the comparator could be a hindrance to gender equality as for example, black women experience a different type of discrimination than black men and white women. Thus, for example, in the case of *Hicks v. Gates Rubber Co.* the claimant, who was a black woman, accused her employer on the grounds of sex and race discrimination.<sup>12</sup> The Court held that the racial slurs used against the claimant were not frequent enough to warrant a racial discrimination claim and there was not enough evidence to prove a case in sexual harassment. However, the Court found that the combination of the two would allow for a hostile work environment claim under Title VII.<sup>13</sup>

The Canadian courts have notably developed their human rights jurisprudence in order to tackle intersectional discrimination.<sup>14</sup> Just under a decade ago, the Supreme Court of Canada held that:

“We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction... we risk undertaking an analysis that is distanced and desensitised from real people’s experiences... More often than not, disadvantage

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<sup>11</sup> Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43(6) *Stanford Law Review* 1241 ;Crenshaw, *Critical Race Theory : the Key Writings that Formed the Movement* (New Press 1995) ;Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1989(1) *U Chi Legal F* 139 ;Audre Lorde, *Sister outsider : essays and speeches* (Crossing Press 1984)

<sup>12</sup> Marguerite HICKS, Plaintiff-Appellant, v. The GATES RUBBER COMPANY, Defendant-Appellee. No. 84-1232. United States Court of Appeals, Tenth Circuit. Nov. 25, 1987.

<sup>13</sup> Civil Rights Act 1964

<sup>14</sup> Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims* (2001)

arises from the way in which society treats particular individuals, rather than from any characteristics inherent in those individuals.”<sup>15</sup>

Over the ten years that followed, Canadian courts have focussed on a contextualised approach when tackling anti-discrimination claims which place less emphasis on the protected characteristic of the individual and instead focuses on the context in which the discrimination took place.

In considering gender equality as a legitimate justification for limiting the manifestation of religious beliefs, the Court needs to define its conception of gender equality, thereby making clearer what it means. The Court needs to move away from the model of a single protected identity and instead focus on the context in which the discrimination took place. The ‘Islamic headscarf’ is an obviously intersectional issue: the very term, used by the Court, may suggest that the garment in question is religious in nature. It is also clearly gender-specific, as only Muslim *women* adopt the practice of wearing it; as a result, the debate on the headscarf is intersectional insofar as it involves at the very least gender and religion.

Subjective rights such as the human rights to equality and non-discrimination should remain under the control of those that benefit from them. As mentioned earlier in the thesis, Muslim women wear the veil for different reasons and the veil itself has different meanings for different women. Some Muslim women claim that it is emancipatory, where others feel the opposite.<sup>16</sup> What is lacking in this debate is the opinion of women, both those who choose to wear the headscarf and those who choose not to.

The Court has said that: “Article 14 of the Convention not only requires that persons in a similar situation be treated in an equal manner, but also requires that persons whose situations are significantly different must be treated differently.”<sup>17</sup> Thus, intersectionality to some extent is already part of this Court’s equality paradigm: it is not sufficient for a State to argue that a

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<sup>15</sup> *Egan v. Canada*, [1995] 2 S.C.R. 513 at 551-2

<sup>16</sup> McGoldrick, *Human Rights and Religion : the Islamic Headscarf Debate in Europe* (Hart Pub. 2006), page 6-8

<sup>17</sup> *Thlimmenos v Greece* (2001) 31 EHRR 15 at para. 47

measure applies equally to all of its inhabitants. If there is an instance of indirect discrimination to a group, the State has a positive duty to address this.<sup>18</sup> The Court has already under Article 14 strengthened the protection of minority groups such as women and ethnic minorities by examining the instances where they are disproportionately affected.<sup>19</sup> In this case, it would be preferred for the Court to use a similar approach, when using gender equality as a reason for limiting a woman's Article 9(2) rights, as this would have a disproportionate effect on women as has been evidenced within this dissertation.

### SAS v FRANCE

In the case *SAS v France*, the Court held that France is entitled to ban all face covering in public spaces on the legitimate ground of 'living together.' As outlined in the previous chapter, the right to manifest a religious belief can be limited provided that the impugned measure is prescribed by law, pursues a legitimate aim and is necessary in a democratic society.<sup>20</sup> As the impugned measure was a legislative measure, the Court focused on the last two criteria. While the Court rejected the legitimate aims of gender equality and public safety, it held that the ban on face coverings did have a legitimate aim, as the aim of 'living together' was interpreted by the Court to fall within the "protection of rights and freedoms of others":

It indeed falls within the powers of the State to secure the conditions whereby individuals can live together in their diversity. Moreover, the Court is able to accept that a State may find it essential to give particular weight in this connection to the interaction between individuals and may consider this to be adversely affected by the fact that some conceal their faces in public places. Consequently, the Court finds that the impugned ban can be regarded as justified in its principle solely in so far as it seeks to guarantee the conditions of "living together."<sup>21</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> See, *Kalac v Turkey App No 20704/91 (ECtHR, 1 July 1997)*, *Dahlab v Switzerland App No 2346/02 (ECtHR, 29 April 2002)*. *Sahin v Turkey App no 44774/98 (ECtHR, 29 June 2004)*

<sup>21</sup> *SAS v. France*, App no. 43835/11 (ECtHR, 14 July 2015). Para 141-142

This is problematic for a number of reasons. While the Court's refusal to accept the justifications of public safety and gender equality is a step towards a more legitimate approach of Article 9(2), a cause for concern is the inclusion of a term which has not before been used in the Court's jurisprudence. The notion of 'living together' as a justifiable ground for restricting Article 9(2) has been described by some to be a cause for concern.<sup>22</sup> This is because it weakens individual concrete rights and prioritized the right of the majority over that of the individual. In fact, it implies that the majority can force a minority to assimilate and change their autonomously chosen life plans in order to fit in with the majority under the rubric of "living together." The Court acknowledged that the concept of 'living together' could lead to the marginalization of Muslim women, but nevertheless allows France a wide margin of appreciation.<sup>23</sup> Although the Court departed from its previous jurisprudence which held that veiling was contrary to gender equality, in allowing the concept of living together to become a legitimate limitation, the Court has failing to prevent the further subjugation of Muslim women in France. It is for this reason that *SAS v France* has been chosen as the subject for the intersectional judgment. To begin with, it is the most recent case with regard to Article 9(2) and the restrictions on the manifestations of religious belief. The ban was subject to extensive public debate in France, all of which focused on the Niqab. Moreover, the case has also been chosen because its facts are similar to two cases that are currently pending before the ECtHR.

There is a contrast between the seemingly neutral language of the law and the language used by politicians who link the religious manifestation with negative stereotypes and their own conception of the group's way of life. The case of *SAS v France* demonstrates the difficulty in promoting the autonomy and dignity of the individual in an increasingly pluralistic society. The ECtHR and the intersectional rewritten judgment agree that the right to manifest a religious belief can be limited for the rights and freedoms of others, but the intersectional judgment brings a focus on the applicant as an individual, and recognises that she has a human rights claim not solely as a member of a wider community but also as an individual.

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<sup>22</sup> Ibid. paras 115-16

<sup>23</sup> Ibid.



As mentioned in earlier chapters, intersectionality requires that these cases are considered both holistically and contextually.

However, prior to writing an intersectional judgment, it is important to outline why this methodological approach is important as a new version of critical legal theory. The following section will therefore start by outlining the process of the appointment of judges to the European Court of Human Rights. It will then outline the importance of feminist judgments and what is required of feminist judges, before presenting my own dissenting judgment of *SAS v France*. The chapter concludes with a reflective piece on the intersectional dissenting judgment of *SAS v France*.

#### APPOINTMENT OF JUDICIARY

The process of appointing judges to the Court involves both the Contracting Party States and the Parliamentary Assembly of the Council of Europe.<sup>24</sup> Every State is charged with nominating three candidates who fulfil the criteria laid down in Article 21 of the Convention. These are: being of “high moral character” and “possessing the qualifications required for high judicial office or be juris consults of recognised competence.” Then Article 22 of the ECHR provides that the Parliamentary Assembly elects the person who will sit as the national judge for that Contracting Party State. Due to its vagueness, this provision has been supplemented by the Parliamentary Assembly’s procedures for both scrutinising nominees and adding further criteria of eligibility for nominees. One such procedure is that, nominees to the full-time Court are required to submit their curriculum vitae and subsequently be interviewed by a sub-committee of the Parliamentary Assembly. The Parliamentary Assembly approved Resolution 1366 in 2004 which held the following:

“The Assembly decides not to consider lists of candidates where: the areas of competence of the candidates appear to be unduly restricted, the list does not include at least one candidate of each sex. The candidates: do not appear to have sufficient knowledge of at least one of the two official languages, or do not appear to be of the

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<sup>24</sup> The Parliamentary Assembly is often described as the “engine” of the Council of Europe. It is made up of 324 parliamentarians from its 47 Contracting Party States and is responsible for upholding human right, democracy and the rule of law. See Parliamentary Assembly of the Council of Europe, ‘In brief: The democratic conscience of Greater Europe’ (*Council of Europe*, 2016) accessed 24/07/2016

stature to meet the criteria in Article 21, paragraph 1, of the European Convention of Human Rights.”

This Resolution also provides that when representatives are nominated to the sub-committee they should include at least 40% women. The Council of Europe deems it necessary to have this parity threshold in order to exclude potential gender bias in decision-making processes. This has been taken a step forward, as, in the case of having candidates of equal merit, preference should be given to the female candidate:

“The Assembly decides to investigate at national and European level what obstacles currently exist to the nomination of women candidates, what measures could be taken to encourage female applicants, and to consider setting targets for achieving greater gender equality in the composition of the Court.”

In order to resolve many cases simultaneously, the ECtHR is organized into five sections, or administrative entities, each having a judicial chamber. Each section has a President, a Vice President, and a number of judges. Within the Court, the judges work in four judicial formations. Applications received by the Court will be allocated to one of these formations:

“1. Single Judge: only rules on the admissibility of applications that are clearly inadmissible based on the material submitted by the applicant.

2. Committee: composed of 3 judges, committees rule on the admissibility of cases as well as the merits when the case concerns an issue covered by well-developed case law (the decision must be unanimous).

3. Chamber: composed of 7 judges, chambers primarily rule on admissibility and merits for cases that raise issues that have not been ruled on repeatedly (a decision may be made by a majority). Each chamber includes the Section President and the “national judge” (the judge with the nationality of the State against which the application is lodged).

4. Grand Chamber: composed of 17 judges, the Grand Chamber hears a small, select number of cases that have been either referred to it (on appeal from a Chamber decision) or relinquished by a Chamber, usually when the case involves an important or novel question. Applications never go directly to a Grand Chamber. The Grand

Chamber always includes the President and Vice-President of the Court, the five Section presidents, and the national judge.”<sup>25</sup>

## THE IMPORTANCE OF FEMINIST JUDGING

It is becoming increasingly difficult to ignore the fact that there is a real failure in the law as a result of the underrepresentation of women and feminists in the higher law-shaping courts, including the ECtHR. This results in the exclusion of women’s voices and experiences from the decision making process, which further leads to the continued paternalism of the law and the subordination of women. As highlighted earlier, in recent years there has been an increasing interest in intersectional feminism, a growing concept and theoretical paradigm which traces its roots to Kimberle Crenshaw. Her research in the U.S. uses this concept to highlight the interaction of multiple identities and experiences of exclusion and subordination of women.<sup>26</sup> She focused on how anti-racist and feminist critics often replicate the exclusion of other groups and argued that feminism should focus on the multiple identities of women in order to prevent the double discrimination of women.<sup>27</sup> This section will use intersectional feminism as a theoretical tool to criticise the Court’s approach to *SAS v France* as being exclusionary and assimilationist.

## FEMINIST JUDGING

The concept of ‘feminist judging’ has received much attention in legal discourse, which includes an array of different methods feminist judges should employ in order to overcome

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<sup>25</sup> Ijrcenterorg, 'European Court of Human Rights' (International Justice Resource Center, 2014) <<http://www.ijrcenter.org/european-court-of-human-rights/>> accessed 26 January 2015

<sup>26</sup> Crenshaw, *Critical Race Theory : the Key Writings that Formed the Movement* (New Press 1995) ;Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1) *U Chi Legal F* 139

<sup>27</sup> Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1) *U Chi Legal F* 139 ;Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241

the implicit gender bias in judicial decision making.<sup>28</sup> The starting point of this section is to emphasize that it is key for judges to maintain their legitimacy, yet ensuring that, in doing so, they don't recreate the current power structures in place which result in the subordination of women. There is a powerful argument to the effect that feminist judging in fact weakens judicial independence in that a judge loses his or her independence.<sup>29</sup> According to this argument 'subjective decision making based on political or social or philosophical beliefs leads to unpredictable and arbitrary results.'<sup>30</sup> This has been answered by Rosemary Hunter, one of the co-editors of the Feminist Judgment Projects at the University of Kent. Hunter contends that a feminist judge should not base her judgment on social and political beliefs, but work with the traditional methods of legal reasoning. However, his or her judgment may be informed by these beliefs, in that personal experiences will inform any judge's legal decision. As stated by Baroness Hale:

The business of judging, especially in hard cases, often involves [?] a choice between different conclusions, any of which it may be possible to reach by respectable legal reasoning. The choice made is likely to be motivated at a far deeper level by the judge's own approach to the law, to the problem under discussion and to ideas of what makes a just result.<sup>31</sup>

Baroness Hale also points out that 'an important project of feminist jurisprudence has been to explore the myth of the disinterested, disengaged and distant judge.'<sup>32</sup> It is impossible for a judge to pretend to be a blank slate in the interest in fairness, especially since, realistically speaking, a judge's philosophical, religious and/or political beliefs, which can include

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<sup>28</sup> Hunter, 'Can feminist judges make a difference?' (2008) 15(1/2) *International Journal of the Legal Profession* 7 ;Hunter, McGlynn and Rackley, *Feminist Judgments: From Theory to Practice* (Hart 2010) ;Hunter, 'The Power of Feminist Judgments?' [Springer Netherlands] 20(2) *Fem Leg Stud* 135 ;Patricia A. Cain, 'Good and Bad Bias: A Comment on Feminist Theory and Judging USC Symposium on Judicial Election, Selection, and Accountability' (1987) 61 *S Cal L Rev* 1945

<sup>29</sup> The current debate on whether feminists can only be women; will not be tackled in this dissertation. Despite the fact that there is much scope of disagreement on this topic, which has been disseminated in current literature my premise throughout will be that a feminist judge is not limited to the female gender.

