

“THE TWO SIDES OF THE SAME COIN”
A Critical Study of the Freedom of Religious Expression on the Current
Headscarf Controversies

by

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Abstract

Freedom of religion and religious expression are components of the right to the most basic and fundamental human rights due to every single individual. However these rights are violated in different areas of the world such as France, Turkey and Switzerland at different intensities. One such violation of the freedom of religious expression is found around the Islamic headscarf as a powerful religious symbol worn by Muslim women and its effect in the public secular education systems for a variety of reasons.

Two particular cases, those of *Dahlab* and *Sahin* are noteworthy because of the implications of the decisions brought down by the ECtHR as well as the dissenting points of view. While the court acknowledged that the appellants may have worn the Islamic headscarf with harmless intentions, the obligation of the state to endorse denominational neutrality may be brought into question. As a result, it will be shown that the identity of women is an often marginalized issue as the courts question the purpose and significance of the Islamic headscarf for Muslim women.

The Islamic veil as a mature phenomenon seeks to emerge as a dynamic identity for contemporary Muslim women, actively involved in the societal sphere, as a generation seeking to uphold human rights in order to combat with extremism and fanaticism. Furthermore, the headscarf issue raised a significant number of concerns due to the manner in which the ECtHR approached the debate, that is, from a liberal secularist point of view, especially in regards to the process of evaluation of the cases at hand however, the importance of the matter lies in the sudden switch to a fundamental secularism approach when determining and justifying the judgment handed down. This brings the legitimacy of the ECtHR into question as it appears to take a form of state paternalism, depriving women of the choice to wear it freely.

In conclusion, the hypothesis that secular fundamentalism as found in some European countries does not put the human rights principles on the freedom of religious expression in less jeopardy than the religious fundamentalism in some Middle Eastern countries proved to be true.

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to my daughter, Niki

and to my husband, Ali

For their unconditional love and unfailing supports.

Introduction

The discussion on the violation of human rights in different countries including, but not limited to, the Middle East has been on the table for a relatively long time. Notwithstanding the “political” and, accordingly, selective approach to the issue, there are a significant number of facts supporting the idea that, in many of these countries, the human rights are continuously violated among which one can refer to the restrictions put on the freedom of religious expression. However, it may be unusual to think of the violation of the human rights concerning the freedom of religious expression in some of the liberal European Union member countries, or would-be members. To my understanding, if taken as granted, though quite controversial per se, the freedom of religious expression should be respected and, in this sphere, it does not make any difference what the *mens rea* would be, namely, a religious fundamentalism which virtually does not tolerate any idea other than itself or a secular fundamentalism which does not allow any religious idea whatsoever.

In this study, I attempt to tackle this issue, taking both sides of “the same coin” into consideration. This will inevitably require an examination of the legal bases in the countries to be studied, as well as references to the decisions of the European Court of Human Rights which has significant effects on the practices of the countries under its jurisdiction.

To date, the issue of the permissibility of wearing the Islamic headscarf and the

legalities of bans concerning hijab in some state run institutions has touched many European Union states. This debate has been actively waged in France, Switzerland, Turkey, Germany, Belgium and most recently England. In majority of cases, the central concern has been its role as a powerful religious symbol and the effect of that role in the public education systems of these member states. Entering into this discourse have come the human rights of freedom of religion, the freedom of religious expression and the rights to education and gender equality, as well as the rights of children, all of which are enshrined in law in the European Union Convention of Human Rights. In addition to the protection of these most basic human rights, the notions of pluralism, democracy, neutrality, fundamentalism and secularism have all been applied in a varying manner of contexts.

In the last hundred years, immigration, conversion, modernization and politicization have all influenced the growth and development of Islamic practice in the region. While this growth has not had a uniform effect on the entire European Union, it has taken on differing meanings in accordance with the differing political climates which will be detailed below. In addition to this, it may be found that as a result of September 11, 2001, growing concerns regarding international terrorism have caused the Islamic religion and its adherents to fall under an increasing shadow of suspicion which may have intensified the political environment throughout Europe.¹

The headscarf debate has perhaps taken on its most noted form in France where in

¹ Kanev Krassimir, "Muslim Religious Freedom in the OSCE area after September 11, 2001" (2004)15:4 Helsinki Monitor 233 at 233-234 [Krassimir].

1989 three female students were expelled from their public school for wearing hijab; since then over a hundred girls have been expelled from schools throughout France for this particular reason. These expulsions and the ensuing controversy has culminated in a law which was passed in March 2004 banning all students in state run schools from dress described as having 'signs and dress that conspicuously show the religious affiliation of students'. While the law is applicable to other forms of religious attire such as the Jewish Kippa or the Christian cross, and has been said to uphold the French principle of secularism, it may be noted that its primary effect has been on female Muslim students. This has lead to strong protest by various human rights organizations seeking to defend the freedom of religion.² Students in Belgium have faced similar barriers when pursuing academic studies. The Belgian government has left policy development regarding hijab, in the hands of individual school administrators. In general, technical and trade schools have permitted students to wear the Islamic headscarf, however academic schools often do not. This has created a significant disparity in the type of education available to Muslim women in the country.³ It is interesting that this debate affects university students and their access to graduate studies even in Turkey which has a majority Muslim population. The secular Turkish government has instituted and permitted such limitations on religious practice, in its efforts to modernize the country and to prevent the development of hard line religious groups. This has been an ongoing process in the country since its establishment as a republic on October 29, 1923.⁴

² *Ibid*, at 235-236.

³ Eva Brems, "Above children's heads the headscarf controversy in European schools from the perspective of children's rights" (2006) 14:2 The Int'l J. children's Rts. 119 at 119. [Brems, "Above children's head"].

⁴ *Sahin v. Turkey*, no. 44774/98, [2004] E.C.H.R., aff'd 2005 E.C.H.R., [2005] ECtHR 44774/98 paras 27-28 [Sahin, 2004].

On the other hand, Germany has made the right of students to wear the Islamic headscarf in state schools a rule. However, there has been debate regarding the rights of teachers to wear the headscarf. While in one case involving a teacher who was denied employment as local courts cited fears regarding the religious freedom of her students, the Constitutional Court overruled this finding as a violation of her religious freedoms but it failed to establish in law, that the headscarf may be worn by teachers. Since that case several German states have adopted laws banning religious insignia for public school teachers.⁵ A similar concern regarding the protection of students' rights to freedom of religion and the preservation of secularism in schools, led to the removal of all religious signs from school grounds and a ban on the wearing of signs of religious affiliation by school employees in Switzerland. An unsuccessful attempt to bring the effect of this ban on one teacher before the European Court of Human Rights provided a basis for increased discussion of the gender issues related to the headscarf controversy.⁶ Likewise, the notions of gender equality and democracy must also be addressed in this highly investigative manner, as the common societal beliefs about these ideals are frequently misunderstood, and lead to misplaced actions. It will be shown that the identity of women is often a marginalized issue as the courts question the purpose of the Islamic headscarf and its significance to Muslim women. Answering this question, this research shall explore the nature of hijab as a vague and forgotten concept in historical memory of the West. In order to introduce the postcolonial approach of hijab in modern era, etymological and epistemological aspects of hijab based on the Quran and doctrines of Islamic scholars will be closely scrutinized. Inspiring from feminist ideologies,

⁵Brems, "Above children's head", *supra* note 3 at 121-122.

⁶Dawn Lyon, & Debora Spini, "Unveiling the headscarf debate" (2004) *12:3 Fem Legal Stud.* 333, at 337-339 [Lyon & Spini].

especially Muslim faith-centered feminists, Islamic veil as a mature phenomenon seeks to emerge as a dynamic identity for contemporary Muslim women, actively involved in the societal sphere, as a generation seeking to uphold human rights in order to combat with extremism and fanaticism. However, a very recent case in England is presenting the start of a new wave of the headscarf debate. In this case, an elementary school teacher was required to remove her face veil while teaching, as school officials expressed concerns regarding her ability to communicate effectively with the students. The current and ongoing nature of this case may give rise to new avenues of exploration and discussion during the course of this work.

Finally, this research finds that it is necessary to assess this debate from the perspective of the children who are affected by such bans, not only as students when they are denied reasonable access to education, but also when they are witness to the effects of such laws on the adults in their lives which results in the suppression of their right to be exposed to and experience diversity in society. The intentional removal of pluralism from their societal sphere in this manner contravenes the United Nations Convention on the Rights of the Child, and it will be demonstrated that this results in a direct conflict with their best interests as the developing citizens of the world.

Chapter I: What is Hijab and its functions?

Veiling and the desire to cover specific body parts for human beings dates back as far as the story of Adam and Eve after their descent from heaven to earth. At the time, there was no religious or secular authority to govern their morality or guide them to modernity. This innate feeling of shame resulted in a genuine decision to choose to be covered with as small a covering as a leaf of a tree to as full as an Afghan woman who is veiled in a burqa. In other words, covering was invented and owned by human beings to protect themselves and to eliminate the feeling of shame which emerged in variety of aesthetics symbols from wild tribal parchment to modern urban attires. As the matter of covering oneself evolved throughout history, emerging in a variety of versions and forms created by different societies and their norms, the question regarding whether there are a variety of philosophies behind these different forms of covering, came to mind. Is there a rational reasoning used to justify why human beings chose to be covered or not covered? Is it possible for an authority apart from the free will of human beings that controls their covering style and amount?

While it is often argued that the hijab is prescribed in the Quran, it is a highly contested issue. Some Muslim scholars such as Yolande Geadah, Haideh Moghissi, Fawzia Zouari, Abderrahmane Fraikech, and Abdelaziz Kacem, to name a few, have explored the concept of whether hijab is mandatory. While these scholars have different ethnic and national backgrounds, their arguments revolve how the matter of hijab came to be challenged, a misinterpretation they attribute to variations in interpretations of Quranic verses. The Quranic verses that have delivered various interpretations are from Surah 33

which refers to the recommendations to the Prophet's wives to cover themselves up, as well as in Surah 34 which introduces the obligation for women to behave themselves in a modest manner so as to avoid exiting men. In essence it is thus evident that there is no prescription for women to wear the hijab which extends to the fact that no punishment is mentioned for those who choose not to.⁷

Recently, among all these versions of coverings, hijab, the Islamic headscarf, came under the spotlight and raised a great deal of controversy all around the globe. The diversity of hijab among Muslim women indicates a variety of understandings and interpretations behind this issue which should be closely investigated. In fact, the safe way to find an appropriate resolution for the recent headscarf controversy is to approach the substantial meaning of hijab and to examine the reality behind it rather than to resort to labeling and stereotyping strategies which divert us from the path, and imprison us in biased ideologies which result in extremist actions which have either made the hijab mandatory or prohibit it as a sign of submission of women to their male counterparts in order to emancipate this oppressed spectrum of society.

This chapter aims to study the philosophy supporting the idea of hijab and investigate the rationality behind the veil based on verses of the Holy Quran as well as the point of view of different Muslim scholars. Furthermore, this study will follow feminist scholars' opinions about the head scarf and whether they consider it as an expression of faith or a sign of oppression.

⁷Bronwyn Winter, "Secularism aboard the Titanic: Feminists and the Debate over the Hijab in France" (2006) 32:2 Feminist Studies, 279 at 287-288 [Winter].

1.1. Hijab in the mirror of Islam and the Quran

One of the distinctive features of the modern world is the continual need for reviewing and revising women's right. Islam has always recognized women as an equal member of humanity who can enjoy the full capacity of their rights. One of the most controversial issues which involves questioning Islam's vindication for women's right is the matter of hijab. Both traditional and modern perceptions of Islam present their own interpretations of the Holy Quran as well as other religious references in order to introduce hijab to Muslim men and women. This spectrum may start from mandatory full body coverage for women with reference to modest behavior for both men and women without necessarily mentioning the covering of hair.

Due to the modern era in which illiteracy is decreasing on a large scale, opportunities provided for people all around the world to have an access to their religion first hand and the courage to express their own precept by eliminating mediators between them and their God, will be reviewed with reference to the primary and divinely revealed source of Islam, the Holy Quran, in order to examine the essence of hair covering recommended to believers. The discourse will be continued by referring to the Suna'h⁸ and Hadith⁹ as a secondary source in addition to the essence of the wisdom which is known as a third reference in understanding Islamic reflections, as an examiner of rationality of religious commands to its followers. Referring to different sources of religion, Islamic scholars present their own points of view which will be explicated in the following chapter.

⁸ Prophet Mohammad (PBUH) behavioral code source.

⁹ Worldly source or the prophetic vision.

1.1.1. Quranic reflections on Hijab

Is there an unfair purpose behind the concept of veiling as a humiliating command, imposed only upon Muslim women by God? Or was there a mixture of ancient customs and practices belonging to a specific group of people, and in particular situations which have been generalized to all Muslim believers? Did God All-Knowing have good intentions to recommend such codes of conduct to His believers?

The Holy Quran has several verses in which Islamic codes of conduct with reference to hair covering are articulated, to convey the advantages of demarcating clothing and behavioral prescriptions as found in Surah Al-Nur which translates as follows:

And say to the believing men that they should lower their gaze and guard their modesty; And say to the believing women that they should lower 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 husbands, their fathers, their husband's fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex; and that they should not strike their feet in order to draw attention to their hidden ornaments. And O ye Believers! turn ye all together towards Allah, that ye may attain Bliss¹⁰

¹⁰ Holy Quran 24:30-31.

According to El Guindi, several ideas can be derived from these verses as “the Arabic notions of lowering the gaze and covering the genitals [in order to keep our modesty] are central to the code; and men are first mentioned as having to abide by these two prescriptions, to control their gaze at women and suppress their passion and forwardness when interacting with ‘strange’ women.”¹¹ In fact not only men are obliged to lower their gaze but also, as a matter of equation between all believers, both men and women are required to avoid from lechery. Ostensibly, the first call for preserving dignity to ensure modesty is addressed to men before women in the Quran and “mostly according to the Hadith, evidence suggests that the Prophet Muhammad had paid much attention to a dress code for Muslims in the emerging community, with a specific focus on Muslim men's clothing and bodily modesty during prayer. By comparison, reference to women's body cover is negligible.”¹²

According to this verse one of the main purposes for such recommendations are implied as the “veil (in the context of relationship with strangers) is for the protection of the family as the source of nourishment for the young and a means of strengthening the relationship between husband and wife. It is a tool for preventing the weakening and dissociation of the married relationship of a couple, and for strengthening the dependency of the spouses on each other.”¹³ I believe in this situation that both men and women feel secure in a family environment and will enjoy a healthy relationship which is built on pillars of trust. In fact, by accepting the nature of human beings, Islam requires believers

¹¹ Fadwa El Guindi, “An Enduring International Gendered Resistance, Feminist Veiling, Islamic Feminism” (2005) 22:1 *The Ahfad J.: Women and Change* 53at 57 [El Guindi].

¹² *Ibid.*

¹³ Abdulali Bazargan, “Wearing of the veil” online: <<http://www.bazargan.com/abdolali/main3.html>>. (accessed date: 10 April 2007) [Bazargan]

to control these aptitudes, since "Islam is an advocator of limiting all sexual fulfillments in family framework...and allocates society only for social activities"¹⁴, in other words, "behavior between men and women, must be desexualized."¹⁵ So in this verse, the Quran recommends to Muslim men and women, to ensure their modesty by avoiding adultery which was so common in the era of Barbarism in the Arabia Peninsula before Islam.¹⁶

In a nutshell, it appears that Quran promotes specific principals through Surah Al-Nur, verse 30 and 31 on the basis of human beings' expediency. In other word, the Quran conveys the message of appropriate codes of conduct by requesting men and women to control their gaze through lowering it. In return this maintains their piety while at the same time aids in avoiding infidelity. As well due to the fact that a "woman is the symbol of grace and a man is the symbol of infatuation"¹⁷ it is required that women not show their ornaments¹⁸ to men. In this case, according to Motahari's interpretation, this kind of covering is only required of women, since "men normally come out more covered than women because, [due to] the nature of men [who have] a tendency to leering while women want to have [an] exhibitionist [style of] dress or behavior".¹⁹ As such, women

¹⁴ Morteza Motahari, *The question of Hijab*, (Tehran; Sadra Publication, 1999) at 89[translated by Author] [Motahari] .

¹⁵ El Guindi, *supra* note 11 at 58.

¹⁶ On the other hand Islam promotes comprehensive factors of womanhood. See e.g. "Within Islam, a woman's sexuality does not diminish her respectability. Islam in fact supports this combined image in womanhood. The *Hadith* mentions an incident in which the Prophet Muhammad told a woman to color her fingernails with henna so that her hands were not like the hands of men. What Islamic morality forbids is the public flaunting of sexuality." El Guindi, *supra* note 11 at 58.

¹⁷ Motahari, *supra* note 14 at 144.

¹⁸ It refers to detachable beauties such as necklace or bracelet or the makeup. These ornaments divided into to group: 1) some of them who normally appear including face makeup or rings in hands 2) some ornaments which are normally covered like belly tattoo or anklet, So Muslim women are required to cover their body except their face and two hands from wrist and two feet from ankle and these part's natural beauties and detachable ornaments which must ordinarily appear is ok.

¹⁹ Motahari, *supra* note 14 at 144.

are asked to draw their headcovering²⁰ which was originally part of the Arabic traditional dress and which existed prior, in order to cover their neck and bosoms. However, in verse 61 of this Surah, menopausal women who are presumably less likely to get married again are allowed to remove that specific amount of covering with the condition that they maintain their modesty.

The other part, in which there are references to women's covering, is in Surah Al Ahzab, in which God All-Knowing states:

“O Prophet! Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when abroad): that is most convenient, that they should be known (as such) and not molested. And Allah is Oft- Forgiving, Most Merciful.”²¹

According to Kadivar, an analysis of this verse provides an important perspective. He suggests that this rule was meant to act as a signifier that a particular woman is a follower of Islam due to the fact that at that time there was no difference in the matter of appearance between virtuous and pious women and others. Thus, this honorable verse asked women to mark themselves with an insignia in order to not being disturbed.²² In other words, “the veil for women is for their security against the sick-hearted and against attacks on women's chastity, and has a custodial role not one of impedance or hindrance

²⁰ In Islam there is no indication to hair to be covered. It depends on the judgment of each believer to consider it ornamental or not. In this case the climate status of the time in which Quran revealed and the specific culture of Arabia Peninsula should be closely considered.

²¹ Quran, 33:59.

²² Kadivar, Mohsen, Interview of Mohsen Kadivar by Darioush Sajadi (24 December 2005) “Islam, Secularism and Otherdimentionism”, Part II on *Guest Sight*, Homa TV and also online: <http://www.afghanistan.fi/index.php?p=fs.dari.pages.culture.religion&o=fs.dari.culture.religion.2-157515871604157> >., (date accessed: 17 December 2006) [translated by author] [Kadivar]

and slavery.”²³ In fact, “such covering is a privilege for [a] woman, [and] should be adopted based on their free will”²⁴

In Surah Al-Ahzab verse 53 God the most merciful revealed that:

“...And when ye ask (his ladies) for anything ye want as them from before a screen: that makes for greater purity for your hearts and for theirs. Nor is it right for you that ye should annoy Allah’s Messenger, or that ye should marry his widows after him at any time.”

In Islam, this was the first time that the term ‘hijab’, with the specific meaning of curtain between men and women, emerged. This verse specifically addresses the wives of Prophet Mohammad and instructs them to communicate from behind a curtain, with men who are not immediate family, due to their significant position in Islam. With reference to the latter part of verse 53 in Surah Al Ahzab, the exemption stems from the fact that, they were called ‘the mothers of devotees’ whom are required not to marry after the death of the Prophet, since they are considered the mothers of believers. So whenever, there is any reference made to hijab, it refers to the rules for the Prophet’s wives and the curtain between them and others. The discourse of forms of covering, the headscarf and other standards of dressing are incorrectly referred to as hijab, which is a misuse of the term because, this verse made hijab mandatory for the Prophet’s wives and not for the rest of Muslim women. As we may see, “some women [are] more conservatively [dressed by adding the] al-niqab, which covers the entire face except for the eye slits; at the most

²³ Bazargan, *supra* note 13.

²⁴ Kadivar, *supra* note 22.

extreme, a woman would also wear gloves and opaque socks to cover her hands and feet”²⁵, it appears that this voluntary practice inspired by the curtain rule, is often generalized to all Muslim female groups, who live mainly in Arabic regions.

In the Islamic world, the ongoing debate regarding the realm of covering is continued whereas there is no controversy on the matter of covering per se. Some interpret the Quran to conclude the fact that the hair should be covered while other groups strongly argue that there is no indication that the verse is in reference to covering the hair in the Holy book. On one hand, a group of Muslim women cover their face as well as their hands and feet in order to be more conservative in their practice; while on the other hand, dissenters criticize them to be fanatics and extremists, or they refer to the origin of their practice as aesthetic principals due to harsh climate and environment in their countries. Some Islamic scholars believe in retrospection in traditional beliefs with respect to headscarf, whereas the most conservative opinions insist on continuances of traditional norms regardless of fundamental changes of circumstances. The following chapter will discuss some of these reflections and thoughts.

1.1.2. Muslim scholar’s viewpoints on Hijab

In modern Islamic societies and particularly among the younger generations, there is a great desire to have direct access to first hand references of Islamic thought. Due to the increasing waive of distrust toward the common versions of interpretations of the

²⁵ El Guindi, *supra* note 11 at 59.

Quran, which are exclusively produced by *Foghaha*²⁶ or are dominantly provided by male interpreters, a group of contemporary scholars made a great deal of effort to pave the way for fundamental retrospect in this monopolized process. One of their very first points of departure is considering the basic difference in social, anthropological and historical circumstances of Prophet Mohammad's era and the decree from his aspirations in the Islamic empire following his death as well as the deviation from recognizing the righteousness and the main objective of religion, that is, God Himself. They believe that specific Islamic regulations, designed for that particular situation, are irrelevant to the circumstances of modern time. Furthermore, other groups of scholars believe that there have been misinterpretations of Quranic terminology especially regarding the Islamic dress code. Therefore specific rules that Prophets used to rule over particular circumstances are not religious rules to be generalized to all societies in all eras. In fact, the elements of time and location are crucial in such analogies.

While there was consensus amongst early Islamic jurists studying Islamic laws in its classical interpretations and understandings that veiling was a duty of women who identified as Muslim, the modern era proved to deliver varying understandings and interpretations of Quranic text. During the modern era, the notion on obligatory veiling was brought into question resulting in differing positions on the interpretation of the requirements of the Islamic dress code. As well, the notion of a singular style of hijab as defined in the Arab world was challenged with the spread of Islam as evident in the varying styles of hijab worn by women throughout the world. Nevertheless, hijab,

²⁶ Classic Islamic Jurists.

regardless of the manner in which it is worn, is fashioned in a manner to display obedience to God's will as defined and outlined in Sharia.²⁷

Bearing all of these doubts in mind, the main focus of their studies was to find the exact nature and practices of those days which resulted in such regulations and specifically for the requirements of veiling. Based on their new perspective, the question of hijab in Islam can be explained as follows:

Islam promotes the concept of covering for both men and women. This notion does not belong to a specific time and place, but rather, it has more serious approaches towards women due to their physical beauties. In fact, such a concern is not applicable for men. Kadivar believes that the usage of term *hijab* is etymologically misused, since hijab literally means curtain or screen (placed on strangers) and thus does not refer to covering. What we have in Islam as a rule for believers is covering, not putting a barrier between them. Hijab is an exclusive religious task addressing the wives of Prophet Mohammad to be recognized as outstanding characters by special insignia and to deter disturbances that may have been directed towards them. This rule apparently can not be generalized for all Muslim women believers, thus there is no need for them to create a curtain between themselves and in the society.²⁸

Bazargan begins his dissenting argument within the discourse of mandatory hair covering as "most people's understanding of the word veil is the head cover or the long

²⁷ Imen Gallala, "The Islamic Headscarf: An example of Surmountable Conflict between Shari'a and the Fundamental Principles of Europe" (2006) 12:5 European Law J., 593 at 595-596 [Gallala].

²⁸ Kadivar, *supra* note 22.

gown worn by some women, whereas the word veil is not mentioned in the Quran to mean head cover or gown, nor is covering the head a sufficient condition to realize the meaning of veil.”²⁹ In fact based on the aforementioned verses of the Quran, Islam required two kinds of covering: both the gaze and the body. In other words, the way we look should be filtered, and lewdness should be strongly controlled since such an action is a forerunner for prospective sinful behaviors. The second step is an appropriate body covering which belongs to all religions and does not originate in Islam. Kadivar articulates three categories of covering in Islam. 1- The minimum covering in pool and Hammam.³⁰ 2- While praying, the minimum dressing is required and in some Islamic Fatawa³¹, women shall remove their outer garment or their headscarf, when the feasibility of strangers’ presence is resolvable. 3- Specific covering realm in front of aliens³² out of the privacy of their homes. He believes that while religious conscientiousness of all men and women believers advises them to dress properly, it also asks women not to reveal their beauties.³³ In his point of view, Kadivar still believes that women should cover not only their necks and bosoms as their ornaments, but that they should also cover their hair. However, Bazargan believes that “whether one’s hair is considered ‘ornamental’, should be judged by an unbiased conscious and a mind independent of sensual inclinations.”³⁴ Tahmasebi also supports this idea, by adding that the only requirement in the Quran was an appropriate covering which does not result in

²⁹ Bazargan, *supra* note 13.

³⁰ Probably he aimed to infer to public bathrooms.

³¹ Islamic doctrines.

³² Aliens refers to all male members of the society except their husbands, their fathers, their husband's fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex.

³³ Kadivar, *supra* note 22.

³⁴ Bazargan, *supra* note 13.

women being enticing. Apparently the reason for the presentation of Hijab was proposing a solution for free men and women who believe in such transcend practices. As well it aims to make them aware of the harm of sexual ferments and lustful looks.³⁵

Ongoing disputes about the realm of specifically covering ones hair continues based on the claim that the reason the Quran does not directly indicate the hair coverage, was due to the fact that the climate of the Arabian peninsula during that era caused both men and women to cover their hair. As such, it was not necessary for the Quran to directly mention the hair covering. However, there is a substantial point in the Quran worthy of close consideration. There is no sanction for women who do not wear the veil in whatever way it may be defined. It appears that the Quran advocates for women's free will, regarding the choice of attire as well as the depth of submission to her faith. The Quran points to the subtle fact that there is a profound difference between religious conscientiousness and legal sanctions, since "new reflections on religion believe in a difference between sin and crime. The women's veil is a matter of morality which should be constraint by religious conscientiousness not by external authorities."³⁶ In fact, hijab is both a relative and voluntary matter. It means that, while believe that transcending is a matter of choice, naturally, supplies and solutions to reach such transcendence is also based on voluntary belief that every man and woman can adopt.

What can be concluded from the abovementioned discourses around the issue of hijab, is that it appears, that regardless of the realm and the degree of hijab, there is a

³⁵ Ali Tahmasebi, "Investigation in Hijab Question", online:
<<http://www.alitahmasebi.com/archives/000064.php>>. (accessed date: 3 May, 2007)[translated by aithor].

³⁶ Kadivar, *supra* note 22.

consensus among the new waves of Islamic scholars, that the hijab is neither imposing nor is it a mandatory obligation upon women. It is a matter of virtue, sheltering women against unbridled sexual exploration. It is a matter of privacy as opposed to imprisoning men and women. This kind of hijab is derived from the free will of human beings to present an outstanding modest character of Muslim women.

The picture of the traditional hijab differentiated throughout the centuries from religion to religion and society to society. In the mid 1970s the world encountered a fundamental revolution on the matter of the Islamic headscarf. The new image of socio-political hijab emerged, through which rays of post colonial mottos raised to attract the world's attention. This new hijab not only conveyed the message of piety, but is also symbolized a departure and dissent from secularist Western movements. This icon was no longer squared with stereotypical images of submissive, oppressed women victimized by the patriarchal system. The symbol of hijab emerged at the time human beings were born, and eventually evolved through different schools of thought. Furthermore, it now manifests itself as an identity, claiming the ideal womanhood.

1.2. Exploration in very modern tradition of Hijab

From Egypt to the Emirates, from Iran to Indonesia and from Europe to Northern America, a soft melody is hearing. The songs of Muslim women celebrate their collective identity in Hijab to realize God's will. Rejoice their hearts with a motto, 'although we do not look like 'you', we look like ourselves.' They veil altogether to "capture a sense of

self worth,”³⁷ to appraise their personhood. Now the song is rising, louder and louder. It is a call for “fusing a western liberal account of individualism with an Islamic culture”³⁸ to thrive for personal deliberation and self determination.

Some of them are forced wear it, others threatened to remove it. Their song reaches the highest; ‘Let us own our hijab’. The saga of veiled Muslim women is now confronting stagnated concepts delivered by liberal markets of humanity. They accused as a submissive and dismissive walking symbols by others who find very hard to embrace plurality. The diversity which even in Islam is highly respected, as you may see variety of veil, variety of color and behind them variety of philosophies.

This section’s goal is exploration of the concept of hijab as a post colonial phenomenon. It will continue with an investigation the validity of the claims about hijab, as a faith expression or sign of oppression. It will provide a literature review of secular and faith centered Muslim feminists in accordance with hijab.

