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THE ‘ISLAMIC SCARF’ IN THE EUROPEAN COURT OF HUMAN RIGHTS²

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[The wearing of religious clothing and symbols has become a source of potent legal and political controversy. This article analyses the way in which the European Court of Human Rights has dealt with claims by two women (one a teacher and one a student) who were denied the right to wear headscarves in their educational institutions. The article analyses the way in which the Court considered but failed to fully engage with three issues raised in those cases: proselytism; gender equality; and intolerance and secularism. It criticises the Court’s reliance on stereotypes and generalisations about Muslim women, and Islam more generally, and explores the way in which two contradictory images of Muslim women inform the Court’s decisions.]

I. INTRODUCTION

Veils, it seems, are very revealing. As soon as a Muslim woman covers her head there are large numbers of people — from journalists to politicians, academics to talkback radio callers — who know exactly who she is and what she stands for.³ Despite the fact that women, both Muslim and non-Muslim, have been wearing head coverings of various kinds for many centuries, suddenly headscarves are engaging attention throughout the world.⁴ While the media has focused on the

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³ See, eg, the following selection of recent media attention: Zarema Velikhanova, ‘Women Challenge Headscarf Ban in Azerbaijan’, *Tulsa World* (Oklahoma, United States), 4 December 2005, G3; Vincent Boland, ‘Turks Debate Headscarf’s Role in Public Life Appointments’, *Financial Times* (London, United Kingdom), 17 March 2006, 6; Liam Houlihan and Clare Masters, ‘Quick Make-Over: The Amazing Transformation of Michelle Leslie’, *Herald Sun* (Melbourne, Australia), 21 November 2005, 1.

⁴ In the 10 year period of 1989–98, over 1500 press articles were written on religion in schools in the UK and France alone, the vast majority on headscarves. For an analysis of these, see Lina Liederman, ‘Pluralism in Education: The Display of Islamic Affiliation in French and British Schools’ (2000) 11 *Islam and Christian–Muslim Relations* 105, 110–12.

changes to the rules for schoolgirls in France,⁵ there have been controversies in many countries — from Danish women who were sacked from their jobs as check-out operators,⁶ to British schoolgirls who did not find the school's Muslim uniform sufficiently strict,⁷ to a Muslim witness in New Zealand whose wearing of a veil over her face when giving evidence in a car theft trial was challenged by the defence,⁸ to an Australian soccer player who was told by a referee that she could not take part in a match unless she removed her headscarf.⁹

The political and legal controversies surrounding the wearing of religious clothing, particularly in public institutions such as schools, universities and public service offices, found their way to the European Court of Human Rights ('the Court') in two important decisions. The first, *Dahlab v Switzerland*,¹⁰ involved a school teacher who was banned from teaching in a primary school because she dressed in traditional, modest clothing including a headscarf. The second case, *Şahin v Turkey*,¹¹ involved a university student who was prohibited from study because she wished to wear a headscarf in her lectures and examinations.¹² *Şahin* is particularly important because it is the first Grand Chamber decision on the issue of religious clothing, but *Dahlab* is also a highly relevant case, despite being dismissed as inadmissible, because this perfunctory treatment is common for religious freedom cases brought by religious minorities in Europe. Thus *Şahin* is of more importance in a legal sense, but *Dahlab* is likely to be more representative and typical of the fate that awaits other applicants in religious freedom cases of this nature.

This article examines both cases and the reasoning that the Court employs in each to determine that the states in question had not breached the applicants' freedom of religion. The decisions of

⁵ For a good contextualisation of these issues, see generally T Jeremy Gunn, 'Religious Freedom and Laïcité: A Comparison of the United States and France' [2004] *Brigham Young University Law Review* 419. See also Jon Henley, 'France to Ban Pupils' Religious Dress', *The Guardian* (London, UK), 12 December 2003, 17; Keith Richburg, 'Chirac Urges French School Ban on Muslim Headscarves' (2003) *The Muslim News* <http://www.webstar.co.uk/~musnews/news/print_version.php?article=6488> at 22 May 2006; Robert Graham, 'Chirac Urges School Ban on Muslim Headscarves', *Financial Times* (London, UK), 17 December 2003; 'Chirac Urges School Ban on Muslim Headscarf', *Reuters News* (London, UK), 18 December 2003; 'France Says "Non" to Muslim Headscarves in Schools', *Associated Press Newsfeed*, 18 December 2003; Jane Kramer, 'Taking the Veil: How France's Public Schools Became the Battleground in a Culture War', *The New Yorker* (New York, US), 22 November 2004, 58.

⁶ Clare MacCarthy, 'Danish Muslim Dismissed for Wearing Headscarf Loses Court Case', *Financial Times* (London, UK), 19 December 2003, 10.

⁷ *R (on the Application of SB) v Denbigh High School Governors* [2005] 1 WLR Civ 3372.

⁸ Tony Stickley and Elizabeth Binning, 'Lawyer Protests Wearing of Veil during Testimony', *The New Zealand Herald* (Auckland, New Zealand), 17 April 2004, A5.

⁹ 'Soccer Referee Suspended after Questioning Muslim Player's Headscarf', *Associated Press Newswires*, 23 June 2004; 'Australian Soccer Hopes New Rule on Muslim Headscarves Will Go Global', *Agence France Presse*, 21 May 2004; 'Referee Steps Aside after Asking Muslim Player to Remove Headscarf', *Associated Press Newswires*, 5 May 2004.

¹⁰ *Dahlab v Switzerland* (2001) V Eur Court HR 449 ('*Dahlab*').

¹¹ *Case of Leyla Şahin v Turkey*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) ('*Şahin*').

¹² Prior to these cases, the Court had only given brief consideration to the issue of religious apparel. One case, *Karaduman v Turkey* (1993) 74 DR 93, involved a female university student who was unable to graduate because she refused to remove her headscarf for the identity photo required for graduation. The Commission dismissed this case as manifestly ill-founded. The Commission treated in the same manner a claim from a Sikh who complained that he could not legally ride a motorcycle in the UK as the law that required him to wear a motorcycle helmet was incompatible with wearing his turban: see *X v The United Kingdom* (1978) 14 DR 234. Another claim from a Sikh who was denied permission to wear his turban due to occupational health and safety issues was likewise dismissed by the United Nations Human Rights Committee: see *Singh Bhinder v Canada*, Human Rights Committee, Communication No 208/1986, UN Doc CCPR/C/37/D/208/1986 (28 November 1989) [2.1]–[2.7], [6.1]–[6.2].

the Court in both cases relied on two contradictory stereotypes of Muslim women as the essential basis for the decisions. While the formal tests adopted by the Court set a very high bar for states that seek to limit the rights of those within their jurisdictions, in practice, the rights of minority religions in many European states have been routinely limited and the Court has not condemned such limitations. The two cases discussed in this article are examples of the way in which the members of the Court find it difficult to move outside the religious paradigms that are most common in Europe (that is, either broadly Christian or secular) and to deal with non-Christian religions in a manner that is respectful and culturally sensitive.¹³ They also demonstrate the extent to which the Court was prepared to rely on government assertions about Islam and the wearing of headscarves — assertions that were not substantiated by any evidence or reasoning.¹⁴

II. THE RELEVANT CONVENTION PROVISION

The key provision in the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁵ with respect to freedom of religion is art 9. It states:

- 9.1 Everyone has the right to freedom of thought, conscience and religion; this right includes the 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.
- 9.2 Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The first sub-section sets out the positive scope of the freedom. Unlike the US and Australian constitutions,¹⁶ the European Convention on Human Rights makes it clear that religious freedom is not limited to beliefs but extends to manifestations, that is, actions as well as beliefs.¹⁷ Thus, religious practices such as wearing particular clothing can be more easily and less controversially captured by art 9 than it can in some constitutional systems.