<sup>30</sup> B Hale, 'Maccabean Lecture in Jurisprudence: A Minority Opinion?' (2008) 154 *Proceedings of the British Academy* 319, 320

<sup>31</sup> B Hale, 'Maccabean Lecture in Jurisprudence: A Minority Opinion?' (2008) 154 *Proceedings of the British Academy* 319, 320

<sup>32</sup> *Ibid.*

feminism, will affect his or her decision making in a different number of ways. However, there needs to be a fair balance in that these preconceived notions of a judge should not allow him or her to prejudge the situation or to be biased. As stated by Rosemary Hunter, “a feminist approach must always be subordinated to judicial norms”. This allows for a considerable scope for feminism, which is included within a judgment and can therefore legitimately inform a decision.<sup>33</sup>

### WHAT IS REQUIRED OF A FEMINIST JUDGE

The starting point here would be to reassert that a feminist judge is not synonymous to a female judge. In order to be considered a feminist judge, the judge would firstly have to make a commitment to women’s equality, not solely in terms of sameness but in terms of difference and what Walby refers to as ‘transformative equality’.<sup>34</sup> This would require tackling inequality from its roots. Feminist judging can be practiced provided that the judge meets a number of criteria, which will be discussed below, in order to incorporate feminism into judicial decision-making. A feminist judge is required to be critical, to ask ‘the woman question,’ to contextualise and focus on women’s lived experience, to judge inclusively and to challenge heteronormativity.<sup>35</sup>

This thesis critiqued the way in which the EctHR, used gender equality as a justification for limiting the right to manifest a religious belief. Instead I used intersectionality to demonstrate the way intersectional feminism lifts the veil of oppression and allows invisible women to be rendered visible. As mentioned before, the focus will be on *Leyla Sahin v Turkey* because this thesis examines the intersection of gender and religion within Europe and focuses on Muslim women. The focus will be specifically narrow in the following section, in order to

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<sup>33</sup> Hunter, McGlynn and Rackley, *Feminist Judgments: From Theory to Practice* (Hart 2010)(Hart 2010) 32

<sup>34</sup> Verloo and Walby, ‘Introduction: The Implications for Theory and Practice of Comparing the Treatment of Intersectionality in the Equality Architecture in Europe’ (2012) 19(4) *Social Politics: International Studies in Gender, State and Society* 433

<sup>35</sup> Hunter, ‘Can feminist judges make a difference?’ (2008) 15(1/2) *International Journal of the Legal Profession* 7

expose the specific problems faced by one group of religious women within the Contracting Party States of the Council of Europe. As mentioned before:

“There is now considerable consensus growing that one must always take into consideration multiple axes of oppression; to do otherwise presumes the whiteness of women, the maleness of people of colour, and the heterosexuality of everyone.”<sup>36</sup>

Despite its many successes in terms of unveiling discriminative practices, intersectional scholarship has failed to reach the legal sphere as an alternative method of challenging legal norms within the international legal order.

Furthermore, within the current intersectional scholarship there is a lack of exploring the complexity of women’s lives and of taking into consideration the lived experiences of religious women. There is a failure among intersectional researchers to recognize intra-group differences among marginalized groups; instead, the focus is on analysing and understanding intergroup differences. There is not much scope within my thesis to discuss and highlight all the intragroup differences within religious women who wish to manifest their religious belief. I will use the term “intergroup discrimination” to highlight the discrimination faced by all religious women as a result to manifest their religious beliefs. The term “intragroup” discrimination will highlight how the forms of discrimination differ amongst different religious groups. In the following sections I will focus on the forms of discrimination faced by Muslim women and how these forms of discrimination are specific only to that group.

The American feminist Katherine Bartlett has identified one methodological tool in terms of “asking the woman question.”<sup>37</sup> The woman question examines whether a social practice or legal rule has taken into consideration the experiences of women, or whether women are excluded. If this is the case, then this needs to be addressed, interestingly, Bartlett also refers to this as “the question of the excluded”.<sup>38</sup> In the same vein, Spelman suggests that when

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<sup>36</sup> Schiek and Lawson, *European Union non-discrimination law and intersectionality : investigating the triangle of racial, gender and disability discrimination* (Ashgate 2011)

<sup>37</sup> Bartlett and Kennedy, *Feminist Legal Theory : Readings in Law and Gender* (Westview Press 1991)

<sup>38</sup> *Ibid*

examining when talking of women one should refrain from essentialising in order to prevent further exclusion.<sup>39</sup> The question of the excluded has resonance in intersectional feminism in that it allows judges to ensure that women do not face double discrimination based on their intersectional identities. The Feminist Judgments Project has highlighted the importance of intersectionality, and incorporated it in their own re-written judgments concerning and highlighting the interrelationship of sex and age, sex and sexuality and sex, religion and culture in order to reach a more feminist judgment. <sup>40</sup> This has allowed writers to engage women's rights within the law and come to a different, more gender-balanced conclusion.

Feminist Practical Reasoning is achieved through contextualising and by a focus on the lived experiences of women. Katherine Bartlett defined it as a more contextual and situation sensitive means of reasoning.<sup>41</sup> Consciousness-raising explores the common patterns and experiences faced by women through the medium of story-telling.<sup>42</sup> It resonates in the Feminist Recasting of Judge Learned Hand's advice to judges:

“When you listen as a judge, you must transcend your sense of self, so that you can really listen. Listen to the story that is being told. Do not prejudge it. Do not say this is not part of my experience. But listen in such a way as to make it part of your experience. Find some small part of your own self that is like the Other's story. Identify with the Other. Do not contrast. Only when you have really listened, and only then should you judge.”<sup>43</sup>

This can be juxtaposed with Carol Gilligan's "ethic of care", namely that women speak in a different moral voice, one which is relational, connected, caring, nurturing, and responsible as opposed to abstract, distanced, calculating and disengaged.<sup>44</sup> This is not to say that feminist judges should not be detached and calculating in their judgments. Feminist judging should

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<sup>39</sup> Spelman EV, *Inessential woman : problems of exclusion in feminist thought* (Beacon Press 1988), 186

<sup>40</sup> Hunter, McGlynn and Rackley, *Feminist Judgments: From Theory to Practice* (Hart 2010)

<sup>41</sup> Bartlett KT and Kennedy RT, *Feminist legal theory : readings in law and gender* (Westview Press 1991), 377

<sup>42</sup> Bartlett and Kennedy, *Feminist legal theory : readings in law and gender* (Westview Press 1991)

<sup>43</sup> Cain, 'Good and Bad Bias: A Comment on Feminist Theory and Judging USC Symposium on Judicial Election, Selection, and Accountability' (1987) 61 S Cal L Rev 1945 ;*ibid*1955

<sup>44</sup> Carol Gilligan, *In a different voice : psychological theory and women's development* (Harvard University Press 1982)

still seek to examine the facts of a case and identify which of these facts should guide the resolution of the dispute by applying the law to the facts. These should then be analysed in a pragmatic manner, by the use of “deduction, induction, analogy and the use of hypotheticals, policy and other general principles.”<sup>45</sup>

A feminist judge should always judge inclusively through the insertion of the feminist voice in the legal judgment alongside challenging heteronormativity and stereotyping. Justice L’Heureux-Dube, a Supreme Court Justice in Canada, argues that there is the hope that an increase in female judges would allow the judiciary to be “more willing and able to hear and understand the stories of women litigants.”<sup>46</sup> A feminist judge would be able to use her own experience to understand some of the woman’s experience. Otherwise the Courts would have little choice but to continue to use the normative standards, which were created with white male, middle-class interests and values in mind and measure women to that. Secondly, the way in which inclusivity in judging can be achieved is through the diversification of the judiciary as highlighted by Justice L’Heureux-Dube, who explained that she recognises “that women’s diverse experience have been sadly lacking in many areas of law and I have continually emphasized the necessity of incorporating them in our judicial decisions.”<sup>47</sup> This highlights the importance of feminism, as well as one of its critical failings, which needs to be recognised and overcome. It is important to note that feminism for years has failed to include the experiences of all women; instead, the theory was created out of the experiences and the voices of a minority.<sup>48</sup> As argued by Rosemary Hunter, the inclusion of women into powerful institutions will not remove the illegitimate power structures feminists are trying to change.

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<sup>45</sup>Bartlet and Kennedy, *Feminist Legal Theory : Readings in Law and Gender* (Westview Press 1991), 371

<sup>46</sup> Claire L’Heureux-Dube, ‘Making a Difference: The Pursuit of a Compassionate Justice’ (1997) 31 *U Brit Colum L Rev* 1 3

<sup>47</sup> *Ibid* at 6

<sup>48</sup> M. Lugones and E. Spelman, ‘Have we Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for the Woman’s Voice’ in J. Kourany et al (eds), *Feminist Philosophies* (1st, Prentice Hall International (UK) Limited, London 1992). 381



<sup>49</sup> This is because women who are being elected into the judiciary may not be representative of women as a group. Furthermore, individual female judges may not wish to risk their status by taking a feminist approach; especially considering that the road for women into the higher courts is not easy.

Those judges who do choose to judge inclusively and allow feminism to seep into their legal reasoning have to take care to ensure that they do not recreate the power imbalance they seek to address. Many women who do not fit the initial mould created by mainstream feminism have since been considered the 'other'. It is important that these religious 'others' experiences and voices are also considered when coming to a judgment. Thus, it is important for judges to judge inclusively and to include the feminist voice, in particular the intersectional feminist voice in the legal debate prior to making a judgment. They should thus take into account the intersectional identities of women. Taking the example of religious women, it is important to note that these women are diverse in their religious, ethnic and cultural background. A feminist judge should bear in mind that the conflict between the manifestation of religion and the law can and will lead to women sacrificing the rights they are entitled to and remain in the private sphere. Thousands of women will find themselves not pursuing a university education in order to fulfil a religious precept.

It is impossible for a feminist judge to be able to fully understand the concept of intersectional feminism and bring to court a full understanding of the diversity that female litigants bring to the courtroom. This can only be achieved if a judge continuously conducts research on women's lived experience or talks to a wide range of women about their lived experiences. According to Elizabeth Sheehy Justice L'Heureux-Dube "consistently attempted to enrich her knowledge of the experience of the 'other' by reading and integrating material" from a wide range of sources including reports of government bodies and women's organisations "in order to craft sounder legal doctrine."<sup>50</sup>

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<sup>49</sup> Hunter, 'Can feminist judges make a difference?' (2008) 15(1/2) *International Journal of the Legal Profession* 7

<sup>50</sup> Sheehy (Ed.) *Adding Feminism to the Law: The Contributions of Justice Claire L'Heureux- Dube'* (Irwin Law, 2004) 12

Therefore one aspect of judging inclusiveness is challenging the notion of sameness. One purpose of this chapter is to illustrate, using intersectional feminism, that the Court's approach to gender in the context of the manifestation of religion relegates women to the private sphere. It will highlight using this case that one aspect of political intersectionality is to do with the critique of hierarchies of structural and political inequalities, which are often perpetuated as a result of seeing women as one homogenous group, and failing to recognise the inter- and intragroup differences amongst them. The argument is that the current "one size fits all" approach to gender equality sanctioned by the ECtHR in this case is based on an incorrect assumption of sameness and leads to the double discrimination of women with religious beliefs. This is because the wearing of religious insignia, like the headscarf is limited to those who have a religion. Furthermore, women are more likely to manifest their religious beliefs than men and are therefore more likely to be discriminated against as a result of their multiple identities.<sup>51</sup>

The conclusion is to the effect that the ECtHR should envisage gender equality in a holistic manner as opposed to the current paternalistic conceptualization of discrimination in its jurisprudence. A good example of where the Court has used gender equality in a holistic manner can be found in the case of *BS v Spain*, where the Court has recognised that the appellant was especially vulnerable as a result of her multiple identities, namely that of a Nigerian female sex worker who was harassed racially and sexually on the basis of her national origin, gender and occupation.<sup>52</sup> In contrast, in the case of *Leyla Sahin v Turkey*, the Court used a "one size fits all approach" to the management of plurality by limiting the wearing of religious symbols in university; the approach was insensitive to the intersectional identities of women and contrary to the Court's own equality paradigm. When using the term "one size fits all" the argument is that despite the fact that the measure put in place by the university is on the face of it universal, this measure solely affects those who have a religion and who manifest it through the wearing of insignia. It is not tailored to meet the needs of those who

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<sup>51</sup> Davie, *Religion in Modern Europe: A Memory Mutates* (Oxford University Press 2000) ;Franzmann, *Women and Religion* (Oxford University Press 2000) ;Juschka, *Feminism in the Study of Religion : a Reader* (Continuum 2001) ;Sunder, 'Piercing the Veil' (2003) [The Yale Law Journal Company, Inc.] 112(6) The Yale Law Journal 1399  
<sup>52</sup>*BS v Spain* App No 47159/08 (ECtHR, 24 October 2012)

may decide not to go to university as a result of an inability to manifest their religious beliefs. This would put religious individuals who wish to manifest their religious beliefs in an impossible situation, especially considering, as we have already discussed above, that women are more devout and more likely to manifest their religious belief.