1.2.1. Faith expression or Sign of oppression

Muslim women have different experiences in approaching the decision to wear their Hijab. Many opponents of the Islamic headscarf place emphasis on its indirect message as an emblem of women’s oppression and utilize it to harbor further religious intolerance. “ For Afshar (1998) and Moghadam (1991), who focus on state-sanctioned

³⁷Atasoy, Yildiz, “Governing Women’s Morality: A study of Islamic veiling in Canada”, (2006) 9:2, *European J. of Cultural Studies*, 203 at 217 [Atasoy].

³⁸ *Ibid* at 212.

and 'compulsory veiling' in Iran, the veil is both a symbol of subordination of Muslim women to men and a cultural element that restricts women's personal freedom and individual human rights."³⁹ In contrast, in the cases of *Sahin* and *Dahlab*, voluntary veiling formed a social movement towards the right for self determination brought before the European Court of Human Right. In fact Gole suggests that,

The Islamic headscarf is deliberately appropriated, not passively carried and handed down from generation to generation. It is claimed by a new generation of women who have had access to higher education, notwithstanding their modest social origins (many come from the periphery of the big cities or from small towns). Instead of assimilating to the secular regime of women's emancipation, they press for their embodied difference (e.g., Islamic dress) and their public visibility (e.g., in schools, in Parliament) and create disturbances in modern social imaginaries.⁴⁰

Such a comparison simply reveals that the stereotypical outlook on the hijab, as a symbol of oppression, can not be validated in all situations. In this case, a global and comprehensive point of view is required as opposed to the narrow understanding of the sole concept within a limited space.

While "the female body has often become the site of struggle between the proponents and opponents of modernity"⁴¹, these groups still seek to provide their

³⁹ *Ibid* at 204.

⁴⁰ Nilufer Gole, "Islam in Public: New Visibilities and New Imaginaries." (2002) 14:1 Public Culture, 173 at 181 [Gole, Islam in Public].

⁴¹ Haideh Moghissi, *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis*, (London: Zed Books, 1999) at 20.

reasoning in order to win the battle. Fawzia Zouri, as a proponent of hijab, believes that the “veil wasn’t a sign of religious submission, but an emblem of feminism, a way of saying ‘Je m’en fou d’hommes’ and ‘like Islamic architecture, a way you can see out but no one can see in.’”⁴² In contrast, some consider hijab as a “modern politicized uniform [which] denotes allegiance to conservative religious values and increasingly Islamism”⁴³ and a “form of religious propaganda.”⁴⁴ While some groups attempt to argue that the “veil has no innate meaning inimical to women’s interest,”⁴⁵ the hegemonic trends of Western feminists impose the hegemonic image of womanhood as a global standard upon women and label non-Western women, resisting assimilation in their proposed agenda as oppressed and vulnerable. In this case the “veil can be called as a site of women agency and an embodiment of an authentic Muslim culture that resist Western models”⁴⁶ Similarly “failing to adequately contextualize non-Western societies, many researchers simply assume that what is good for Western middle-class women should be good for all women”⁴⁷ As a result, pro-hijab feminists argue that the headscarf ban is a picture of “Islamophobia operating to systematically deny young Muslim women the freedom to express their religious identification”⁴⁸ which results in the misconception that Muslim women are “dangerous foreigners and must be purged of any symbols that

⁴² Jane Kramer, “The Letter from Europe, Taking the Veil: How public schools in France became the Battleground in a culture war”, *The New Yorker: Fact*, (22 November 2004) [Kramer].

⁴³ Winter, *supra* note 7 at 295.

⁴⁴ Lyon & Spini, *supra* note 6 at 335.

⁴⁵ Atasoy, *supra* note 37 at 204.

⁴⁶ *Ibid* at 205.

⁴⁷ Huma, Hoodfar, “The Veil in Their Minds and on Our Heads: Veiling Practices and Muslim Women”, In David Loyd & Lisa Lowe Eds. *Politics of Culture in the Shadow of Capital* (Durham; Duke University Press, 1997) 248 at 249 [Hoodfar].

⁴⁸ Zine, Jasmine, “Between Orientalism and Fundamentalism: The Politics of Muslim Women’s Feminist Engagement”, Online: (2006) 3:1, *Muslim World J. Hum. Rts.* 5.
<http://www.bepress.com/mwjhr/vol3/iss1/art5/> at 10 [Zine, “Orientalism”].

would further align them to their violent and degenerate faith”⁴⁹. Furthermore, “the assumption that veil equals ignorance and oppression means that young Muslim women have to invest a considerable amount of energy to establish themselves as thinking, rational, literate students/individuals, both in their class rooms and outside”⁵⁰ However, Muslim scholars such as Kadivar, Amina Wadud, Ashkevari and Azzizah Al Hibri place a strong emphasis on the fact that the veil is not a religious requirement, and its style is as diverse as the countries who have a Muslim population, and as varied as the names of the veil. In fact the veil has taken on multiple meanings as is evident in Hoodfar’s statement that, “while for Westerners its meaning has been static and unchanging, in Muslim cultures the veil’s functions and social significance have varied tremendously, particularly during times of rapid social change”⁵¹

Meanwhile, different groups of scholars try to articulate different occasions of wearing hijab, based on their own perspective. Khosrokhavar and Gaspard make a distinction between three typical situations of wearing hijab. The first group belongs to the first generation of Muslim immigrants following the same format as that of their country of origin. Through this form of hijab, a specific personality is defined. The second category of hijab is the way by which parents of young adolescents are being pleased and will provide more outgoing circumstances for their youth. In this way the gap between the relatively odd traditions of hijab is perambulated toward an acceptable practice. In addition to ‘pleasing hijab’, a ‘repressive headscarf’ can be categorized in the type two, in which the traumatizing imposition of hijab initiated by the parents is the one

⁴⁹ *Ibid.*

⁵⁰ Hoodfar, *supra* note 47 at 249.

⁵¹ *Ibid.*

followed by French society reactions. Finally, the third type which is 'vindicated hijab' is one through which a Muslim girl can claim her identity.⁵²

In this classification, the neutral, oppressive and expressive types of hijab are articulated. Epistemologically, the first two categories seem vulnerable in terms of their profound distance from free will and self assertiveness of Muslim females. However, the third category appears problematic for the values and institutions of French society as "they claim neither a French society, nor a resignation of their autonomy. They assert themselves as French and Muslim, and at the same time, modern and independent with a headscarf."⁵³ It is very interesting that the authors consider the last group as the most problematic one 'refusing to compromise'. While in the first two groups, the autonomy of Muslim women is profoundly jeopardized, with the state turning a blind eye to them and initiating a disciplined strategy toward the group who still insist their vocation. In this concept, the anti hijab stream not only fails to award authority to the first group mentioned, but it also fails to ensure the sense of self worth in the third group mentioned. Special Rapporteur of United Nation in France, Asma Jahangir, believes that, "it may safely be assumed that the fear of fundamentalist Islam is a strong undercurrent explaining contemporary negative attitudes toward Islamic headscarf....but head scarf ban may lead to radicalization among French Muslims, especially as the bans sometimes implemented in an abusive manner."⁵⁴

⁵² Francoise Gaspard and Frahad Khosrokhavar, *Le foulard et la republique*, (Paris: La Decouverte, 1995) as cited in Brems, Above children's head, *supra* note 3 at n. 11.

⁵³ *Ibid.*

⁵⁴ *Ibid* at 128.

The Islamic headscarf in Islamic countries, in which hijab is compulsory, causes resistance among women and sometimes even the male population. Muslim women also claim their full authority over their territory in their own countries. In these countries hijab can be divided into two major categories. The 'formal' or 'communal' hijab is the first category which is affiliated with patriarchal traditions of Muslim nations around the world which may vary across Islamic states. Hijab in this format emerges in the most conservative style, which institutionalized by fundamentalist political trends. For example chador, a black piece of material utilized as an outer garment, in the Islamic Republic of Iran originated from the pre Islamic era in which upper class women wore it when they left their living quarters. However, it transformed to an eminent piece of Islamic clothing supported by the government even though it is not necessarily compatible with the Islamic dress code. In addition, the burqa in Afghanistan, which is a full face and body coverage from head to toe, epitomizes the extremist character of the Taliban, was similarly inspired by the Afghan tribal dress codes. This mandatory hijab as well as the chador were the focal point of increasing criticism by the 'modern world' since conformity of Muslim women to these hegemonic governmental images is under strict controls and any infraction from the conventional hijab is officially subject to sanctions.

In contrast, 'primary hijab' is merely rooted in Quranic verses, through which Muslim women express their devotion to the will of God through their modest behavior. Meeting the minimum requirements of Hijab as stated in the Quran, Muslim women exercise their autonomy by submission to divine authority through their modest attire

with environmental elements having an insignificant role in their choice of clothing. But, it appears that hijab in the aforementioned notions became a competing zone between male dominant orders and the commands of God for keeping piety and faithfulness in Islamic societies. While the former style of hijab, dictated by authorities was from an up to bottom approach while the latter form was a bottom up wielding of absolute power among Muslim women. Therefore, Muslim feminists try to emphasize the fact that hijab should be practiced because it is a “tangible and visual marker of female identity not of submission to male domination”⁵⁵ Homa Hoodfar, as an Iranian Muslim feminist states that “the static colonial image of the oppressed veiled woman thus often contrasts sharply with the lived experience of veiling. To deny this is also to deny Muslim women their agency”⁵⁶

1.2.2. The message of Hijab

Hijab is an insignia and a phenomenon rather than as a simple part of clothing, seeks to address humanity through conveying its message while simultaneously evolving in its essence and substance. “It calls neither for blind approval, nor condemnation”⁵⁷. In fact, its modern identity among the diverse images of womanhood through out the globe is evidence of its ever-changing nature. Through its universal motto, the hijab is aimed at proposing its definition of womanhood alongside with major feminist trends and Muslim

⁵⁵ Lyon and spini, *supra* note 6 at 343.

⁵⁶ Hoodfar, *supra* note 47 at 250.

⁵⁷ *Ibid.*

women who “convey their vision of Islamic ideals by becoming exemplary contemporary models.”⁵⁸

However, the Islamic veil strongly challenges the Western image of women imposed upon humanity through which their “dress style is an affirmation of an Islamic identity and morality and a rejection of Western materialism, consumerism, commercialism, and values.”⁵⁹ In fact, “the tendency of Western scholars and the colonial powers to present a unidimensional Islam and a seamless society of Muslims has prevented them from exploring the socioeconomic significance of the existing variations”⁶⁰

In today’s world, Hijab which was originally invented by women to tame the baleful energies surrounded her⁶¹, emerged as an instrumental device. In one hand, It forms ideological campaigns in postcolonial era as a political phenomenon soaring in Egypt and Middle East. “The more intensely covered the college girl, the more ‘serious’ her public behavior, and the more knowledgeable she is in Islamic sources, the higher she was on the scale of leadership among women”⁶² On the other hand, protesting against totalitarian religious authorities, hijab deliberately fade as a symbol of tension between nationalist and fundamentalist Islamist trends in post revolutionary era in Iran. In other word women associate with hijab demonstrate their “Participation in local politics [as] a

⁵⁸ El Guindi, *supra* note 11 at 60.

⁵⁹ *Ibid.*

⁶⁰ Hoodfar, *supra* note 47 at 253.

⁶¹ See more in Gilgamesh or Jill Gamesh myth when a harlot tears the piece of material to cover the bared bodies of tamed beast (Ankido) and herself to protect their shame.

⁶² El Guindi, *supra* note 11 at 59.

sense of empowerment in that they could have their voices heard by politicizing their perspectives within the cultural realities of their localities”⁶³ and by initiating a social action as opposed to passive reaction via their exploration for humanized justice rather than gendered justice.

Today the Muslim women movements are strongly committed to their vocation as a dynamic and vital modern trend and their dress code plays a crucial role embracing new literature. Like a poet composing feminine song of the earth imprisoning the masculinity of the conqueror’s thirst to “reveal, discover and possess”⁶⁴ the globe. It’s time to crusade against religious misuse, perpetuated discriminations and intolerance for the pride of differences which are not easy to understand. According to Itrath Syed, a Canadian Muslim feminist, “Muslim women’s bodies have become battlefields of contested meaning” but “what is critical to consider in this issue, and what has been wholly sidestepped by all sides, is the idea that women’s bodies should not be sites of ideological struggle”⁶⁵ She further argues that “It seems to me that the real political struggle is not just that French schoolgirls should be allowed to wear a headscarf if they choose to do so, but that all women, everywhere, should retain complete and sole authority over our bodies”⁶⁶

⁶³ Soon-yong PAK, “Politicizing Imagery and Representation of Muslim Womanhood: Reflections on the Islamic Headscarf Controversy in Turkey” (2006) 12:4, *Asian J. of Women Studies*, 32 at 41 [Pak].

⁶⁴ These verbs are inspired from a Frantz Fanon quote about a veiled women in the eyes of colonizer.

⁶⁵ Itrath Syed, “Reflections on the Headscarf Ban in France” (2004) 2, *Ampersand*, 63 at 66 [Syed].

⁶⁶ *Ibid.*

Chapter II: Current Headscarf Controversy in some EU Member Countries

In order to develop a complex and clarified understanding of the many aspects of the apparent conflict between rights and values that have arisen out of the headscarf controversy in Europe, the notions of secularism and democracy must be critically analyzed. There is considerable confusion regarding the definition and function of secularism, specifically in Islamic societies which view it as a colonial, European and Christian concept. Through this work, efforts will be made to outline the relationship between secularism, human rights and religion, highlighting their interdependent natures.⁶⁷

This study shall focus on Switzerland, Turkey and France. Switzerland and Turkey have both had complaints brought against them to the European Court of Human Rights as a direct result of headscarf bans. While Switzerland is famous for its political neutrality, the country's difficulties in extending its neutrality to the freedoms of its citizens will be demonstrated. Turkey is a fairly young republic which has struggled to wrest itself from the influence of Islam upon politics and daily life. The country currently seeks to win acceptance into the European Union. This effort has led to a powerfully driven sense of secularism which has at times resulted in the suppression of elements of the Islamic religion that approximately ninety percent of the population adheres to. The Islamic headscarf has been just one of the targets of this movement. Finally France will

⁶⁷ Abdullahi Ahmed An-Na'im., "The interdependence of religion, secularism, and human rights", (2005) *11:1 Common Knowledge* 56. at 56-80 [An-na'im, Interdependence].

be highlighted on account of the republic's strict adherence to laïcité, a uniquely French version of secularism. France considers its democracy, secularism and human rights record to be a great source of national pride. Yet, at the same time as the nation loudly proclaims these ideals, it has become the home of the most widely publicized debate regarding the headscarf and other religious symbols in public schools.

In the following sections of this chapter the focus will be on Switzerland, Turkey and France. The first two countries are significant as they had cases brought before the European Court of Human Rights against them. The latter case of France involves a country which has made several very bold claims regarding their national ideals of democracy, secularism and constitutional human rights and freedoms. Through the consideration of this debate in France, the fragility of these claims will be explored.

2.1. Significant cases occurring in European member countries

Two very different cases regarding the right to manifest one's religion via the Islamic headscarf, *Dahlab v. Switzerland*⁶⁸ and *Sahin v. Turkey*⁶⁹, have been brought before the European Court of Human Rights in recent years. While in both cases the appellants aimed to restore their rights to wear the headscarf while maintaining their roles in the education system and the countries in question, presented identical arguments of public order concerns and the principle of secularism, the roles these women played and the history of their nations were very dissimilar. Through these cases we will see the

⁶⁸ *Dahlab v. Switzerland*, no. 42393/98, [1998] E.C.H.R. [*Dahlab*].

⁶⁹ *Sahin* (2004), *supra* note 4.

identical arguments presented in two highly polarized instances.

2.1.1. Dahlab v. Switzerland

This case concerned a primary school teacher who began wearing hijab to the school where she was employed after her conversion to Islam. For several years the headscarf went unnoticed and no issues were ever raised in its regard until a district inspector mentioned the scarf in a report to his superiors. This led to the enactment of a measure that required Ms. Dahlab to remove her scarf while teaching, purportedly to maintain the denominational neutrality required by schools in accordance with the Swiss constitution.

As the ban was upheld by all national courts the appellant brought the case to the ECtHR alleging a violation of the article 9 “right to freedom of religion” and the article 14 “right to equal treatment under the law”. However after its consideration of the facts, the court found that the application was ill-founded and dismissed it.

2.1.1.1. History

The case of *Dahlab v Switzerland* was submitted to the European Court of Human Rights after a primary school teacher, Lucia Dahlab, exhausted the available legal remedies to reclaim her right to wear the Islamic headscarf while working in the Canton of Geneva in Switzerland. Ms. Dahlab had been employed in the public school system as

a primary school teacher for 8 months prior to her conversion to Islam in March of 1990. Shortly after this, she began to wear the Islamic headscarf to the Chatelaine Primary school where she worked. For several years from 1991 until May 1995 the applicant's headscarf remained a non-issue in her workplace, and her direct superiors made no mention of any concerns regarding it. Yet, quite suddenly in May 1995 the school's inspector for the district notified the Canton of Geneva Directorate General for Primary Education that Ms. Dahlab was wearing the Islamic headscarf while on duty and added to his report that this practice had not led to any complaints by students or parents.

On June 27, 1996 a meeting was held between the Director General, the head of the teaching personnel department and Ms. Dahlab to discuss the headscarf issue, and further to the outcome of this meeting, the Director General issued a letter requesting that the applicant cease wearing the scarf while on duty as it contravened section 6 of the Public Education Act. When the director general confirmed her request and issued a formal ruling requiring that Ms. Dahlab remove the scarf while at the school on August 23, 1996 the applicant made an appeal to the Geneva Cantonal Government which was ultimately dismissed on October 16 of that year. On November 25, 1996 Ms. Dahlab made a further public legal appeal to the Swiss Federal Court alleging that her rights under article 9 of the European Union Convention on Human Rights had been violated by this ban. The Federal Court passed a judgment on November 12, 1997 upholding the findings of the Cantonal Government. It was this judgment that led the applicant to bring her appeal before the European Court of Human Rights.

The history of secularism and neutrality in the education system of Switzerland can be traced to the Federal Constitution incepted on May 29, 1874 in which article 27.3 states: "It shall be possible for members of all faiths to attend state schools without being affected in any way in their freedom of conscience or belief." The Canton of Geneva furthered this legal concept in its November 6, 1940 Public Education Act in Section 6 providing that: "The public education system shall ensure that the political and religious beliefs of pupils and parents are respected."

Moreover, it confirms that "all civil servants must be lay persons" and that the only exception to this rule will be made for university instructors. It was pursuant to these laws that the Swiss Federal Court had issued a judgment on the 29th of September, 1990 that the crucifix must be removed from state primary schools as it was in direct conflict with the principle of denominational neutrality that was an imperative of the education system. Through this history, it is apparent that while educational neutrality dates back to the previous century, where its primary role would have eased Catholic/ Protestant tensions, it has transformed and ultimately intensified in accordance with the development of the country, its changing political sphere and increasing religious diversity.

2.1.1.2 Case Facts

In the facts considered by the ECtHR the court considered Ms. Dahlab's personal history including the fact that she was a Swiss national born in 1965 and had been a

member of the Catholic Church until March 1991 when she made her conversion to Islam after "a period of spiritual soul searching".⁷⁰ At this time she had already been a primary school teacher since 1989 and was employed in the position that was brought into question due to her choice to wear the Islamic headscarf. The issue of her subsequent marriage to an Algerian national and the births of their three children and her periods of maternity leave were also entered into the facts along with the coinciding periods where Ms. Dahlab wore her Islamic headscarf to school without consequence.

As per the August 23, 1996 ruling issued by the Director General of Primary Education that Ms. Dahlab should remove her headscarf during the exercise of her teaching duties. The court considered the Director General's assertion that the headscarf "Constituted an obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system."⁷¹

In addition to this statement the findings of the Geneva Cantonal Government were entered as follows:

Teachers must ...endorse both the objectives of the state school system and the obligations incumbent on the education authorities including the strict obligation of denominational neutrality." and "The clothing issue... represents... regardless even of the appellant's intention, a means of conveying a religious message in a manner which in her case is sufficiently strong... to extend beyond her purely personal sphere and to have repercussions for the institution she represents, namely the state

⁷⁰ *Dahlab, supra* note 68 para 1.

⁷¹ *Ibid.* para A.1.

school system.⁷²

These findings were supported and further developed in the November 12, 1997 judgment of the Federal Court which heard Ms. Dahlab's appeal that the measure had infringed upon her article 9 "right to freedom of religion". The elements of this judgment entered into the record as case facts by the ECtHR as below:

Firstly it should be observed that the appellants main argument is that her clothing, consisting of items purchased in the hypermarket, should be treated not as a religious symbol but in the same way as any other perfectly inoffensive garments that a teacher may chose to wear for his or her own reasons, notably for aesthetic reasons or in order to emphasize or conceal part of his or her anatomy (a scarf around the neck, a cardigan, a hat etc.) She accordingly submits that the impugned decision is tantamount to prohibiting teachers, without sufficient justification from dressing as they please. However there is no doubt that the appellant wears the headscarf and loose-fitting clothes not for aesthetic reasons but in order to obey a religious precept which she derives from the following passages of the Quran.⁷³

The Quranic verse referred to in the above statement was never listed in its completion by the ECtHR as evidence or fact in the case, but rather referred to only with the general statement: "A precept laid down in the Quran whereby women were enjoined to draw their veils over themselves in the presence of men and male adolescence."⁷⁴ The Federal Court's conclusion to their considerations of that verse was that:

⁷² *Ibid.*

⁷³ *Ibid.* Para A. 2.

⁷⁴ *Ibid.* Para A. 1.

The wearing of the headscarf and loose fitting clothes consequently indicates an allegiance to a particular faith and a desire to behave in accordance with the precepts laid down by that faith. Such garments may even be said to constitute a 'powerful' religious symbol—that is to say, a sign that is immediately visible to others and provides a clear indication that the person belongs to a particular religion.⁷⁵

It is important to note at this juncture, that the ECtHR accepted as evidence, the Federal Court's submissions that the children the appellant taught were between the ages of four to eight and were in a sensitive age group that would make them more inclined to be susceptible to the influence of their teacher. Ms. Dahlab made no efforts whatsoever to discuss her religious beliefs with her students and always took care to avoid providing such information, particularly when students on occasion did ask about the headscarf, making references to aesthetics and personal comfort regarding the weather. However the courts felt that her students would sense that she was avoiding the issue and that she would have no choice but to admit to her religious identity.⁷⁶

With this in mind, along with the added facts that none of her pupils or their parents had ever seen fit to comment on her headscarf and some of her pupils and their parents wore headscarves at home and in the school, the appellant submitted that the ban did not serve the public interest. The state's response to the fact that no comments or complaints had been lodged was that the parents' silence did not mean they were

⁷⁵ *Ibid.* Para A. 2.

⁷⁶ *Ibid.* Para A. 4.

unaffected. It determined that those who may have taken issue with the headscarf may have simply been avoiding a disturbance and waiting for authorities to respond. In support of this, the state offered its own slow action in response to the knowledge of Ms. Dahlab's attire and to its preference to resolve the situation peacefully.⁷⁷

The Federal Court also stated that since the case began, that is when the Grand Council had made a resolution of the same nature as the cantonal governments decision, some public outcry had occurred in relation to the case and the appellant had given interviews, all of which demonstrated that there was public interest surrounding the matter.

The state furthered its view that the ban had served public interests as it introduced the argument that the ban was reasonable and proportionate to the needs of the community. Ms. Dahlab's freedom to manifest her religion as a civil servant was weighed against the rights of parents and pupils to remain unaffected in their own beliefs and the maintenance of religious harmony. The Federal Court's judgment stated:

Here the appellant's freedom of conscience and belief should be weighed against the public interest in ensuring the denominational neutrality of the school system; in other words; the appellants interest in obeying a precept laid down by her faith should be set against the interests of pupils and their parents in not being influenced or offended in their own beliefs, and the concern to maintain religious harmony in schools. Lastly, regard must also be had to the need for tolerance - a further element of the

⁷⁷ *Ibid.*

principle of denominational neutrality - between members of different faiths.⁷⁸

Additionally the state offered that religious freedoms could not free civil servants from the requirements of their jobs, and that while private freedom of conscience was the right of individuals, the state held the right to infringe on that freedom where necessary, so long as it did not discriminate by financially supporting or favoring any particular religious group stating: "However the neutrality requirement is not absolute, as is illustrated by the fact that national churches recognized by public law are allowed to exist"⁷⁹

Neutrality does not mean that all religious or metaphysical aspects are to be excluded from the state's activities; however attitudes that are antireligious, such as militant secularism, or irreligious do not qualify as neutral. The principle of neutrality seeks to ensure that consideration is given, without any bias, to all conceptions existing in a pluralistic society."⁸⁰

These arguments referring to the principle of neutrality and its purpose were further used by the Federal Court to support its case that the ban was "*necessary in a Democratic society*"⁸¹" (article 9 of the convention) as will be seen below, while the appellant questioned the impugned order's basis in law as required by the ECtHR. The

⁷⁸ *Ibid.* Para A.3.

⁷⁹ ATF. vol118 la, p.46, ground 4(e)(aa) at p. 58; vol.116 la, p.252 ground 5(d) at pp.258-259 cited in *Ibid.* para A.4.

⁸⁰ *Dahlab, supra* note 68 para A.4.

⁸¹ This Part is drawn from article 9 of European Convention on Human Rights.

Federal Court submitted the legal basis was held in the Public Education Act of November 1940 and its provisions that: "The public education system shall ensure that the political and religious beliefs of pupils and parents are respected."⁸² "Civil servants must be lay persons; derogations from this provision shall be permitted only in respect of university teaching staff."⁸³

And the Federal Constitution Act of May 29, 1874 article 27.3: "It shall be possible for members of all faiths to attend state schools without being effected in any way in their freedom of conscience or belief."

These sections of Swiss national law were weighed against the relevant sections of the Convention for the Protection of Human Rights and Fundamental Freedoms entered into force on September 21, 1970. Article 9- Freedom of thought, conscience and religion which reads as follows:

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

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

⁸² The Public Education Act, Canton of Geneva, 1948, s. 6 cited in *Ibid.* para A.3.

⁸³ The Public Education Act, Canton of Geneva, 1948, 120:2 cited in *Ibid.* para A.3.

of others.”

Additional considerations were made to the case law of the ECtHR regarding article 9 and its meanings and purpose stating its nature as a cornerstone of democracy by the introduction of its May 25, 1993 judgment in the case of *Kokkinakis v. Greece*⁸⁴ which in note 31 on page 17 states:

A. General principles

31. 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 also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism in dissociable from a democratic society, which has been dearly won over the centuries, depends on it.

While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to ‘manifest [one’s] religion’. Bearing witness in words and deeds is bound up with the existence of religious convictions.

According to article 9, freedom to manifest one’s religion is not only exercisable in community with others, ‘in public’ and within the circle of those whose faith one shares, but can also be asserted ‘alone’ and ‘in private’; furthermore, it includes in principle the right to try to convince one’s neighbor, for example through ‘teaching’, failing which, moreover, ‘freedom to change [one’s] religion or belief’, enshrined in

⁸⁴ *Kokkinakis v. Greece*, (1993), 60 E.C.H.R. (Ser. A).

article 9, would be likely to remain a dead letter.⁸⁵

As evidence was given that the impugned order had interfered with the appellant's ability to find employment within her profession the further consideration of gender issues was brought into the case.⁸⁶ Ms. Dahlab entered the fact that while she as a Muslim woman was asked to choose between practicing her religion and finding employment within the public school system⁸⁷, which she had earlier established had a virtual monopoly on schools with private schools being rare⁸⁸, no such barriers existed for Muslim men.⁸⁹ In support of this argument she offered article 14 of the Convention-Prohibition of Discrimination; "The enjoyment of the rights and freedoms set forth in this convention 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."

In assessing the validity of this complaint the court applied the final notion that related to the case in its entirety; 'the margin of appreciation'. This concept permeated all of the considerations of the case regarding national law, necessity, neutrality, public safety and interests, and discrimination. The concept of 'margin of appreciation' is designed to permit certain flexibility in the interpretation of law and its intended meanings. As it is impossible for law makers to predict every possible application of a law this provides that so long as laws infer the intentions or needs of the state and a basis

⁸⁵ *Ibid.* note 31.

⁸⁶ Dahlab, *supra* note 68, para B.1.

⁸⁷ *Ibid*

⁸⁸ *Ibid*

⁸⁹ *Ibid*

for jurisprudence they can be applied to a wider range of cases. For example in the *Dahlab* case the state could not have been expected to foresee the possible specifics of the case i.e. the wearing of a headscarf in a state school, when drafting the constitution, thus it is expected only to provide a general notion of its intentions for example to maintain a secular school system. The 'margin of appreciation' is the basis to permit the consideration of this specific case in the light of the possible interpretations of a more general law. The full affect of the court's thorough application of this concept to the case will be seen in its judgment.

