

## THE CASE OF THE ISLAMIC VEIL: THE EUROPEAN COURT OF HUMAN RIGHTS AS A FORUM FOR INTERCULTURAL DIALOGUE

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### *-abstract-*

The motto of the EU “United in Diversity” has represented a new paradigm in the conception of Europe – from the old continent cradle of the nation-state to a new adaptable Europe that needs to be prepared to take on the challenges of the new century – especially in regard to cultural rights. The paper will examine the process of politicization of the Islamic veil and the subsequent attempts of states to intervene with legal restrictions on the wearing of the veil in the public space. These restrictions will be critically analyzed by deconstructing the underlying assumption and prejudices rooted in the colonial history of Europe and its interaction with different cultures within the continent. Through this critical lens the paper will examine international human rights law in relation to religious freedom, especially focusing on the jurisprudence of the European Court of Human Rights and the doctrines which it has developed. Additionally, the paper will examine the real-world implication of these decisions and the overall public discourse on the lives of Muslim women in Europe. Furthermore, the paper will argue that intercultural dialogue can be a mechanism for reconciling the cultural differences between groups thus providing a public space in which every person can exercise the full extent of their rights. In this regard, the European Court of Human Rights can and should act as a forum in which these topics can be deliberated upon and result in decisions and doctrines which are culturally sensitive.

**Key words:** *religious veil, secularism, Human Rights, ECHR, Multiculturalism*

### I. INTRODUCTION

Cultural pluralism is the cornerstone of modern Europe. Faced with the horrors of the Second World War and the loss of its imperial lands across the world, European states had to create a new paradigm for Europe with which the continent would adapt to the new post-war world order and be prepared for the onset of the 21<sup>st</sup> century. The new European integration through the communities and eventually the EU; the creation of regional instruments for the protection and enhancement of Human Rights (such as the Council of Europe, its European Convention of Human

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Rights (ECHR) and the Strasbourg Court) and the emphasis of cultural pluralism are key elements of the new European paradigm. It must be noted that Europe, as a historical creation, instead of a philosophical one<sup>1</sup> faces difficulty in the reconciliation with its past, especially in regard to the old colonial worldview. These conflicting trends in the context of the new rise of right-wing populism and radical nationalism result in the need for dialogue within Europe.

This paper focuses on the regulation of the Islamic veil (this includes a wide range of religious symbol such as the hijab, the niqab, the burqa and others). In that sense it will analyze the process of politicization of the religious symbol and the controversies that sparked government regulation. Furthermore, through a critical lens the paper will examine the relations between Europe (and the west in general) towards the Muslim minority and generally towards the East (the Orient). From these critical aspects the text will examine international human rights documents and the jurisprudence of the Strasbourg court in relations to the freedom of religion and the effect of national laws on Muslim women in the context of secularism. The paper will conclude with argumentation as to why the European Court of Human Rights (ECtHR) can and should be a forum and catalyst for intercultural dialogue in Europe.

## **II. FROM POLITICIZATION TO REGULATION**

The 21<sup>st</sup> century and the colliding tendencies between globalization and promotion of the multicultural concept had an impact on already established nation-states, especially in Europe. These states were faced with the challenge of their internal diversity, which is a drastic departure from the homogenous nation paradigm. The process of politicization, and from there the need to regulate certain religious practices is relatively new in regards to the modern context, but certain elements of the debate have deeper roots due to Europe's colonial history, the presence of Islam on the continent and new migratory paths of the globalized world and the proletariat on the move – factors which Europe often ignores. Specifically, the modern debate of the Islamic veil originates in France with the 1989 scandal in a school in Creil where a group of girls refused to remove their veil - this event sparked a debate about the place of religious symbols in the context of the French style of secularism called *Laïcité*, which is unique within Europe.<sup>2</sup> Similar debates arise across Europe. The public discourse took a turn after the events of September 11, 2001 and the subsequent “war on terror” which created a difficult situation for Muslims who now carried an additional burden – to prove to their society that they are not terrorists. There was also a rise of hate speech and hate crimes against Muslims.<sup>3</sup> States, through the language of national security passed further regulations and interventions in the public space limiting religious symbols – with a special emphasis on the Islamic veil.<sup>4</sup>

## **III. THE WEST AND THE ISLAMIC VEIL**

Europe as a continent has historic ties with Islam that date back to the beginning of Islam through religious wars, in the 18<sup>th</sup> and 19<sup>th</sup> centuries Muslims were residence of European empires. Additionally, Christians were under Muslim rule as part of Arab empires on the Balkans and the

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<sup>1</sup> Thatcher, Margaret. Speech at Hoover Institution Lunch, 8 March 1991, Four Seasons Hotel, Washington DC.