The use of stereotypes is especially visible in the ECHR “hijab” cases. In the case of *Dahlab v Switzerland*, the Court relied on commonly held stereotypes and misconceptions about Muslim women. As explained by Evans:

While the formal tests adopted by the Court set a very high bar for states that seek to limit the rights of those within their jurisdictions, in practice, the rights of minority religions in many European states have been routinely limited and the Court has not condemned such limitations.<sup>53</sup>

In fact, as outlined in Chapter Four, the Court has found it easier to defer to national states under the margin of appreciation device. It was also willing to fully depend on the government’s interpretation of Islam and the meaning of the headscarf, without requesting further evidence or reasoning from the Contracting Party State.<sup>54</sup>

In the case of *Dahlab v Switzerland*, in determining whether the restriction on the applicant’s freedom of religion was necessary in a democratic society, the Court stated the following:

“The Court accepts that 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 influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf may 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 the Islamic headscarf with the message of tolerance, respect for others and, above all, equality and

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<sup>53</sup> C. Evans, 'The 'Islamic Scarf' in the European Court of Human Rights' (2006) 7 *The Melbourne Journal of International Law* 52-73. 55

<sup>54</sup> *Ibid.*

non-discrimination that all teachers in a democratic society must convey to their pupils.”<sup>55</sup>

The Chamber in *Leyla Sahin v Turkey* said:

“...In addition, like the Constitutional Court ..., the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted ..., the issues at stake include the protection of the ‘rights and freedoms of others’ and the ‘maintenance of public order’ in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated ..., this religious symbol has taken on political significance in Turkey in recent years...”<sup>56</sup>

These cases have a harmful impact on Muslim women who wish to manifest their religious beliefs. In neither of these cases did the Court consider the motivating reasons behind those women’s choice to wear the Islamic headscarf, nor did it contemplate the implications on these women of banning religious dress.

Feminist judges should also seek to challenge gender bias and to challenge the hegemonic discourses of sexism, racism and heteronormativity. This, according to Rosemary Hunter, would involve questioning of judicial norms which are constantly in flux, such as the current legal definition of ‘woman’ and firmly rejecting shock stories. This was highlighted in greater detail in Chapter Two where the *Leyla Sahin v Turkey*<sup>57</sup> case was discussed. It was shown that there were certain misconceptions which the ECtHR did not seek to challenge, such as a narrow definition of gender equality and the fact that the Court did not seek to explore the impact and the value of the headscarf on Miss Sahin. Instead, it held certain assumptions which limited the personal autonomy of Miss Sahin and forced her to choose between her religious convictions and continuing her studies at the university.

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<sup>55</sup> *Sahin v Turkey App no 44774/98 (ECtHR, 29 June 2004)*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

Heteronormativity here is used in the sense that these women are placed by the Court in a specific gender category. They veil, because they are supposedly forced to do so by an “invisible man”, whether that man is their spouse, partner or father. As mentioned in earlier chapters, it is clear in the discourse around the right to manifest a religious belief that there is a paradigm image of oppressed Muslim women who are penalised for failing to wear a headscarf not only in countries such as Iran, Saudi Arabia and Afghanistan, but also within their homes. As mentioned before, a large portion of the liberal feminist discourse on sexual emancipation often has a colonial undertone, because of the stereotype that Muslim women are oppressed and require being saved by a white, middle class individual.<sup>58</sup> This stereotype is so prevalent, that the saving of Muslim women was part of the justification for the 2002 US-led invasion of Afghanistan.<sup>59</sup>

In the next section I have written a dissenting judgment of the SAS v France case where I will try to incorporate some of the above critique. As my intersectional judgment makes clear, it is important that that the Court re-conceptualises and re-contextualises the problems that occur through limiting the right to manifest a religious belief of women who wears a face veil. The jurisprudence of the Court and the way in which plurality is managed has left women at the margins, by limiting their ability to enter the public sphere in a misguided attempt to protect the right to living together. In the re-writing of the judgment, I sought to incorporate intersectional feminist legal methods and scholarship as well as include a comparative analysis where other Courts have successfully incorporated an intersectional viewpoint within their jurisprudence. I highlight the potential in reinterpreting notions of autonomy and religious freedom to see these not in conflict with gender equality but as holistically in harmony with it. That is, to interpret women’s freedom or autonomy taking into account the social construction of choices in an unequal world but the starting point must not be to ban women’s behaviour as reflecting false consciousness. Such a reaction penalises women and fails to take them seriously as persons in their own right with a capacity and ability to plan their own lives. As such, it is patronising and against liberal principles of equality, freedom, rights and the rule

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<sup>58</sup> Abu-Lughod, ‘Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others’ (2002) 104(3) *American Anthropologist* 783

<sup>59</sup> *Ibid.*

of law. Instead we need an empowering, inclusive, notion of equality that starts by acknowledging the existing choices made by women to wear what they say they want to wear. In this judgment, I also critique the wide margin of appreciation afforded in this case, and instead put forward the argument that there is no European oversight.

#### SAS V FRANCE: AN INTERSECTIONAL JUDGMENT

I cannot share the opinion of the majority, as not only does it, as mentioned by my learned colleagues Nussberger and Jaderblom, sacrifice the concrete individual rights guaranteed by the Convention to abstract principles, but it also runs counter to the right to manifest a religious belief, insofar as this right can only be limited by the exceptions found in Article 9(2) ECHR. I want to reiterate that interference with the right to freedom of religious manifestations cannot be justified solely because some people happen to be offended by religious practices. Furthermore, my colleagues misapply the margin of appreciation in the instant case, inasmuch as there is no European consensus on the matter and they place a greater value on the preferences, rights and freedoms of the majority at the expense of the minority.

#### FREEDOM OF RELIGION

Since, to my mind, the criminalisation of the face covering was not based on reasons that were sufficient and relevant, it cannot be considered that the reasons provided by the respondent State were “necessary for a democratic society”; therefore, there has been a breach of Article 9(2) ECHR.

The freedom of thought, conscience and religion is one of the oldest human rights in Europe and is standardly considered as a fundamental right within the Convention. As held in *Kokkinakis v Greece*:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is so a precious asset for atheists, agnostics, sceptics and the

unconcerned. The pluralism in dissociable from a democratic society, which has been dearly won over the centuries, depends on it.

A limitation or interference to the Article 9(2) right to freedom to manifest a religious belief can be justified only if it is: prescribed by law, necessary in a democratic society, for a permissible purpose and proportionate.

#### LEGITIMATE AIM OF LIVING TOGETHER

I agree with the dissenting judgments of Judges Nussberger and Jaderblom that the purpose of “living together” cannot be included to fall under the category of necessity:

The Court’s case-law is not clear as to what may constitute “the rights and freedoms of others” outside the scope of rights protected by the Convention. The very general concept of “living together” does not fall directly under any of the rights and freedoms guaranteed within the Convention. Even if it could arguably be regarded as touching upon several rights, such as the right to respect for private life (Article 8) and the right not to be discriminated against (Article 14), the concept seems far-fetched and vague.

I find that the criminalisation of the face veil goes against the principles of promoting pluralism and tolerance, since it sacrifices the cultural and religious right of the individual on the assumption that it makes the majority uncomfortable.

It is even more worrying that the purpose of Article 9(2) is to protect religious minorities from the excesses of state action and to allow them to manifest their religious beliefs in a pluralistic and tolerant society.

There is a danger, as a result of my colleague’s failure to use a more cautionary approach that they set out to do, that a Contracting Party State could assume assimilation projects onto the minorities for the sake of social cohesion.

#### LEGITIMATE AIM OF GENDER EQUALITY

The majority rightly argues that neither respect for equality between men and women, nor respect for human dignity, can legitimately justify a ban on the concealment of the face in public places (see paragraphs 118, 119 and 120).

They also touch on Article 14 ECHR, by stating that the ban has

A significant negative impact on the situation of women who, like the applicant, have chosen to wear a full face veil for reasons related to their beliefs. They are thus confronted with a complex dilemma, and the ban may have the effect of isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life. It is also understandable that the women concerned may perceive the ban as a threat to their identity (paragraph 146)

This is especially worrying, considering that only a minority of Muslim women wear the face veils. Indeed, these women are only 2000 in number and both the Open Society Initiative and the Human Rights Centre of Ghent University have expressed the well-considered view that the ban does not serve its purpose, but instead has led to the isolation of women who were previously active in society (paragraph 96)

It is worrying that the majority have highlighted that the burqa ban can risk contributing to the negative stereotype often faced by the Muslim population in France (paragraph 149), yet uphold France's decision on a basis that could not be on its face specifically connected to the protection of a Convention right. It is even more disconcerting that my colleagues have accepted the French premise that the burqa breaks social ties. This builds on the negative stereotypes which have made their way in this Court's judgments concerning Muslim women.

Like Judge Tulkens in her dissenting judgment of *Leyla Sahin v Turkey*, I would like to draw a parallel with the right to freedom of expression. Similarly, this case brings to light the right to gender equality, not only because the French government has used our own case law in order to limit the autonomy of Muslim women, through its argument that the burqa goes against gender equality, but in that it has gone one step further by arguing that a religious practice goes against the very notion of social cohesion.



I feel the need to iterate that there is indeed intersectional discrimination at play here, as it is only Muslim women who are disproportionately affected by this law. Indeed France does not deny that the law was passed in order to prevent Muslim women from wearing the burqa, despite the fact that out of a population of 5 million Muslims, out of which roughly half are women, only 2000 of them wear the niqab. As held in our Article 14 jurisprudence, it is imperative for Contracting Party States to consider laws that are indirectly discriminative to a minority group.

#### PROPORTIONALITY

My colleagues have stated that:

Pluralism tolerance and broadmindedness are hallmarks of a “democratic society.” Although individual interests must on occasion be subordinated to that of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position (paragraph 128)

This was despite finding that ‘a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate’ (para. 147). These actors include the Parliamentary Assembly of the Council of Europe (paras 35-36) and the Commissioner for Human Rights of the Council of Europe (para. 37).

In *Arslan and others v Turkey*, 127 members of a religious group were convicted for touring the streets of Ankara while wearing turbans and distinctive trousers and tunics, a dress code based on their religious beliefs. The Court then found that Turkey had violated Article 9 ECHR. The interference with the applicants’ religious manifestation was not justified because the Turkish government had not convincingly established the necessity of the disputed restriction and the interference was not based on sufficient reasons (para. 52). One of the issues emphasized by the Court was that there was a distinction between wearing religious dress in public areas open to all and wearing it in schools or other public establishments where

religious neutrality might take precedence over the right to manifest one's religion or belief (para. 49).

I stand by the fact that a blanket ban in all public spaces is not justified, just like the Court held in the case of *Arslan v Others*. Similarly, the Court held then that there was no evidence that the applicants had represented a threat to public order or that they had been involved in proselytising by exerting inappropriate pressure on passers-by (para. 50). In a similar manner, there is no evidence that the niqab is a danger to social cohesion, in fact as evidence suggests, it is the criminalisation of the niqab that leads to the social isolation of these women.

#### MARGIN OF APPRECIATION

In order to determine the scope of the margin of appreciation that states enjoy, there must be due consideration of the right's importance and the "nature" and "aim" of the restricted activity. The extent to which this Court should defer to the national authorities is an important question which arises when the regulation of religious pluralism across Europe.

In many areas, especially those that relate to religious freedoms, national authorities possess a margin of appreciation that reflects, inter alia, the notion that they are "better placed" to decide how best to discharge their Convention obligations. It is noted that the doctrine of the margin of appreciation should not in any circumstances exempt the Court from the duty to exercise the function conferred on it under Article 19 of the Convention, which is to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto. The Court's jurisdiction is, of course, subsidiary and its role is not to impose uniform solutions, especially in the sphere of religious pluralism/

The margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at the national level were both justified in principle and proportionate. In delimiting the extent of the margin of appreciation in the present case, the Court must have regard to what is at stake, namely the need to protect the rights and freedoms of individuals

to practice their religion without being discriminated against and excluded from higher education. This is necessary if true religious pluralism is to be balanced with other rights, which is vital to the survival of a democratic society.

The margin of appreciation is of limited application for a further two reasons. Firstly, there is no European consensus in this sphere. In the vast majority of the member States, a ban on face coverings is not regulated. Secondly, the issue raised by this application, namely the scope of religious freedoms guaranteed by the Convention, is not merely a “local” issue, but one that is of importance to all the Member States. European supervision of this fundamental human right should not be escaped simply by invoking the margin of appreciation.

Consequently, I conclude in the present case that Member States should not be given a wide margin of appreciation to implement a total ban on face coverings. The Court’s duty is to ensure the observance of the engagements undertaken by the parties to the Convention and the Protocols thereto, which in this instance the Court deems to have been violated.

#### CONCLUSION

In view of the above reasoning, I find that the criminalisation of the wearing of a full-face veil is a measure which is disproportionate to the aim of protecting the idea of “living together” – an aim which, as mentioned by my colleagues Judge Nussberger and Jaderblom, cannot be reconciled with the Convention’s restrictive catalogue of grounds for interference with basic human rights.

In my view there has therefore been a violation of Articles 8 and 9 and 14 of the Convention.

#### REFLECTION ON INTERSECTIONAL JUDGMENT

This dissertation has been concerned with exploring the gender equality argument as it has been used to limit the right to manifest a religious belief. Domestic courts across Europe have allowed for the restriction on Islamic veiling practices by deploying the gender equality argument, which, as highlighted within this dissertation, has longstanding colonial and racist connotations. However, it is also difficult for Muslim feminists, myself included, to argue that

Islamic veiling symbolises women's quests for equality and liberation, especially considering that in certain parts of the world, Islamic veiling is enforced upon women by law. The dissertation's main contribution was to argue that the Court's employment of the gender equality argument in order to limit the right to manifest a religious belief was at odds with its own gender equality jurisprudence, as well as on freedom of choice, expression, autonomy and identity.

Finally, it was difficult to write an intersectional judgment, due to the lack of information and the scope of the judgment. I found that there were quite a few methodological constraints in my judgment writing. Other than the fact that the applicant was a young woman of Pakistani descent who wears the face veil, I couldn't really explore all the intersecting aspects of her identity. One drawback from this is that one may critique me for essentialising Muslim women, which is one of the things I tried to avoid. By initially highlighting that I was trying to incorporate a Muslim voice into the debate, I failed to identify what Muslim voice that would be, other than the applicant's. I feel this should be sufficient, as all we can do as (hypothetical) feminist judges is to ensure that the applicant's voice is heard and for the purpose of clarity of the law there has to be some uniformity. Also, it became quite obvious that as a lawyer I tried to stick to the black letter of the law, which I did not change or critique; instead judgment writing became wholly about using the usual black letter tools of legal writing, but at the same time recognising gendered norms and taking into consideration the context.

