

## Articles

# Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law

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*This Article advocates an innovative contextual approach to assessing the international legality of bans in public schools on "modest" garments claimed to be required by religious beliefs for Muslim women. Too often this has been considered solely a question of religious freedom. This paper advocates the re-insertion of gender equality into the heart of the debate. To obtain results most conducive to reconciling the human right to religious freedom and the human right to gender equality, it examines restrictions on headscarves and veils in a novel matrix of factors, including pressures on individual women to wear or not wear such gear, the impact on other female students, fundamentalist organizing targeting education, Islamophobia, and the multiple meanings of veiling. Applying the contextual approach, this Article argues*

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\* Associate Professor, Rutgers School of Law—Newark. I would like to thank Elizabeth Espert and James McGhee for excellent research assistance. Further, I would like to acknowledge the thoughtful comments of Gita Sahgal, Professors Bernie Bell, Sherry Colb, Claire Dickerson, Stephanie Farrior, Tanya Hernandez, Charles Jones, John Leubsdorf, Saul Mendlovitz, Twila Perry, Jim Pope, Sabrina Safrin, Calvin Sharpe, and Mark Weiner, and all of those who took part in the Rutgers Law School Faculty Colloquium. I am also indebted to participants in the symposium on Constitutional Reconstruction in Turkey, Iran, Iraq, and Afghanistan, held at the International Institute for the Sociology of Law in April 2005, who considered the earliest draft. This Article was supported by funding from the Dean's Research Fund at Rutgers School of Law—Newark. Remaining shortcomings are solely my responsibility.

This Article is humbly dedicated to the memory of Dr. Mahfoud Bennoune.

*that the European Court of Human Rights ruled correctly in Şahin v. Turkey when it upheld Istanbul University's ban on headscarves in context. The Article rebuts the sharp criticism of this decision from some human rights groups and asserts that secularism is vital for the implementation of women's human rights.*

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# I. PROLOGUE: ON NOT-BEING-VEILED

As an Arab-American woman of Muslim heritage, I will never forget the first time I saw a veiled woman.<sup>1</sup> In 1977, my family returned to my father's native Algeria. As a progressive intellectual and veteran of the country's war of independence, he was determined to place no dress restrictions on me. So, on that hot August day when he and I set out for Algiers, I put on shorts. As we drove, a woman walked past us in the dusty heat wearing a *haik*. The white silk veil covered everything but her eyes, hands, and feet. A sudden sense of my own utter nudity overcame me. It was the first time I remember feeling shame. It was the first time I understood the impact one woman's dress can have on another.

This Article explores consequences of that interconnection for a human rights analysis of restrictions placed by the state on veils, headscarves, and other "modest" garments for women, all of which are claimed to be expression of Muslim religious beliefs. It will focus on such restrictions in public education, both in majority Muslim countries and in minority communities in the Diaspora. In doing so, this paper will make much of the imperative of context. Context reveals the complexity, too often ignored, that underlies these issues. For example, although a sign of women's oppression, the *haik* had also been a symbol of Algerian nationalist resistance to French colonialism, particularly in the face of French attempts to cajole its removal. However, in 1977 in socialist Algeria, the woman in the *haik* was not in the majority. In that political moment, many women, including many practicing Muslims, appeared in short sleeves. Only

1. I begin with a personal story spurred on by Angela Harris who argues that "[i]n order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced." Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990). I recognize that women barred from wearing headscarves also have stories of discomfort to tell. See, e.g., Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil? Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743 (2006).

the later introduction of religious fundamentalism into Algerian politics brought the coverings discussed in this paper, the *hijab* (a headscarf) and the *jilbab* (a dark cloak), to the country.

## II. INTRODUCTION: COVERING AND UNCOVERING INTERNATIONAL LAW

Discussion in this Article revolves around two recent cases regarding bans in public schools on “modest” garments claimed by some to be required by religious beliefs for Muslim women and girls.<sup>2</sup> In the first, *Leyla Şahin v. Turkey*,<sup>3</sup> the European Court of Human Rights (ECtHR) ruled that Istanbul University’s ban on headscarves did not violate freedom of religion. Freedom of belief is absolute in human rights law, while expression of belief is subject to limitation. Such limits must be prescribed by law and necessary to achieve a legitimate aim, such as to protect the rights of others. The Court found that Turkey’s goal of preserving secularism<sup>4</sup> as a way of protecting women’s right to equality met this test. In a context where

2. The debate over banning headscarves spawned a vast literature in many languages. In English, for law review articles and notes, see for example, Elisa Beller, *The Headscarf Affair: The Conseil d’État on the Role of Religion and Culture in French Society*, 39 TEX. INT’L L.J. 581 (2004); Benjamin Bleiberg, Note, *Unveiling the Real Issue: Evaluating the European Court of Human Rights’ Decision to Enforce the Turkish Headscarf Ban in Leyla Şahin v. Turkey*, 91 CORNELL L. REV. 129 (2005). For English-language journalistic accounts, see Lori Montgomery, *Turkey Cracks Down on Muslims’ Head-Scarves, Ban in Schools Becomes Emotional Issue*, DETROIT FREE PRESS, Aug. 27, 1998, at 5A; Caroline Wyatt, *Headscarf Row Hides Deeper Issues*, BBC NEWS, Dec. 11, 2003, <http://news.bbc.co.uk/1/hi/world/europe/3311485.stm>. See also DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE (2006).

While this Article focuses primarily on the approach of human rights organizations rather than academicians, numerous scholarly considerations of the subject are available. See, e.g., Caitlin Killian, *The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair*, 17 GENDER & SOC’Y 567 (2003) (arguing that North African women in France have reacted in diverse ways to the ban on religious symbols in public schools, with their reactions dependent on age and education); Ghada Hashem Talhami, *European, Muslim and Female*, 11 MIDDLE EAST POL’Y (No. 2) 152, 167 (2004) (positing that bans on veiling in Europe “fail to protect the rights of Muslim women to education and religious freedom”); Alain Garay et al., *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in France*, 19 EMORY INT’L L. REV. 785 (2005) (suggesting that the French law is likely to “lead to complicated legal disputes”); and Cindy Skach, *Leyla Şahin v. Turkey: “Teacher Headscarf” Case*, 100 AM. J. INT’L L. 186 (2006) (concluding that the principles articulated in the Şahin case will have global impact in countries seeking models of secularism that can limit social conflict).

3. *Şahin v. Turk.*, App. No. 44774/98 (Eur. Ct. H.R. Fourth Section June 29, 2004) [hereinafter *Şahin*, Fourth Section]. The judgment was affirmed by the Grand Chamber in *Şahin v. Turk.*, App. No. 44774/98 (Eur. Ct. H.R. Nov. 10, 2005), available at <http://www.echr.coe.int/echr> [hereinafter *Şahin*, Grand Chamber].

4. The text below provides a definition of secularism. See *infra* notes 205–222 and accompanying text.

fundamentalist groups were targeting women's dress in higher education as part of a project to undo secularism, the Court considered the ban to be necessary. Some human rights groups sharply criticized the ruling as failing to defend women's rights to manifest their religion.

In the second case, *Begum v. Headteacher*,<sup>5</sup> decided in March 2006, the British House of Lords ruled that prohibiting a young girl from wearing the *jilbab* in a British high school with a Muslim majority was not a violation of human rights. This, the Lords reasoned, was in part because of the need to protect the rights of other Muslim girls at the school who feared being coerced to wear the *jilbab*.<sup>6</sup>

In assessing the meanings of such garments, the importance of secularism for women's human rights, and international law norms on religious freedom and gender equality,<sup>7</sup> this Article argues for a contextual approach to such restrictions. A central dilemma is how to reconcile charges of paternalism made against such bans and charges of coercion made to support them, a conundrum which can only be addressed in context. To obtain results most conducive to harmonizing the right to religious freedom and the right to substantive gender equality, the restrictions are examined in a matrix of factors, including pressures on an individual woman to wear or not wear such gear, fundamentalist organizing targeting both education and secularism, the rights of other women students, and related issues like Islamophobia. Applying the contextual approach, the Article argues that the European Court's judgment in *Şahin* was correct, as was that of the House of Lords in *Begum*. However, the jury is still out in a third case, that of the French law banning religious symbols in public schools which, though valid on its face, raises possible concerns about religious and ethnic discrimination in context. Above all, this Article advocates the re-insertion of women's human rights into the heart of this debate in the human rights world, which so far has largely focused on freedom of religion.

Ultimately, the Article confronts tensions between simultaneous commitments to transnational cosmopolitanism and civic republicanism. What do we do when secularism is a prerequisite to women's human rights in certain contexts, yet its defense requires

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5. *Begum v. Headteacher and Governors of Denbigh High School* [2006] 2 All E.R. 487 (H.L.) (appeal taken from Eng.).

6. *Id.*

7. For analysis of the pros and cons of using the terminology of gender (which emphasizes the social constructions of sex) or of sex (which emphasizes biological distinctions), see Dianne Otto, "Gender Comment": *Why Does the U.N. Committee on Economic, Social and Cultural Rights Need a General Comment on Women?*, 14 CAN. J. WOMEN & L. 1, 32 (2002). These terms are used interchangeably in this Article for stylistic reasons.

limitations which might be uncomfortable in an international human rights framework, even if allowed by human rights law? The first step toward an answer is to proceed with great caution, bearing in mind the specifics of the particular context and the actual result our approach is likely to produce both for women seeking to dress in certain ways and for their peers.

#### A. *Secularism and Women's Human Rights*

David Kennedy wrote in global terms in the 1990s of what he termed "the secular establishment," suggesting, as do many, that secularism has become so entrenched it no longer requires articulation or defense.<sup>8</sup> In a world where the President of the most powerful country on earth tells supporters God wants him to be President,<sup>9</sup> and where religious fundamentalisms of all sorts flourish to the detriment of women's human rights, this is undoubtedly an overstatement. The recent controversy in which cartoons of the Prophet Mohammed sparked worldwide protest further illustrates the contemporary global power of religious claims.<sup>10</sup>

A great deal of the establishment to which Kennedy refers has, at least outside some of Western Europe, seemingly returned to the religious.<sup>11</sup> Given, as Hilary Charlesworth has described it, "the fundamental inequality between women and men on which the major religious traditions operate,"<sup>12</sup> this reality entails profound conse-

8. David Kennedy, *Losing Faith in the Secular: Law, Religion, and the Culture of International Governance*, in RELIGION AND INTERNATIONAL LAW 309, 310 (Mark W. Janis & Carolyn Evans eds., 2004). This assumption is shared by others. For example, Human Rights Watch has labeled the human rights movement "secular," though the organization itself does not champion secularism. See generally Jean-Paul Marthoz & Joseph Saunders, *Religion and the Human Rights Movement*, in HUMAN RIGHTS WATCH, WORLD REPORT 2005, at 40, available at <http://hrw.org/wr2k5/wr2005.pdf>.

9. As recounted by Dr. Richard Land of the Southern Baptist Convention. *Meet the Press: Faith in America* (NBC television broadcast Mar. 27, 2005), available at <http://www.msnbc.msn.com/id/7284978>.

10. See, e.g., Press Release, U.N. Comm'n on Human Rights, Human Rights Experts Call for Tolerance and Dialogue in Wake of Controversy Over Representations of Prophet Muhammad (Feb. 8, 2006), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/EC806806182D5F16C125710F0059C630?opendocument>.

11. See, e.g., *RENOUVEAUX RELIGIEUX EN ASIE* (Catherine Clémentin-Ohja ed., 1997); OLIVIER ROY, *L'ISLAM MONDIALISÉ* (2002); JEAN-PIERRE DOZON, *LA CAUSE DES PROPHÈTES: POLITIQUE ET RELIGION EN AFRIQUE CONTEMPORAINE* (1995); CHETAN BHATT, *LIBERATION AND PURITY: RACE, NEW RELIGIOUS MOVEMENTS AND THE ETHICS OF POSTMODERNITY* (1997); KEVIN P. PHILLIPS, *AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY* (2006).

12. Hilary Charlesworth, *The Challenges of Human Rights Law for Religious Traditions*, in RELIGION AND INTERNATIONAL LAW 401, 409 (Mark W. Janis & Carolyn Evans eds., 2004).

quences for the human rights of women, including with regard to their choice of dress.

These consequences are magnified by the rise of religious fundamentalisms. Debate rages about the appropriate terminology to describe such phenomena. Here the term “fundamentalisms” refers to “political movements of the extreme right, which, in a context of globalization . . . manipulate religion . . . in order to achieve their political aims.”<sup>13</sup> One advantage of the language of fundamentalisms is that it speaks across religious boundaries about movements within many traditions. In a recent report to the General Assembly on violence against women, then-U.N. Secretary-General Kofi Annan argued that “[t]he politicization of culture in the form of religious ‘fundamentalisms’ in diverse . . . religious contexts has become a serious challenge to efforts to secure women’s human rights.”<sup>14</sup> In fact, experts have argued that such movements represent one of the two major obstacles to the advance of women’s human rights at the dawn of the twenty-first century.<sup>15</sup>

In such an environment, the struggle to keep religion and law

13. M. A. Hélie-Lucas, *What is Your Tribe? Women’s Struggles and the Construction of Muslimness*, in 23/24 DOSSIER, WOMEN LIVING UNDER MUSLIM LAWS (2001), available at <http://www.wluml.org/english/pubsfulltxt.shtml?cmd%5B87%5D=i-87-2789>. This Article uses the terms “fundamentalisms” and “religious extremism” interchangeably for stylistic reasons.

14. The Secretary General, In-Depth Study on All Forms of Violence Against Women, ¶ 81 (July 6, 2006), in U.N. Doc. A/61/122/Add.1, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/419/74/PDF/N0641974.pdf?OpenElement>.

15. HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 249 (2000). Much of the literature on fundamentalism comes from the field of women’s human rights. See, e.g., REFUSING HOLY ORDERS: WOMEN AND FUNDAMENTALISM IN BRITAIN (Gita Sahgal & Nira Yuval-Davis eds., 2000), available at <http://www.wluml.org/english/pubs/pdf/misc/refusing-holy-orders-eng.pdf>; FUNDAMENTALISM & GENDER (John Stratton Hawley ed., 1994). “Fundamentalism” is the term used, *inter alia*, by some of the international women’s human rights movements, but it is rejected by others and is not a legal term of art.

While some object to employing the term “fundamentalist” in the Muslim context, many opponents of such movements in the Muslim world have preferred this label. It is seen as more accurate than “Islamist” which is argued to be both derogatory of Islam and to privilege “Islamist” claims of authenticity. See Karima Bennouné, “*A Disease Masquerading as a Cure*”: Women and Fundamentalism in Algeria, *An Interview with Mahfoud Bennouné*, in NOTHING SACRED: WOMEN RESPOND TO RELIGIOUS FUNDAMENTALISM AND TERROR 75, 76 (Betsy Reed ed., 2002). Some who use the term “fundamentalist” do so even while critiquing how the word has been used pejoratively by some others to talk only about Muslims. See, e.g., Amrita Basu, *Hindu Women’s Activism in India and the Questions It Raises*, in APPROPRIATING GENDER: WOMEN’S ACTIVISM AND POLITICIZED RELIGION IN SOUTH ASIA 167 (Patricia Jeffery & Amrita Basu eds., 1998).

“Religious intolerance” is a term used in international human rights law, though with a range of connotations. It means both extreme forms of religious practice with negative consequences for the human rights of others, as well as discrimination on grounds of faith. As a legal term of art, it is used below in the discussion of international standards. See *infra* notes 164–177 and accompanying text.

separate is one of the most crucial human rights struggles of our time, especially for women.<sup>16</sup> Keeping religious doctrine out of law requires secularism, which must be recognized as a human rights value itself.<sup>17</sup> Ultimately, this project may require some limitation of religious expression in the service of protecting women's rights, in accordance with international human rights norms.

The views of secularists in many cultures,<sup>18</sup> especially those in the Muslim world<sup>19</sup> who are so often overlooked despite their championing of women's rights, inform these simple, yet increasingly neglected, assertions. This Article is most centrally influenced by the opinion of the Algerian anthropologist Mahfoud Bennoune who said,

Because of my own experience with the fundamentalists, I believe the separation of church and state represents major progress in human history . . . . [It] is the only way you can promote tolerance, coexistence and democracy within a state. I am more convinced than ever now that secularism is the only way out.<sup>20</sup>

Such voices are found in many scholarly fields. However, with increasing capitulation to relativism<sup>21</sup> in response to critiques of universality theory, fair and unfair,<sup>22</sup> and in the current polarized global environment, similar voices in human rights law theorizing grow timid. The emphasis on freedom of religion has overshadowed

16. See, e.g., REFUSING HOLY ORDERS: WOMEN AND FUNDAMENTALISM IN BRITAIN, *supra* note 15 at 201; Chetan Bhatt, Speech to Amnesty International—U.K.: Women's Human Rights and Religious Absolutism (May 10, 2006); *infra* notes 210–222 and accompanying text.

17. See, e.g., Ioanna Kuçuradi, *Secularization and Human Rights*, in CULTURAL TRADITIONS AND THE IDEA OF SECULARIZATION 65 (Bhuvan Chandel & Ioanna Kuçuradi eds., 1998). See also Sadik J. Al-Azm, Address on the Occasion of the 2004 Dr. Leopold-Lucas Award: Islam and Secular Humanism (2005). On the meanings and value of secularism, see discussion, *infra* at notes 205–222 and accompanying text.

