Unveiling the Real Problem

White Supremacy, Not Islam, nor the Veil

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# Chapter I – Introduction and Case Law

# 1. Introduction

**France**

When Youssra’s three-and-a-half year old son started school, he really wanted his mom to come on a school trip. So she signed up to help out on a cinema visit [...] but there, she was stopped by the head teacher, who told her, in front of the baffled children: “You don’t have the right to accompany the class because you’re wearing a headscarf.” She was told to remove her hijab, because it was an affront to the secular French Republic. “I fought back,” she says. “I brought up all the arguments about equality and freedom for all. But I was forced home, humiliated. The last thing I saw was my distressed son in tears. He didn’t understand why I’d been made to leave.”[[1]](#footnote-1)

The Guardian, July 2013

**Canada**

Fatemeh Anvari, a third grade teacher in the town of Chelsea, was told earlier this month that she would no longer be allowed to continue in the role because her headwear ran afoul of Bill 12, a law passed in 2019. The law has an outsized impact on Muslim women and in schools in the province, where 74.5% of teachers are women.[[2]](#footnote-2)

The Guardian, December 2021

**Germany**

When 24 years old Shilan Ahmad arrived to start working at a nursery in Erfurt, Germany, she was immediately turned away. She had applied for the job with her resume and a photo. When she received approval by phone, she was excited. But when she went for a meeting last December, the director took one look at her and turned to the colleague who had organized the meeting. “How can it be that you’ve allowed this woman to come speak with me?” She said. Ahmad, who is from Syria, was wearing a hijab. “I did not think this would be a problem, because I assumed the team had seen the photo with the hijab before bringing me in,” Ahmed said.[[3]](#footnote-3)

ALJAZEERA News, September 2021

These stories are neither surprising nor new. Over the last two decades, several countries, mainly in Europe, have enacted a series of state laws prohibiting the wearing of religious symbols, such as Christian crosses, Jewish skullcaps, Muslim hijab, burqa or niqab,[[4]](#footnote-4) in public venues. In the wake of these laws, many cases, primarily involving the Muslim hijab, have reached the European Court of Human Rights (ECtHR), which has had to deliberate on their compatibility with fundamental rights. [[5]](#footnote-5)

Examining the Court’s cases, which have upheld the state laws and supported the various governments’ bans on Muslim women wearing the hijab, revealed an intriguing incongruity between the principles underlying the women’s positions and the justifications for the Court’s decisions. Most of the Muslim women’s applications argued that these laws represented a violation of various rights, such as the right of equality (not necessarily gender equality), education, and other rights. The Court, however, chose to focus primarily on whether these laws represented a violation of the “freedom of religion” under Article 9 of the European Convention on Human Rights (ECHR), and whether limiting freedom of religion in this particular way is constitutional, giving virtually no attention to the Muslim women’s advocacy for their right to equality and education and to have the opportunity to flourish professionally and personally.[[6]](#footnote-6) Others rights, such as that of equality and education, received minimal attention from the Court. It also appears that the Court based its reasoning on some questionable assumptions. Most notably, the Court viewed the hijab as a sign of religious oppression, and focused on the question of choice, apparently unquestionably assuming that Muslim women’s insistence that they wore the hijab of their own free will and choice was not truthful; that is, the Court suspected that the Muslim women’s position that they wore the hijab out of free choice represented, in the language of Karl Marx, a “false consciousness.”

Consequently, the Court was able to conclude that by upholding these laws banning the wearing of the hijab, the Court was actually “saving” these women, or “liberating” them from the oppression of both their religion – Islam – and from Muslim men’s patriarchy. By doing so, the Court could justify its decisions upholding the various Hijab bans as promoting the principle of “gender equality”, a principle that, from the Court’s perspective, benefits not only these Muslim women, but many other women in society.

These series of judgments on hijab bans have given rise to considerable public and academic debate. Much scholarship within and beyond Europe has criticized the Court’s judgments. Critical voices have also been raised among legal experts on religion and minorities rights, legal feminist scholars, constitutional law scholars and many others – all, impressively united in opposition to the Court’s judgments. A significant portion of the academic literature has focused on critically examining the European Court of Human Rights interpretation of the freedom of religion,[[7]](#footnote-7) joining an ongoing scholarly discussion calling for protection of religious minorities, arguing that the historical record, and the continuing vulnerability of these minorities requires that their rights be protected, *inter alia*, through international law.[[8]](#footnote-8) Some other literature has focused on criticizing the Court’s negative antipathy to the practice of wearing the Islamic hijab, arguing that the Court’s approach to the Islamic practice was based on stereotypes, and that the way it was presented by the Court in its decisions was simplistic, even contributing to Islamophobia.[[9]](#footnote-9)

Other critics of the Court’s decisions have argued that the Court’s negative approach to Islam represented an expression of the Court’s more comprehensive Eurocentric approach.[[10]](#footnote-10) Comparing the Court’s judgments about the Hijab bans with other cases in which restrictions on Christian symbols were brought before the Court reinforced these critiques, as in the latter cases, the Court ruled in favor of the Christian applicants, protecting their freedom of religion under Article 9.[[11]](#footnote-11) Some other criticism especially that from legal feminist scholars, referred to the case of Muslim women as a unique one, due to, borrowing from Kimberle Crenshaw,[[12]](#footnote-12) their intersectionality. According to these critiques, gender equality must be understood as challenging – multiple and intersectional – forms of disadvantages. Therefore, from their perspective, the formalistic conceptualization of discrimination, and the Court’s simplistic and paternalistic understanding of gender equality, is insensitive to the Muslim women’s intersectionality.[[13]](#footnote-13)

By focusing on two such representative cases, *Lucia* *Dahlab v. Switzerland* and *Leyla Sahin v. Turkey*,[[14]](#footnote-14) this paper seeks to undermine the courts’ view of Muslim women as victimized, lacking agency, perhaps religiously-obsessed, to argue that courts, including, alarmingly, The European Court of Human Rights, are acting both - actively and passively - to maintain, protect and enforce white power and control, in the guise of gender equality, when it comes to dealing with Muslims. Put differently, using the justification of “gender equality” and the willingness to save and liberate Muslim women, to justify the hijab ban, I argue, both courts and government are maintaining and preserving, as critical race scholars call it - White Supremacy. To advance this argument, this paper will be divided into two parts.First part will critically examine how the Court presents the Muslim woman as always embedded in power struggles, passively shaped and created by her religion and culture, a woman who lives in a “false consciousness” and makes choices not out of free choice. Instead, an alternative approach will be suggested. One that recognizes that Muslim women are embedded in worlds of meaning and significances, worlds that not only represent part of a culture, but that also invest the individual with the agency to choose to use her culture and religious tools to fulfill her needs and meet the challenges of different situations in life. For this purpose, I apply principles from the disciplines of political theory, anthropology and recent cultural sociology theories devoted to understanding and exploring how people understand and act in the world. This part will be enriched from a series of interviews I have had with Muslim Women Last month (December 2021) in favor of this paper.[[15]](#footnote-15)

Second part will trace three performances of White Supremacy which can be recognized while going through the European Court of Human Rights Judgments in the case of Lucia Dahlab and Leyla Sahin. Using critical race theory (CRT) insights, devoted to understanding how American racism has shaped public policy and exploring the idea that race is a social construct embedded in legal systems and policies, this part seeks to identify three performances of White Supremacy within the European Court of Human Rights judgments.

First performance points put the way interests and perceptions of white subjects placed center stages and assumed as “normal”. Second performance will deal with the visibility of Muslim women that is being fought by the governments and court for maintaining the white public sphere and its power from “the other” non-white. In the third performance, I will critically and skeptically scrutinize the Court’s insistence on focusing on Article 9’s Freedom of Religion, while giving only minimum attention to the women’s arguments about violations of their right to education and equality. For this, I will draw on some of the historical record showing that the negative discourse about Islam and the mobilization of Muslim women was deliberately engaged in to promote broader political policies, aim to strengthen the white power and control.