2.1.1.3. Decision

In assessing the validity of this complaint, the court applied the final notion that related to the case in its entirety: 'the margin of appreciation'. This concept permeated all of the considerations of the case regarding national law, necessity, neutrality, public safety and interests, as well as discrimination. The concept of 'margin of appreciation' is designed to permit certain amount flexibility in the interpretation of law and its intended meanings. As it is impossible for law makers to predict every possible application of a law this provides that so long as laws infer the intentions or needs of the state and a basis for jurisprudence they can be applied to a wider range of cases. For example in the *Dahlab* case the state could not have been expected to foresee the possible specifics of the case i.e. the wearing of a headscarf in a state school, when drafting the constitution, thus it is expected only to provide a general notion of its intentions for example to maintain a secular school system. The 'margin of appreciation' is the basis to permit the

consideration of this specific case in light of the possible interpretations of a more general law. The full affect of the court's thorough application of this concept to the case will be seen in its judgment.

Secondly, the court reviewed the requirement for the measure to pursue a legitimate aim of protecting public safety, security and the rights of others. In relation to this responsibility the court viewed its role as supervisory and sought to determine if the measures were justified in principle without interfering with the state's intentions if they could be seen as having some legitimate aim. As the Swiss Courts had listed concerns regarding the above stated goals in their judgments, the court found that the aims had been legitimate.

Having accepted that its role in the matter was supervisory, the court opened its assessment into the measures "necessity in a democratic society" by reiterating the margin of appreciation that must be granted to contracting states. Thus it accepted the state's argument that the ban was needed to protect the rights of children who, considering their sensitive and impressionable age could, be influenced by a possible proselytizing effect caused by Ms. Dahlab's headscarf, which it had found to be a 'powerful religious symbol'. The Federal Court had also stated that the wearing of the Islamic headscarf failed to convey the ideals of gender equality and tolerance to pupils as it applied only to women. As it weighed these state concerns against the rights of Ms. Dahlab to freely manifest her faith the ECtHR states: "The court's task is to determine whether the measures taken at a national level were justified in principle – that is,

whether the reasons adduced to justify them appear ‘relevant and sufficient’ and are proportionate to the legitimate aim pursued.”⁹⁰

It was with this reasoning that despite the fact all incidents of disruptions to public order stemmed not from the headscarf per se but from the ban, the court concluded, without consideration to the quality of the aim, or its true capacity to accomplish that aim, the ban was necessary to preserve neutrality and secularism in the public school system as well as religious harmony throughout the state. Thus the court found that the ban met all the requirements of article 9 section 2 and it was a permissible infringement on the appellant’s right to freedom of religion.

As to the further submission that the measure had violated Ms. Dahlab’s right to enjoy such freedoms without discrimination as is guaranteed under article 14 of the Convention, the court considered that the ban was not intended to discriminate against Ms. Dahlab as a woman but to maintain a neutral environment within the school system and could equally affect men wearing visible symbols of religion. It reasoned that the margin of appreciation allowed for states to determine if actions were made in pursuit of legitimate aims, and stated that if individuals are treated differently, it must be considered if legal justifications excusing such differences can be found. The court offered that: “For the purposes of article 14 a difference in treatment is discriminatory if it does not pursue a legitimate aim or if there is not a relationship of proportionality between the means employed and the aim sought to be realized.”⁹¹

⁹⁰ *Ibid.* para B.1.

⁹¹ *Ibid.*

After detailed consideration of the case, it was found to be manifestly ill-founded under article 35.3 “The court shall declare inadmissible any individual application submitted under article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.”⁹² And dismissed the case according to article 35.4 which states: “The court shall reject any application which it considers inadmissible under this article. It may do so at any stage of the proceedings.”⁹³

2.1.2. Sahin v. Turkey

This case involved a university student who was denied entry into lectures and exams necessary to her graduation from the School of Medicine at Istanbul University as she wore the Islamic headscarf. The University of Istanbul had issued a circular stating that female students wearing the Islamic headscarf and male students with beards were not to be admitted to lectures and exams in the university. This led Ms. Sahin to take steps to overturn the ban in Turkey and failing that, appeal to the ECtHR for protection of her rights to freedom of religion and religious expression, freedom from discrimination and the right to education. When the chamber judged in favor of the state, she appealed to the Grand Chamber which upheld the findings of the Chamber. She was finally forced to complete her education at the University of Vienna, outside her homeland.

⁹² Convention for the Protection of Human Rights and Fundamental Freedoms, 1 November 1998, Eur.T.S. online: <<http://conventions.coe.int/treaty/en/Treaties/Word/005doc>>.

⁹³ *Ibid.*

2.1.2.1. History

Leila Sahin was a Turkish national, from a practicing Muslim family, born in 1973, who was in pursuit of a medical degree at the time of this case. She studied at the University of Bursa for four years, during which she wore a headscarf without incident before enrolling at the Cerrahpasa Faculty of Medicine at the University of Istanbul on August 26, 1997. On February 23, 1998 the Vice Chancellor of the University issued a notice to staff and students that read as follows:

By virtue of the constitution, the law and regulations and in accordance with the case law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the University administrative boards; students whose 'heads are covered' (wearing the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students.⁹⁴

This notice further instructed teachers that any such students should be told that they are not entitled to enter classes and to leave the premises. Teachers were to report any difficulties arising from this, so that discipline may be handed out.

On four occasions, the Istanbul University staff denied Ms Sahin entrance to necessary classes and exams; a March 12, 1998 oncology exam, an April 16, 1998

⁹⁴ *Sahin* (2004), *supra* note 4, para. 12.

neurology lecture, a June 10 public health exam and on March 20, 1998 she was refused enrollment in an orthopedic traumatology class. In February of 1998, disciplinary action was started against her as a result of her participation in a protest against the dress code, and in June she was issued a warning that her attire was unbecoming a student. Due to these actions Ms. Sahin applied for an order to set aside the February 23, 1998 circular on the grounds that it violated her rights under the European Convention for the Protection of Human Rights, which Turkey had ratified. That application was dismissed by the Istanbul Administrative Court on March 19, 1999 and the Supreme Administrative Court dismissed an appeal of the matter on April 19, 2001. Prior to these judgments the applicant, finding it impossible to continue study in Turkey left the country to attend Vienna University where she would be free to finish her medical degree while wearing her headscarf.⁹⁵

The history of Turkey held significant relevance to this case, in particular, the country's development as a republic and the move to develop secularism after this change in administration. The Ottoman Empire which ruled Turkey prior to the revolution had been a religious government and had required that all persons dress in keeping with their religious affiliations. When the country was officially established as a republic on October 29, 1923 secularism became a founding principle of the state. A series of revolutionary reforms were undertaken in order to facilitate this new separation of the church and state including, the abolition of the caliphate in 1923, the closure of all religious schools in 1924, and the repeal of Islam as the official state religion in 1928. In its efforts to suppress the influence of religion and religious identity in the state the

⁹⁵ *Ibid.* paras. 13-25.

government aimed to develop a religion free zone which it believed would allow for all citizens to be treated equally. In the Headgear Act of November 28, 1925 the republic sought to enforce what it viewed as modern dress, discouraging traditional religious attire. On December 3, 1934 it furthered this aim through the Dress (Regulations) Act, requiring that all forms of religious attire were to be permitted only in places of worship and religious ceremonies.⁹⁶

In more recent history Cabinet ruled on July 22, 1981 that public employees, personnel and students in state institutions must wear ordinary, sober, modern dress. On December 13, 1984 Supreme Administrative Court stated: "Beyond being a mere innocent practice wearing the headscarf is in the process of becoming the symbol of a vision that is contrary, to the freedoms of women and the fundamental principles of the republic".⁹⁷ Then, a judgment from April 9, 1991 made by the Constitutional Court in response to the Higher Education Act Section 17 that allowed for freedom of dress so long as it was in keeping with the law, was published in the Official Gazette on July 31, 1991 stating: "In higher-education institutions, it is contrary to the principles of secularism and equality for the neck and hair to be covered with a veil or headscarf on grounds of religious belief."⁹⁸

These bans were seen as efforts to emancipate society, and especially women from old world traditions and fundamentalist influences.⁹⁹ They were considered by the

⁹⁶ *Ibid.* Paras. 27-29.

⁹⁷ *Ibid.* para 34.

⁹⁸ *Ibid.* para. 38.

⁹⁹ *Ibid.* para. 27-30.

government and the courts to be essential in the development of a free and secular state. The headscarf, in its natural role as a form of women's dress, was seen as contrary to the movement for gender equality. The concern that religious dress could lead to discrimination was not limited to gender issues however as the vast majority of the population of Turkey is Muslim, there existed concerns that those who failed to wear traditional religious attire would be discriminated against by the more religious individuals in society.¹⁰⁰

2.1.2.2. Sahin v Turkey, Chamber 2004, Case Facts

In addition to the above stated historical background of the Turkish state and Ms. Sahin's specific case, the chamber took into account the fact that there had been a precedent set at Istanbul University prior to Ms. Sahin's enrollment regarding the appropriate attire for midwifery and other medical students that was enforced due to hygiene considerations and the standard uniforms that students would be expected to wear once working in their field. It was also noted that in the Turkish constitution the Vice Chancellors of universities held the legal right to take whatever actions they feel necessary to maintain proper order in the institutions they have responsibility for, including the right to issue a dress code.¹⁰¹

The court brought into its considerations the laws throughout the European Union regarding the headscarf and the varied state of the debate regarding it. It noted that while

¹⁰⁰ *Ibid.* paras. 30-38.

¹⁰¹ *Ibid.* paras 40-41.

there were no issues arising in several countries and that some had enacted laws to give the right to wear the Islamic headscarf to student and teachers there had been bans in other states. The court entered France as an example of this looking to the country as one built upon the foundation of secularism and reviewing the example set in its ban of religious attire as a means of protecting secular values.¹⁰²

It was accepted by the court that Ms. Sahin wore her headscarf as a means of obeying a precept of her faith and that regulations requiring its removal constituted an infringement of her article 9, right to freedom of religion and religious expression. Pursuant to this fact the primary considerations of the court were focused on article 9.2 regarding the acceptability of this infringement on an individual's rights. The circular issued by the Vice Chancellor of Istanbul University on February 23, 1998 and all forms of domestic law including both written and unwritten law, statutory and judge made law, plus regulatory measures of those upon whom parliament had delegated such powers were all entered into evidence in relation to the requirement that the measure was 'prescribed by law'. The history of dress codes at the school was given as evidence that there was not only a legal basis for the ban but that such an interpretation of the law could be foreseeable to the appellant.¹⁰³

There was no dispute between the appellant and the government in regards to the 'pursuit of a legitimate aim' requirement as Ms. Sahin understood the importance of maintaining neutrality and secularism in Turkish universities. She fully accepted that the

¹⁰² *Ibid.* paras 53-54.

¹⁰³ *Ibid.* paras 72-75.

university should endeavor to uphold these state values and undermining such order had never been her intention in any manner.¹⁰⁴

However, her claim of acceptance for state values would play a significant part in this dispute as the court considered if the ban was 'necessary in a democracy'. In this respect the applicant offered the fact that she supported the principles of secularism and neutrality and had worn the scarf solely on the grounds of religious obedience and not for political reasons such as to advance fanaticism, cause tensions or to spread her religion, demonstrated the ban was not required to achieve state aims, involving such factions. It alleged these groups had used the headscarf for political purposes. This was intended by Ms. Sahin to challenge the idea that hijab was in conflict with the founding ideals of the state. She further submitted that there had been no negative incidents resulting from her wearing of the scarf during her four years at Bursa University and stated that: "The vast majority of Turkish people- who were deeply attached to the principle of secularism- were opposed to theocracy, but not to the Islamic headscarf."¹⁰⁵

The appellant also offered the following statement on the duties of the state should public order be a concern due to differences between citizens: "When there was a risk of tensions coming to the surface in society- as was inevitable in a pluralist society- the authorities role in such circumstances was not to eliminate the cause of the tensions by doing away with pluralism, but to ensure that the competing groups were tolerant of

¹⁰⁴ *Ibid.* paras 82-84.

¹⁰⁵ *Ibid.* paras 85-87.

each other.”¹⁰⁶

Lastly, she alleged that as the ban had only affected Muslim students, because Jews were permitted to wear the Kippa and crucifixes were allowed for Christian students, thus, that the ban was discriminatory.

The government responded to this evidence with concerns regarding the possible growth and development of religious fanaticism which it viewed the headscarf to be a symbol of. The University of Istanbul had been the site of previous incidents and was a risk to women's rights in that these fundamentalists promoted Sharia¹⁰⁷ which the government viewed as “[w]holly incompatible with the principle of secularism and the Convention.”¹⁰⁸

It also argued that the headscarf was in conflict with the idea of freedom as shown by the following court statement:

Turning to the applicant's argument that the Quran 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 presupposed that the individual enjoyed the widest possible range of opportunities and choices.¹⁰⁹

¹⁰⁶ *Ibid.* para 88.

¹⁰⁷ Islamic Law.

¹⁰⁸ *Sahin* (2004), *supra* note 4, para 94.

¹⁰⁹ *Ibid.*

2.1.2.3. Chamber 2004, Judgment

The chamber reviewed these differing opinions and found for the state in its judgment. In doing so the court noted that the primary responsibility and ability in assessing the needs of the contracting states lay with the national government as they knew best the needs of their nation. "The court observes at the same time, that the role of the Convention machinery is essentially subsidiary. As well established in its case-law, the national authorities are in principle better placed than an international court to evaluate local needs and conditions."¹¹⁰

The court further found that a margin of appreciation must be granted for this assessment and its application to state law. That although considerations must be given to the freedoms that are at stake, the "national decision-making body must be given special importance"¹¹¹ Thus, although the supervision of the ECtHR may be necessary to maintain pluralism and ensure that freedoms are never fully withdrawn by the state, this margin allows for vast differences in state definitions of need and law to exist and for those differences to be respected by the supervising bodies. Ultimately in the course of exercising this supervision, the court's duty is therefore not to judge the validity of the state's need for interference with individuals' rights but to determine if the state truly regarded the interference as necessary.¹¹² It is apparent that when the state regards it as necessary, offering evidence of concerns of fundamentalism, interference with the rights of others and public order, the court considers itself impotent to declare the infringement

¹¹⁰ *Ibid.* para 100.

¹¹¹ *Ibid.* para 101.

¹¹² *Ibid.* paras 102-104.

unnecessary in light of the state's concerns.

In addition to this, the court found that based on *Dahlab v Switzerland* and *Karaduman v Turkey*¹¹³ it was already present in case law that it was acceptable to limit the wearing of the Islamic headscarf if the state demonstrated a legitimate purpose in accordance with article 9 section 2.¹¹⁴

It also accepted the state's evidence that the ban was applied to persons of all faiths and was not discriminatory. The court considered that in Turkey's view the ban was in fact designed to prevent discrimination both among differing faiths and genders. In relation to this issue of gender equality, the court noted its role as a primary value of the European Union and agreed with the state that the Islamic headscarf, being a religious requirement that applied to women only, was in contradiction with the principle of gender equality. As the Turkish courts had already ruled on this incompatible nature of the headscarf with the state's Constitution in this sense and enshrined the rights of universities to regulate it the fact that different institutions dealt with the matter differently was inconsequential.¹¹⁵

Based on the fact that the university's policy was in keeping with article 9, the court further found, although the ban had required Ms. Sahin to choose between receiving her education in her Turkish homeland and obedience to her religion. It had not violated her right to education under article 2 of protocol 1 or her rights to maintain a private life

¹¹³ *Karaduman v. Turkey*, no. 16278/90, [1993], DR 74, E.C.H.R.

¹¹⁴ *Sahin* (2004), *supra* note 4, para 98.

¹¹⁵ *Ibid.* paras 104 -108.

under article 8 and to express her beliefs under article 10. In respect to the latter two complaints, the court considered that the evidence and judgment in these matters would have been identical to its considerations under article 9.

2.1.2.4. Sahin v Turkey, Grand Chamber 2005¹¹⁶, Case Facts

Ms. Sahin appealed the Chamber findings and brought her case before the Grand Chamber on May 18, 2005. During this hearing the court took into evidence the case facts, procedures and judgments of the original chamber hearing in addition to new arguments from the parties.

Ms. Sahin's submitted to the court that the concepts of democracy and republic were differing in nature, and that the court should take into consideration those military coups that had played a primary role in the development of the Turkish judiciary and university systems. She inferred through this that while Turkey was a republic, it had not been created democratically and could not claim to stand by the values of pluralism and broadmindedness. She further questioned the margin of appreciation that the courts had granted European Union states, and argued that as no other states had headscarf bans affecting university students and that no tensions had arisen from the lack of such bans. She further stated that:

Students were discerning adults who enjoyed full legal capacity
and were capable of deciding for themselves what appropriate conduct

¹¹⁶ Sahin v. Turkey, no. 44774/98, [2005] E.C.H.R., aff'g (2004) E.C.H.R. 44774/98 [*Sahin* (2005)].

was. Consequently, the allegation that, by wearing the Islamic headscarf, she had shown a lack of respect for the convictions of others or sought to influence fellow students and to undermine their rights and freedoms was wholly unfounded. Nor had she created an external restriction on any freedom with the support or authority of the state. Her choice had been based on religious conviction, which was the most important fundamental right that pluralistic, liberal democracy had granted her. It was, in her mind, indisputable that people were free to subject themselves to restrictions if they considered it appropriate. It was also unjust to say that merely wearing the Islamic headscarf was contrary to the principle of equality between men and women, as all religions imposed such restrictions on dress which people were free to choose whether or not to comply with.¹¹⁷

The court fell back on its previous statement, that while the rights to hold and manifest religious beliefs is an essential freedom, it is also designed to protect those who do not believe, and that article 9 was not made to protect every act of religion. It stated that balance must be achieved through this so that the majority does not abuse the minority in a democracy. These concerns were expressed throughout the following court statements:

The court has frequently emphasized the state's role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressedThat it requires the state to

¹¹⁷ *Ibid.* para 101.

ensure mutual tolerance between opposing group Accordingly the role of authorities in such circumstances is not to remove the cause of the tension by eliminating pluralism but to ensure that the competing groups tolerate each otherPluralism, tolerance and broadmindedness are hallmarks of a democratic societyPluralism and democracy must also be based on dialogue and 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.¹¹⁸

In addition to these statements which express the views of the court regarding pluralism, democracy and tolerance, the court referred to the varying attitudes regarding the Islamic headscarf in Europe and that previously, the Convention had found that it was acceptable to limit rights and to restrict the wearing of the headscarf when it was done in the name of maintaining public order and security. It viewed the principle of secularism to be the main consideration in the case at hand and that allowing any form of religious dress in a secular institution as a direct act against that value. It also entered the fact that this ban did apply equally to all faiths via a July 9, 1998 resolution of Istanbul University to ban all religious dress.

In this appeal the court further considered Ms.Sahin's argument that the ban had interfered with her right to education as guaranteed under article 2 of protocol No.1¹¹⁹ since she had been forced to move her studies to the Faculty of Medicine at Vienna

¹¹⁸ *Ibid.* paras 107-108.

¹¹⁹ No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

University where no such ban existed. While the government maintained that the ban was in place to control religious extremism on campus, Ms. Sahin offered that as no issues had arisen when she had worn the Islamic headscarf at other schools and as such, this was unnecessary. She also argued that if university officials held concerns about such extremist groups, they had other means available to them to control such threats to public order. The government stated that the appellant could have foreseen the ban coming into effect considering past rules on dress and that as it had permitted her to enroll in the university with her headscarf, it had not interfered with her right to pursue an education.

2.1.2.5. Sahin v. Turkey, Grand Chamber, 2005. Decision

The court found, by means of a majority, that there had been no interference with Ms. Sahin's right to education and despite the courts many statements regarding the value of pluralism in democracy and the role of the state in its duty to uphold that value it maintained its reliance on the margin of appreciation granted to member states and the member states' ability to ascertain local needs.¹²⁰

While it ruled the right to higher education, though not explicitly mentioned in article 2 of protocol no.1, it was included in its scope, and such education was imperative to the development of human rights, the court also found that the right to education was subject to regulation and could be denied by the state if there was a legitimate need. The court decided that in this case, secularism in universities was a legitimate state aim and

¹²⁰ *Sahin* (2005), *supra* note 116 para. 122-123.

that the ban on headscarves was proportional to this aim.¹²¹

Thus the Grand Chamber unanimously upheld the Chamber finding that there had been no violations to articles 8¹²², 10¹²³ and 14¹²⁴ of the convention. As to article 2 of protocol No.1¹²⁵ and article 9¹²⁶ the court held by majority that there had been no violations, with Judge Tulkens submitting the lone dissenting judgment.¹²⁷

In her dissenting opinion, Judge Tulkens, agreed that article 9 is precious to all who believe and those who choose not to believe and that while restrictions may sometimes be required, it is, as the court stated, the responsibility of a democratic government to maintain pluralism and assist differing groups to engage in compromise and tolerance. To this end, she asked whether the interference with Ms. Sahin's article 9 rights was truly necessary. While it was accepted that the interference had sufficient basis in Turkish law and had pursued a legitimate aim, Judge Tulkens questioned the ability of

¹²¹ *Ibid.* para 127-146.

¹²² 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

¹²³ 1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

¹²⁴ The enjoyment of the rights and freedoms set forth in this Convention 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 states.

¹²⁵ See n. 119.

¹²⁶ See page 40.

¹²⁷ *Sahin* (2005) *supra* note 116 paras 164-166.

the headscarf ban to guarantee the aim of public order in an efficient manner. She felt that the assumption that the ban was the least restrictive and the most proportionate solution should be reconsidered. In doing so she again drew on the court's own words expressing her agreement with the statement that: "The court must seek to reconcile universality and diversity and that it is not its role to express an opinion on any religious model whatsoever."¹²⁸

She offered her full support for the ideals of secularism, liberty and equality in her judgment while holding a firm stance against the notion that these ideals could be used against each other. She found that Ms. Sahin had no interest in undermining the value of secularism in her country, and that as a student she should be viewed differently than a teacher would in a similar case, specifically, *Dahlab v. Switzerland*. Ms. Sahin's headscarf was worn in a manner which was not found to cause disruption to public order or to pressure, proselytize, or cause interference with the beliefs of others. Judge Tulkins found that in the absence of any evidence that the headscarf had a tangible effect on those who chose to leave their heads uncovered there was insufficient evidence of a pressing social need for the ban.¹²⁹

In regards to the question of gender equality she found the court had overstepped its role by appraising the Islamic headscarf as 'a powerful religious symbol',¹³⁰ that 'appeared to be imposed on women by a religious precept that was hard to reconcile with

¹²⁸ Sahin v. Turkey, no. 44774/98, [2005] E.C.H.R., aff'g (2004) E.C.H.R. 44774/98, Tulkins F., dissenting, paras 1-3 [Tulkins, "dissenting opinion"].

¹²⁹ *Ibid.* para 5-8

¹³⁰ *Ibid.* see para 12

the principle of gender equality' and difficult to be 'reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination'¹³¹. Judge Tulkens felt the court should not judge Ms. Sahin's free choice to wear a headscarf by imposing its own opinion of the scarf's meanings upon her. She referred to this action of the court as 'paternalism' and held the opinion that a woman could not be deprived of her own free choice to practice her faith in the name of gender equality.¹³²

As to the issue of violation to Ms. Sahin's rights to education, Judge Tulkens agreed with the courts assessment that higher education was included in this right and that it was a contributing factor in the continued development of human rights. Based on these facts she found it unfortunate that the court viewed it acceptable to infringe on this right under the pretence of reasons she found to be insufficient for such actions. She further questioned the possibility that this infringement had constituted religious discrimination quoting Resolution no.1464 (2005) of the Parliamentary Assembly of the Council of Europe, passed on October 4, 2005 in which all states had a duty to "fully protect all women living in their country against violations of their rights based on or attributed to religion"¹³³ She furthered her opinion on this issue by stating:

"More fundamentally, by accepting the applicant's exclusion from the University in the name of secularism and equality, the majority have accepted her exclusion from precisely the type of liberated environment in which the true meaning of these values can take shape and develop... A tolerance-based dialogue between religions and cultures is an education in

¹³¹ *Ibid.*

¹³² *Ibid.* paras 12-13

¹³³ *Ibid.* para 18

itself, so it is ironic that young women should be deprived of that education on account of the headscarf. Advocating freedom and equality for women cannot mean depriving them of the chance to decide on their future. Bans and exclusions echo that very fundamentalism that these measures are intended to combat.”¹³⁴

In the final note of Judge Tulkens dissenting opinion she provides that: “Above all, the message that needs to be repeated over and over again is that the best means of preventing and combating fanaticism and extremism is to uphold human rights.”¹³⁵

2.1.3. France

Since 1989, there has been an ongoing controversy throughout France regarding the Islamic headscarf¹³⁶ or veil.¹³⁷ This debate began in the 1989-1990 school year and persisted until March 2004, when legislation was enacted banning headscarves in all state schools. French law no. 2004- 228 of 15 March 2004, with respect to the principle of ‘laicite’ reads as follows: “In public schools, the wearing of symbols or dress by which the students ostensibly manifest religious membership is prohibited. The school rules must confirm that disciplinary procedures are preceded by dialogue with the student.”¹³⁸

On May 18, 2004, the Minister of Education issued a circular about the interpretation of this provision (note 6) which stated: “The prohibited signs and dress are

¹³⁴ *Ibid.* para 19.

¹³⁵ *Ibid.* para 20.

¹³⁶ Foulard, French.

¹³⁷ Voile, French.

¹³⁸ Brems, “above children’s head”, *supra* note 3 at n. 5.

those by which the wearer is immediately recognizable with regards to his or her religion, such as the Islamic veil, whatever its name, the kippah or a crucifix of manifestly exaggerated dimensions.”¹³⁹ This circular was challenged before the Conseil d'etat, which held that it did not violate religious freedom. “Since it is motivated by an objective of public interest, i.e. respect for the principle of laicite in public schools.”¹⁴⁰

In 2000 the Conseil d'Etat recommended that state school teachers should refrain from wearing the headscarf in schools and was successful in limiting teacher's rights in this manner.¹⁴¹ The Special Rapportuer, sent to France by the United Nations in 2005, found that in regards to employment by the state, factors such as religion could not be considered but that ultimately a person, upon being hired as a civil servant, for example as a teacher, would then be expected to appear neutral. This rule had been applied to teachers in France who were already barred from wearing religious symbols, such as the Islamic headscarf during the performance of their duties at the time when the religious symbols ban for students came into effect. She then commented that concerns have been raised regarding the fact this policy does effectively bar members of certain religious groups from public sector employment, as those who are unable to remove all visible signs of faith cannot comply.¹⁴² These new laws were the culmination of the recommendations of a special investigatory commission which, President Jacques Chirac appointed in July 2003 to look into “the application of the principle of secularism”; to

¹³⁹ *Ibid.* at n. 7.

¹⁴⁰ Laïcites, Conseil d'Etat, 2004, Union Française pour la cohésion nationale, nr. 269077

¹⁴¹ Brems, “above children's head”, *supra* note 3 at 119-120.

¹⁴² Asma Jahangir, *Civil and Political Rights, Including the Question of Religious Intolerance*, Addendum 2, E/CN.4/2006/5/Add.4, (2006) para 38-43 [Jahangir].

lead this commission President Chirac appointed an immigration expert, *Bernard Stasi*.¹⁴³ The conclusions of this commission were widely publicized for their efforts to create a new understanding in regards to the assimilation of the countries' growing minority population with consideration to the principle of laicite and its value in French society.¹⁴⁴

2.1.3.1. History of Immigration and Laicite

France has a long and proud history of secular politics that can be traced as far back as in 1589, when it attempted to create the notion of freedom of religion for Protestants at a time when governments traditionally dictated the religion of their subjects. This attempt to create an aura of freedom of choice in religion was a small first step in the country's efforts to separate the church and the state which progressed centuries later in the course of the revolution when the French began to develop strong principles of humanity and tolerance between citizens. After much dispute, these ideals came to form the tone of law under the Third Republic. In 1882 secular education was mandated for all children aged six through thirteen by this government.¹⁴⁵

Today in France this notion of secularism is one of the nation's highest held values. The French strongly believe that citizenship is not a means of identifying oneself as a member of the whole, that is, simply being swayed and controlled by the majority

¹⁴³ COMMISSION DE REFLEXION SUR L'APPLICATION DU PRINCIPE DE LAÏCITE DANS LA REPUBLIQUE, (11 December 2003; report by Bernard Stasi).

¹⁴⁴ Elian R. Thomas, "Keeping identity at a distance: Explaining France's new legal restrictions on the Islamic headscarf" (2006) 29:2 Ethnic & Racial Stud. 237 at 237-238 [Thomas].

