The European Court of Human Rights Goes to School: The "Headscarf Cases" (*Leyla Sahin v. Turkey* and *Dahlab v. Switzerland*) as Unjustified Restrictions of Religious Practice

Oren Fliegelman†

As guarantor of individual liberties in the Council of Europe's 47 member states, the European Court of Human Rights (ECtHR) is tasked with balancing the competing rights of citizens against citizens and states against citizens. In a group of controversial continent-spanning cases dealing with the right of female Muslim students and teachers to wear Islamic headscarves in public schools–known collectively as the "headscarf cases" and called by one scholar "almost a touchstone for the reflection on the presence of Islam in the public space"–the Court has found itself adjudicating between the sometimes contradictory values of state-sponsored secularism and religious freedom.

In this article, I argue that the ECtHR has failed miserably in the "headscarf cases" at fairly balancing these rights. I distill the reasoning used by the Court in *Dahlab v. Switzerland* and *Leyla Sahin v. Turkey*, the two most significant of these cases, into four major arguments: Argument from Religious Pressure, Argument from Political Symbolism, Argument from Gender Inequality, and Argument from Subjugation of Women. Using this novel argument categorization, I show that rather than protecting the rights of individuals to practice their religion freely with only the necessary restrictions, it has defended the actions of over-reaching national governments infringing on those rights under the banner of secularism. I also argue that these decisions hint that the Court does not understand the multifaceted meaning of the Islamic headscarf and has a generally negative view of Islam, both of which color its judicial decisions.

"What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to."

Judge Françoise Tulkens,
Dissent in *Leyla Sahin v. Turkey*

I. Introduction

Schools are closely tied to a country's cultures and values. States rightly see public schools—ranging from primary schools all the way to universities—as spaces for the inculcation of critical national values, like good citizenship, political involvement, and tolerance. For this reason, many governments and scholars believe that it is particularly important that these educational spaces epitomize and manifest these national values.[1] For many states in Europe, secularism is a fundamental national value. While secularism has a number of localized flavors, its core demand is creating a public sphere for public activity that is separate and free from religious influence.[2] Thus, countries that believe in secularism believe that students must have the opportunity to grow in a safe environment in which they feel no pressure to submit to any specific religious beliefs. Moreover, creating this environment in European schools is more important than in traditional "adult" settings for it is setting a standard for the interaction of state and religion from which the young pupils can learn. It is not only that secularism requires a place of learning, like all public spaces, to be free from religious interference, but the students who are just beginning to learn key political concepts should see the school as a model for the type of separation that the state supports.

---

†: Oren Fliegelman is a student at Princeton University, majoring in Politics.

1: In the US, where an emphasis is placed on the First Amendment's guarantee of freedom of speech, the Supreme Court has said, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). In Switzerland, the highest Court has said that the country's principle of secularism "assumes particular importance in State schools, because education is compulsory for all, without any distinction being made between different faiths." *Dahlab v. Switzerland,* 42393/98 ECtHR 5 (2001). Aernout Nieuwenhuis has written that "the school system has been one of the most important battlefields between religion and state." Aernout Nieuwenhuis, *European Court of Human Rights: State and Religion, Schools and Scarves,* 1 Eur. Const. L. Rev. 495, 503 (2005).

2: See Heiner Bielefeldt, "Political Secularism and European Islam: A Challenge to Muslims and Non-Muslims," in Jamal Malik, ed., *Muslims in Europe: From the Margin to the Centre* 149 (2004), and Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* 4 (2012).

The implementation of secularism in public schools, however, must not be allowed to interfere with one's right to manifest and practice one's faith. The same countries that endorse secularism also believe in the right to freedom of religion, a right that is protected by the European Convention on Human Rights (ECHR). These values—secularism and freedom of religion—although not necessarily contradictory, often find themselves on opposite sides of legal battles. Indeed, these values have been at the epicenter of a decades-long controversy that has important political and cultural dimensions: can states legitimately institute bans on the wearing of Islamic headscarves in schools or are such bans an unreasonable infringement on a woman's ability to practice her religion? Does a ban advance the protection of the rights of others at school critical to creating a modern secular society or is this an egregious violation of an individual's right to manifest her religion?

The significance of the controversy can be measured in European Court of Human Rights (ECtHR) casework: as of 2011, twelve of the sixteen cases brought to the ECtHR by individuals who had been barred from wearing religious symbols in public involved women who wanted to wear the Islamic headscarf.[3] As will be shown, the so-called ECtHR "headscarf cases" have been discussed, debated, and commented on by academics, journalists, and religious leaders.[4] Moreover, the debate is not only a legal one: it involves a number of emotional and social dimensions that are influenced by Western views on Islam. Schirin Amir-Moazami recounts that at a recent academic seminar she attended there was "a tangible sense of relief among most of the participants in the room" as a scholar expressed his disapproval of veiling, "spell[ing] out what the majority of people probably thought but were unable to voice: that veiling provokes reactions and touches on a number of embodied emotions that can hardly be addressed by legal rules."[5] Many scholars, judges, and citizens have strong antipathies toward veiling, even if their feelings are couched in legalistic terms. To emphasize the headscarf controversy's poignant social significance, one scholar has even called it "almost a touchstone for the reflection on the presence of Islam in the public space."[6] Another has said it

3: Elver, *The Headscarf Controversy* at 75 (cited in note 2).

4: Ayşe Saktanber & Gül Çorbacioğlu, *Veiling and Headscarf-Skepticism in Turkey,* 15 Soc. Pol.: Int'l Stud. Gender, St., & Soc'y 514, 521 (2008).

5: Schirin Amir-Moazami, "The Secular Embodiments of Face-Veil Controversies Across Europe" in Nilüfer Göle, ed., *Islam and public Controversy in Europe* 83 (2013).

6: Stefano Allievi, "Relations and Negotiations: Issues and Debates on Islam," in Brigitte Maréchal, ed., *Muslims in the Enlarged Europe: Religion and Society* 338 (2003).

"represents a major international challenge in this 21st century."[7]

As guarantor of individual liberties in the Council of Europe's 47 member states, the ECtHR has played a crucial role in debating this issue through its adjudication of cases. Unfortunately, its role has not been a productive one. Rather than protecting the rights of individuals to practice their religion freely with only strictly necessary restrictions, it has defended the actions of over-reaching national governments infringing on those rights. With this article, I hope to add a new perspective on the role that the ECtHR has played in this debate by distilling into four major arguments the reasoning used by the Court in two of the most significant headscarf cases.[8] I will maintain that using these four arguments, the ECtHR has sacrificed Muslim women's freedom of religious exercise in the public schools in the name of protecting a secular and sexually equal environment. I will also argue that these decisions hint that the Court does not understand the multifaceted meaning of the Islamic headscarf and has a generally negative view of Islam, both of which color its judicial decisions.

I have selected the two ECtHR cases because they are particularly good examples of the Court's jurisprudence on this topic. I will focus on *Dahlab v. Switzerland* (2001), a case about a Zurich primary school teacher who was fired because she refused to refrain from wearing the Islamic headscarf. Next, I will discuss *Leyla Sahin v. Turkey* (2005), a Grand Chamber decision about an Istanbul University student who was suspended for not following a University-wide ban on headscarves. *Dahlab*'s reasoning has been used as precedent in almost every subsequent headscarf case and *Sahin* was the first Grand Chamber judgment on the topic of religious clothing.[9]

To advance my argument, I will first discuss the relevant article of the ECHR, explain the Court's jurisprudence on the article, and outline the details of *Leyla Sahin* and *Dahlab.*[10] Next, I will discuss and critique the four main arguments that the Court uses in the two cases to defend the

---

7: Malika Ghamidi, "The Islamic Veil: a Focal Point for Social and Political Debate," in Theodore Gabriel, ed., *Islam and the Veil: Theoretical and Regional Contexts* 143 (2011).