<sup>2</sup> The Muslim headscarf: France's Republican dilemma. YouTube  
[https://www.youtube.com/watch?v=R\\_K4ryktKOs](https://www.youtube.com/watch?v=R_K4ryktKOs)

<sup>3</sup> <https://www.hrw.org/reports/2002/usahate/usa1102-04.htm>

<sup>4</sup> Elver, Hilal. *The Headscarf Controversy: Secularism and Freedom of Religion*. Oxford: Oxford University Press, 2014. Print.

Iberian Peninsula. These historical turbulences effect the modern discourse on religious freedom and the different conceptualizations of East and West as described by Edward Said.

Susanna Mancini in her paper deconstructs feminist arguments for the banning of the Islamic veil, and through such deconstruction analyses their underlying assumptions which are the basis for the European view on Islam.<sup>5</sup> According to her, the liberal feminist discourse (which has an authentic commitment to gender equality) understands gender equality as a purely western value and ideal that is based on arguments of equality, individual freedom and oppression. Namely, her critic of liberal feminism from the side of those in favor of multiculturalism is based on deep colonial roots of their worldview – that is the superiority of the western model of emancipation where there is an equation between “uncovering” and “liberation”. Mancini through her analysis of multiple authors concludes that the European perception of Islam and the East is a perverted fantasy of the covered woman that stands in opposition of the uncovered western woman. Notably, in her analysis of the public interventions by the French politician Badinter she concludes that “Badinter suggests that nuns are justified to hide themselves because of their asexual character and of the confinement of their choice within the private sphere. In contrast, “wives” and “mothers” (i.e., sexually active women) must interact with men in the public sphere according to the Western system of gender relations. This means, however, that it is men who confer identity to women, being able to see them as sexual beings. The (assumed) refusal by fully veiled women to act according to this pattern, leads for Badinter to unacceptable results: a new form of empowerment in which women exercise their power outside of a system of accepted rules and experience nonconformist (“perverse”) forms of pleasure as a result.” As a conclusion to her paper she offers the following thesis: “One thing is for an intellectual to advance arguments concerning the empowering or demeaning nature of the veil for women; another thing is for a democratic system to rely on such arguments to restrict fundamental freedoms. A liberal democracy should not be concerned whether citizens exercise their individual rights for self-empowering purposes. This is a question that liberalism leaves to each individual’s conscience. But the ban on the veil suggests that women have only one way to exercise their rights *correctly*, and it regulates them accordingly. That is, it makes a political use of women’s bodies.”<sup>6</sup>

In section four of her paper, she borrows the concept of false projection from “Dialectic of Enlightenment” from Adorno and Horkheimer: “In projection, a subject attributes impulse, which he will not admit as his own, even though they are, to an object-the prospective victim. Projection entails a construction of a subject’s most intimate experiences as hostile: by projecting them outward, onto others, the subject destroys the intolerable within himself.”<sup>7</sup> She argues that the liberal European society projects its own patriarchy onto religious minorities with the goal to alienate them, even though the same is innate to it and attempts to show it as incompatible with the modern European society.

In this sense there are two thesis that need to be taken into consideration on the perception of the veil – on the one side the veil as an oppressive symbol (in the eyes of the European liberals) and as an identity symbol, and in some cases a symbol of self-actualization and empowerment (in the eyes of Muslim women). The reconciliation of these opposing theses we can see that patriarchy

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<sup>5</sup> Mancini, Susanna. "Patriarchy as the exclusive domain of the other: The veil controversy, false projection and cultural racism." *International journal of constitutional law* 10.2 (2012): 411-428.