18. See, e.g., Kuçuradi, *supra* note 17; Amartya Sen, *Secularism and Its Discontents*, in SECULARISM AND ITS CRITICS 297 (Rajeev Bhargava ed., 1998).

19. For a sample of such views, see the copious Arabic-language literature reviewed in Ghassan Abdullah, *New Secularism in the Arab World*, <http://www.ibn-rushd.org/forum/Secularism.htm> (last visited Dec. 8, 2006), and SOHEIB BENCHEIKH, MARIANNE ET LE PROPHÈTE: L'ISLAM DANS LA FRANCE LAÏQUE (1998). The latter is especially interesting as its author was trained at Al Azhar and served as Grand Mufti of Marseille.

20. Bennoune, *supra* note 15, at 87–88.

21. See, e.g., Kimberly Younce Schooley, *Cultural Sovereignty, Islam and Human Rights—Toward a Communitarian Revision*, 25 CUMB. L. REV. 651 (1994).

22. See, e.g., Bilahari Kausikan, *Asia's Different Standard*, 92 FOREIGN POL'Y 24 (1993); Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996). There has been a rejoinder to such critiques in writings such as Shashi Tharoor, *Are Human Rights Universal?*, WORLD POL'Y J., Winter 1999–2000, at 1; Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT'L L. 593 (1997).



the importance of freedom *from* religion, particularly in legal scholarship.<sup>23</sup>

This Article seeks to redress that imbalance by focusing on permissible limitations on what is claimed to be religious expression in dress in the service of promoting women's substantive human rights. Such restrictions are permissible if they are in accordance with international human rights standards. The test for whether or not the requirements of human rights law are met by particular limits needs to be approached in a context-specific way, interpreting the manifestation of religion in light of the particular circumstances and socially constructed meaning(s) of the expression and its impact on sex equality, another fundamental human right.

Roger Clark has rightly suggested that some may understand expression to be "crucial to the continued existence of religious groups" and that public manifestations of religion represent "highly visible targets" for the expression of the religious intolerance of others.<sup>24</sup> However, he does recognize that such manifestation of belief may "on occasion interfere with other functions in society."<sup>25</sup> This view is echoed by Bahia Tahzib-Lie, who reiterates Clark's view that "manifestation of belief . . . impacts directly on society at large, so that limiting such manifestations may be a legitimate goal of overall social policy."<sup>26</sup> Some limitations are justified, but necessitate careful, contextual scrutiny.

Furthermore, though interrelated, freedom of religion and freedom to manifest religion are distinct concepts and are handled differently by human rights law. Analyses that focus instead on an absolutist approach to freedom of religion in which belief and expression are conflated, and which are de-contextualized, are unhelpful at best and ignore the human rights imperatives associated with secularism, especially for women.

While religious freedom is a basic human right, substantive equality, including on the grounds of sex, is every bit as fundamental a human right,<sup>27</sup> and yet the latter has been downplayed relative to

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23. Diverse authors have produced a voluminous literature on freedom of religion. See, e.g., BAHIIYYIH G. TAHZIB, *FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION* (1996); Roger S. Clark, *The United Nations and Religious Freedom*, 11 N.Y.U. J. INT'L L. & POL. 197 (1978).

24. Clark, *supra* note 23, at 211.

25. *Id.*

26. Bahia Tahzib-Lie, *Women's Equal Right to Freedom of Religion or Belief*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN 117, 121 (Courtney W. Howland ed., 1999) (quoting Clark, *supra* note 23, at 215).

27. The right to non-discrimination, including on the basis of either gender or religion, is the only human right explicitly mentioned in the UN Charter. Even when derogating from

the former. Furthermore, in applying freedom of religion, both those who believe and those who choose not to believe, as well as those who seek to manifest belief and those who do not wish to be coerced to do so, must be taken into consideration. This is only possible in a framework of secularism.<sup>28</sup>

Despite the focus here on headscarves worn by Muslim women, the broader discussion about equality, religious freedom, and fundamentalisms should not be centered on Islam alone. David Kennedy has rightly suggested that Islam is currently the trope for religion.<sup>29</sup> This use of Islam leads to absurd and distorted discussions.<sup>30</sup> These queries are also live for Indian Hindus,<sup>31</sup> Israeli Jews,<sup>32</sup> American Christians,<sup>33</sup> and those who share societies with them, as well as for many others around the world. Some forms of many other religious traditions have also placed modesty restrictions on women, whether Hindu purdah or the long skirts and head coverings worn by some Orthodox Jewish women.

With these concerns in mind, this Article will consider secularism and human rights as follows. Part One parses the *Şahin* case. An overview of NGO critiques of the case follows. Subsequently,

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human rights in a time of crisis, states may not discriminate on these bases. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

28. See HENRI PENA-RUIZ, *HISTOIRE DE LA LAÏCITÉ: GENÈSE D'UN IDÉAL* (2005).

29. Kennedy, *supra* note 8, at 309.

30. See, for example, David Brooks' characterization of the cartoon controversy as a debate between "you," "Islamists . . . young men who were well educated in the West, but who have retreated in disgust from the inconclusiveness and chaos of our conversation," and "us," meaning "we in the West . . ." "Our mind-set is progressive and rational," he argues. "Your mind-set is pre-Enlightenment and mythological." David Brooks, *Drafting Hitler*, N.Y. TIMES, Feb. 9, 2006, at A27. This is a remarkable assertion in a country like the United States, where research into an H.I.V. vaccine is reportedly opposed by the Christian right because it might lead to sexual promiscuity. See Michael Specter, *Political Science: The Bush Administration's War on the Laboratory*, NEW YORKER, Mar. 13, 2006, at 58. Furthermore, in the Brooks worldview, those in the "East," who disagree with Muslim fundamentalists, and those in the West who represent other fundamentalisms disappear. Contrast this with the paradigm described by dissident Muslim intellectuals, including Salman Rushdie, for understanding the cartoon controversy: "[i]t is not a clash of civilizations nor an antagonism between West and East that we are witnessing, but a global struggle that confronts democrats and theocrats." *Writers Issue Cartoon Row Warning*, BBC NEWS, Mar. 1, 2006, available at <http://news.bbc.co.uk/1/hi/world/europe/4763520.stm>.

31. See, e.g., Ratna Kapur, *The Two Faces of Secularism and Women's Rights in India*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN, *supra* note 26, at 143.

32. See, e.g., Alice Shalvi, "Renew Our Days as of Old": Religious Fundamentalism and Social Change in the Modern Jewish State, in THE FREEDOM TO DO GOD'S WILL: RELIGIOUS FUNDAMENTALISM AND SOCIAL CHANGE 75 (Gerrie Ter Haar & James Busuttill eds., 2003).

33. See, e.g., KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? (2005); Barbara Ehrenreich, *Christian Wahhabists*, in NOTHING SACRED: WOMEN RESPOND TO RELIGIOUS FUNDAMENTALISM AND TERROR, *supra* note 15, at 255.

the Article weighs the conflict in international law between the human right to equality and that to religious freedom, setting out the contextual approach as a way forward through this morass. A discussion of secularism as a human rights concept bolsters this methodology. Along the way, the Article will delve into the human rights meanings of the headscarf and other “modest” dress worn by some Muslim women and into the implications of Islamophobia for this discussion in the contemporary moment. In this matrix, it will then provide illustrative applications of the contextual approach to *Begum*, the French law on religious symbols, and *Şahin*, and offer a model for analyzing other cases which may arise in the future.

### III. A WOMAN’S RIGHT VERSUS WOMEN’S RIGHTS: THE *ŞAHİN* CASE

#### A. *The Facts in Context*

In June 2004, the ECtHR engaged with limitations on headscarves when its Fourth Section ruled in *Leyla Şahin v. Turkey*. The applicant was a thirty-one year-old medical student whom the court described as coming “from a traditional family of practicing Muslims [who] considers it her religious duty to wear the Islamic headscarf.”<sup>34</sup> Ms. Şahin argued that Istanbul University’s implementation of its 1998 circular<sup>35</sup> prohibiting the wearing of the headscarf or beards in class violated her rights under the European Convention on Human

34. *Şahin*, Fourth Section, *supra* note 3, ¶ 10.

35. According to the ECtHR, the circular reads, in part, as follows:

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

*Şahin*, Fourth Section, *supra* note 3, ¶ 12 (citing Vice-Chancellor of Istanbul University, Circular Regulating Students’ Admission to the University Campus, Feb. 23, 1998). Human Rights Watch has particularly criticized this circular as emanating from military pressure on the university via the state-controlled Higher Education Council. The organization situates the ban in the broader context of limits on academic freedom in Turkey. *Memorandum to the Turkish Government on Human Rights Watch’s Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf* 26–29 (Human Rights Watch Briefing Paper 37–38, June 29, 2004), available at [http://hrw.org/backgrounders/eca/turkey/2004/headscarf\\_memo.pdf](http://hrw.org/backgrounders/eca/turkey/2004/headscarf_memo.pdf) [hereinafter *Memorandum to the Turkish Government*]. Others see the military as an important, though repressive, defender of secularism against fundamentalist political parties. See, e.g., David Holley, *Turkish Secularists See Red over Islamists’ Rise*, L.A. TIMES, Aug. 6, 2002, at 5.

Rights.<sup>36</sup> Among others,<sup>37</sup> she invoked her right to manifest her religion under Article 9.<sup>38</sup>

Following issuance of the circular, Ms. Şahin was denied access to medical exams and courses while wearing a headscarf.<sup>39</sup> Subsequently, she participated in an “unauthorized assembly” against the rules on dress and was suspended.<sup>40</sup> Ultimately, she benefited from an amnesty; however, she had already enrolled at Vienna University where she completed her education.<sup>41</sup> Citing a long line of precedents, the ECtHR noted that “Article 9 does not protect every act motivated or inspired by a religion or belief and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by a belief.”<sup>42</sup> While the Court conceded that the rules at stake amounted to “an interference with the applicant’s right to manifest her religion,”<sup>43</sup> under the circumstances they were deemed lawful. This resulted from the Court’s acceptance that such measures “primarily pursued the legitimate aims of protecting the rights and freedoms of others.”<sup>44</sup>

In its pleadings, the Turkish government claimed that “secularism was a preliminary requisite for a liberal, pluralist democracy,”<sup>45</sup> submitting that “protection of the secular state” was a *sine qua non* for the realization of human rights in the Turkish context.<sup>46</sup> In light of the notorious human rights record of successive Turkish governments with regard to certain civil and political rights,<sup>47</sup> includ-

36. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

37. Şahin, Fourth Section, *supra* note 3, ¶ 14.

38. Article 9(1) sets out that:

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.

This right is subject to a limitations clause in para. 9(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.

European Convention, *supra* note 36, art. 9. For universal human rights law’s approach to the protection of religious freedom, see *infra* text at notes 145–177.

39. Şahin, Fourth Section, *supra* note 3, ¶ 13.

40. *Id.* ¶¶ 19–20.

41. *Id.* ¶ 25.

42. *Id.* ¶ 66.

43. *Id.* ¶ 71.

44. *Id.* ¶ 84.

45. *Id.* ¶ 91.

46. *Id.*

47. See, e.g., AMNESTY INT’L, *Turkey*, in ANNUAL REPORT 2005, available at <http://web.amnesty.org/report2005/tur-summary-eng>. This may be part of the explanation for the unwillingness of some human rights NGOs to lend any credence to the Turkish

ing freedom of expression,<sup>48</sup> its invocation of human rights must be taken with a grain of salt. Yet, this does not undercut the merit of the argument itself. Furthermore, compared to some of its neighbors, Turkey has made important advances in the sphere of women's human rights, though its record there, too, is subject to some criticism.<sup>49</sup>

The growing fundamentalist movements in the region are a vital part of the matrix within which to consider this issue in the Turkish context.<sup>50</sup> The Turkish government referred to the headscarf as "a sign that was regularly appropriated by religious fundamentalist movements for political ends and constituted a threat to the rights of women."<sup>51</sup> As Şenal Sarihan, a Turkish woman and human rights lawyer, has argued, "[t]he *türban* or headscarf is not just a dress but a sign of political conviction. This really is a 'near and present danger.'" <sup>52</sup> She takes this even further, in a neighborhood comparison that is both controversial and commonly made: "[t]his is a political movement that intends to destroy the whole republic, and to change it into another Iran."<sup>53</sup> Another Turkish academic told Human Rights Watch:

I always had students who wore the headscarf, but it was not a problem then. Universities always approached this issue and students who wore the headscarf in a spirit of moderation. But . . . these demands are going to escalate. They start by wanting to wear the headscarf, and then it will be the *çarşaf*, and then people will ask where we are going.<sup>54</sup>

government's claims here.

48. See especially Amnesty Int'l, *Turkey: Article 301—How the Law on "Denigrating Turkishness" Is an Insult to Free Expression*, Mar. 1, 2006, available at <http://web.amnesty.org/library/index/engtur440032006>.

49. See, e.g., Dicle Kogacioglu, *The Tradition Effect: Framing Honor Crimes in Turkey*, 15 DIFFERENCES 118 (2004). Human Rights Watch suggests that one reason some Turkish women oppose lifting the ban on the headscarf is the poor track record of the Turkish state in preventing violence and discrimination against women. *Memorandum to the Turkish Government*, *supra* note 35, at 4.

50. On the rise in regional fundamentalism and its impact on women's human rights, see HAIDEH MOGHISSI, *FEMINISM AND ISLAMIC FUNDAMENTALISM: THE LIMITS OF POSTMODERN ANALYSIS* (1999). On similar phenomena in Turkey, see Douglas Frantz, *Turkey: Well Along Road to Secularism, Fears Detour to Islamism*, N.Y. TIMES, Jan. 8, 2002, at A8.

51. Şahin, Fourth Section, *supra* note 3, ¶ 93.

52. *Memorandum to the Turkish Government*, *supra* note 35, at 38. This paper contains one of the few serious explanations by a major human rights NGO of secularist arguments. It does not, however, adequately respond to them or reflect them in the Memorandum's final conclusions.

53. *Id.*

54. *Id.* at 40 (quoting interview by Human Rights Watch, in Istanbul, Turkey (Nov. 23, 2000)) (footnote omitted). According to Human Rights Watch, the *çarşaf* is a "sheet . . .

The fears of advocates of the ban have been exacerbated by violence directed against those who oppose veiling on campus. Human Rights Watch details, for example, how a mail bomb killed the academic Bahriye Üçok after her public pronouncements on this topic. Uğur Mumcu, a journalist who wrote that Üçok's murder resulted from her opposition to the headscarf on campus, died in a car bombing just over two years later.<sup>55</sup> The Human Rights Watch memorandum also mentions the stabbing of a professor while he debated this topic with students on campus.<sup>56</sup>

In addressing permissible limitations on religion in such a context, the Turkish government made a larger, methodological point about the need to circumscribe religious doctrine for human rights ends. It argued that implementing some provisions of the Sharia required action incompatible with human rights law, including the European Convention, namely "torture as punishment for crime"<sup>57</sup> and an unacceptable status for women.<sup>58</sup> In fact, the Turkish government had already broken with Islamic Law in other areas, as exemplified by its 2002 reform of Turkish family law.<sup>59</sup> Of course, this argument can be taken too far. Every religion, particularly in certain interpretations, makes some demands incompatible with human rights law. This cannot be an authorization for governments to prohibit other aspects of religious practice that do not violate human rights. Still, the point that some limits on religion may be necessary to safeguard basic human rights resonates in Turkish reality.

#### B. *The Reasoning of the European Court of Human Rights*

The ECtHR's assessment supported the vision of the Turkish authorities. It recognized that in democratic societies, public displays of religion might have to be circumscribed to "ensure that everyone's beliefs are respected."<sup>60</sup> In past cases, the Court had allowed restrictions on religious symbols, including the veil, in order to protect the

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allowing little more than the eyes to be seen." *Id.* at 40 n.100.

55. *Id.* at 40.

56. *Id.* at 40-41.

57. On such punishments, see Karima Bennoune, "A Practice Which Debases Everyone Involved": Corporal Punishment Under International Law, in 20 ANS CONSACRÉS À LA RÉALISATION D'UNE IDÉE 203 (1997).

58. *Şahin*, Fourth Section, *supra* note 3, ¶ 94.

59. See Seval Yildirim, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 PACE INT'L L. REV. 347, 370 (2005) ("Today, outside of the former Soviet republics of Central Asia and the Balkans, Turkey is the only majority Muslim country where family law is not based on the *Sharia*.").

60. *Şahin*, Fourth Section, *supra* note 3, ¶ 97.

rights of others, as well as public order and safety.<sup>61</sup> For example, in *Dahlab v. Switzerland*, upholding a Swiss decision prohibiting public school teachers from wearing the *hijab*<sup>62</sup> in class, the Court argued that the *hijab* was “imposed on women by a precept laid down in the Koran that was hard to reconcile with the principle of gender equality.”<sup>63</sup> Thus, for the Court, combating gender discrimination was an acceptable reason for the Turkish ban. Particularly given that Turkey is ninety-nine percent Muslim, removing the concern of certain types of discrimination, these measures taken to combat fundamentalist coercion of students were seen as justified.<sup>64</sup>

The Court’s understanding here is shaped by the margin of appreciation approach, according to which a government’s claim of necessity for limiting particular rights receives special deference from the European Court, where such a limitation is permitted by the Convention.<sup>65</sup> In *Şahin*, the Court asserted that the relationship of religion and state is particularly suited to determination at the national level.<sup>66</sup> Though the deference of the margin of appreciation method-

61. *Id.* ¶ 98.