8: While other scholars have also attempted to distill and distinguish certain specific arguments from one or both of these decisions, I have not read any that come to the same conclusion as my own.

9: Carolyn Evans, *The Islamic Scarf in the European Court of Human Rights,* 7 Melb. J. Int'l. L. 52, 53 (2006).

10: I will only deal with the cases here from the perspective of the ECHR's Article 9. While both Dahlab and Sahin appealed to the Court on the basis of multiple infringements (including, among others, the right to an education), freedom of religion was the primary and strongest of their arguments.

headscarf bans: religious pressure, political symbolism, gender inequality, and subjugation of women. Finally, in the conclusion I will describe four of the judgments' overarching issues which highlight the Court's problematic approach to Islam, and then provide a number of general recommendations for future Court decisions in similar cases.

II. Background: The ECHR's Article 9 and the Headscarf Cases

IIa. Article 9 of the ECHR

The European Convention on Human Rights (ECHR) was established by the Council of Europe's member states in 1950 and came into force in 1953.[11] In the wake of World War II, the Convention was aimed at ensuring the rule of law by protecting the individual rights and liberties of citizens from overbearing state government. The Convention is meant to be a "living document" that adapts to the exigencies of the times and has been amended with 14 subsequent protocols, protecting additional rights such as the right to education (Protocol 1) and a ban on the death penalty (Protocol 6). Since 1959, the ECtHR has been the primary enforcer of the Convention and the protocols' guarantees of individual rights. While any citizen in a member state can bring their case to the ECtHR, it is a court of last resort; the citizen must first exhaust all the domestic legal avenues of appeal.

Article 9 of the Convention guarantees to citizens the right to freedom of religion, both in belief and practice. The ECHR provides:

> 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.[12]

11: European Convention on Human Rights.
12: *Id.* at Art 9.

The article follows a frequent double structure of articles in the ECHR: guarantee of a right and then explicit restrictions. In the first paragraph, the right is asserted and detailed. For Article 9, the right is freedom of thought, conscience, and religion, which includes belief, manifestation of belief, religious practice, and so on. In the second paragraph, the types of legitimate interferences on the right are explained. By developing the right in this way, the Convention is saying that while in general freedom of religion and its subsidiary rights are absolute, there will be certain circumstances when, for the sake of public interest or the rights of others, the state may reasonably need to infringe upon these rights.

When handling applications that accuse states of infringements on freedom of religion, the Court first determines whether or not the measure actually interfered with the applicant's freedom of religion. In both *Leyla Sahin* and *Dahlab,* the ECtHR found the law to be an interference on the right.[13] If the Court determines that there has been an interference, it then uses a three-part test to judge whether the interference was a legitimate one within the scope of the second paragraph of Article 9.

To do this, the Court first determines whether the restriction was "prescribed by law." In *Leyla Sahin*, the Court explains that this requirement means that the measure must have "a basis in domestic law" and be expressed with enough precision so that that a regular citizen would have been able to foresee the restriction.[14] Second, the Court judges whether the restriction pursues "legitimate aims." These first two tests are generally not very difficult burdens to meet and the bans in *Leyla Sahin* and *Dahlab* passed both.

The true test of the legitimacy of the interference lies in the third component of the test, the "most complex and open-ended" of the requirements.[15] The second paragraph requires that the interference be "necessary in a democratic society," by forwarding the interests of public safety, health, or morals, or the protection of the rights of others. When examining a measure in light of this test, the Court looks at whether the law is effective in accomplishing its aims, uses the least intrusive means, and its interference is proportional to the significance of the goals of the measure. While the Court determined the "legitimate aim" test in one paragraph of *Leyla Sahin,* the explanation of the

13: In *Sahin,* the Turkish government did not dispute that the law was an interference. *Sahin v. Turkey,* 44774/98 ECtHR Grand Chamber 19, ¶ 76-78 (2005). In *Dahlab,* the Swiss government did dispute the interference. *Dahlab,* 42393/98 ECtHR at 8.

14: *Sahin*, 44774/98 ECtHR Grand Chamber at 20, ¶ 84.

15: Douwe Korff, *The Standard Approach under Articles 8-11 ECHR and Article 2 ECHR,* Euro. Commission 3, online at http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf.

"necessary in a democratic society" test took up eight pages.[16] In both *Leyla Sahin* and *Dahlab,* the ECtHR found that the headscarf bans were "necessary in a democratic society."

IIb. *Dahlab v. Switzerland*

Dahlab v. Switzerland (2001) was the first petition that came before the Court that involved a ban on Islamic headscarves in public schools. Switzerland is a secular state and Geneva, the canton in which the case occurred, places an emphasis on secularism in its school system. The Geneva cantonal laws state that "the public education system shall ensure that the political and religious beliefs of pupils and parents are respected."[17] To ensure this respect for all political and religious beliefs in schools, section 6 of the Geneva Public Education Act requires that there be no "obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system."[18] While Switzerland is an overwhelmingly Christian country, the federal government—and the cantonal government of Geneva—is committed to creating a public sphere free from religious influences.[19] For this reason, Geneva places primary importance on ensuring that teachers in public schools act in religiously neutral ways in front of their students.[20] Students, however, are free to wear religious symbols as they please.[21]

Lucia Dahlab was an elementary school teacher in Geneva, and converted to Islam in 1991 after a period of "spiritual soul-searching" and in preparation for her marriage to a Muslim man.[22] At the end of that year, she began wearing the Islamic headscarf in public at all times, including during the school day in her role as a teacher. She continued to do so for the next four years with no complaints from teachers, students, or parents. So as not to religiously influence her students, when they asked about the headscarf she would tell them that it was to keep her ears warm.[23]

In January 1996, an inspector informed the Director General for Primary

16: *Sahin,* 44774/98 ECtHR Grand Chamber at 23-28 (2005).
17: *Dahlab,* 42393/98 ECtHR at 4.
18: *Id.* at 2.
19: Rene Pahud de Mortanges, *Religion and the Secular State in Switzerland,* Int'l. Ctr. L. & Religion Stud. 690, online at http://www.iclrs.org/content/blurb/files/Switzerland.1.pdf.
20: In fact, most schools in Switzerland are public. *Id.* at 692.
21: Allievi, "Relations and Negotiations: Issues and Debates on Islam" at 342 (cited in note 6).
22: *Dahlab,* 42393/98 ECtHR at 10.
23: Evans, 7 Melb. J. Int'l. L. at 59 (cited in note 9).

Education in Geneva that Dahlab wore a headscarf while she was carrying out her teaching duties. After a meeting, the Director General ordered that Dahlab stop wearing the headscarf while teaching, informing her that she was in violation of section 6 of the Geneva Public Education Act.[24] In August 1996, she appealed the decision as a violation of her Article 9 right to manifestation of religion to the Geneva cantonal government, which dismissed it. She then appealed to the Federal Swiss Court, which dismissed it, saying that it is "especially important that [teachers] should discharge their duties—that is to say, imparting knowledge and developing skills—while remaining denominationally neutral."[25] The Court added that "it must also be acknowledged that it is difficult to reconcile the wearing of a headscarf with the principle of gender equality."[26]

After exhausting all of her domestic avenues of appeal, Dahlab submitted her case to the ECtHR. In 2001, the Court declared her application for the case to be heard as inadmissible, stating that her complaint was "manifestly ill-founded" partially because of the wide margin of appreciation granted to Switzerland in this type of case. In other words, the Court believed that Dahlab's complaints were insignificant or unconvincing enough that they did not merit a full examination before a chamber of the Court. The Court's decision to not even fully hear the case provoked a significant wave of criticism from scholars.[27]

IIc. *Leyla Sahin v. Turkey*

Leyla Sahin v. Turkey (2005) was the first decision issued by the ECtHR Grand Chamber on religious clothing in the public sphere. It has been the most influential and widely debated of the headscarf decisions and has been cited as precedent in all subsequent related ECtHR decisions. Secularism has been a primary value of Turkey since the creation of the Republic of Turkey

24: *Dahlab,,* 42393/98 ECtHR at 2.