<sup>6</sup> Ibid, section 3

<sup>7</sup> Ibid, section 4

appears in different forms in Europe and Islam – differential patriarchy. If we accept that patriarchy can manifest itself in different forms in different culture then it follows that the struggle for emancipation is also different for different cultures – differential emancipation. Proponents of multiculturalism will have to allow space for intracultural dialogue within the group to create an authentic form of gender emancipation (which in some cases might be different from the western model), but others should not be barred from good faith questions and critiques on the situations within the group and their interaction with the wider public space.

#### **IV. INTERNATIONAL STANDARDS FOR RELIGIOUS FREEDOM. THE JURESPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS**

Having in mind the critical arguments of Susanna Mancini in this section the paper will focus on international law and international human rights law. Special focus will be placed on article 9 of the European Convention of Human Rights and the jurisprudence of the ECtHR regarding religious freedoms:

“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 for the protection of the rights and freedoms of others.”<sup>8</sup>

The interpretation of article 9 differentiates between forum interum (the internal subjective belief of a person), that means that the right to hold a belief is absolute and cannot be the subject of restrictions. On the other hand, forum exterum (the external manifestation of the belief) can be the subject of restriction that is in line with the preconditions outlined in paragraph 2 of article 9. These preconditions are: that the restriction should be prescribed in law and the restrictions need to be necessary for upholding a democratic society.<sup>9</sup> The second condition on the necessity for democracy is the central point of analysis in much of the jurisprudence of the ECtHR.

The text of the ECHR sets legitimate goals for establishing restrictions - measures in the interest of public safety, and the protection of public order, health and morals or the protection of the rights and freedoms of others. But these goals alone are not sufficient justification for restricting of the rights from Article 9, which is why the restrictions must be proportionate to the realization of the legitimate goals. Multiple factors are taken into account – this is the basis for the necessity test.

In its practice, the ECtHR developed the margin of appreciation doctrine, the rationale of which was established in the case of *Handyside v. the United Kingdom*. This doctrine covers those issues for which there is no "pan-European" consensus, such as the question of the place of religion in the public sphere<sup>10</sup> including the cases of the Islamic veil, which is why the court gives the states the discretion to assess the necessity and proportionality of the measure themselves because of

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<sup>8</sup> Article 9 of the European Convention of Human Rights

<sup>9</sup> Evans, Malcolm David. *Manual on the Wearing of Religious Symbols in Public Areas*. Council of Europe, 2009.

<sup>10</sup> The ECtHR further defined the public sphere in the *Otto-Preminger Institut v. Austria* decision

their "direct and continuous contact with the basic factors of their countries"<sup>11</sup> But this does not mean that the ECtHR in later judgments cannot expand or limit the margin of admissibility due to the fact that *stare decisis* is not binding. Regarding the wearing of the Islamic veil, the ECtHR has accepted a wide margin of acceptability in the case of *Leyla Sahin v. Turkey*.

Furthermore, the ECtHR has developed several concepts and theses that would be applicable in cases about the Islamic veil. Namely, the ECtHR in the case of *Kokkinakis v. Greece* has confirmed the place of freedom of thought and religion as a basic postulate of a democratic society and creation of personal identity. It further affirms that pluralism is fully compatible and inseparable from a democratic society, so that instead of balancing interests between public and private, interests should be balanced within the public sphere in which all people interact.

In several rulings<sup>12,13</sup>, the ECtHR has established the principle of respect (Principle of Respect), where the state has an obligation to give due respect to other religions in considering possible restrictions. This in effect means that the state should act as a neutral actor and is tasked with ensuring the peaceful and full enjoyment of the rights under Article 9 of the ECHR which include holding a religion but also sharing that religion with others in the free exchange of ideas - whereby those who choose to manifest their faith cannot reasonably expect to be protected from criticism of their faith (except in certain cases).<sup>14</sup>