62. The *hijab* is the Arabic language term used to refer to the headscarf worn by some Muslim women which covers head, hair and neck. Joan Scott has argued that it is not the same as a “veil” though the difference between these terms is often elided. Joan Scott, *Symptomatic Politics: The Banning of Islamic Head Scarves in French Public Schools*, 23 *FRENCH POL., CULTURE & SOC’Y* 106, 108 (2005). The two terms appear interchangeably here, though the author recognizes that the implicated garments are distinct, the level of covering involved lying along a continuum. Below, this Article defines each particular form of covering discussed. However, this range of “modest” clothes raises many similar issues.

63. *Şahin*, Fourth Section, *supra* note 3, ¶ 98. See *Dahlab v. Switz.*, 2001-V Eur. Ct. H.R. 447. Note that to assume, as the Court did here, that the Koran imposes the veil is to give in to a particular, contested interpretation. See FATIMA MERNISSI, *THE VEIL AND THE MALE ELITE* 85–101, 191–92 (1991).

64. *Şahin*, Fourth Section, *supra* note 3, ¶ 99. On Turkish demographics, see DORLING KINDERSLEY *WORLD ATLAS* 217 (Andrew Heritage ed., 4th ed. 2005).

65. *Şahin*, Fourth Section, *supra* note 3, ¶ 100. The origins of the margin of appreciation doctrine in the jurisprudence of the European Court of Human Rights lie in the Court’s approach to derogation of rights in emergencies. See Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 *INT’L. & COMP. L.Q.* 638, 640 (1999).

66. *Şahin*, Fourth Section, *supra* note 3, ¶ 101. Hence, the court has used the margin of appreciation doctrine in a wide range of religious freedom cases, including *Dahlab v. Switz.*, 2001-V Eur. Ct. H.R. 447; *Refah Partisi v. Turk.*, 2003-II Eur. Ct. H.R. 267 (holding government’s actions dissolving a religious political party that enjoyed electoral success were proportional to the “pressing social need” created by Refah Partisi’s threat to secularism); *Ch’are Shalom Ve Tsedek v. Fr.*, 2000-VII Eur. Ct. H.R. 231 (holding the French government did not violate the Article 9 rights of an ultra-Orthodox group when it permitted only the Jewish Consistorial Association of Paris, a group representing the majority of French Jews, to control access to slaughterhouses operating in accordance with a mainstream interpretation of Judaism); and *Wingrove v. U.K.*, 1996-V Eur. Ct. H.R. 1937 (holding that restricting offensive religious media, here the applicant’s video called *Visions of Ecstasy* representing Christian figures in sexual situations, to protect the feelings of adherents to a religion was within the margin of appreciation).

ology is shown here, to write *Şahin* off on those grounds alone misses the point.<sup>67</sup> In its holding, the Court considered the legal and social context of the disputed Turkish restrictions, and made significant substantive comments, accepting that, at least in certain contexts, secularism is a prerequisite to the enjoyment of human rights.<sup>68</sup>

Despite according a margin of appreciation, since it acknowledged the government's action as "interfering" with *Şahin*'s enjoyment of her full rights under the Convention, the Court considered two questions in weighing the permissibility of this interference: 1) Were the reasons given "relevant and sufficient"? 2) Were the measures taken proportionate to the goals?<sup>69</sup> As to the first, the Court found that Turkey interfered in the expression of religion in defense of secularism and gender equality. It accepted these goals for the ban, which "reinforce and complement each other,"<sup>70</sup> in context.<sup>71</sup> The Fourth Section noted approvingly that the Turkish Constitutional Court had held secularism to be "the guarantor of democratic values," which "protected the individual from external pressure."<sup>72</sup>

As to proportionality, as some of its critics have noted,<sup>73</sup> the Court did not engage at this level in an explicit, thorough application of the principle. This is both regrettable and a logical consequence of the margin of appreciation. Nevertheless, its painstaking explication of the Turkish context reflects upon this question. In particular, the Court's discussion of the parameters of the ban which notes that devout Muslim students can perform the bulk of their ordinary religious duties despite the constraints seems directed at this objective.<sup>74</sup> The Court also stressed that the ban applied equally to the headscarf for

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67. However, Eyal Benvenisti's critique of the margin of appreciation may be of relevance when considering similar limits in other contexts, like France. He sees it as inappropriate when minority rights are at stake because they are less likely to be vindicated by national governments. In his view, such cases ought to receive "strict scrutiny," akin to that applicable under the U.S. Constitution. He also sees the margin of appreciation as a block to the application of truly universal standards. Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 844–52 (1999).

68. *Şahin*, Fourth Section, *supra* note 3, ¶¶ 103–06.

69. *Id.* ¶ 103.

70. *Id.* ¶ 104.

71. *Id.* ¶¶ 110, 114.

72. *Id.* ¶ 105.

73. Tore Lindholm, *The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: A Critical Assessment in the Light of Recent Case Law (Leyla Sahin (sic) v. Turkey, 29 June 2004)* 10–13, (paper presented to Strasbourg Conference International Protection of Women's Rights: The Islamic Headscarf Controversy, 2005), available at <http://www.strasbourgconference.org/papers/Lindholm%20Strasbourg.pdf>. For a related critique of the Court's application of the concept of "necessity," see Carolyn Evans, *The 'Islamic Scarf' in the European Court of Human Rights*, 7 MELBOURNE J. INT'L L. 52, 56–57 (2006).

74. *Şahin*, Fourth Section, *supra* note 3, ¶ 111.



women and to beards for men that are meant to manifest religious belief.<sup>75</sup> Furthermore, the Court lauded the universities for not instantly barring access to students so garbed, but rather engaging them in dialogue.<sup>76</sup> Ultimately, on these bases, both the Fourth Section and Grand Chamber deemed the restrictions proportionate.<sup>77</sup>

By way of denouement, the Fourth Section declared that “[t]his notion of secularism appears to the Court to be consistent with the values underpinning the Convention and it accepts that upholding that principle . . . [is] necessary for the protection of the democratic system in Turkey.”<sup>78</sup> This was, in part, due to the centrality of gender equality to the Convention framework.<sup>79</sup> Additionally, the Court accepted the Turkish government’s restrictions in view of the fact of extremist political movements in Turkey and their manipulation of the restricted symbols.<sup>80</sup> It also expressed concern about the impact of the symbol on others. If more and more students veil, this calls into question the style of dress and religiosity of other women students, potentially placing great pressure on them.<sup>81</sup> Hence, in context, the Court found no violation of Ms. Şahin’s rights. In its 2005 reply to the referral of the case following the 2004 Fourth Section ruling, the Grand Chamber reaffirmed this judgment.<sup>82</sup>

75. *Id.* ¶¶ 43–45, 111.

76. *Id.* ¶ 113.

77. *See id.* ¶ 114 and *Şahin*, Grand Chamber, *supra* note 3, ¶ 122.

78. *Şahin*, Fourth Section, *supra* note 3, ¶ 106.

79. For example, see the non-discrimination provision in European Convention, *supra* note 36, art. 14.

80. *Şahin*, Fourth Section, *supra* note 3, ¶ 109. *See also* Niyazi Öktem, *Religion in Turkey*, 2002 BYU L. REV. 371, 395–400 (2002).

81. This issue has also been raised by some feminists of Muslim origin. For example, Paris-based Senegalese sociologist Fatou Sow asks: “If girls are allowed to wear hijab, what does this imply for other young girls (Muslim) who don’t wear it? Eventually the trend could be that they would all feel obliged to wear it because of its political significance. That would be undemocratic.” Women Living Under Muslim Laws, *France: Issues Related to the Headscarf Ban*, Apr. 20, 2004, <http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-44910>.

82. *Şahin*, Grand Chamber, *supra* note 3, ¶ 123. The Grand Chamber judgment sparked one important dissent which will be discussed below, *infra* notes 298–304 and corresponding text.

IV. THE EUROPEAN COURT OF HUMAN RIGHTS VERSUS HUMAN RIGHTS WATCH: "A CERTAIN LACK OF EMPATHY" OR A CERTAIN LACK OF CONTEXT?

A. *Friends of the Court Dissent: The NGO Response to Şahin*

Following the release of the original Fourth Section opinion, the highly-respected U.S.-based NGO Human Rights Watch (HRW) castigated the ECtHR in an opinion piece entitled "A Certain Lack of Empathy,"<sup>83</sup> suggesting such a "lack of empathy" represents the attitude of the ECtHR in general to "the believer."<sup>84</sup> Its Turkey expert labeled the ECtHR view "disappointing," and alluded to veiled women feeling "rather badly let down by the human rights machinery."<sup>85</sup> This Op-Ed averred that the *Şahin* judgment tends toward a ban on veiling anywhere and did not mention that coercion may be involved either in the choice of women to veil, or the impact of their choice on others.

Despite the fraught political context of Turkish university campuses, the NGO framed veiling in its response as entirely religious expression, and omitted any discussion of its political implications. Notwithstanding the fact that Turkey is a predominantly Muslim country, the group came close to accusing the Court of Islamophobia in accepting its government's policy.<sup>86</sup> More troubling, it broadly disparaged the Court's approach by saying, "[t]he ECtHR judgment draws the conclusion that this abstract principle of secularism must take priority over the rights, future and welfare of an individual . . . ."<sup>87</sup> This suggests that secularism does not have a concrete impact on individual human rights but represents merely an excuse. The HRW opinion piece built on an earlier memorandum to the Turkish Government calling for the ban to be lifted.<sup>88</sup> Its basic tenets were later reiterated in the organization's 2005 World Report.<sup>89</sup>

Other groups also weighed in on the decision.<sup>90</sup> The Interna-

83. Jonathan Sugden, *A Certain Lack of Empathy*, HUMAN RIGHTS WATCH, July 1, 2004, <http://www.hrw.org/english/docs/2004/07/01/turkey8985.htm>.

84. *Id.* (quoting CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 316 (4th ed. 2006)).

85. Sugden, *supra* note 83, ¶ 1.

86. *Id.*

87. *Id.* ¶ 9.

88. *Memorandum to the Turkish Government*, *supra* note 35.

89. Marthoz & Saunders, *supra* note 8, at 58–63.

90. See also Otmar Oehring, *Turkey: Is There Religious Freedom in Turkey?*, FORUM 18 NEWS, Oct. 12, 2005, [http://www.forum18.org/Archive.php?article\\_id=670](http://www.forum18.org/Archive.php?article_id=670) (criticizing

tional Helsinki Federation for Human Rights concluded that the ruling in *Şahin* was “widely criticized by human rights lawyers and others, who found that the Court did not identify any compelling evidence to show that the restrictive university regulations served to protect the values they were said to protect.”<sup>91</sup> It also appeared taken aback that the Court saw the headscarf as “an expression of religious fundamentalism.”<sup>92</sup> On the other hand, notably, Amnesty International has so far not opined on this case.<sup>93</sup> The issue of dress restrictions is reportedly under discussion in the organization, but a policy has not yet been adopted.

Who was right? Did the ECtHR, in accepting limitations on religious expression on public university campuses, fulfill its human rights mission or fail it? Did it protect the rights of Turkish women students to be free from religio-political extremist coercion about dressing and hence their right to equality? Alternatively, did it turn a blind eye to an official policy forcing “traditional” women to come to school feeling as Western women might feel if required to go to campus topless? Was the Turkish government in fact, “compromis[ing] women’s private choices in a way that reduces their enjoyment of . . . life by disrespecting their dignity?”<sup>94</sup>

On the other hand, in their pointed critiques of the ECtHR, were HRW and other critical human rights groups vindicating a more just approach, or using an absolute, de-contextualized notion of religious freedom, ultimately harmful to women’s substantive human rights or to the protection of those rights from religious extremism? While the ECtHR, in deference to the Turkish Constitution sanctified secularism and received it as necessary for human rights, HRW overlooked Turkey’s constitution and dismissed secularism as an irrelevant and vague notion to which governments were sacrificing indi-

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Turkish ban as “disturbing” and as one which “de jure bars devout Muslim women from universities,” without mentioning any coercion of women to cover). Though it was published in 2004 and does not reference *Şahin*, note also the complex analysis of veiling bans in Diaspora contexts by the Minority Rights Group in FAREDA BANDA & CHRISTINE CHINKIN, MINORITY RIGHTS GROUP INTERNATIONAL: GENDER, MINORITIES AND INDIGENOUS PEOPLES 19–20 (2004).

91. INT’L HELSINKI FED’N FOR HUMAN RIGHTS, INTOLERANCE AND DISCRIMINATION AGAINST MUSLIMS IN THE EU: DEVELOPMENTS SINCE SEPTEMBER 11, at 158 (2005), available at [http://www.ihf-hr.org/viewbinary/viewdocument.php?download=1&doc\\_id=6237](http://www.ihf-hr.org/viewbinary/viewdocument.php?download=1&doc_id=6237).

92. *Id.*

93. The author has drawn this conclusion from the lack of any documents on this matter on the organization’s website. See Amnesty International, <http://www.amnesty.org> (last visited Dec. 8, 2006).

94. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 386 n.65 (1991) (examining U.S. case law concerning African-American women’s ability to wear braided hairstyles in the workplace).

vidual rights, much like they are seen to do invoking national security. How could two organizations, the ECtHR and HRW, so often on the same side,<sup>95</sup> have such diametrically opposed views? Whose view of the issue is more in line with international human rights law and more likely to promote a gender-sensitive and meaningful approach to human rights even beyond the law?

*B. The Verdict*

Although judicial reasoning and human rights advocacy tend toward simple prescriptions, any truly satisfactory approach to this issue must be able to embrace a series of dualities. These include the simultaneous importance of freedom of religion and gender equality, the interrelationship and yet crucial distinction between freedom of conscience and expression of that conscience, concern for the rights of women seeking to express themselves by wearing headscarves and for those of other women in the same context, coercion and agency, the religious meanings of the veil and its political meanings, discomfort with veiling and discomfort with restrictions on veils. Only by weighing all of these factors and contradictions in context can one begin to discover an adequate response to this problem.

Ultimately, swimming against the tide of the opposing human rights lawyers to which the Helsinki Federation alluded, this Article favors the *Şahin* opinion over those of its opponents. Hopefully this critique of the NGO positions described above will be understood as a substantive disagreement with respected colleagues whose body of work makes important contributions. However, the limitation exercise carried out by the Turkish government and the ECtHR on these *specific* facts is clearly acceptable under international and European human rights law. Even to the extent that for some women, the choice to wear a headscarf is their own, and is for them an expression of religious belief, this limitation on that choice is necessary in context to protect the rights of others.

This assessment speaks only to the context of public educational institutions, which shape the identities of future generations and forge the public consensus about gender roles and equality. Ms. Şahin was free to wear the clothing of her choice to and from the University, and anywhere else outside that context where she chose to do so. However, in public education, allowing such symbols risks

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95. See, e.g., Human Rights Watch, *Freedom of Expression and Movement*, <http://www.hrw.org/about/projects/womrep/General-229.htm> (last visited Dec. 8, 2006) (praising the Court's decision favoring access to abortion information).

seeming to ratify them. This is how the Turkish Constitutional Court read permitting the veil in state-run higher education.<sup>96</sup> The French government also expressed this worry when preparing its 2004 law.<sup>97</sup> Similar concern has factored in analogous U.S. judgments. This view arguably takes Justice O'Connor's approach to the *Lemon* test in U.S. constitutional law,<sup>98</sup> as expressed in her concurrence in *Lynch v. Donnelly*, to its logical conclusion.<sup>99</sup> She reasons that the government violates the Establishment Clause if its action has the *effect* of communicating an endorsement of religion, regardless of its intention. In O'Connor's view, such effective endorsement can "send[] a message to non-adherents that they are outsiders, not full members of the political community . . . ."<sup>100</sup> This assertion resonates in a public school with numerous female Muslim students where those who wish to are allowed to wear restrictive clothing because they allege it is required by religion for Muslim women. Non-wearers of such garb risk becoming outsiders, seen as not fully or equally Muslim; or, to paraphrase Justice O'Connor, as not full members of the religious community.

The Turkish government's argument about the nature of Ms. Şahin's medical studies is also compelling. A "conservative religious approach would undoubtedly be incompatible with hygiene requirements."<sup>101</sup> This raises significant questions. Should *any* garments be permissible in surgery or in the face of infectious patients? Surely no human rights advocates would dispute clothing restrictions where the goal is protecting health.<sup>102</sup> Does the protection of gender equality justify similar limits?

One of the major obstacles to a clear rule on headscarves is the spirited debate over the exact meaning of such garments. Thus, we now turn to an effort to discern these significations.

# 1. The Meaning of the Meanings of an "Unstable Signifier"

Any thick analysis of this problem must account for the contextual connotations of the headscarf. Some, including Judge

96. *Şahin*, Fourth Section, *supra* note 3, ¶ 36.

97. See, e.g., COMMISSION DE RÉFLEXION SUR L'APPLICATION DU PRINCIPE DE LAÏCITÉ DANS LA RÉPUBLIQUE, RAPPORT AU PRÉSIDENT DE LA RÉPUBLIQUE 56–60 (Dec. 11, 2003), available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>.

98. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

99. *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring).

100. *Id.* at 688.

101. *Şahin*, Fourth Section, *supra* note 3, ¶ 95.

102. HRW explicitly accepts this justification for limits. *Memorandum to the Turkish Government*, *supra* note 35, at 24.

Tulkens in the lone dissent in *Şahin*, have stressed that headscarves and veils have multiple meanings,<sup>103</sup> seeing this as dispositive of the issue and militating against bans. The assertion of multiple meanings, that the headscarf holds a “position as an unstable signifier,”<sup>104</sup> is undoubtedly correct. However, the overall meaning of this multiplicity of meanings should be complexified, a process begun below.

Some veils and headscarves represent a freely-chosen personal conviction that such “modesty”<sup>105</sup> is required by the teachings of the Muslim religion. This is a choice of a particular interpretation of the faith, and one which is highly contested. The choice may be shaped by local custom or habit. In any case, for an individual wearer it may have nothing to do with fundamentalism. Ms. *Şahin* claimed precisely this, and her assertion was not questioned by either the Turkish government or the ECtHR.

Should such claims end an equality analysis? This type of a personal determination may be shaped on the anvil of gender subordination by male supremacist clergy, community, and family members, male and female. Can such a choice be a free one? Or does even asking such a question amount to the “paternalism” for which Judge Tulkens chastised the ECtHR in her Grand Chamber dissent?<sup>106</sup> One must respect the agency of adults. However, allegations that, in many contexts, “modesty” restrictions are imposed on women, directly or indirectly, either by family members or as a result of discriminatory attitudes, render a careful contextual analysis of claims in this vein essential, particularly for young girls.<sup>107</sup>

103. *Şahin*, Grand Chamber, *supra* note 3, at ¶ 11 (dissenting opinion of Judge Tulkens); see also Scott, *supra* note 62, at 116; Nacira Guénif-Souilamas, *Ni putes, ni soumises ou très pute, très voilée? Les inévitables contradictions d'un féminisme sous influence*, in *CE SEXE QUI NOUS DÉPASSE* 53, 64–65 (Valérie Battaglia ed., 2003).

104. Scott, *supra* note 62, at 117.

105. Central projects of both conservative religious movements and religious fundamentalisms include control of the female body and female sexuality, often coded as “modesty.” In some Muslim cultures, and others, modesty is linked to notions of honor, especially the honor of the male members of a woman’s family. These men’s honor may be seen to be threatened by “their” women violating dress codes and failing to cover. Such a threat to honor may in turn have terrible consequences for the women in question. See Purna Sen, ‘Crimes of Honour’, *Value and Meaning*, in ‘HONOUR’: CRIMES, PARADIGMS, AND VIOLENCE AGAINST WOMEN 42, 47–48 (Lynn Welchman & Sara Hossain eds., 2005). According to the United Nations, some 5000 women die in honor killings every year, most of them in the Middle East, and many in Turkey. See Dan Bilefsky, *How to Avoid Honor Killing in Turkey? Honor Suicide*, N.Y. TIMES, July 16, 2006, at A3. Hence, in such contexts, even “freely” chosen modesty-based religious expression ought to be interpreted with caution.

106. See *Şahin*, Grand Chamber (dissenting opinion of Judge Tulkens), *supra* note 3, ¶ 12.

107. See, e.g., Ghaïs Jasser, *The Twin Evils of the Veil*, 5 SOC. IDENTITIES 31, 35–37 (1999); FADELA AMARA WITH SYLVIA ZAPPI, *NI PUTES NI SOUMISES* 77 (2003); Frances Raday, *Culture, Religion and Gender*, 1 INT’L J. CONST. L. 663, 708 (2003).

Still other proffered meanings, shaped by context, swirl in the debate about headscarves, many more than can be enumerated here. For some living in countries where Muslims are in the minority, headscarves may reflect minority identification and pride, or criticism of government policies toward the Muslim world.<sup>108</sup> Some appear to adopt such clothing as the best way to rebel against more liberal parents or parents whose religiosity is deemed insufficiently pure.<sup>109</sup> And yet other women may wear headscarves and veils as an affiliation to an Islamist political project aimed at theocracy, which is an antithesis to women's human rights as conceived in international human rights law.<sup>110</sup>

Note that many of these personal beliefs about the imperative to cover may have implications for other women, especially other Muslim women, in the same environment who choose, or believe there is no need, to veil. Either they are seen by some as not identifying with their ethnic or religious group and therefore may be coded as "assimilated." Or they are seen as not expressing their religious beliefs as required by certain interpretations of Islamic dogma and thus are labeled "bad" Muslims by some. Or they may be considered "loose" or "shameful." In particular environments, this may yield a range of consequences, including pressure to cover, stigma, or even threats, violence, and death.<sup>111</sup> The ECtHR appeared to have precisely this problem in mind when it warned of "the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it."<sup>112</sup>

Of course, all of this is contextual. In Turkey, commentators have suggested that "[t]he importance of fights over Islamic symbols cannot be underestimated."<sup>113</sup> Yet, in some other environments, either because there are few other Muslim women or little pressure to dress in such a manner, the impact on others may be relatively minor. For example, at Rutgers Law School–Newark where this author

108. Scott, *supra* note 62, at 117. This has become more complicated in the post-September 11 environment.

109. See, e.g., Simona Tersigni, *La pratique du hijab en France: Prescription, transmission horizontale et dissidence*, in *LA POLITISATION DU VOILE* 37, 39–40 (Françoise Lorcerie ed., 2005).

110. See NILÜFER GÖLE, *THE FORBIDDEN MODERN: CIVILIZATION AND VEILING* 83–130 (1996).

111. See, e.g., CHAHDORTT DJAVANN, *BAS LES VOILES!* 30–31 (2003); AMARA, *supra* note 107, at 47–48; Karima Bennoune, *S.O.S. Algeria: Women's Human Rights Under Siege*, in *FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD* 184, 187 (Mahnaz Afkhami ed., 1995).

112. Şahin, Fourth Section, *supra* note 3, ¶ 108.

113. K. Gajendra Singh, *Ban on Headscarves and Turkey*, *TURKISH DAILY NEWS*, Sept. 21, 2004, at Part Two, available at <http://www.turkishdailynews.com.tr/archives.php?id=37737>.

teaches, there are only a negligible number of Muslim students, a tiny number who wear the headscarf, and little interest in the law school from area Muslim fundamentalist groups. Here headscarving may have no impact on the rights of other students. A contextual approach leads to a different conclusion on the balancing in human rights law than in *Şahin* or *Begum*. However, were one of the local fundamentalist groups (which reportedly are very active in New Jersey<sup>114</sup>) to begin campaigning for “modest” dress in area educational institutions, or were more women to begin to cover, this contextual determination could shift. Indeed, one of the benefits of the contextual approach is its ability to respond to changes on the ground.

Any thoughtful analysis must also contend with the range of positive and negative significations of veils. However, the meaning of the choice of garment in the head and heart of the wearer is not the only meaning to consider in the human rights framework. Some of these garments are now particularly associated, both in the minds of some Muslims and some non-Muslims, with Taliban,<sup>115</sup> Iranian,<sup>116</sup> and Saudi<sup>117</sup> practices, according to which wearing headscarves or veils is, or was, required by law and violators subject to punishments, including corporal punishments banned under international law.<sup>118</sup> Similar associations are made with fundamentalist or conservative social movements seeking to impose or “strongly encourage” veils.<sup>119</sup> Given these echoes, such coverings come to represent for many a threat to secularism and to basic notions of gender equality which secularism makes possible, especially when deployed in the public school system.

For some secular feminist women, wearing the headscarf or veils in this political moment means choosing to wear “a sign of male domination over women’s bodies and lives.”<sup>120</sup> As French Muslim

114. See Radhika Marya, *Islamic Society’s Rules Challenged*, THE DAILY TARGUM, Dec. 6, 2005, at 1.

115. Polly Toynbee, *Behind the Burqa*, THE GUARDIAN, Sept. 28, 2001, reprinted in NOTHING SACRED: WOMEN RESPOND TO RELIGIOUS FUNDAMENTALISM AND TERROR, *supra* note 15, at 325.

116. See DJAVANN, *supra* note 111, at 7–8, 30–31 (providing descriptions).

117. See, e.g., European Parliament, *Note on Human Rights in Saudi Arabia*, § 2.1, Dec. 2004, available at [http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/fd/dgul2005011902/dgul2005011902en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/dgul2005011902/dgul2005011902en.pdf).

118. On corporal punishments, including those used to enforce dress codes, see Bennoune, *supra* note 57.

119. Note, for example, the exhortation by the Assembly of Muslim Jurists in America that “its [the *hijab*’s] abandonment is among the major sins that expose the Muslim woman to The Creator’s exasperation and wrath.” Communiqué of the Assembly of Muslim Jurists in America Concerning the Issue of the Islamic Dress Code (Hijab) in France, Jan. 21, 2004, [http://www.islamonline.net/English/in\\_depth/hijab/2004\\_01/article\\_03.shtml](http://www.islamonline.net/English/in_depth/hijab/2004_01/article_03.shtml).

120. The views of a Turkish feminist cited in Leylâ Pervizat, *Rights of the Religious Women in Turkey*, in AMNESTY INTERNATIONAL—NORWAY, Apr. 28, 2004,



women's rights activist Fadela Amara has written, "[i]t is a mistake to see the veil as only a religious issue. We must remember that it is first of all a tool of oppression, alienation, discrimination, and an instrument of men's power over women. It is not an accident that men do not wear the veil."<sup>121</sup> The veil is not just or even primarily a religious symbol, but a highly contested social and political sign. Some Muslim and Arab women's organizations, and many Muslim and Arab intellectuals have long campaigned against it in their home countries.<sup>122</sup> This leads Ghais Jasser angrily to assert that:

If, then, you claim that the veil is simply a manifestation of cultural particularity, you lack solidarity with women opposing purdah—of which the head-covering is but one expression among others—at the cost of their very lives. You also abandon to their destiny the young girls courageously confronting daily their own families and neighbourhoods.<sup>123</sup>

Fundamentalist movements seeking to challenge governments deemed insufficiently religious in the Muslim world have often sought to encourage or impose this range of garments as a way of indicating support for their project. Conservative movements that lash back against women's rights invoke these symbols, an effect magnified in education. Moroccan scholar Fatna Aït Sabbah has described this phenomenon as follows: "So the number of women with secondary and university degrees has been increasing non-stop? They require her to don the veil to remind her that in high places of knowledge . . . she is merely accepted on sufferance."<sup>124</sup> These garments thus can become affiliated with these social projects which seek to limit women's rights and increase the role of religion in the rule of law. In certain contexts, then, it is not mere paranoia which leads to restrictions on such coverings.

Most paradoxically, the veil may be all, or many, or some of these contradictory things at the same time. It is against the complex weave of this tapestry of meanings that human rights norms must be applied. Headscarves and other "modest" garments for women in specific contexts cannot be seen as mere innocent symbols of per-

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<http://www.amnesty.no/web.nsf/pages/3EBB64E4FBF25236C1256E840055357F>.

121. AMARA, *supra* note 107, at 79 (author's translation).

122. See Margot Badran, *Competing Agenda: Feminists, Islam and the State in Nineteenth- and Twentieth-Century Egypt*, in WOMEN, ISLAM AND THE STATE 201, 223 (Deniz Kandiyoti ed., 1991); Jasser, *supra* note 107, at 32–37.

123. Jasser, *supra* note 107, at 37.

124. *Id.* at 36–37 (citing FATNA AÏT SABBABH, *LA FEMME DANS L'INCONSCIENT MUSULMAN* (1986)).

sonal religious beliefs nor simply as flags of gender discrimination in the abstract. One criticism of the French law has been that it risks imbuing the headscarf with only one meaning, and one that is derogatory to women, leading to abusive treatment of veiled women in broader French society.<sup>125</sup> On the other hand, rejections of restrictions sometimes focus only on the positive meanings, dismissing or overlooking the negative connotations and their consequences. Hence, this Article's plea for careful, contextual consideration of any proposed limitations on such symbols, in light of their many meanings. Where that consideration leads to the conclusion that the restrictions are necessary in public education to prevent women's subordination, and are in accordance with international human rights norms, they are permissible.

Banning the veil or headscarf feels repressive because it concerns a choice about the public presentation of one's body. Given that efforts to control the female body have been crucial in maintaining women's subordination historically,<sup>126</sup> this may feel viscerally wrong. Yet women's freedom to make physical choices is not defended across the board on human rights grounds. Ironically, some mainstream human rights organizations have been reluctant to battle the imposition of religious garments on women,<sup>127</sup> even by governments, nor do prominent human rights groups have clear positions defending nudity. Clearly some limits are deemed acceptable when religion is taken out of the picture. Given the presence of religion in this debate, for those who are committed to tolerance, openness suggests itself. Yet being tolerant of intolerance can have paradoxical results. In some contexts, the decision which one woman makes about covering her body in particular ways directly affects the choices other women may have to make about the public presentation of *their* persons. Mediating all these realities is an extremely sensitive task.

Here we begin to grapple with tensions between simultaneous commitments to transnational cosmopolitanism<sup>128</sup> and civic republi-

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125. See U.N. Econ. & Soc. Council [ECOSOC], Special Rapporteur on Freedom of Religion or Belief, *Civil and Political Rights, Including the Question of Religious Intolerance: Mission to France*, ¶ 67, UN Doc. E/CN.4/2006/5/Add.4 (Mar. 8, 2006) (prepared by Asma Jahangir).

126. POLITICS OF WOMEN'S BODIES: SEXUALITY, APPEARANCE, AND BEHAVIOR (Rose Weitz ed., 1998).

127. To be fair to HRW, that organization has done so. See *Memorandum to the Turkish Government*, *supra* note 35, at 23 n.48.

128. Transnational cosmopolitanism looks primarily for guarantees of human rights through application of transnational norms and international institutions. For further definitions, see Seyla Benhabib, *Reclaiming Universalism: Negotiating Republican Self-Determination and Cosmopolitan Norms*, in 25 THE TANNER LECTURES ON HUMAN VALUES

canism,<sup>129</sup> to borrow a paradigm articulated by Seyla Benhabib.<sup>130</sup> What do we do when secularism is a prerequisite to democracy and women's human rights in certain contexts, yet its defense may require limitations which might be uncomfortable in a traditional international human rights approach? The first step toward an answer is that we proceed with great caution, bearing in mind the specifics of the particular context and the actual result our approach is likely to produce for women seeking to dress in certain ways and for their peers. Conversely, if we proceed oblivious to context, we may see human rights used as a strategy to curb women's equality and promote their further subordination,<sup>131</sup> a result specifically forbidden by the limitations clauses in human rights law discussed below.<sup>132</sup> Still, one must concede that the potential misuse of such restrictions on headscarves in a context of increasing anti-Muslim sentiment poses yet other risks.

## 2. Islamophobia

Islamophobia embodies grave challenge to human rights, particularly in the era of the "war against terrorism."<sup>133</sup> The term denotes hostility towards Islam and Muslims.<sup>134</sup> It is argued to have

111, 117 (2005).

129. Civic republicanism highlights the idea that human rights only flourish within a democratic republic. Hence, defense of that republic becomes a key path to realizing human rights.

130. Benhabib, *supra* note 128, at 126. Note that, in the same lecture, she comes to a somewhat different conclusion on headscarf bans than does this Article. *Id.* at 141–52.

131. The following example illustrates this paradox. Women's rights advocates campaigned for the creation of the Optional Protocol to the Women's Convention that allows individual women to complain of gender-based discrimination to the U.N. Committee on the Elimination of All Forms of Discrimination against Women ("CEDAW Committee"). Turkey is one of the few Muslim countries to have ratified the young Protocol. A Turkish schoolteacher recently sought to bring a case to the CEDAW Committee based on her dismissal for wearing the headscarf in violation of school rules, not exactly the sort of case advocates of the Protocol had in mind. The CEDAW Committee recently dismissed the case for failure to exhaust domestic remedies. Committee on the Elimination of Discrimination Against Women, *Decision of the Committee on Elimination of Discrimination Against Women Under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (Thirty-Fourth Session) Concerning Communication No. --8/2005*, CEDAW/C/34/D/8/2005 (Jan. 27, 2006). See also *infra* note 231 and accompanying text.

132. See *infra* notes 191–195 and accompanying text.

133. For thoughtful consideration of this issue and its impact on women's human rights, see Charlotte Bunch, *Women's Human Rights and Security in the Age of Terror*, in NOTHING SACRED: WOMEN RESPOND TO RELIGIOUS FUNDAMENTALISM AND TERROR, *supra* note 15, at 413–20.

134. See COMMISSION ON BRITISH MUSLIMS AND ISLAMOPHOBIA, ISLAMOPHOBIA: ISSUES, CHALLENGES AND ACTION 7–8 (2004) [hereinafter ISLAMOPHOBIA], available at <http://www.insted.co.uk/islambook.pdf>. See also Combating Defamation of Religions,

been a part of European society since the Eighth Century.<sup>135</sup> Manifestations of Islamophobia include assaults on Muslims, negative stereotyping, job discrimination, and laws that restrict civil rights that have a disproportionate effect on Muslims.<sup>136</sup> Hence, this could be a real area of related concern and may need to be weighed in some contextual analyses. Some have warned that today veiled women, because they are so visible, become the signifier for fundamentalism in ways which put their human rights at risk. An era when some make the false equation Terrorist = Fundamentalist = Muslim = Veiled Woman requires anti-racist vigilance. In non-Muslim countries, some bans that target headscarves might reflect or purvey such stereotypes.