25: *Id.* at 6.

26: *Id.*

27: Carolyn Evans has written of *Dahlab*, "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" Evans, 7 Melb. J. Int'l. L. at 60 (cited in note 9). Eva Brems has written that this "one-sided opinion about the negative signification of the head-scarf is in my view not befitting to a body of the stature of the European Court of Human Rights" Eva Brems, *Diversity in the Classroom: The Headscarf Controversy in European Schools*, 31 Peace & Change 117, 127 (2006).

in 1923, following the breakdown of the Ottoman Empire after World War I. Article II of Turkey's current constitution declares that the country is "a democratic, secular and social state," a section of the constitution that is marked as "unchangeable."[28] The president's oath includes the promise to safeguard and abide by "the principles of the secular republic."[29] The commitment to secularism has special significance in Turkey, given that the country's founder deliberately set up a non-religious republic in a country in which approximately 99 percent of the country's population identifies as Muslim.[30] The state is particularly sensitive to religious clothing because of the close connection that existed between clothing and religious and social status in the Ottoman Empire.[31] Against this background, in 1982 Turkey became the first (and only) European state to ban Islamic headscarves at institutions of higher education.[32] This ban was upheld in 1984 by the Turkish Supreme Administrative Court, writing that "the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic."[33]

Leyla Sahin was a fifth-year medical student at the Faculty of Medicine at the University of Bursa when she chose to transfer to the Faculty of Medicine at the University of Istanbul in August 1997. Sahin was 24 years old and wore a headscarf during her time at Bursa and continued to wear it at the University of Istanbul until February 1998.[34] At that time, the vice-chancellor of the University issued a statement that said students with headscarves and beards should be barred from lectures, courses, and tutorials.[35] Throughout the next few months, Sahin was refused entrance to written exams and lectures, making it impossible for her to participate in school. After receiving a warning from the dean of the faculty, she filed a case to end the ban with the Istanbul Administrative Court. She argued that the ban violated her Article 9 rights to practice her religion, in addition to her Protocol 1, Article 2 rights to an education, among others. She was suspended from the University in April 1999 and her appeal of the headscarf ban was dismissed by the Court in November and by the Supreme Administrative Court the next year.[36]

28: Turkish Const., Art. 2, 4.
29: *Id.* at Art. 103.
30: *International Religious Freedom Report 2004: Turkey*, U.S. Dep't. State (2004), online at http://www.state.gov/j/drl/rls/irf/2004/35489.htm.
31: *Sahin,* 44774/98 ECtHR at 8-9, ¶ 36.
32: *Id.* at 13, ¶ 55.
33: *Id.* at 7, ¶ 34.
34: *Id.* at 3, ¶ 11.
35: *Id.* at 3, ¶ 12.
36: *Id.* at 4-5, ¶ 24-27.

Sahin appealed the Turkish courts' decisions to the ECtHR. Unlike *Dahlab,* the Court allowed the case to proceed to a discussion of its merits. The fourth section issued its Chamber ruling in June 2004, saying that the ban was "justified in principle and proportionate to the aims pursued, and therefore, could be regarded as 'necessary in a democratic society.'"[37] Sahin then requested a referral to the Grand Chamber, which the Court granted. In November 2005, the Grand Chamber handed down a 51-page judgment, including a short concurrence and a 9-page dissent, which declared that the ban's interference with her religious practice was legitimate and within the scope of Article 9's second paragraph.[38] The decision cited *Dahlab* six separate times. By then, Sahin had already left Turkey to continue her studies at the University of Vienna.

III. The Four Arguments

The specifics of *Leyla Sahin* and *Dahlab* are quite different. One was a Grand Chamber judgment regarding an adult medical student and the other was a case dismissed for lack of merit about a primary school teacher. Moreover, one case dealt with Turkey, a country with an overwhelmingly Muslim population, while the other took place in Switzerland, a country in which 26 of 28 cantons have established Christian churches.[39] Surprisingly, despite these differences, three of the four main arguments used by the EctHR in explaining its decisions were similar in the two cases. Indeed, the similarity between their arguments is a significant indicator to the generalized and stereotype-influenced manner in which the Court approaches the issue of Islamic headscarves. A probable cause of this approach is the Court's handling of the margin of appreciation in both cases: by granting a wide margin to Switzerland and Turkey, the EctHR has given itself legal wiggle-room to step back from the specifics and leave the details—as important as they are—to the national governments.

In her scathing dissent in *Leyla Sahin,* Judge Françoise Tulkens asserts that the Court's arguments for the legality of the university headscarf ban are in "general and abstract terms."[40] She goes on to say that the majority's arguments are based entirely on the apparent protection of two main principles of Turkish democracy—secularism and equality—from the headscarf. In its

37: *Leyla Sahin*, 44774/98 ECtHR 26, ¶ 114 (2004).

38: *Sahin,* 44774/98 ECtHR Grand Chamber at 30, ¶ 123.

39: Mortanges, *Religion and the Secular State in Switzerland* at 689 (cited in note 19).

40: *Sahin,* 44774/98 ECtHR Grand Chamber at 44, ¶ 4 (Tulkens, J., dissenting).

jurisprudence, the Court approves and even encourages the notion that the headscarf is incompatible with these principles. I would like to expand and adjust Judge Tulkens' statement, because I believe that her dichotomy does not only hold true for the arguments used in *Leyla Sahin,* but also for the arguments used by the Court in *Dahlab.*

To show this, I have categorized the Court's arguments into four types. Two of the arguments—religious pressure and political symbolism—fall under the "secularism" category. While religious pressure appears in both decisions, political symbolism appears in only *Leyla Sahin* because of the unique nature of Turkey's majority Muslim population. Two of the arguments—gender inequality and subjugation of women—fall under the "equality" category and also appear in both decisions. I believe that the Court places more of an emphasis on the "secularism" category and gender inequality arguments, while the subjugation of women argument is secondary.[41] I will detail the Court's reasoning in each of the arguments, while critiquing its approach and offering potential ways forward.

IIIa. Argument from Religious Pressure

The argument from religious pressure is the most clear-cut and fully reasoned of the four arguments given by the Court and it appears prominently in both cases. In *Dahlab*, the Court expresses concern that a teacher wearing a headscarf will inappropriately pressure or influence his or her students to become interested in Islam or, even more distressingly, want to convert. The Court makes clear that this pressure does not need to be spoken or even intentional: the headscarf is a "powerful external symbol" and merely wearing it potentially proselytizes and exerts pressure on the students.[42] This is because the ECtHR agrees with the Swiss court in that the Islamic headscarf constitutes "a 'powerful' religious symbol" that "clearly identified [the wearer] as a member of a particular faith."[43] Dahlab maintained that she told her pupils that she wore the headscarf to keep her ears warm so as to abide by the Geneva rules for school teachers, but the Swiss Court (quoted by the ECtHR) said that the students "will realise that she is evading the issue. It is therefore

41: While Judge Tulkens does not say this explicitly in her dissent, I believe she also thinks the "secularism" category of arguments is more significant than the "equality" category of arguments. Although admittedly a rough barometer of importance, the division of pages in her dissent is telling: arguments from secularism merit three full pages of explanation, while the arguments from equality merit one.