Interestingly, I did feel a power dynamic when writing the judgment. When I took on the persona of a judge, armed with both legal reasoning and professional/ political clout I found writing to come easier to me. I started off referencing in my judgment writing in order to lend more strength to my argument but continued to do so less and less and until the final draft only provided references to other jurisdictions, critical texts and empirical studies to evidence my normative claims. The reflective aspect proved to be the hardest part of the judgment writing process, precisely because I stopped writing as a judge and was writing once again as myself.

In my intersectional judgment, I have chosen to rewrite the decision by the ECtHR, by contextualising the problem and placing the applicant back into the epicentre of the case. It takes into account the applicant's intersectional identity as a young French, Muslim woman of Pakistani heritage who is unable to manifest her religious belief in the public sphere and has as a result withdrawn into the private sphere. One positive factor to be taken from this case is that the Court did not accept the legitimate justification of gender equality for the limiting of the religious manifestation, as it did in *Dahlab v Switzerland* and *Leyla Sahin v Turkey*, where the Grand Chamber was criticised for stating that the wearing of the headscarf by two adult, consenting women, went against the principle of gender equality and that:

“It 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”<sup>60</sup>

In *SAS*<sup>61</sup> however, where the French authorities raised the same gender equality argument, the Court refused to accept it as a legitimate aim:

“[A] State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.”<sup>62</sup>

The Court therefore respects the applicant's autonomous choice to wear the niqab and refrains from attributing a meaning to it. In fact, the Court goes further and recognises that criminalising a religious manifestation can be “traumatising”<sup>63</sup> and result in the alienation of these women. Furthermore, the Court has raised concerns about the islamophobic remarks made by government officials before the enactment of the law:

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<sup>60</sup> *Sahin v Turkey* App no 44774/98 (ECtHR, 29 June 2004)

<sup>61</sup> *SAS v. France*, App no. 43835/11 (ECtHR, 14 July 2015)

<sup>62</sup> *Ibid.* Paragraph 119

<sup>63</sup> *Ibid.* Paragraph 158

“That remarks which constitute a general, vehement attack on a religious or ethnic group are incompatible with the values of tolerance, social peace and non-discrimination which underlie the Convention and do not fall within the right to freedom of expression that it protects”<sup>64</sup>

The Court even takes this one step further by acknowledging the broader impact of the legislation on the Muslim community “including some members who are not in favour of the full-face veil being worn.”<sup>65</sup> Notwithstanding the fact that the Court has recognized the defendant as a woman and as a Muslim, it has failed to link the identities, and this despite mentioning the intervening evidence by third parties which specifies the intersectional discrimination Muslim women experience. Furthermore, through the banning of religious symbols which disproportionately affects women without taking into account their intersectional identities, the Court has gone against its equality case law, which has developed the right to personal autonomy over the decades through a number of groundbreaking cases.<sup>66</sup>

In the longer term, the SAS judgment can produce harmful effects in other Contracting Party States. This is already evident in the number of countries which have limited religious practices in the public sphere. The most recent one is Austria, which has reformed its 1912 law governing Muslim affairs, the proposed reform requires, among other things, a single German translation of the Quran.<sup>67</sup> Considering the wide margin of appreciation, the Court’s new stance on proportionality following SAS and Austria’s legitimate aim of tackling extremism, it would appear that the right to freedom of religion has truly lost its way in Europe.

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<sup>64</sup> Ibid. Paragraph 149

<sup>65</sup> Paragraph 148

<sup>66</sup> Ibid. As discussed previously Article 14 of the Convention not only requires that persons in a similar situation must be treated in an equal manner but also requires that persons whose situations are significantly different must be treated differently.

<sup>7</sup> *Hoogendijk v Netherlands* (2005) 40 EHRR SE22 at 206. See also, ECtHR, *Thlimmenos v Greece* (2001) 31 EHRR 15 at para. 47.

<sup>67</sup> BBC, ‘Austria passes controversial reforms to 1912 Islam Law’ *Austria passes controversial reforms to 1912 Islam Law* (25 February 2015)

## CONCLUSION

This chapter engaged in the 'real world' exercise of judgment writing in order to test whether the current institutional structure is able to withstand a change in the way in which minority women are represented in the law. It put forward a more inclusive framework for limiting the right to manifest a religious belief, by asking judges to examine cases holistically, through an intersectional lens, by placing the affected women at the centre of the judgment.

The next chapter will take into consideration the role of gender mainstreaming at State level in guaranteeing the rights of religious women.

## 7. Chapter Seven: Gender Mainstreaming

### INTRODUCTION

This thesis used a thematic framework derived from feminist critiques of political, cultural and religious thought within intersectionality and argued that the ECtHR has integrated underlying assumptions and representations of religious women into their discourse in a way which undermines its current gender equality jurisprudence. The implementation of the rights guaranteed by the Convention is left to Contracting States; thus, States are also parties to the human rights machinery. One important way of ensuring the human rights protection of the most disadvantaged, as seen in the previous chapter, is by challenging power structures at the level of judicial enforcement. This chapter argues that through the implementation of gender mainstreaming policies at both Council of Europe and Contracting Party State level, there will be a greater level of equality protection across Europe.

Drawing on the published materials from the Committee of Ministers, Assembly and expert working groups of the Council of Europe, this chapter highlights the way in which gender mainstreaming can further protect the rights of minority women within a national context. It argues that Contracting Party States ought to ensure that the right to manifest a religious belief is protected at ground level by creating an impact assessment on legislation and policies that could disproportionately affect a minority group. This chapter further argues that by mainstreaming all disadvantaged social categories under one umbrella, states can further strengthen their equality infrastructure.

As mentioned in previous chapters, the legislation passed by countries like France, Belgium, Denmark and Germany which restricts the Islamic veil have disproportionately affected Muslim women. If an impact assessment was to be carried out by the legislators, the Contracting Party States may have been able to address the way the legislation has a disproportionate effect on minority groups and attempt to tackle the negative impact on their lives as highlighted in chapter three. This chapter argues that Contracting Party States, as part of their obligations under the Convention, should assess whether their legislations and policies perpetuate the subordination of women or other identity characteristics. Contracting



Party States have a duty to protect their citizens from indirect discrimination; accordingly, they should assess the repercussions of their policies, in their multiple forms, from the perspective of the disadvantaged.

#### DEFINING GENDER MAINSTREAMING

Feminist perspectives on international law have grown in the last thirty years. Gender issues have become part of the international agenda, which is evidenced by the proliferation of gender mainstreaming projects within the international community.<sup>1</sup> The concept of gender mainstreaming first appeared in international texts after the United Nations Third World Conference on Women.<sup>2</sup> In the following World Conference on Women, gender mainstreaming was endorsed by the Platform for Action and the concept was adopted by the United Nations.<sup>3</sup> The platform for action promoted gender mainstreaming and stated that:

“governments and other actors should promote an active and visible policy of mainstreaming, a gender perspective in all policies and programmes, so that before decisions are taken, an analysis is made of the effects on women and men, respectively.”<sup>4</sup>

In that same year, the Council of Europe created a Group of Specialists on mainstreaming, which created a number of materials on the subject, these materials are applied to individual Contracting States to examine whether they are in compliance with the concept. The Group of Specialists definition is the following:

“Gender mainstreaming is the (re) organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in

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<sup>1</sup> Verloo, ‘Displacement and Empowerment: Reflections on the Concept and Practice of the Council of Europe Approach to Gender Mainstreaming and Gender Equality’ (2005) 12(3) *Social Politics: International Studies in Gender, State & Society* 344

<sup>2</sup> UN Third World Conference on Women (Nairobi, 1985) *Global Platform for Action*. New York, United Nations

<sup>3</sup> UN Fourth World Conference on Women (Beijing, 1995) *Global Platform for Action*. New York, United Nations.

<sup>4</sup> *Ibid.* Platform for Action, paragraph paragraphs 79, 105, 123, 141, 164, 189, 202, 229, 238, 252, 273.

all policies at all levels and at all stages, by the actors normally involved in policy making.”<sup>5</sup>

The definition of gender mainstreaming emphasises its aim, the process, and the subjects of gender mainstreaming. As identified in one of the policy documents of the Group of Specialists gender mainstreaming places gender equality in the centre of its common policies. The definition of gender in these documents are wider and more inclusive as it considers the differences and diversity amongst and between the genders. In stressing the need to re-organise, improve, develop and evaluate policy processes, gender mainstreaming makes it possible to challenge the male, and I would argue, white, heteronormative, able bodied bias and structural character of intersectional inequality. Mainstreaming also allows gender equality issues to be tackled across a wider social policy machinery, instead of solely being dealt with by policies of gender equality. Furthermore, the process of gender mainstreaming allows more and new actors to participate in building a fairer society within the Contracting Party State. The Council of Europe has issued the following rationale for gender mainstreaming:

“Gender mainstreaming is essential for a properly functioning democracy. It puts people at the heart of policy making; leads to better informed policy-making and therefore enhanced government; makes full use of all human resources and acknowledges the shared responsibilities of women and men in all spheres of social ordering; makes gender visible at all levels of society; and takes account of diversity between women and men and between women and women, men and men.”<sup>6</sup>

It is crucial for actors to be aware that gender mainstreaming does not aim at replacing specific equality policies and machineries that are already in place at both international and national level. Rather, mainstreaming complements the traditional equality policies mentioned in Chapter Three. As highlighted in a number of documents produced by the

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<sup>5</sup> Council of Europe, Committee of Ministers. 1998. *Recommendation No. R (98) 14 of the Committee of Ministers to Member States on Gender Mainstreaming*. Adopted by the Committee of Ministers on 7 October 1998 at the 643<sup>rd</sup> Meeting of the Minister’s Deputies. 15

<sup>6</sup> Council of Europe, Committee of Ministers. 1998. *Recommendation No. R (98) 14 of the Committee of Ministers to Member States on Gender Mainstreaming*. Adopted by the Committee of Ministers on 7 October 1998 at the 643<sup>rd</sup> Meeting of the Minister’s Deputies. 15

Specialists on Mainstreaming, they are two separate approaches working together to achieve gender equality.<sup>7</sup> They are used together, precisely because there is no universal consensus on what gender equality really is. This resembles the way in which the concept of the margin of appreciation comes in play when there is no common European standard on a particular right. Mainstreaming stipulates that it is important that Contracting Party States take into consideration the voices of those most disadvantaged and address specific power imbalances through legislation and targeted policies. More specifically, it is customary for equality policies to be created specifically to address a specific gender imbalance, whereas in mainstreaming the policy is already in existence. Then the policy process is reorganised in order for actors to take gender perspective into account, which over time leads to the objective of gender equality. As mentioned in the Specialists' policy documents:

“Gender mainstreaming is the (re) organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy making.”<sup>8</sup>

Gender mainstreaming develops on the knowledge gained from previous equality policies. One of these lessons is that the piecemeal creation of specific equality policies is insufficient in reaching the goal of gender equality, gender mainstreaming is therefore, according to the Group of Specialists on Mainstreaming, the logical next step to take. Nevertheless, it is also crucial not to underestimate the importance of traditional equality policies, since these are more direct in challenging specific inequalities.

Jacqui True highlights five models of gender mainstreaming: the gender as sameness model, the gender as difference model, the gender as intersectionality model, the transformationalist model and the rejection of gender mainstreaming model. She states that the gender-as-sameness model is an example of an ‘add women and stir’ approach, in which

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<sup>7</sup> Gender mainstreaming: conceptual framework, methodology and presentation of good practices. Council of Europe, Strasbourg May 1998, Council of Europe study on national machinery, action plans and gender mainstreaming (EG (99) 12),

<sup>8</sup> Council of Europe, Committee of Ministers. 1998. *Recommendation No. R (98) 14 of the Committee of Ministers to Member States on Gender Mainstreaming*. Adopted by the Committee of Ministers on 7 October 1998 at the 643<sup>rd</sup> Meeting of the Minister's Deputies. 15

gender concerns are simply added to existing framework without substantially challenging them. This “add women and stir” approach is exemplified by aspects of recommendations made by the Council of Europe advocating for ‘balanced participation’ which is defined as follows:

“The Balanced participation of women and men is taken to mean that the representation of either women or men in any decision-making body in political or public life should not fall below 40%.”<sup>9</sup>

Similarly, gender is a consideration when appointing a judge to the ECtHR. This will be discussed in more detail in the following chapter, but at this point it is sufficient to stress that the Court aims to ensure that at least 40% of its judiciary is made up of women to ensure that no gender bias takes place in its decision making process.<sup>10</sup> This approach, as can be seen from the case of the Council of Europe, usually highlights the necessity to include women in the areas from which they have been traditionally excluded.

While the gender-as-sameness model focuses on women becoming like men, the gender-as-difference approach re-values women/femininity as crucially different from men/masculinity. This approach refers to the distinct contributions of women and men in society and calls for their equal valuation. However, one criticism of the gender as difference model is that it commonly falls into the trap of essentialism and perpetuates gender stereotyping.<sup>11</sup>

In contrast to gender-as-sameness and gender-as-difference that both present integrationist approaches, the gender-as-intersectionality model takes into account the complexity of gender relations. More specifically, it reflects on social inequalities that come into interplay with gender. Mainstreaming a gender perspective into peace and conflict analysis reveals, for instance, that sexual and gender-based violence does not target all women

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<sup>9</sup> 3 Recommendation Rec (2003)3 of the Council of Europe Committee of Ministers to member states on balanced participation of women and men in political and public decision making.

<sup>10</sup> Council of Europe. Parliamentary Assembly. 2004. Resolution No 1366 (2004). Text adopted by the Assembly on January 2004.

<sup>11</sup> Ackerly and True, ‘Back to the future: Feminist theory, activism, and doing feminist research in an age of globalization’ (2010) 33(5) Women's Studies International Forum 464

in the same way. Rather, women belonging to ethnic and/or religious minority groups that are relatively disempowered vis-à-vis the state or dominant armed groups often become more frequent targets.<sup>12</sup>

The transformationalist model, which is adopted by Sweden will be discussed in more detail below. It roughly licenses a gender perspective that is integrated to challenge existing frameworks. This model calls for the transformation of gender relations and aims at creating a new standard for both women and men. Gender mainstreaming has been frequently criticised for reflecting a single gender perspective, often based on Western, heterosexist norms of gender relations.<sup>13</sup> Some current national approaches to gender mainstreaming understand the subjects of policy as diverse with respect to gender, ethnicity, race, sexuality, class and incorporate this diversity into policymaking by addressing these identity categories together rather than separately.