On the other hand, among the many negative consequences of Islamophobia, in the words of a Muslim woman scholar, is also “the silencing of self-criticism and the slide into defending the indefensible. Muslims decline to be openly critical of fellow Muslims, their ideas, activities, and rhetoric in mixed company, lest this be seen as giving aid and comfort to the extensive forces of condemnation.”<sup>137</sup> Such silencing has a stultifying effect on debates about the status of women, an effect magnified by claims made by the U.S. government to be acting to defend women’s rights in uses of force in the Muslim world.<sup>138</sup> This silencing may even extend to human rights advocates in the West. Some seem to be less willing to decry violations of women’s human rights, in the Muslim world and Muslim communities, including those that involve pressure to wear “modest” dress, because of the rise in prejudice against Muslims and Islam. Such prejudice has indeed been greatly exacerbated in the post-September 11 era.<sup>139</sup> While the underlying motives of such caution may be laudable, such self-censorship leads to distorted analysis.

Confronted with the bundle of ambivalences associated with

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Comm’n on Human Rights Res. 2004/6, ¶¶ 6, 16, U.N. Doc. E/CN.4/RES/2004/6 (Apr. 13, 2004).

135. ISLAMOPHOBIA, *supra* note 134, at 7. See also EDWARD SAID, ORIENTALISM (1970). For particular consideration of the impact of Islamophobia and Orientalism on women, see Laura Nader, *Orientalism, Occidentalism and the Control of Women*, 11 CULTURAL DYNAMICS 323 (1989).

136. ISLAMOPHOBIA, *supra* note 134, at 7–8.

137. *Id.* at 9.

138. See Karima Bennouna, Making the World Safe for the Dallas Cowboy Cheerleaders, Address Before the Michigan Journal of International Law Conference: “Dueling Fates: Should the International Legal Regime Accept a Collective or Individual Paradigm to Protect Women’s Rights?” (Apr. 6, 2002), in 24 MICH. J. INT’L L. 461, 465 (2002).

139. For outstanding gendered analysis of September 11 and its impact, see Catharine A. MacKinnon, *Women’s September 11: Rethinking the International Law of Conflict*, 47 HARV. INT’L L.J. 1, 26 (2006).

headscarves and their bans, some critical and anti-racist voices that espouse inter-sectionality have sometimes focused solely on the issue of race or religious discrimination. They often leave out or downplay the factor of women's subordination as manifested in "modest" dress, as if they can only concentrate on the rights of one victimized group and one form of victimization at a time.<sup>140</sup> The reality is that there is strong support from *some* French anti-racists of Muslim descent for the French law on religious symbols in the context of rising fundamentalism and the pressures such forces place on women and girls.<sup>141</sup> As Chetan Bhatt has noted in the context of the United Kingdom, "generally . . . black and multiracial feminism has been virtually alone in creating an activist political challenge to fundamentalism."<sup>142</sup> To be anti-racist also means to support this challenge and to do so is not Islamophobic. In the era of the war against terrorism, many read solely the inter-cultural aspects of the debate, not the intra-cultural.<sup>143</sup> This is a mistake.

Furthermore, the accusation of Islamophobia sometimes occludes a serious policy debate about religion and women's human rights.<sup>144</sup> Thoughtfully considered, such concern might indeed form part of the argument about France but makes little sense as part of the debate about a Muslim country's own laws, such as those in Turkey. One must avoid projecting this Western concern onto restrictions in Muslim countries and communities where legitimate internal debate and political contestation over dress codes continues. Furthermore, in the context of a substantial Muslim minority in a non-Muslim country, as in France or the United Kingdom, one must be mindful of both the problem of racism against Muslims from outside the community, and the political debates within. Many Muslim women and men are uncomfortable with "modest" clothing for women and concerned with how to move away from it in non-repressive ways.

140. See, e.g., Wing & Smith, *supra* note 1.

141. For example, one of France's leading anti-racist non-governmental organizations, S.O.S. Racisme, now supports the headscarf ban. See Amelia Gentleman, *Angry Schoolgirls Head Back to Class in Muslim Veil Row*, THE OBSERVER, Aug. 29, 2004, at 24.

142. BHATT, *supra* note 11, at xx.

143. Talhami, *supra* note 2, at 156.

144. See, for example, the critique of such deployment of Islamophobia by Diaspora Muslim dissidents made in response to the cartoon controversy. "We refuse to renounce our critical spirit out of fear of being accused of 'Islamophobia,' a wretched concept that confuses criticism of Islam as a religion and stigmatization of those who believe in it." *Writers Issue Cartoon Row Warning*, *supra* note 30.

*C. The Contextual Approach*

The litany of concerns enumerated above demonstrates that the subject of government restrictions on the wearing of veils and other “modest” garments in public education is too complex to give rise to an easy bright line rule for compatibility with human rights norms. While a bright line rule seems more objective and easier to apply, it produces a formalistic approach blind to reality on the ground. Instead, this Article advocates a contextual approach which enables a thick analysis and maximizes the ability to effectively address particular challenges to human rights in a specific context.

Under the contextual approach proposed here, human rights advocates weighing restrictions on “modest” garments for Muslim women and girls in public schools would look carefully at the meanings and impact of the symbols in context. In doing so, they should consider the following factors: the impact of the garments on other women (or girls) in the same environment; coercion of women in the context, including activities of religious extremist organizations; gender discrimination; related violence against women in the location; the motivation of those imposing the restriction; Islamophobia, if relevant, or religious discrimination in the context; the alternatives to restrictions; the possible consequences for human rights both of restrictions and a lack thereof; and whether or not there has been consultation with impacted constituencies (both those impacted by restrictions and by a lack of restrictions on such garments), and, if so, what their views are. Though this formula forces consideration of a multiplicity of issues, this matrix also enables a truly intersectional approach more likely to produce substantively rights-friendly results for the most women and girls in the long run.

The first question to ask is whether deployment of the symbol causes, magnifies, or otherwise constitutes discrimination against women in that particular locale. If it does not, obviously, restrictions on the wearing of the symbol are not justifiable on these grounds. If it does, the second question to ask is whether the specific restrictions of the symbol are likely to violate freedom of religion, especially on discriminatory grounds. If the answer is no, and the restrictions are otherwise in accordance with human rights law (necessary to protect the rights of others, proportionate, prescribed by law), they should be deemed acceptable.

If the answer to both questions is yes, i.e., where both discrimination against women and against Muslims is at play, the situation becomes more difficult to resolve. There the deciding factor ought to be coercion. The state should not interfere with the right of

adults to dress as they please in public education unless coercive social movements (in the family or the community) that mandate the use of the veil or other forms of “modest” dress are active to that end in the location. In such a situation, the state can interfere to protect women from coercion, and is actually mandated by human rights law to do so. For children a lower standard for what constitutes coercion can apply, given their greater sensitivity to peer pressure and less-developed agency.

In any case, gender-sensitive and anti-racist education, and community dialogue must accompany any restrictions. Furthermore, any constraints on dress must be imposed with religious and, where relevant, racial and ethnic sensitivity. However, this issue cannot be seen as involving religious freedom alone. Gender equality remains at the heart of the matter. Human rights law requires states to act affirmatively to end discrimination against women. This prescription must be remembered, along with what that law says about religious freedom. These issues are explored in turn below.

#### V. HUMAN RIGHTS LAW’S PROVISIONS ON FREEDOM OF RELIGION AND GENDER EQUALITY

##### A. *Conflicting Prohibitions of Discrimination in Human Rights Law*

Prohibitions of discrimination on the grounds of religion and of sex are both part of the touchstone anti-discrimination rule of human rights law found, *inter alia*, in the U.N. Charter<sup>145</sup> and both of the major covenants on human rights.<sup>146</sup> The prohibition of religious discrimination does not trump the prohibition on gender discrimination, which is of equal importance. Note however that the right to freedom of conscience and religious belief and the right to gender equality are not susceptible to limitations. The right to express religious belief is. Therefore, this aspect of the right can indeed be trumped by gender equality by its very terms. In fact, experts argue that the Convention on the Elimination of All Forms of Discrimination against Women (“Women’s Convention”)<sup>147</sup> requires states to adapt religious practice to end gender discrimination.<sup>148</sup> Human

145. U.N. Charter art. 55(c).

146. ICCPR, *supra* note 27, art. 2(1); International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3.

147. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter Women’s Convention].

148. Raday, *supra* note 107, at 681.

rights theory has mostly failed to harmonize freedom of religion and the right to sex equality, or to confront the consequences of this failure.<sup>149</sup> In such a vacuum, the contextual approach becomes essential for handling conflicting rights by suggesting the actual effects of accepting or denying particular rights claims. Before we discuss how to reconcile these obligations, let us address the underlying documents supporting each rights claim.

## B. *Freedom of Religion*

### 1. General Human Rights Documents

Freedom of thought, conscience and religion is a fundamental human right.<sup>150</sup> Under universal human rights law, it cannot be suspended even in emergency.<sup>151</sup> It includes the right to be a religious believer, and the “right not to profess any religion or belief.”<sup>152</sup> Article 18(1) of the ICCPR, the approach of which has been characterized by Manfred Nowak’s authoritative commentary as religious pluralism,<sup>153</sup> proclaims:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest

149. Exceptions to this lacuna are found in Raday, *supra* note 107, and Donna Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT’L L. & P. 795 (1992). Sullivan’s suggestion of a complex balancing of gender equality and religious freedom helpfully reminds readers that freedom of belief does not operate in a vacuum. She also indicates generally that this balancing must be assessed in context, a useful starting point. However, her focus is on personal status laws rather than clothing restrictions. In contrast, this Article elaborates the framework for balancing, by specifying the range of contextual factors at stake, developing the relevant discussion of coercion and its impact on balancing, and applying all of this to religious symbols deployed on the body.

150. For further explanation, see U.N. Human Rights Comm., *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)*, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993) [hereinafter *General Comment No. 22*].

151. ICCPR, *supra* note 27, art. 4(1). Non-derogable rights are not capable of suspension even in an emergency. In the ICCPR, the enumerated list of such rights includes freedom of religion (Article 18). Non-derogability does not preclude limiting aspects of this right, in accordance with Article 18(3). In the European Convention, Article 15, which lists non-derogable rights, does not specifically mention freedom of religion. See European Convention, *supra* note 36, art. 15.

152. *General Comment No. 22*, *supra* note 150, ¶ 2.

153. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 311–12 (1993).



his religion or belief in worship, observance, practice and teaching.<sup>154</sup>

The constitution and laws of any state ratifying the ICCPR must make this so.<sup>155</sup> Article 18(2) sets out a further prong of the right relevant to the contextual approach laid out above, namely that “[n]o one shall be subject to *coercion* which would impair his freedom to have or to adopt a religion or belief of his choice.”<sup>156</sup>

In both paragraphs, the ICCPR speaks of “a religion of *his* choice.” “His,” as Katarina Tomaševski has written, does not include “hers.”<sup>157</sup> The language of the ICCPR reflects the timeframe of its drafting. Today we interpret it in gender-neutral ways. Still, the language displays an exclusionary dimension often found in considerations of religious freedom which frequently ignore the lives of women and the reality of their pervasive subordination, including by and in religion.<sup>158</sup> This is true until women are prohibited from covering themselves, when they suddenly take center stage. For example, in Amnesty International’s 2005 Annual Report, the only criticism of dress codes for women is in the entry on France which notes the restrictions on religious symbols in schools. Neither Saudi Arabia’s nor Iran’s provisions which penalize women for failing to cover, including with internationally unlawful corporal punishments, are enumerated as concerns.<sup>159</sup>

a. *Manifestations of Religion*

While the underlying right to freedom of religion in the ICCPR is unconditional, the Covenant distinguishes this from the right to manifest one’s religion, which *is* subject to certain limitations. These are found in Article 18(3): “Freedom to manifest one’s

154. ICCPR, *supra* note 27, art. 18(1). According to Nowak, at the time of drafting the ICCPR, some “Islamic States” objected to specific reference to the right to change one’s religion. NOWAK, *supra* note 153, at 312. However, according to the HRC, “the freedom to ‘have or to adopt’ a religion or belief necessarily . . . includ[es] the right to replace one’s current religion or belief with another or to adopt atheistic views.” *General Comment No. 22*, *supra* note 150, ¶ 5.

155. ICCPR, *supra* note 27, art. 2(2). Turkey, France, and the United Kingdom have all ratified this treaty. Office of the UN High Commissioner for Human Rights, *International Covenant on Civil and Political Rights, New York, 16 December 1996, Ratifications and Reservations*, available at <http://www.ohchr.org/english/countries/ratification/4.htm> (last visited Feb. 1, 2007).

156. ICCPR, *supra* note 27, art. 18(2) (emphasis added).

157. KATARINA TOMAŠEVSKI, WOMEN AND HUMAN RIGHTS 8 (1993).

158. See Tahzib-Lie, *supra* note 26, at 117–18.

159. AMNESTY INT’L, *France*, in ANNUAL REPORT 2005, available at <http://web.amnesty.org/report2005/fra-summary-eng>.

religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>160</sup> Such limitation is needed because, as Nowak has written, “far-reaching freedom of religion can lead to its misuse . . . and thus to suppression of the freedom of religion of others.”<sup>161</sup> Hence, the limitations clause provides a “corrective function” such that “the interplay between . . . freedom of religion and its restrictions is what truly determines the actual scope of the individual’s right.”<sup>162</sup>

For example, the U.N. Human Rights Committee [HRC], which oversees implementation of the ICCPR, found in the *Singh Bhinder* case that Canadian National Railway’s insistence that a Sikh employee sport protective headgear at work, rather than his turban, was a violation of Article 18(1).<sup>163</sup> Yet, simultaneously, the HRC also determined it permissible in accord with 18(3). Regulations and laws which impose some limits on religious expression, in accordance with the stipulations of human rights law, are permissible. The question is whether the rules governing such limitations are followed.

## 2. The Declaration on Religious Intolerance

The U.N. General Assembly adopted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief [the Declaration on Religious Intolerance] in 1981.<sup>164</sup> This source warrants serious consideration when interpreting freedom of religion, notwithstanding its soft-law<sup>165</sup> status.<sup>166</sup> Adapting the definition of discrimination used in the treaties on race and gender, the Declaration offers the following definition:

“[I]ntolerance and discrimination based on religion or

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160. ICCPR, *supra* note 27, art. 18(3).

161. NOWAK, *supra* note 153, at 310.

162. *Id.* at 311.

163. U.N. Human Rights Comm., *Views of the Human Rights Committee Under Article 5, Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights (Thirty-Seventh Session) Concerning Communication No. 208/1986*, U.N. Doc. CCPR/C/37/D/208/1986 (Nov. 9, 1989).

164. Ideological and religious conflicts lengthened this drafting process to nearly two decades. See Donna Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM J. INT’L L. 487, 487–88 (1988).

165. “Soft law” describes a set of standards in the gray zone between non-law and black letter law. Such standards have been influential in many areas and have led to the development of treaties. See DINAH SHELTON, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (2000).

166. NOWAK, *supra* note 153, at 311.

belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.<sup>167</sup>

Notably, the Declaration’s preamble reminds us that “religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life.”<sup>168</sup>

Still, crucially, the Declaration’s preamble insists that use of religion for ends inconsistent with the U.N. Charter,<sup>169</sup> other relevant instruments, and the Declaration’s own principles is “inadmissible.”<sup>170</sup> Hence, there are illegitimate uses of religion, and neither the framework of the Declaration, nor the right to religious freedom, protects these. This problem resurfaces in the Declaration’s last Article, its Savings Clause: “Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.”<sup>171</sup> This is significant for women in that gender equality is protected by all of these referenced texts.

Yet, the word “woman” never appears in the Declaration and, as in the case of the ICCPR, though with less excuse given the Declaration’s later drafting date, exclusive male pronouns are used. Again, one is entitled to a religion “of *his* choice,”<sup>172</sup> which is ironically how things often play out in real life. The language is gender-exclusive, despite a Canadian drafting proposal to use both male and female pronouns or to explain that the male pronouns also refer to women.<sup>173</sup> The Canadian proposals were only incorporated to the extent of including preambular language which recalls U.N. Charter pledges to promote human rights, “without distinction as to race, sex,

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167. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, art. 2(2), U.N. GAOR, 36th Sess., Supp. No. 51 at 171, U.N. Doc. A/36/684 (Nov. 25, 1981) [hereinafter Declaration on Religious Intolerance].

168. *Id.* pmbl. Again, note the gender-exclusive language.

169. As noted above, non-discrimination, including on the bases of sex and religion, stands as the only human right inscribed in the text of the U.N. Charter. U.N. Charter art. 55(c).

170. Declaration on Religious Intolerance, *supra* note 167, pmbl.

171. *Id.* art. 8.

172. *Id.* art. 1 (emphasis added).

173. See The Secretary-General, *Analytical Presentation of the Observations Received from Governments Concerning the Draft Declaration on the Elimination of All Forms of Religious Intolerance, delivered to the General Assembly*, U.N. Doc. A/9135 (Sept. 19, 1973) [hereinafter *Observations of Governments*].

language or religion . . . .”<sup>174</sup> At least the inclusion of this language inserts equality at the very foundation of the Declaration. It also serves as the only explicit reference to gender.