42: *Dahlab,* 42393/98 ECtHR at 13.

43: *Id.* at 2.

difficult for her to reply without stating her beliefs."[44]

From the government's perspective, this type of pressure from an authority figure in a public school would be a clear violation of the country's principle of secularism and the laws passed to enforce it. This pressure was an even graver concern to the Court because of the young age of Dahlab's students. Teachers are "important role models for their pupils, especially when, as in the applicant's case, the pupils were very young children attending compulsory primary school," said the Court.[45] The Court quotes the Swiss court in saying that by wearing the headscarf "the appellant may have interfered with the religious beliefs of her pupils, other pupils at the school and the pupils' parents."[46]

In *Leyla Sahin,* the Court applies a similar argument, saying that Sahin's wearing of the headscarf makes other non-observant Muslim students uncomfortable and pressures them into wearing headscarves. The Chamber explains that wearing the headscarf "may have an [impact] on those who choose not to wear it" because it is a symbol that is "presented or perceived as a compulsory religious duty."[47] The Court is saying that by the mere act of following her religious beliefs and wearing the headscarf, Sahin could be intimidating or pressuring her peers to do the same. Since the majority of Turkey's population "profess[] a strong attachment to the rights of women and a secular way of life" but still "adhere to the Islamic faith," the Court views the wearing of the headscarf as disrespecting the rights of other female citizens who choose not to wear it.[48] By wearing the headscarf, Sahin would be interfering with the right of other students to not wear it.

It seems like a difficult challenge to prove that one can pressure others to dress like one's self just by wearing a certain article of clothing. Indeed, despite these assertions, the Court fails to prove anything of the sort, whether it be pressuring students in the case of *Dahlab* or pressuring peers in the case of *Leyla Sahin*. The Court does not cite any evidence that Dahlab or Sahin's headscarves had made any student or peer uncomfortable and even says explicitly that neither verbally proselytized. In Dahlab's case, there was no evidence from other cases or studies that indicated that students felt uncomfortable with teachers who wore headscarves. While it is reasonable to worry somewhat about the way a civil servant represents the state, the Court simply trusted the Swiss court's assumptions of pressure, saying that "it

---

44: *Id.* at 6.
45: *Id.* at 9.
46: *Id.* at 4.
47: *Sahin*, 44774/98 ECtHR Grand Chamber at 28, ¶ 115.
48: *Id.*

cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect."[49] But certainly, not being able to deny something outright is not nearly the same as being able to prove it. As Carolyn Evans notes, the Court in *Dahlab* tries to blur the effects on Dahlab's students of her wearing the headscarf by declaring them unknowable rather than admitting that there most likely was just no harm.[50] She adds that "even if the Court's assumption—that there might be some proselytizing effect on the children—is true, it is not clear why this effect is sufficient" to discharge the high burden of "necessary in a democratic society."[51] Surely, one teacher in one year at school would not be enough to challenge a child's complete religious outlook.

The Court's reasoning in *Leyla Sahin* is even less convincing. It is not surprising that in a generally non-observant student body, a woman wearing a headscarf might make some feel uncomfortable. But just like the ECHR guarantees the majority the right *not* to wear the headscarf, naturally it should also guarantee Sahin the right *to wear* the headscarf. Nowhere does the Court explain how the mere wearing of the headscarf would make other students feel uncomfortable in such a way that it justifies the state's interference with Sahin's right. Like in *Dahlab,* the Court speaks solely in generalities. It says that democracy is a "constant search for a balance between the fundamental rights of each individual" and that it "entail[s] various concessions" from individuals, but does not explain why headscarf-wearing women should make the concessions and not the non-headscarf-wearing.[52] Is it more difficult for most women to ignore the headscarf-wearing women than it is for a woman to ignore what she believes to be a religious commandment? In her dissent, Judge Tulkens compares the argument to freedom of expression jurisprudence, saying that "the Court has never accepted that interference with the exercise of the right to freedom of expression can be justified by the fact that ideas or views concerned are not shared by everyone and may even offend some people."[53]

While the Court's generalities are useful in contextualizing the problem, they are not helpful in finding a solid justification for why the rights of non-observant Muslims trump those of observant ones. Nowhere does the Court offer such a reason or justification. Moreover, the Court relies on the "powerful external symbol" rationale from *Dahlab*, but does not note the key difference between the two cases: that Dahlab was in a position of authority,

---

49: *Dahlab,* 42393/98 ECtHR at 13.
50: Evans, 7 Melb. J. Int'l. L. at 63 (cited in note 9).
51: *Ibid.*
52: *Sahin,* 44774/98 ECtHR Grand Chamber at 26, ¶ 108.
53: *Id.* at 47, ¶ *9 (*Tulkens, J., dissenting).

while Sahin was in a peer position. In her dissent, Judge Tulkens also takes issue with the Court attempting to attribute to Sahin the same proselytizing potential as Dahlab.

In truth, the Court appears to be confusing who is pressuring who: the non-religious state governments are pressuring, through the bans, observant Muslim woman into abandoning the headscarf. Indeed, *Leyla Sahin* seems like a manifestation of what Aernout Niewuwenhis describes as the "special" component of Turkish secularism: Turkey is "militant against the pressure put on the secularity of the state by Islam, the religion of the vast majority of the people."[54] The state is so afraid of agitation against secularism that it is proactively infringing upon the rights of the religious whether or not they threaten the secular state. An easy way to accomplish this is to turn religious practices into a public expression of faith. Ayse Saktanber and Gul Corbacioglu argue that the Turkish government, with help from the ECtHR and the observant women themselves, have done exactly that: transformed headscarves into a "public question of religious expression" in Turkey rather than "a private question of piety."[55] Choosing to wear the headscarf is no longer seen as simply a personal religious choice that happens to be publicly visible, but an intentionally public religious-political expression that exerts pressure on others. In essence, the wearing of the headscarf is no longer directed inward—to emphasize one's own spirituality—but directed outwards at others, as if a challenge or threat. Once this transformation in the public eye has taken place, it is much easier from the human rights perspective to restrict public and potentially pressuring expressions of faith than private commitments to practice a religion. While Switzerland does not seem to have this same fear about the overthrow of the secular system, it remains aggressive in protecting its citizens from any religious pressure, as represented in *Dahlab.*

IIIb. Argument from Political Symbolism

In *Leyla Sahin,* the ECtHR invokes the political symbolism of the headscarf as a primary reason for barring it from educational institutions. This unusual argument originated from the Turkish government and courts and is prominent in Turkey because of its majority Muslim population and history. Since the mid-1980s, Turkey has seen a rise of Islamist leaders and parties who openly advocate the overthrow of the secular nature of government or are believed by secularists to be secretly pursuing it. While the

54: Nieuwenhuis, 1 Eur. Const. L. Rev. at 501 (cited in note 1).

55: Saktanber & Çorbacioğlu, 15 Soc. Pol.: Int'l Stud. Gender, St., & Soc'y. at 518 (cited in note 4).

most well-known of these parties is the now-banned Welfare (Refah) party, others include the National Salvation party in the early 1980s, some members of the Motherland party, and the current ruling Justice and Development party.[56] The female supporters of many of these parties wear headscarves, and by the 1980s, many headscarf-wearing women had begun entering higher education.[57] Opponents of the Islamists began identifying the headscarf as a rhetorical symbol used by the fundamentalists, and some fundamentalists indeed began using it as such. As Özlem Denli explains, "Turkish legislators and judges portray veiling as a politicized symbol of systematic rejection targeting the laicist [secularist] organizing principle of the state."[58] Many Turkish officials feel that if a woman wears a headscarf, she is automatically opposed to the secular nature of the state. They believe that it is a symbol of these fundamentalist Islamist groups and assume that any woman wearing it is a supporter of fundamentalism.