¹³ See generally Carolyn Evans, *Religious Freedom under the European Convention on Human Rights* (2001) 117–23; Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (2005) 351 criticising the Court's lack of a global approach to religious issues and its consequent difficulty in dealing appropriately with minority religions.

¹⁴ *Dahlab (2001) V Eur Court HR 449*, 458–9, 461; *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [150], [154].

¹⁵ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('European Convention on Human Rights').

¹⁶ United States Constitution amend I; Australian Constitution s 116.

¹⁷ The complexities of trying to untangle belief and practice are explored well in Gabriel Moens, 'The Action–Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195.

The Court has set out a variety of tests for each of the terms 'worship, teaching, practice and observance'.¹⁸ The wearing of headscarves almost certainly falls into the category of 'practice' (assuming that it falls within the scope of religious freedom at all). This is the most amorphous and least well defined of the categories of protected religious freedom, in part because the Court will often say that it is assuming a breach of art 9 (and then go on to explore the limitations in art 9(2)) without discussing in any detail the claims of the particular practice to the protection of art 9(1).¹⁹ This is precisely the approach that the Court took in *Dahlab* and *Şahin*. In *Dahlab*, for example, the

Court simply proceeded on the assumption that wearing religious clothing was covered by art 9(1).²⁰ In *Şahin*, the Grand Chamber took the slightly more encouraging route of quoting the original Chamber judgment, which discussed the fact that the applicant believed that she was obeying a strict religious injunction in wearing a headscarf.²¹ This, the Grand Chamber held, meant that her decision 'may be regarded as motivated or inspired by her religious belief'.²² This wording is important, as the Court has held on numerous occasions, and has reiterated in *Şahin*, that not every action that is motivated or inspired by religious belief is entitled to protection as a practice under art 9. The Court then 'proceeds on the assumption' that the regulation of clothing in this case constituted an interference with the right to manifest a religion.²³ The Court thus merely assumes this position, and carefully qualifies it so that it is clear that it has not decided 'whether such decisions are in every case taken to fulfil a religious duty'.²⁴ There is no clear finding (only an assumption) that religious freedom has been interfered with and no clear test set out for later cases.²⁵

Despite the reluctance of the Court to make such a determination, there is a strong case for arguing that the wearing of religious clothing, at least when the wearing of such clothing is a requirement of the religion, does fall within the protection of art 9. In a decision by the European Commission that has since been followed a number of times in European cases, it was held that the term 'practice' in art 9(1) did not 'cover each act which is motivated or influenced by a religion or belief'.²⁶ Rather, the manifestations must be 'normal and recognised manifestations'²⁷ of the religion or belief that 'actually express the belief concerned'.²⁸ Over time, this test narrowed into a type of 'necessity' test whereby the Court judged whether a particular activity fell within the scope of art 9(1) by asking whether the activity in question was required by the religion or belief (as compared to merely being motivated, influenced or encouraged by it).²⁹ Using this test, the wearing of heads-

¹⁸ Evans, above n 11, 105–10.

¹⁹ *Ibid* 134–5.

²⁰ *Dahlab* (2001) V Eur Court HR 449, 461.

²¹ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [78].

²² *Ibid*.

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ *Arrowsmith v the United Kingdom* (1978) 19 Eur Comm HR 5, 19. See also Evans, above n 11, 113, 116–19.

²⁷ *Arrowsmith v the United Kingdom* (1978) 19 Eur Comm HR 5, 20.

²⁸ *Ibid*.

²⁹ See Evans, above n 11, 115–23 for an overview of the relevant cases and a critique of the methodology used by the Court. This approach has been used in many instances to exclude cases that the Court or Commission deemed unmeritorious, particularly those involving mi-

carves by women who believe that the wearing of such garments is a compulsory obligation of their religion should be held to be a manifestation of religious practice. That the Court was unwilling to state this explicitly in its judgment demonstrates its general reluctance to acknowledge the value and religious importance of many key religious practices outside of Christianity. It compares poorly to the clear and unambiguous finding of the UN Human Rights Committee in dealing with a student whose wearing of the headscarf at university led to her harassment by university authorities. In that case, the Committee commented on the application of art 18, the religious freedom provision in the International Covenant on Civil and Political Rights,³⁰ stating that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation...³¹

Even if the wearing of religious apparel is covered by art 9(1), art 9(2) makes it clear that the right to manifest a religion can be subject to limitations of a specific kind.³² Thus, even if the wearing of religious garments is a manifestation of religion, it may be subject to limitations where necessary in a democratic society in 'the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.³³ It is this limitation clause that is the focus of most of the decisions of the Court, including the two examined here.

The limitations clause of art 9, while not precisely the same as the clauses used in similar articles of the European Convention on Human Rights, is of sufficient similarity that the basic tests developed under similar provisions — for example, the free speech or free assembly articles — are also used with respect to religious freedom. In particular, the term 'necessity' has been found to connote a high burden to be discharged by a state. Necessity is 'not synonymous with "indispensable" neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".'³⁴ A measure does not become a 'necessity' simply because it has the support or approval of a majority of the population — as is appropriate with a human rights instrument, the Court must also consider the rights of minorities.³⁵

Yet despite this seemingly strict test, the degree of oversight by the Court has been lessened by the development of the concept of the margin of appreciation.³⁶ The margin of appreciation plays a

minority religions or beliefs. In this case, however, it would seem to work in favour of Muslim women who wear the headscarf because of a belief that to do so is required by their religion.

³⁰ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³¹ *Raihon Hudoyberganova v Uzbekistan*, Human Rights Committee, Communication No 931/2000, UN Doc CCPR/C/82/D/931/2000 (18 January 2005) [6.2]. The Committee noted in the same paragraph that this freedom could be limited if there were sufficient justification, but that Uzbekistan had not made any submissions to the Committee regarding justification. In such circumstances the Committee found a violation of art 18.

³² For an overview of these limitations, see Javier Martinez-Torron, 'The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: A Comparative Perspective' (2003) 3(2) *Global Jurist Advances* [6], available from <<http://www.bepress.com/gj/advances>> at 22 May 2006.

³³ European Convention on Human Rights, above n 13, art 9(2).

³⁴ *Handyside v the United Kingdom* (1976) 24 Eur Court HR (ser A) 5, 22; 1 EHRR 737, 754.

³⁵ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [108].

³⁶ See generally Howard Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1995) for a good overview of the variety of contexts in which the margin is applied.

role in deferring to the judgement of states whose democratically elected officials are said to be in closer contact with the particular needs of their populations. One context in which it is employed is where there is little or no European consensus on a particular issue, or where the issue is of particular complexity or sensitivity.³⁷ The Court stresses that it is not intended to abrogate the duty of the Court — the margin of appreciation goes ‘hand in hand with ... European supervision’³⁸ — but in some cases, such as *Şahin*, it seems to lead to a very high degree of deference to state authorities.