#### WHY GENDER MAINSTREAMING?

As mentioned in the previous section, the Platform for Action on Gender Mainstreaming called for the promotion of the policy of gender mainstreaming; by putting forward the argument that:

“Governments and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes, so that before decisions are taken, an analysis is made of the effects on women and men, respectively.”<sup>14</sup>

Some academics have criticised the platform for being vague, as it doesn't include guidelines on the way States should implement a mainstreaming policy.<sup>15</sup> However, this can

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<sup>12</sup> Julia S. Jordan-Zachery, 'Am I a Black Woman or a Woman Who Is Black? A Few Thoughts on the Meaning of Intersectionality' 3(02) *Politics & Gender* 254

<sup>13</sup> Verloo, 'Displacement and Empowerment: Reflections on the Concept and Practice of the Council of Europe Approach to Gender Mainstreaming and Gender Equality' (2005) 12(3) *Social Politics: International Studies in Gender, State & Society* 344

<sup>14</sup> UN Fourth World Conference on Women (Beijing, 1995) *Global Platform for Action*. New York, United Nations. Paragraphs 79, 105, 123, 141, 164, 189, 202, 229, 238, 252, 273.

<sup>15</sup> Stephanie Farrior, 'Human Rights Advocacy on Gender Issues: Challenges and Opportunities' (2009) 1(1) *Journal of Human Rights Practice* 83 ;Verloo, 'Displacement and Empowerment: Reflections on the Concept and Practice of the Council of Europe Approach to Gender

be countered by the fact that the Contracting Party States are in a better position to decide, the best method implement a gender mainstreaming policy within their own legal, political and social landscape. Also, an important implication of the platform for action is that many Contracting Party States have adopted a domestic mainstreaming policy with the main aim of increasing the participation of women in policy making. This is important, because one of the premise of this thesis is that women, and more specifically religious women, have been excluded from the decision making process. Through the inclusion of women and other minorities within policy making, laws which previously were built on white, heteronormative masculine values can be more inclusive and equality legislation can be used not only to tackle the intersectional discrimination faced by minority women, but to overcome the implicit intersectional marginalisation often found in the current equality framework of most Contracting Party States. This is especially important in light of the fact that many countries, including the United do not recognise intersectional discrimination leaving many religious women on the margins.

Mainstreaming is used within this thesis to overcome the Court's shortcomings in the right to manifest a religion cases. The court system is highly adversarial and should not be the first point of call where the conflict between two fundamental rights clash. Instead the onus should be on Contracting Party States to ensure that legislation and policies which they pass are in accordance with the Convention. Gender mainstreaming would force countries to consider the seemingly hidden impacts legislation have on minority groups and force them to consider them prior to passing the legislation. The Contracting Party States should look beyond looking at statistical data and studies, and complement these with qualitative research where they take into consideration the lived experiences of the women who are marginalised by seemingly neutral legislation. When the right to manifest a religious belief is limited, Contracting Party States should take into consideration the viewpoint of the women affected. This as will be explained in more detail in the following chapter did not occur in the two

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Mainstreaming and Gender Equality' (2005) 12(3) Social Politics: International Studies in Gender, State & Society 344

countries which have a total ban on the face veil. Instead the Contracting Party States took into consideration the media representation of veiled woman, and propagated these.

This can be contrasted with the Begum case, where Shabina Begum wanted to wear the jilbab as part of the school uniform. Factors which the House of Lords took into consideration when balancing whether the right to manifest a religious belief could be limited by a school uniform policy which was there to protect students. Furthermore, the Court took into consideration the contextual factors including the painstakingly way in which Denbigh High School tried to make the school uniform policy as inclusive as possible. The case mentions that the head teacher, whose identity as a Muslim woman of Bengali descent was, had links to the Muslim community in the town and took care to ensure that the school uniform represented the religious and cultural identities of the students. This is reflective in the diversity of the school governors and alongside the working group who were asked to research whether the school uniform was acceptable to parents and faith leaders. Had it not been for a diverse set of staff dealing with a diverse population of school children, one is left to wonder whether the salwar kameez and headscarf the school uniform policy allows for its Muslim, Sikh and Hindu pupils would have been an option for the students of Denbigh High School.

#### METHODOLOGY OF GENDER MAINSTREAMING

This section will outline the methodology of gender mainstreaming as employed by the Group of Specialists on Mainstreaming and outline the effect this will have on Contracting Party States. The Group of Specialists on Mainstreaming indicate that the following factors are essential for gender mainstreaming to work as a strategy: “political will, specific gender equality policies, a working knowledge of the administration, funding, human resources and participation of women in political and public life and in decision making.”<sup>16</sup> The latter is highlighted as being especially important. As the document states:

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<sup>16</sup> Council of Europe, Committee of Ministers. 2003. Recommendation No. 2000(3) of the Committee of Ministers on balanced participation of women and men in political and public

“It is obvious that it will be difficult to obtain the political will for gender mainstreaming if women are not fully involved in political and public life and in decision making in general. Therefore, it is important that women enter political and public life in greater numbers. It is especially important that women enter the decision making processes, to ensure that the various values, interest and life experiences of women are taken into account.”<sup>17</sup>

The working group also stresses that there is a need for analytical and educational techniques and tools to make visible gender impact, as these are often hidden. Concurrently, these tools are needed, insofar as policy may not have the prerequisite knowledge of what gender equality is or entails. There is also a demand for data collection in the form of both statistics and surveys and forecasts, especially those which are aggregated by gender in order to examine subordinate power relations. The first is because the perspectives and experiences of those who are adversely affected by the decision making should be taken into consideration in order to tackle inequality. In order for this to be achieved, data in the form of statistics have to be collected, more specifically statistics which are split up by gender and other background variable, in order to discover whether there are individuals who are suffering from discrimination, whether multiple, compound or intersectional. There is a high demand for identifying, collecting, using and also disseminating gender and other background variable data and the Specialists on Gender Mainstreaming stress the importance of Contracting Part States to examine gender, amongst other subordinate power relations within their respective jurisdictions.

## GENDER MAINSTREAMING IN PRACTICE

This section aims at giving an overview of the way in which gender mainstreaming is practiced in the United Kingdom and in Sweden. These two countries have been chosen

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decision making. Adopted by the Committee of Ministers on 12 March 2003, at the 831st meeting of the Ministers' Deputies)

<sup>17</sup> Council of Europe, Committee of Ministers. 2003. Recommendation No. 2000(3) of the Committee of Ministers on on balanced participation of women and men in political and public decision making. Adopted by the Committee of Ministers on 12 March 2003, at the 831st meeting of the Ministers' Deputies)



primarily because intersectionality featured most prominently in these two countries in Hanvinsky's influential study on gender mainstreaming.<sup>18</sup> Hanvinsky interviewed gender mainstreaming stakeholders, e.g. policy-makers, gender researchers and people from equality-seeking NGOs, from five different countries including Sweden and the United Kingdom. She highlighted that Sweden has had special relevance in the international arena of gender mainstreaming, since it is regarded as having favourable preconditions for gender mainstreaming.

Because gender mainstreaming assumes that policies can have a different effect on men and women, it has been called a "potentially revolutionary concept" and a "paradigm shift for thinking about gender equality in policy making processes."<sup>19</sup> However, one drawback in the way in which gender mainstreaming has been implemented is that it does not consider difference feminism. As mentioned in previous chapters, the notion of intersectionality which was defined and grounded by Kimberle Crenshaw as intersecting gender and race identity in shaping both the experiences of power relations and oppressions of black women has since been widened by acknowledging other identity categories in the context of power structures and relations. Accordingly, intersectionality "places an explicit focus on differences among groups and seeks to illuminate various interacting social factors that affect human lives, including social locations, health status, and quality of life."<sup>20</sup> Intersectionality has thus been used as a way in which individuals understand power relations in social movements.<sup>21</sup>

Sweden and the United Kingdom are the two countries which are the closest to utilising an intersectional approach to gender mainstreaming, but, as will become clear from the discussion, both approaches have various limitations.

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<sup>18</sup> Olena Hanvinsky, 'Gender Mainstreaming: A Five-Country Analysis' (2013) 41(5) *Politics and Policy* 629

<sup>19</sup> Olena Hanvinsky and Ashlee Christoffersen, 'Gender mainstreaming in the United Kingdom: Current issues and future challenges' (2011) 6(1) *British Politics* 30, 30

<sup>20</sup> Hanvinsky et al. (2010, p. 1)

<sup>21</sup> Nira Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13(3) *European Journal of Women's Studies* 193 Hancock, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm' (2007) 5(01) *Perspectives on Politics* 63 ;Hancock, 'Intersectionality as a Normative and Empirical Paradigm' (2007) 3(02) *Politics & Gender* 248

## Sweden

Sainsbury and Bergqvist assess the strengths and weaknesses of gender mainstreaming using Sweden as a case study.<sup>22</sup> They outline that Sweden is an example of a state which has used gender mainstreaming successfully, primarily because it has practised various forms of gender mainstreaming for thirty years and as a result thereof have a strong institutionalisation of gender mainstreaming policy.<sup>23</sup> Furthermore, Daly (2005) examined the integration of gender mainstreaming in eight European countries. These countries were Belgium, France, Greece, Ireland, Lithuania, Spain, Sweden and the United Kingdom. All eight countries had “made a formal commitment to implement a gender mainstreaming approach to gender equality.”<sup>24</sup> The only country which had adopted, at all levels of administration, all the relevant procedures for gender mainstreaming is Sweden.<sup>25</sup> Furthermore, Daly’s research piece asserts that out of the eight countries examined, only in Sweden has there been a: “change across the spectrum, that is, in the discourses structures, processes and agency of policy within and across domains.”<sup>26</sup> In comparison, in France and the United Kingdom, change is most evident at the central government level and in the remaining countries change is much more fragmented.<sup>27</sup>

Sweden adopted gender mainstreaming in 1994 and defines the strategy in the following way: “Gender equality work must be conducted in every area of policy, and measures should primarily be undertaken as part of the regular operations of the body concerned.”<sup>28</sup> Gender mainstreaming has been a part of the Swedish gender policy for over twenty years, since the enactment of its 1993 bill ‘Shared Power, Shared Responsibility.’ The first plan of how this should be implemented by government was adopted in 2004, in which the overarching goal

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<sup>22</sup> Diane Sainsbury and Christina Bergqvist, ‘The Promise and Pitfalls of Gender Mainstreaming’ (2009) 11(2) *International Feminist Journal of Politics* 216

<sup>23</sup> *Ibid*

<sup>24</sup> Jämi, *Jämi: A National Commission for Gender Mainstreaming* (Jämi 2011)

<sup>25</sup> *Ibid*.

<sup>26</sup> international Justice Resource Centre, *European court of Human Rights* (2012), 436

<sup>27</sup> *Ibid*. at 439

<sup>28</sup> ‘Govt. Bill 1993/94:147, Jämställdhetspolitiken: Delad makt – delat ansvar [Gender Equality Policy: Shared Power—Shared Responsibility] (only available in Swedish). p. 17aa

was to “ensure that women and men have the same power to shape society and their own lives”.<sup>29</sup> In addition, four sub goals were formulated:

“Equal distribution of power and influence. Women and men shall have the same rights and opportunities to be active citizens and to shape the conditions for decision making.

Economic equality between the sexes. Women and men shall have the same opportunities and conditions with regard to education and paid work that provide them with the means to achieve lifelong economic independence.

Equal distribution of unpaid care and household work. Women and men shall take the same responsibility for household work and have the same opportunities to give and receive care on equal terms.

Men’s violence against women must stop. Women and men, girls and boys, shall have equal rights and opportunities in terms of physical integrity.”<sup>30</sup>

In 2005 the Swedish Gender Mainstreaming Support Committee (JämStöd)<sup>31</sup> was created in order to supervise gender mainstreaming in government bodies and agencies. Furthermore, in 2006 after the enactment of the Equality Policy Bill, gender mainstreaming became the primary strategy for achieving gender equality.<sup>32</sup> It gave each ministry and policy area the responsibility for gender equality within their remit. Subsequently, in 2011 the Swedish government created a platform for gender mainstreaming at central, regional and local level.<sup>33</sup>

To this date gender mainstreaming is the main strategy used to achieve gender-equality objectives in Sweden. The Strategy for the Work on Gender mainstreaming in the Government Offices 2012-2015 outlines the responsibilities of civil servants and government officials and holds them accountable to the Gender Equality Minister. An external evaluator evaluates the work in government on a yearly basis and then reports back to the Gender Equality Minister. This then becomes the basis for a comprehensive evaluation on the implementation of gender mainstreaming, using this specific strategy within the Swedish

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<sup>29</sup> Govt. Bill 2005/06:155, Makt att forma samhället och sitt eget liv - nya mål i jämställdhetspolitiken [The Power to Shape Society and Your Own Life: Towards New Gender Equality Policy Objectives]

<sup>30</sup> Jämi, Jämi: A National Commission for Gender Mainstreaming (Jämi 2011).

<sup>31</sup> [Ibid.](#)

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

government. The Swedish government has assigned 41 of its agencies to work actively with gender mainstreaming in 2015-2018. The aim of the programme, named Gender Mainstreaming in Government Agencies, is for the participating agencies to integrate a gender equality perspective in all aspects of their work. The Swedish Secretariat for Gender Research has been assigned by the government to support the agencies in the planning and implementation of their development work.