# 2. Case Law

As representatives of many other cases dealing with similar laws banning Muslim women from wearing the hijab, this part will present both *Lucia* *Dahlab (2001)* and *Leyla Sahin* (2004, 2005) cases at the European Court of Human Rights. [[16]](#footnote-16) Both cases share so many common elements with numerous other cases, and due to the fact that the court referred to them in many of its later decisions, I have chosen them as the focus of the discussion.

## 2.1 Lucia Dahlab v. Switzerland

Lucia Dahlab, born in 1965 citizen of Switzerland, a primary school teacher in Geneva. On March 1991, two years from starting her appointment in the school, she had converted her religion to Islam, and therefore, she started to wear the hijab. On 19 October 1991, she got married with A.Dahlab, an Algerian national. In May 1995, Lucia Dahlab, was asked by the Director General for primary education to stop wearing the hijab while carrying out her professional duties as a teacher, on the ground that such a practice contravened section 6 of the Public Education Act,[[17]](#footnote-17) and constituted “an obvious means of identification imposed by a teacher on her pupils, especially in public, secular education system”.[[18]](#footnote-18) On August 1996, Lucia Dahlab appealed against the decision to the Geneva Cantonal government, which dismissed her appeal on the ground of:

Teachers must [...] endorse both the objectives of the State school system and the obligations incumbent on the education authorities, including the strict obligation of denominational neutrality […] The clothing in issue […] represents[…] regardless even of the appellant’s intention, a means of conveying a religious message in a manner which in her case is sufficiently strong […] to extend beyond her purely personal sphere and to have repercussions for the institution she represents, namely the State school system.[[19]](#footnote-19)

After the completion of the state proceedings, the case went on to be heard in The European Court of Human Rights (ECtHR). Lucia Dahlab alleged that a ban on wearing the hijab in the performance of her teaching duties violates her freedom to manifest her religion, under Article 9 of the European Convention on Human Rights (ECHR). In conjunction with Article 9, Dahlab argued that the prohibition discriminate on the basis of sex guaranteed under Article 14 of ECHR (Prohibition of Discrimination), in that a man belonging to the Muslim faith could teach at a State school without being subject to any form of prohibition. In addition, she complained that the Swiss courts had erred in accepting that the measure had a sufficient basis in law and in considering that there was a threat to public safety and to the protection of public order. She observed that the fact she wore a hijab did not appear to have cause any obvious disturbance within the school.

The court chose to concentrate its examination only on whether the ban violated Article 9 (Freedom of Religion). The violation of the right to equality, received minimal attention from the Court and in the end was rejected.

Although the Court accepted the argument that wearing the hijab is covered by the freedom of religion enshrined in Article 9 of the ECHR.[[20]](#footnote-20) However, the Court in its judgment, accepted Switzerland’s argument and considered that the measure pursued aims that were legitimate for the purposes of Article 9(2) ECHR, namely the protection of the rights and freedoms of others, public safety and public order:

The applicant further argued that the measure did not pursue a legitimate aim. Having regard to the circumstances of the case and to the actual terms of the decisions of the three relevant authorities, the Court considers that the measure pursued aims that were legitimate for the purposes of Article 9 § 2, namely the protection of the rights and freedoms of others, public safety and public order.[[21]](#footnote-21)

The court, however, has three main arguments. First, the Court argued that the hijab is a powerful external symbol and it cannot be denied outright that is may have an effect on young children aged between four and eight:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant’s pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. [[22]](#footnote-22)

Second, the Court argued that the hijab appears to be imposed on women by a precept which is laid down in the Kora’n seemingly does not correspond to the principle of gender equality:

In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. [[23]](#footnote-23)

Third, the Court argued that wearing the hijab is difficult to reconcile with the tolerance and respect messages. Furthermore, wearing the hijab is difficult to be reconcile with the message of equality and non-discrimination that all teachers in a democratic society must convey to their pupils:

It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.[[24]](#footnote-24)

Finally, the imposition of the ban on wearing the hijab, according to the Court, was within the framework of the state’s “margin of appreciation.”[[25]](#footnote-25)

## 2.2 Leyla Sahin v. Turkey

Leyla Sahin, born in 1973 in a traditional Islamic family, considered it her religious duty to wear the Islamic hijab. It was in her fifth year of study at the Faculty of Medicine at Istanbul University that the university issued a directive regulating students’ admission onto the university campus. This directive banned students from wearing the Islamic hijab, and forbade other students with beards from entering lectures, stating that disciplinary measures would be taken if such students refused to leave the university premises. The relevant part of the directive declares:

By virtue of the Constitution, the law and regulation, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose ‘heads are covered’ (Wearing the Islamic Headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students.[[26]](#footnote-26)

Because she was wearing a hijab, Leyla was denied access to a written examination by exam monitors, was not allowed to enroll in a course, and was denied admission to a lecture. After Leyla refused to remove her hijab on several occasions, disciplinary proceedings were taken against her, resulting in her suspension from her studies.

The Turkish Constitutional Court ruled that the university’s ban was constitutional, its decision anchored in what it viewed as the need to protect the country’s secular character, and explaining that when Muslim dress was imposed on women by men, the wearing of such garb could not be considered an autonomous choice warranting protection. The Turkish Court also held that non-enforcement of the ban could lead to a violation of equality, in that women not wearing a hijab could possibly be perceived as opposed to religion, and would then be pressured to wear a hijab against their will. In addition, the Turkish court accepted Turkey’s position that, for the most part, the contested measure pursued the legitimate aims of upholding the principle of secularism, protecting the rights and freedoms of others and maintaining the public order.

The case went on to be heard in the ECtHR. That Court’s first decision was handed down in 2004, and the second decision, issued by the Grand Chamber of the ECtHR in 2005, largely systematically reviewed the analysis of lower Court’s approval of the prohibition against wearing the hijab, an analysis it would go on to apply in later cases.

In the ECtHR, Sahin alleged that a ban on wearing the hijab in institutions of higher education in Turkey violated her rights and freedoms under *Article 8* (Right to Respect for Private and Family Life), *Article 9* (Freedom of Thought, Conscience and Religion), *Article 10* (Freedom of Expression), *Article 14* (Prohibition of Discrimination) of the ECHR, and *Article 2* of Protocol No. 1 (Right to Education) to the ECHR. Notwithstanding Sahin’s identification of extensive possible violations of the ECHR, the European Court of Human Rights chose to concentrate its examination only on whether the ban violated Article 9 (Freedom of Religion). Others rights, such as that of education and equality, received minimal attention from the Court.

The Court accepted Turkey’s position that the ban was intended to fulfill the legitimate purpose of protecting the rights of others and promoting public order, referring in its ruling to the *Dahlab* case,[[27]](#footnote-27) in which, as I presented in the previous section, it determined that wearing the hijab is a practice imposed on women, not chosen by them.[[28]](#footnote-28) On the question of whether the ban was “necessary in a democratic state,” the Court accepted Turkey’s position that the ban was indeed necessary for the protection of secularism, because it constituted a necessary basis for the protection of democratic values and gender equality in Turkey. The Court also accepted the argument that allowing women to wear a hijab could serve as a means of pressuring other women who chose not to wear it. In this regard, the Court referred to Turkey’s Constitutional Court judgment, noting:

Secularism also protected the individual from external pressure. It added that restrictions could be placed on freedom to manifest one’s religion in order to defend those values and principles.[[29]](#footnote-29)

In the additional hearing in 2005, the Grand Chamber upheld the Court of Human Rights’ 2004 ruling, while also expanding the initial reasoning to include the issue of the right to education. However, just as no violation of the freedom of religion under Article 9 was found by the Court, here too, the Court determined that the ban did not represent a violation of the right of education was found.[[30]](#footnote-30) With regard to the question of the violation of the right of equality, the Court stated that there was no evidence of a violation of equality, since the applicant had not proven that the ban was directed at her as a member of a particular religion. As the Dahlab case, here too, the imposition of the ban on wearing the hijab, according to the Court, was within the framework of the state’s “margin of appreciation.”