While the margin was only briefly mentioned in the *Dahlab* decision (though it no doubt played some role in informing the Court’s conclusions),³⁹ it was of great significance in *Şahin* partly because of the Court’s analysis that there was no European consensus on whether religious clothing should be permitted in educational institutions.⁴⁰ This example demonstrates the potential problems with the margin of appreciation — even an issue such as whether there is a European consensus is one that depends very much on the way in which the Court frames the question. In *Şahin*, for example, the Court considered in some detail the approach of numerous other European states to the wearing of religious apparel in educational institutions.⁴¹ The Court pointed to the variety of practice in schools where some states permitted religious clothing with few restrictions and others did place limitations on the students’ right to wear religious clothing or symbols.⁴² In the case of higher education institutions, however, only three States — Turkey, Azerbaijan and Albania — prohibit the wearing of such garments in universities⁴³ and indeed many states described by the Court allowed pupils at all educational stages to wear religious clothing. Thus, if the Court poses the question in terms of the degree of consensus about the wearing of religious apparel in educational institutions, the answer is that there is no consensus, although most European states permit it.⁴⁴ On the other hand, if the Court asked what degree of consensus there is about the wearing of religious clothing in universities, there is a very high degree of consensus that students should be permitted to wear such clothing.⁴⁵ This distinction between school and university students is important given the differences between the two student groups in terms of maturity, independence and capacity for decision-making. Indeed, in *Dahlab* the Court seemed to recognise that this distinction is of significance because the particular vulnerability of young children made it important to protect them from certain religious influences (an argument which is discussed further below).⁴⁶

³⁷ The Court has invoked the margin in many cases relating to religion by reference to a lack of European consensus on these issues. For example, in *Otto-Preminger-Institut v Austria* (1994) 295 Eur Court HR (ser A) 6, 19; 19 EHRR 34, 57, the Court held that it is ‘not possible to discern throughout Europe a uniform conception of the significance of religion in society’ and thus some deference to the decision-making of the national authorities was required.

³⁸ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [110].

³⁹ *Dahlab* (2001) V Eur Court HR 449, 462–3.

⁴⁰ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [109].

⁴¹ *Ibid* [55]–[65].

⁴² *Ibid*.

⁴³ *Ibid* [55].

⁴⁴ *Ibid* [55]–[65].

⁴⁵ *Ibid* [3] (Dissenting Opinion of Judge Tulkens).

⁴⁶ *Dahlab* (2001) V Eur Court HR 449, 463.

The Court justifies its deference to national institutions and standards on a number of bases in the judgment. The first is that the appropriate relationship between church and state is one about which reasonable people could widely differ. This is clearly correct but represents a very high level of abstraction — there might well be specific issues in relation to the church–state relationship where there is greater consensus and therefore less justification for limiting rights. The Court then, more problematically, moves to the more specific level of the wearing of religious symbols in educational institutions, and claims that diversity in this area is demonstrated by the discussion of comparative law. As noted above, however, it is not at all clear that this discussion does support the conclusion of significant European diversity, at least in so far as higher education is concerned. The judgment then moves outward again to a higher level of abstraction — this time relating to the significance of public expressions of religious belief and the diversity of approach regarding this issue. Finally, it concludes that states are in a better position to determine how best to protect rights and freedoms and to maintain public order when making determinations on these issues.⁴⁷ The judgment segues between empirical claims about difference, legal claims about the role of the margin of appreciation, and normative claims about the primacy of national institutions in dealing with religion and state issues. Given the centrality of the margin of appreciation in this judgment, it is disappointing that the justification for using it is not particularly coherent and, at least as far as the empirical claims are concerned, not well made out.

It is also worth briefly noting that the Court seemed to extend the margin in *Şahin* beyond respecting the decisions of democratically elected governments to respecting university authorities who are also — or so the Court found — better able to understand the needs of their education community than the Court. In assessing the way in which internal university rules should be imposed, the Court stated that by reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course.⁴⁸ In using the same language to refer to the superior decision-making capacities of university authorities as it has used for governments, the Court is opening the door to a dangerous extension of the margin of appreciation principle. In *Şahin*, the Court effectively defers twice — first to the views of the Government and then to the views of the university about the application of these principles. The ‘European supervision’ with which the margin of appreciation is supposed to work ‘hand in hand’ is difficult to discern.

⁴⁷ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [109].

⁴⁸ *Ibid* [121].

III

A. FACTUAL BACKGROUND

Dahlab v Switzerland

The first of the two cases decided on the issue of religious freedom and the Islamic headscarf was *Dahlab v Switzerland*,⁴⁹ which was handed down by the Court in 2001.

The case involved a Swiss primary school teacher who converted to Islam. When she converted she decided that she needed to wear long, loose clothing and a cover over her hair, though not her face. She wore this apparel for a period of over four years (although some of that time was spent on maternity leave). During that time there were no complaints from her colleagues, her pupils or their parents. When her students asked her why she covered her head she said it was to keep her ears warm.⁵⁰ She seemed to have been very sensitive to the idea that she should not proselytise — so much so that she used this excuse rather than identifying herself as Muslim to her students.

But then, an inspector called. When the inspector reported that Ms Dahlab was wearing these garments, the Director General of Public Education became involved. After an attempt at mediation, the Director General issued a direction that she cease wearing these garments at school. She refused and challenged this decision in the Swiss courts, where she lost.⁵¹

While this article does not look at the Swiss Court's decision in detail, it is worth noting two aspects of that judgment. First, the domestic court gave far more detailed and thoughtful consideration to the issues than the European Court did, despite ultimately finding against the applicant. Even the summary of the Swiss judgments is significantly longer than the operative part of the European Court's own reasoning.⁵²

Second, the Swiss Court clearly found Ms Dahlab's stance odd and judged her against the norms of a Christian country. The Court partly justified the fact that she was sacked despite the absence of any law explicitly prohibiting the wearing of religious clothing by saying that it was impossible for the law to comprehensively cover all the required behaviours by teachers, and that some leeway was allowed in circumstances where the conduct 'would be regarded by the average citizen as being of minor importance'.⁵³ No mention is made of the fact that who the average citizen is and what he or she thinks is important are products of a culture in which the wearing of religious clothing is now peripheral. The determination of rights issues, based on assertions about the convictions of majorities about what is important and what is not, has serious implications for religious freedom which are insufficiently explored in the judgments.

⁴⁹ *Dahlab (2001) V Eur Court HR 449*.

⁵⁰ *Ibid* 456.

⁵¹ *X c Conseil d'Etat du canton de Genève (1997) BGE 123 I 296, 312; Dahlab (2001) V Eur Court HR 449, 451–2*.

⁵² *Dahlab (2001) V Eur Court HR 449, 452–7, 461–4*.

⁵³ *Ibid* 453.

The Swiss Court continued that it was ‘scarcely conceivable’ that schools could be prohibited from exhibiting crucifixes (as they had been in an early case)⁵⁴ yet be required to permit teachers to wear religious clothing. It said that the fact that teachers were permitted to wear religious symbols such as ‘small pieces of jewellery’ was an issue that did not require further discussion,⁵⁵ quite probably because any further discussion would have revealed that such small pieces of jewellery were almost invariably crucifixes which are arguably in quite a different position when worn around the neck of a particular Christian teacher than when nailed to the wall arguably as a representation of the values of the school as a whole.