Though the text indicates that freedom of religion should promote the ending of colonialism and racism,<sup>175</sup> it makes no similar note about sexism.<sup>176</sup> Given that the Women’s Convention entered into force not even two months before the Declaration on Religious Intolerance was adopted, and that the Convention mandated that all state parties mainstream the prohibition on such discrimination into their own laws, the omission is striking.<sup>177</sup> This lacuna reflects a failure in human rights law to bridge the gap between two sometimes conflicting prohibitions: the ban on discrimination on grounds of religion and that on discrimination against women.

### C. *Gender Equality*

Gender equality is guaranteed by the most basic tenets of international human rights law. An entire treaty, the Women’s Convention, is devoted to ending discriminatory treatment of women. This standard is the international yardstick for measuring states’ efforts in the area. Discrimination against women has been defined by the Women’s Convention as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>178</sup>

Discrimination against women is a human rights violation rooted in deep-seated structural inequality and gender stereotypes that are sur-

174. Declaration on Religious Intolerance, *supra* note 167, pmbl. On the Canadian drafting proposals, see *Observations of Governments*, *supra* note 173, ¶ 21.

175. Declaration on Religious Intolerance, *supra* note 167, pmbl.

176. The greater emphasis on racial discrimination is partly a product of the origins of the concept of religious intolerance. It was viewed as intertwined with ethnic and racial discrimination in the treatment of minorities. Thus, the Declaration was constructed to protect religious minorities from abuse by majorities, largely ignoring the protection of dissenters within religious groups. See Angelo Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, ¶ 67, U.N. Doc. E/CN.4/1987/35 (Dec. 24, 1986).

177. Women’s Convention, *supra* note 147, art. 2.

178. *Id.* art. 1.

prisingly pervasive, and that appear in some interpretations of religious doctrine.

Hence, Article 2(e) of the Women's Convention requires states to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."<sup>179</sup> States that ratify the Convention must fight discrimination in education and even

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on . . . the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>180</sup>

All three of the states whose laws and policies are most directly discussed in this paper—France, Turkey and the United Kingdom—are parties to this treaty and have undertaken to implement these sweeping obligations.

Women's human rights scholarship insists that a sophisticated methodology be employed in assessing whether or not discrimination violating these provisions has occurred.<sup>181</sup> Rather than a formal test, women's human rights theorists have posited a test that "defines discrimination as legislation or practices, which maintain or aggravate the disadvantages of a subjugated group in society."<sup>182</sup> Rebecca Cook submits that such an approach "requires judges to look at women as they function in the real world [i.e., in context] to determine whether women's abuse or deprivation of power is due to their place in a sexual or gender hierarchy."<sup>183</sup> Like the contextual analysis recommended in this Article, such an approach is grounded in the real-life experiences of women and girls.

#### *D. Addressing the Conflict*

Despite the plethora of specific standards enumerated above,

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179. *Id.* art. 2(e).

180. *Id.* art. 5(a).

181. See, e.g., Marsha Freeman, *Equality and Rights: Article 3 of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2002/5 (Feb. 5, 2002).

182. Katarina Frostell & Martin Scheinin, *Women*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 331, 336 (Asbjørn Eide et al. eds., 2d ed. 2001).

183. Rebecca Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 156 (1994).

international human rights law offers minimal guidance on the practicalities of sorting out conflicts that arise between these rights to sex equality and freedom of religion. There has been some—mostly vague—mention of the issue in recent standards. For example, the Commission on Human Rights in 1998 urged states to “take all necessary action to combat hatred, intolerance and acts of violence, intimidation, and coercion motivated by intolerance based on religion or belief, including practices which violate the human rights of women and discriminate against women.”<sup>184</sup> Moreover, the U.N. General Assembly, in its 1993 Declaration on the Elimination of Violence against Women, affirmed that “[s]tates . . . should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to [the elimination of violence against women].”<sup>185</sup> The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, “stresse[d] the importance of . . . the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.”<sup>186</sup> These standards state the problem, an important first step. However, they offer limited guidance on solutions.

In its 2000 General Comment on gender equality, the HRC extolled the notion that “Article 18 [of the ICCPR] may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion . . . .”<sup>187</sup> The HRC also reminded state parties that when interpreting permissible limitations to the right to manifest religion they should aim to protect the range of Covenant rights.<sup>188</sup> In particular, it singled out “the right to equality and non-discrimination on all grounds specified in Articles 2, 3 and 26.”<sup>189</sup> This concentrates attention on a women’s human rights perspective in the calculus of permissible limitations.

184. Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination or Belief, Comm’n on Human Rights Res. 1998/18, ¶ 4(c), U.N. Doc. E/CN.4/1998/18 (Apr. 9, 1998).

185. U.N. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 4, U.N. GAOR, 48th Sess., Supp. No. 49 at 217, U.N. Doc. A/48/49 (Dec. 20, 1993). In this declaration, violence against women means “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, *coercion* or arbitrary deprivation of liberty, whether occurring in public or in private life.” *Id.* art. 1 (emphasis added).

186. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 22, U.N. Doc. A/CONF.157/23 (July 12, 1993).

187. U.N. Human Rights Comm., *General Comment No. 28: Equality of Rights Between Men and Women (Art. 3)*, para. 21, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

188. *General Comment No. 22*, *supra* note 150, ¶ 8.

189. *Id.*

While Articles 2 and 26 of the ICCPR both include the same lists of prohibited grounds for discrimination (including sex and religion), Article 3 zeroes in solely on gender equality. The fact that the HRC mentioned it on top of Article 2 focuses particular attention on this issue. Article 3 mandates that “[t]he States Parties to the present Covenant undertake to *ensure* the equal right of men and women to the enjoyment of all civil and political rights . . . .”<sup>190</sup> The legal commitment to ensure this right requires the state to take such action to defend equality from private actors, as well as state actors. In light of Charlesworth’s assertion, cited above, about gender inequality in so many religions, significant limitation of religious expression may be required to meet such a high standard. Defense of women’s substantive human rights and the right to equality are, then, legitimate reasons for fashioning limits on religious expression in certain circumstances.

Article 5 of the ICCPR, the Prohibition of Misuse Clause, amplifies this truth. Its first paragraph warns that

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.<sup>191</sup>

This is to avoid misuse of Covenant-derived freedoms so as to assault the rights of others, including women. Nowak has explained this provision as standing against the totalitarian use of rights to “destroy democratic structures and the human rights of others ensured by these structures.”<sup>192</sup> An example might be using religious expression to strip the liberty and equality rights of women. This would not be defensible on the grounds of the right to religious freedom. Such an approach has been described as one of “militant democracy.”<sup>193</sup>

While Article 5 can be the object of government misuse in curtailing the exercise of rights,<sup>194</sup> it also serves as a purposeful marker of the need to consider the rights of others when interpreting

190. ICCPR, *supra* note 27, art. 3 (emphasis added).

191. *Id.* art. 5. The European Convention also includes a prohibition of misuse clause. See European Convention, *supra* note 36, art. 17.

192. NOWAK, *supra* note 153, at 95.

193. *Id.* at 98.

194. See Wilder Tayler, Notes on the Human Rights Movement and the Issue of Terrorism, Presented at the International Council on Human Rights Policy: International Meeting on Human Rights and Political Violence (May 20–22, 2005), ¶¶ 74–75, available at [http://www.ichrp.org/public/workingpapers.php?id\\_projet=28&lang=AN](http://www.ichrp.org/public/workingpapers.php?id_projet=28&lang=AN).

certain rights in context. This is permissible where the framework of the right in question, such as the right to expression of religious belief, already admits some limitation, or where the right is derogable. Women's human rights proponents have employed Article 5 to counter arguments that limitations imposed to stop attacks on women's human rights violate other rights, including freedom of religion.<sup>195</sup>

### *E. The Rights of Girls*

Human rights law also contains a separate branch on children's rights, which complements the rights of persons under eighteen.<sup>196</sup> This law requires decision-making with regard to children to focus on the child's best interests.<sup>197</sup> In the educational context, reconciling the diverse interests of different girls, those who wish to cover, those who are coerced to cover, and those who do not wish to cover, is complex.

Children are also protected from all forms of discrimination, including those on grounds of sex and religion.<sup>198</sup> They have a right to religious freedom, expression of which is subject to the same limitations as that of adults.<sup>199</sup> States must respect the rights of parents and guardians to "provide direction . . . in the exercise of his or her right . . . ." <sup>200</sup> However, the goals of education, enumerated in the U.N. Convention on the Rights of the Child, include both "development of respect for . . . his or her own cultural identity . . . and values" and "preparation . . . for responsible life in a free society, in the spirit of . . . equality of sexes . . . ." <sup>201</sup>

Women and girls both may express themselves by wearing headscarves or other "modest" clothing, or they may both be subject to coercion to do so. However, girls may be especially subject to pressure, including peer pressure, in regards to dress, and need extra protection from religious extremists and coercive family members.

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195. See, e.g., INT'L WOMEN'S HUMAN RIGHTS LAW CLINIC, CTR. FOR CONSTITUTIONAL RIGHTS & INT'L LEAGUE FOR HUMAN RIGHTS, SHADOW REPORT ON ALGERIA (1999), available at <http://www.ilhr.org/ilhr/reports/shadow/index.html>.

196. Under international law, a child is "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." United Nations Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3.

197. *Id.* art. 3(1).

198. *Id.* art. 2(1).

199. *Id.* art. 14.

200. *Id.* art. 14(2).

201. *Id.* art. 29.



This is particularly true for young girls.<sup>202</sup> Still, the U.N. Committee on the Rights of the Child, in its concluding observations on France's second periodic report in 2004, expressed

concern[] that the new legislation . . . on wearing religious symbols and clothing in public schools may be counterproductive, by neglecting the principle of the best interests of the child and the right of the child to access to education, and not achieve the expected results.<sup>203</sup>

While it recognized the importance of secular public schools in France, the Committee did not address the very real problem of coercion of girls. Nor did it explicitly say that the legislation violated the Convention.

For both girls and women, secularism is an important tool for combating discrimination under the guise of religious doctrine. It is arguably the most useful framework within which to resolve tensions between the human rights to freedom of religion and to gender equality. Hence, we now consider its parameters.

#### VI. THE MEANINGS OF SECULARISM: "MADAM, YOU CANNOT ARGUE WITH GOD"<sup>204</sup>

The literature is rife with definitions of secularism.<sup>205</sup> Etymologically, the term is derived from "sæculum," meaning century or world-age, overlaid with connotations of temporality.<sup>206</sup> Turkish Philosopher İonna Kuçuradi, building on this meaning, views secularization as expressing, "not necessarily a denial of religion but rather a kind of temporal change, an adjustment of religious faith to the experiences and 'exigencies of an age . . . .'"<sup>207</sup> While secular-

202. As exiled Algerian journalist Rachida Ziouche has asked, "do you really believe a four-year-old is wearing the headscarf by choice?" *Viewpoints: Europe and the Headscarf*, BBC NEWS, Feb. 10, 2004, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/europe/3459>.

203. Comm. on the Rights of the Child, *Concluding Observations: France*, ¶ 25, U.N. Doc. CRC/C/15/Add.240 (June 30, 2004).

204. Comment made by a "notaire" in Algeria, in the author's presence, to a woman expressing criticism of the country's religiously based and gender discriminatory inheritance laws, in May 2005. "Notaire" translates as "notary" though the functions held by such a person, who is usually a lawyer, are more complex in civil law systems. In this instance, the notary coordinated the resolution of an estate.

205. In *Şahin*, neither the Fourth Section nor the Grand Chamber defines this concept.

206. See Fred Dallmayr, *Rethinking Secularism (with Raimon Pannikar)*, 61 REV. POL. 715 (Autumn 1999), available at <http://sacred-sovereign.uchicago.edu/fd-secularism.html>.

207. *Id.* at 720 (paraphrasing Kuçuradi, *supra* note 17, at 72–73).

ism is sometimes criticized for being rigid or doctrinaire,<sup>208</sup> Abdullahi An-Na'im describes it positively as "a principle of public policy, applied variously in distinct contexts, for organizing the relationship between religion and state."<sup>209</sup> He understands secularism as a tool for promoting pluralism.

To put these definitions together, the term secularism here means emphasis on the temporal over the religious in law and an accompanying minimization of the role of religion in the functioning of the state and legal system. The significance of the temporal for human rights is not that it is always morally superior to the religious,<sup>210</sup> but rather that it is contestable. The temporal allows space for dissent which the "you cannot argue with God" paradigm forecloses. Hence, it facilitates the dynamic advance of human rights over time, something particularly important for women. Certain tendencies within most religions have, at certain times, encouraged discussion, but fundamentalist and conservative trends seek to shut this process down.

The definition above suggests that it is entirely possible to be both a religious person and an advocate of secularism. Though atheists and agnostics are often also proponents of secularism, secularism is not the same as either atheism or agnosticism.<sup>211</sup> Critics often assert that secularism is itself a religion.<sup>212</sup> If this characterization were true, it would be reprehensible to limit religious expression for the purpose of promoting what is simply another religion. Instead, secularism represents the opposite of religion. It creates spheres devoid of religion and religious symbols, by, for example, prohibiting the display of the Ten Commandments in a court room<sup>213</sup> or precluding the teaching of religiously-based theories like "intelligent design" in a public school science classroom.<sup>214</sup> There is no question that ideology may fill the space vacated by religion, and that this too may raise a range of human rights problems, as it does in the Turkish con-

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208. John Mayer, *Secularization and Cultural Diversity*, in CULTURAL TRADITIONS AND THE IDEA OF SECULARIZATION, *supra* note 17, at 33, 36.

209. Abdullahi Ahmed An-Na'im, *The Interdependence of Religion, Secularism, and Human Rights*, 11 COMMON KNOWLEDGE 56, 58 (2005).

210. Note for example, the moral lead offered by the Catholic Church on human rights issues like the death penalty, and in opposition to armed conflicts like the 2003 invasion of Iraq. This is in contradistinction to its antipathy to many women's human rights, especially in the area of reproductive and sexual rights.

211. PENA-RUIZ, *supra* note 28.

212. This accusation comes from both the Moral Majority and post-modernists. See, e.g., PAUL KURTZ, IN DEFENSE OF SECULAR HUMANISM 4 (1983) (citing Senator Jesse Helms, *Introduction to HOMER DUNCAN, SECULAR HUMANISM: THE MOST DANGEROUS RELIGION IN AMERICA* (1979)); Kennedy, *supra* note 8, at 312.

213. See, e.g., *McCreary County v. A.C.L.U. of Ky.*, 545 U.S. 844 (2005).

214. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

text.<sup>215</sup> Nevertheless, secularism fosters a focus on temporal politics which, however deeply flawed, are accepted as human created. Though difficult to change, human constructs are at least open to human question. Secularism is then an embrace of the fallibility of our rules.

Kuçuradi goes so far as to proclaim that “Laïcité is a *conditio sine qua non* . . . of the possibility of making determinant human rights.”<sup>216</sup> She further develops this into the notion that today, “we can formulate secularism as a demand for the arrangement and administration of public affairs . . . [not] by religious-cultural-traditional world views and norms, but by human rights and the implications of human rights in the conditions of the given country.”<sup>217</sup>

That said, advancing secularism globally as a bridge to human rights poses a major challenge today in that it is often seen, ironically for those living in G.W. Bush’s America, as a Western rather than a universal concept.<sup>218</sup> We, all too often, overlook secularisms all around the world,<sup>219</sup> including in parts of the Muslim world. However, one cannot deny this perception of Western orientation on the part of some, and the colonial baggage it carries.<sup>220</sup> Nevertheless, at this historical juncture secularism is a *sine qua non* for women’s human rights in the Muslim World, as the fate of Iraqi women since the 2003 invasion of Iraq underscores.<sup>221</sup> Promotion of secularism, though, must be done with sensitivity, respect for international law,

215. See, e.g., Amnesty Int’l, *Turkey: No Security Without Human Rights*, AI Index: EUR 44/084/1996, Oct. 1, 1996, available at <http://web.amnesty.org/library/index/engEUR440841996>.

216. Kuçuradi, *supra* note 17, at 75. The French word *laïcité* derives from the Greek *laos*, which means “the population undivided,” and is related to the English word “secularism.” *Laïcité* also yields more overtly republican connotations. PENA-RUIZ, *supra* note 28, at 17. The ideal of *laïcité* reconciles diversity and equal rights through equal republican citizenship under law. At its best, *laïcité* represents the universality of human rights; at its worst, the particular imposed as the universal.

217. Kuçuradi, *supra* note 17, at 75–76.

218. For an example of such views, see M. Hakan Yavuz, *Cleansing Islam from the Public Sphere*, 54 J. INT’L AFF. 21 (2000) (describing contemporary secularizing projects in Turkey as “Westernization project[s]”). For challenge to such assertions, see, for example, Ira M. Lapidus, *The Separation of State and Religion in the Development of Early Islamic Society*, 6 INT’L J. MIDDLE EAST STUD. 363, 385 (1975) (arguing there was a “fundamental differentiation” between state and religion in early Islamic society).