In her dissenting opinion in the 2005 Grand Chamber judgment, Judge Tulkens emphasized that the majority opinion identified the wearing of the hijab with the oppression of women, and accordingly, saw the ban as a means of promoting equality between women and men, without clarifying the connection between the ban and gender equality:

The ban on wearing the headscarf is […] seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say.[[31]](#footnote-31)

In Tulkens’ opinion, a single meaning cannot be attributed to wearing a hijab, and some women even consider it a symbol of liberation. Tulkens argued that it was not the role of the Court to assess and attribute meaning to religious practices, and that the voices of women were missing in the hearing – both those who wear the hijab, and those who do not:

What is the signification of wearing the headscarf? [...] Wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons. It does not necessarily symbolize the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to...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.[[32]](#footnote-32)

Accepting Leyla’s argument to the Court that she was wearing the hijab out of free choice, Judge Tulkens stated that the Court cannot, in the name of gender equality, prevent a woman from engaging in a practice she chooses to follow, and that equality and non-discrimination are subjective rights that must remain under the control of those who are entitled to benefit from them:

The applicant, a young adult university student, said – and there is nothing to 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.[[33]](#footnote-33)

To conclude, both in the case of Lucia Dahlab and Leyla Sahin, the Court upheld the state laws and supported the various governments’ bans on Muslim women wearing the hijab. In its examination, the Court, primarily, focused on whether these laws represented a violation of the “freedom of religion” under Article 9 of the European Convention on Human Rights (ECHR), and whether limiting freedom of religion in this particular was legitimate. Others rights, such as that of equality and education, received minimal attention from the Court. Similarly, in both cases the court viewed the hijab as a sign of religious oppression, and focused on the question of choice, assuming that Muslim women were forced to wear the hijab, and that they did not wear the hijab of their own free will and choice. In the two cases, the court accepted the government’s arguments measure pursued the legitimate aims of upholding the principle of secularism, protecting the rights and freedoms of others, such as other women, children and pupils, and maintaining the public order and safety.

# Chapter II – The Victim Myth

A review of the European Court of Human Rights judgments and its reasoning in cases of Muslim women, such as the *Lucia Dahlab* and *Leyla Sahin* case, reveals a problematic position, presenting Muslim women as perennial victims. This chapter suggests to shatter this victim myth, to argue later, that Muslim women do not really need saving or liberating, and that European governments and courts are using this justification for other political purposes, such as maintaining white power and control. In my attempt to shatter this myth, I will use interdisciplinary theories, such as anthropology, social sociology, and political theory, to show that Muslim women are not necessarily oppressed by their religion and culture, and the hijab is not necessarily an expression for oppression as the court and governments assume. I will add some insights from interviews I’ve conducted with Muslim women in favor of this study.

# 3. The Muslim Women Subject

The Court appears to hold a position in which the Muslim woman is necessarily trampled by religious and masculine forces, perceived as someone trapped within oppressive power structures and suffering from the demands of religious and cultural boundaries. Rather than viewing the Muslim woman as subjugated by oppressive forces, I propose that the Muslim woman is actually a subject immersed in a world of meanings, and embedded in social layers of meanings within which her moral life and her experiences and worldview are shaped.

The idea of the subject deeply immersed and embedded in layers of meaning and significances can be found even without looking beyond liberal theory. In his pioneering book *Putting Liberalism in Its Place*,[[34]](#footnote-34) Paul Kahn, a professor of Law and the Humanities, argues that the two central concepts in the politics of the liberal nation-state are “Love” and “Sacrifice.” Political identity, Kahn argues, “is linked to a willingness to sacrifice: Not contract, but love; not safety, but sacrifice. These are critical elements of political experience.”[[35]](#footnote-35) What defines the political, Kahn argues, “Is the willingness to sacrifice for the idea of the nation.”[[36]](#footnote-36) “Recognition of the possibility of sacrifice is at the basis of our experience of the political and an adequate theory of our political beliefs must offer an explanation of sacrifice.”[[37]](#footnote-37) “The political begins when I can imagine myself sacrificing myself […] to maintain the state.”[[38]](#footnote-38) Kahn’s project does not mean rejecting liberalism, but rather, as Samuel Moyn put it, “exploring the larger worldview it really is – usually unbeknownst to those who most passionately espouse it.”[[39]](#footnote-39)

Kahn finds that traditional liberal theory, especially as expressed by Rawls, does not provide an adequate explanation of the world of meaning that presumably underpins it. Consequently, Kahn, focusing on replacing traditional liberalism’s contractual vision of the will with one based instead on collective togetherness, which inherently allows for self-sacrifice, offers an alternative interpretation of liberal political culture, one that better reflects how its underlying culture actually operates. That is, according to Kahn, what truly motivates citizens to be willing to sacrifice for the sake of their state is their love of the state. “We experience the political community as a matter of love,” [[40]](#footnote-40)Kahn argues. “We cannot understand the character of the relationship between self and the polity without first understanding love.” Kahn continues, “To understand love, however, we need to explore the character of the will in dimensions that are beyond the imagination of liberal thought.”[[41]](#footnote-41) Although Kahn writes about the political liberal culture, claiming that it is also characterized by its communality, as expressed in the relationship between the individual and the state, his arguments, as I will show later, could be applied to the case of Muslim women to explain their relationships with their smaller political community – the Muslim community in Europe.

Political theory alone, however, cannot fully address the idea of the subject deeply immersed and embedded in layers of meaning and significances. Indeed, this concept is a central one in the fields of Anthropology and Cultural Sociology, both of which view culture as a critical component for explaining social phenomena. Cultural sociology scholarship, the development of which can be credited to Yale Professor Jeffrey Alexander, differs from the sociology of culture.[[42]](#footnote-42) While the sociology of culture considers culture as a dependent variable that is a product of other factors, such as economy and politics, cultural sociology sees culture as having more autonomy, and consequently gives more weight to inner meanings. In essence, while sociology of culture, to a large extent, tends to see individuals as constantly embedded in power struggles and in material inequality, cultural sociology, together with anthropology, views individuals as embedded in layers of inner meanings.

Empirical examples that reinforce Paul Kahn and Jeffery Alexander’s abstract arguments in the context of Muslim women, can be found in Saba Mahmood work, an anthropologist who taught at Berkeley, and was influenced by the work of Talal Asad, wrote on gender, religious politics, secularism, and Muslim and non-Muslim relations in the Middle East. In her book about the women’s mosque movement in Egypt, Mahmood begins with the question many western feminists ask about women who support Islamist movements: “Why would such a large number of women across the Muslim world actively support a movement that seems inimical to their own interests and agendas?”[[43]](#footnote-43) Mahmood begins by challenging the very frameworks within which such a question is asked. Her ethnographic study exposes assumptions of both feminist theory and “secular liberal thought” about the nature of the self, agency, and politics. Mahmood suggests we consider other ways of conceptualizing the self, authority, and tradition; in particular, that we try to identify multiple forms of agency beyond that of subversive agency.