The case arose in the European Court as a jurisdictional matter. Switzerland argued that the case was so ‘manifestly ill-founded’ that it did not deserve to proceed to the merits phase. The Court agreed.⁵⁶ A woman with an otherwise spotless employment record who had spent years wearing Islamic clothing to which no-one objected had been effectively sacked because of her religion. But the issue was so clear that it did not even deserve a full and proper consideration by the Court.

B. *Şahin v Turkey*

The second case, *Şahin v Turkey*, was given more serious consideration by the Court and ultimately was decided in a split decision by the Grand Chamber.⁵⁷ Leyla Şahin was a fifth year medical student who had studied for four years at Bursa University in Turkey before transferring to the medical faculty at Istanbul University. She claims to have worn the Islamic headscarf for the four years at Bursa and the first few months at Istanbul. After that time the Vice-Chancellor issued a circular that instructed lecturers to refuse access to lectures, tutorials and examinations to students ‘with a beard or wearing the Islamic headscarf’.⁵⁸ Ms Şahin was refused permission to sit for certain examinations and was excluded from other subjects because she refused to remove her headscarf. She attempted to continue to attend lectures and was issued with a warning by the Dean of Medicine. She participated in what the Court described as an ‘unauthorised assembly’ outside the deanery of the faculty of medicine, protesting against the rules on dress, and as a consequence, was suspended for a semester. While a general university amnesty released her from this penalty, she left the university and completed her studies in Austria.⁵⁹

She brought a case against the Government of Turkey, arguing that her right to freedom of religion had been violated by her exclusion from university. While, as opposed to the Dahlab decision,

⁵⁴ Ibid 457.

⁵⁵ Ibid 456–7.

⁵⁶ Ibid.

⁵⁷ Şahin, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005).

⁵⁸ The judgment reproduces the relevant sections of the circular: *ibid* [16].

⁵⁹ See *ibid* [14]–[28] for the full facts of the case.

the Court found that the claim was not manifestly unfounded and thus admissible, both the Court at first instance and the Grand Chamber dismissed the claim.

IV. KEY ELEMENTS OF REASONING

In both cases the Court dealt very briefly with the key elements of contention between the parties. As discussed above, the focus of both judgments was on whether the state could justify the restrictions placed on wearing religious apparel by reference to the criteria set out in art 9(2) of the European Convention on Human Rights.⁶⁰

The core of the Dahlab decision is dealt with in a single paragraph. When explaining the approach taken to art 9(2) generally, the Court repeats the particularly loaded phrase, often used in art 9 cases, which describes the weighing of the different interests in the case. The Court, it says, must 'weigh the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused'.⁶¹ At this point in the decision, the right-holder ceases to be Ms Dahlab and she instead becomes someone 'accused' of behaviour. Instead of weighing the rights of Ms Dahlab against the rights of others, the Court sets up a scenario in which these mysterious and ill-defined others must be protected against a presumptive wrongdoer.⁶²

Once these preliminaries are dealt with, the Court moves to the heart of the issue. It is worth quoting this significant extract at length, as it formed the basis of the decision:

The 'Islamic Scarf' in the ECHR During the period in question there were no objections to the content or quality of the teaching provided by the applicant, who does not appear to have sought to gain any kind of advantage from the outward manifestation of her religious beliefs.⁶³

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as wearing a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older

⁶⁰ While some issues were raised in *Şahin* about whether the restriction was prescribed by law, these will not be discussed here as they were specific to the legal arrangements in Turkey: see *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [79]–[98]. The focus will be on those parts of the reasoning stating that the restrictions were necessary in a democratic society — statements from which more general principles can be derived: at [100]–[123].

⁶¹ *Dahlab* (2001) V Eur Court HR 449, 462.

⁶² For an example of a more rigorous weighing of the competing values, see Bahia Tahzib-Lie, 'Dissenting Women, Religion or Belief, and the State: Contemporary Challenges that Require Attention' in Tore Lindholm, W Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 455, 473–83.

⁶³ Note the insidious implication of 'appear to' and the hint that she might have been seeking some unspecified but illegitimate gain. Even in this one sentence when the Court acknowledges that Ms Dahlab appears to be a good teacher who taught her students well, it throws out suggestions of hidden, unknown harms that they need not specify and against which she cannot, therefore, defend herself.

pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.⁶⁴

There are three key elements to this reasoning. The first is that wearing the headscarf might have a proselytising effect; the second is that it is incompatible with gender equality and the third is that it is incompatible with tolerance and respect for others.

In *Şahin*, the proselytising element is less of a feature of the judgment, which instead relies on gender equality and religious tolerance (as perceived through the margin of appreciation) as the essential bases for its conclusion. While pressure on other students is a key consideration in *Şahin*, it is not dealt with in terms of proselytism. This makes sense as most of the other students will share the same religion as the women wearing headscarves, even if they have a different understanding of its requirements. Instead it is analysed more in terms of the rights and freedoms of others.

While *Şahin* is a Grand Chamber judgment, and did deal with the issues in a little more detail, the Grand Chamber relied in part on the decision in *Dahlab* with respect to gender equality and tolerance, and cites the relevant section of the quotation above as justification for its conclusions.⁶⁵ That passage, therefore, forms the basis of the following analysis.

A. Proselytising

The first form of harm referred to in *Dahlab* is that of proselytising. It should first be acknowledged that the evidence of direct proselytising by Ms Dahlab was nonexistent. As the facts make clear, she did not even tell her students that she was Muslim, let alone verbally encourage them to convert.

The evidence of indirect proselytism was also very weak and was based entirely upon the wearing of the Islamic headscarf. The Court acknowledges the problems with finding any empirical evidence to support the claims of harm. The decision states that it is ‘difficult to assess the impact’ of wearing such clothes.⁶⁶ It heavily qualifies the claim of proselytism — ‘it cannot be denied’ (rather than it is true) that there ‘might’ be ‘some kind’ of proselytising effect.⁶⁷ This wording is a roundabout way of saying that there was no evidence whatsoever presented to the Court of any harmful

⁶⁴ *Dahlab* (2001) V Eur Court HR 449, 463.

⁶⁵ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [111].

⁶⁶ *Dahlab* (2001) V Eur Court HR 449, 463.

⁶⁷ *Ibid.*

or proselytising effect beyond the mere assertion of the Government that the proselytising effect existed. Indeed, for several years there had been something of an experiment in the classes taught by Ms Dahlab — if wearing of the headscarf by her had a proselytising effect it should surely have been possible to produce evidence from students who had suffered as a result. But the Court did not consider the fact that over that reasonably extended time there was no harm and no evidence of any proselytising effect on the children. The Court tries to blur the picture by creating the impression that the effects are unknown and unknowable rather than being prepared to accept that the evidence that exists suggests that there is no harm, at least in a case such as this with a sensitive teacher.

Furthermore, the evidence of harm, which in this case amounted to largely unsubstantiated assertions, was very weak. The test that the Court is supposed to use is whether the action taken by the state to limit religious freedom is 'necessary in a democratic society'.⁶⁸ As discussed above, 'necessity' is a high threshold test. Even if the Court's assumption — that there might be some proselytising effect on the children — is true, it is not clear why this effect is sufficient to discharge the burden of necessity.