The Turkish government's linkage of headscarf-wearing women to fundamentalist Islamic parties was given a prominent role at the ECtHR. In the "History and Background" section of the Grand Chamber decision, the Court explains that while those in favor of the headscarf view wearing it as "a duty and/or a form of expression linked to religious identity," "supporters of secularism" believe the headscarf is "a symbol of political Islam."[59] The Court goes on to essentially endorse this attitude and linkage. It references the linkage multiple times in the Court's 2003 decision in *Refah v. Turkey*, in which the Court affirmed that the Turkish Constitutional Court's dissolution of the fundamentalist Islamist Refah party for attempting to overthrow the secular nature of the government was in compliance with Article 11 of the ECHR. In the decision, the Court agrees that it is legitimate for a democracy to ban a political party that is aimed at eliminating a core concept of the state, including secularism. In relation to headscarves, the Court in *Refah* specifically noted how the party was planning on using headscarves in universities to display the power and popularity of the party.[60] As will be discussed later, Patrick Macklem has pointed to *Refah* and *Leyla Sahin* as examples of what he calls "militant secularism," the state's proactive attack of any organization or movement that appears to threaten a state's secularism.[61]

56: Özlem Denli, "Between Laicist State Ideology and Modern Public Religion: The Head-cover Controversy in Contemporary Turkey," in Tore Lindholm, ed., *Facilitating Freedom of Religion or Belief: A Deskbook* 506-507 (2004).

57: *Id.* at 507.

58: *Id.* at 504.

59: *Sahin,* 44774/98 ECtHR Grand Chamber at 8, ¶ 35.

60: *Refah Party v. Turkey,* 41340/98 ECtHR Grand Chamber 8 (2003).

61: Patrick Macklem, *Guarding the Perimeter: Militant Democracy and Religious*

The ECtHR then applies some of its reasoning for banning Refah to why it is understandable that the Turkish government would want to bar headscarves at universities. In *Leyla Sahin,* the Grand Chamber quotes the Chamber's decision saying that "The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts."[62] The Chamber also added that "it should be noted" that the Turkish Constitutional Court believed that the opinions expressed by the leaders of fundamentalist Islamist parties "on the question whether the Islamic headscarf should be worn in the public sector and/or schools demonstrated an intention to set up a regime based on the Sharia."[63] Without explicitly saying it, the Court marks Leyla Sahin's wearing of the headscarf as a symbol of fundamentalist political Islam like the banned Refah party.

The ECtHR's linkage of these two issues is highly troubling. Indeed, it seems like the Court is painting all Muslim women who choose to wear the headscarf as antagonists of the secular system with one broad brush stroke. It divides the population between "supporters of secularism" and all others, presumably opponents of secularism, a group that includes all women who choose to wear headscarves. While it is legitimate to protect the secular system from people who would like to overthrow it, it is not legitimate to try to do this by restricting the rights of those who happen to dress similarly or follow similar religious beliefs to those who would like to overthrow the system. Judge Tulkens expresses as much in her dissent, when she writes that "merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and 'extremists' who seek to impose the headscarf as they do other religious symbols."[64] The Court does not only fail to distinguish these political and non-political individuals, but it also does not take into account the number of different reasons that Muslim women choose to wear the headscarf or what types of political affiliations they might have. There was nothing that Leyla Sahin said or did to indicate that she held anti-secular beliefs, aside from the fact that she did not believe that the principle of secularism barred her from being able to wear the headscarf as a student at a public university.[65]

In her dissent, Judge Tulkens takes issue with the Court's assumption of the political nature of Leyla Sahin's headscarf. In particular, she believes that

---

Freedom in Europe, 19 Constellations 575, 579-81 (2012).

62: *Sahin,* 44774/98 ECtHR Grand Chamber at 28, ¶ 115.

63: *Sahin,* 44774/98 ECtHR at 7, ¶ 32.

64: *Sahin,* 44774/98 ECtHR Grand Chamber at 47, ¶ 10 (Tulkens, J., dissenting).

65: *Id.* at 20, ¶ 85.

the connection that the Court emphasizes between Leyla Sahin's headscarf and fundamentalist Islamic hopes to overthrow the secular government is incorrect and inappropriate. She writes, "Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views."[66] Indeed, it seems that the *Refah* decision and discussion of the political nature of the headscarf is entirely inappropriate for this decision since it is clear that Leyla Sahin was not wearing the headscarf for political reasons.[67] Patrick Macklem argues that this component of *Leyla Sahin* is a quintessential example of the ECtHR approving Turkey's use of "militant secularism." Like Niewuwenhis, Macklem believes that Turkey has taken a proactive stance in protecting its secular nature by trying to ban any acts or symbols that it even remotely sees as a threat. Secularism is so important to Turkey's government, Macklem argues, that it views a threat to secularism as an existential threat to the democracy. From the Turkish government's handling of the *Leyla Sahin* case—and of headscarf issues, more generally— Macklem's opinion and its logic certainly appears correct. He says that "characterizing the headscarf ban" as a threat to democracy "means that it is not only a measure designed to promote secularism, but also a preemptive measure taken by the state designed to combat a threat to a democratic Turkey."[68] While one can understand why the Turkish government might bring this "political symbol" argument before the Court, the Court should have explicitly refused it, explaining that a ban due to political symbolism would not outweigh the restrictions that the ban would place on women who wore the headscarf because of religious (and not political) convictions.

IIIc. Argument from Gender Inequality

In both *Leyla Sahin* and *Dahlab,* the ECtHR accepts the premise offered by the national governments that the Islamic requirement of only women wearing headscarves is inherently sexually unequal. The Court seems to believe that since the Muslim tradition requires that only women wear the headscarf—a clothing regulation thought of as restrictive—headscarves are by definition opposed to the ideological underpinning of democracy, that

66: *Id,* at 47, ¶ 10 (Tulkens, J., dissenting).

67: However, this is not to deny that some women do use the veil as a political challenge of acceptance in a number of countries. Seyla Benhabib writes about the *l'affaire foulard* ("the Scarf Affair") in France, which began in 1989 when three French school girls wore the scarf to school so as to "defy[] the state." Seyla Benhabib, *The Claims of Culture* 94-102 (2002).

68: Macklem, 19 Constellations at 581 (cited in note 61).

every individual, both male and female, merits an equal presence in the public state. By forcing only women to wear the veil, the judges believe that Islam is marking women as separate and inferior. In *Dahlab*, the Court writes that it is "difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others, and, above all, equality and non-discrimination."[69] Not only does the headscarf contradict the value of gender equality, but it also advocates discrimination and a lack of respect for others. The Court emphasizes that these are not values that a teacher should be transmitting to his or her pupils in the classroom, thus implying that the mere wearing of the headscarf symbolizes these values. The Court also describes the headscarf as a requirement that "appears to be imposed on women by a precept which is laid down in the Koran."[70] Even the word choice of the Court expresses dissatisfaction with the headscarf. As Carolyn Evans points out, describing the headscarf as what "appears" to be a requirement that is "imposed" by the Koran is using a clearly "loaded" manner of describing the religious rule.[71] She goes on to say that it is unusual for the Court to refer to religious duties in such negative terms.[72]

In asserting the gender inequality of the Islamic headscarf requirement, *Sahin* references the above statements from *Dahlab.* The Grand Chamber also stood by the Chamber's comments about the inherent inequality of the headscarf. The Chamber wrote that "it is understandable" that the Turkish authorities "would consider that it ran counter to the furtherance of such values [of tolerance and respect for others] to accept the wearing of religious insignia, including as in the present case, that women students cover their heads with a headscarf while on university premises."[73] While the Court presents this rule as general—applying to all religious insignia from any faith—

69: *Dahlab,* 42393/98 ECtHR at 13.