¹⁴⁵ Talal Asad, "Reflections on Laicite and the public Sphere", (2005) 5:3 Social Science Research Council: Items and Issues [Asad].

but rather the entitlement of one's right to the realization of individuality. Their concept of secularism is designed to liberate the individual from community pressures, allowing them to make their own free choices in matters of faith and lifestyle. With this freedom granted, a citizen can choose to believe or not to believe in the ideals of their community of origin, allowing them to change their belief systems, and through membership in the wider French community, be released from the constraints of their smaller, natural family and community. On the other hand, critics of this attitude state that secularism should include the right to be a member of a religion or ethnic community and to choose to concede one's individuality to the will of such a community. In this manner, the application of secularism in France is designed to protect the individual and the state from the influence or control of religion, which is interestingly different from the American ideology that secularism's function is to protect the rights of religion and the religious from abuse by state powers.¹⁴⁶ Likewise, while the common understanding of human rights is that they are one's protection from the state, the French see the enforcement of state values as their protection from society.¹⁴⁷ In its ideal form, this principle should create a balance that permits people to choose or choose not to identify with religious and cultural traditions without being unduly controlled by them or the state.¹⁴⁸

It is in this political realm that nearly half of all Muslims in the European Union reside. France's years of lax immigration laws and past colonial exploits in North Africa have been major contributors to this surging Muslim community. However despite this

¹⁴⁶ Thomas, *supra* note 144 at 239-242.

¹⁴⁷ Lyon & Spini, *supra* note 6 at 335.

¹⁴⁸ Thomas, *supra* note 144 at 242.

unprecedented growth in its minority population, the French government persists in its refusal to address the specific needs of its minority communities, but rather works to feed the nation's original sense of 'Frenchness' irrespective of the changing ethnic terrain. As a result of this government attitude, France has not accepted the Council of Europe's Framework Convention for the Protection of Minorities and views it as irrelevant to the Republic¹⁴⁹. It is possible that one may infer from this, a prevailing sense that in the eyes of the French Government and in accordance with their views of secularism, that minorities do not exist in France because citizenship has rendered them French, and therefore placed them in the majority, regardless of the uniqueness their communities of origin may possess. In this sense when one becomes French, one's origin at least in the official government view is erased.

However, the reality is that amongst citizens, community differences not only exist but are increasingly becoming the cause of tensions. An element of communitarianism has been developing throughout the country, meaning that individuals are embracing a tendency to identify with certain social groupings along religious and ethnic lines.¹⁵⁰ Anti-Muslim attitudes, often stemming from misunderstanding and misinformation, as well as anti-Semitism have been on the rise in France. Violence against these two minority groups from outside parties and frequent tensions between them have been at the forefront of racism in France, including fears that the Israeli-Palestinian issue and related politics are entering schools. Terrorism, the American "War on Terror" and the deportation of several Muslim Imams, who were viewed as extremist,

¹⁴⁹ Krassimir, *supra* note 1 at 236-237.

¹⁵⁰ Thomas, *supra* note 144 at 253.

have all played a role in growing problems, however these issues are extraneous to the headscarf debate which began in 1989 and has since then remained the recognizable 'face' of racial tensions in France.¹⁵¹

2.1.3.2. French law, 2004, NO. 288

These tensions led to concerns by school officials, that in order to create harmony it was necessary in some cases to prevent minority Jewish students from being identified or from feeling threatened by their visibly Muslim class mates.¹⁵² In addition to these issues, administrators held strong concerns that in some cases, girls may be forced by their families to attend school veiled, and were deserving of protection from such pressures. In 1989 after the expulsion of three schoolgirls from their public School of Gabriel-Havez College¹⁵³, the Conseil D'Etat¹⁵⁴ issued an opinion that a religious symbol such as the Islamic headscarf can have many meanings and outcomes, and as such, gave authority to local administrators to decide on a case by case basis if the wearing of hijab was appropriate in their schools. The council also sought to encourage better communication among schools, students and student families.¹⁵⁵

While this policy provided the flexibility for girls to continue covering where it was acceptable, it posed a very difficult problem for school administration. The council had set a very precise list of requirements, such as evidence of provocative or

¹⁵¹ *Ibid.* at 246-253.

¹⁵² *Ibid.* at 252.

¹⁵³ Krassimir, *supra* note 1 at 235.

¹⁵⁴ Council of State.

¹⁵⁵ Thomas, *supra* note 144 at 244.

proselytizing behavior¹⁵⁶ that administrators had to meet before they could order a student to stop wearing her hijab and outlawed any total bans, preferring for school staff to consider each case individually. Administrative decisions were often contested in court and were sometimes overturned, adding to the difficulties faced by officials.¹⁵⁷

With respect to these ongoing failures of the original policy the state ordered a special commission to be convened to research the issues more thoroughly and provide a report as well as policy recommendations to the government. This commission was convened in 2003, under the heading of Bernard Stasi, an expert in immigration and former cabinet minister. Stasi was responsible for the selection of the nineteen remaining commission members and placed among them three Jews, three Muslims and six women, all of whom held a firm belief in secularism.¹⁵⁸

The Stasi Commission heard testimony from school officials, students and parents as well as outside parties concerned about the headscarf issue. It heard testimony regarding anti-Semitism in schools and the reading of a letter from the parent of a Jewish student whose child was afraid of being recognized as a Jew for fear of abuse by classmates¹⁵⁹. Several feminist organizations testified before the commission including the French-Iranian writer, Chadortt Djavann, who is strictly against the headscarf, and NPNS, a women's organization, representing women from poor, disadvantaged neighborhoods, whose name stands for, Neither Whores Nor Submissive. In the

¹⁵⁶ Jahangir, *supra* note 142, paragraph 11.

¹⁵⁷ Thomas, *supra* note 144 at 244 -245.

¹⁵⁸ Kramer, *supra* note 42.

¹⁵⁹ Thomas, *supra* note 144 at 252.

testimony of NPNS, the chronic abuses many of these women experienced in their communities were offered for consideration. This included family pressures that had removed the hijab from the realm of choice, and entered it into the area of force. This group spoke of an Islam that was male dominated and abusive to girls in the community, through the enforcing of hijab. Throughout the course of this testimony, the commission heard from only two girls who wore the hijab, and the environment is reported to have become so charged that it was difficult to express views in favor of the headscarf without fear of negative backlash.¹⁶⁰

The Stasi Commission, given the testimony that was heard, regarding the wearing of the Islamic headscarf in the classroom and its interest in upholding the French principle of *laïcité*, came forward with a recommendation for a nationwide ban on the wearing of visible religious symbols of any kind in schools. In its report concerns are expressed that the ideologies of the world outside the classroom could damage the learning environment inside:

“The students must be able to learn and develop themselves in a serene climate in order to acquire autonomous judgment. The state has to prevent their minds being harassed by the violence and passions of society: without being a sterile room, school should not become an echo room of the world's passions, lest it fails its educational mission.”¹⁶¹

The commission did find that some girls did have a strong desire to wear the headscarf by their own free will, but when it considered that the majority did not want to

¹⁶⁰ *Ibid* at 248-249.

¹⁶¹ Brems, “above children’s head”, *supra* note 3 at 120, n. 8.

cover, it chose to cede to the majority, stating: "After we heard the evidence, we concluded that we faced a difficult choice with respect to young Muslim girls wearing the headscarf in state schools. Either we left the situation as it was, and thus supported a situation that denied freedom of choice to those- the very large majority- who do not want to wear the headscarf; or we endorsed a law that removed the freedom of choice from those who do want to wear it. We decided to give freedom of choice to the former during the time they were in school, while the latter retain all their freedom for their life outside school".¹⁶²

Ghislaine Hudson, the principle of Lycee Joliot-Curie, a high school within just over an hour drive of Paris, that has at least twenty-five percent Muslim students in its body, and has seen many issues of racism and intolerance in recent years, sat on the Stasi Commission. In a later interview she expressed the concern that many of these immigrant children are poorly integrated into French society and in defense of the veil law, which she had voted for, stated: "School at least should be free; the time you're in school should be free. Muslim girls should be given the choice to be free young women. And the law was aimed at protecting the minds of those girls."¹⁶³

The commission was further required to consider the case-laws of the European Court of Human Rights in order to make recommendations on the phrasing of the new law, which would be acceptable to the court if the law was appealed. In its investigation into the court's previous findings in cases involving other countries, the commission

¹⁶² Weil, Patrick, "A Nation in Diversity: France, Muslims and the headscarf" (2004) as cited in Asad, "Interdependence", *supra* note 7, n. 10.

¹⁶³ Kramer, *supra* note 42.

found that the court had consistently upheld the principle of secularism, and this ultimately became the cornerstone of the new law.¹⁶⁴

In addition to the recommendation it made for the veil law, the Stasi Commission made several more recommendations to government, on improving immigrant and minority status in France. One of these was a proposal to implement Eid-el-Kebir and Yom Kippur as public school holidays in an effort to permit some open-minded allowances for religious groups present in the school system, while trying to remove the elements which had caused problems. However, only the ban on religious symbols was brought into effect.¹⁶⁵

2.1.3.3. Global Reactions

The entrance of the ban on Islamic headscarves in French public schools has met with criticism from many sources. In what was probably the most anticipated form of protest, members of France's Muslim community held marches against the law in Paris and other major French cities drawing between five and ten thousand estimated participants, declaring that the veil is their choice. However, more surprisingly, while one may be tempted to believe that the ban was designed to protect Christian interests, officials from the three major Christian denominations in France; Catholic, Protestant and Orthodox, all argued against the ban. Even the National Front, a right-wing organization,

¹⁶⁴ Thomas, *supra* note 144 at 254-255.

¹⁶⁵ Brems, "above children's head", *supra* note 3 at 121.

disagreed with the ban, complaining that it masked the real issue of over-immigration.¹⁶⁶

Allegations of discrimination in the application of the law were made by The International Helsinki Federation for Human Rights (IHF) on account that the ban held greater consequences for young Muslim women, than for other groups. To this effect it stated that: "It is not at the discretion of a state to determine which manifestations are legitimate as long as they do not violate other people's basic human rights or do not endanger public health safety or morals, as defined by international law."¹⁶⁷

The allegations of discrimination were further fuelled by the fact that the Ministry of Education made a 2004 declaration that the Sikh turban was not a religious symbol and is related to cultural traditions, after a group representing Sikh boys argued that the unshorn hair is the required religious symbol, and that the turban is only a traditional means of containing the hair. In the end, this ruling was overturned in August of 2004¹⁶⁸.

The CRC Committee voiced the opinion that the state should review the law with considerations to the European Union Convention's Rights of Children and that the ban constituted an infringement on their right to education. This concern was also at the forefront of the September 2005 decision of the United Nations Commission on Human Rights to assign its Special Rapportuer, Asma Jahangir to visit France where she assessed the headscarf ban. In her statement she expressed an opinion that the bans' effect fell disproportionately upon Muslims. She understood the intention of the law to protect those

¹⁶⁶ Thomas, *supra* note 144 at 246.

¹⁶⁷ Krassimir, *supra* note 1 at 236.

¹⁶⁸ Asad, *supra* note 145.

who may be abused via pressure from family and the community to cover up, but also addressed the fact that it was harmful to those who freely choose to. However, she noted that many women's groups who lobbied for the Islamic headscarf to be banned in schools as a religious symbol, also argued that the covering of a woman's hair is not a religious duty in Islam. Ms. Jahangir further feared that the excess of interest in the matter of Islamic headscarves in schools, had also led to problems for Muslims outside the education system. This included the capacity of the ban to, in the long term, propel young Muslim women toward fundamentalism due to their anger over the mistreatment of their faith in their formative years.¹⁶⁹ In relation to her concerns that this ban may actually fuel extremism in the Islamic community her report states:

The adoption of the law is also said to have radicalized a faction of the Muslim youth and has been systematically used in the banlieues and Mosque to disseminate the message of religious radicalism. Some critics of the new law argue that it may have been among the different elements explaining the widespread violence and riots that erupted all around France's banlieues in early November 2005.¹⁷⁰

She reinforced the child's right to education and felt that governments needed to educate schools, and in fact French citizens at large, regarding the right to manifest religion, in order to protect against discrimination that may have occurred and to assist those who have been victimized.¹⁷¹ The Special Rapportuer's assessment of the ban was due in part to her ability to look more closely at the ban's affects, and the possibilities that

¹⁶⁹ Jahangir, *supra* note 142 paras 59-63, 101-102.

¹⁷⁰ *Ibid.* para 64.

¹⁷¹ *Ibid.* para 103.

a general aura of discrimination could ensue as opposed to only considering a tight grouping of case-laws, with preference to national interpretations¹⁷². Note 68 of the Special Rapportuer's report summed up the criticism of this law stating:

More generally, some intraocular criticized the law because; in their opinion it was meant to solve a problem of a more social than religious nature. They considered that the law has had a negative impact on social cohesion and that, instead of prohibiting religious symbols, the school system should teach the peaceful cohabitation of communities and universal values.¹⁷³

¹⁷² Brems, "above children's head", *supra* note 3 at 127.

¹⁷³ Jahangir, *supra* note 142, para 68.

Chapter III: Critical analysis of European member state's approach through secularism and neutrality

The government of Turkey has boldly claimed that the Islamic headscarf is contrary to secularism. France and Switzerland have also found that banning religious insignia is a valid method, by which to protect and maintain secularism. Through these incidents it appears that secularism is incompatible with the human right to freedom of religious expression. In the current age, international bodies are struggling to develop and enshrine human rights in law, as a means of protecting the dignity and sacred nature of all human lives. Yet, despite these developments in human consciousness, secularism is emerging as a political ideology that is more valuable to some societies than human freedoms. In order to understand the conflict between these two notions, we must extrapolate the exact nature of secularism that has made it so valuable. Moreover, it is crucial to identify and question the results of secular exclusivity which have been shown to include the ghettoization and marginalization of cultural or religious communities. This situation has disenfranchised the members of many such communities, creating a situation that increases barriers to fruitful interaction between different layers of society. A movement away from communitarianism of this nature, could greatly contribute to the prevention of radicalization and its potentially dangerous outcomes.

3.1. Secularism and its various dimensions

The Universal Declaration of Human Rights, issued by the United Nations in

1948, in its article 1 asserts that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood."¹⁷⁴ All of these terms need to be defined and evaluated via the foundation of human rights and its philosophical background. Clearly, there is an overt elimination of any religious basis to clarify the concepts like 'equality' in the above article, since this omission is planned to achieve a consensus among all participants including the secular and religious based sources of human rights.

However, from a religious point of view, this situation did not create an equal sphere for both parties and thus fails to achieve consensus among them. The founders of modern human rights have imposed a degree of denial on the role of religion as a human rights foundation to be considered alongside secularism, known as a Westernization of humanistic values.

In its effort to liberate itself from accusations of having biased content toward secularism, human rights must engender an overlapping entity encompassing all participants' perspectives. It is unfortunate that when particular attention is focused on religion, the need for secularism is neglected and when there is a total commitment to the secular foundations of human rights, all religious aspects are being eradicated. In other words, they appear mutually exclusive.

However, a triangle model can be assumed between religion, secularism and

¹⁷⁴ Universal Declaration of Human Rights, 10 December 1948, U.N.T.S., online: <<http://www.un.org/Overview/rights.html>>.

human rights which can emerge in our modern era on a daily basis by establishing fruitful interaction among them. The need for promoting this triangular paradigm can be observed in recent massive demographic changes in the world. Immigration and the increasing creation of multicultural societies, globalization of values and public orders is resulting in the possibility of a clash among these norms, that can be prevented by first taking steps forward in fruitful dialogue, which can pave the way for mutual understanding resulting in maintaining human rights.

In attempting to cast light on how such an understanding and collaboration is possible, it is necessary to articulate the apparent tensions between secularism, religion and human rights and as An-Naim through his famous model of interdependency of these three different terrains demonstrates that “the interdependence of these three should be deliberately reinforced and stressed now; Indeed each of three undergo an internal transformation to strengthen the already existing synergy.”¹⁷⁵

Stressing these paradigms and trying to shed light on their interdependent relationship, can lead to profound mutual understanding in most of the provocative arguments in human rights issues by delivering the true essence of social justice in both the contemporary international and national realms while it contributes to “legitimizing human rights, regulating the role of religion in public life and affirming the positive place of secularism in Islamic societies.”¹⁷⁶ This approach may also be effective in the rest of the world in which governments and nationals attempt to draw a line on their rights and

¹⁷⁵ An – na'im, *supra* note 67 at 56.

¹⁷⁶ *Ibid* at 59.

obligations. In recent arguments on freedom of religious expression as a basic human right and the headscarf controversy as a multidimensional legal and political issue, worldwide and especially in some European Union member states, a situation is created in which demands for a comprehensive collaboration between the religious, secular and human rights terrains appears crucial.

In this section, we will discuss different aspects of secularism as a multifaceted concept, addressed in various ways through court decisions including those of the *Sahin* and *Dahlab* cases and also used for justification of a policy banning all religious symbols in France.

3.1.1. What is secularism?

The notion of secular and secularism has always been a controversial issue in Islamic countries and currently even in Western, secular-based states such as Switzerland, Turkey and France. At a glance, it seems that, secularism is associated with religiophobia which forms an irreconcilable ideology to manifest its substance. This notion of secularism is well known in some Islamic countries in which there is a powerful belief in the collaboration of religion, politics and the hegemony of divine will and power over state sovereignty, as well as in some non – Islamic countries where a fundamental approach to secularism is presumed.

According to a conservative Islamic point of view, the term secularism and its

derivatives are alien and borrowed notions which stemmed from rival or competitor cultures¹⁷⁷ and due to the fact that these concepts are profoundly heterogeneous and destructive toward the host society's culture, they may result in serious controversies in this field. Alireza Parsania believes that social and political motivations create many barriers to the process of transparency in the concept of secularism in host societies. The infatuations of the translators and transmitters of these notions from rival societies to host communities, covers the true face of secularism to hide the unpleasant aspects, which may engender resistance in some levels, in total vagueness. This deliberate, preplanned ambiguity somehow creates a sense of welcoming in the host society.

Through this pessimistic perception of secularism, he continues that "coming from ontological discourses, there are two major perspectives. The first one gives an authenticity to the material and mundane affairs which can be named secular. On the other hand, there is an alternate approach in which validity is given to holy and spiritual beings¹⁷⁸ that surround this materialistic globe and give meaning to it. In this spiritual perspective, religious centrality deals with the material world in an active and constructive way which maintains a positive status towards rationality."¹⁷⁹

This scholar recognizes two approaches for secularism towards religious issues. The first approach of secularism emerges boldly and precisely to deny any source of metaphysics and spiritual truths. On the other hand, secularism may also quietly pass by

¹⁷⁷ Western societies.

¹⁷⁸ Invisible world.

¹⁷⁹ Hamid Parsania, "Spirituality and Secularism" online: baztab <<http://www.baztab.ir/news/52923.php>>, (date accessed: 10 Nov 2006) [translated by author]; Although it may be considered opposing to rationality in some religions, Islam believes in the total association of faith and rationality.

spiritual and religious notions and like the Vienna circle positivists, consider religion inconsequential and meaningless. Moreover, their essential belief is that proving or disproving religion is unnecessary.

Parsania continues that religion may be studied through two different approaches to its domain's reach. One considers religion to be associated with the individual or internal realm and recognizes religion at the personal and mental levels while the other is searching for the territory of religion in social and political affairs. This latter view considers it as an ideology that justifies and interprets the means of livelihood, behavior and social structure. This ideological look at religion can appear in radical, conservative, left, right and socialist or liberalist formats. While Freud's psychoanalytical interpretation of religion has a kind of mental and personal approach to this notion, Durkheim and Marx had social and ideological explanations of religion. In this precept religious factors are limited to social horizons and are an apparatus to act upon political grudges by entering the scene under the mask of social religion.¹⁸⁰

A closer look reveals that, "etymologically, the word secular derives from a Latin *saeculum*, meaning 'great span of time' or perhaps 'spirit of the age'. Later secular came to mean 'of this world' (a conception presuming there is more than one world), and eventually the distinction between secular and religious came to overlap with that between the temporal and spiritual."¹⁸¹ Moreover, Longman Dictionary of Contemporary

¹⁸⁰ *Ibid.*

¹⁸¹ Meta Uday, "Secularism, Secularization, and Modernity: A sociological Perspective of the Western Model" in *State Secularism and Religion: Western and Indian Experience*, Asghar Ali Engineer & Mehta, ed. (Delhi: Ajanta, 1998), 24-25 as cited in An-na'im, *supra* note 67, P. 62

English in defining secularism states that it is: "A system of social organization that does not allow to religion to influence the government or the belief that religion should not influence the government."¹⁸² Additionally, The Oxford Advanced Learner's Dictionary definition of secularism is as follows: "The belief that the religion should not be in the organization of a society."¹⁸³

In the above definitions, both have the common precept of radical elimination of religion in all social and political considerations. Their main goal is conformity with the values of the contemporary modern world and more precisely Oxford Short Dictionary defines this term as "the doctrine that morality should be based solely on regard to the well - being of mankind in the present life, to the exclusion of all considerations drawn from belief in God or in a future state."¹⁸⁴

The mutual denominator of liberal and fundamental points of view in secularism is that they believe in the privatization of religion. These perspectives actually consider religion as an entity belonging to the private sphere. The interesting point is the profound differences in manners of interpreting such concepts in these circumstances.

On one hand there is an Islamist exegesis which considers this interpretation be a limit upon the functional terrain of religion and is strongly opposed to this notion. They believe that if we recognize religion merely in the private realm we are denied the vast majority of its functions which indeed form its social and political aspects. The absolute,

¹⁸² LONGMAN dictionary of contemporary English, 4th ed., s.v. "secularism".

¹⁸³ Oxford advanced learner's dictionary of current English, 6th ed., s.v. "secularism".

¹⁸⁴ An- na'im, *supra* note 67 at 62.

plenary religion is the one that emerges in both public and private realms and widely spreads its powerful effects across society. This approach knows religion as a dual faceted phenomenon in which the elimination of its social functions results in provocative resistance and causes serious dissent among those engaged in pious fellowship, since “the essential condition of modernization is not to decrease the role of religion in modern life but to discipline its existence in real life.”¹⁸⁵ This concept of discipline in religion is designed to conform it to function in a reasonable, controlled and positive manner suitable for current society.

On the other hand, there is the other interpretation of the above notion that ‘religion is a private issue’ which allows for the use of free will in submitting or not submitting to, practicing or not practicing a religion or religious duty. One has the choice to choose one’s own religion and can convert to another, at liberty, if desired. In this system no exterior power may interfere with the individual’s right to exercise free will in the religious domain. From this perspective, religion may not impose itself or its ideologies upon the individual whatsoever and any attempt to do so is strongly condemned. This concept is sometimes taken so far that its promoters believe it “is the scale of democracy in human realms of intellect”¹⁸⁶ It is possible to find this notion of human centrality based on free will in the Quran which states “There is no compulsion in the matter of faith.”¹⁸⁷

¹⁸⁵ Kadivar, *supra* note 22.

¹⁸⁶ Dara Farshidian, “Religious Reformists and secular religion believers” online: <<http://www.secularismforiran.com/farshidian.htm>>, (date accessed: 15 December 2006)[translated by author].

¹⁸⁷ Holy Quran, (1:257).

In conclusion, working from the first understanding of the private, will culminate in a great quantity of resistance in religious sectors while, becoming loyal to the latter notion of private, will make some fundamental modifications needed in the political sphere of those states who continue to exercise a considerable amount of power over the religious lives of their people, since this point of view claims to address the human conscience and beliefs and endeavors to eradicate all means of discrimination based on ideology.

However, is it really possible to separate all connections and overlapping areas between religion and politics and simply deny the interwoven nature of the human being as a complex entity which is capable to encompass both divine and rational ways of thinking? In other word is it possible to “bury religion in the most beautiful way in the social system which named secularism, the process of decreasing the role of religion in day to day life, and creating the situation for religion of not having even a minimal role in individual behavior and education.”¹⁸⁸ It is possible that the elimination of any of these realms can create fragmented identities which are being prevented from presenting natural behaviors based on their structure of beliefs and paradigms in this environment biased toward one principal or another.

The Muslim headscarf controversies in some European countries occurring in the name of a strict understanding of secularism are nothing less than the engendering of uniform commodities (citizens) produced by secular factories to maintain individual freedom and communal consciousness in secured public order. However, the reality is

¹⁸⁸ Kadivar, *supra* note 22.

this factory can no longer create an ideal environment for its commodities based on neither religious nor secular paradigms. What is necessary in these circumstances is cooperation between these opposing tendencies by minimizing their expectations to create more tangible social justice and freedom of human consciousness, emerging to have an identity which is desirable in the public and private spheres. Through this, it is possible to meet the human rights norms and assimilate to a triangle model of interdependence based on their systematic transformation which appears inevitable. On the other hand, the theory which believes in the self sufficiency of either religious or secular basis in sovereign state will not find a passage for negotiation in this field.

To clarify the different perspectives in secularism and find a window through which to facilitate mutual understandings between religious and secular styles, it is necessary to point to two opposing forms of secularism which are being used in European legal instruments, such as, The European Human Rights Court's decisions and more generally, their style of decision making in handling the so called 'social crises' occurring in confrontations between religious desires and secular norms. These two major categories of secularism, referred to as liberal and fundamental approaches which are being applied by different legal and judiciary systems in legislation and rulings in the courts. These various notions of secularism directly influenced the decisions of the ECtHR in headscarf cases brought before this court. In a closer look,

[B]oth liberal and fundamentalist notions of secularism take as a point of departure a basic distinction between the competence of the religion and the competence of the political powers and institutions, so

that neither unduly dominated nor controlled by other. This distinction builds upon differentiation between the public and private sphere and between the role of the state and the role of religion or belief. Both liberal and fundamental notions of secularism, imply that 'religion is a private issue', but in two different ways.¹⁸⁹

From this definition one may understand that although the liberal form of secularism states that religion is a private issue; there are no barriers preventing religious manifestations in the public realm. These neutral conditions should be protected from any imposition from both political and religious perspectives, creating a space in which citizens are able to express their beliefs not only in private but also in the public realm and there is no obligation for the state to supervise or enforce any religious or non-religious ideology or specific identity upon its citizens.

In other words, a government which permits an individual to freely choose to adhere to a belief system (be it religious or nonreligious), and also express that belief to others through their manner of dress, speech and actions can be described as being liberal secularist, in this system, the government will accept that faith is a private matter which can not be judged by authorities, used as a basis for discrimination or subjected to government interference of any kind, with the only exception to this being made in matters of grave security threats to others.¹⁹⁰

On the other hand, fundamental secularism seems to have a deliberate intention to

¹⁸⁹ Ingvill Thorson Plesner, "The European Court of Human Rights between Fundamentalist and Liberal Secularism" (paper presented to the Islamic head scarf controversy and the Future of Freedom of Religion or Belief Seminar, Strasbourg, France 28-30, July 2005) at 2 [Plesner].

¹⁹⁰ *Ibid.* at 2.

eradicate all signs and symbols of religion from the public sphere. This approach apparently discriminates among religious and nonreligious citizens in terms of their contribution in the public sphere by imposing the state religion of non-religion upon all, obligating them to live a dual life in the public and private spheres. As Ingvill believes, a fundamental secularist system is in strict opposition with freedoms of public expression in areas of faith, and those who work from this perspective may continue to respect the right of a citizen to hold beliefs, but seek to place tight controls on the manifestation of those beliefs outside of the realm of the individual's private and unseen conscience.¹⁹¹

3.1.2. The state and spirit of article 9

The European Convention of Human Rights has been accepted as the ideal model of human rights protection, designed to function in the neutral, modern, secular, democratic and pluralistic societies that are proclaimed to exist in Europe today. Its conception gives an impression of a utopian secularist model which in fact due to difficulties in application has encountered barriers to its creation. These barriers include limits made to civil liberties under the guise of the protection of security. In 1775 Benjamin Franklin coined his famous hypothesis "They who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."¹⁹² Is the world approaching at time when the truth in this prediction will be visible on an international level?

¹⁹¹ *Ibid.* at 3.

¹⁹² Franklin, Benjamin, "Contributions to the Conference on February 17 (III) Fri, 1775", online: <<http://www.ushistory.org/franklin/quotable/quote04.htm>>., (accessed date: 2nd January 2007).

The Convention for the Protection of Human Rights and Fundamental Freedoms entered into force on September 21, 1970. Article 9: freedom of thought, conscience and religion which reads as follows:

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

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

This law creates an environment which is open to the emergence of all forms of thought and belief. These forms include the belief in religious texts, doctrines and traditions, be they monotheist or polytheist, as well as the ideas of spirituality, enlightenment and the like. So this naturally includes the right of the individual to choose not to hold such beliefs and present oneself as an atheist, agnostic or unconcerned party. The second section guarantees that one has the right to change their system of belief freely, without external hindrances, fear of inquisition or criminal prosecution for apostasy. Under this reasoning no person should experience fears or concerns that they will face judgment or public criticisms on account of their conversion. The third section

of the law covers the freedom to manifest one's religious beliefs via the widest possible range of actions including worship such as prayers and the singing of hymns or practice, teachings and observances which may include dress styles, the shaving of the head, consuming or abstaining from certain foods, pilgrimage etc. This right to express one's ideals is extended to both the public and private areas of life as stated in the law. For the purposes of this law, it can be assumed that the private refers to one's own property or home and the designated meeting places or centers of worship that belong to the individual's specific group of adherents. Additionally, the private can be taken to mean any place where one is hidden from the view of others. The 'public' can then be interpreted as all places that are not 'private' such as public schools, community centers, streets, markets and workplaces as well as any other place where a person would be visible to the public.