## **V. BETWEEN PLURALISM, SECULARISM AND CULTURAL ACCOMODATION**

The concept of secularism as a principle of separation of the state from religion is established in most of the European countries, but with a different mechanism - the most extreme of them is the French concept of *Laïcité*. Particularly relevant for analysis are the cases of the Islamic veil in relation to employment in the public sector, education and public space. For the restriction of freedom of religion for public employment, the ECtHR generally leans towards a wide margin of appreciation of the states because of the expressed principle of secularism - which means that employees as representatives of the state and its administration must have a neutral external manifestation in their work position in order to preserve the principle of secularism. Education has a special place because of its socialization, pedagogical and educational function in developing future generations. Mass education also has a function in nation-building and the development and sustaining of the political community which is why the state is also interested in its regulation and promoting certain values. In this domain, the ECtHR has ruled regarding the limitation of teaching staff in their manifestation of faith, such as in the case of *Dahlab v. Switzerland*, where the ECtHR judged that the wearing of veils by teaching staff could influence the opinion of students. In its decision, the ECtHR pointed out that wearing a veil is not compatible with the "message of tolerance, equality and non-discrimination" that teachers in a democratic society should convey to students.<sup>15</sup> Similar argumentations has been used even in cases where the democratic country has a majority Muslim population such as Turkey.<sup>16</sup> It should be noted that in the case of *Lautsi and Others v. Italy* the ECtHR did not make a similar conclusion regarding the presence of a Christian cross in all school classrooms in Italy: "The fact that crucifixes in State-school classrooms in Italy

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<sup>11</sup> *Handyside v. the United Kingdom*

<sup>12</sup> *Kokkinakis v. Greece*

<sup>13</sup> *Larissis and others v. Greece*

<sup>14</sup> Evans, Malcolm David. *Manual on the Wearing of Religious Symbols in Public Areas*. Council of Europe, 2009.

<sup>15</sup> *Dahlab v. Switzerland* (ECtHR 2001, no. 42393/98)

<sup>16</sup> *Kurtulmus v. Turkey* (ECtHR 2006, no. 65500/01)

conferred on the country's majority religion predominant visibility in the school environment was not in itself sufficient to denote a process of indoctrination. Moreover, the presence of crucifixes was not associated with compulsory teaching about Christianity; and there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions. Lastly, the applicant had retained her right as a parent to enlighten and advise her children and to guide them on a path in line with her own philosophical convictions."<sup>17</sup> The ECtHR's argument is that all of this falls within the margin of appreciation where the state enjoys primacy, but still raises the question of unconscious predispositions and prejudices to interpret certain religious symbols depending on the current discourse that surrounds them.

In relation to public spaces (public area) there is the greatest degree of controversy because it is the space where the public life of the individual takes place within the wider society - there you can see the society as a whole with all its diversity, which is why the states are trying to ban it the Islamic headscarf in those spaces are faced with more sophisticated arguments and criticism. There is no clear definition of public space due to the different scope of interpretation that can be applied - in this direction the ECtHR suggests in the *Otto-Preminger-Institut* case that the designation of "public" should be approached with a purposive interpretation rather than a textualist/literal interpretation. According to the ECtHR, the state should be a neutral and impartial organizer in the practice of different religions and faiths in order to maintain public order, religious peace and tolerance in a democratic society.<sup>18</sup>

The state's argument regarding the prohibition of the veil that covers the face completely (niqab or burqa) is based on the need for communication and establishing social relations that are part of what it means to "live together" - in this regard, the state considered the veil to be contradictory to this principle. In the case of *S.A.S. v. France* the Court assessed that the ban on the full-face veil was proportionate to the legitimate aim of "respecting the minimum requirements of life in society as part of the "protection of the rights and freedoms of others".<sup>19</sup> Although the ECtHR allows a wide margin of appreciation for the states following these bans, it nevertheless warns that the legal measures undermine pluralism and risk contributing to the affirmation and strengthening of stereotypes with a negative effect on certain parts of the population and can result in the expression of intolerance, when the state, contrary to this, it has an obligation to promote tolerance. Illustratively, in her dissenting opinion in the *Leyla Sahin* case, Justice Tulkens stated: "On this issue, the Grand Chamber refers in its judgment to *Dahlab*, taking up what to my mind is the most questionable part of the reasoning in that decision, namely that wearing the headscarf represents a "powerful external symbol", which "appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality" and that the practice could not easily be "reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils". It is not the Court's role to make an appraisal of this type - in this instance a unilateral and negative one - of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant. The applicant, a young adult university student, said - and there is nothing to