70: *Id*. Navigating the Islamic law of headscarves is difficult territory, with multiple expert opinions developed over more than a millennium. Since examining this is out of this paper's scope, I will go by the majority of Islamic jurisprudence which believes that women are required to cover their hair in some way; of course, this does not mean that all Muslim women follow (or should follow) these religious rules. However, since this paper deals with Turkey, it is interesting to note that even in the heavily secular country 67% of men and women prefer that women at least partially cover their hair. See Jacob Poushter, *How People in Muslim Countries Prefer Women to Dress in Public,* Pew Research Ctr. (Jan. 8, 2014), online at http://www.pewresearch.org/fact-tank/2014/01/08/what-is-appropriate-attire-for-women-in-muslim-countries/.

71: Evans, 7 Melb. J. Int'l. L. at 65 (cited in note 9).

72: *Id.*

73: *Sahin,* 44774/98 ECtHR Grand Chamber at 26, ¶ 110.

it is clear that that the Court and those representing the Turkish government are emphasizing the rule against Islamic headscarves. In fact, Sahin explains that the Turkish authorities only apply the restriction of religious symbols to Muslims, whereas Jews are allowed to wear *kippot* (skullcaps) and Christians are generally allowed to wear crucifixes.[74] Moreover, the circular sent out by the University of Istanbul that Sahin was appealing specifically targeted Muslim students. It only barred from classes and examinations students "whose 'heads are covered' (who wear the Islamic headscarf) and students… with beards," a Muslim religious requirement for men.[75] It was not until months later that the university issued another circular that mentioned other religious symbols.

The Court does little in either case to prove that duty to wear the headscarf is an inherently misogynistic and sexually unequal rule. They simply state it as fact with little to no explanation. In fact, it seems from the opinions that the judges did little research into the Koran or other Islamic texts to examine the reasoning for the headscarf, or spoke with Muslim women about the reasons why they might choose to wear or not to wear it.[76] Jill Marshall phrases the issue nicely when she writes that "the assumed conflict between the Islamic faith and the rights of women goes uninvestigated" by the Court.[77] She goes on to argue that by declaring the headscarf as inherently unequal without deep analysis of the religious reasoning behind it displays an obvious disrespect for Islam as a whole and the Muslim women who choose to wear it. Carolyn Evans agrees, emphasizing that the Court states that the headscarf is a symbol of gender inequality with hardly a line of explanation. She says that the ECtHR's assumptions about the inherent gender inequality embodied by the headscarf seem to be based off a popular western view of Islam as oppressive to women. For the Court, there is no reason to go into further analysis or detail about the headscarf because "it is a self-evident, shared understanding of Islam" that the religion is oppressive to women.[78] Cindy Skach adds that the "Grand Chamber's analysis in this regard was notably thin and unsatisfying," simply repeating what the ECtHR had said in earlier decisions.[79] In fact, much of the Grand Chamber decision is quotations from

74: *Id.* at 21, ¶ 88.

75: *Id.* at 3, ¶ 16.

76: See Saktanber & Çorbacioğlu, 15 Soc. Pol.: Int'l Stud. Gender, St., & Soc'y. at 530 (cited in note 4); Jill Marshall, *Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate,* 30 Hum. Rts. Q. 631 (2008); and Evans, 7 Melb. J. Int'l. L. at 65 (cited in note 9).

77: Marshall, 30 Hum. Rts. Q. at 633 (cited in note 76).

78: Evans, 7 Melb. J. Int'l. L. at 65 (cited in note 9).

79: Cindy Skach, Sahin v. Turkey *& 'Teacher Headscarf,'* 100 Am. J. Int'l. L. 186, 192 (2006).

the earlier Chamber decisions, *Dahlab,* and *Refah.* As Judge Tulkens phrases it, the Court views the headscarf as the alienation of women, but "what, in fact, is the connection between the ban and sexual equality? The judgment does not say."[80]

If the Court would have examined the meanings of the headscarf more thoroughly, the judges would have discovered a much more nuanced picture. Many women find wearing the headscarf liberating. After interviewing Canadian Muslim women who chose to wear the headscarf in 1998 and following up with them ten years later, Katherine Bullock explains that the women find wearing the headscarf freeing and enjoyable. She says that the headscarf has two dimensions: one that represents piety and religiosity, and another that is a "healthy way of desexualizing women in public space." This last dimension is key because it allows women to feel liberated from the fashion industry and the Western cultural ideal of skinny beautiful femininity.[81] In Bullock's words, the veil returns to the women "personhood, dignity and respect" that is lost in the sex-heavy Western culture.[82] Rather than viewing the veil as a marker of inequality, these women voluntarily choose to wear it because they believe that it makes them more equal in the public sphere. While Bullock's work deals with only Canadian women, it is but one study of many that show the multifaceted way in which Muslim women view the veil—a feature of veiling that has been noted by a significant number of scholars.

It is for this reason that Seyla Benhabib calls veiling a "*complex* institution that exhibits great variety." [83] She laments that the West has "reduced" this complicated cultural tradition to just a few items of clothing that play oversized symbolic roles in Westerners' judgment of Islam. Rather than simply assuming that the headscarf marks women as inferior, the ECtHR has a duty to challenge its initial negative reactions to the veil and study its true meaning to many Muslim women. While, of course, not everyone will agree with this picture of the headscarf, a response like that would miss the point. The views of the headscarf as expressed in Bullock and Benhabib's research are legitimate and cannot simply be brushed aside by states that view the headscarves as restrictive. Moreover, I agree with Judge Tulkens that it is not the Court's role to judge the meaning or legitimacy of religious practices. As

---

80: *Sahin,* 44774/98 ECtHR Grand Chamber at 48, ¶ 11 (Tulkens, J., dissenting).

81: Katherine Bullock, "Hijab and Belonging: Canadian Muslim Women," in Theodore Gabriel, ed., *Islam and the Veil: Theoretical and Regional Contexts* 168 (2011).

82: *Id.*

83: Benhabib, *The Claims of Culture* at 94 (cited in note 67).

long as the mandatory wearing of the headscarf is not so terrible a practice that it corrupts "democratic society"—which seems highly unlikely for mere headscarves—then the government has little right to judge the legitimacy or morality of the practice.[84]

IIId. Argument from Subjugation of Women

The Court does not only believe that the headscarf is inherently unequal, but it also indicates that it thinks that the headscarf leads to inequality in another way: it permits the communal and familial subjugation of women. Although the Court does not say so as explicitly, much of the Court's discussion of the headscarf's gender inequality is based on the idea that the state must protect Muslim women from family or community pressure to wear the headscarf against their wishes. Nowhere is this clearer than when the Court in *Leyla Sahin* compares the headscarves worn in Turkey to the full-body coverings forced on Afghani and Iranian women by the Taliban and Iranian government.[85] Like the judges did with the argument from political symbolism and gender inequality, they paint headscarf-wearing women and Islam in broad brush strokes. In the Court's pronouncement that banning the headscarf for the sake of protecting "the rights and freedoms of others, public order and public safety," there is an implicit indication that women must be protected from their own ideas about what is good for them. Rather than dealing with the details, the Court generalizes. By banning the headscarf, the Court believes that it can prevent this pressure on women. Certainly, the subjugation of women by those who pressure them into donning the headscarf is problematic and the state should work to stop such pressure. But there is no evidence that either Dahlab or Sahin were forced to wear the veil and, more generally, there is little evidence that these are widespread problems in Turkey or Switzerland.[86]

In fact, by denying women the right to voluntarily don the headscarf, the

---

84: Judge Tulkens wrote in her dissent, "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." *Sahin*, 44774/98 ECtHR Grand Chamber at 48, ¶ 12 (Tulkens, J., dissenting).