This law provides completely for a tolerant, considerate society in which all members enjoy the greatest possible freedom to hold, express and even share their deepest thoughts and beliefs. There is no doubt that everyone would fully embrace this type of utopian environment of mutual allowance and respect. However, the dream is quickly shattered as the reality that it is unfortunately not possible for all people to engage so freely without restriction due to the fact that not all practices and observances of religion are appropriate in all situations. For example, certain rituals may affect others, who do not wish to participate, by posing a significant health risk and as such some compromise is necessary.¹⁹³

¹⁹³This can be demonstrated in the recent requirement for Buddhists to halt the traditional practice of releasing captive birds due to concern that certain fowl may be infected with the "bird flu" virus which

To introduce these limitations the law contains a second paragraph designed to set reasonable boundaries and guidelines for their invocation. The first requirement that must be met in order to place a limit upon the individual's rights to freedom of religion is that it must be 'prescribed by law'. It means that:

[F]irstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.¹⁹⁴

This concept also refers to the necessity for a state law to be in place restricting the desired form of expression in the member country. Once the limitation is found to contain a basis in local laws, it must also be deemed necessary to the continuation of democracy. This infers that the limits placed upon freedoms are the best possible and most democratic solution to maintain the safety, security, health and values of the society. This law and its concept of necessity includes the above requirements as a prerequisite for creating an environment for the growth of the aforementioned utopian state which inherently respects the rights and freedoms of others. This article promotes the idea that while the needs and rights of the individual should be preserved, the rights of others in

could potentially cause illness among the public. The solution in this case was for the observant Buddhists to compromise by freeing fish into the river, thus while maintaining the spirit of their traditions, public health was protected, "Freed birds seen as risk: AVIAN FLU: Hong Kong urges a Halt to religious Practice", *The Province*, The Associated Press/ news at A26, (14 January 2007).

¹⁹⁴ *Dahlab*, *supra* note 68, para A.2.

the society must also be considered. In order for the society to function successfully, mutual respect, consideration, tolerance and informed understanding must exist between all members.

The problems that are posed by this type of law, however well intended it appears to be, relate to the wide variety of manners in which it may be defined and applied. Member states throughout Europe have attributed vastly different meanings to concepts such as democracy and public safety. This leads to the need to observe this law, its applications and its true spirit through the wide range of human rights goals that can be used to better define the notions of democracy, equality and liberty in the context of religious freedom. It is necessary to consider the history, needs and values of governing bodies as well as those of the citizens under its power. This process will encounter the administrative ideals of secularism and neutrality.

3.2. The fragility of secularism and neutrality

A major complication to the application of article 9 has been the use of secularism as a basis upon which several countries have defended alleged violations of this law. Secularism not only has differing roots in specific European regions but it also has multiple presentations. Regardless of these variations and its potential to be interpreted in its liberal or fundamental forms, secularism does have a consistent common goal to provide a neutral environment.

After considering the goal of neutrality and its purpose in ensuring that laws and judicial decisions are fairly and equally balanced, it can be seen that this notion requires all who seek to administer it to put aside personal experience and thought. The complex ability to consider and even empathize with the persons and situations at hand, regardless of how foreign or unfamiliar they may be, is demanded by neutrality. The question is; to what extent can courts and governments fulfill that demand? Is it truly possible to view every situation openly without being affected by personal bias? Once the possibility of neutrality is questioned in this manner, secularism itself comes into question. If it is found to be seeking a goal which appears intangible, is the concept of secularism inherently flawed? Can its development as a source of political and religious balance function in today's society?

In order to address these issues, the cultures and environments where these notions are at work must be assessed. The history, growth and desired outcomes of each nation effect the application of such ideals. When evaluating these vastly different methods in application, it is important to consider not only the past and future of its subscribers but also the current reality to which it is being applied. Does the freedom to express one's religious belief by wearing faith specific insignia such as the Islamic headscarf constitute a challenge to, or a turning point in, the function of concepts like neutrality and secularism in the current age?

3.2.1. Critical analysis of neutrality

Neutrality should eliminate all forms of discrimination. Ideally it places all races, cultures and belief systems on equal ground before the law. It is necessary to consider that neutrality should be exercised throughout the complete legal processes for this to occur. For example, it is possible for a law to be formatted in a manner that is designed to be applicable to all people without discrimination and yet be discriminatory in its effect. So while an attempt is made at developing neutral policy such laws are effectively not neutral as they have consequences that weigh on some more than others, causing inequality in its effects. To clarify this “we hence should ask whether a) an aim of the policy or legal provision is to discriminate on the basis of religion or belief, b) if the policy or legal provision openly, on its face, discriminates on the basis of religion or belief, and c) if the policy or legal provision has discriminatory effects, that is if certain persons or groups rights to freedom of religion or belief are more restricted than others as a consequence of the law or policy.”¹⁹⁵

The discriminatory effect referred to in part c) of the above can be seen throughout each of the major European cases and legal applications that this paper focuses on. In France and Turkey we see Muslim female students being prevented from accessing equal education due to their religious beliefs. In Switzerland a teacher was discriminated against and faced the loss of employment as a direct result of laws designed to create neutrality in the learning environment where she worked.

¹⁹⁵ Plesner, *supra* note 189 at 12.

In the *Dahlab* case, the Swiss government professed that its application of the law, in banning teachers from wearing the Islamic headscarf, was designed to create a neutral environment. What is the definition of a neutral environment in this circumstance? Does it include an adherence to absolute conformity to the pre-existing image of the majority in a manner which completely disallows diversity? The concept that neutrality can require such uniformity in physical appearances renders the esteemed purpose of the ideal, void. Neutrality by definition means to refrain from making judgments in one direction or another, and/or giving in to one's biases in decision making. It requires an open-minded and open-hearted, consideration of the situation at hand. If an image is forced upon an individual against their will, it is indicative of the fact that a judgment has been made rendering the individual's personal image unacceptable.

The appearance of bias in the making of such a determination regarding what is correct or incorrect dress interferes with the creation of neutrality. As the ECtHR Court so eloquently stated: "The principle of neutrality seeks to ensure that consideration is given, without any bias, to all conceptions existing in a pluralistic society"¹⁹⁶ and one of the crucial obligations of such societies is protecting minority rights and interests to meet the prerequisites for a fully democratic society, since "Constitutional democracy is designed to restrain majoritarianism but, in its constituting moments, can fail to avoid tyranny."¹⁹⁷

¹⁹⁶ *Dahlab*, *supra* note 68 at A.1.

¹⁹⁷ Whyte, John D., "Text, Context and Narrative in the Search for Constitutional Meeting" (The Douglas Mc. Brown Lecture delivered at University of British Columbia, 14 March 2007) [Unpublished].

In addition to its failure to provide the necessary consideration to Ms. Dahlab's concept, the Swiss school system also provided a bias environment for its children as it provided only one set image of teaching staff for them to be exposed to. In effect, the desired neutral learning environment which could have exposed students to a tolerant, diverse atmosphere, free of judgments, became a monistic one. This biased imposition of a uniform image can also be seen in France, where all ostensible religious symbols have been banned from public schools. It can be argued that this closed vision of the world presented a clear preference to what may be called a Western or Judeo Christian image which can not be considered neutral.

A significant part of the problems associated with the development of neutral attitudes in Switzerland and France stems from the fact that educational neutrality dates back to the previous century where its primary role was to ease Catholic/ Protestant tensions. State laws and ideals in this respect are very dated as their application was intended to ensure the freedoms of all students, regardless of their denomination at a time when it was expected that while they may be Catholic or Protestant, they were almost entirely Christian. The current situation is vastly different in the sense that now students and teachers adhere to a wide variety of religions and often do have unique styles of dress.

In the *Dahlab* case, the state's use of the Swiss law stating that "...all civil servants must be lay persons..."¹⁹⁸ is an example of a law that was designed specifically to apply to Christian teachers who should refrain from holding any sense of

¹⁹⁸ *Dahlab*, *supra* note 68 at A.3.

denominational authority over students. It was not intended to prevent teachers from having religious beliefs, only to prevent them from teaching religion or being officially associated with a specific Church. Unfortunately this law was used by the Swiss to argue that Ms. Dahlab should not wear the Islamic headscarf while teaching. When the definition of lay person as offered by the Cambridge dictionary “someone who is part of a religious organization but who is not paid or specially trained”¹⁹⁹ is considered it is clear that she was indeed a lay person and that the understanding that she did not meet this requirement due to her headscarf is the result of the biased labeling of her scarf. It appears that an ill-informed concept of religious dress has been taken to mean that if an individual wears clothing specific to their religion it is the equivalent of a Catholic priest or nun’s specific uniform or traditional garb and that therefore the individual should be assumed to be a member of some religious authority. This understanding of religious dress stems from a historical Christian standpoint and not from the informed, open minded, view that is necessary to qualify it as neutral. Yet, the ECtHR found its use to be acceptable without question, demonstrating its own bias to a Christian conception of a neutral image.

The concept of labeling is a major hindrance to the development of neutrality. In essence a behavior, or in this case style of dress and belief system must first be found to be contrary to the ideals or values of the majority in order to be labeled in a manner which sets it apart from what is thought to be the societal norm. As Howard Becker states “...social groups create deviance by making the rules whose infraction constitutes

¹⁹⁹ Cambridge Dictionary, online: <<http://dictionary.cambridge.org/define.asp?key=45079&dict=CALD>> accessed date (12 January 2007), s.v. “lay person”.

deviance, and by applying those rules to particular people and labeling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but, rather a consequence of the application by others of rules and sanctions to an offender.”²⁰⁰ Thus in order for the headscarf to be deemed inappropriate it must first have faced the judgments and criticisms of those who are responding to it and these critical reactions cannot be qualified as neutral.

The application of labels to the Islamic headscarf can also be seen in the case of Leyla Sahin, where state references elude to the headscarf as being “contrary to equality.”²⁰¹, “contrary to freedom...contrary to secularism and a sign of fundamentalism.”²⁰² It is clear that these labels contain a bias level of opinion that can only be described as an affront to neutrality. A neutral assessment of the headscarf in this situation would have given equal consideration to Ms. Sahin’s definition of the headscarf. It can be noted that both Ms. Sahin and Ms. Dahlab wore the headscarf with no intention of causing disorder, proselytizing or interfering with the beliefs of others. Both women sought only to freely adhere to their personal religious beliefs. However, both Turkey and Switzerland labeled the headscarves a threat to public safety and security.

The one dissenting judge in the *Sahin* case, Judge Tulkins, found that the court had overstepped its role by appraising the headscarf as ‘a powerful religious symbol’, that ‘appeared to be imposed on women by a religious precept that was hard to reconcile with

²⁰⁰ Max Travers, “Symbolic Interactionism and Law” in Reza Banakar & Max Travers Eds. *An introduction to law and social theory* (Portland; Oregon: Hart Publishing, 2002) 209 [Banakar & Travers] at 215.

²⁰¹ See *Sahin* (2004) *supra* note 4, paras 98-115.

²⁰² See *ibid.* paras 90-96.

the principle of gender equality' and difficult to be 'reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination.'²⁰³ It is evident, by the admission of its own panel member, that the court had preconceived notions of the Islamic headscarf which colored its view and prevented it from acting in the completely neutral manner required of the court.

Judge Tulkins also noted that the court acted contrary to its own belief systems regarding the importance of neutrality in the course of the *Sahin* ruling saying:

The court has frequently emphasized the state's role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in democratic society. It also considers that the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or ways in which those beliefs are expressed.²⁰⁴

The court clearly believes that state governments must not place judgments upon the validity of religious expression in its varying forms, including the Islamic headscarf. However, the court did permit such conclusions to be made in reference to the headscarf in both the *Dahlab* and *Sahin* cases. It further accepted these judgments upon Muslim women's head coverings by applying the margin of appreciation to the cases, thereby limiting the court's power to question such notions presented by the states appearing before it. "The margin of appreciation is deference to national bodies in the examination

²⁰³ Tulkins, "dissenting opinion", *supra* note 142, para 12.

²⁰⁴ *Ibid.* para 107.

of whether a restriction of a convention right is acceptable or not”²⁰⁵ Under this definition supplied by Eva Brems the margin of appreciation is designed to allow the courts to consider the broader definitions of state laws, as well as, the history and culture that is specific to the member state before it. The court has referred to its use of this concept saying: “The court observes at the same time, that the role of the Convention machinery is essentially subsidiary. As well established in its case law, the national authorities are in principle, better placed than an international court to evaluate local needs and conditions.”²⁰⁶

Special attention must be paid to the use of the phrase 'in principle' in this statement. While 'in principle' the local governments do have greater access to information regarding the specific needs and circumstances in their state, when a case is brought before ECtHR the court is asked to fulfill its supervisory role. This role is in place to scrutinize the claims of national bodies seeking to restrict human rights and to verify that the restrictions being placed on those liberties are absolutely necessary in a democracy and that under the convention laws there are no other more suitable alternatives.

In *Sahin* case the court makes a strong argument for its use of a wider margin of appreciation, detailing the variations in public opinions that occur in any democratic society, and the fact that throughout Europe there are no set definitions regarding the need for public order and respect for others. Each state defines these concepts via their

²⁰⁵ Brems, Eva, “Diversity in the classroom: The headscarf controversy in European schools” (2006) 31:1 Peace and change 117, n.10 [Brems “Diversity”].

²⁰⁶ *Sahin* (2004) *supra* note 4, para 100.

national governments and court systems, so as these bodies are democratically elected they are thought to represent the majority opinion in that state. The court does specify that: "A member state's authority to interfere with the convention rights of an individual must never entail a breach of the principle of pluralism; conflicts with other rights enshrined in the convention, or entirely negate the freedom to manifest one's religion or belief."²⁰⁷

However reasonable the court's intent in granting member states a margin of appreciation, two major barriers interfere with the ability to rely on this concept to produce a fair outcome. These barriers are the implementation of democracy itself and the possibility for preconceived notions or judgments to interfere with the member state's presentation of the facts.

As to the implementation of democracy, the majority of democratic states see a considerable portion of the population failing to fully participate in elections and other forms of democratic action. It is unfortunate that these non-participant members of society are often the most uneducated, poor and disenfranchised of citizens who as a result of their difficulties in exercising their political rights may lack equal representation in government²⁰⁸. In the state of Turkey a further barrier to the development of true democracy has been the states dissolution of political parties, such as the Refah party, that openly advocate allowing for greater religious considerations, such as permitting the

²⁰⁷ *Ibid.* at 101.

²⁰⁸ See Tisch, Jonathan M., "Research Group focusing on Economic Inequalities as Barriers to Democracy" College of Citizenship and Public Service, Tufts University, online: <<http://activecitizen.tufts.edu/print.php?pid=131>> and also <http://www.gatt.org/trastat_e.html#democracy>. (accessed date: 12 January 2007).

headscarf or the use of Sharia²⁰⁹ in deciding some legal matters. As a result of the Turkish Constitutional Court's decision to dissolve this party based on its opinion that *Refah*'s²¹⁰ views may undermine secularism in the state, the people of Turkey have been denied the opportunity to voice their political opinions in a truly free democratic manner²¹¹. These restrictions have also been shown to exist within the Turkish school system which is designed to educate the society on coming voters. "A 2004 Human Rights Watch Report charges that the Higher Education Council 'exercises central control over the university system and violates international human rights law and standards on academic freedom. It restricts the liberty of professors to write, teach and take an active role within society, and limits the autonomy of universities in their staffing, teaching and research policies and practice.'²¹²

The second issue lies in the ability of the court to scrutinize the allegations of the member state in regards to its definition of ideas such as neutrality, 'the rights of others' and 'public safety'. For example, in the *Dahlab* case considerable evidence was offered that Ms. Dahlab in no way expressed her religious opinions to students, refused to identify her headscarf as a religious symbol when questioned by them and did everything possible to adhere to the principle of denominational neutrality while maintaining her own values. Yet although a definition of neutrality was offered stating that "all conceptions existing in a pluralistic society"²¹³ should be considered, the court did not

²⁰⁹ Islamic Religious Law.

²¹⁰ Welfare party.

²¹¹ Krassimir, *supra* note at 238-241.

²¹² Aisha Labi, "A symbol of oppression or a sign of faith?" (2006) 52:22, A44, A47, Chronicle of Higher Education at 7 [Labi].

²¹³ *Dahlab*, *supra* note 68 at 4.

question the state's disregard for Ms. Dahlab's conception but rather accepted it at face value as evidence that the headscarf interfered with the principle of neutrality. Again it is clear that the state's ideal neutral image was in fact a western or Judeo-Christian image yet due to this margin of appreciation such a definition is accepted by the court.

Although the French laws on religious symbols in public schools have not been tested before the ECtHR, there exists in them a significant example of the possibility for the state and democratic society to fail to exercise sufficient neutrality. Talal Asad in his study of neutrality and secularism in France found the republic fails in achieving neutrality due to its tendency to be "suspicious of some (Muslims) because of what it imagines they may do, and it is ashamed when confronting others (Jews) because of what they have suffered at the hands of Frenchmen"²¹⁴ He further found that a "web of emotions indicates how fraught the very idea of neutrality is in the domain of public opinion. Guilt, contempt, resentment, virtuous outrage, slyness, pride, comfort, all intersect in complicated ways in the secular Republic's public sphere and inform attitudes towards its religiously or ethnically stigmatized citizens."²¹⁵ In this manner many concerns and ideas about ethnic minorities have lead to a biased approach when dealing with such communities bypassing the primary goal of French secularism which is neutrality and equality in the treatment of its citizens. Should this law be tested before the court, the margin of appreciation would no doubt be exercised and the full effect of its flaws may be felt, in that when the state and the society it governs fails to exercise true neutrality, the court, in relying on the state's concepts is bound to follow suit.

²¹⁴ Talal Asad, *supra* note 145.

²¹⁵ *Ibid.*

It is an unfortunate result of this flawed legal concept that has resulted in a situation whereby if the responding state fails to act in a neutral manner, the court is bound to accept their concepts and definitions in this area, and is then unable to render a verdict that is representative of the neutrality required of a court. In this way, the court acts against its own values and fails in its duty to the Convention and all who are governed by it, to provide an independent and neutral review of the cases before it. As a remedy it is necessary for the court to apply its own principles with greater resolve in assuring that the burden of its supervisory role is sufficiently met.

3.2.2. Critical analysis of secularism

In the course of investigating secularism, it is necessary to compare its original definitions and design with its current use. Was it designed to prevent any sign of religious belief from ever being seen in public spaces? Is the true meaning of secularism to “bury religion... in the social system which named secularism, the process of decreasing the role of religion in day to day life, and creating the situation for religion of not having even a minimal role in individual behavior and education?”²¹⁶ Or was this concept created to minimize the interference of politics and government authority in religion? A simple question maybe; is the role of secularism to protect religious plurality or is it intended to end religious involvement?

Historically, secularism was designed to protect the rights of the individual to freely choose their own belief systems and citizens were no longer forced to convert to

²¹⁶ Kadivar, *supra* note 22.

the religion of the ruling party or monarch. In the *Dahlab* case, the ECtHR referred to the freedom of thought, conscience and religion, as enshrined by article 9 of the convention as representing one of the foundations of a democratic society within the meaning of the convention.

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 also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism in dissociable from a democratic society, which has been dearly won over the centuries, depends upon it. While religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one's religion. Bearing witness in words and deeds is bound up with the existence of religious convictions.²¹⁷

Secularism was a tool to ensure that governments acted in a manner necessary to the protection of these freedoms. Yet in these cases "secular" governments fought to limit freedoms in the name of secularism. Even the court who strongly supports the need for believing persons to express their faith freely and be tolerated by a pluralistic society, accepted the protection of 'secularism' over that of religious freedom. What can be seen in this situation is not only the distinguishing line between the liberal and fundamental notions of secularism but also what appears to be an alteration of its meaning.

So what has caused the sudden shift in the way secularism is defined? It can perhaps be traced to shifting the demographics in the cases of France and Switzerland. These primarily Christian countries once based their full conceptions of life in a secular

²¹⁷ *Dahlab*, *supra* note 68 para B.1.

state on a Judeo-Christian basis. As previously stated this sense of secularism allowed for all forms of Christianity to be tolerated and fostered by the state. Governments, law makers and courts, schools and the population at large were never confronted by beliefs, attitudes or dress that was boldly outside the norm.

In the case of France in particular, the post colonial era brought influxes of immigrants from former colonies in Algeria and North Africa. Many of these immigrants were low paid, uneducated workers brought in to help jumpstart the economy which was sagging after World War 2 and it was originally expected that they would eventually choose to go home. However, these Muslim immigrants stayed on to become the nation's new citizens. In an effort to assimilate these persons from a foreign culture and belief system the government has attempted to develop a domesticated 'Islam de France'.²¹⁸

However, French desire for immigrants and the like to integrate into its concept of a secular system includes the notion that they should lose their existing sense of cultural and religious identity and be overcome by their new French identity. In addition to this loss of culture and faith, minorities are expected to assimilate to French society so much so that France, despite its massive immigrant population, signed onto the International Covenant on Civil and Political Rights only with reservation to an article which would have dealt with minority rights, declaring it inapplicable to the country²¹⁹. This can be simplified into an attitude which appears to declare that when one becomes French; all other marks of identity, community allegiances and needs disappear. There is nothing that

²¹⁸ John R. Bowen, "Does French Islam have Boarders? Dilemmas of domestication in a global religious field" (2004) 106:1, Am. Anthropologist, 43 at 44-45.

²¹⁹ krassimir, *supra* note 1 at 237.

can remain except for true, complete and undeniable Frenchness. In the French view “Laïcité à la Française is much more than a system of separation of state and church, it is a fundamental conception of citizens and society within French Republicanism, in all its indivisibility. Liberties publiques are not rights against the state, as human rights are often perceived but are rights granted by the state.”²²⁰

Contrary to this sense of denial towards the existence of minorities in a France where all people are suddenly and irrevocably declared 'French' and therefore equal under the concept of laïcité, the reality is “Every one who lives in France is not equal before the law.”²²¹ At the same time migrant communities are denied minority status in the state they prevented from intermingling with natural born citizens, ghettoized in small ethnic enclaves and denied equal access to employment. “Many state positions (surgeons, for example) are legally closed to foreigners but they are employed unofficially, paid much less and have no job security.”²²² In regards to the Islamic headscarf, the ban effectively weighed far more heavily on religious minorities whose religions required them to wear items that could be classified as “ostensible signs of religious affiliation” while the majority of citizens held belief systems that did not require any such dress. As Mouruzzi believed:

“When French intellectuals mount a defense of secular values, they are refusing to acknowledge that their version of secularism allows for freedom of religious practice for one hegemonic group- who go with their heads uncovered outside of sacred space and pursue their community

²²⁰ Lyon & Spini, *supra* note 6 at 335.

²²¹ Asad, Tallal, *supra* note 145.

²²² *Ibid.*

devotions on Sunday- but not for others- who may believe that the head should always be covered and that the Sabbath falls on Friday or Saturday. For members of those religions and cultural communities, French secularism becomes an unequal religious prohibition, and hence a deeply felt political problem.”²²³

Based upon the above we can see that “politics is not neutral and all individuals are rooted in their cultures, communities and minority identities.”²²⁴ As a result laicite fails to truly envelop and equalize minorities into mainstream society. This bias then works to inform the nation’s secularism and overrules its primary goal of creating equality.

The case in Switzerland is very similar, Judeo-Christian bias has informed its notion of secularism in such a manner that any public expression of a notion outside the mainstream is considered to be contrary to secularism. The Swiss school system and courts which required Ms. Dahlab to conform to their definition of secular dress were effectively unable to do so. While asking her to dress in a manner consistent with the majority of citizens, eliminating her identity as a minority, her dress could not be considered secular. It could be argued that students in her charge would be left to assume that she was an adherent to some form of Christianity or atheism by default.

Secularism is now challenged by these changing demographics throughout Europe and must deal with the emerging pluralism in society. It must strike new balances

²²³ Norma Claire Mouruzzi, “A Problem with Headscarves: Contemporary Complexities of Political and Social Identity” (1994) 22:4, *Political Theory*, 653 at 665 [Mouruzzi].

²²⁴ Jiri Priban, “Sharing the Paradigms? Critical Legal Studies and the Sociology of Law” in Banakar & Travers, *supra* note 200 at 130.

in an effort to ensure that the freedoms of one group of individuals do not cause difficulty to another group. A situation has arisen with the Islamic headscarf where eliminating discomfort for some citizens has caused grief to other citizens. "In that sense, secular agency is confronted with having to change a particular distribution of pain, both in public and in private. And while in that capacity it tries to curb the inhuman excesses of religion, it allows other cruelties that can be justified by a secular calculus of social utility and a secular dream of happiness."²²⁵ Ideally secularism would afford them a level of equality, where in the needs of one are not placed over the other. However, it only redistributes the suffering replacing "patterns of pre-modern pain and punishment with those that are peculiarly its own."²²⁶

This approach to secularism enforces many notions upon the citizens of those states subscribing to it. French President Jacques Chirac is quoted by journalist Jane Kramer stating "the state does not put a foot in any belief. It is a very French conception, and we hold dear to it... Religion is not a subject we impose on French children."²²⁷ It is interesting that while in his view the state does not impose religion upon its students, it does actively impose its definition of secularism and an almost devout absence of religion upon them. This can only be described as a very fundamentalist understanding of secularism. The state of Turkey also enforced its own definition of secular freedom in the *Sahin* case where the court records that:

Turning to the applicant's argument that the Quran imposed a duty

²²⁵ Asad, *supra* note 145.

²²⁶ *Ibid.*

²²⁷ Kramer, *supra* note 42.

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 presupposed that the individual enjoyed the widest possible range of opportunities and choices.²²⁸

Should the variety of choices available in a free society not include the right to subject one self to religious duties in accordance with one's own free will? Can a government really increase a person's access to the 'widest possible range of opportunities and choices' by preventing them from submitting to religious authority? In this instance it would appear that the state is asking Ms. Sahin to relinquish her freedom by submitting to state law against her will in an effort to protect her from the limits imposed by the religion of her choice. Through this development of fundamentalism in the notion of secularism its ability to qualify as a method for separating religion from the state comes into question as secularism effectively risks becoming the new religion of the state.

The ECtHR demonstrated some apparent religious bias in its dealing with the *Dahlab* case. When referring to the religious requirement for women to wear the headscarf the court never considered the actual ayah or verse from the Quran mentioning it only as "a precept laid down in the Quran whereby women were enjoined to draw their veils over themselves in the presence of men and adolescents."²²⁹ It appears that the court wishes to avoid giving the headscarf a legitimate role as a religious order. By omitting

²²⁸ *Sahin* (2004); *supra* note 4, paragraph 92.

²²⁹ *Dahlab*, *supra* note 68 at A.1.

this verse, the court sends a message that it does not warrant consideration or legitimacy as a very real part of the belief system held by Ms. Dahlab. Had the court fully accepted the headscarf as a serious religious order, it would have shown greater respect for the beliefs of Ms. Dahlab and in the spirit of that respect, may have found it more difficult to accept state interference with her freedom of religious expression.

In addition to this act of omission the court also made a very interesting choice of words when it stated that “After a period of soul searching, the applicant abandoned the Catholic faith and converted to Islam.”²³⁰ This statement opens the court to criticism on two levels. First, it refers to the period of soul searching, which can be read as an explanation for her conversion. This appears to be based upon a notion that her change of belief could not possibly have been natural, sudden or simply a logical form of personal growth that could have occurred without requiring any type of explanation. Secondly the court’s use of the word abandoned infers that the applicant had left the Catholic Church in a negative and wrongful manner. Merriam Webster’s Dictionary of Law defines abandon in the following ways “1) to give up with the intent of never again asserting or claiming an interest in (a right to property) 2) to disassociate oneself from or forsake in spite of a duty or responsibility; abandon one’s child. 3) to renounce one’s obligations and rights under; abandon a contract. 4) to fail purposely to bring to completion or fruition; abandon a crime; abandon a lawsuit.”²³¹ In all of these applications of the term there remains a subtle negative undertone. It almost appears as if the court, which is required to be unbiased, feels that Ms. Dahlab has in some manner thrown away or

²³⁰ *Ibid.*

²³¹ Merriam Webster’s Dictionary of Law, online: <<http://dictionary.reference.com/browse/abandon>> (date accessed: 11 February 2007), s.v. “abandon” (date accessed: 11 February 2007).

wasted her original Catholic faith.

The most severe effects of fundamentalist secularism can be seen in Turkey, where secular rules and laws have been forced upon its majority Muslim population in order to expedite modernization and change based upon a heavily westernized conception in a bid to allow the country to join the European Union. In this bid we see the country as a whole, enforcing a single notion of modernity upon the majority of its citizens as it seeks to become the 'minority', 'immigrant' state within the greater regional union. Turkey has developed a stringent form of secularism that demands religion be removed from the public sphere just as deeply as it was once entrenched. The Islamic headscarf is considered contrary to this secular state and has been banned from not only universities but also government buildings at various times during the states republican development. Political parties with religious leanings have been dissolved and religious schools are not permitted. This has been described as "moralistic and pedagogical; it imposes and teaches secularism as a western way of living. The secularization of education, of politics, of everyday life practices, and of social spaces is critical to the modernist project."²³² In this manner the notion has seeped into every facet of Turkish life and has become the primary factor in all actions of the state. "In some ways we can speak of the excess of secularism to the extent that it becomes almost a fetish idea of modernity overriding from time to time the principle of liberal democracy."²³³

The effect of this fundamentalist approach to modernization and Westernization

²³² Nilufar Gole, "Contemporary Islamist movements and new sources for religious tolerance" (2003) 2:1 *J. Hum. Rts* 17. at 22 [Gole, "contemporary Islamist Movement"].