Mahmood describes the women of the mosque as moral agents whose work is rooted in a religious, non-liberal cosmological logic. Therefore, their agency experience is also radically different from the liberal agency experience. It is an experience that is nurtured by a connection to tradition instead of defiance against it, by fulfilling duties, instead of exercising rights, and by sanctifying the existing order instead of dismantling it. This interpretive shift enables Mahmood to re-examine the ontological position of liberal feminism, which presupposes a necessary connection between the autonomy of the individual and self-fulfilment, and to identify the limitations of the interpretive positions derived from it. Mahmood also emphasizes that radical feminist scholars, such as Judith Butler, also suffer from these limitations. According to Mahmood, these feminist scholars also tend – despite their critical stance – to focus on studying actions that seek to disrupt social norms, and oppose and challenge existing social order.[[44]](#footnote-44) These limitations, according to Mahmood, also characterize post-colonial approaches, such as that of Gayatri Chakravorty Spivak, considered one of the most influential post-colonial intellectuals, and best known for her essay “Can the Subaltern Speak?”[[45]](#footnote-45) Even these critical approaches, Mahmood argued, focus mainly on voices that are consistent with the critical-progressive approach.

More example of the above I encountered during the interviews I conducted with Muslim women who are students in Tel-Aviv University.

When I asked, ***Amal*** [[46]](#footnote-46), a Muslim student, “what does the hijab mean to you? And about her choice to wear the hijab, I was given various and multiple answers. Indeed, as judge Tulkens mentioned, in her dissenting opinion “the headscarf has no single meaning”[[47]](#footnote-47). From Amal answer we can also learn that not only each woman can have different meaning for a hijab, but also one woman can have various meanings at the same time, as Amal put it:

The hijab is who I’m, as a person, and as a Human. But the hijab is also symbolizes my religious affiliation, and my national affiliation. It’s this and this and this. The hijab means many many things for me. Part of them I can’t even explain.

***Eman*** [[48]](#footnote-48)***,*** another Muslim student,repeated similar things that came up in my conversation with Amal. However, she emphasized her surprise when she asked about her hijab by secular women who study with her:

Sometimes some secular women, mainly Jewish, ask me why I should put the hijab. For example, during last summer, one colleague asked me if it is not too hot for me. This question is always surprising for me. After all, for me the hijab is part of me. Not something that I wear it in specific season. This is something that I wear it all the time, regardless seasons. It’s part of my identity.

Regarding the encounter between Muslim women and secular Israeli Jewish women, ***Heba,***[[49]](#footnote-49)expressed a sense of discomfort when she meets secular women colleagues in zoom:

During the last semester I participated in several virtual meetings where only secular Jewish Israeli women and I were present. I felt uncomfortable. I kept thinking what they are thinking of my hijab. Especially because I attended the meeting from my room, and because all of us were women. They might think there is no reason to put the hijab because we all women, I was telling myself. I was afraid they will think that I’m a strange person because of that. This made me sometimes to consider taking the hijab off.

# 4. The Muslim Woman’s Agency

Following the previous section’s argument that the Muslim woman is a social being belonging to a particular community that shapes her desire and choices, this section goes further to argue that the Muslim woman is not only a **product** of the networks of meanings, in which she lives, but she also a **maker**, an **agent,** an **active** participant, and thus her world’s creative existence is derived from this subject.

Current sociological theories reflect a new conception of the relationship between people and the culture (or religion) to which they belong. In the 20th century, theoreticians viewed culture as a unified system, working hierarchically downwards from above, instructing people how to act and dominating how people shape the various meanings they give to their lives. Challenging this approach, recent cultural sociological theories have begun to adopt a notion of culture as something to be **used** by people. These new theories submit that people don’t merely live within a culture, passively absorbing its attributes, but **actively** draw upon elements of that culture to inform their behavior and decision-making. They thus use “cultural equipment” to make sense of their world.[[50]](#footnote-50) Other scholars sharing this approach suggest that people selectively use culture to inform or justify behavior rather than simply being affected by it without question. Alexander,[[51]](#footnote-51) for example, posits that culture is not only a product of meaning-making processes, but itself possesses a relative autonomy in shaping actions and institutions.

Ann Swidler pioneered this new approach to culture, perceiving culture as a frame of reference to be used by individuals, offering them different toolkits for constructing their action strategies,[[52]](#footnote-52) providing individuals with a certain degree of freedom of choice and actions for navigating the world, and enabling each person to find the most suitable course. Swidler shifted the focus to a cultural toolkit of symbols, stories, rituals, and worldviews as motivators of strategies of actions that people use to cope with various kinds of problems. Consequently, culture’s significance lies not in determining ends of action, but in providing cultural components that can be used to construct strategies of action. By referring to culture as a toolkit offering certain choices, we can better ascertain how people act within their cultures in the course of creatively applying the culture’s selection of elements to meet the challenges of diverse situations and contexts.

A practical example of the above, involving how Muslim women **use** their hijab for their own interests, I encountered during the interviews I conducted with the Muslim women. For instance, when I asked ***Suha***,[[53]](#footnote-53) a student who use to appear to some of her virtual classes without the hijab, about her choice to do so and to wear the hijab, she responded:

I did not wear my hijab because I was learning from my bed room during the virtual sessions, and all the other students were Muslim women. So I felt comfortable to join without the hijab. In some cases, especially in morning classes, I use to take a shower, and it takes time to hair to dry. In these cases I choose not to wear the hijab. It’s not comfortable to wear a hijab while the hair is wet.

Suha’s respond, however, aroused my curiosity about the other women who choose to wear the hijab, despite the fact that we were all Muslim women. Therefore, when I asked other Muslim women who chose to wear the hijab, despite the fact that all women in the virtual room were Muslim women, I was given very revealing and creative answers. ***Abeer***,[[54]](#footnote-54) for instance, emphasized how the hijab help her to feel the same “formality” she felt before the pandemic in the physical classroom:

Since the pandemic, all classes were via Zoom, and I was studying at home, in my room, the place I consider informal. Being with the hijab makes me feel more formal, and therefore more serious, and a better student.

Therefore, Abeer, on the contrary from Suha, chose to wear the hijab, despite the fact thatshe did have the option and choice not to wear it, because she used it to feel and appear as more “serious” students. Another Muslim woman student, ***Faten***,[[55]](#footnote-55) gave another answer, explaining that when she put on the hijab, she feels more “adult,” and therefore people perceive her as such, and that she doesn’t want to be a “little girl anymore”; she wants to be an “educated” woman:

Sometimes I have this feeling that people, in the classroom but also somewhere else, talk to me in a different way, a way that makes me feel more respected, and more adult. This make me think good things about my personality and about myself. I feel more mature and more educated. I really like that.

Additional findings consistent with mine can be found in other research, such as findings that the modest dress that many educated Muslim women have chosen can be read as a sign for modernity and for being educated. For example, in her ethnography of women in the mosque movement in Egypt, anthropologist Saba Mahmood, mentioned earlier, has shown that this new form of dress is perceived as part of a bodily means of cultivating virtue, the outcome of their professed desire to be close to God.[[56]](#footnote-56)

Other examples of how the hijab can be used in creative ways by Muslim women can be found in several ethnographic works carried out by anthropologists studying gender in Muslim communities. For example, anthropologist Hanna Papanek described the burqa as a “portable seclusion,”[[57]](#footnote-57)and following her, anthropologist Abu-Lughod referred to the burqa as “mobile homes,” noting that many saw the garb as “a liberating invention because it enabled women to move out of segregated living spaces while still observing the basic moral requirements of separating and protecting women from unrelated men.”[[58]](#footnote-58)

To conclude, in this part I sought to challenge the way Muslim women are presented by both Courts and government, as victims and as women who are always subjected to oppression. Instead, I suggested alternative position, one that sees the Muslim woman as a subject embedded in a world of meanings, shaped by it, but also using it for her own needs and interests. By doing so, I tried to shuttle this victim myth, to argue later, that this is part of a broader political rhetoric which aims to maintain, perhaps strengthen the white supremacy.