The weakness of the Court's use of proselytism in this case is underlined by the general case law of the Court with respect to far more overt forms of proselytism than that engaged in by Ms Dahlab. The Court has, in previous cases, held that attempting to convince others of the truth of your religion is protected as a manifestation of religious freedom. The leading case in this area is *Kokkinakis v Greece*, which involved a Jehovah's Witness couple who were charged with a criminal offence after knocking on the door of a member of the Greek Orthodox Church and trying (unsuccessfully) to convince her to convert to their church.⁶⁹ The Court held that the conviction was a breach of art 9 of the European Convention on Human Rights because simply attempting to convince others to change their religion is not in itself a breach of religious freedom.⁷⁰ However, the wording used by the Court in *Kokkinakis*, to distinguish between permissible and unacceptable forms of proselytism, is indicative of the difficulty that the Court has when dealing with non-Christian religions. 'Bearing Christian witness' in the ways sanctioned by the World Council of Churches is held up as protected proselytism, while the practices disapproved by the Council are held to be impermissible.⁷¹ Ms Dahlab was not involved in any of the types of practices condemned as improper, which tend to focus on coercive measures such as the use of threats, financial or other incentives, or control techniques.

The Court also held, however, that special protection is needed for those who are particularly vulnerable, or to ensure that positions of authority are not abused. So a superior officer who attempted to use his military rank to put pressure on subordinates to convert was not held to be

⁶⁸ European Convention on Human Rights, above n 13, art 9(2).

⁶⁹ *Kokkinakis v Greece* (1993) 260 Eur Court HR (ser A) 6, 8; 17 EHRR 397, 399 ('*Kokkinakis*').

⁷⁰ *Ibid* 17; 414.

⁷¹ *Ibid* 21; 422.

protected by the freedom.⁷² In *Kokkinakis*, the Greek laws were found not to be in themselves a breach of art 9 because they protected vulnerable people such as children or the mentally incapable.⁷³

In *Dahlab* both factors were present — children are generally considered particularly vulnerable to intellectual or emotional manipulation and the student-teacher relationship has an element of power that is open to being abused. But the behaviour in this case was far from being a clear case of proselytism. Even if the students were particularly vulnerable and curious in early primary school, it is not quite clear what malign or coercive influence Ms Dahlab was exercising. She did not even tell them that she was Muslim. Are pupils likely to feel that they should also be Muslim in order to be like their teacher? That would be a very long stretch. The school was presumably filled with Christian teachers. The children would have been, in their home life, exposed to the religion or religions of their parents, relatives, and other figures of authority. Those families that were religious would have given explicit religious teaching to their children, attended religious ceremonies and participated in religious celebrations. Is there any reason to believe that children are so in the thrall of a particular teacher, who only teaches them for one year, that they will ignore or defy all the other authority figures and cultural influences in their lives, will actively seek out information about the religion of their teacher (as the teacher has not given any information herself) and will then feel pressured to convert to that religion? That line of logic seems absurd, but without it the *Dahlab* facts do not fall within the usual principles used by the Court to determine the circumstances in which proselytism is illegitimate. If Ms Dahlab had been giving explicit religious instruction to students, or had required them to participate in religious activities such as praying, then the case for proselytism would have been made out quite easily. But all that she was doing was being true to her religion in her own behaviour. It is difficult to understand how this amounts to improper pressure on children in religious matters.

Furthermore, the Court's references to the curiosity and vulnerability of children in the early years of school give rise to another set of questions. While the Court focuses on this issue as evidence that there might be a proselytising effect from the wearing of particular clothing, it also seems to be relevant to ask what message is being sent to curious and vulnerable children when their teacher is dismissed for wearing Muslim clothing. Such children might well ask where their teacher has gone and what she had done wrong. The Court's judgment makes clear that there were Muslim children in the school who wore traditional Muslim clothing and they might well wonder why dressing as they do or as their mothers do is so terrible that it requires an otherwise good teacher to be forced out of the school community.⁷⁴ In addition, children who are already inclined towards mistrust, religious hatred or racial discrimination could be sent the message that their fears are justified and their stereotypes valid. For a judgment that relies heavily on the idea that Muslim women force their views on others and that children need protection from intolerant or discriminatory practices,

⁷² *Larissis v Greece* (1998) I Eur Court HR 362, 367–8, 381; 27 EHRR 329, 334–6, 351.

⁷³ *Kokkinakis* (1993) 260 Eur Court HR (ser A) 6, 17; 17 EHRR 397, 414.

⁷⁴ *Dahlab* (2001) V Eur Court HR 449, 460.

the Court seems oblivious to the coercive nature of state intervention and any messages that this action might send about intolerance and discrimination.⁷⁵

B. Gender Equality

The next type of harm is that of gender inequality. This is a serious issue that deserves proper consideration, but it did not receive such consideration by the Court in either case. In both cases the Court made the assertion that wearing the veil is incompatible with gender equality, but in neither case did it flesh out the reasoning behind this statement beyond saying that it 'appears to be imposed on women by a precept which is laid down in the Koran'.⁷⁶ The way in which the word 'imposed' is used here is loaded. Most religious obligations are 'imposed' on adherents to some extent and the Court does not normally refer to the obligations in such negative terms. It is not clear why wearing headscarves is any more imposed on women by the Qur'an, than abstinence from pork or alcohol is imposed on all Muslims, or than obeying the Ten Commandments is imposed on Jews and Christians. Both Ms Dahlab and Ms Şahin lived in societies where there was no imposition by the state that required women to wear particular religious clothing — indeed, it is clear from the cases that the governments in question were unsupportive of the wearing of Muslim clothing. In this circumstance the adoption of the headscarf by educated, intelligent women might be better described as voluntary compliance with what they perceived to be a religious obligation.⁷⁷

Further, the Court is coy about the 'precept' and the particular part of the Qur'an to which it was referring. There is no detailed discussion of the teaching on clothing or of the different interpretations that it is given in different Muslim societies and by different Muslim scholars.⁷⁸ The vague, broad-brush approach to the issue by the Court seems to rely on the popular Western view — that the Qur'an and Islam are oppressive to women and there is no need to be more specific or to go into any detail about this because it is a self-evident, shared understanding of Islam.

Yet once the particular details of the cases are examined, the Court should have realised that the simplistic assumptions about Muslim women were questionable. The two women who were the applicants in the cases did not appear to be stereotypically subordinate. Both were prepared to litigate in domestic and international courts to protect their rights. Both were educated, professional women (a teacher and a medical student) and Ms Dahlab was a working mother, having returned to

⁷⁵ For example, a 31 year-old Moroccan woman who had immigrated to France said that her perception of the exclusion of girls who wear the veil is that the school authorities 'say to ... [the girls] ... "your culture. It's not good." You don't have a right to judge like that': Caitlin Killian, 'The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair' (2003) 17 *Gender and Society* 567, 577.

⁷⁶ Dahlab (2001) V Eur Court HR 449, 463.

⁷⁷ This is not to deny that the headscarf may be imposed on some women, but it is not directly the Qur'an that coerces. The Qur'an may set out some obligations with respect to clothing, but it is social institutions — governmental, familial or cultural who may take away the choice of women to decide what clothing to wear.