219. See *supra* notes 18–19.

220. See, e.g., Guénif-Souilamas, *supra* note 103, at 61–65 (discussing colonial perceptions). These colonial overtones are especially complex in discourse about women’s human rights given that they have been invoked to justify colonial and neo-colonial projects. See Jessica Rutter, Note, “Saving” Women in Algeria and Afghanistan: (neo)Colonialism, Liberation and the Veil, 24 ERUDITIO (2004), available at <http://www.duke.edu/web/eruditio/rutter.html>.

221. See, e.g., Dilip Hiro, *Wrong Mission Accomplished: How Invading Iraq Has Set Back Democracy in the Middle East*, WASH. SPECTATOR, June 1, 2006, at 1.

and by paying heed to its local advocates. Like human rights, it remains an unfinished project,<sup>222</sup> but one that must be consistently fought for, precisely on human rights grounds.

## VII. APPLICATIONS OF THE CONTEXTUAL APPROACH

### A. *Guidance from Begum v. Headteacher*

With all of this in mind, we turn to practical applications of the contextual approach. The best opinion in *Begum v. Headteacher*, authored by Baroness Hale, took precisely such an approach. Though in a different context, this case ratifies *Şahin*. It is distinct in the sense that Shahbina Begum was a child at the relevant time while Leyla Şahin was an adult, and the clothing restrictions are different in each case, but the analysis of the Law Lords in *Begum* nonetheless confirms *Şahin*'s limiting process in principle. Here the school allowed certain headscarves, but disallowed the more restrictive *jilbab*, which is a long dark cloak covering everything but the head, hands and feet.<sup>223</sup>

Shahbina Begum, a British Muslim schoolgirl of nearly fourteen, sought to wear the *jilbab* to Denbigh High School in violation of its dress code. The highly successful coeducational public school represents a model multicultural environment. Its student body is seventy-nine percent Muslim, with students of many other faiths, including Sikhs and Hindus making up the rest.<sup>224</sup> The Headmistress is also a Muslim woman of Bengali origin.<sup>225</sup> The school's administration attributes part of its success to its dress code which allows students to forge a sense of community, with some room for differences.<sup>226</sup> Following extensive community consultation, including with Muslim clerics, the girls' version of the uniform offers several

222. There are thoughtful critiques of secularism and its practice which must be remembered and learned from. See, e.g., Janet R. Jakobsen & Ann Pellegrini, *Introduction to World Secularisms at the Millennium: Dreaming Secularism*, SOC. TEXT, Fall 2000, at 1.

223. This exemplifies the secular Turkish fear of escalating claims for "modest" clothing. Today this is a live issue. Several other European countries now struggle with whether to allow the burka, which covers even the eyes, in school. See, e.g., *Germany Mulls School Uniforms, Burka Ban*, UNITED PRESS INT'L, May 8, 2006, available at <http://www.hrwf.org>.

224. *Begum v. Headteacher and Governors of Denbigh High School*, [2004] EWHC 1389 (Admin), available at <http://www.religionlaw.co.uk/casescivil.htm>.

225. *Begum v. Headteacher and Governors of Denbigh High School*, [2006] 2 All E.R. 487 (H.L.) (appeal taken from Eng.), ¶ 5 (opinion of Lord Bingham).

226. *Begum v. Headteacher and Governors of Denbigh High School*, [2004] EWHC 1389 (Admin), ¶ 40.

variants.<sup>227</sup> Along with their standard uniform, girls may choose to wear a skirt, trousers or a shalwar kameeze, a loose fitting South Asian pants suit which conceals the contours of the body. The dress code even allows girls to wear a headscarf with their uniforms, subject to certain limitations.<sup>228</sup>

Although Shahbina's family did not reside in the district, they chose to enroll her at Denbigh, which she attended for two years, cooperating with the dress code. However, in 2002, she appeared on the first day of school in a *jilbab*,<sup>229</sup> accompanied by her older brother Shuweb Rahman and a male friend of his,<sup>230</sup> who brandished human rights as a justification for Shahbina to be allowed to wear the *jilbab*.<sup>231</sup> The assistant headteacher met with them and said that Shahbina should go home and change. The assistant described the demeanor of the brother and his companion as threatening.<sup>232</sup> For nearly two years, a protracted dispute between the school and the brother raged. Though in places the opinions suggest that Shahbina's own conscientiously held view compelled the stricter dress, the opinions also allude to her brother's refusal to allow her to return without the *jilbab*.<sup>233</sup> She lost nearly two years of school in the meantime.

Ultimately, the older brother brought suit on his sister's behalf, arguing *inter alia*, as did Leyla Şahin, that her right to manifest her religion under the European Convention had been violated by the school's policy.<sup>234</sup> The grounding for this claim in U.K. law was the Human Rights Act,<sup>235</sup> which makes most rights in the European Con-

227. *Begum v. Headteacher and Governors of Denbigh High School*, [2006] 2 All E.R. 487 (H.L.) (appeal taken from Eng.), ¶ 7 (opinion of Lord Bingham).

228. *Begum v. Headteacher and Governors of Denbigh High School*, [2004] EWHC 1389 (Admin), ¶ 13.

229. This is described in the opinions as "a long shapeless [black] dress ending at the ankle and designed to conceal the shape of the wearer's arms and legs." *Begum v. Headteacher and Governors of Denbigh High School*, [2006] 2 All E.R. 487 (H.L.) (appeal taken from Eng.), ¶ 79 (opinion of Lord Scott).

230. In view of Shahbina's father's death and her mother's inability to speak English, Shuweb held a powerful position in the family. *See id.* ¶ 9.

231. *Begum v. Headteacher and Governors of Denbigh High School*, [2005] EWCA 199 (Civ), available at [http://www.hmcourts-service.gov.uk/judgmentsfiles/j3114/sb-v-denbigh\\_high\\_school.htm](http://www.hmcourts-service.gov.uk/judgmentsfiles/j3114/sb-v-denbigh_high_school.htm).

232. *Begum v. Headteacher and Governors of Denbigh High School*, [2004] EWHC 1389 (Admin), ¶ 15.

233. For example, Lord Bingham notes that "[t]he respondent's brother told [the deputy headteacher] that he (the brother) was not prepared to let the respondent attend school unless she was allowed to wear a long skirt." *Begum v. Headteacher and Governors of Denbigh High School*, [2006] 2 All E.R. 487 (H.L.) (appeal taken from Eng.), ¶ 11 (opinion of Lord Bingham).

234. *Begum v. Headteacher and Governors of Denbigh High School*, [2004] EWHC 1389 (Admin), ¶ 47(iii).

235. Human Rights Act 1998, ch. 42, available at <http://www.opsi.gov.uk/acts/acts1998/19980042.htm>.

vention justiciable in British Courts and requires that those Courts “take account of Strasbourg [ECHR] case-law.”<sup>236</sup> Hence, all actions by British authorities must be compatible with the European Convention, unless Acts of Parliament make that impossible.<sup>237</sup> In the Administrative Division the school policy was found to meet that test and upheld, only to be overturned by the Court of Appeals. However, making reference to *Şahin*, the House of Lords unanimously supported the school, finding its policy concordant with human rights.<sup>238</sup>

That Denbigh is a secular school influenced the Law Lords, even though Britain is not formally a secular country. They made frequent reference to the concern expressed by many other Muslim girls at the school that “they do not wish to wear the *jilbab* and fear they will be pressured into wearing it.”<sup>239</sup> The girls indeed had reason to fear. A fundamentalist organization held a demonstration at the school gates seeking to pressure the girls to cover themselves and may well have been instigating the brother’s case.<sup>240</sup> Warnings from educators and parents that allowing a stricter uniform would set up classifications among Muslim girls at the school swayed the Lords, as they “endeavour[ed] to apply the Strasbourg jurisprudence in a reasonable way” in this particular context.<sup>241</sup> Additionally, the consultative nature of the process that fashioned the restrictions made it difficult to rationalize undermining the school dress code in the name of a highly restrictive garment. Gender-sensitive consultation ought to be a part of designing any rules banning what are claimed to be religiously motivated “modest” garments.<sup>242</sup>

Baroness Hale of Richmond, the only female member of the Appellate Committee, authored the superlative opinion, providing an excellent example of a contextual approach. For her, the restriction constituted an interference, but was justified under the circumstances to protect the rights of others. In part she identified with the Tulkens

236. DEP’T FOR CONSTITUTIONAL AFFAIRS, A GUIDE TO THE HUMAN RIGHTS ACT 1998, 7 (2006). See also Human Rights Act 1998, ch. 42, *supra* note 235, § 2(1)(a).

237. See DEP’T FOR CONSTITUTIONAL AFFAIRS, *supra* note 236, at 5.

238. Begum v. Headteacher and Governors of Denbigh High School, [2006] 2 All E.R. 487 (H.L.) (appeal taken from Eng.), ¶ 22 (opinion of Lord Bingham); *Id.* ¶ 32 (lauding the “valuable guidance of the Grand Chamber . . . in *Şahin* [sic]”).

239. *Id.* ¶ 18.

240. See, e.g., Joan Smith, *Our Schools Are No Place for the Jilbab, Or for the Creationists*, INDEPENDENT, Mar. 26, 2006, at 37.

241. Begum v. Headteacher and Governors of Denbigh High School, [2006] 2 All E.R. 487 (H.L.) (appeal taken from Eng.), ¶ 25 (opinion of Lord Bingham).

242. HRW rightly calls for consultation on the Turkish rules with the country’s women’s movement. However, the call is made for consultation only as part of lifting the ban, rather than for consultation about whether or not to do so. *Memorandum to the Turkish Government*, *supra* note 35, at 4.

dissent in *Şahin*, agreeing that for some adult women wearing the *hi-jab* may be a free choice with a range of meanings.<sup>243</sup> However, she averred that some women, and especially girls, may be imposed upon to do so. As so many commentators on the subject have failed to note, she lucidly recognizes that “the more extreme requirements are imposed as much for political and social as for religious reasons.”<sup>244</sup>

In this regard, she dared to utter the word “fundamentalism” and suggested that for fundamentalist movements, imposing modesty on women is symbolically important. Quoting women’s rights advocates Nira Yuval-Davis and Gita Sahgal, she indicated that “[t]he ‘proper’ behavior of women is used to signify the difference between those who belong and those who do not.”<sup>245</sup> Furthermore, she acknowledged that religion (not just Islam) often sanctifies gender discrimination. Hence, under the facts of this case she was persuaded by the thoughtful and proportionate approach of the school. Most of all, she responded to the views of some of the other Muslim girls at the same school who worried that they would be coerced into wearing the *jilbab*. In her view, “[h]ere is the evidence to support the justification which Judge Tulkens found lacking in the *Sahin* [sic] case.”<sup>246</sup>

*Begum* is a sensible, careful, contextual consideration of limits on religious expression in school in light of its meanings and impact on the human rights of others and questions of agency, particularly appropriate with regard to children. It is in accordance with international human rights law, limiting religious expression in only a minimal way and doing so in the face of serious questions about the freedom of choice of the girl in question and her classmates, in context. Though Shahbina Begum was represented by prominent human rights lawyer Cherie Booth and by the Children’s Legal Centre in Essex at various stages of the litigation, human rights advocates should support Baroness Hale’s approach.

#### B. *The French Law on Religious Symbols*

Since the adoption of the 2004 French law forbidding reli-

243. *Begum v. Headteacher and Governors of Denbigh High School*, [2006] 2 All E.R. 487 (H.L.) (appeal taken from Eng.), ¶ 94 (opinion of Baroness Hale). See also discussion of the Tulkens dissent, *infra* text at notes 298–304 and accompanying text.

244. *Begum v. Headteacher and Governors of Denbigh High School*, [2006] 2 All E.R. 487 (H.L.) (appeal taken from Eng.), ¶ 95 (opinion of Baroness Hale).

245. *Id.*

246. *Id.* ¶ 98.

gious symbols in public schools,<sup>247</sup> there has so far been no case analogous to either *Şahin* or *Begum*, though there have been some reports of complaints regarding the legislation's impact.<sup>248</sup> The broader effect of the law, including on France's Sikhs,<sup>249</sup> merits consideration but lies beyond the scope of this Article. Here analysis relates only to the law's impact on the headscarf worn by some Muslim girls in school, given the specific meanings and context of that symbol as discussed above.

On its face, the law appears largely unobjectionable on religious discrimination grounds.<sup>250</sup> It treats "conspicuous" religious symbols from all faiths precisely the same way and is limited to removing them from the public school context.<sup>251</sup> In light of the ECtHR's acceptance of the need to protect secularism as a way to safeguard human rights in certain contexts in *Şahin*, it is useful to remember that the stated purpose of the French law is precisely to shore up the related concept of *laïcité*. This principle has been forged in the historical battle over the role of the Catholic Church in France which culminated in the 1905 law separating church and state,<sup>252</sup> a fact often forgotten in de-contextualized human rights critiques of the current law.

Given fears of rising fundamentalism among some young men in certain parts of the Muslim community in France, many secular Muslims have been outspoken champions of the ban as a way to avoid coercion of young women to wear the headscarf to school. Organized groups of young men have used attacks and threats in many working class immigrant communities to impose "modest" dress. According to reports, "[t]he most horrific ritual is the tournante, gang rape of teen-age girls who appear loose by wearing miniskirts or going to the movies . . . . Some banlieue girls have started wearing head scarves as protection, but many . . . are rebelling . . . ." <sup>253</sup> In

247. Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190. The English-language media has translated this law as follows: "in schools, junior high schools and high schools, signs and dress that conspicuously show the religious affiliation of students are forbidden." *French Lawmakers Overwhelmingly Back Veil Ban*, MSNBC, Feb. 10, 2004, <http://www.msnbc.msn.com/id/4231153/print/1/displaymode/1098/>.

248. See Jahangir, *supra* note 125, ¶¶ 61–68.

249. *French Law Means Sikhs Cannot Wear Turbans*, ASSOCIATED PRESS, May 17, 2004, <http://www.religionnewsblog.com/7322/french-law-means-sikhs-cannot-wear-turbans>.

250. See Jahangir, *supra* note 125, ¶¶ 69–72.

251. Law No. 2004-228, *supra* note 247.

252. See PENA-RUIZ, *supra* note 28, at 64–65. Law of Dec. 9, 1905, Loi concernant la séparation des Églises et de l'État [Law concerning the separation of church and state], J.O., Dec. 11, 1905 (Fr.), available at <http://www.assemblee-nationale.fr/histoire/eglise-etat/sommaire.asp#loi>.

253. See *French Muslims Fail to Enter Mainstream and Suffer from Poverty*,



such a context of violent coercion, the law's limitation on expression, not belief, in defense of the rights of schoolgirls who do not wish to cover and in defense of secularism, appears both proportionate and necessary. Following *Şahin*, it seems likely to be acceptable under European human rights law. Nevertheless, the political threats to secularism are much graver in Turkey than in France, and the overall calculus of social pressures on girls to cover is different, so a new contextual analysis would need to be carefully carried out in the precise context of specific cases that arise.

The French law has elicited a wide range of reactions. Some important religious figures like Soheib Bencheikh, former Mufti of Marseille and an outspoken champion of both secularism and women's human rights, have come out in favor of the rules.<sup>254</sup> Others, like prominent  *beur*  (French-Algerian) feminist Fadela Amara have supported the idea of prohibiting religious symbols in public institutions because, "the veil is the visible symbol of the subjugation of women" and thus has no place in school.<sup>255</sup> Though once having expressed nervousness about adopting a particular law on the subject which could inadvertently focus too much attention on the issue and lead to a backlash,<sup>256</sup> she has since been a defender of the law on the grounds that it "helps fight . . . outdated and oppressive practices."<sup>257</sup>

NGOs representing some Muslim women have taken diverse positions on the French ban which have tended to be more grounded and nuanced than those of international human rights NGOs. For example, the French Muslim women's group *Ni Putes, Ni Soumises* [Neither Whores, Nor Submissive] supported the ban since, in practice, many girls who wear the headscarf in school are forced to do so by family members, often an older brother.<sup>258</sup> This was a highly contextual approach.

In contrast, other Muslims and some others in France have outspokenly opposed the ban. While the French law does not violate international human rights law on its face, critics often point to possible discriminatory motives and enforcement, a legitimate concern. The HRC has explained that "restrictions [under 18(3)] may not be

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*Discrimination and Sexism* (National Public Radio broadcast Feb. 26, 2003).

254. See Soheib Bencheikh, *Mufti from Marseille: About the Life Prospect of Islam in France*, LIBERAL ISLAM NETWORK, Apr. 12, 2004, <http://www.islamlib.com/en/page.php?page=article&mode=print&id=602>.

255. Rose George, *An Interview with Fadela Amara, Head of France's Noisiest Feminist Movement*, July 17, 2006, [http://www.rosegeorge.com/frameworks/generic/public\\_users/morearticles.asp?ArticleID=85](http://www.rosegeorge.com/frameworks/generic/public_users/morearticles.asp?ArticleID=85).

256. AMARA, *supra* note 107, at 77–79.

257. Wing & Smith, *supra* note 1, at 768.

258. See Women Living Under Muslim Laws, *supra* note 81.

imposed for discriminatory purposes or applied in a discriminatory manner.”<sup>259</sup> The law’s prohibition of “conspicuous” symbols may be seen to be particularly targeted at the headscarf worn by Muslims. This red flag is further raised by anti-Arab, anti-immigrant, and anti-Muslim sentiments in France and the rise of the National Front party which champions such views.<sup>260</sup> As in India where the otherwise legitimate defense of secularism has sometimes been deployed in anti-Muslim campaigns by the Hindu right,<sup>261</sup> defense of the republic and *laïcité* can mask a racist agenda. Amara warns, “[t]he issue of the veil has become for some, a new political argument for stigmatizing Muslims and the suburbs [slums where many Muslim communities live in France].”<sup>262</sup> On the other hand, the restrictions are supported by large swathes of the French anti-racist movement. In such a context, the law’s application and impact on both freedom of religion and sex equality will have to be studied before a final determination can be made.