# Chapter III – Unveiling the White Supremacy: Three Performances

White supremacy is the belief that white people are superior to those of other races and thus should dominate them. This belief favors the maintenance and defense of any power and privilege held by white people, and it was a key justification for European colonialism. White supremacy in Critical race theory (CRT), also refers to a social system, in which white people enjoy structural advantages and privilege, over other ethnic group. Although Critical race theory developed in American legal academia, it can be applied beyond the national boundaries of the United States, as Douzinas and Gearey put it: “CRT provokes a critical thinking that is not limited to a historical time and place, but confronts law’s complicity in the violent perpetuation of a racially defined economic and social order”.[[59]](#footnote-59) CRT, however, has received insignificant attention in European legal scholarship. In his article, Mathias Moschel, suggests in which CRT can contribute to a critical thinking on race and law in Europe.[[60]](#footnote-60) Moschel’s article scrutinized the narrow legal definition, interpretation and implementation of what constitutes racism and racial discrimination according to European legislators and courts. According to him, “the result is that from a socio-legal point of view Europe emerges as a place of racism without race and without (or with very few) racist. This approach can be defined as a European color/race-blindness”.[[61]](#footnote-61) Therefore, using insights from critical race theory, this section will trace three performances of white supremacy within the European Court of Human rights’ judgments.

# 5. First Performance: Who Matters and who is not?

Going through the European Court of Human rights judgments in the case of Lucia Dahlab and Leyla Sahin, one can notice who is on the priority scale, and who is not. The judgments arises a disturbing picture in which the rights of non-actual “others” (i.e. “The public order”, “The public safety”, “other women”, “pupils in school”) are taking into accounts rather than the rights of the actual one woman. these non-actual “others” are white people belong to the hegemony in Europe, who are on the court’s priority scale, more than others who are standing in front of the court in the courtroom.

In the case of Lucia Dahlab, for instance, the court argued that the hijab is a powerful external symbol and it cannot be denied outright that is may have an effect on young children aged between four and eight, an age at which, according to the court, children wonder about many things and are also more easily influenced than older pupils. While I do agree with the claim that pupils are most influenced in these ages, as many research shows,[[62]](#footnote-62) however, I do think that this possibility of influence, could be used to educate pupils, especially in a plural and democratic society, to respect and accept the other who comes from a different culture. This possibility of influence could be used, if there is a willingness, to present the other not abnormal, but normal. And as other who belong to other community, without hierarchy. Instead, the school, supported by the law and courts, chose to maintain this perception of Muslims as the abnormal other, a one that wear “powerful external symbol” that negatively affects pupils in these age.

In the same case, Lucia Dahlab case, the court also argued that wearing the hijab is difficult to reconcile with the tolerance and respect messages. And that wearing the hijab is difficult to be reconcile with the message of equality and non-discrimination that all teachers in a democratic society must convey to their pupils. Also this example presents nit only the negative image the court has about the Muslim practice, but also presents who is prioritize and who is not.

As for the augment about wearing the hijab cannot reconcile with the tolerance and respect messages, and as for the argument that it might harm other, some insights could be taken from Nejaime and Siegel article *Religious Accommodation, and Its Limits, in a Pluralist Society*[[63]](#footnote-63), in which they make points about claims for religious exemption from laws that protect contraception, abortion, and same-sex relationships, seeking to reconcile commitments to religious freedom, reproductive rights, and LGBT equality. In their article, Nejaime and Siegel distinguish between claims for religious exemptions from laws that protect contraception, abortion, and same-sex marriage, and claims involving ritual observance in dress or prayer, such as wearing a head. While accommodation claims of the first kind have the capacity to inflict targeted harms on other citizens who don’t share the claimant’s beliefs, the second kind, according to them, are less likely to harm other citizens. [[64]](#footnote-64) The recent December 2021 Canadian case, with which I opened this paper, serves as a good example: the parents in this case, were opposed to the law that resulted in the firing of a teacher wearing a hijab in the classroom.[[65]](#footnote-65)

In Leyla Sahin’s case, similarly to Lucia Dahlab’s case, the government and following that, the Court, argued that the hijab can be considered as a threat to the “public order” and that it could harm others, such as other “non-actual” women who choose not to wear the hijab.[[66]](#footnote-66) What we mean when we say “public order”? To which public we refer? Who define what is harm and whether there was, or could be harm? The answer seems to be easy – The public, and the harm’s definers are those who belong the hegemony – the white European society. Arguments about the harm being normative is not new within the legal discussion. A recent article, written by Yale graduate, Sebastian Guidi, shows that identifying harm is not as simple it might look at first sight. And that any theory that pertains to limiting the action of an agent based on the prohibition of inflicting “harm” on another must rely on a substantive notion of harm that it cannot itself provide.[[67]](#footnote-67)

Finally, I brought these examples to argue that the court, in its judgments and reasoning saw in front of his eyes, primarily, the interests of European white people. The interests of others, such as Muslim women, who belong to a group historically was exposed to discrimination, didn’t occupy a significant place in the European court of human rights judgments. Some of these women probably chose, following the harsh regulation, to stay at home, in the private sphere, where the patriarchy dominates, and where no one knows what happen. Indeed, the law not only banned them from wearing the hijab. The result of this law was to aggressively exclude these women from the public sphere, and prevent them from pursuing professional and personal progress and prosperity, which is contrary to the key principles of numerous forms of liberalism.

# 6. Second Performance: Whitening the Public Sphere

As I presented previously, the background of these ECtHR judgments is a state laws enacted in various European states that prohibited anyone to wear religious symbols in public places. The ban was considered to be mainly targeted at Muslim, Muslim women wearing the hijab, burqa or niqab, in particular. In the case of Lucia Dahlab, repeating the same in the case of Leyla Sahin, the Court held that the headscarf worn by a schoolteacher, or by a student, is a “powerful external symbol.” This characterization strongly contrasts with that in *Lautsi v. Italy*,[[68]](#footnote-68) where a crucifix hanging in a classroom is deemed an “essentially passive symbol” by the Court. In the case of Lautsi, the Court accepted Italy’s position that crucifix consider to be a religious symbol and having them in public schools, is not harming. In other case, *Ewida v. United Kingdom,[[69]](#footnote-69)* the Court accepted the petition of a British airway employee who was asked to cover up a necklace with a Christian cross. The Court found that her rights had been violated under Article 9 of the European Convention on Human Rights.

When does something appear powerful to us? Certainly, previously unseen minorities who gain visibility will seem disproportionally powerful because their visibility itself is seen as a form of power. Visibility per se is, usually, taken for granted. With minorities, we come to understand that visibility is power; the same process is noticeable with women appearing in boardrooms and people of color gaining political representation. Many disciplines have dealt with space, a topic that has become central to sociological, anthropological, historical research written in the United States, Europe, and former colonies.[[70]](#footnote-70) The prevailing approach sees the organization of space as a cultural product, which not only expresses and replicates the social power relations, but also contributes, actively, to their design. According to this writing, the planning, and organizing of space, is not an action that is for the general public interest, but an action intended to serve the interests of the hegemonic regime.

Some scholars, such as those dealing with the anthropology of law, notably Jean Comaroff and Joan Comaroff,[[71]](#footnote-71) have argued, for example, through the colonial view, that the native landscape is "in need of development." Development means domestication and culture of nature itself and the restoration of order in social chaos. Put differently, making the abnormal normal and thus making order in chaos. The right to the physical and social space, Joan and Jean Comaroff argue, was perceived as the right of the one who develops it. Both Comaroff, argue that in the colonies, the development served as a justification for taking over the native lands.[[72]](#footnote-72)

State laws banning wearing the hijab, or other Islamic religious symbol, are intended, therefore, to defend, thus maintain, the "normal" color of European space. It is designed to conceal any symbol that can undermine that “normal” space. The normal space, characterized by its Europeanism, and in its white color. Every color of immigrants could challenge, thus threat, and perhaps harm, the space’s whiteness. Therefore, the law, through the court, do everything possible to preserve the white control, and to strengthen it.