⁷⁸ Dahlab (2001) V Eur Court HR 449, 463.

work relatively quickly after giving birth to her children. Ms Şahin attended student protests against the prohibition on headscarves. In short, their behaviour, beyond wearing the headscarf, tended to indicate that they were strong-minded and intelligent women who refused to be oppressed by what they considered to be illegitimate regulation of their clothing. There was nothing in evidence to suggest that either woman considered herself less than equal to men or that she wished to perpetuate gender inequality in society more generally. They gave uncontested evidence that they wore the headscarf voluntarily and through their own choice, rather than because of their subordination to a particular man or to men generally.⁷⁹ In their view, the imposition in relation to clothing was not that found in the Qur'an but that of the respective states.

The main argument of the Court in relation to gender equality, therefore, must be the broader one — that the veil is an unambiguous symbol of gender inequality. The logic of the Court's position seems to follow these lines: whatever evidence the women in the cases gave (and indeed whatever they may genuinely but mistakenly believe about their own motivation),⁸⁰ those who wear the veil demonstrate their own acceptance of gender inequality and (possibly) also seek to perpetuate this inequality in society as a whole.⁸¹ The Court's reasoning is oblique so it is not even clear if these two bases are what the Court is referring to. However, they are the strongest bases for this element of the decision and therefore constitute the focus of the rest of this discussion.

The Court does not develop its reasoning in either case, merely stating that it is 'difficult to reconcile'⁸² the wearing of the headscarf and gender equality. It is not clear where this difficulty lies. There are certainly feminist arguments from both Muslims and non-Muslims that criticise the wearing of the headscarf as oppressive to women.⁸³ There are also writers from both inside and outside Islam who explore the very many meanings of the headscarf to Muslim women and who make feminist arguments in favour of Muslim clothing.⁸⁴ The Court fails to engage with the complexity of this debate.

In her powerful dissenting judgment in Şahin, Judge Tulkens criticises the paternalism of the majority who refuse to allow a young woman to act in a manner consistent with her personal choice on

⁷⁹ Şahin, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [12] (Dissenting Opinion of Judge Tulkens).

⁸⁰ Some women (though not the two applicants in these cases) may not be able to fully or accurately explain why they wear distinctive religious clothing — 'oftentimes people engage in symbolic behaviour without a conscious understanding of what they do': Linda Arthur, 'Introduction: Dress and the Social Control of the Body' in Linda Arthur (ed), *Religion, Dress and the Body* (1999) 1, 4.

⁸¹ It is possible that the ready acceptance of the viewpoint that the headscarf is both oppressive of women and a symbol of fundamentalism is due to the regular media propagation of this viewpoint: see Liederman, above n 2, 111.

⁸² Dahlab (2001) V Eur Court HR 449, 463.

⁸³ This debate within Islam is not a new one. For an overview of the writings of early 20th century Muslim feminist and opponent of veiling Zin al-Din, see Bouthaina Shaaban, 'The Muted Voices of Women Interpreters' in Mahnaz Afkhami (ed), *Faith and Freedom: Women's Human Rights in the Muslim World* (1995) 61, 68–72.

⁸⁴ For the diverse reactions of a group of Muslim women to the French laws on the headscarf, see Killian, above n 73. For an overview of some of the different scholarly perspectives, see Chouki El Hamel, 'Muslim Diaspora in Western Europe: The Islamic Headscarf (Hijab), the Media and Muslims' *Integration in France* (2002) 6 *Citizenship Studies* 293, 301–4.

the basis that this would promote sexuality inequality.⁸⁵ She then neatly dissects the reasoning of the majority in assuming that banning headscarves will improve gender equality:

However, what, in fact, is the connection between the ban and sexual equality?

The judgment [of the majority] 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 practise that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.⁸⁶

In the final sentence of this passage, Judge Tulkens makes the important point that a male dominated Court (in this case 12 male judges and five female judges, one of whom dissented) is simply accepting the assertions of gender inequality by a male-dominated Government and is paying little attention to the views of women.⁸⁷

The majority of the Court falls into the error of refusing to engage with the reality of Muslim women's lives and the complex and multiple reasons for which different women wear the veil. This attitude — which assumes that the observer understands the symbolic meaning of the headscarf without engaging with the women who cover their heads — has been analysed by Homa Hoodfar from her study of the experience of young Muslim women in educational institutions and the labour market in Canada. These women express their frustration at the assumption that veil equals ignorance and oppression [which] 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 classrooms and outside.⁸⁸

She criticises this assumption about the nature of the veil as racist and colonial and argues that while 'for Westerners [the veil's] 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'.⁸⁹ This observation is far from unique or radical; as Judge Tulkens notes, even the

⁸⁵ Şahin, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [12] (Dissenting Opinion of Judge Tulkens).

⁸⁶ Ibid (citations omitted).

⁸⁷ When Muslim women are asked about their views on these issues, they too are divided about the correct response by the state: see Killian, above n 73, 575–86.

⁸⁸ Homa Hoodfar, 'The Veil in Their Minds and on Our Heads: Veiling Practices and Muslim Women' in Lisa Lowe and David Lloyd (eds), *The Politics of Culture in the Shadow of Capital* (1997) 248, 249 (emphasis in original).

⁸⁹ Ibid. See also Faegheh Shirazi, 'Islamic Religion and Women's Dress Code: The Islamic Republic of Iran' in Linda Arthur (ed), *Undressing Religion: Commitment and Conversion from a Cross-Cultural Perspective* (2000) 113, 118–19; Joesph Stempf, 'Veiling and Unveiling: Reconstructing Malay Female Identity in Singapore' in Linda Arthur (ed), *Undressing Religion: Commitment and Conversion from a Cross-Cultural Perspective* (2000) 169, 169–82; Sebastian Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 *Oxford Journal of Legal Studies* 43, 71.

German Constitutional Court recognised that the veil has many meanings, yet the complexity of the debate is not touched on by the Court in Şahin.

The debate over the extent to which religious clothing perpetuates gender inequality is a complex one. There are circumstances in which a government might legitimately make a decision to restrict or prohibit some forms of religious clothing in order to further gender equality.⁹⁰ Such a measure might be justified particularly in situations (such as was asserted in Şahin) where there is: evidence that other women would be pressured into unwilling compliance with religious clothing;⁹¹ violence against women who refuse to veil;⁹² or when women's clothing is being used for political purposes to further a cause inimical to women's rights.⁹³ Yet even then, the exclusion of women from important public spaces such as schools and universities is a peculiar way to achieve gender equality and has the potential to harm women's educational and employment rights in the name of gender equality.⁹⁴ In the earlier moves to restrict schoolgirls from wearing the headscarf in France during the mid-1990s, more than 100 Muslim girls were expelled from school for refusing to comply with the ban.⁹⁵ This demonstrates that it is not a simple matter of banning religious clothing and thus ensuring that all girls remove the veil and embrace a Western notion of sexual equality. The reality is that some women will no longer be able to pursue their education or their careers in public places. If a feminist analysis is to be undertaken, the harm done to these women must be taken into account.