### The United Kingdom

The United Kingdom is being used as a case study for the intersectional model of gender mainstreaming because of its history of accepting cultural difference. Naima Boutelda found in her study where she interviewed a number of veiled women within the United Kingdom, that they felt that the UK was the best possible country to practice a religion.<sup>34</sup> Similarly, Leila Hadj Abdou and Linda Woodhead found in their study that: “Muslim women have been active in the veiling debate in the UK, particularly in three areas: in social mobilization and political lobbying around the issue, in participation in media debates and in bringing legal cases concerning covering.”<sup>35</sup>

Favell comments that the United Kingdom has historically used a race relations approach to equality.<sup>36</sup> As a result of this multicultural approach, a normative framework and a set of state policies which advance tolerance and recognises difference between communities was used as a framework for dealing with cultural difference. At the turn of the century, Parekh, in his well-known and heavily cited report on the *Future of Multi-Ethnic Britain* affirmed this idea of Britishness as a plural identity that celebrates difference, a ‘community of communities’. According to a 2005 Home Office Paper:

“Our respect for freedom means that no one set of cultural values should be privileged more than another. With the exception of the values of respect for others

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<sup>34</sup> Eva Brems, *The experiences of face veil wearers in Europe and the law* (Eva Brems ed, Cambridge University Press 2014), p120

<sup>35</sup> Leila Hadj-Abdou and Linda Woodhead, ‘Muslim Women’s Participation in the Veil Controversy: Austria and the UK compared’ in Sieglinde Rosenberger and Birgit Sauer (ed), *Politics, Religion and Gender: Framing and Regulating the Veil* (Routledge 2012), 189

<sup>36</sup> Favell, Adrian (2001) *Philosophies of Integration. Immigration and the Idea of Citizenship in France and Britain* (second ed.), New York: Palgrave in association with Centre for Research in Ethnic Relations, University of Warwick.

and the rule of law, including tolerance and mutual obligations between citizens, which we consider as essential elements of Britishness, difference in values and customs need to be resolved through negotiation.”<sup>37</sup>

However, Britain, like other Contracting Party States, has recently experienced backlash against cultural difference. This is evidenced by the rise of right wing nationalist parties such as the EDL, BNP and UKIP. This is also evidenced by the rise in right wing rhetoric within the media and the increasing stringency of immigration control and the introduction of both citizenship tests and ceremonies and the increased use of stripping citizenship by the Secretary of State since 2014. The British Prime Minister, David Cameron, early in 2011 argued that:

“Under the doctrine of state multiculturalism, we have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream. We’ve failed to provide a vision of society to which they feel they want to belong. We’ve even tolerated these segregated communities behaving in ways that run completely counter to our values.”<sup>38</sup>

As mentioned earlier within this chapter, in order to fully protect the human rights of individuals, Contracting Party States cannot rely on the effective regulation of supervisory international human rights organisations. Instead, there needs to be mutual co-operation between the ECtHR and the State. This thesis has already scrutinised and discussed the ways in which the ECtHR ought to interpret Article 9(2) ECHR in order not to perpetuate the multiple discrimination faced by religious women. This section argues that in order for human rights to be applied consistently, States should have a strong national legislative framework that takes into consideration the principle of non-discrimination. Under the principle of gender mainstreaming, this should include a policy in which legislators take into consideration the way in which national legislation could negatively impact on a minority population and ways in which to mitigate this.

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<sup>37</sup> Parekh, Bhikhu (2000) *The Future of Multi-Ethnic Britain*, London: Profile.

<sup>38</sup> Home Office (2005) *Improving Opportunity, Strengthening Society: The Government’s strategy to increase race equality and community cohesion*, HMSO: London. 1.9

The United Kingdom adopted gender mainstreaming in 1997 by establishing the Women's Unit, which became responsible for gender mainstreaming, but was criticised for "applying gender mainstreaming solely to government priorities."<sup>39</sup> In the last decade, gender mainstreaming in the United Kingdom, through the influence of the European Union's anti-discrimination legislation, has broadened its traditional mainstreaming beyond gender considerations.<sup>40</sup> This was achieved through the creation of a unified Equality and Human Rights Commission (EHRC), which unified the commissions which dealt with disability, gender and race and now includes age, gender identity, religion or belief and sexual orientation.

The relevant legislation which upholds the principles of non-discrimination with regards to groups and individuals within society is the Equality Act 2010. The EHRC enforces this statutory instrument which came into force in April 2011 and enforced a single public sector equality duty, where previously there were specific public sector equalities duties relating to gender, disability and race. This new general duty required that public authorities have due regard to the elimination of discrimination, harassment and victimisation directed at individuals with a protected characteristic and that such authorities 'advance equality of opportunity' and 'foster good relations' '(...) between persons who share a relevant protected characteristic and persons who do not share it.'<sup>41</sup>

The previous Equality Act was praised for creating specific public sector equality duties in relation to gender, race and disability. While initially these were considered to be both revolutionary and powerful, they were soon criticised for being inadequate.<sup>42</sup> This is because the public sector equality duties were insensitive to the intersectional identities of individuals, who would have been disadvantaged on a number of overlapping marginalized identities as opposed to one. This meant that when individuals put forward a claim for discrimination,

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<sup>39</sup> Hanvinsky page 6

<sup>40</sup> Ibid.

<sup>41</sup> Equality Act 2010, s149(1)(a)

<sup>42</sup> Judith Squires, 'Is Mainstreaming Transformative? Theorizing Mainstreaming in the Context of Diversity and Deliberation' (2005) 12(3) *Social Politics: International Studies in Gender, State & Society* 366,

they were forced to choose one marginalized identity, thus making their claim weaker than if they were able to put forward a claim for multiple grounds of discriminations.

Gender mainstreaming policy encourages the collection of gender disaggregated data, not only between men and women, but also between different types of women. This was undertaken by Professor Barbara Bagilhole, who in her study found that women still fare considerably worse in comparison to men in terms of employment rates, with a higher proportion of women in part time work. If we now turn our attention to religious women, we face the following facts.

Muslim women form the largest group belonging to a non- Christian religion; there are 1.5 million in the UK. They have the lowest employment rates of all religious groups, with only 24% of women and 58% of men aged 16-64 employed. The unemployment rate for Muslim women at 18% is over four times the rate for Christian and Jewish women (4% in each case). Within each religious group, women were more likely than men to be economically inactive, that is, not seeking work or claiming unemployment benefit. However, Muslim women were more likely than other women to be economically inactive. About seven in ten Muslim women of working age were economically inactive, compared with no more than four in ten women in each of the other religious groups.<sup>43</sup>

As a result of this, critics of gender mainstreaming have pointed out the inadequacies of homogenising individuals by requiring them to identify with only one identity group when pursuing a discrimination case. For example, as described above, if an individual was discriminated against on the basis of being a Black Muslim woman, she would have to choose the ground on which she would pursue a claim, when in actual reality the discrimination may have been as a result of her intersectional identity. Consequently, there has been a call to recognise multiple and intersectional forms of inequality. This language of diversity has been embraced by the Council of Europe, the EU as well as the UN and the World Bank.

At the time of their introduction, the former specific public sector equality duties were considered to be revolutionary, but they were subsequently criticised for failing to move

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<sup>43</sup> Barbara Bagilhole, 'Equal Opportunities and Diversity Policies' (2010) 27 Canadian Journal of Administrative Science 263, 265

beyond the single identity categories of gender, race and disability. The main critique is that these duties reflected a narrow understanding of inequality, which requires individuals to choose which identity category to identify with when discriminated against, even if the individual was victim to multiple or intersectional discrimination.<sup>44</sup> For example, a Muslim woman would have to choose the ground on which she wanted to pursue a claim, when in reality the discrimination may have been as a result of her intersectional marginalized identity. This is exemplified in Bagilhole study where she outlines the complex ways in which an individual can experience social inequality.<sup>45</sup> Furthermore, Bagilhole evidences that on the whole Muslim women are economically disadvantaged in comparison to men and women who belong to a different religious group and she highlights the '(...) diverse and intersectional (in)equality between differentiations and communities, and polarization within each.'<sup>46</sup>

Returning to the Equality Act 2010, one of its principal aims was to create a single equality duty covering eight protected categories of identity in order to 'harmonise' and 'simplify' Britain's equality law framework.<sup>47</sup> Whilst extending identity protection to include more characteristics is welcome, there were some who were concerned that the conceptual underpinning to this change was far from simple and required some form of consciousness raising.<sup>48</sup> Another concern was that the public sector duty required policy makers to extend their understanding of inequality at a time when public resources in the UK are stretched.<sup>49</sup>

Approximately eighteen months after the Equality Act came into force, the British Prime Minister announced that 'equality impact assessments' (EIAs), which is an assessment which evaluates the impact policy and legislation have on protected groups, were to be stopped.<sup>50</sup> This was criticised for sending: "the message that the evaluation of legislation and policy

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<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> Equalityhumanrightscom, 'What is the Equality Act' (*Equalityhumanrightscom*) <<https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act>> accessed 10 June 2016

<sup>48</sup> ilona Cairns, 'Gender mainstreaming and "equality proofing" in British law-making: a comment on the impact of the Equality Act 2010' (2013) 4 *Aberdeen Student Law Review* 92

<sup>49</sup> Ibid.

<sup>50</sup> Cairns, 'Gender mainstreaming and "equality proofing" in British law-making: a comment on the impact of the Equality Act 2010' (2013) 4 *Aberdeen Student Law Review* 92



against a standard of equality is unnecessary ‘red tape’ rather than a necessary and prudent measure to ensure that British laws do not have a disproportionate effect on society’s most vulnerable groups.”<sup>51</sup> Furthermore, this move is at odds with gender mainstreaming policy, which requires that all legislations and policies be measured for their gendered impact.<sup>52</sup>

Another important aspect of the Equality Act is that it was supposed to introduce the concept of intersectional discrimination, but this move was later scrapped on budget grounds. Research suggests that this is a cause for concern for those who face intersectional discrimination on a daily basis.<sup>53</sup> Evidence was put forward in the *Fawcett Report* that there was a consistent lack of data in the types of discrimination suffered by minorities, which was problematic, as this criticism has been made for decades and is yet to be addressed. This study highlighted that BAME (Black, Asian and minority ethnic) women suffered from intersectional discrimination in the workplace.<sup>54</sup>

Despite the fact that there was public pressure on the government to include multiple discrimination grounds in the UK’s equality legislation, the government refused and described it as problematic. However, after a conference led by the Equality and Diversity Forums on multi-dimensional discrimination, which was widely attended by both government and non-government representatives and created a forum for debate, the

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<sup>51</sup> Ibid

<sup>52</sup> This is part of the commonly-referred to definition of gender mainstreaming, coined by the UN Economic and Social Council in 1997. See United Nations, *Report of the Economic and Social Council for*

*1997* (New York: General Assembly, A/53/3) available at

<<http://www.un.org/documents/ga/docs/52/plenary/a52-3.htm>> accessed 10 June 2016.

<sup>53</sup> for example in the case of *Burnip v Birmingham City Council & Anor [2012] EWCA Civ 629* the Court of Appeal has held that the size criteria in the housing benefit regulations discriminate against disabled people, because they do not allow for an additional room to be paid for where a disabled person has a carer, or where two children cannot share a room because of disability. Despite the fact, that both of these cases involve an intersection of identities, a group of severely disabled people on the lowest end of the socio-economic spectrum and that of a Nigerian migrant with a mental health illness. Both cases examined one ground, that of disability and used the Strasbourg Article 14 principle of indirect discrimination to argue that the State has a positive duty in instances where a minority group are disproportionately affected. Such an approach only works in cases of extreme disadvantage, where at least one of the comparable factors, i.e. were the claimants treated less favourably in comparison to non-disabled people was satisfied.

<sup>54</sup> Fawcett Report EOC (2007) *Moving On Up? The way forward: report of the EOC’s investigation into Bangladeshi, Pakistani and Black Caribbean women and work*. Manchester: EOC.

government changed its mind and drafted the Equality Bill, which included “combined discrimination” in section 14. This was later scrapped by the coalition government for being considered ‘too costly’.<sup>55</sup>

As seen above, there are a number of tools used in order to facilitate the integration of gender equality at all stages of the law making process, including equality proofing procedures and gender based analysis. In the United Kingdom equality impact assessments form an important part of the wider process of equality proofing. Subsequent case law has highlighted that equality impact assessments are not a legal requirement under the public sector’s gender equality duty.<sup>56</sup> Nevertheless, public authorities do carry them out so as to evidence ‘good practice’ in eliminating discrimination under their gender equality duty.<sup>57</sup> Furthermore, its purpose is to highlight the ‘gap’ created by the assumptions found within policy, instead of ensuring gender neutrality, or using the add gender and stir approach mentioned above.<sup>58</sup>

## CONCLUSION

The European Court of Human Rights has already outlined within its jurisprudence that gender equality is central to the Convention, but, as mentioned earlier has failed to take the different types of equality into account when dealing with the right to manifest a religious belief. This is most evident in the cases that have been analysed in chapters two and three. As will be mentioned in the next chapter, the Contracting Party States and the Parliamentary Assembly of the Council of Europe ensure that the judiciary is representative in terms of gender. Representation is important not only in terms of gender but also because of concerns with inclusivity with regard to ethnicity, religion, sexual orientation, class, ability and gender

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<sup>55</sup> Cairns, ‘Gender mainstreaming and “equality proofing” in British law-making: a comment on the impact of the Equality Act 2010’ (2013) 4 *Aberdeen Student Law Review* 92

<sup>56</sup> See *R (Brown) v Secretary of State for Work and Pensions and another (Equality and Human Rights Commission intervening)* [2008] EWHC 3158 (Admin)

<sup>57</sup> *ibid.* At 17, Pyper notes that ‘(...) although the law does not require public authorities to carry out EIAs,

the courts place significant weight on the existence of some form of documentary evidence of compliance

with the PSED when determining judicial review cases.’

<sup>58</sup> Mackay & Bilton, *Equality Proofing Procedures in Drafting Legislation* (n 32) 5

identity. However, it is equally important that judges incorporate critical judging and challenge their own outsider views in order to ensure that their judgements are legitimate. Be that as it may, the first step is and should be broaching the issue of representation, not only at the Council of Europe level but also at the domestic level, as it is the Contracting Party States' responsibility to protect the human rights of individuals. The next chapter will conclude with some of the over-arching ideas in this dissertation and will highlight the importance of balancing competing interests in a way which does not disproportionately affect a minority population.