85: *Id.* at 22, ¶ 92.

86: Marshall, 30 Hum. Rts. Q. at 649 (cited in note 76). However, the same may not be true about France. The Stasi Committee reported in 2003 that many young French Muslim women felt pressured to wear headscarves. Nieuwenhuis, 1 Eur. Const. L. Rev. at 506 (cited in note 1).

EctHR and the governments are the ones pressuring women. Now observant Muslim women must choose between following one of their religious edicts and studying at a university, a choice that, at least ostensibly, should be barred by the right to education established in the ECHR's Protocol 1. Jill Marshall makes a strong case that the EctHR is taking away from Muslim women the exact right that it promises to protect: the personal autonomy of women. She believes that the Court is making assumptions about women who wear the headscarf, because wearing it "may not be a symbol of humiliation, subordination, or oppression by a patriarchal religion or community" as the Court believes.[87] As mentioned earlier, many women embrace the headscarf, believing that it liberates them and gives them more control over their lives. Rather than protecting women's rights by saving them from a misogynistic religious rule, she argues that "in the Islamic headscarf cases the Court tells people how to behave."[88] If anything, making the assumption that the Court is implicitly making—that most women wear headscarves because they are forced to— is "controversial, some may even say insulting."[89] To make such an argument, the Court needs evidence which it does not attempt to provide.

There is another issue with this "paternalistic" argument, as Judge Tulkens calls it: the argument projects an image of women as submissive that contradicts the image that is presented by EctHR's argument from pressure.[90] This contradiction is highlighted by Carolyn Evans, who explains that the Court views women as both "victims" and "aggressors," and is an argument that fits nicely into my division of the EctHR's arguments. On the one hand, the argument from subjugation of women displays women as victims of a "gender oppressive religion" who "need protection from abusive, violent male relatives."[91] On the other hand, the argument from pressure displays women as aggressors who "force[] values onto the unwilling and undefended" and who are "inherently and unavoidably engaged in ruthlessly propagating [their] views."[92] This dual image of women as both victims and aggressors is littered throughout both *Leyla Sahin* and *Dahlab* and begs questions about the feasibility of using both the argument from pressure and the argument from subjugation of women: if veiled women only wear the headscarf because they are forced to by male relatives, why would other women feel that veiled women were forcefully encouraging them to follow suit? Yet, if veiled women

87: Marshall, 30 Hum. Rts. Q. at 649 (cited in note 76).
88: *Id.* at 642.
89: *Id.* at 649.
90: *Sahin*, 44774/98 ECtHR Grand Chamber at 48-49, ¶ 11-13 (Tulkens, J., dissenting).
91: Evans, 7 Melb. J. Int'l. L. at 71 (cited in note 9).
92: *Id.* at 72.

are encouraging other women to wear the headscarf against their wishes, then surely the veiled women would not need to be forced to wear the veil in the first place?[93] This dual image accounts for the contradictory way in which the Court approaches the relationship between headscarves, women, and Islam. As Evans concludes, "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."[94] Indeed, it shows that there is little reasoning behind the Court's arguments and it seems that there is not much that headscarf-wearing women can do that would disprove the Court's dual vision of them. For the Court to legitimate its reasoning, it must come to terms with this contradiction.

IV. Conclusion

In *Dahlab* and *Leyla Sahin*, the ECtHR employs four main arguments to defend bans against wearing Islamic headscarves in school environments. The argument from pressure states that by wearing the headscarf a Muslim woman is inherently pressuring other Muslim women to wear it, and proselytizing to non-Muslims. The argument from political symbolism states that in countries where there are strong Islamic fundamentalist movements, the headscarf acts as a political symbol of defiance to secularism and marks its wearer as a supporter of overthrowing the secular system. In the argument from gender inequality, the headscarf marks women as inferior to men and wearing it is antithetical to the values systems of modern democracies. In the argument from the subjugation of women, the Court views itself in a paternalistic role protecting women from families and communities who pressure them to wear the headscarf against their will.

I believe that the Court's usage of these arguments exposes four overarching issues with the Court's reasoning. Together, these issues do not only indicate that these two judgments were badly reasoned and not fully investigated; they also provide hints that the entire line of ECtHR jurisprudence on this topic faces difficulties and must be re-examined. While not all of the significant wave of criticism that this line of jurisprudence has received has

93: To put this point another way, the pressure that non-veiled Muslim women feel from veiled women is one of condescension for not properly practicing their religion. This pressure is necessarily premised on the voluntary basis by which observant women veil themselves or else they would be in the same "voluntary observance" category as the non-veiled women. If veiled women do not wear the headscarves voluntarily, the condescension-based pressure would not exist.

94: Evans, 7 Melb. J. Int'l. L. at 73 (cited in note 9).

been well-argued, most of the legitimate objections to the Court's decisions are contained within these four issues. After discussing them, I will outline three general recommendations for the Court that it should use to solve these problems in its jurisprudence by taking advantage of the next case on this topic that appears on its docket.

IVa. Overarching Issues

The first overarching issue with the arguments is that they make clear that the Court does not understand Islam and that the judges allow the West's often negative picture of the religion to color their decisions. In the arguments from "secularism" the Court places meaning on the headscarf that most Muslim women never intend to give it. They become political enemies of the modern state, opposed to its secular and democratic form. Of course some fundamentalist Muslim women might use the headscarf as a political tool, but that is no reason to restrict all women from following their religious duties. Many of these women, like Dahlab and Sahin, are dedicated citizens who hope to give back to their communities through teaching and medicine.

In the arguments from "equality," the Court treats headscarf-wearing women as individuals who do not know what is best for themselves. It strips them of their personal autonomy to make decisions regarding their beliefs and religion. Ironically, when the ECtHR claims that it is "necessary in a democratic society" to treat headscarf-wearing women in this way, it seems reasonable for the women to question what modern secularism and pluralism is all about. From these decisions it seems that the judges allow the popular negative Western attitude toward Islam to color their adjudication of the cases. By labeling Islam and headscarves as anti-secularism and anti-gender equality without more supporting evidence, the ECtHR seriously limits the ability of observant Muslim women to participate in the public sphere without sacrificing their religious practices. Unfortunately, the Court shows little interest in investigating Islam or its beliefs more deeply, instead trusting that the state governments can be relied upon to balance freedom of religion with protecting secularism.

The second issue that the arguments highlight is that the Court often ignores nuances in the headscarf cases, instead treating disparate cases in similar ways. Despite the highly different situations from which the *Leyla Sahin* and *Dahlab* cases arose—one involving a teacher in a primary school in a Christian-majority country, the other involving a student at a university in a Muslim-majority country—the Court utilizes strikingly similar arguments for both. In fact, all but one of these four main arguments appears prominently in both cases. At first glance, this continuity might seem admirable: despite

the inevitably different details that will arise in cases before a supra-national court, the ECtHR is attempting to establish a uniform jurisprudence that is coherent. A uniform jurisprudence is often important so that countries and citizens understand what is allowed and not allowed by the ECHR and can act accordingly.