C. Intolerance and Secularism

The final element of the justification for banning the headscarf is that it is incompatible with a tolerant, secular society that respects the rights and freedoms of others. Again, the evidence of direct intolerance of either of the applicants is minimal. Ms Dahlab had not coerced her students to dress, behave or believe in the same way as she did. She did not exclude students or parents from

⁹⁰ These circumstances should, however, be demonstrated by clear evidence. As the Quebec Human Rights Committee put it, 'one should presume that hijab-wearers are expressing their religious convictions and the hijab should only be banned when it is demonstrated — and not just presumed — that public order or sexual equality is in danger': as cited in Cynthia DeBula Baines, 'L'Affaire des Foulards — Discrimination or the Price of a Secular Public Education System?' (1996) 29 *The Vanderbilt Journal of Transnational Law* 303, 324.

⁹¹ For a discussion of the problems related to the state's imposition of religious clothing on women, see Tahzib-Lie, above n 60, 483–7. In the context of schools, Sebastian Poulter makes the interesting point that the dividing line between normal parent–adolescent debates over appropriate clothing and patriarchal control is also not an easy one to draw: Poulter, above n 87, 72–3. This observation, however, does not apply as readily in the context of a woman in the workforce or at university.

⁹² For an example of widespread social violence being used to impose religious clothing on women, see the discussion of Algeria in Karima Bennoune, 'SOS Algeria: Women's Human Rights under Siege' in Mahnaz Afkhami (ed), *Faith and Freedom: Women's Human Rights in the Muslim World* (1995) 184, 187–8.

⁹³ Strict enforcement through legal or social means of religious clothing can be a way of manifesting conservative, patriarchal social control. As Linda Arthur notes, '[i]n many of the most conservative groups ... dress codes are used as gender norms that reinforce the existing power system': Linda Arthur, 'Introduction: Dress and the Social Control of the Body' in Linda Arthur (ed), *Religion, Dress and the Body* (1999) 1, 1.

⁹⁴ For an interesting description of the way in which compulsory de-veiling limited the social freedom and economic independence of many women in Iran, see Hoodfar, above n 86, 259–67.

⁹⁵ Baines, above n 88, 307.

her classroom. She did not denigrate the beliefs of others or promote the superiority of her own views, except in the way in which everyone who is serious about her beliefs must do so — by living in compliance with them. Similarly, there is no evidence that Ms Şahin was intolerant of the views of others. She did not engage in any behaviour that involved attempting to force her views on others. She was not guilty of any disciplinary offence at university other than those related to clothing and she did not belong to any of the fundamentalist groups within Turkey. At some level, the Court seems to be saying that anyone who is sufficiently serious about advertising the fact that they are Muslim must be, by definition, intolerant. Of course, the Court does not make that point explicitly, but this equating of Islam with intolerance (and Islamic woman with oppression) seems to inform the Court's judgment implicitly.

Juxtaposed against intolerant Islam is tolerant secularity — a secularity which needs protection against fundamentalism and what the Court describes as 'political Islam'. The state is the guarantor of secularity and the Court gives a classical liberal description of the role of the state in relation to religious disputes:

The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed and that it requires the State to ensure mutual tolerance between opposing groups.⁹⁶

State secularity is assumed to be unproblematic and a method of ensuring that all religions and beliefs are treated fairly and equally. In his comparison to this bland assumption by the Court, Professor Jeremy Gunn views the role of *laïcité* and religious freedom in France and the US respectively as inherently conflictual.

But despite the popular beliefs that *laïcité* and religious freedom are founding principles that unite the citizens of their respective countries, they actually operate in ways that are more akin to founding myths. If we probe their historical backgrounds, it becomes clear that neither doctrine originated as a unifying or founding principle. Rather, each emerged during periods of confrontation, of intolerance, and often of violence against those who held dissenting beliefs. Moreover, in current controversies involving religion and the state, where the doctrines are cited for the ostensible purpose of resolving conflicts, they continue to be applied in ways that divide citizens on the basis of their beliefs and that belittle those whose beliefs do not conform to popular preferences.⁹⁷

This more probing analysis of the role played by *laïcité* (and a similar point could be made about secularism in both of the cases under analysis) does not assume that a secular state is a non-con-

⁹⁶ Şahin, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [107] (citations omitted).

⁹⁷ Gunn, above n 3, 422.

troversial guarantor of minority rights.⁹⁸ In the case of Turkey, Özlem Denli concludes her analysis of the complex question of the anti-democratic nature of both Kemalist-inspired and militarily underpinned secularism and fundamentalist religious politics with the observation that secularism is not a neutral position that levels all distinctions in public life.

Rather it is 'a normatively prescriptive model that favors certain forms of modern religion at the expense of others that are equally legitimate'.⁹⁹ For the Court, however, secularism is unproblematic and, at least in the case of Turkey, measures taken for the protection of a secular government, untainted by the influence of 'political Islam', has led to the Court approving a series of quite repressive measures by the Turkish Government, including the banning of a popular Muslim political party that was part of a coalition government in Turkey and might well have won the forthcoming elections outright if it had been allowed to contest democratic elections.¹⁰⁰

The willingness of the Court to assume that the veil was a dangerous signifier of intolerance and anti-secular fundamentalism is particularly disturbing when set in the context of another judgment of the Court in relation to Turkey heard not long before Şahin. In that case, a religious leader was prosecuted for explicitly criticising secularism, calling for a Muslim state with sharia law, and using offensive names to refer to children born outside of wedlock.¹⁰¹ The punishment of a male religious leader who deliberately set out to undermine secularism and to increase intolerance of non-Muslims, secular Muslims, and those born out of wedlock was held by the Court to violate his freedom of expression under art 10.¹⁰² But the punishment of a woman, who never criticised secularism or its claims in the state realm, and about whom there was no proof of personal intolerance, was held not to be a violation of rights.

Part of the explanation for the distinction in treatment between an overtly intolerant leader and women who come to symbolise intolerance through their clothing is the power of the symbolic role of the control of women as a signifier of cultural and political power.¹⁰³ An offensive public statement is simply a political claim that can be adjudicated in the rational realm, no matter how irrational the statement. Such debate may simply be accepted as an impotent gesture that the dominant culture can tolerate in part because of the strength of secularism and modernity. But control of women is a signifier of success in the culture war between secular governments and Muslim subcultures

⁹⁸ Thus, in states that highly value secularism, the adoption of religious clothing may be perceived as incompatible with full citizenship. As Cynthia DeBula Baines puts it in the French context, 'a simple hijab, when worn by Muslim girls, signifies to many French a refusal to become French': Baines, above n 88, 311.

⁹⁹ Özlem Denli, 'Between Laicist State Ideology and Modern Public Religion: The Head-Cover Controversy in Contemporary Turkey' in Tore Lindholm, W Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 497, 511.

¹⁰⁰ *Refah Partisi (the Welfare Party) v Turkey* (2003) II Eur Court HR 269, 269–72; 37 EHRR 1, 1–7.

¹⁰¹ *Gunduz v Turkey* (2003) XI Eur Ct HR 259, 262–6; 41 EHRR 59, 61–5.

¹⁰² *Ibid* 272–5; 71–4.