## 8. Chapter Eight: Conclusion and Future Research Prospects

### INTRODUCTION

This concluding chapter is split into four parts; firstly, it will consider the context and key findings of my research. Secondly, it will consider the relative strengths and limitations of my theoretical framework. Thirdly, I will look ahead to some of the policy changes that are happening across Europe which will have a negative impact on the right to manifest a religious belief. Finally, I will highlight my future research prospects.

This dissertation considered the representation of women, their right to manifest their religious beliefs and ways to promote their inclusion in policy-making by the European Court of Human Rights (ECtHR). The study included extensive case law analysis of the jurisprudence of the ECtHR and examined the language, content and legal concepts integrated in the areas of religious manifestations and gender equality. It also drew on the quantitative and qualitative research that had been conducted by researchers across Europe, who have evidenced that women are disproportionately affected by such bans and documents the way in which these religious women experience exclusion and subordination. Using intersectional feminism, feminist judging and gender mainstreaming as forms of critical scholarship it concludes that the bans are based on outsider experiences and views and proposes a more inclusive framework for qualifying the right to manifest a religious belief.

### RESEARCH CONTEXT

In the last two decades public discussion on the role of religion in the public sphere has been spreading across a number of European countries. The right to manifest a religious belief is protected in a number of human rights instruments, including the European Convention on Human Rights (ECtHR). Article 9 of the Convention provides that:

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 or observance.

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

In the history of developing human rights, the right to a religious belief has been considered to be one of the oldest rights enshrined in international law within Europe.<sup>1</sup> It wasn't until 1993 that the first case in relation to Article 9(2) ECHR was heard by the ECtHR, due to the level of protection afforded to the right from within the constitutional legal frameworks of the Contracting Member States.<sup>2</sup> However, recent developments in the make-up of religious diversity within Contracting Party States have led to a number of countries limiting these rights, especially with regard to religious dress, as has been discussed extensively within this thesis.

Restrictions across Europe include preventing civil servants, school teachers and students from manifesting their religious beliefs.<sup>3</sup> The countries who have had the most complaints under Article 9 of the ECHR are Turkey and France, two countries whose legal traditions are deeply rooted in different forms of secularism. Both were discussed in Chapter 2, which contextualised the Islamic veiling debate using the landmark case of *Leyla Sahin v Turkey*<sup>4</sup> and chapter 7 which provided an alternative intersectional judgment of *SAS v Frances* in order to exemplify the way in which outsider experiences can influence a judgment.

## RESEARCH FINDINGS

As mentioned above, Article 9(1) ECHR guarantees freedom of thought, conscience and religion which includes the freedom to change one's religion or belief and the freedom to

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<sup>1</sup> Leo Gross, 'The Peace of Westphalia, 1648-1948' (1948) 42(1) *The American Journal of International Law* 20

<sup>2</sup> This case was *Kokkinakis v Greece App No 3/1992/348/421 (ECtHR, 19 April 1993)*.

<sup>3</sup> *SAS v. France*, App no. 43835/11 (ECtHR, 14 July 2015), *Sahin v Turkey App no 44774/98 (ECtHR, 29 June 2004)*, *Dahlab v Switzerland App No 2346/02 (ECtHR, 29 April 2002)*, *Kalac v Turkey App No 20704/91 (ECtHR, 1 July 1997)*

<sup>4</sup> *Sahin v Turkey App no 44774/98 (ECtHR, 29 June 2004)*

<sup>5</sup> *SAS v. France*, App no. 43835/11 (ECtHR, 14 July 2015)

worship either alone or in community with others. The freedom of religion is absolute; the freedom to manifest a religion or belief can be legitimately limited under Article 9(2) of the ECHR. Thus state interference of the manifestation of religion can only be limited if the limitation is prescribed by law, pursues a legitimate aim and is necessary in a democratic society.

When the Court considers whether there has been a violation of the right to hold a belief and the qualified right of manifesting that belief, the Court considers whether the matter relates to a protected belief and if so, whether the individual's act is considered a manifestation of that belief. If these two are affirmed, the Court moves on to consider whether the measure imposed by the individual does in fact limit or interfere with the individual's ability to manifest their religious belief. If this is the case, the Court under Article 9(2) considers whether the prescribed measure is justified.

Furthermore, as has been discussed in Chapter Four, in recent years the jurisprudence of the Court indicates a tendency for judges to defer to the margin of appreciation more routinely in the application of Article 9(2), thereby affording states more discretion to control the public manifestation of religion and in turn disproportionately affecting women. It is important to note that an international human rights authority which has the power to make a legal or political decision binding on all states has to abide by certain rules. Firstly, all the Contracting Party States have agreed to respect certain fundamental principles, and, secondly, the European Court on Human Rights has to abide by the margin of appreciation. This means that the ECtHR has to defer to national authorities if a legal and political issue is culturally sensitive and therefore better handled at national level.<sup>6</sup>

Besides, the Court has held that the margin of appreciation works with European oversight and that little appreciation is given to states' choices in the event that there is a 'pan-European consensus' on some issue. As of yet, there is no such consensus with regard to Article 9 as outlined in *Otto Preminger Institut v Austria* where the Court held that 'it is not possible to discern through Europe a uniform conception of the significance of religion in society: even

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<sup>6</sup> *Handyside v the United Kingdom*

within a single country such conceptions may vary.”<sup>7</sup> Because of the diversity of different State approaches to the problem of the place of religion in the public sphere, the Court struggles to pass a judgment which may have legal ramifications on the other Member States and is more likely to allow the national state to deal with it under the margin of appreciation. This does not mean that the Court doesn’t have any guiding principles that each Contracting Member State should adhere to. The current guiding principles national courts should adhere to are that the state should have the role of a “neutral and impartial organiser” of the exercise of the different religions, faiths and beliefs as this is “conducive to public order, religious harmony and tolerance in a democratic society,”<sup>8</sup>

However, this thesis argued that the way in which the margin of appreciation has been used by the ECtHR in this area of law is problematic. One reason for this is due to the diversity of Contracting Party States, and the different ways in which they approach religion in the public sphere, makes it difficult for the Court to pass a judgment which would have legal ramifications in all of the 49 Contracting Party States. Interestingly, the first case on the right to manifest a religious belief concerned a Jehovah’s Witness who was arrested for proselytising. It is noteworthy that in this case, the Commission held that Greece’s action were disproportionate and a breach of Mr Kokkinakis’ Article 9(2) rights. Similarly in the Grand Chamber judgment of *Lautsi v Italy*, the Court held that a crucifix in the classroom did not breach Italy’s neutrality. Furthermore, as explained in the chapter on the margin of appreciation, the Court held in *Lautsi* that the crucifix was a passive symbol of peace, where in *Dahlab* and *Leyla Sahin v Turkey* the headscarf was seen as an active proselytising symbol that ran counter to the principle of gender equality. In addition to this the Court found that the wearing of the Islamic headscarf, in schools, universities and in the workplace could constitute a breach of neutrality. Notably, in all the European Court of Human Rights cases on the right of a Muslim woman to manifest her religious belief, the Court referred to the margin of appreciation and the applicant lost. This includes the case of *SAS v France* where

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<sup>7</sup> *Otto Preminger Institut v Austria* Paragraph 56

<sup>8</sup> *Refah Partisi (the Welfare Party) and Others v Turkey* (GC) para 91



the Court mentioned in obiter that a blanket ban on religious manifestations was disproportionate, yet ruled in favour of France.

The author appreciates that the margin of appreciation is a useful doctrine which strengthens democratic principles of power, but maintains that the Court should not shirk its duty towards those who are already marginalised. As mentioned in Chapter Five, the Court was in a similar position in the cases regarding gender identity, where they discerned a pattern of European consensus. A similar approach could be taken in the two veil cases pending before the European Court of Human Rights, as there is in fact a European consensus on face veils.<sup>9</sup> Only two countries, namely Belgium and France have criminalised the act. The author maintains that this is not only a breach of the applicants' right to manifest their religious belief, but also a breach of her right to equality, as the ban disproportionately affects Muslim women who veil and forces them to choose between exercising their right to religion or remaining in the private sphere.

#### WHY LEGITIMACY?

This dissertation does not put forward the normative view that the bans on religious manifestations are illegitimate, as Contracting Party States are able to limit religious manifestations under Article 9. Instead, it argues that States should consider the voices of those who are affected within the debate and ensure that outsider views and stereotypes do not influence decisions made at this level.

While a variety of tests determining the legitimacy of the ECtHR have been suggested, this dissertation will use the test put forward by Basak Cali et al. based on their extensive study on the topic.<sup>10</sup> The argument here is that legitimacy is often used as a yardstick to measure the quality of the actions accomplished by institutions and political actors. Legitimacy is often used in two situations: firstly, it is used to assess political institutions' right to exist and to be deferred to. And secondly, it is used in order to assess whether the institution is in fact achieving what it has been created to do. These two understandings of legitimacy are not

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<sup>9</sup> *Belkacemi and Oussar v Belgium and Dakir v Belgium*

<sup>10</sup> Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29(1) Human Rights Quarterly 251

mutually exclusive, as the overarching purpose of assessing the legitimacy of an institution is that of a normative assessment against a given set of criteria or factors. There are many factors which were taken into consideration when assessing the legitimacy of the ECtHR institution, but for the purposes of this dissertation the assessment used is that a judgment is legitimate if it remains within the boundaries of the Convention and is considered authoritative by those who are affected by the judgment.

To assess this, the legal framework within this dissertation has been discussed in more detail in Chapter Three. Chapters Four and Five explained in more detail the political-normative standards aspect of legitimacy, which refers to the understanding of Member States and its citizens with regard to the Court's constitutive legitimacy.

#### CRITICAL FORMS OF SCHOLARSHIP AND THEIR LIMITATIONS

Intersectional feminism is an area of law which is growing and traces its roots to Kimberle Crenshaw, whose research in the U.S used this concept to highlight the interaction of multiple identities and experiences of exclusion and subordination of women. Crenshaw focused on how anti-racist and feminist critics often replicate the exclusion of other groups:

The failure of feminism to interrogate race means that resistance strategies of feminism will often replicate and reinforce the subordination of people of colour, and the failure of anti-racism to interrogate patriarchy means that anti-racism will frequently reproduce the subordination of women.<sup>11</sup>

Thus, I started with Crenshaw's point that anti-racism often fails to interrogate patriarchy and that feminism often reproduces racist practices.<sup>12</sup> The use of intersectional feminism as mentioned previously has grown exponentially in recent years, precisely because it recognises that inequities are not one dimensional and that individuals can face injustices as a result of a number of social factors. This thesis employed intersectional feminism to highlight the double discrimination of women as a result of their multiple identities and to illustrate that there is

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<sup>11</sup> K Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241.

<sup>12</sup> Ibid.

in fact a problem in the way in which Article 9(2) jurisprudence is being dealt with in the ECtHR. A solution put forward is that judges should consider gender equality in a holistic manner which is sensitive to the intersectionality of women. I primarily used intersectional feminism as an unveiling exercise in order to highlight the way in which outsider views have an impact on the jurisprudence of the Court.

Intersectionality fits in the sphere of feminism, and the feminist metanarrative within my dissertation was based on two premises. Firstly, the argument that women are differently situated in relation to the limitation of manifesting religious beliefs does not mean that men are not affected by it, or that men don't wish to manifest their religious beliefs. This is incorrect, as evidenced by the number of cases where men have argued before the Court that their Article 9(2) has been disproportionately violated. The argument instead was that women are affected disproportionately, and in different ways, especially since evidence suggests that women are more likely to manifest their religious beliefs than men and women are evidenced to be more devout than men.<sup>13</sup> My second premise was that the management of plurality is gendered in terms of where women are located in the debate and is derived from the public-private dichotomy which has defined inter-state decision making and politics in liberal thought. When forced to make the decision between manifesting religious beliefs and remaining in the public sphere thousands of women may choose to remain in the private sphere and become disconnected from public life.

My thesis also included an examination of gender mainstreaming within the ECHR in order to overcome the Court's shortcomings in its jurisprudence on the manifestation of religion. Carol Smart argues that solely using a human rights perspective leads to problems when using feminism as a critical tool.<sup>14</sup>

Therefore gender mainstreaming was employed, which has been described as being based on "the participation of women as decision makers". The ultimate aim is a wider recognition

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<sup>13</sup> Casanova J, *Public Religions in the Modern World* (1 edn, Chicago University Press 1994), Davie G, *Religion in Modern Europe: A Memory Mutates* (1 edn, Oxford University Press 2000), Davie G, *Europe - the exceptional case : parameters of faith in the modern world* (Darton Longman & Todd 2002), Davie G, *the Sociology of Religion* (1 edn, Sage Publications 2007)

<sup>14</sup> Smart C, *Feminism and the power of law* (Routledge 1989) 135

of women's agenda. The premise is that "women participate in all development decisions and through this process bring about a fundamental change in the existing development paradigm."<sup>15</sup> I observed that the Council of Europe has created an expert committee which deals with the rights of women: the Steering Committee for Equality between Women and Men (CDEG). It consists mainly of civil servants who work on gender equality in their domestic country. In 1995, the CDEG created a Group of Specialist on Gender Mainstreaming who defined mainstreaming as: "the (re) organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making."<sup>16</sup> My claim was that if gender mainstreaming is enforced upon all the Contracting Member States of the Council of Europe, States would be forced to reconsider their policy and laws on the manifestation of religion and the gender differences found therein. Thus, if all states reconsidered the role of religion in the public sphere using an intersectional approach, Europe would be a step closer towards creating a pan-European consensus, which would in turn narrow the margin of appreciation.