²³³ *Ibid.*

has placed significant limitations upon the more active members of its considerably religious Muslim majority. Their faith has been effectively swept under the carpet of secularism causing a strong backlash of activist groups that are fighting equally hard to re-enforce religion in society. It was the University of Istanbul's fears about religious fundamentalist groups that caused it to ban beards and the headscarf in university classes. The state seeks to stifle the voices of such groups which interfere with its notion of modernization.

The most dangerous impact of fundamentalism in secularism is in fact its ability to cause an equal and opposite reaction within the realm of religion. As it was observed by the United Nations Special Rapporteur to France, Asma Jahangir, the humiliation caused by laws created through this model "can only lead to the radicalization of the persons affected and those associated with them."²³⁴ The dissenting judge in the case of *Sahin v. Turkey* noted that the ban on headscarves was similar in nature to the religious fundamentalism it was alleged to be symbolic of, stating:

More fundamentally, by accepting the applicant's exclusion from university in the name of secularism and equality, the majority have accepted her exclusion from precisely the type of liberated environment in which the true meaning of these values can take shape and develop... A tolerance based dialogue between religions and cultures is an education in itself, so it is ironic that young women should be deprived of that education on account of the headscarf. Advocating freedom and equality for women cannot mean depriving them of the chance to decide on their future. Bans and exclusions echo that very fundamentalism that these

²³⁴ Jahangir, *supra* note 142, para 101.

measures are intended to combat.²³⁵

She furthered her concern in relation to fundamentalism through her final note which provided: "Above all, the message that needs to be repeated over and over again is that the best means of preventing and combating fanaticism and extremism is to uphold human rights."²³⁶

Yet despite this risk and the court's own ideals on secularism which strike one as much more liberal than that proffered by Switzerland and Turkey, the ECtHR has upheld laws that fit this fundamentalist definition. Ingwill found that while the nature of the convention is one of liberal ideals "when the ECtHR uses the term fundamentalism in a case dealing with these Turkish conceptions of secularism it should hence explicitly have stated that its use of the term is not similar to - or even in compliance with - the Turkish use of the term. By not doing so ... the court not only seems to accept the Turkish, fundamentalist approach to secularism in the *Refah* case, but also leaves the impression that this is a notion of secularism that is most in compliance with the principles of the Convention."²³⁷ He further expresses a concern that the acceptance of Turkish style fundamentalist secularism by the court may set precedence for this interpretation to be used in future. This precedent was indeed followed as the court failed to question the evidence on secularism in the *Dahlab* and *Sahin* cases and offered little resistance to the ideals of the member states regardless of how ill founded it was.

²³⁵ Tulkins, "dissenting opinions", *supra* note 128, para 19.

²³⁶ *Ibid*, Para 20.

²³⁷ Plesner, *supra* note 189 at 6-7.

In the wake of the changes in society, secularism has stagnated. It has failed to grow, failed to develop in tandem with the societies it governs and has become a force for limitation and oppression as opposed to a gateway to freedom. Its application has become drastically fundamentalist despite its potential as a liberalist notion. Perhaps this is due to a dependence on its existence as a single, self sufficient governing concept. It is true that "each country has its own specificity as far as the concept of secularism is concerned. This specificity depends on its historical evolution as well as contemporary social conditions."²³⁸ However rooted in history these varied conceptions of secularism may be, they must remain willing to work within the bounds of the current age. When An Naim states that "secularism suffers from a basic limitation or rather a need for limitation: it must confine its normative content to a minimum if it is to achieve its purpose."²³⁹ He refers to the need for secularism to avoid making judgments to define societal norms. By eliminating biased notions from the application of secularism the political ideal returns to its liberal roots and becomes more able to adapt to changing societies. "Demographer Michele Tribalat recalls the specificity of the French context...in her article, 'Un sentiment de trahison: A feeling of betrayal'. She asks why the French were asked to sacrifice so much in the often brutal process of secularization in France, only to see the meaning of secularism now being changed, this time with Islam the beneficiary, and reminds readers that secularism exists not to suppress all religions but to enable them all to exist."²⁴⁰

If we can view secularism as a concept that can be implemented not by itself but

²³⁸ An-na' im, "Interdependance", *supra* note 67 at 62.

²³⁹ *Ibid* at 63.

²⁴⁰ Winter, *supra* note 7 at 291.

rather in unison with other notions such as human rights or pluralism a balance can be established. A first glimpse of the notions and ideals that can act as control mechanisms for secularism can clearly be found in the following list of considerations from the court report from the *Sahin* case: "That it requires the state to ensure mutual tolerance between opposing groups...Accordingly the role of authorities in such circumstances is not to remove the cause of the tension by eliminating pluralism but to ensure that competing groups tolerate each other."²⁴¹

"Pluralism, tolerance and broadmindedness are the hallmarks of a democratic society ... Pluralism and democracy must also be based on dialogue and 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 ideas of a democratic society."²⁴²

Throughout these statements tolerance, broadmindedness, pluralism, and democracy are all offered as methods to ensure balance. It is unfortunate that while laying a framework for theories of secularism to mature and redevelop into a useful strategy in the modern diversifying society, the court failed to enforce these ideals.

The development of communication, understanding and compromise that the court highlights is also necessary to the growth of pluralism and tolerance. Steps must be taken to make meaningful exchanges of thought and culture a societal norm, in order to eradicate the bias that are found in the current intransigent secularism. "We need to hope

²⁴¹ *Sahin* (2005), *supra* note 116, para 107.

²⁴² *Ibid.* para 108.

for a universalism of differences in which equality – judicial and political – becomes the condition for the assertion of those differences (religious, cultural, etc.) and in which there is the possibility to communicate and negotiate.”²⁴³

“Historical experience shows that religious exclusivity tends to undermine solidarity and even peaceful co-existence among differing communities of belief, and secularism apparently evolved as a means of encouraging pluralism in the state.”²⁴⁴ Through this we see the roots of secularism as a notion to foster and defend diversity, pluralism and human rights. This may be the basis behind his belief that secularism is actually a method of maintaining the relationship between religion and the state as opposed to a methodology for the separation of the two. Further to this he suggests an approach that sees secularism as being intrinsically connected to religion and human rights.²⁴⁵

Judge Tulkins echoed this theory that secularism should work in combination with other liberal theories to establish itself as a fair balance.

“In the present case, relying exclusively on the reasons cited by the national authorities and courts, the majority put forward, in general and abstract terms, two main arguments: secularism and equality. While I fully subscribe to each of these principles, I disagree with the manner in which they were applied here and to the way they were interpreted in relation to the practice of wearing the headscarf. In a democratic society, I believe it

²⁴³ Lyon & Spini, *supra* note 6 at 340.

²⁴⁴ An-na'im, “interdependence”, *supra* note 67 at 63.

²⁴⁵ *Ibid* at 56.

is necessary to seek to harmonize the principles of secularism, equality, and liberty, not weigh one against others.”²⁴⁶

Perhaps, when properly balanced a new mature form of secularism can be established. In the aforementioned issues we encountered a “juxtaposition of acknowledging deep-seated constitutional principles and making constitutional determinations based on political imperatives [which] presents an interpretive conundrum.”²⁴⁷ In other words putting principles next to judgments based on political needs, causes problems in understanding the legal principles. These constitutional human rights laws should thrive to understand the past ideals and also give credit to the influence of modern times on our applications of such laws. We have to allow the present to influence the meanings we apply to the laws of the past. If we return to the matter of secularism by focusing on its definition and purpose, it may be found that a solution to its current faulty conception exists within its etymological roots. The fact that this term stems from ‘the spirit of the age’ provides a clue to exactly what is responsible for the fragility of secularism. What is the spirit of the age? Are we as a human race living in an age where we should embrace fundamentalist ideas? Is this the age where we must deny and eradicate the diversity that is growing in our population? When the spirit of the age is considered, it can be recognized that this fragile nature of secularism is caused by the failure of human intellect and capacity to keep abreast of the rapid changes to our world.

It is time for fresh understandings of secularism like a “... the Living

²⁴⁶ Tulkins, “dissenting opinion”, *supra* note 128, para 4.

²⁴⁷ Whyte, John D., “Text, Context and Narrative in the Search for Constitutional Meeting” (The Douglas Mc. Brown Lecture delivered at University of British Columbia, 14 March 2007) [Unpublished].

Constitution, a morphing document that means, from age to age, what some say it ought to mean.”²⁴⁸ It is time to let go of stale, biased, past notions regarding its role and application which are irrelevant in the modern world. Globalism, diversity, pluralism and multiculturalism must all be embraced to redefine secularism as a balance between culture, religion, human rights and freedoms that is in keeping with the true spirit of the age. Through this new, balanced comprehension of secularism, courts and governments will be better equipped to fulfill their role as the mediators of differing ideas, in order to create and enforce harmony and a respectful coexistence.

²⁴⁸ Whyte, *supra* note 107.

Chapter IV: Headscarf controversy with respect to women and children on gender equality issues

The ultimate goal in this chapter will be to develop more complex understandings of the Islamic headscarf, the women who choose or choose not to wear it, the role of family pressures in their lives and the effect of the scarf on families and children. An attempt will be made to recognize the needs and rights of women and children and to highlight their struggles through this discourse in an effort to identify possible solutions. The notion of gender equality will be analyzed thoroughly and headscarf controversies related to the *Dahlab*, *Sahin* and France cases will be examined further.

4.1. Gender equality

In this section the definition and application of gender equality will be examined from a variety of international view points in an effort to explain the concept as it relates to the Islamic headscarf. It is crucial to understand the underlying need for gender equality to fully assess its relationship with the headscarf issue. Through a comprehensive study of the issue and how it applies to Muslim women and their choice of dress, an even handed approach to the Islamic headscarf, domestic violence and the notion of equality can be formed.

This study will demonstrate the paradoxical nature of the courts' understanding of equality which was based upon a very limited conception of womanhood. In addition, the

study will critically analyze the implications of such limited understandings. The rulings which have resulted from these attitudes have set an undesirable precedent for defining and advancing gender equality.

4.1.1. Gender equality and the headscarf

Embedded within the subtext of gender equality, lies a deeply rooted pattern of thinking that places women into only one of two limited frames. The first of the frames is that of the sexual object. The second is heavily tied to her existence in the first frame albeit through a different lens. While in the first, she may hold some power through her status as an object of desire, in the second frame she is considered weak and in need of either protection or domination as a result of her inability to control her sexuality.

In regards to the matter of the headscarf, it is important to look specifically at the imposition of these frames on Muslim women. In recent history, namely the last two centuries, Muslim women have been squarely positioned in these frames as “sensual, elusive harem girls or backwards victims of their heathen and misogynistic cultures.”²⁴⁹ Zine also suggests that as such, “the veiled Muslim woman has simultaneously been constructed as an object of fear and desire”²⁵⁰. Neither of these conceptions of Muslim women has afforded them their due respect as capable human beings.

Before moving further into these recent impositions upon the identity of women

²⁴⁹ Zine, “orientalism”, *supra* note 48 at 4.

²⁵⁰ Jasmine Zine, “Gendered Islamophobia and the Politics of Veiling.” (2006) 39:3 Equity and Excellence in Education, 239 at 242 [Zine, Islamophobia].

in the Muslim world, it is important to make note of their status in pre-colonial periods. Prior to colonization by Western forces many women in this region²⁵¹ held extensive rights over their Western counterparts. For example in Egypt participation in higher education had been proportionate between the genders since around 950 A.D.²⁵² Another excellent example of women's rights and gender equality in this region of the globe can be seen in the example of Khadija, the first wife of Mohammed. She is recognized as a powerful business woman, who controlled an extensive trading empire. Her initial contact with Mohammed actually began when she employed him for trading purposes. In this manner an initial culture of 'gender equality' or 'gender neutrality'²⁵³ may be ascribed to the region. Unfortunately, colonial and missionary pressures at the turn of the century, as well as consumerist and secularizing trends in the twentieth century, led women away from rights they already had in Islam - most importantly the right (with precedents in Islam) to full participation in the Islamic practices, teaching and worship. By submitting to these distancing trends, women excluded themselves from the two most relevant spheres (the Arabic language and Islamic studies) that most crucially regulate and sanction their lives, engender dignity and respect, and legitimize their rights and privileges. These became dominated by men.²⁵⁴ This demonstrates the loss of gender equality and rights for women during the colonial period.

During this period of colonization and in the recent 'Persian Gulf' wars, scholars

²⁵¹ It is commonly referred to Middle East.

²⁵² El Guindi, *supra* note 11 at 67- 68.

²⁵³ I borrow this expression from Osgood hall law report.

²⁵⁴ El Gudini , *supra* note 11 at 61.

have likened the conquest and occupation of land to a male's conquest of women.²⁵⁵ Contrasting images of women are used to fuel war and build morale by feeding the macho needs of soldiers while simultaneously giving the world a sense that liberation is the primary incentive for such intrusions. From to Bahramitash's point of view, the examination of feminist Orientalism may prove to be beneficial in better understanding the position Muslim women occupy in such wars. She describes feminist Orientalism as "Orientalists who [use] women's rights as an excuse to legitimate their colonial presence and their modern version such as the current neo-conservatives who raise support for war in defense of women's rights."²⁵⁶ In times of war, namely wars waged on the Middle East, it is evident that feminist Orientalism plays an important role in constructing a fantasy of what the non-West is at best or sustaining occupation at worst. In this dynamic a woman is clearly not seen as an equal but rather as a weak, needy and willing conquest for men.²⁵⁷ "This discursive positioning cast all Muslim women within a limiting narrative. Historically the category of 'Muslim woman' has been a malleable construct, constantly redefined to suit particular political, cultural or ideological purposes."²⁵⁸ In any event, Muslim women are too often portrayed as "victims and not as agents of social transformation"²⁵⁹ denying them their reality wherein they are women who resist and empower themselves in avenues different from those of Western feminists.

²⁵⁵ See e.g. "In these fantasies the world is feminized and spatially spread for male exploration" McClintock as quoted by Jasmine", "She as a metaphor for her land becomes available for Western penetration and knowledge." And "An air force pilot at the start of the war predicted 'It'll just be slam bam thank you Saddam!'" in Zine, "Orientalism" *supra* note 250 at 6.

²⁵⁶ Rokhsana Bahramitash, "The War on Terror, Feminist Orientalism and Orientalist Feminism: Case Studies of Two North American Bestsellers." (2005) 14:2 Critical Middle Eastern Studies, 223.at 321[Bahramitash].

²⁵⁷ Zine, "Orientalism", *supra* note 48 at 5-6.

²⁵⁸ *Ibid* at 9.

²⁵⁹ Bahramitash, *supra* note 256 at 224.

As a result of the frames Muslim women are categorized in, it is easily seen how impossible it is for courts and governments working from outside their cultures and religion to view them as equals, respectable in their own right. The question these courts find so difficult to answer is how any woman from one of these two frames can be a strong independent and equal human being, capable of agency, opinion and choice. This is the direct result of their obsession with and reliance upon the concept of womanhood that was created by Western feminists. While "as an Islamic feminist construct, the veil represents a means of resisting and subverting dominant Euro-centric norms of femininity and the objectification of the female body."²⁶⁰ Similarly, Gole states that "instead of assimilating to the secular regime of women's emancipation...[Muslim women] press for their embodied difference (e.g. Islamic dress) and their public visibility (e.g. in schools)"²⁶¹ Therefore, in understanding gender equality, we must not limit the function and uses of particular frames to Muslim women as women in the West have been equally subjected to similarly limiting dimensions.

Having outlined these pervasive attitudes that stigmatize all women and the special context utilized when referring to Muslim women, we must ask what gender equality is. The egalitarian goal of defining equality of two genders that are so fundamentally different seems idealistic given the bumpy terrain provided by these gender frames as a starting point. Ideally equality means equal access in society for all

²⁶⁰ Bullock, K. H. "The gaze and colonial plans for the unveiling of Muslim women" (2000) 2:2 *Studies in Contemporary Islam*, 1 at 20; Bullock, K. H., *Rethinking Muslim women and the veil: Challenging historical & modern stereotypes*, (Herndon, VA: International Institute of Islamic Thought, 2002); Read, J. G., & Bartkowski, J. P. "To veil or not to veil?: A case study of identity negotiation among Muslim women in Austin, Texas" (2000) 14:3 *Gender and Society*, 395 at 417 as cited in Zine, "Islamophobia", *supra* note 250 at 243.

²⁶¹ Gole, "Islam in Public", *supra* note 40 at 181.

people, however when applied to gender, there are many theories as to the exact nature of equality. The Canadian Ministry for the Status of Women defines its goals for equality as

closing the gender gap in medical research and health care; appreciating women not only as consumers but also as contributors to public policies and to the public purse; sharing family and work responsibilities equitably between women and men; valuing women's work- both paid and unpaid; indeed, reintegrating the market activity into the larger sphere of economical activity generally.²⁶²

This definition has a primarily economic focus, one which sees the status of women improved vis- a-vis their ability to participate in the financial realms of life equally to men. While fiscal independence can provide women the security necessary to improve their social and familial situations by emancipating them from chronic dependence upon men for support; it may have negative repercussions. This definition opens the door to increased expectations for women to enter the paid work force outside the home, as a means of developing and establishing self-reliance. However, these increased expectations may severely impact women who elect to prioritize their home and family life. While women are entitled to respect for such unpaid work in this theory, the fact remains, they are unpaid and lack the means to find economic equality to men. This often leads to a sacrifice of the woman's values and priorities in order to meet the demand that they should contribute financially in the home and society. The burden of such sacrifice

²⁶² Canada, Status of Women, "Setting the Stage for the Next Century: The Federal Plan for Gender equality" (Ottawa, Ontario, Status of Women,1995) online:
< http://www.swc- cfc.gc.ca/pubs/066261951X/199508_066261951X_1_e.html>. [status of women].

often weighs even heavier upon women who become single parents.

Marxist feminists strongly believe that financial control allows men to keep women in a stagnant position as domestic laborers. In short, due to their dependence on men for support, women are held hostage to men as a means of satisfaction and for rearing their offspring. Extensions of this theory associate such paternalism with the success of capitalism and the men who are more liberated to seek wealth in the common market. It was argued that as the state benefited via this system of patriarchy and capitalism the state could therefore not be trusted as a source of equality for women.²⁶³ In contrast, liberal feminists turn to the state for help with improving the lives of women. They seek programs such as state run childcare, which would provide women some autonomy. However, this theory also leads to a dilemma where state power, risks becoming stronger than family ties. It is stated that, "As most feminist analyses identify the State as patriarchal, they cannot advocate an increase in control by the State. As the family, at least in its contemporary form, is also identified as oppressive to women, feminists may not logically endorse the strengthening of the family."²⁶⁴

Thus a considerable balance between the state and the family must be struck. Can two traditionally patriarchal systems work together to mutually raise the status of women in society? If the two parties will consciously commit to the establishment of women's rights, a joint effort will be feasible. The state can introduce laws that provide rights to women for societal access such as education, health care, politics, employment, safety

²⁶³ Archana Parashar, *Women And Family Law Reform In India* (New Delhi: Sage Publication, 1992) at 36-43.

²⁶⁴ *Ibid.* at 28.

and security, legal assistance etc. It can also provide much needed funding for women's programs and education programs for all family members. The family can and must be held responsible to do its share for women's equality by accessing such programs and by promoting the status of women from within the familial domain. The United Nations in defines gender equality as,

[T]he equal rights, responsibilities, and opportunities of women and men and girls and boys. Equality does not mean that women and men will become the same, but that women's rights and men's rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration, while recognizing the diversity of different groups of men and women. Gender equality is not a women's issue, but should concern and fully engage men as well as women. Equality between women and men is seen as both a human rights issue and as a precondition for, and indicator of, sustainable people-centered development.²⁶⁵

This definition makes what may appear to be a very simple and obvious point but in fact a critical one nonetheless by stating that, "equality does not mean that women and men will become the same."²⁶⁶ Men and women can claim neither equal nor identical rights. They must both claim fair and appropriate rights. Due to their biological differences, they have varying needs and responsibilities. Men and women have the roles of complementing each other and working in tandem together.

²⁶⁵ "Women Peace Makers Programme: International Fellowship of Reconciliation: Definitions" UN Office of the Spec. Advisor on Gender Issues (OSAGI) online: Women Peace Makers Programme <<http://www.ifor.org/WPP/definitions.htm>>. [OSAGI].

²⁶⁶ *Ibid.*

It is this notion that men and women possess inherent differences which true, attainable gender equality hinges upon. We must accept that men and women are different, while at the same time acknowledging the fact that each gender possesses its own physical, emotional, mental and tendencies and capacities for procreation; each individual has their own unique variation in that. According to Fletcher, "treating women the same as men will not bring about equality because it would, among other things, simply perpetuate already existing inequalities. The goal of equality should not be the production of sameness in individual people either."²⁶⁷ If men and women are equalized in a manner irrespective of their inherent differences, women will possibly lose more than they stand to win. However, if the model of equality accepts that while men and women are inherently different, both should have the right to participate in society equally and in the manner in which they find most appropriate. Grace and consideration may be given to both genders at times when they voluntarily choose to refrain from participation. A secure and free environment, that is considerate to the needs of family rather than focusing on the needs of the individual woman, may assist in correcting this issue.

It is not unreasonable for a woman to exercise what should be her choice and right to focus her activities around her home and children, to step out from that role and enter the professional world or to do both. Unlike Marxist feminists who believe women to be trapped in the domestic role, family oriented; faith-based feminists seek to establish women's domestic labor as a chosen role worthy of respect and economic remuneration. It is through the acceptance of women as strong contributors to the society in all that they do vis-à-vis these traditional roles that we can pave the way for the acceptance of women

²⁶⁷ Fletcher, Ruth, "Feminist Legal Theory" in Banakar & Travers, *supra* note 200, 135 at 149.

in the modern workforce. By highlighting and remunerating domestic labor, society moves away from the thinking pattern that confines women to the role of an inconsequential work horse and towards the realization that she is in fact an intelligent, powerful, capable contributor to society. When a woman's capacity for wisdom and hard work are recognized, her image as a human being with the ability to take on the role as a provider for the family becomes tangible. She is promoted from her status as fodder to her rightful position as an able minded individual, worthy of equal opportunities and equal respect.

Historically women from all parts of the globe have played dual roles, naturally combining their home lives with varying levels of work outside the home. In the modern era, the outside work that women undertake is becoming increasingly professional in nature as a part of the natural progression in industrialization. All the achievements women have made in this realm have been met by equally increasing barriers. The headscarf saga is only one example of the tendency for society to find new ways to thrust women out from the position of self realization they have fought to earn themselves.

Perhaps the truth is that what is commonly called gender equality is in fact a concept that would be easier defined under a different name. It is stated that, "equality rights are human rights"²⁶⁸; thus, we should begin defining this concept as one which demands equality in human rights such as that of education, health care, safety and security, food, clothing and shelter, as well as the freedom of religion and conscience. These rights can all be distributed equally among males and females with little variation.

²⁶⁸ Status of Women , *Supra* note 262.

It is the gender specific abilities, needs and desires that pose a dilemma. The United Nations makes careful note of these concepts while also pointing to the fact that no one culture or group of individuals can set a norm. That is to say that while a style of dress is desired by women of one culture, it cannot be presumed to be desirable to women of another. The common factor is that both women are equally entitled to choose for themselves, without fear of domestic violence or any other limitation launched against them as a result of their gender. Women are presumed in this circumstance to be the best judges of their own desires, needs and identities as women.

This equal application of human rights should also ideally eliminate the frames that women are traditionally held in. It should allow women to exist in a state of neutrality, free of judgments based on sex, and free from gender-based frames. This is referred to as gender neutrality. According to this concept women are neither presumed to be sexual objects nor weak and needy creatures, but rather, capable human beings. It is their status as a human that grants them the right to respect and consideration as individuals. Their skills, education and experience are all viewed as human qualifications, without bias to their gender or their personal conception of gender. Establishing gender neutrality is urgently necessary to rectify the current bias that informs society and permits patriarchal attitudes and behaviors to prevail, as these notions of women are so deeply rooted in the psyche of society.

As the United Nations definition points out, "gender equality is not a women's

issue but should concern and fully engage men as well as women.”²⁶⁹ The Canadian Ministry for the Status of Women offers that, “gender equality, by definition, involves both women and men as partners in the quest for fairness and in the benefits of equality. These changes will be vital to the future wellbeing of our daughters and sons.”²⁷⁰ This statement suggests that both sexes must participate in the development of equality in order to build a healthier, more conscious environment for future generations. Thus we can see that progress in the area of gender neutrality may not be immediately visible, but we should set the building blocks for its existence now by recognizing its importance and making conscious efforts to work towards it.

In conclusion, while the term gender equality may continue to be used, its definition must be more comprehensive than a mere even split of rights and responsibilities between the sexes. For gender equality to work efficiently, differences must be embraced, rather than homogenized, gender neutrality must be included and actively promoted, complementary roles must be deemed acceptable and women's rights must be understood to be human rights. Equality must not be forced and mandated on behalf of women but rather must listen to their voices and act within their expressed interests, promoting women to speak out about their needs and empowering them to work on their own behalves. Bullock believes that the voices and experiences of Muslim women are especially valuable because “it cannot be acquired through books or even distanced observation and study of a particular reality.”²⁷¹ Furthermore, the state can

²⁶⁹ OSAGI, *supra* note 265.

²⁷⁰ Status of women, *supra* note 262.

²⁷¹ K. H. Bullock, *The politics of the veil*. (MI: Bell & Howell Information and Learning, 1999) at 245. [Bullock]

work to ensure those human rights are upheld in an equitable manner, fund programs to help men, women and children to embrace gender neutral attitudes and to sustain a woman's rightful share to the wealth accrued by the family during her domestic efforts. Families must uphold these human rights for women and must be educated to do so. Education for both sexes is paramount to developing fair rights and practices among family members. The framing of women as either sexual fodder or weak and needy creatures must be accepted as equal forms of objectification and be eliminated from the attitudes of society. Only when women are seen as equals, that is, as real human beings, can equality be achieved. This comprehensive definition and outline for the achievement of gender equality may in fact be more aptly named a process of gender humanization.

4.1.2. Critical analysis of gender equality application

Equality between men and women is a fundamental principle of the European Union. The Council, European Parliament and the European Commission aim to increase the awareness, the pooling of resources and the exchange of experience in the area of gender equality, in particular through the establishment of a European Institute for Gender Equality.²⁷²

The notion of equality is one which should be open to the reality that all people are inherently different. Each woman experiences her female identity in a manner which is unique to her. Thus there can be no blanket assumptions made to define the headscarf

²⁷² Council of Europe, Commission of European Communities, Sec 2005 328, COM 81 final, *Proposal for REGULATION OF EUROPEAN PARLIAMENT AND OF THE COUNCIL: establishing a European Institute for Gender Equality*, (2005) online: <http://ec.europa.eu/employment_social/news/2005/mar/genderinstitute_en.pdf>. at 1.1.

in a particular woman's life. For some women patriarchal preferences or control is simply not a factor in their choice of attire. When assumptions are made, the courts send the message that "these women do not know what is good for them."²⁷³ Professor "Gunn"²⁷⁴ accused the European Court of being either 'ignorant or complicitous' in perpetuating the harshly secular military legacy and allowing the state to decide, 'in its infinite wisdom, that people can't make decisions for themselves.' There was no evidence of political motivation on Sahin's part since as a practicing Muslim, she had worn the head scarf for many years. Gunn alleged that by essentially banning religious Muslim women from universities, the state is violating the principle of gender equality and the right to education.²⁷⁵

In her dissenting opinion Judge Tulkens states, "equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. 'Paternalism' of this sort runs counter to the case-law of the court, which has developed a real right to personal autonomy on the basis of article 8"²⁷⁶ [of The European Convention on Human rights]²⁷⁷

This observance justly connects the attitudes of the court to paternalism and it can

²⁷³ Jill Marshall, "Freedom of religious expression and gender equality: Sahin v turkey" (2006) 69:3, Modern Law Rev., 452 at 460 [Marshall].

²⁷⁴ Professor Jeremy Gunn "Unveiling Sahin: The European Court Decision on the Islamic Head Scarf." (10 November 2004 from Emory University).

²⁷⁵ Hana, Askren, " veiled meaning", online: (2004-2005) 37:6 , McGill Reporter 4. <<http://www.mcgill.ca/reporter/37/06/gunn/>>.

²⁷⁶ 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

²⁷⁷ Tulkens, dissenting opinion, *supra* note 128 Para 12 .

be seen that the freedom of these women has been returned to a state of patriarchal control - not by family in this case but rather by the courts.