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<sup>17</sup> *Lautsi and Others v. Italy* 18.03.2011

<sup>18</sup> Evans, Malcolm David. *Manual on the Wearing of Religious Symbols in Public Areas*. Council of Europe, 2009

<sup>19</sup> *S.A.S. v. France* (ECtHR 2014, no. 43835/11), para. 149; *Belcacemi and Oussar v. Belgium* (ECtHR 2017, no. 37798/13), para. 52.

suggest that she was not telling the truth – that she wore the headscarf of her own free will. In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. 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”.<sup>20</sup> The Court’s decisions implicate the lives of Muslim women across Europe which is why the next section will examine the societal consequences of these legal argumentations.

## **VI. SOCIETAL CONSEQUENCES**

The ECtHR correctly noted the potential negative consequences of these bans established by states. The problem with analyzing the experience of veiled Muslim women is the lack of a proper record system that makes their experiences invisible. From the available information, it should be noted that there is discrimination in employment, education and public space. This discrimination is further aggravated by increased hatred and violence in the form of Islamophobia, xenophobia, hate speech and hate crimes against veiled Muslim women.<sup>21</sup> As a reaction to social pressure, Muslim women find different coping mechanisms. In their paper, Nuray Karaman and Michelle Christian identify several such mechanisms: Detection and rejection of the headscarf; Education of the people; Self-silencing.<sup>22</sup> All these mechanisms actually force Muslim women to decide whether they will fully participate in social life, while if they decide to keep the veil they will be exposed to violence; they will give up their religious identity represented by the headscarf or isolate themselves from social interaction with others. This represents a complex situation in which rights collide, but also civilizational views that can be overcome through dialogue.

## **VII. CONCLUSION: INTERCULTURAL DIALOGUE AS A MECHANISM TOWARDS A SOLUTION**

Europe (and the West more broadly) as the cradle of liberal ideology and propagator of cultural pluralism should enter into a dialogue with the religious minorities who live in their territory as well as those who, with the new globalization trends and conflicts, immigrate to its territory. Faced with the conflict between freedom of religion, the operative public value of secularism as well as other values that have been consolidated through historical processes in European culture - dialogue is a mechanism for finding a solution, while not only confronting the two groups with each other, but also enabling of them to perform self-reflection and to approach an intracultural dialogue internally among the members. From the point of view of Europe, it would mean confronting the colonial past which is present in today's action of states in relation to "others"; getting to know and facing other forms of realizing the ideals set by international human rights law and accepting that the European model is not always superior. Furthermore, the intracultural dialogue within Muslim communities should explore their authentic form of emancipation of women while realizing the postulate of gender equality - determining the symbolic place of the veil as part of this new emancipatory form of the Muslim woman will be crucial. Additionally, it

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<sup>20</sup> Para. 12 of the Dissenting Opinion.

<sup>21</sup> “Veil in Europe Report.” Section 4 “The experiences of women wearing the veil” *OHCHR*, [www.ohchr.org/EN/Issues/Women/WRGS/Pages/VeilinEuropereport.aspx](http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/VeilinEuropereport.aspx).

<sup>22</sup> Karaman, Nuray, and Michelle Christian. “‘My Hijab Is Like My Skin Color’: Muslim Women Students, Racialization, and Intersectionality.” *Sociology of Race and Ethnicity*, vol. 6, no. 4, Oct. 2020, pp. 517–532, doi:10.1177/2332649220903740.

is important that both sides approach appropriate accommodation in terms of different practices and values, so that a society of tolerance would be enabled.

The application of international human rights standards will be crucial - on the soil of Europe, the ECtHR remains the central instrument within which this dialogue can take place. Because of this, the European Court of Human Rights in Strasbourg can and should be a forum where groups will face each other and, through the practice of the court, models for possible reconciliation of conflicts between rights will be born. Through the freedom of expression and the framework of human rights, this dialogue will be possible within the framework of society, between individuals in a public space free for the exchange of ideas - in this space every attitude can be criticized, including religious beliefs.

The case of the Islamic veil is a test for Europe about its commitment to cultural pluralism on the continent and in the world, and it is the interpretation of a piece of cloth that can open the doors to great debates about the future of liberalism and human rights.

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