# 7. Third Performance: The Focus on Religion

Although Leyla and Lucia based their opposition to the ban against wearing the hijab on numerous articles form the ECHR, such as the right to education and equality, the Court chose to examine the ban, following the government’s arguments, almost exclusively in terms of whether it violated Article 9 protecting freedom of religion. This section will critically and skeptically scrutinize the Court’s insistence on focusing on Article 9’s Freedom of Religion, while giving only minimum attention to the women’s arguments about violations of other rights. For this, I will draw on some of the historical record showing that the negative discourse about Islam and the mobilization of Muslim women was deliberately engaged in to promote broader political policies, aim to strengthen the white power and control.

Lila Abu-Lughod, an American anthropologist who has devoted more than twenty years of her life to studying women and gender in the Middle East, specifically in Egypt, makes an argument about the mobilization of Muslim women, particularly female symbols in the U.S. war against terrorism following September 2001.[[73]](#footnote-73) One out of many examples she brings in her article is Laura Bush’s 2001 speech calling on women to justify the American bombing and intervention in Afghanistan, saying: “Because of our recent military gains in much of Afghanistan, women are no longer imprisoned in their homes. They can listen to music and teach their daughters without fear of punishment. The fight against terrorism is also a fight for the rights and dignity of women.”[[74]](#footnote-74) Abu-Lughod suggests one should be sceptical about the focus on the “Muslim women,” or “culture,” and particularly Islam’s religious beliefs and treatment of women. According to her, such cultural framing prevents the serious exploration of the roots of human suffering, and artificially divides the world into binary spheres, such as West versus East, or American versus Muslims.

Other scholars have made observations similar to those of Abu-Lughod in different contexts. For example, in her pioneering book on officials and missionaries in colonial service during the European colonial presence in the Middle East, Leila Ahmed, an Egyptian-American scholar working on women and gender in Islam, outlined the notion of colonialism in the guise of feminism.[[75]](#footnote-75) Calling it “Colonial Feminism,” Ahmed pointed out that this kind of feminism was ostensibly concerned about the plight of Egyptian women, focusing on the Islamic hijab as a sign of oppression, but gave no support to women’s education and other paths to flourishing. In her other writings, Ahmed analyzes the veiling of Muslim women in the United States, rejecting her own earlier and others’ current critiques of the veil as sexist, and promoting the idea of the veil, when it is voluntarily chosen, as a progressive and feminist act.[[76]](#footnote-76)

These examples are not limited to the United States, Afghanistan, and Egypt. Marnia Lazreq, a professor of sociology, makes a critical shift from traditional studies of the Algerian women, which usually examine female roles in relation to Islam, to an interdisciplinary approach, arguing that Algerian women’s position is affected by different structural factors, including colonial domination in Algeria, along with other factors, such as nationalism and capitalist economy. Lazreq, like Abu-Lughod, also makes a connection with broader political disruptions in the twentieth century, such as the attacks on New York and other events related to the “Arab Spring.”[[77]](#footnote-77) Regarding French colonialism, Lazreq offered some examples of how the French mobilized women for their cause. She writes:

Perhaps the most spectacular example of the colonial appropriation of women’s voices, and the silencing of those among them who had begun to take women revolutionaries [such as…] as role models by not donning the veil, was the event of May 16, 1958. On that day a demonstration was organized by rebellious French generals in Algiers to show their determination to keep Algeria French. To give the government of France evidence that Algerians were in agreement with them, the generals had a few thousand native men bused in from nearby villages, along with a few women who were solemnly unveiled by French women [..] Rounding up Algerians and bringing them to demonstrations of loyalty to France was not in itself an unusual act during the colonial era. But to unveil women at a well-choreographed ceremony added to the event a symbolic dimension that dramatized the one constant feature of the Algerian occupation by France: Its obsession with women. Little is known about the handful of women who were unveiled publicly by French women, their circumstances or the conditions under which they were brought in.[[78]](#footnote-78)

These mobilizations of women did not pass over Palestine. For example, Manar Hasan, a Palestinian scholar of gender studies in Israel, focuses on the phenomenon of “honor killings” in the Palestinian community in Israel. Hassan points out the factors and mechanism that work together to preserve the honor killing phenomenon, thereby identifying the politics of honor, which originate from the State of Israel.[[79]](#footnote-79) Hassan shows how both the State of Israel, and the patriarchy within the Palestinian community in Israel unite in sacrificing women in the name of honor and political order. As for the state, she shows how Israel, a Jewish Zionist State, under the guise of “multiculturalism” and “cultural relativism,” is not making any efforts to save these women’s lives, even when Palestinian women turn to the state, especially its legal institutions, such as the police, and welfare authorities for help, these state actors simply return them to their homes, knowing these women are in danger there. According to Hassan, by delegating the treatment of honor issues to the local Arab-Palestinian patriarchy, the state giving them greater power in their communities while also relieving the government of any responsibility for intervening, which could cost political capital and raise opposition. In this same way, the state and the patriarchy join hands in sacrificing women on the altar of honor and social order. Hassan shows that behind this tacit collusion, which deeply weakens Arab-Palestinian women’s power and position, there is a political interest in preventing any organic growth of Palestinian national organized opposition against the State of Israel and its Zionist agenda. Without the added strength of the woman’s voice and action, any such opposition is stymied from its inception. Although Hassan wrote this pioneering article more than twenty years ago, data shows that things actually are getting worse.[[80]](#footnote-80)

# 9. Conclusion

In her dissenting opinion in 2005 Leyla Shahin case, Judge Tulkens emphasized that the majority opinion identified the wearing of the hijab with the oppression of women, and accordingly, saw the ban as a means of promoting equality between women and men. Judge Tulkens also mentioned the fact that the majority opinion didn’t clarify the connection between the ban and gender equality.[[81]](#footnote-81) This paper suggest one explanation to this seemingly connection, which is the way the Court sees Muslim women as oppressed by their religion and culture. However, this paper sought to undermine this view of Muslim women, and drawing on critical race theories, it argued that gender equality is not necessarily what these judgments are about. Instead, this paper suggested an alternative reading. According to this reading, states and courts are maintaining white power and control, in the guise of gender equality. By doing so, I sought to emphasize the role of the court, as a human rights court, in maintaining the situation by giving credence to states, such as Turkey and Switzerland, that the ban is necessary in a democratic and secular societies. By focusing on two such representative cases, *Lucia* *Dahlab v. Switzerland* and *Leyla Sahin v. Turkey,* first chapter critically examined how the Court presented the Muslim woman as always embedded in power struggles, passively shaped and created by her religion and culture, a woman who lives in a “false consciousness” and makes choices not out of free choice. Instead, an alternative approach have been suggested, one that recognizes that Muslim women are embedded in worlds of meaning and significances, worlds that not only represent part of a culture, but that also invest the individual with the agency to choose to use her culture and religious tools to fulfill her needs and meet the challenges of different situations in life.

This paper, however, did not stop in challenging this view of Muslim Women. It went further in its second chapter to trace three performances of White Supremacy which can be found in the European Court of Human Rights Judgments. First performance pointed out the way interests and perceptions of white subjects placed center stages and assumed as “normal”. Second performance dealt with the visibility of Muslim women that is being fought by the governments and court for maintaining the white public sphere and its power from the threating “other”, the non-white. Finally, the third performance critically and skeptically scrutinized the Court’s insistence on focusing on Article 9’s Freedom of Religion, while giving only minimum attention to the women’s arguments about violations of their right to education and equality. As I presented, historical record showing that the negative discourse about Islam and the mobilization of Muslim women was deliberately engaged to promote broader political policies, which aim to maintain and strengthen the white power and control.