In addition to this finding, the court accepted the notion that “it appears to be imposed on women by a precept which is laid down in the Quran and which, as the Federal Court noted, is hard to square with the principle of gender equality.”²⁷⁸ Through these statements the court appears to open the door to the acceptance of statements like that of the Turkish Supreme Administrative Court as quoted in *Sahin v. Turkey* that the headscarf was “contrary to the freedoms of women.”²⁷⁹

Yet, despite this suggestion there are many women who wear the veil as a means of empowerment, as suggested earlier. These women actively resist the “largely uninvestigated assumption that their culture and/or religion is based upon gender inequality and that they are some kind of duped victims.”²⁸⁰ This category of women would include those who wear the scarf of their own volition in the manner that Ms. Dahlab and Ms. Sahin did. For both of these women, the headscarf held significant personal meaning. It was a symbol of their faith and obedience to God so valued by them, that they were willing to launch extensive court cases in an effort to liberate themselves from what they viewed as governmental intrusions upon their freedoms. In their minds gender equality would allow them to elect to wear a uniquely female style of dress, including a headcovering, while participating in society on equal footing with their male counterparts. Neither of the women interpreted the fact that the headcovering was not

²⁷⁸ *Ibid* at 9.

²⁷⁹ *Sahin* (2004), *supra* note 4 at para 34.

²⁸⁰ Marshal, *supra* note 273 at 461.

equally required of males in their religious community to be an offence or to be contrary to gender equality. In this situation their experience of hijab may have been quite the opposite of the court's assumptions.

If the idea that the pursuit of gender equality has been misdirected is correct, it is urgently necessary to review the concept of equality even deeper. This is to say that recognizing the effects of domestic violence and patriarchy on women is not adequate. It is important to ask how these problems came to exist in society at large. How did they come into being in a community that bases its conduct upon the Islamic religion, which granted many rights to women long before Western societies? Why is it that when presented with women like Sahin and Dahlab that are not under the stress of community or patriarchal pressures, the courts see fit to impose a new form of control over them? Only when the true extent of oppression against women is exposed will actions aimed at emancipating them become effective.

As previously mentioned, the ECtHR accepted that the principles of gender equality and that of wearing the Islamic headscarf appear to be two very conflicting matters. In light of the differing manners in which gender equality and women's rights are defined, it is necessary to address the underlying issues upon which this assumed conflict is based and to identify the real barriers to women's freedom and equality. Many misunderstandings regarding the headscarf have served to inform this position, without consideration to the full range of experiences held by those who wear it. It has been noted that these misunderstandings are often framed by male judges who possess no tangible

ability to gauge the female experience.²⁸¹ This is not to deny that the headscarf is on many occasions utilized as a method to control, contain and oppress women²⁸², but rather to say that all the dimensions of such oppression must be addressed far deeper than the courts and governments who have expressed concerns regarding this issue have ever attempted to undertake.

The primary question to be resolved is whether or not the headscarf itself has a causal relationship with the oppression of women. It has indeed been labeled as a symbol of the need for women's rights and gender equality. However, is the headscarf, even in this role, as a symbol of oppression, the source of the problem? Can the issue of gender inequality be resolved through the banning of the headscarf? Do government edicts regarding dress codes really liberate women and provide them agency to make free choices on an equal stance with their male counterparts?

If increased awareness and the sharing of experience are the goals for developing gender equality in the European Union then challenging the assumed definition of the headscarf through the widest possible lens seems poignant in these cases. The voices of women must be heard and the truth sought with brutal efficiency if the courts truly wish to create equality and justice for women. Judge Tulkins believes that,

²⁸¹ Lyon & Spini, *supra* note 6 at 339.

²⁸² See e.g., "Women in Saudi Arabia are required to cover themselves with an *abaya* and black veil to conceal their faces. The source of stringent rule is not the Shari'a, but this and other rules are defended as being part of Islamic creed. The *Muttawwas* (religious police) strictly enforce the dress code to women yet turn a blind eye to men that violate Qura'n requirements to be covered from the waist to the knee. P. Desphande, "The role of women in two Islamic Fundamentalist countries: Afghanistan and Saudi Arabia" (2001) 21, Women's Rts. L. Rep. 193 at 195 as cited in S. Mtango, "A state of oppression? women's rights in Saudi Arabia" (2004) 5:1 Asia-Pacific J. on Human Rts. & the Law 49 at 53.

Turning to equality, the majority focus on the protection of women's rights and the principle of sexual equality.²⁸³ By converse implication, wearing the headscarf is considered synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say. Indeed, what is the signification of wearing the headscarf? As the German Constitutional Court noted in its judgment of 24 September 2003, wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons. It does not necessarily symbolize the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.²⁸⁴

For *Sahin*, arising out of Turkey, a state actively seeking European Union membership, the statement was that they too were an "authoritarian regime seeking to modernize their societies, [by] removing signs of backwardness. Given such a context, it has been argued that choosing to wear the veil becomes a symbol of dissent"²⁸⁵ may have rung true. *Sahin* is quoted as having told an interviewer that "it is something that I choose to wear myself, and it is only I, who can decide not to wear it, and I don't think it can be imposed by a prohibition."²⁸⁶ She further explained that it was purely a matter of her faith and how strongly she felt about it. Her intent may not have been to act in protest to the government, but given the position she was placed in at Istanbul University, forcing her to choose between her faith and her country, the headscarf was most definitely placed

²⁸³ See also Paras 115 and 116 of *Sahin* (2005) *supra* note 116.

²⁸⁴ Tulkins, "dissenting opinion", *supra* note 128 para 11.

²⁸⁵ Marshal, *supra* note 273 at 460.

²⁸⁶ Labi, *supra* note 212.

into a category of dissent.

This dissent can be seen in stronger forms than that of *Sahin*. It can possess the weight of a political statement for which one is willing to suffer as is evident in the case of Hacer Betza, an Istanbul University student who declared, "yes, it is a political statement...you know that our country wants to join the European Union, but we are a Muslim country, and those other countries are not."²⁸⁷ With this power behind the political statement she makes with her headscarf she wears it with the same intensity and passion that another individual may use to fuel a hunger strike. We can see this statement as a method to exercise one's right to participate in the political decision making process.²⁸⁸

The same issue regarding freedom of choice was seen in the *Dahlab* case where her scarf was labeled as "not consistent with gender equality, even though this appeared to be a clear case of an adult woman choosing to wear the headscarf."²⁸⁹ However, regardless of choice, or the fact that her clothes were of a style that was readily available in Switzerland, the court had no problem determining that wearing a headcovering designed solely for women could not be squared with equality. The equality issue came into play as Ms. Dahlab tried to point out that as a Muslim woman, she was unfairly affected by the ban since a Muslim man would be unaffected by a dress code. The court's

²⁸⁷ *Ibid.*

²⁸⁸ In the past some women in Iran wore headscarves in protest of the pre-Islamic revolutionary government, now that the Islamic government has mandated the headscarf Iranian women protest this enforcement by removing their scarves and burning them. In both circumstances the headscarf is used as a political statement against injustice and inequality. A wife may also protest the actions of her husband by wearing the headscarf in front of him. This sends the message that she does not recognize him as her spouse at that time as he is behaving in a manner that is not in keeping with the nature of their union.

²⁸⁹ Lyon & Spini, *supra* note 6 at 338.

response to this concern was that while “the advancement of the equality of the sexes is today a major goal of the member states of the council of Europe”²⁹⁰ the ban did not qualify as gender discrimination as it “was not directed at her as a member of the female sex.”²⁹¹

However, she believed the scarf to be an acceptable item of clothing for a woman and the only style of dress appropriate for her. The problem in this case was a lack of plurality in the state's concept of women's dress. There was a strong bias to the conception of a ‘Western’ woman, as opposed to the image presented by Ms. Dahlab which was more similar in fashion to that of the ‘immigrant’ or ‘Oriental’ woman. Based on her understanding of gender appropriate dress and the role it played in her identity as a woman the ban discriminated against the female gender in this case. In a diverse society, the manner in which women express themselves as members of the female gender is constantly changing. Courts and governments must be willing to increase their conceptions of womanhood to keep up with the pluralistic societies they govern. Germany for example has recognized that for some women the veil highlights male/female differences and is a part of maintaining the female identity and has determined “wearing the veil in this context seems far from a submission to male domination.”²⁹² It is therefore accepted as an essential element of the self for those women.

On a different scale, the reality that many families do enforce high levels of

²⁹⁰ *Dahlab*, *supra* note 68 at B.1.

²⁹¹ *Ibid.*

²⁹² *Marshall*, *supra* note 273 at 460.

patriarchal control upon their female members is an issue that cannot be overlooked. Many families and religious organizations do use the hijab to confine women to a limited sphere. In other word "it cannot be denied that the Islamic headscarf is used as a symbol by those of fundamentalist tendencies to advance agendas that are incompatible with women's rights."²⁹³ Included in this group are many of the young girls in France who gave testimony before the Stasi commission, reporting undue family and community pressures in relation to the headscarf. During this time in France many "cases of girls forced to wear foulards or veils by community pressure, threats or intimidation were widely publicized."²⁹⁴ One of the most severe cases of such violence was that of Sohane Benziane, a teenaged girl from the ghettos who was set ablaze and subsequently killed by neighborhood males as a result of her decision not to wear the hijab. This case fueled the launch of NPNS²⁹⁵, a women's rights group lead by Samira Bellil who was a survivor of such domestic and community violence.²⁹⁶

Thus, it is clear that the courts and governments do have some basis for the argument that the headscarf can be a barrier to women's rights. However, is it the headscarf per se or is it an underlying problem of domestic violence that has created such a situation? An argument can certainly be made that the latter case is more accurate. Emmanuel Terray has suggested that the focus on the Islamic headscarf as a flash point for the women's rights and gender equality movement may in fact be the result of a recent slowing of improvements in those fields. He asserts that despite the many successes

²⁹³ Brems, "above children's head", *supra* note 3 at 124.

²⁹⁴ Thomas, *supra* note 144 at 248.

²⁹⁵ Ni Putes, Ni Sumises or Translated as Neither Whores nor Submissives.

²⁹⁶ Thomas, *supra* note 144 at 248.

which were made in the past, several core issues remain unresolved for today's women including their ability to reach the highest levels of political and economic success as well as the continuation of domestic violence and the misuse of women by the sex industry.²⁹⁷ The ongoing and pervasive nature of these inequities may have driven the focus from the real issues like domestic violence and onto the easier, more specific target of the headscarf.

We may begin by returning to the definition of gender equality. As noted above any true equality must give way to the fact that there are varying conceptions within the realm of womanhood. It is argued that, "the strand of feminism that assumes a universality of womanhood, often expressed in activists' phraseology by terms such as 'global sisterhood' has been irreversibly challenged by anthropology on systematic ethnographic and theoretical grounds."²⁹⁸ In fact Arat-Koc argues that the 'global sisterhood' approach, which she describes as a Eurocentric approach to 'global feminism', "creates an abstract sense of solidarity with Third World women"²⁹⁹ which further "leads to an ignorance about the actual historical and daily constitution of women and their bodies."³⁰⁰

The headscarf in the cases of *Sahin* and *Dahlab* was judged based upon this theory that all women are alike and should fit into a 'European' model of womanhood, rather than asking how the scarf fit into their concepts of womanhood. Through this

²⁹⁷ Emanuel Terray, "Headscarf Hysteria" (2004) 26 New Left Rev. 118 at 120.

²⁹⁸ El Gudini, *supra* note 11 at 53.

²⁹⁹ Sadeq Arat-Koc, "Imperial Wars or Benevolent Interventions? Reflections on 'Global Feminism' post September 11th," (2002) 26:2, *Atlantis: A Women's Studies J.* 53 at 55.

³⁰⁰ *Ibid.*

action we see the European version of an “American-based feminist agenda ...assumed to speak to issues of concern by, in the case of our focus here, Arab and Muslim women just as it does to issues of some American women”³⁰¹ However, the issues and ideas of Western feminists are not the same and cannot be made to fit Muslim women. While the courts may have been well intentioned in working towards gender equality from their perspective, they were in fact not well informed. As a result they appear “unaware of the hegemonic character of imposing their agenda upon women from different cultural traditions.”³⁰² Further, demonstrating the imposition of European concepts of womanhood upon immigrants and Muslim converts is that within the French theory that hijab bans would liberate young Muslim women, “an investigation of the political play of gender as a social construct in the affair of headscarves is rejected in favor of a normative (Western) standard of women's social identity, compared to which any other set of feminine cultural practices will be found wanting.”³⁰³

There is currently a unique situation arising from immigration to Europe that finds practicing Muslims confronting modern, secular life which has caused some reinterpretation of the religion and more importantly the limits to interactions between the sexes traditionally³⁰⁴ encouraged by Islam.³⁰⁵ Muslims now living out of their motherlands, seek to keep some sense of the Islamic identity they value despite the fact that, it remains somewhat separate and different from the ‘Western’ or ‘European’

³⁰¹ *Ibid* at 53-54.

³⁰² *Ibid* at 54.

³⁰³ Mouruzzi, *supra* note 223 at 662.

³⁰⁴ In most cases, a person's life framework is a blend of cultural, ethnical and even religious practices. It is necessary to consider that not all practices are rooted solely in religion.

³⁰⁵ Gole, “Islam in public”, *supra* note 40 at 18.

identities of the majority. This is not intended to serve as resistance to participation in their host societies but rather as a means of remaining authentic to their personal values. As a result contemporary Islamist movements are identity building movements in the sense that they redefine, recompose and reconstruct Muslim identity. Where some traditionalists seek to maintain morality by using the veil to control women's innate sexuality and therefore limit cross-gender interaction and participation, many other Muslim women of the modern era are using the scarf to gain admittance to the mixed situations they encounter while maintaining their personal boundaries.³⁰⁶

One of the principles of effective gender equality is the right to protect one's self by creating a safe and secure zone which allows for the enjoyment of the maximum level of social rights possible. If an individual finds this sense of security through wearing the hijab is it acceptable to deny them the right to wear it? Would interfering in their development of such a conception of personal space not be there-by denying them the full benefits of social interaction?

Rather than accepting this imposed hegemony, the courts and governments of Europe ought to be supporting their new Muslim citizens in their efforts to create a new form of gender equality that will allow for the scarf to play a role in the lives of those

³⁰⁶ A recent BBC News program investigated the fact that women are now outnumbering men in the countries post secondary schools and attributed this to the fact that modest dress standards and other limits to interaction instituted by the Islamic government have given conservative families a greater sense of security in letting their daughters leave home for studies. This can be taken as an example of Muslim women using the headscarf to their advantage in order to enjoy greater access to and participation in society. Iran's women embrace education, BBC News, News night, online: <http://news.bbc.co.uk/1/hi/newsid_5400000/newsid_5401200/bb_wm_5401288.stm>. (accessed date 1st, March 2007).

women who choose to wear it. It has been said that “no women's emancipation, in fact no liberation of any kind for women, will be successful unless it seeks to transform the fundamental divide between the north and the south, between Third World people and those in the West.”³⁰⁷ The transformation of this divide must not only encompass the way in which the world is envisioned in an ‘us’ versus ‘them’ context but also allow for the society to accept those considered to be outsiders as a genuine part of the whole and begin to view them, regardless of their differences, as members of ‘Us’ as a human race. Similarly, the notion of hegemonic knowledge, described as “a system of thought that is formed over time and that is representative of the interests of the dominant class that manages to universalize its own beliefs and value systems to subordinate classes”,³⁰⁸ resulting in ‘positional superiority’ of the West over the East must be challenged and replaced with a system of knowledge that thrives on the idea of disseminating and engaging in ‘true discourse’.³⁰⁹ This pluralistic allowance for new conceptions of womanhood would certainly be more in keeping with the United Nations definition of gender equality.

If we work from the United Nations definition, which can be presumed to be the most culturally informed on an international level, the actions of the ECtHR in these case can be deeply questioned in the realm of gender equality. It is clear that the court felt that hijab was not an appropriate form of women's dress as it was designed solely for women,

³⁰⁷ Sunera Thobani, , “Women's Resistance: From Victimization to Criminalization” (Speech at the conference Ottawa, 1 October 2001) Cable Public Affairs Channel online: <http://www.casac.ca/english/conference01/conf01_thobani.htm>. (date accessed 3 April 2007).

³⁰⁸ Gramsci as cited in Bahramitash, supra note 256 at 224.

³⁰⁹ Gramsci, Antoni, “*Selections from the Prison Notebook*”, Quinton Hoare & Geoffrey Nowell-Smith, Eds. (New York: International Publishers, 1971); Michel Foucault, *The Archaeology of Knowledge*, trans. by A. M. Sheridan (New York: Pantheon Books, 1972). as cited in Bahramitash, supra note 256 at 224.

by a community the court had little familiarity³¹⁰ with. However, in the *Sahin* case it went one step further in accepting hijab as a system of dress which could not be adapted to the medical field. In this case Turkey suggested that appropriate attire for midwifery and other medical students was enforced due to hygiene considerations and the standard uniforms that students would be expected to wear once working in their field.³¹¹ However, a limited conception of hijab was used to determine that it could not possibly conform to medical standards. Long sleeves could sit tightly against the skin on the lower arms and a snug headcovering could be worn to ensure that loose fabric did not hinder movement or become tangled causing dangerous accidents. If styled correctly the full body clothing with headscarf required could actually enhance hygiene as medically sterile attire usually requires that the hair, body and hands be covered to prevent cross contamination between physicians and patients. Would it not stand to reason that in a pluralistic society, in regards to the interest of gender equality, the greatest possible flexibility to adapt clothing

³¹⁰ I feel uncomfortable with the unfamiliarity of the court with headscarf concept since the Holy Bible states: Now I want you to realize that the head of every man is Christ, and the head of the woman is man, and the head of Christ is God. Every man who prays or prophesies with his head covered dishonors his head. And every woman who prays or prophesies with her head uncovered dishonors her head--it is just as though her head were shaved. If a woman does not cover her head, she should have her hair cut off; and if it is a disgrace for a woman to have her hair cut or shaved off, she should cover her head. A man ought not to cover his head, since he is the image and glory of God; but the woman is the glory of man. For man did not come from woman, but woman from man; neither was man created for woman, but woman for man. For this reason, and because of the angels, the woman ought to have a sign of authority on her head. (1 Corinthians (11: 3-10); From Jewish points of view also the following question is answered as follows: *What is the reasoning behind the act of Jewish married woman covering their heads in public?* The source is an inference found in Numbers (5; 18): a married woman, suspected of having been involved in an adulterous relationship, would have her hair uncovered. According to the Talmud (Kesubos 72a), it was clearly understood that under normal circumstances a Jewish woman's hair would be covered. Perhaps one could say that the covering provides a similar service as does a man's yarmulka: when I go through my day with my head at least partly covered, I am supposed to be thereby reminded that my activities should reflect the terms of my relationship with God. There is something that should remain "on my mind" that encourages me to evaluate my actions by a higher authority. Similarly, by covering her hair, a woman is maintaining a symbol designed to strengthen her commitment to one key aspect of her life, her marriage. Indeed, a married person (man or woman) must act differently, with greater caution and propriety, than others as here's so much depending on a marriage's sanctity and success. A couple's very happiness and satisfaction (along with that of their children) rests almost exclusively on their loyalty and cheerful obedience to each other. A wife, and those who encounter her through the day, can regularly consider the importance of this relationship.

³¹¹ *Sahin* (2005), *supra* note 116 para 43.

preferences would be made in order to ensure the widest range of options remained available to women? Canada has also recently experienced a situation where hijab was deemed to be inconsistent with safety in girls soccer, when it may have actually helped to promote player safety as the style worn fully contained the hair, holding it near the head and preventing any possibility of the player being injured due accidental hair pulling.³¹²

Further to defining hijab as a reasonable barrier to employment in the medical field, it served to prevent Ms. Dahlab from continuing her work in the state school system. This essentially ended her teaching career as limited positions were available within the private education system in Switzerland. When she argued this fact before the court and offered that her rights as a woman had been violated, the court simply disqualified her concern on the basis that hijab was a gender specific form of dress and thus could not be accepted as being in concert with gender equality. However, many other forms of gender specific attire exist within the European conception of womanhood. Specific women's underwear, high heeled shoes, nylon stockings, and skirts are some examples. The courts have never suggested that any other female specific dress

³¹² A recent case in Canada has raised the question of the right to wear religious insignia while participating in organized soccer. Eleven year old student, Asmahan Mansour, was told by a referee that for reasons of safety she could not play in a soccer match with her teammates while wearing the Islamic headscarf. Due to her religious beliefs and the value the scarf held for her she did not remove it and was therefore banned from play. Her team and other rival teams left the field in protest. The girls coach, Louis Maneiro, expressed concern that this ruling told "the world that no Muslim girl is allowed to play the sport" as soccer officials in Quebec where the incident occurred claimed that these rules were designed by FIFA. However, FIFA which oversees soccer around the world responded by stating that the headscarf is acceptable attire in women's soccer and that the game is actively being promoted in Muslim countries., Charest backs soccer referee's call on girl's hijab, Andy Riga & Jan Ravensbergen, "Charest backs soccer referee's call on girl's hijab", *Montreal Gazette* (26 February 2007) online: <<http://www.canada.com/montrealgazette/news/story.html?id=cde703d1-2b35-4753-b144-3f474a5b59d3>>. (accessed date: 2 March 2007) and also see Heather Scofield, "Charest backs soccer referee in hijab flap" *Globe and Mail update*, (27 February 2007) online: <<http://www.theglobeandmail.com/servlet/story/RTGAM.20070227.wcharest0227/BNSStory/National/home>>.

was hard to square with gender equality, thus it can be assumed that the assertion regarding the headscarf was made on the basis that it existed outside the European norm.

As an additional barrier to equality, France and Turkey allowed their bans to limit the educational possibilities of girls and women who valued the headscarf as a legitimate part of their female identity. Due to phenomenon such as those discussed in the previous parts, the world has lost many female scholars who could have successfully stood against the archaic and fundamentalist notions of women vis-à-vis an Islamic standpoint. Now, the governments of these nations have increased that lack of educated Muslim women by making it more difficult for them to seek the education required for them to have hopes of equality. As Judge Tulkins noted, a tolerance based dialogue between religions and cultures is an education in itself, thus it is ironic that young women should be deprived of that education on account of the headscarf. Advocating freedom and equality for women cannot mean depriving them of the chance to decide their future.³¹³ The statement has been made that “Austrians seem delighted with what amounts for them to a brain gain of educated immigrants”³¹⁴ as female Muslim students are abandoning their homeland in favor of educational opportunities in the freer, more liberal Austria.

Considering the fact that the United Nations considers equality between the sexes to be “a precondition for, and an indicator of, sustainable people centered development”³¹⁵ this brain drain does not bode well for Turkey. In fact the future of any country, including France and Switzerland which denies women equal access to

³¹³ Tulkins, “dissenting opinion”, *supra* note 128 para 19.

³¹⁴ Labi, *supra* note 212 at 8.

³¹⁵ OSAGI, *supra* note 265.

education and employment due to their identity as women³¹⁶ may be in jeopardy.

Islam itself is far from being a source of gender inequality when viewed in the correct context. Shirin Ebadi, a Nobel laureate and Iranian Muslim woman has sought to bring forth women's rights from within Islam. Her experience has found that "when Islam was used against her mission, she found her strongest sources of support from within that same Islam."³¹⁷ Had the ECtHR fully understood the nature of correct Islamic practice, it may have been more open to the notion that the religion provided a sense of equality for these women? As far as issues of dress in Islam are addressed, evidence suggests that the Prophet Mohammed had paid much attention to a dress code for Muslims in the emerging community, with a specific focus on Muslim men's clothing and bodily modesty during prayer. By comparison reference to women's bodily cover is negligible.³¹⁸

The Quran first states the modesty requirements for men before raising the issue for women. This demonstrates that within the Islamic religion, modest dress is not contrary to gender equality and is not only enjoined upon both sexes, but is in fact a duty imposed upon men before their female counterparts.³¹⁹

In France where several women stood up from among the Muslim community to speak out strongly against hijab a very special dynamic must be recognized. The majority

³¹⁶ Expressed through the headscarf, in this discussion.

³¹⁷ El Gudini, *supra* note 11 at 54.

³¹⁸ El Gudini, *supra* note 11 at 57.

³¹⁹ *Ibid.*

of these women came from families who had enforced hijab in a manner that is contrary to Islam. They imposed their single-minded view and understanding of the hijab onto all headscarves due to their traumatic experiences with the mandatory headscarf laws in these situations. The panic they endure due to their previous loss of autonomy at the hands of others causes them to redirect their feelings of frustration and helplessness into a mission that inadvertently limits the autonomy of others.

The fact that the headscarf is imposed at all is highly contrary to the Islamic religion which declares in the Quran that, "there is no compulsion in matters of Faith."³²⁰ Undue pressures from the community and family in this regard are truly not caused by the religion but rather by poor practice and domestic violence. In this realm the headscarf may be used as a symbol of control or a means of subjugation but it is very important to reinforce the fact that such applications of hijab are an unlawful misuse.³²¹

However, did the headscarf itself cause that abuse? Can a ban end the abuse? The

³²⁰ Holy Quran, 1: 257.

³²¹ It is interesting to note the issues of hijab, domestic violence and cross-cultural or religious understanding in Canada. A recent radio program noted the need for Canadians to become more informed about Muslim immigrants and to engage in more fruitful interactions and discussions around hijab. A survey discussed found that 36% of Canadians were in favor of the French ban on the headscarf. While the Charter of Rights and freedoms forbids such a law, many citizens are concerned about the use of hijab as a means of oppression. Sahina Sadiqi, the president of the Islamic Social Services Association stressed the need to view hijab in the Canadian context, where for the majority it remains a choice rather than stressing the global context of the headscarf which does point to countries such as Afghanistan where headcoverings are misused. She stated that the majority of women she meets with family problems want to wear hijab and are troubled because the families will not allow it. Canadian author Irshad Manji, stated that while she strongly supports the freedom of choice for women, she decided to support the French ban after hearing that the majority of muslim women polled in France had favored the ban. She stated that these women had no problem with Islam but rather sought to end domestic violence and pressures on girls. The host countered this view by questioning the fact that the ban was only in schools and asking if it should be extended to all areas of the public realm if it was meant to combat violence. Anna Maria Tromonti, "The Current" CBC Radio (13 February 2007)
online: <<http://www.cbc.ca/thecurrent/2007/200702/20070213.html>>.

answer to both these questions is in the negative. It is not possible to end domestic violence by eliminating an article of clothing from the public view. According to Judge Tulkins, "if wearing the headscarf really was contrary to the principle of the equality of men and women in any event, the State would have a positive obligation to prohibit it in all places, whether public or private"³²² After all, the truth remains, every woman who is victimized by this misuse of the hijab has a home to which they must ultimately return. Who or what will protect them when they re-enter that environment? Could this limited ban have saved the life of Sohane Benzaine?

Just as it is impossible to use a ban on an item of clothing to end domestic violence, it is equally unfeasible to improve the rights of women by placing restrictions upon them. Does that not constitute a transfer of women's custody from the male family members to the modern secular government which now plays the role of fatherhood? By forcing women to switch their submission from the former source of power to the latter, the decision to wear the headscarf is completely removed from the woman's control. Through these bans legislators simply erase the issue without ever resolving it and the voices of women remain stifled. Thus the Islamic headscarf is the wrong target for government actions aimed to promote gender equality.

There are many alternative acts that could not only assist in putting a legitimate end to domestic violence but begin the process of gender humanization, eliminating the restrictive frames placed upon women and allowing for the development of a comprehensive and inclusive form of gender equality. Governments can implement

³²² Tulkins, "dissenting opinion", *supra* note 128 para 12.

programs that educate police, judges and other law officials on women's rights, provide training to men and youth on the rights of women including their sexual and reproductive rights and support men's groups designed to combat domestic violence. In addition to addressing the needs of these violent men, governments can target the problem on all levels through legislation, policing, medical care, social welfare programs and allow for the creation of other Non Governmental Organizations to work to support families dealing with domestic violence. Women can be educated to better understand their rights by empowering them to emancipate themselves from difficult situations. As well, programs can be employed to strengthen women led households.

We must demand that governments act to reduce the real inequities between men and women in the areas of economics, social status, civil liberties and freedoms, rather than tolerating their scapegoating of the headscarf issue, while ignoring the real challenges of women today.

4.2. Children's rights perspective

The hijab controversy, as a multidimensional phenomenon, embraces different factors of religion, as well as creed and race while engaging different stratum of society such as university students, government employees, public elementary school teachers and public school students in an ongoing debate. The latter group, comprised of public schools in regards to either teachers or students, directly relates to children's rights discourse. In the case of France, outlined in the aforementioned chapters, female Muslim

students in public schools are being banned to wear their ostensible religious insignias similar to other students who affiliate with other faiths. On the other hand, in countries such as Germany and Switzerland, numbers of elementary school teachers are prevented from pursuing their career as long as their choice of attire is in accordance with the Islamic dress code. The common denominator between these two prohibitions was to protect the rights of the children as attendants of public schools, or to create a safe and secure environment so that children's level of awareness is kept untouched and intact. It is necessary to follow up this investigation by addressing the effect of such issues upon the rights of children. This section aims to cast light on related aspects of children's rights and the role of their teachers based on the best interest of the child. Furthermore a thorough analysis of the headscarf prohibition will be conducted from a children's rights points of view.