¹⁰³ Fatima Mernissi, 'Arab Women's Rights and the Muslim State in the Twenty-First Century: Reflections on Islam as Religion and State' in Mahnaz Afkhami (ed), *Faith and Freedom: Women's Human Rights in the Muslim World* (1995) 33. Mernissi argues that [s]ince the abolition of slavery, only women and minorities are left as a test for the state to modernize itself ... This is why most of the debate around democracy in the Muslim world circles endlessly around the explosive issue of women's liberation, and also why a piece of cloth, the veil, is so loaded with symbolic meaning and so powerful as a source of violence within, and now also without, Muslim territories: at 44.

in those societies. The women in these cases cease to be individuals with their own personalities, histories and concerns. Instead they become a symbol of the tension between the imagined West (secular, rational, egalitarian, human rights respecting) and imagined Islam (religious fundamentalist, irrational, discriminatory and violative of human rights). Having accepted such a world view, it is little wonder that the Court opts for the West.

V. ISLAM AND THE MUSLIM WOMAN IN THE COURT'S JUDGMENTS

The reasoning in this case reflects part of the broader debate about Muslim girls and women and their clothing. The debate reflects two seemingly contradictory views of Muslim women and girls. The Court uses both stereotypes of Muslim women without any recognition of the inherent contradiction between the two and with minimal evidence to demonstrate that either stereotype is accurate with respect either to the applicants or to Muslim women more generally.

The first stereotype is that of victim — the victim of a gender oppressive religion, needing protection from abusive, violent male relatives, and passive, unable to help herself in the face of a culture of male dominance. This view is reflected in the statements by the Court in both cases that it is difficult to reconcile the headscarves with gender equality.¹⁰⁴ This argument is also used by many governments who seek to justify the ban on the headscarf on non-religious grounds.¹⁰⁵ When these arguments are raised in public debate they are normally in relation to stories about Muslim girls whose male relatives use threats or violence to impose unwanted religious dress upon them.¹⁰⁶ The state (supported by the Court) acts as the rescuer of these women and girls.

It is undoubtedly true that some women and girls face oppression in the home with respect to what they wear (as well as other issues of personal honour such as sexual purity). The state that takes gender equality seriously should guarantee the rights of personal safety and autonomy of women. But caution needs to be exercised before assuming that this means that all Muslim women need rescuing (or, indeed, that no non-Muslim woman needs the same protection and safety). Patriarchal Western societies have used the justification of saving women from the barbarity of their own cultures (including Muslim cultures) for many centuries as a partial excuse for colonialism and racism.¹⁰⁷ This is a point of which many Muslims are acutely aware and it should at least lead to some level of self-reflection on the part of those Westerners who suddenly realise the need to save a new generation of Muslim women from Muslim men.¹⁰⁸

¹⁰⁴ *Dahlab (2001) V* Eur Court HR 449, 463; *Şahin v Turkey (2004)* Eur Court HR 299, [111].

¹⁰⁵ Henley, above n 3, 17.

¹⁰⁶ *R (on the application of SB) v Denbigh High School Governors [2005]* 1 WLR Civ 3372.

¹⁰⁷ Liz Fekete, 'Anti-Muslim Racism and the European Security State' (2004) 46 *Race and Class* 3, 19.

¹⁰⁸ Indeed, the precise nature of what Muslim women need saving from has changed over time — at one point the colonial enterprise was constructed in part to save Muslim women from the sexual demands of Muslim men. Now it is to save them from the sexual repression

The second stereotype relied on by the Court is that of aggressor — the Muslim woman as fundamentalist who forces values onto the unwilling and undefended. This is illustrated in the Court's discussion of proselytism and intolerance. The woman in a headscarf is inherently and unavoidably engaged in ruthlessly propagating her views — even a school teacher who never mentions the word 'Islam' is such a dangerous proselytiser that she needs to be removed from the school. Moreover, the values that are being propagated are dangerous, intolerant and discriminatory, and threaten to undermine the secular system that would otherwise grant equal protection to all religions and beliefs.

Again, such images of Muslim women who wear the headscarf are common in mainstream political debate. The French leadership regularly invokes a vision of militant, fundamentalist schoolgirls who actively seek to undermine the secularity of the French legal system by wearing a headscarf.¹⁰⁹ In Australia, Member of Parliament Sophie Panopoulos was supported by another senior Liberal in her claim that girls who wore the headscarf in Australian schools were engaging in an 'iconic act of defiance'.^{108 110}

These two stereotypes are deployed by the Court and in popular political culture with respect to the same group of women (in the case of the Court, two specific women) with no recognition of the conflict between the two images. On the one hand, women such as Ms Şahin and Ms Dahlab are representations of gender inequality — oppressed, submissive, victims of patriarchy. They have conformed with sexist religious dictates that force women to be asexual, timid and deferential. On the other hand, those very same women are dangerous destabilisers of the state. They have such personal force that their mere presence is enough to amount to problematic proselytising (proselytising far more problematic than overt, deliberate attempts to encourage others to change their religion). They have the capacity to ruthlessly pursue a religious Islamic state (even, improbably, in Switzerland). In the course of a single sentence in Dahlab, Ms Dahlab transforms from a woman who needs rescuing from Islam to an Islamic woman from whom everyone else needs rescuing.

So what unites these two, disparate images of Muslim womanhood — the victim and the aggressor; the one in need of protection and the one from whom we all need protection? The link seems to be the idea of threat. The implicit threat in the woman who is too powerful, too intolerant, too aggressive is easy to see. But the victim is a threat too. A threat to the liberal, egalitarian order. A threat to control by the state and secular authorities because their coercion is less effective than that of the family and the subculture. In response, the state increases its coercion and control. With all the concern that the French Government (and certain English schools) had with fathers or brothers using violence to force girls to wear the headscarf to school, there was almost no mention of punishing the men involved or even working with the relevant communities to eliminate domestic violence. Instead, the girls were used as a battleground for cultural control, with each side continually making life more difficult for the girls involved. If the family forces girls to wear headscarves,

and denial of Islam.

¹⁰⁹ Jon Henley, 'Something Aggressive about Veils, Says Chirac', *The Guardian* (London, UK), 6 December 2003, 19.

¹¹⁰ 'Bishop Backs Ban on Muslim Headscarves', *Australian Associated Press Newsfeed*, 28 August 2005.

then the state will ban the girls from public schools. If the state bans them from public schools, then the family will send them to religious schools. If the family sends them to religious schools, then the state will cut off funding to the religious schools. If the state cuts off funding, then the family will refuse to allow the girls to go to school at all. Such brinksmanship can deny a girl an education for many years before it is resolved.

In all this contestation, the position of the many women who voluntarily choose the headscarf for one of many reasons is marginalised, when in reality it is far more representative of the mainstream. Ms Dahlab and Ms Şahin went to the European Court of Human Rights to assert that they were not some symbol of oppressed womanhood in need of rescue, nor aggressive proselytisers in need of restraining. They hoped that their rights might be upheld when there was no sign that they had done any harm. They asked for the fulfilment of the promise of the European Convention on Human Rights — equality, freedom and dignity. Instead the Court sided with the state and permitted a good teacher to be humiliated and rendered virtually unemployable in her chosen profession until she agreed to remove her headscarf. The Court sided with the state against a student who was denied access to education and forced out of university. Such judgments, justified on the basis of equality, tolerance and human rights, do harm to the very notion of neutrality that the Court claims to be central to proper adjudication in these areas. When those who are not Christians but whose rights have been violated can gain no relief from the Court because the Court employs stereotypes and refuses to engage with the complexity of modern religious pluralism, then religious freedom and pluralism are undermined and the notion of human rights degraded.