My final point within the thesis was that it is not enough to critique the current framework of Article 9(2) which allows religious women to be rendered invisible. My thesis therefore put forward a framework using intersectional feminism in order to ensure that future limitations of the right are legitimate. In order to test this framework the thesis engaged in the 'real world' exercise of judgment- writing, which is subject to the various constraints placed on the judges of the ECtHR. As highlighted by the Audre Lorde quote, there are real methodological limitations on the use of rewriting judgments as a critical tool, but it is important to note that these are written to highlight an alternative to current judicial reasoning, one which is more inclusive of minority women. I wrote a judgment within this dissertation to test whether the current institutional structure is able to withstand a vigorous overhaul in the way in which minority religious women are represented in the law. As argued by Rosemary Hunter, the

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<sup>15</sup> Jahan R, *The Elusive Agenda: Mainstreaming Women in Development* (1 edn, London Zed Books 1995) 15

<sup>16</sup> Council of Europe, Committee of Ministers. 1998. *Recommendation No. R (98) 14 of the Committee of Ministers to Member States on Gender Mainstreaming*. Adopted by the Committee of Ministers on 7 October 1998 at the 643<sup>rd</sup> Meeting of the Minister's Deputies. 15

creator of the feminist judgments project, judgment writing is premised on the proposition that in many cases, the law is to some extent indeterminate, and therefore judges, specifically appellate judges have considerable scope to make choices between competing interpretations of the law.<sup>17</sup> The use of a feminist judgment is a form of critical scholarship which has flourished in recent years, precisely because it challenges the notion that: “feminism in a judge is... evidence of judicial partiality and a threat to judicial independence.”<sup>18</sup>

Another limitation that I had to address is that religious discourse, like feminist discourse uses a different language to that of the European legal systems. More has been written on this in relation to gendered language than religious language. Carol Gilligan explained that women’s voices are different than that of men. According to Carol Smart, “it is the work of feminism to deconstruct the naturalistic, gender-blind discourse of law.”<sup>19</sup> Katharine Bartlett states that this is done through feminist legal reasoning which involves “asking the woman question”, “feminist practical reasoning” and “consciousness-raising.”<sup>20</sup> These feminist legal methods have been refined further by Hunter, McGlynn and Rackley through their feminist judgment writing project, where they have sought to rewrite a selection of the United Kingdom’s Supreme Court judgments using feminist legal reasoning.<sup>21</sup> According to Hunter the components needed in order for a judgment to be considered as feminist is that it ask the ‘woman question,’ it include the stories and experiences of women, and that it challenge gender bias in both legal doctrine and judicial reasoning.<sup>22</sup> The aims of feminist judgements are primarily to seek to remedy injustice, improve the lives of women and to promote substantive equality and drawing on feminist legal scholarship to inform decision-making.<sup>23</sup> Based on the findings of Hunter McGlynn and Rackley, the author put forward the argument that it is important that all judgements be feminist in order to further advance gender equality.

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<sup>17</sup> Ibid.

<sup>18</sup> W Baker, ‘Women’s Diversity: Legal Practice and Legal Education- A View from the Bench’ (1996) 45 University of New Brunswick Law Journal 199, 199

<sup>19</sup> Smart, *Feminism and the power of law* (Routledge 1989), 88

<sup>20</sup> Ibid.

<sup>21</sup> Hunter, McGlynn and Rackley, *Feminist Judgments: From Theory to Practice* (Hart 2010)

<sup>22</sup> Hunter, ‘Can feminist judges make a difference?’ (2008) 15(1/2) *International Journal of the Legal Profession* 7

<sup>23</sup> Ibid.

I took this argument one step forward and argued that all judgments should be intersectional in order to ensure that women are not facing multiple discriminations as a result of manifesting their religious beliefs and put forward an intersectional framework for judging cases where an applicant's right to manifest a religious belief has been limited.

## LOOKING FORWARD

Increasingly, most serious concerns over the freedom of religion or belief involve social hostilities and actions of non-state actors. States have clear duties to protect their citizens from such communal pressure and to enable them to fully and freely exercise their rights. When they fail to uphold these duties, humans suffer significantly as, for the vast majority of the world, religious faith is not simply a matter of personal belief but has serious social, political and cultural implications. Therefore, it is not surprising to see that denial of freedom of religion or belief is one of the most widespread human rights abuses in the world. According to the Pew Research Foundation, almost 75% of the world's roughly 7 billion people live in countries with high levels of government restrictions on freedom of religion or belief or where they face high-level hostility due to their religious affiliations.<sup>24</sup>

Furthermore, as mentioned within the thesis, more and more regions, provinces and Contracting Party States across Europe are looking to restrict Islamic manifestations of religious belief. This week alone, French regions have banned the wearing of a bathing suit created specifically with Muslim women in mind, because it does not comply with the French principles of secularism and living together.<sup>25</sup> The French authorities have held that this was important in light of the recent terrorist attacks, thus linking Muslim dress with Islamic fundamentalism. Furthermore, the opinion that veiling goes against gender belief, which has been rejected by the ECtHR in *SAS v France* has spread to other Contracting Party States who are having a similar debate. Furthermore, it is clear that the bans on veils can be linked to clashes of interests, the interests of the individual who wishes to manifest her religious belief

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<sup>24</sup> Pewforum, 'The Future of World Religions: Population Growth Projections' (Pew Research Centre 2015) accessed 26 June ;ibid

<sup>25</sup> Ben Quinn, 'French police make woman remove clothing on Nice beach following burkini ban ' (<https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach>, 24/08/2016) <<https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach>> accessed 24 August 2016

and the interests of the state, in a misguided attempt to protect gender equality. There is currently a case pending before the European Court of Human Rights, which concerns Muslim women who wear the face veil in Belgium. The case of *Belkacemi and Oussar v Belgium* concerns two applicants, the first a Muslim woman who was successfully challenged a fine at a police tribunal, the fine was issued to her for violating a municipal face veil ban in Brussels.<sup>26</sup> However, after the criminalisation of the face veil in 2011, she chose to stop wearing the face veil, after considering her responsibilities to her family and the ramifications of wearing the face veil outside the home. The second applicant was also fined for violating the Brussels municipal face veil ban prior to the criminalisation of the face veil. After 2011 she decided to stay at home to reconcile her religious belief with the national law. She argues that this has seriously affected her right to private and family life. The second case is that of *Dakir v Belgium* which concerns an applicant who chose to wear the face veil at the age of sixteen in 1994, but was affected by a municipal ban on veiling in 2008 and the subsequent criminalisation.<sup>27</sup>

Moving on from this dissertation, my next project would be an empirical piece of research which would further examine critically my conclusions. The first step would take the form of a qualitative research piece which examines the non-legal factors that influence judicial decisions, which have been the subject of extensive debate. It would employ a law-in-context approach and would use Nvivo to organise and analyse all the Article 9(2) cases, of which, up to this date, there are 70. These would then be organised by year, decision, country, whether there is a breach, religion and whether the margin of appreciation has been used to evidence that there is a pattern.

The second step would be an empirical piece which tests the more inclusive framework which I have put forward in this PhD, by interviewing stakeholders, judges and women who veil. The study would examine the experiences of women who have been affected by a veil ban. The research would utilise a personal narrative analysis which centres the experiences of

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<sup>26</sup> *Belkacemi and Oussar v Belgium*, Application Number No 37798/13 (pending before the Court)  
*Dakir v Belgium* Application No 4619/12 (pending before the Court)

<sup>27</sup> *Dakir v Belgium*

Muslim women who veil and the way in which they navigate the dichotomy of social coercion versus consent, using intersectionality as a theoretical framework. It would also add to the current work body of intersectionality which seeks to create a more robust methodology of intersectionality. As mentioned in Chapter Four of the thesis, is that one of the limitations of intersectionality theory is that there is no clear methodology for intersectional research.<sup>28</sup> Furthermore, there is no developed research design and methods that can be used universally to apply intersectional theory to research projects.<sup>29</sup>

## CONTRIBUTION TO RESEARCH

The current literature on the intersection of law, gender and religion is very limited and focuses specifically the compatibility of human rights and feminism with Islam.<sup>30</sup> It is important to note that literature which perceives non-western religion as antithetical to Western values can lead not only to the double oppression of women, but can lead to double, or even quadruple oppression as a result of their ethnic background or sexuality.<sup>31</sup>

As mentioned earlier, this thesis builds significantly on the work found in Anastasia Vakulenko's article on the legal construction of headscarves in the jurisprudence of the ECtHR using an intersectional perspective.<sup>32</sup> Vakulenko considers that intersectionality is conducive to a rereading of the case law, so that it is compatible with the gender equality

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<sup>28</sup>Stephanie A. Shields, 'Gender: An intersectionality perspective' (2008) 59(5-6) *Sex Roles* 301, 301  
Nash, 'Re-thinking Intersectionality' (2008)(89) *Feminist Review* 1 Nash 2008, 4

<sup>29</sup> Hancock, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm' (2007) 5(01) *Perspectives on Politics* 63. 74

<sup>30</sup> Al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights' (1997) 12(1) *American University International Law Review* 1 ;Othman, *Citizenship Rights for Women in a Modern Islamic State* (Bauer and Bell eds, Cambridge University Press 1999) ;Vakulenko, 'Islamic Headscarves' and the European Convention On Human Rights: an Intersectional Perspective' (2007) 16(2) *Social & Legal Studies* 183 ;Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19(4) *European Journal of International Law* 841 ;Laborde, *Critical republicanism : the hijab controversy and political philosophy* (Oxford University Press 2008) ;Al-Saji, 'The racialization of Muslim veils: A philosophical analysis' 36(8) *Philosophy & Social Criticism* 875 ;Moghissi, 'Islamic Feminism Revisited' (2011) 31(1) *Comparative Studies of South Asia, Africa and the Middle East* 76

<sup>31</sup>Rahman, 'Queer as Intersectionality: Theorizing Gay Muslim Identities' (2010) 44(5) *Sociology* 944 ;*ibid*

<sup>32</sup> Vakulenko, 'Islamic Headscarves' and the European Convention On Human Rights: an Intersectional Perspective' (2007) 16(2) *Social & Legal Studies* 183



argument used by the Court to justify headscarf bans. This thesis explores this in more depth and takes the argument a step forward, by arguing that intersectionality is to some extent already part of the jurisprudence of the ECtHR through its consideration of the Court's Article 14 jurisprudence. This thesis argues that the Court's conceptualisation of gender equality in its veiled cases, runs counter with the principles of gender equality, autonomy and choice found in its Article 14 jurisprudence. Furthermore, through the examination of the little qualitative research in this area, it also takes into consideration the lived experiences of the Muslim women who were affected by the veil bans in order to propose a more inclusive legal framework for the right to manifest a religious belief.

Using the example of *Leyla Sahin v Turkey*, the Turkish Constitutional Court argued that the right to manifest a religious belief could be limited under the principle of gender equality, and that as a result thereof the headscarf ban was legal, as the Islamic precept of the headscarf ran counter to gender equality. Interestingly, the European Court of Human Rights agreed, despite the fact that no one asked what the wearing of the headscarf means to Leyla Sahin, an adult woman, who was excluded from university on the basis of the headscarf. When reading the case, it is extremely difficult to find Leyla Sahin's voice and experiences, furthermore she was not asked what the headscarf means to her. Interestingly as highlighted in Chapter 2, research and documentation of violence against women and girls in Turkish societies is insufficient, as it limits the action plans the Turkish government ought to take, if it is concerned solely through the lens of gender equality, as the Court argued in *Leyla Sahin v Turkey*. In my analysis of the research available, the social tolerance for violence in police stations, public prosecution offices, courts and health care facilities is widespread.<sup>33</sup> Specific violent acts towards women in Turkey can include "virginity controls" and "honour killings" which occur in the private sphere as a method of controlling social ethics and the honour of women.<sup>34</sup> The legal rights of women are not adequately enforced and both women and girls are exposed to cultural, sexual and psychological harassment.<sup>35</sup> In addition, women's

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<sup>33</sup>See Chapter 3

<sup>34</sup>Erci, 'Women's Efficiency in Decision Making and Their Perception of Their Status in the Family' (2003) 20(1) Public Health Nursing 65

<sup>35</sup>Ibid

experience of violence and their opinion of men affect their behaviour in decision making within the family. It is significant that religious, cultural and sociological doctrine has been used to legitimate the subordination of women. If Turkey wanted to tackle gender equality, it should have focussed on these gender imbalances, as opposed to creating legislation which effectively bars Muslim women who veil from education and the workforce. It is important to note that at the core of these studies, it was highlighted that women with lower levels of education were more likely to be dependent on male relatives.<sup>36</sup> As highlighted in this dissertation, education is central in order to promote the social mobility of these women.

It is therefore important that the Court re-conceptualise and re-contextualise the problems that occur through limiting the right to manifest a religious belief of women who wear the headscarf. The jurisprudence of the Court and the way in which plurality is managed has left women at the margins, by limiting their ability to access tertiary education and the workforce in a misguided attempt to protect gender equality. Furthermore, it is important for Contracting Member States to consider the way in which seemingly neutral legislation could have a disproportionate impact on a minority group. This thesis starts with the premise that the law has been created with a masculine viewpoint, and as a result has excluded those who do not fit the white, middle class, heterosexual mould. Through the participation of minorities in the decision making process, society as a whole could be much more inclusive.

## CONCLUSION

In sum, this PhD critiqued the legal discourse surrounding the ban on Islamic veiling practices. It used intersectional feminism and gender mainstreaming as theoretical frameworks in order to examine the multiple identities and experiences of exclusion and subordination of minority women who are affected by the ways in which Contracting Party States manage religious pluralism. This dissertation included extensive case law analysis of the jurisprudence of the ECtHR and examined the language, content and legal concepts

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<sup>36</sup>(AKDER), 'A Statistical Examination of the Conditions of Women in Turkey and the Impact of the Headscarf Ban on Turkey's Gender Equality Ranking' accessed 10/02/2014 ;Bleiberg, 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Sahin v. Turkey* Note' (2005) 91 Cornell L Rev 129 ;Büken and Sahinoglu, 'Violence Against Women in Turkey and the Role of Women Physicians' (2006) 13(2) Nursing Ethics 197

integrated in the areas of religious manifestation and gender equality. It also drew on the quantitative and qualitative research that has been conducted by researchers across Europe who have evidenced that women are disproportionately affected by such bans and documents the experiences and motives of the women affected. Using intersectional feminism, feminist judging and gender mainstreaming as theoretical tools, it concluded that the bans are based on outsider experiences and views and proposed a more inclusive framework for qualifying the right to manifest a religious belief. Last, it implemented this by writing a feminist judgment in the vein of a number of other feminist judgment projects.

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