4.2.1. Children's right principals

Women and children have typically been recognized as one of the most vulnerable groups throughout history, until and including the modern era. The United Nations played a pioneer role in accommodating a variety of measures³²³ in order to protect women's³²⁴ and children's rights as well as to provide acceptable standards of life, as outlined in its two related Conventions. The Convention on the Rights of the

³²³ See *e.g.*, The Geneva Declaration of the rights of the Child (1924); The Declaration of the Rights of the Child (1959).

³²⁴ Convention on the Elimination of All Forms of Discrimination against Women, 1979, U.N.T.S.

Child³²⁵, as a member of the human family, was entered into force on September 2nd 1990, as inspired by the Universal Declaration of Human Rights³²⁶ and its International Covenants³²⁷ which “proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”³²⁸. In particular, the Convention on the Rights of the Child, pays special attention to psychological and intellectual aspects of children, while encompassing their physical and other such related needs at the same time.

In the aforementioned cases, namely those in France and Switzerland, two existing groups are involved including Muslim girls manifesting their faith by wearing the Islamic dress code and enjoying their rights to its full capacity, while contributing to a pluralistic and democratic society, in tandem with others. The other group is comprised of elementary school children having a teacher dressed in hijab, while they and their parents may not necessarily belong to a specific faith, or that they belong to a belief different from Islam. In both cases, the modern secular countries such as France, Switzerland and even Germany, react strictly to create such measures by which children’s conscience being is protected from the imposition of belief systems either through their parents or their teachers in order to provide for a safe and secure environment where they can manifest and shape their own convictions. This provocative situation caused a lot of

³²⁵ Convention on the Rights of the Child, 20 November 2 September 1990, U.N.T.S., online: <<http://www.unhchr.ch/html/menu3/b/k2crc.htm>>. [CRC]

³²⁶ UDHR, *supra* note 174.

³²⁷ International Covenant on Civil and Political Rights, 1967, Arts 23-24; International Covenant on Economic, Social and Cultural Rights, 1967, Art. 10.

³²⁸ CRC, *supra* note 325 at preamble.

controversy by perpetuating the 'Us' vs. 'Them' binary which in return created a further divide and resulted in the splitting of people into two opposing groups.

The Convention on the Rights of the Child provides some significant articles which can be employed in order to shed the light on this provocative debate. Article 13 (1) states that: "The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice." In this section, The Convention reserved a right for children to freely express and receive different ideas from different sources of information, and this freedom is supported and articulated by article 14(1) with respect to religion and thought which asserts: "States Parties shall respect the right of the child to freedom of thought, conscience and religion." The articles provided, promote the spirit of diversity and convey the message of tolerance among children while aiming to recognize specific rights for them regardless of the age category they belong to. In order to pave the way for such practices, the Convention on the Rights of the Child calls for states to "... assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child" in its 12(1) article and expand the duties of member states to "... respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child."³²⁹

³²⁹ *Ibid*, Art. 14 (2).

A glimpse at the Convention reveals the compatibility of these notions with the feasibility of wearing the Islamic headscarf as a means of expression of religious belief by Muslim children in their school environment. As well, the articles outlined by the Convention gives the notion that the rights of the parents to belong to one faith group or another, while at the same time encouraging their children to partake in the rituals of that faith is not only tolerated, but promoted. Moreover, based on the notion of diversity encouraged in these articles, children are free to impart and receive different ideas from a variety of sources, including the education system which should allow a wide range of teachers and instructors to be involved.

In contrast, the secular points of view promoted by the Convention on the Rights of the Child places some limitations on these freedoms in order to hinder against inordinate and anarchical environments for children, as is evident in article 13(2): "The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (*ordre public*), or of public health or morals." Similar to the European Convention of Human Rights, these freedoms are subject to limitations as prescribed by law and necessary for public safety and order.³³⁰ These barriers may result in having the affect of a double edge sword. On one hand, the consciences of prospective generations should be considered as sacred and should be protected from any bias toward any race, religion or creed. On the other hand, the barriers can create a situation in which the margin of appreciation occupies the main

³³⁰ *Ibid*, Art 14 (3).

role in majority of cases while referring to the limitations 'prescribed by law' as a means of rationalizing political maliciousness which parades in an attempt to achieve its own interpretations and schools of thoughts. Although the Convention on the Rights of the Child promotes States Parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child" in paragraph one of article 19, there are ongoing concerns about political authorities who may ignore or misinterpret the limitations placed on the mentioned freedoms. As such, they should be examined closely by the ECtHR as cases such as that of *Dahlab*. In this case the court made several references to the affect of the headscarf upon the children whom the appellant taught.

In addition to the basic concern that her headscarf, being a symbol of adherence to a particular faith, may have had a proselytizing effect on their young minds, the court also expressed concern that the headscarf was inconsistent with the ideals of equality and tolerance that teachers should relay to their students.³³¹ Also relevant is the case of France, in which the system attempted to address the rights of children through their ban on headscarves in the classroom while naturally failing to address the needs of those students who freely chose to wear the hijab and other forms of religious insignias. France's decision to ban the headscarf is in direct contradiction to article 29 (2) of the Convention, which suggests that no part of article 28 or 29 be used in a manner which interferes with the liberty of individuals who are part of the educational institution.

³³¹ *Dahlab*, *supra* note 68 at 9.

4.2.2. Critical analysis of children's right in Head scarf controversy

The headscarf controversy began as a simple local issue which could hardly qualify as national news and eventually transformed to an event that overwhelmed the media all around the world, appearing as a significant threat to immigrant minorities in some European Union member states whom are mostly marginalized in majority of both social and economical fields. In addition, the role of religion in public education heightened, as was evident in both the academic and public space. As a result, much needed discourse regarding the historical and political underpinnings of this issue would prove to be highly beneficial.

In Switzerland, several regulations were passed to ensure a secular environment in the Swiss education system which can be traced to the Federal Constitution incepted on May 29, 1874 where Article 27.3 states: "It shall be possible for members of all faiths to attend state schools without being affected in any way in their freedom of conscience or belief." The Canton of Geneva furthered this legal concept in its November 6, 1940 Public Education Act in section 6 providing that: "The public education system shall ensure that the political and religious beliefs of pupils and parents are respected." These rules present corroborative evidence that the Swiss government's strategies are an attempt to follow in accordance with the principals of children's rights as promoted by the Convention of the Rights of the Child. However, the elementary school teacher in the canton of Geneva was required to remove her ostensible religious insignia during her time in the school environment, in order to protect the children's conscience and respect

for conviction of others.

Bearing this in mind, two questions arise from this situation. How did Ms. Dahlab's hijab affect the students' consciences and did it interfere with their freedom? It appears that the students remained free to maintain their beliefs, since her presence as a Muslim teacher did not limit the students' abilities to think and decide for themselves. Based on reports as well as her character, which should be accurately considered, it is reported that she never spoke to her students about religion. Also, she firmly declined discussing the topic when it arose after the students came to the realization that the headscarf was affiliated to their teacher's religion. In this case her behavior was qualified as proselytizing.

The term proselytizing is defined as 1. To induce someone to convert to one's own religious faith and 2. To induce someone to join one's own political party³³² or to espouse one's doctrine or referred to try to persuade someone to change their religious or political beliefs or their way of living to your own.³³³ In response to such allegation against Ms. Dahlab, suffice to say that she made no efforts whatsoever to discuss her religious beliefs with her students and always took care to avoid providing such information, particularly when students on occasion did ask regarding the headscarf; she made references to aesthetics and personal comfort regarding the weather. Thus it was apparent that she avoided conveying the message that she belonged to the faith, which is different from the conviction of the majority or promoting pupils to convert to her religion. As such, it is

³³² *American Heritage Dictionary in English Language*, 4th ed., s.v. "proselytize".

³³³ *Cambridge Advanced Learner's Dictionary*, s.v. "proselytize".

evident that the title of 'proselytizer' fails to square with her behavior as a 'lay person'³³⁴ while according to Swiss laws, she should be free to be committed to her faith in the public realm rather than hiding it as a secret, since the law intended to prevent discrimination amongst different sects, and was never aimed to prevent teachers from adhering to any faith. Such prohibitions were never prescribed by law as outlined in paragraph 2 of article 9 based on the European Convention on Human Rights.

On the other hand, Dahlab's head scarf was labeled as 'harm' for 'public safety'. It is hard to imagine that a mere headscarf could cause physical 'harm' to any one, however it was construed to cause 'harm' to the minds of young children whose conscience and freedom of religion was deemed to be under threat. In fact, it was never proven that any 'harm' resulted from Ms. Dahlab's actions or that 'public safety' was jeopardized. It appears that children are exposed to far greater 'harm' caused by a lack of diversity. As well, for Muslim students who could infer by what would undoubtedly appear to them to be a strictly Christian and irreligious environment in the school system, that they as Muslims may be inadequate or unacceptable and this is a real 'harm' causing an identity crisis for them as "immigrant Children, and the children of immigrants, often find themselves caught between two competing sets of cultural constructions, out of which they must fashion a workable identity that will permit them to traverse between two often antagonistic communities, two discourse"³³⁵ and such struggles towards a non homogeneous environment could result in physical and mental 'harms'.

³³⁴ See page 40.

³³⁵ Moruzzi, *supra* note 223 at 663.

As mentioned above in the *Dahlab* case, the main goal was to vindicate the students' freedom of conscience. In contrast, the headscarf ban was ill equipped to do so, since the right's of a child to be exposed to diversity is vastly ignored by state authorities and the court. In fact, all children in various categories of age have a right to be educated in a neutral environment according to state law. Apparently, in the *Dahlab* case, one image is selected among others and the rest are enforced to conform to the chosen paradigm, which cannot be considered a neutral strategy. In such situations, while the presence of the religious insignia can be considered as a marker, "the absence, is also a marker....as going bareheaded may be seen as an overtly Christian practice.... is legislated in a dominantly Christian country."³³⁶

The European Court on Human Rights also failed to consider another consequence regarding the lack of diversity in the school environment. In a diverse and neutral school system, all types of teachers can be seen, e.g.: Muslim, Christian or Jewish. In an environment that solely promotes Christian or Jewish images of teachers, may result in pupils thinking that only non-Muslims can become teachers since Islam and Muslim teachers are not welcomed in their education system. In addition, it may convey a message that Muslims are not intelligent and hence not capable of the great responsibility of being teachers. In this case of *Dahlab*, the court failed to address the equal risk that the pupils may infer second class citizenship upon Muslim women as they appeared to be absent from the education system.³³⁷

³³⁶ *Ibid* at 664.

³³⁷ For example an Afghan refugee who adopted German nationality, was judged by the court in Germany that because of wearing headscarf, "she does not possess the required capacities for the job, since in the

Along with the message that the headscarf prohibition brings for both Muslim and non-Muslim students, should be considered the perpetuation of racism in the depth of students' minds which the court failed to consider and the fact that one Muslim teacher among the hegemonic Christian image of other teachers is not a threat to conscience of children compared to the threat of promoting a sense of exclusivity by discouraging a lack of diversity.³³⁸ It is true that "by accepting expression of various identities among the teachers, the public school would express its own tolerance for plurality and by that also give the pupils a better chance to develop tolerance for difference, like the UN Convention on the Rights of the Child calls for."³³⁹ Based on this discourse, states have the responsibility to not only tolerate diversity, but to adequately educate their citizens to consider the differences between them, and form their own personal decisions without imposing it upon others.³⁴⁰ In particular according to Dutch law, "the headscarf issue is not treated as a matter of religious freedom but rather as a matter of nondiscrimination"³⁴¹ as veils in Dutch public education was reportedly so unproblematic so that it hardly results in any discomfort.

Moreover, religious schools have suffered a great deal in this matter due to profound lack of diversity. Stereotypes, fanaticism and lack of tolerance are the

capacity requirement religious freedom is subordinate to the duty of neutrality, in order to protect the religious freedom of parents and pupils." Brems, *Diversity*, *supra* note at 123.

³³⁸ See e.g. "In its critique of the attempts of certain German states (Bundeslander) to prohibit Muslim public school teachers from wearing headscarves, the UN Committee on the Rights of the Child expressed this point in the following way: The committee (...) is concerned at laws currently under discussion in some *Lander* aiming at banning school teachers wearing headscarves in public schools because it does not contribute to the child's understanding of the right to freedom of religion and to the development of an attitude of tolerance, as promoted in the aims of article 29 of the Convention. (CRC/C/15/Add.226,30.01.2004)", Plesner, *supra* note , n.15.

³³⁹ Plesner, *supra* note 189 at 8-9.

³⁴⁰ Asad, *supra* note 145.

³⁴¹ Brems, "Diversity", *supra* note 205 at 124.

threatening elements which put them in the same category in which secular schools can be placed. The reality is that secular fundamentalism does not jeopardize the human rights principles of freedom of religious expression and fruitful diversity any more than religious fundamentalism has.

Furthermore, the Islamic dress code prohibition in public schools was endorsed by different points of view due to the fact that it showed disrespect for parents and students. In reality the fact that a lack of complaints about Ms. Dahlab's hijab would suggest that no one was offended or felt disrespected by her mere presence as a visible Muslim. The state's response to the fact that no comments or complaints had been lodged, was that the parents' silence did not mean they were unaffected. It determined that those who may have taken up an issue with the headscarf may have simply been avoiding a disturbance and waiting for authorities to respond. However, to take silence to be a dissenting opinion over that of consent is unacceptable. It appears that people are more likely to say something when they are offended, than when something is not an issue for them.³⁴²

Does the state aim to create 'harmony'? Is the 'harmony' considered an ultimate solution to respect parents' and pupils' conviction? Both in France and Switzerland, states do not even offer that other efforts to maintain 'harmony' have been tried and failed. Does Ms. Dahlab's headscarf directly affect the 'harmony' parents expected from the education system? In the *Dahlab* case, as a teacher or the *Sahin* case as an adult

³⁴² For example, A French teacher called Djamila left her job after parents complained that a women in veils was not a good role model for little girls. She asked for a week off to think this over, and then offered to compromise by wearing a high rolled collar and her scarf, "just some thing to cover my neck and hair", but the complaints continued and she had to quit. Kramer, *supra* note 42.

student, and all French school girls, the 'harmony' could have been resolved by school rules that any student or teacher who wore the hijab and was directly causing disruption through proselytization, fundamentalism or placing pressure upon others could then be forced to remove their headscarf, thus allowing peaceful students to act according to their free wills would have been an appropriate response. Ms. Dahlab could have been asked to refraining from providing answers regarding religion, as she did and could have been asked that her coverings be modern and widely available in local stores, as Ms. Dahlab's were. The state could have interviewed and/or polled parents in the school to better assess the affect the headscarf may, or may not have had on them, instead of making assumptions.

France was one of the countries in which the headscarf controversy with regards to children's rights created much provocative discourse. There was a significant failure on the part of French officials to act upon the primary threat to the rights of women and children which occurred in the form of domestic violence. The proven reports on children's abuse³⁴³ in some cases in France, would illustrate how the headscarf ban has failed to facilitate the safety and security of children in such environments. Although the Stasi commission spent a great amount of energy in studying girls who wore headscarves in France and their true intentions, it failed to equally consider those who did not wear scarves. In this manner they overlooked the possibility that there could exist a group of girls within the state education system who desired to wear scarves, but chose not to, due to safety and security concerns related to its wearing.³⁴⁴ Headscarf prohibition has really

³⁴³ For example Sohane Benzain was burned alive by her brothers for refusing to wear veil in public school.

³⁴⁴ Asad, *supra* note 145.

“touched on only the surface of France’s problems...even some of Stasi commission members complained that, of the twenty-six proposals in their report, many addressing significant social and economic inequities that Muslims in France face, only the one about headscarves was actually adopted [since] there was a rush to implement”³⁴⁵ A question that comes to mind is: what is the motivation for such a rush in comparing proposals on teaching religion in public schools, in jobs and hospitals.³⁴⁶

France’s historical records indicates that this country had a good reputation dealing with Jewish and Christian students as the “French school week runs through part of Saturday, and the only full day of rest on the weekend is Sunday. That practice is a happy compromise of the religious and the secular”³⁴⁷ But the hard situation can be imagined, when “[one’s] religion is other than Christian, in which case the secular school week may seem very much religiously defined”³⁴⁸

Overall, the rights of children from all faiths, as well as those belonging to different races and ethnicities need to be vindicated in a variety of social environments. In Ireland, an Ombudsman was established for children in order to provide them with specific services and provide an appropriate support for them. “The establishment of that office is in recognition of the need for an independent person to act as an advocate for children in promoting their welfare and rights reflecting the emerging consensus that

³⁴⁵ Kramer, *supra* note 42.

³⁴⁶ *Ibid.*

³⁴⁷ Mouruzzi, *supra* note 223 at 664.

³⁴⁸ *Ibid.*

children can be holders of certain rights which can be enforceable in law.”³⁴⁹

Organizations such as ombudsmen can contribute a great deal to protect children’s rights since they are independent and thus unaffected by political and governmental biases.

“The ombudsman may investigate a complaint made by or on behalf of a child ... gives directions to the school board of management in regard to remedying the matter the subject of the appeal. That appeal may be initiated by the Ombudsman or by a child, a family member or by a person having a professional relationship or other appropriate relationship with the child.”³⁵⁰

In the cases in France, an independent organization could investigate why the hijab prohibition in French government has priority over the everyday reality of racism that needs to be the focus of attention. Such a system can vindicate Muslim school girls’ rights on a case by case basis in order to provide an equal opportunity for different tastes and different schools of thoughts amongst pupils, their parents and teachers rather than imposing generalized prohibitions upon them. The final suggestion is that we should not let the system force Muslim students to submit to one particular form of tutelage, namely that of the modern and the secular. Their rights need to be protected even from governments which nowadays play more significant roles in children’s education system in comparison with their parents. In fact, “Asking school girls in France to remove their veil inside the classroom or the school is precisely turning their affirmative veil into a traditional/patriarchal veil that can be removed inside the private space. It is forcing them into categories that deny their autonomy.”³⁵¹ In this case, the weakness of the education system in providing adequate and appropriate supporting

³⁴⁹ Dympna Glendenning, “The Ombudsman for children: an analysis of the Irish model as it relates to recognized schools”, (2004) 16:2-3, *Education and the Law* at 133.

³⁵⁰ *Ibid* at 138.

³⁵¹ Lyon and Spini, *supra* note 6 at 344.

agents who are able to closely communicate with children and involve with their emotional challenges including their identity crisis or their efforts to achieve indepenance as well as promoting the spirit of multiculturalism and acceptance rather than tolerance, will result in the rules, which aims to clean up the consequence of the problem rather than solve the origin of the issue which belongs mostly to political spectrums. And finally, in order to become compatible with principals of the Convention of the Rights of the Child, “The students must be acquir[ing] autonomous judgment [and] the state has to prevent their minds being harassed by the violence and furors of society: without being a sterile room, school should not become an echo room of the world’s passions, lest, it fails its educational missions”³⁵²

³⁵² Commission de reflexion sur l’application du principe de Laicite dans la Repoblique, Rapport au President de la republique, December 11, 2003, 14 [translated by Eva Brems] as cited in Brems, Diversity, *supra* note 205 at 121.

Chapter V: Conclusion

Through this research, I examined the variety of concepts and interpretations based on the modest behavior of Muslim women through the Islamic headscarf and indicated that the probability that debate on the rules and obligations relating to headscarf is likely to continue. In other word, no consensus was found among Muslim scholars on the fact that whether the traditional form of the Islamic headscarf is a fundamental religious requirement or if it may subject to change in different circumstances throughout the centuries.

My journey from traditional and historical hijab inspired from holy sources such as the Quran and the Hadith started and continued with the new format of the Islamic dress code. Growing in post colonial trends, Muslim women were motivated to practice new strategies towards the modern mainstream of Western feminisms by challenging the standard image of Western women imposed on them, as they believe the women's freedoms can be guaranteed, when the plurality of women's social identity is acknowledged. Akbar Ganji provides an illustrative approach toward the acceptance of plurality. He believes "a modern human being is one who creates a piece of art out of himself and each piece of art is different from the other"³⁵³ In order to achieve these ultimate goals, governments should resign their efforts to impose their own accepted normative standards on women. Moreover, self determination of women in their ideological fields should be recognized since Muslim feminists believe that women

³⁵³ Akbar Ganji, "Bareness and veilllessness of Islamic republic [of Iran]: Considarations around women's suppression", < <http://news.gooya.com/politics/archives/2007/05/059631.php>>. (accessed date 15 May 2007)[translated by author].

should not being used as means to achieve governments' political and ideological destinations.

Among most recent Islamic movements, a critical faith-centred perspective is continually emerging. It aims to acknowledge that "while religion and spirituality can be sites or sources of oppression, they also offer powerful spaces of resistance to injustice and provide avenues for critical contestation and political engagement."³⁵⁴ Alongside this novel perspective to religious movements, new waves of Muslim thinkers call for secularization of Islamic laws. Their writings are apparently influenced by rationalist traditions of Mu'tazilites. Due to political reasons, this school of thought disappeared from the social sphere after 846 A.D.³⁵⁵ Such an approach can be considered an active and compatible approach to synergic models of interdependence between Secularism, religion and human rights. Hence "freed from the undue piety of Muslim law and returning to what is universal in the Quran's message, these thinkers rediscovered an Islam liberated from the inequalities laid down in Muslim law (inequalities between man and woman, between freeman and slave, between Muslim and non-Muslim and so on) and present a livable Islam for today."³⁵⁶

Regardless of recent movements in Islamic societies, this research tried to investigate the current tensions between freedom of religious expressions through ostensible religious insignias such as the Islamic headscarf as fundamental human rights

³⁵⁴ Zine, "orientalism", *supra* note 48 at 18.

³⁵⁵ Gallala, *supra* note 27 at 606.

³⁵⁶ Gallala, " Homme, Nature et Droit dans la philosophie juridique musulmane", in *Direito Natural Religioes e culturas* (Coimbra Editora, 2004), 97-114 as cited in Gallala, *supra* note 27 at 606.

and principals of secularism. Based on paragraph 2 of article 9 of the European Convention of Human Rights, the European Court of Human Rights was involved in several cases related to the hijab controversy. A margin of appreciation was largely utilized to justify state bans on the headscarf and it appears that the court failed to question the evidence on secularism and offered little resistance to the ideals of the member states regardless of the degree their philosophies are ill founded.

By examining the historical and political circumstances of the countries involved in the hijab debate, this research found that in France, similar to Turkey, religious fundamentalism was a concern. The Special Rapportuer wisely linked the headscarf bans to a possible future increase in fundamentalism, and although it is important to note in that at least one girl, Sohane Benzein, was killed for reportedly refusing to wear a headscarf, it was an exceptional event. The country took this experience as a threat to public safety, however it is unlikely that the headscarf ban in schools would have prevented this death which occurred outside the school environment and in the housing project where the girl lived. In addition, rising anti Semitism was considered a risk to public safety by the French government, however there is no evidence that the ban of religious symbols was able to halt this and indeed if anything, it may have provoked tensions further. Ultimately such bans may have given some students who wished to be unidentifiable as Jews or Muslims protection in school. However, liberal policies may have similarly achieved this goal however students could still identify one another by ethnic origin, first language, name and etc.

As this research went through public order, health or moral issues mentioned in paragraph 2 of article 9, it was found that all three countries including France, Turkey and Switzerland experienced public order problems as a result of the headscarf ban and the ensuing controversy. However, there is no evidence that public order was directly affected by the headscarf per se. Moreover, none of aforementioned countries raised health or moral concerns, although Istanbul University did state that Ms. Sahin's status as a medical student wearing in Islamic dress would be problematic, which can be interpreted that she would ultimately be required to wear a uniform for hygienic reasons.

The European Court of Human Rights paid a great deal of attention to the protection of the rights of others in these cases. In the *Sahin* case, the state claimed that there is a considerable amount of threat to the secular nature of the state, women's rights, gender equality and the rights and conviction of others to feel safe from fundamentalists. By making the veiling for Muslim women permissible, such a threat would be maintained if not enhanced. Could the ban really protect other people's faith in this case? Does taking the freedom of a woman to choose her attire protect her equality? Can such strategy impede religious fundamentalism or may it in fact promote these movements by giving them a purpose, a united issue to fight against? In the *Dahlab* case, the goal was to protect students' freedom of conscience but a headscarf ban was found ill-equipped to do so. Furthermore, the importance of the fact that society must pave the way for children to be exposed to diversity must be closely considered and indeed it must be recognized as the right of a child. This study found that the fact that children have to be educated in a neutral environment according to state law in secular states is contrary to the reality of

the matter, which is that the one selected image enforced upon them by government is in fact not neutral.

In the *Sahin* case, the government expressed that secularism had been undertaken by the republic to protect those who chose not to be religious and to give rights and freedoms to the minority. Through this research it reveals that now after several decades the religiously observant individual had become the minority and the secularists in the majority wished to infringe upon their rights. There was no evidence that the headscarf directly or indirectly threatened the rights of others; however, the state claimed it was a threat to women's rights and principals of gender equality.

France also sought to protect women's rights for those women who may wish to be free from the veil; however the ban can be exercised at the expense of those who choose the veil. Promoting the law whereby parents, guardians and spouses demanding women to forcefully cover themselves can contribute a great deal in improving women's status. Such people could in fact be charged and jailed for domestic abuse if the woman in question reported to police that her covering was done by force. In such cases family violence issues should be considered and women's rights could be protected under the laws effectively combating against all means of violation and discrimination against women. Although anti-Semitism arguments raised a considerable controversy around the issue of the headscarf and interpreted as it as an interference with the rights of Jewish students to feel safe and secure in school, the ban simultaneously violates their right to religious attire.

All three countries being studied in this research look at the rights of others while boldly neglecting the rights of those women who choose the Islamic headscarf by their own free will. The proportionality and ability of the headscarf bans to achieve the protection of others becomes a paramount consideration in such cases. In the absence of evidence that the headscarf posed a real, tangible and demonstrable threat to the freedoms of others, these countries and the supervising court, the ECtHR, should have found that the amount of interference with the rights of others was insufficient to justify the interference with the rights of those affected by the ban. The rights of others should only trump the rights of an individual or group, if the dangers posed by that individual or group's exercising of their rights are greater than the infringements to rights taken for the protection of others.

Realistically, the main source of the European Court of Human Rights which was paragraph 2 of article 9, fails to prevent such acts of harm to others such as: rape, forced underage marriage, forced marriage and marital rape, human sacrifice, murder, rioting, forced conversions, the unsafe burning of property, medical procedures done without consent and etc. These are all actual physically harmful actions that have been undertaken in the name of religion throughout history and today, these imminent threats to human life, health and freedoms. However, to equate the headscarf and the need for a law to ban it with these considerations is a grave injustice and a significant abuse in the fundamental application of this law. This abuse of article 9, section 2 can open the doors for states seeking to ban religious meetings and close up Mosques, Synagogues, Temples, and Churches on the premise that they are often the site of hate crimes and that in order to

curb vandalism and arson attacks on such buildings, they should all be closed down, thus protecting public safety. This may give rise to the question as to what the potential is for the headscarf issue to develop overtime into other fundamentalist secular outcomes.

Overall, through this study my efforts were focused in illustrating and enriching my arguments regarding the inadequacy of the mainstream discourse on the freedom of religious expression and its compatibility to principals of neutrality, democracy and secularism. I found that there is continuous disagreement on the legitimacy of Islamic headscarf and its role as a faith expression or sign of oppression. In such multi dimensional phenomenon, case by case studies can contribute a great deal in pacific settlements of disputes among faith based and secular trends since empirical researchers can pave the way for revealing new legal strategies toward recent legal and political challenges. Recognising the necessity of diversity in legal approaches, this research calls for close interaction through empirical studies with different involved parties to know and understand them effectively. In fact close engagement can result in discovering new legal alternatives towards the headscarf cases.

In documenting the ECtHR's logical paradoxes through its rulings over aforementioned headscarf cases, this study revealed that freedom of religious expression in the headscarf frame work is profoundly jeopardized. Primarily this research conceives the fact that extremist religious systems exercise a great amount of limitations upon their nationals within the public and private realm. Collecting relevant databases related to the European Courts' judgments, I found that the evaluations of the ECtHR on freedom of

religious expression were primarily based on profound respect for plurality and democracy, tolerance and neutrality and finally liberal trends of secularism. However, the court's judgments in both the *Dahlab* and *Sahin* cases are likely veered towards fundamental approaches of secularism. The reality is, that the ECtHR verdicts in favor of Turkey and Switzerland, and legislated prohibitions on the Islamic headscarf as a symbol of anti religious expression strategies in such secular states.

Based on the researches conducted in this study and my understandings of freedom of religious expression as a fundamental principal of human rights, it appears that current violations on these rights and freedoms shall confirm the hypothesis of this work that "The secular fundamentalism in the some European Union countries does not put the human rights principles on the freedom of religious expression in less jeopardy than the religious fundamentalism in some Middle East countries."

The picture rendered through this study is aimed to call for identification and clarification of alternative voices and replace traditional social and legal approaches with a responsible and fresh look to the trends resisting the hegemonic ideologies. What I attempted to discover was an alternate understanding of the Islamic headscarf by shedding light on the different aspects of it. The veil discourse will keep its door open for further dialogue and will continue to evolve like a morphing document, like a dynamic energy which goes beyond the dominant understanding of selfhood.

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