Finally, and more generally, courts entertaining states’ claims for religious limitations and restrictions. Courts should consider whether supporting states will promote equality or perpetuate inequality. This is especially true when we deal with groups of citizens who historically have been subject to discrimination. Therefore, courts, and the European Court of Human Rights, should not frustrate its aim of bringing into being a more egalitarian society.

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4. There are differences between a hijab, niqab and burka. All of them are kinds of covering worn by Muslim women. However, while the hijab cover the head and hair, the burka or niqab cover also the face. The burka considered to be the most concealing of all Islamic veils, due to the fact that it is a one piece veil that covers the face and body. The niqab, compared to the burka, leaves the area around the eyes clear. [↑](#footnote-ref-4)
5. *See, e.g.*, Dahlab v. Switzerland, App. No. 42393/98 (Feb. 2, 2001), <https://hudoc.echr.coe.int/eng?i=001-22643> (The Dahlab Case, Judgment of 2001); Sahin v. Turkey, App. No. 44774/98 (June 29, 2004), <https://hudoc.echr.coe.int/eng?i=003-1040422-1076658> (The Sahin Case, Judgment of 2004); Sahin v. Turkey, App. No. 44774/98 (Nov. 10, 2005), <https://hudoc.echr.coe.int/eng?i=001-70956> (The Sahin Case, Judgment of 2005); S.A.S. v. France, App. No. 43835/11 (July 1, 2014), <https://hudoc.echr.coe.int/eng?i=001-145466>. [↑](#footnote-ref-5)
6. Article 9 of the European Convention on Human rights: (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 interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. EUROPEAN COURT OF HUMAN RIGHTS & COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (2013), <https://www.echr.coe.int/documents/convention_eng.pdf>. [↑](#footnote-ref-6)
7. *See, e.g.*, Christopher Belelieu, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the Sahin Judgment*,12 Colum. J. Eur. L. 573 (2005); Benjamin Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in* Leyla Sahin v. Turkey, 91 Cornell *L. Rev.* 129 (2005); Talvikki Hoopes, *The* Leyla Şahin v. Turkey *Case Before the European Court of Human Rights*,5Chinese J. Int'l L. 719 (2006); Tom Lewis, *What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation*, 56 Int'l & Compar. L. Q. 395 (2007); Dawn Lyon & Debora Spini, *Unveiling the Headscarf Debate*, 12 Feminist Legal Stud. 333 (2004). [↑](#footnote-ref-7)
8. *See, e.g.*, Natan Lerner, *The Nature and Minimum Standards of Freedom of Religion or Belief*, 2000 BYU L. Rev. 905 (2000);‏ Nātān Lerner, Group Rights and Discrimination in International law (2nd ed. 2003).‏ [↑](#footnote-ref-8)
9. *See, e.g.*, Lourdes Peroni, *Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising*,10 Int'l J. L. in Context 195 (2014). [↑](#footnote-ref-9)
10. *See, e.g.*, Ergul Celiksoy, *A Critical Analysis of the Jurisprudence of the ECtHR on Islamic Headscarves and Religious Symbols*, 8 Hum. Rts Rev. 81 (2018). [↑](#footnote-ref-10)
11. The Case of *Lautsi v. Italy*, known as the “Crucifix Case”, the Court accepted Italy’s position that crucifix consider to be a religious symbol and having them in public schools, is not harming. In other case, *Ewida v. United Kingdom* the Court accepted the petition of a British airway employee who was asked to cover up a necklace with a Christian cross. The Court found that her rights had been violated under Article 9 of the European Convention on Human Rights. See: Lautsi v. Italy, App. No. 30814/06 (Mar. 18, 2011), <https://hudoc.echr.coe.int/eng?i=001-104040>; Eweida v. UK, App. No. 48420/10 (Jan. 15, 2013), <https://hudoc.echr.coe.int/eng?i=001-115881>. [↑](#footnote-ref-11)
12. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*,1989 Univ. Chi. Legal F. 139 (1989). [↑](#footnote-ref-12)
13. *See, e.g.*,Ivana Radacic, *Gender Equality Jurisprudence of the European Court of Human Rights*,19 Eur. J. Int'l L. 841 (2008).‏ [↑](#footnote-ref-13)
14. The Dahlab Case, Judgment of 2001; The Sahin Case, Judgment of 2004; The Sahin Case, Judgment of 2005. [↑](#footnote-ref-14)
15. Interviews were conducted with nine Palestinian Muslim women citizens of Israel, who use to wear the hijab in a daily basis. I taught them the course “Introduction to Anthropology” in the fall term in 2020 during the pandemic and the transition to virtual classes. The idea of conducting these interviews with them came first to my mind after seeing one Muslim woman appearing in the virtual classroom, without the hijab. I was wondering if the fact that some women, virtually appeared with the hijab, and some appeared without, can gave us some insights when we think about choice and freedom regarding to the hijab. In this paper I will use these interviews to enrich the discussion, rather than concentrating on them. It should be noted that the reality of Muslim women in Europe is much different than the reality of Muslim women in Palestine. Two significant differences are, for instance, the political context and the geographic space. In each space, there are certain nuances around choice and freedom. In order not to make a reduction to the differences between a discussion about freedom to wear a hijab by Muslim women citizens of Israel, and Muslim women Citizens of European countries, this paper will carefully use insights with are relevant. For the sake of anonymoucy and privacy, names of women appear in this paper were changed. [↑](#footnote-ref-15)
16. The Dahlab Case, Judgment of 2001; The Sahin Case, Judgment of 2004; The Sahin Case, Judgment of 2005. [↑](#footnote-ref-16)
17. Section 6 of Geneva Public Education Act provides: “The public education system shall ensure that the political and religious beliefs of pupils and parents are respected. [↑](#footnote-ref-17)
18. The Dahlab Case, Judgment of 2001, Page 1. [↑](#footnote-ref-18)
19. *Id*, at 2. [↑](#footnote-ref-19)
20. *Supra note*, 6. [↑](#footnote-ref-20)
21. The Dahlab Case, Judgment of 2001, Page 12. [↑](#footnote-ref-21)
22. *Id*, at 13. [↑](#footnote-ref-22)
23. *Id*. [↑](#footnote-ref-23)
24. *Id*. [↑](#footnote-ref-24)
25. A judicial doctrine under which international courts allow states to have a measure of diversity in their interpretation of human rights treaty obligations. [↑](#footnote-ref-25)
26. *Id*. ¶12. [↑](#footnote-ref-26)
27. Dahlab v. Switzerland, App. No. 42393/98 (Feb. 2, 2001), <https://hudoc.echr.coe.int/eng?i=001-22643>. [↑](#footnote-ref-27)
28. The Sahin Case, Judgment of 2004, ¶97. [↑](#footnote-ref-28)
29. *Id*. ¶105. [↑](#footnote-ref-29)
30. The Sahin Case, Judgment of 2005. [↑](#footnote-ref-30)
31. The Sahin Case, Dissent Opinion of Judge Tulkens, ¶11 (Nov. 10, 2005). [↑](#footnote-ref-31)
32. *Id.* ¶12. [↑](#footnote-ref-32)
33. *Id.* ¶12. [↑](#footnote-ref-33)
34. Paul W. Kahn, Putting Liberalism in its Place (2005). [↑](#footnote-ref-34)
35. *Id.* at 64. [↑](#footnote-ref-35)
36. *Id.* at 247. [↑](#footnote-ref-36)
37. *Id.* at 12. [↑](#footnote-ref-37)
38. *Id.* at 240. [↑](#footnote-ref-38)
39. Samuel Moyn, *Putting Liberalism in Its Place,* Ethics & Int'l. 19 Aff. 110, 110‏ (2005) (Reviewing Paul W. Kahn, Putting Liberalism in its Place (2005)). [↑](#footnote-ref-39)
40. Kahn, *supra* note 300, at 64. [↑](#footnote-ref-40)
41. *Id*. at 9. [↑](#footnote-ref-41)
42. Jeffrey C. Alexander, The Meanings of Social Life: A Cultural Sociology (2003). [↑](#footnote-ref-42)
43. Saba Mahmood, Politics of Piety: The Islamic Revival and the Feminist Subject 2 (2005). [↑](#footnote-ref-43)
44. *Id.* at 23. [↑](#footnote-ref-44)
45. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* Marxism and the interpretation of culture 271 (Cary Nelson & Lawrence Grossberg eds. 1988).‏ [↑](#footnote-ref-45)
46. Amal, a 20-years-old Muslim student in her first year of studies in the department of Anthropology in Tel-Aviv University. Suha is coming for a Muslim Arab-Palestinian Family in Israel, and she started to wear the hijab at the age of 8. [↑](#footnote-ref-46)
47. *Supra note* 32. [↑](#footnote-ref-47)
48. Eman, a 24-years-old Muslim student in her second year of studies in the department of Anthropology in Tel-Aviv University. Suha is coming for a Muslim Arab-Palestinian Family in Israel, and she started to wear the hijab at the age of 17. [↑](#footnote-ref-48)
49. Heba, a 23-years-old Muslim student in her second year of studies in the department of Anthropology in Tel-Aviv University. Suha is coming for a Muslim Arab-Palestinian Family in Israel, and she started to wear the hijab at the age of 15. [↑](#footnote-ref-49)
50. *See, e.g.*, Melissa A. Milkie & Kathleen E. Denny, *Changes in the Cultural Model of Father Involvement: Descriptions of Benefits to Fathers, Children, and Mothers in Parents’ Magazine, 1926-2006*, 35 J. Fam. Issues 223 (2014). [↑](#footnote-ref-50)
51. Alexander, *supra* note 28. [↑](#footnote-ref-51)
52. Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 Am. Socio. Rev. 273 (1986). [↑](#footnote-ref-52)
53. *Suha*, a 23-years-old Muslim student in her first year of studies in the department of Anthropology in Tel-Aviv University. Suha is coming for a Muslim Arab-Palestinian Family in Israel, and she started to wear the hijab at the age of 12. According to her, she chose to wear the hijab without being told by someone else. [↑](#footnote-ref-53)
54. *Abeer*, a 21-years-old Muslim student in her Second year of studies in the department of Anthropology in Tel-Aviv University. As Suha, Abeer is also coming for a Muslim Arab-Palestinian Family in Israel, and she started to wear the hijab at the age of 15. According to her, she chose to wear the hijab after her grandmother death, and she did that out of free choice. [↑](#footnote-ref-54)
55. *Faten*, a 20-years old Muslim student in her second year of studies in the department of Anthropology in Tel-Aviv University. This is her second round in the academia, after completing a bachelor degree in political sciences. Faten started to wear the hijab in the age of 13, according to her, after having her first period. [↑](#footnote-ref-55)
56. Saba Mahmood, *Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival*,16 Cultural Anthropology 202 (2001). [↑](#footnote-ref-56)
57. Hanna Papanek, *Purdah in Pakistan: Seclusion and Modern Occupations for Women*, *in* Separate worlds: Studies of Purdah in South Asia 190 (Hanna Papanek & Gail Minault eds. 1st ed. Columbia: South Asia Books, 1982). [↑](#footnote-ref-57)
58. Lila Abu‐Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and its Others*, 104 Am. Anthropologist 783, 785 (2002). Some scholars criticized both Abu-Lughod and Papanek ideas that the burqa is not an object of women’s oppression but rather of their liberation. These critics argue that there is something inherently misogynistic about the burqa. *See, e.g.*,: Karina Jougla, *The Ideology of the Veil: Fundamentally Misogynistic or Fundamentally Misunderstood?*, 10 Morningside Rev. 40 (2014), <https://journals.library.columbia.edu/index.php/TMR/article/view/5431>. [↑](#footnote-ref-58)
59. Douzinas and Gearey, 2005, p.259). DOUZINAS, C. and GEAREY, A. 2005 Critical Jurisprudence, Oxford: Hart Publishing [↑](#footnote-ref-59)
60. Möschel, Mathias. "Race in mainland European legal analysis: Towards a European critical race theory." *Ethnic and Racial Studies* 34.10 (2011): 1648-1664.‏ [↑](#footnote-ref-60)
61. *Id*, at 1650. [↑](#footnote-ref-61)
62. See, e.g. Prinstein, Mitchell J., and Kenneth A. Dodge, eds. *Understanding peer influence in children and adolescents*. Guilford Press, 2008.‏ [↑](#footnote-ref-62)
63. Douglas NeJaime & Reva Siegel, *Religious Accommodation, and Its Limits, in a Pluralist Society*, *in* Religious Freedom and LGBT Rights: Possibilities and Challenges for Finding Common Ground 69 (William N. Eskridge Jr. & Robin Fretwell Wilson eds., Cambridge Univ. Press 2018).‏ [↑](#footnote-ref-63)
64. *Id*. [↑](#footnote-ref-64)
65. *Supra note* 2. [↑](#footnote-ref-65)
66. The Sahin Case, Judgment of 2004; The Sahin Case, Judgment of 2005. [↑](#footnote-ref-66)
67. Guidi, Sebastián, and Nahuel Maisley. "Who Should Pay for COVID-19? The Inescapable Normativity of International Law." *The Inescapable Normativity of International Law (May 13, 2021)* 96 (2021).‏ [↑](#footnote-ref-67)
68. *Supra note* 11. [↑](#footnote-ref-68)
69. *Id.* [↑](#footnote-ref-69)
70. Sheehan, Michael. *The international politics of space*. Routledge, 2007; Alonso, Ana Maria. "The politics of space, time and substance: state formation, nationalism, and ethnicity." *Annual review of anthropology* 23.1 (1994): 379-405.‏ [↑](#footnote-ref-70)
71. Comaroff, John, and Jean Comaroff, 1992. *Ethnography and the Historical Imagination*. Boulder:

    Westview Press. [↑](#footnote-ref-71)
72. *Id.* [↑](#footnote-ref-72)
73. Abu‐Lughod, *supra* note 533. [↑](#footnote-ref-73)
74. Abu-Lughod referring to Laura Bush words, *supra* note 53, at 784. [↑](#footnote-ref-74)
75. Leila Ahmed, Women and gender in Islam (2021).‏ [↑](#footnote-ref-75)
76. Leila Ahmed, A quiet revolution (2011).‏ [↑](#footnote-ref-76)
77. Marina Lazreq, Eloquence of Silence: Algerian Women in Question (1994). [↑](#footnote-ref-77)
78. *Id.* at 135. [↑](#footnote-ref-78)
79. Manar Hasan, *The Politics of Honor: Patriarchy, State and Honor Killing*, 21 J. Isr. Hist.‏, no. 1-2, 2002, at 1. [↑](#footnote-ref-79)
80. The number of femicide cases in the Palestinian community soared in the past five years (2015–2020), reaching the horrifying peak of 73 Arab-Palestinian women in Israel murdered. In 2020, the welfare authorities were aware of the risk of ongoing household violence; 60% of murdered women had filed a police complaint previously about the violence they had experienced. Kayan Feminist Organization, Femicide: A grim reality and possibilities for resistance 86 (2021), <https://www.kayanfeminist.org/sites/default/files/publications/%D9%83%D9%8A%D8%A7%D9%86_%D8%B8%D9%84%D8%A7%D9%85%D9%8A%D9%91%D8%A9_%D8%A7%D9%84%D9%85%D8%B4%D9%87%D8%AF%20isbn-%20final%20102021%20%281%29.pdf>. [↑](#footnote-ref-80)
81. Supra note 32. [↑](#footnote-ref-81)