However, when examined more closely, the similarity in the arguments is troubling. The Court is not establishing a uniform jurisprudence on a specific type of case; it is, in fact, applying a uniform jurisprudence to two quite *different* cases. This is especially problematic for a human rights court, because of the importance placed on understanding the types of pressures that minority applicants feel. In cases involving religious liberties, judges can only understand these pressures by grasping the importance of certain rituals or practices to those individuals who believe in the faith—regardless of how strange or unusual they may seem—and placing them in the case's context. However, the Court chose not to allow these detailed issues to influence its arguments. For example, the Court cites *Dahlab* extensively in *Leyla Sahin* in making the argument from pressure, failing to make the distinctions that Dahlab was in a much better position to "pressure" as a teacher and that Dahlab was dealing with more impressionable primary school students while Leyla Sahin was dealing with much older university students. Meanwhile, the Court used the very stark difference in the minority communities to which the two women belonged—Dahlab as a Muslim in a Christian-majority country and Sahin as an observant Muslim in a secular-majority country—only to highlight the feelings of intimidation felt by the Turkish majority, not Sahin.

Much of the decisions' dearth of details or nuanced arguments mostly likely stems from the third overarching issue: the Court's granting a wide margin of appreciation to the states in dealing with the headscarf cases. In both cases, the Court announced that the sensitivity of the topic and the lack of European-wide standards on headscarves in public schools indicated that Turkey and Switzerland deserved a significant margin of appreciation in determining their domestic laws. Because of the significant margin of appreciation, the Court explained that the countries had leeway in how to handle headscarves and it was not appropriate for the Court to get too involved.

As with the second issue, this significant margin of appreciation appears positive on its face for it allows countries to handle the headscarf issue in ways appropriate to their specific cultural tradition, something that is often seen as an advantageous component of the ECHR system. However, both countries chose to ban the headscarf in similar ways, as do a significant number of other countries. When looking at the similarity of argument in this way, it seems that the Court's grant of a significant margin of appreciation is actually

allowing the states to run free in unjustly restricting their citizens' religious rights. Instead of the wide margin of appreciation permitting countries to deal reasonably with the headscarf issues, it is creating a situation in which there is just no "European supervision" at all.[95] More specifically, since the wide margin means it is unlikely that the Court will intervene in national decisions, it creates an excuse for the lack of care and diligence in examining the details and nuances of the cases on the topic, as demonstrated by these two decisions.

The fourth issue with the decisions is tied in with the first problem: the Court does not seem to examine the full extent of the ramifications that the bans—and thus its own decisionswill have on observant female Muslims in Europe. The evolving line of ECtHR jurisprudence that is represented in *Leyla Sahin* and *Dahlab* will have a significant negative effect on the roles that observant Muslim women can play in the European public spheres. As the European-wide guarantor of individual liberties, the Court is looked to as a defender of political, cultural, and religious minorities. Instead, the Court has approved the essential barring of thousands of observant Muslim women from the teaching profession in Switzerland and from pursuing higher education in Turkey. Outside of just the specific details of these two cases, by allowing—and even advocating—for the relegation of headscarf-wearing women to the sidelines, the Court is marking as acceptable similar attitudes and behavior across Europe. It is deeply troubling that the majority in *Leyla Sahin* did not grapple with the ways that this line of jurisprudence will affect Muslim women that were brought up by Judge Tulkens in her dissent.

IVb. General Recommendations

When adjudicating decisions as delicate as the headscarf cases, the ECtHR must balance a number of divergent interests and opposing rights. Managing these is a complicated task, but it is crucial that in future cases the Court avoids these four overarching issues with its current jurisprudence. While it is difficult to provide particular standards to the Court without knowing the specifics of the future cases, there are three general recommendations that the Court should begin following.

The ECtHR should decide future headscarf cases with a narrow margin of appreciation. The main jurisprudence of the ECtHR has been wise to recognize the margin of appreciation because it has played a critical role in ensuring that national governments do not feel as if the Court is hoisting a strict set of standards upon countries. However, the Court's belief that

95: *Sahin*, 44774/98 ECtHR Grand Chamber at 44, ¶ 3 (Tulkens, J., dissenting).

these cases necessitate a particularly wide margin because the "relationship between State and religions are at stake" and there is significant "diversity of the approaches taken by national authorities on the issue" is misguided.[96] This is precisely the type of issue that the Court must supervise closely. In countries with as significant religious majorities as Switzerland and Turkey, it is especially likely that the rights of minority religious groups will need protection. The Court cannot just trust that the national governments—by definition, the majorities—will defend these rights, especially given the great impact these decisions will have on observant Muslim women. Moreover, the margin of appreciation should be especially narrow in cases dealing with universities because European opinion on the subject of headscarves is, in fact, not diverse like the Court says: Turkey is the only country in the Council of Europe to ban headscarves at universities.[97]

Second, the ECtHR should make clear that the argument from pressure can only be a valid reason for an interference with a woman's right when there is clear evidence that the woman actually pressured others. In both *Dahlab* and *Leyla Sahin*, the Court made assumptions about the effects of the women's headscarves on others without examining statistical or anecdotal evidence. Without finding evidence of the pressure, the Court has little justification for interfering with a woman's religious right. Looking at the *Dahlab* case, the Court, responding to Dahlab's assertion that she told students who asked about her headscarf that she wore it because it was cold outside, assumed without speaking to the students or their parents that they felt pressured. Because of this, the Court unjustly denied her the right to wear the headscarf. While this unfairly placed blame for religious coercion on Dahlab, the case would have been different if Dahlab had instead given her students a long religious explanation for why she wore the headscarf, or if the students had complained that she acted in such a way that they felt pressured by her wearing it. In these situations, there would have been evidence that Dahlab either actually promoted Islam in comparison to other religions or the young children felt as if she did. Thus, it might be reasonable for the Court to say her behavior—but not merely the wearing of the headscarf—placed unreasonable pressure on the students. However, when dealing with students old, mature, and intelligent enough to be in university as in *Leyla Sahin*, it seems unreasonable to mark actions short of actual proselytizing as placing pressure on peers significant enough to justify interference with a religious right.

Lastly, the ECtHR should make clear in its judgments that it understands

96: *Id.* at 26, ¶ 109.
97: *Id.* at 13, ¶ 55, and 44, ¶ 3.

the complexity behind the decision of Muslim women to wear or not to wear the headscarf and challenge states' negative generalizations about the practice. While it is unlikely that secularist national governments such as Turkey and Switzerland will stop viewing the headscarf in a negative light, the Court has an opportunity to defend the reputation of a significant European minority. In *Dahlab* and *Leyla Sahin*, the Court did little to call into question the assertions of the state governments regarding headscarves as symbols of subjugation and gender inequality, even though the two applicants clearly did not see them as such. In the future, the Court should more actively investigate the states' arguments on this topic, challenging stereotypes and assumptions. A primary way to do this would be to replace the one-line statement with veiling as a tradition that "appears to be imposed on women," with an examination of the diverse Muslim views of the topic and the importance the tradition plays in Islamic culture.[98] The Court should also take care to only use arguments that are applicable to the specific case that it is deciding, such as not using the argument from subjugation to defend a ban in a country where there is no evidence that this is a predominant problem. Rather than inappropriately judging the practices and adherents of a religion, these changes would show respect to the diversity of opinions on the topic and indicate that the Court is speaking about the religion in the terms of its adherents.

With the Muslim population of Europe continuing to grow, the legal issue debated in the headscarf cases will not disappear. In upcoming cases, the ECtHR must strive to adjudicate the headscarf fairly and un-prejudicially, grant a narrower margin of appreciation, grapple with the details of the situations rather than make generalized assumptions, and make clear that it understands the significant ramifications of its judgments. If the Court does not alter its jurisprudence on this topic, it risks ostracizing a significant European minority and failing to fulfill its role as a defender of religious liberties for all.

98: *Dahlab,* 42393/98 ECtHR at 13.