Applying the contextual analysis outlined above, *Şahin* and *Begum* are clear-cut cases where the restrictions in question are acceptable. The Rutgers hypothetical posed above stands as an easy case where limits would be impermissible.<sup>263</sup> The French law perches in between as a truly hard case. The jury is still out; the issues *Şahin* raises, to which we now return, should inform the deliberations.

### C. *Şahin Revisited: The Meaning of the Headscarf in the Turkish University, and Beyond*

As Lord Bingham aptly began his opinion in *Begum*, “this case concerns a particular pupil and a particular school in a particular place at a particular time.”<sup>264</sup> To weigh such restrictions under human rights law we must look carefully at the place and time at stake.

259. *General Comment No. 22*, *supra* note 150, ¶ 8.

260. *See, e.g., World: Europe Report Attacks Racism in France*, BBC NEWS, June 17, 1998, <http://news.bbc.co.uk/1/hi/world/europe/114626.stm>.

261. *See, e.g.,* Susane Hoeber Rudolph & Lloyd Rudolph, *Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA 36, 53–56 (Gerald Larson ed., 2001).

262. AMARA, *supra* note 107, at 78 (author’s translation). The attendant politics were further complicated by the 2005 riots in French suburban ghettos and beyond, and the government response thereto. For analysis of these events, see Susan Ossman & Susan Terrio, *The French Riots: Questioning Spaces of Surveillance and Sovereignty*, 44 INT’L MIGRATION 5 (2006).

263. *See supra* notes 113–114 and accompanying text.

264. *Begum v. Headteacher and Governors of Denbigh High School*, [2006] 2 All E.R. 487 (H.L.) (appeal taken from Eng.), ¶ 2 (opinion of Lord Bingham).

In *Şahin*, the Turkish government asserted that the impetus for the circular restricting scarves and beards came from “complaints by other students of pressure from students from fundamentalist religious movements.”<sup>265</sup> The authorities also pointed to a history of violence on campus related to such groups.<sup>266</sup> Furthermore, Refah Partisi, an Islamist party, had been appealing for women to wear headscarves in state schools, while calling for the achievement of an Islamic state through jihad and war.<sup>267</sup> The former chairman of Refah, Necmettin Erbakan, who at one point served as Turkey’s Prime Minister, had campaigned on the issue, warning that “[university] chancellors are going to retreat before the headscarf when Refah comes to power.”<sup>268</sup> This occurred at a time when other members of parliament from his party were decrying the failure to apply Islamic law and threatening those who opposed such a project.<sup>269</sup> A complex, threatening atmosphere where a repressive military holds the secular line against an Islamist government and where women are apparently beginning to feel they may be denied some jobs if not veiled constitutes the backdrop of the *Şahin* case.<sup>270</sup>

Some Refah Partisi party members went so far as to predict that “if supporters of applying sharia came to power they would annihilate non-believers.”<sup>271</sup> They raised the specter of violence similar to that perpetrated by Algeria’s fundamentalist armed groups.<sup>272</sup> Given that these Algerian groups had begun gunning down schoolgirls who refused to cover their heads, this reference sounded particularly ominous.<sup>273</sup> Human rights advocates often correctly warn of using the violence of some to ban the non-violent activities of others who may be supporters of the same movement or to whom some connection, however remote, is imputed. However, there is no question that such allusions affected the pressures other non-veiled Turkish women might feel.

265. *Şahin*, Fourth Section, *supra* note 3, ¶ 96.

266. *Id.*

267. Refah Partisi v. Turk., 2003-II Eur. Ct. H.R. 267, ¶ 14 (holding that Turkish government’s actions dissolving Islamist political party that enjoyed electoral success were proportional to the “pressing social need” created by its threat to secularism). The Turkish government has been critiqued on this score in NOAH FELDMAN, AFTER JIHAD 106–12 (2003).

268. Refah Partisi v. Turk., 2003-II Eur. Ct. H.R. 267, ¶ 27.

269. *Id.*

270. For descriptions of this context, see Holley, *supra* note 35, and Johnathan Ewing, *Turkish Women Professionals on Rise: Study Sees Strides in Numerous Careers*, J. COM., Sept. 9, 1996, at 3A.

271. Refah Partisi v. Turk., 2003-II Eur. Ct. H.R. 267, ¶ 34.

272. See Karima Bennoune, *Algerian Women Confront Fundamentalism*, MONTHLY REV., Sept 1994, at 26, 26–39.

273. See Bennoune, *supra* note 111; *Ni la valise, ni le foulard!*, LE NOUVEL OBSERVATEUR, Jan. 19–25, 1995, at 44.

HRW is correct that individual women choosing to cover their heads are not to blame for the broader political context. One must be sympathetic to those whose personal conscientiously held beliefs lead them to feel they must or should cover their bodies in ways which are prohibited in certain institutional contexts. Their right to believe what they choose about the veil as a religious symbol is absolutely immune from limitation as part of the freedom of belief. However, the socially-constructed meanings and impact on others of the symbol they reclaim is indeed implicated by this context. Hence, their display of it, which is expression, not belief, may be limited in response to that context in accordance with international human rights law, to protect the rights of others and in pursuit of other legitimate social goals, whether women's equality as mandated by the Women's Convention or the secularism which makes it possible.

If we are to take substantive gender equality as seriously as religious freedom, as prescribed by human rights law itself, in such contexts limits may be unavoidable. As Frances Raday has written in a passage cited by Baroness Hale in *Begum*,

A mandatory policy that rejects veiling in state educational institutions may provide a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families . . . [S]uch a policy may send a clear message that the benefits of state education are tied to the obligation to respect women's and girls' rights to equality and freedom.<sup>274</sup>

Raday's use of "may" seems to indicate that it depends precisely on the context of the rules. Furthermore, though she refers in the first instance only to girls, the observation stands for young adult women in university also, especially in a political climate like that in Turkey. Additionally, not only the pressure of the family can be so challenged, but also the push of community groups, such as fundamentalist movements. Mainstream human rights advocates who focus traditionally on state conduct, rather than on the impact of non-state actors on human rights, may overlook the human rights imperative to check coercion by such groups.<sup>275</sup> Given this emphasis on the

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274. *Begum v. Headteacher and Governors of Denbigh High School*, [2006] 2 All E.R. 487 (H.L.) (appeal taken from Eng.), ¶ 98 (opinion of Baroness Hale) (citing Raday, *supra* note 107, at 709).

275. For criticism of this classical approach, which is in the process of evolving, see Frances E. Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 157 (Dorinda G. Dallmeyer ed., 1993), and Catharine A. MacKinnon, *On Torture: A Feminist Perspective on Human*

state, the mainstream human rights movement is prone to respond only to one dress code (the state's restrictions on the headscarf) but not the other (pressure to cover from family, community and social movements).

Education represents a targeted site of struggle for religious fundamentalist movements around the world.<sup>276</sup> This is why American science teachers now reportedly shy away from teaching evolution.<sup>277</sup> Human rights advocates cannot be naïve about this. Such vying over education is a key part of the context in which human rights need to be understood and implemented and must factor into our interpretations. Some liberal opponents of veiling restrictions have argued that the concern with religious extremist or conservative attacks on women would be better served by placing limits on extremists themselves and their activities rather than on individual women. However, the two are complementary not alternative. Furthermore, the contextual approach accepts such limits on adult women's dress in public education precisely when coercion occurs, in other words, when other efforts to counter fundamentalist or conservative assaults prove insufficient.

In his concurrence in *Abington Township v. Schempp*, justifying restrictions on religious activities in schools, Justice Brennan offers a vision of American public schools as designed for "the training of American citizens in an atmosphere free of parochial, divisive or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions."<sup>278</sup> Those who support restrictions on the veil and headscarves in certain educational contexts claim just such a construction, to the disdain of some human rights critics who would be unlikely to challenge Brennan's vision in the U.S. context.

Still, an obvious downside to bans is, as expressed by Michel Troper, that "[i]f the wearing of the veil is prohibited, the young women dismissed from public school will not have any contact with the values of tolerance and equality that only the school can inculcate."<sup>279</sup> This leaves policy-makers with a terrible choice, as it were, between a woman's right and women's rights. Undoubtedly, they

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*Rights*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY 21 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

276. See, e.g., PHILLIPS, *supra* note 11.

277. Cornelia Dean, *Evolution Takes a Back Seat in U.S. Classes*, N.Y. TIMES, Feb. 1, 2005, at F1.

278. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 242 (1963) (Brennan, J., concurring).

279. Michel Troper, *French Secularism, or Laïcité*, 21 CARDOZO L. REV. 1267, 1279 n.17 (2000).

must develop plans to mitigate this possible consequence of bans as a matter of priority. However, though some women and girls may be taken out (or take themselves out) of school initially in response to such rules (some being sent to parochial schools), this author's prediction is that over time they will return.<sup>280</sup> The long-term good of creating a free secular space in school which overtly opposes women's subordination is worth the, admittedly grave, short-term loss. As Kimberly Yuracko has explained with regard to public schools, "The mission of schools is to educate and inculcate children with social values. Schools cannot help but socialize children."<sup>281</sup> Furthermore, where is the alternative for girls being coerced to wear such garments by families and communities, if the public school yields? They do not have religious educational institutions as a fall-back space to protect their free choice.

Reaching the above verdict means answering Troper's question about whether secularism and state neutrality on religion require "allowing all values to be expressed or propagating neutrality as a value,"<sup>282</sup> by favoring the latter, an assuredly controversial answer. This answer seems especially challenging to those steeped in the Anglo-American tradition which is largely in the "refusal to propagate values" model.<sup>283</sup>

HRW belies this very bias when it suggested in its early press statement regarding the then-proposed French law that the organization "recognizes the legitimacy of public institutions seeking not to promote any religion via their conduct or statements, but the French government has taken this a step further by suggesting that the state is undermining secularism if it allows students to wear religious symbols."<sup>284</sup> This is in part a contrast between Anglo-American approaches and continental European republicanism, the model for the Turkish state. HRW seems to concede as much when it notes that "[t]he headscarf issue is . . . a 'wake up call' for a human rights movement comfortably embedded, *especially in continental Europe*, within secularism . . . ."<sup>285</sup> However, the approach taken by the Law Lords in *Begum* suggests that some of the analysis is beginning to cross the legal English Channel. Another disconnect lies in the fact

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280. HRW argues that the Turkish ban on headscarves "excludes thousands of women from higher education each year." *Memorandum to the Turkish Government*, *supra* note 35, at 3.

281. KIMBERLY YURACKO, *PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES* 6 (2003).

282. Troper, *supra* note 279, at 1279.

283. *Id.* at 1283.

284. Human Rights Watch, *France: Headscarf Ban Violates Religious Freedom*, Feb. 27, 2004, <http://hrw.org/english/docs/2004/02/26/france7666.htm>.

285. Marthoz & Saunders, *supra* note 8, at 21 (emphasis added).

that continental European approaches, and indeed international human rights law itself, allow for some content-based restrictions on expression, whereas in U.S. law any restriction directed at the communicative impact of expression is highly suspect.<sup>286</sup>

It is also startling to hear a human rights movement, whose most visible spokespersons do not actively champion secularism, described as embedded in it. In fact, greater support of secularism by the human rights movement in the current moment, given the Chinkin and Charlesworth thesis that religious extremism is one of the two major contemporary threats to women's human rights,<sup>287</sup> would be welcome. Instead, the mainstream human rights movement often does not seem fully aware of the grave dangers religious extremism poses to human rights. For example, this author was initially drawn to this topic out of frustration with the muted response of many international human rights NGOs to the rise of religious fundamentalism and associated atrocities against women in 1990s Algeria.<sup>288</sup>

A review of the human rights NGO discourse suggests a ready confusion of religious belief (which is legitimately subject to no restrictions) with religious expression (which is subject to restrictions). It also demonstrates a de-contextualized analysis that sees the headscarf as a purely religious, mostly non-coercive symbol largely devoid of political symbolism or impact on others. Neither of these is an exact parallel to the headscarf, but it is safe to say that the same NGOs would not come out in favor of Christian prayer in American schools (a religious practice), or the right to wear a swastika (once a religious symbol, now a political one) in a European classroom, because they understand the potential impact on other students and are able to appreciate the political meaning in context.

Human rights discourse also frequently centers religious freedom in this debate, de-centering sex equality. For example, in analyzing Turkey's rules, HRW focused mainly on freedom of religion, ironically only citing the prohibition on discrimination against women as a criticism of the Turkish government's ban—but not of the societal gender discrimination it is putatively designed to com-

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286. See, e.g., Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305 (1999); U.N. Human Rights Comm., *Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 550/1993*, U.N. Doc. CCPR/C/58/D/550/1993 (Nov. 8, 1996).

287. CHARLESWORTH & CHINKIN, *supra* note 15, at 249.

288. See Bennoune, *supra* note 272, especially text accompanying footnote 2.

bat.<sup>289</sup> This fails to heed the now iconic call of Kimberle Crenshaw for inter-sectionality.<sup>290</sup> She stresses the need to avoid “struggles [being] categorized as singular issues,” the importance of “resist[ing] efforts to compartmentalize experiences,” and the need “to recenter discrimination discourse at the intersection.”<sup>291</sup>

Instead, HRW criticized as Dantonesque those who “want to restrict the civil and political rights . . . of members of religious groups believed to pose a threat to a rights-respecting political order.”<sup>292</sup> However, some restrictions exist in human rights law itself, precisely to ensure the human rights of others. HRW’s international legal analysis of the Turkish rules simply concludes that “headscarves . . . do not impinge on the rights of others.”<sup>293</sup> Hence, the organization posits itself as Voltairian, as do many mainstream human rights advocates faced with such questions, and as defending “the right of every man to profess, unmolested, what religion he chooses.”<sup>294</sup> The archaic gender-exclusive language quoted here reflects exactly the result produced in certain contexts of coercion when no limits are made.

HRW concludes that today, “[t]he real challenge is finding ways to preserve basic rights in efforts to combat terror in order to strengthen the appeal of liberal, rights-respecting societies.”<sup>295</sup> This is entirely true. The question is whose basic rights one seeks to preserve—merely the individual seeking to veil or also those women around her.<sup>296</sup> The reason that defending secularism represents an important task is its impact on the human rights of all these real people, not because it is an abstract state interest. If this author has a

289. *Memorandum to the Turkish Government*, *supra* note 35, at 33–34.

290. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 167 (1989).

291. *Id.*

292. Marthoz & Saunders, *supra* note 8, at 57.

293. *Memorandum to the Turkish Government*, *supra* note 35, at 4. Elsewhere, in critiquing the French law, they have argued, “Muslim headscarves . . . have no effect on the fundamental rights and freedoms of other students . . .” Human Rights Watch, *supra* note 284.

294. Marthoz & Saunders, *supra* note 8, at 57.

295. *Id.* at 58.

296. This Article takes seriously Mari Matsuda’s appeals to use multiple consciousness as method and to make “a deliberate choice to see the world from the standpoint of the oppressed.” Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, Presented at the Yale Law School Conference on Women of Color and the Law (Apr. 16, 1988), in 14 WOMEN’S RTS. L. REP. 297, 299 (1992). The challenge here is that there are multiple oppressed constituencies and multiple oppressions making the choice of with whom to identify complex. The contextual approach is an effort to ground mediation of these choices, moving away from the abstraction which Matsuda disparages. *See id.*



quibble with the ECtHR in *Şahin*, it is that the human rights impact of secularism in protecting individuals from religious coercion is much more important than its function as an abstract state value. The Court discusses both aspects, but the margin of appreciation approach tends to emphasize the state interest. This plays into the hands of those who would write off secularism as an ephemeral excuse less important than individual human rights. It could also be misused in the future to allow limitations for statist reasons rather than human ones.

### VIII. CAUTIONS AND CONCLUSIONS

Notwithstanding the overall conclusion on *Şahin* here, it is regrettable that few women are even given voice in the debate. Seven ECtHR judges ruled in *Şahin* in the Fourth Section judgment; six were men. All of Ms. Şahin's lawyers and advisers at both levels were male. Oral argument in the Grand Chamber was made only by male advocates on either side of the issue. The author of HRW's critique, a distinguished Turkey expert, is male. This is not to disqualify male voices, but to hope rather that women of diverse views are more empowered in the discussion. It is thoroughly positive that Leyla Şahin had her days in court (both the Turkish Constitutional Court and the ECtHR). But, given the particular context, the responses to her claim were correct.

#### A. *A Dialogue with Judge Tulkens*

Despite this determination on the *Şahin* case, we must remain committed to moving away from polarization<sup>297</sup> toward latitudinarianism, and respond to thoughtful arguments from other points of view.<sup>298</sup> While the underlying ECtHR decision was unanimous, the Grand Chamber opinion gave rise to one dissent, authored by Judge Tulkens from Belgium, one of the five female judges on the seventeen-judge panel. She thoughtfully expresses some of the most common human rights-based critiques of the *Şahin* approach.

For example, she argues that the principle of sexual equality cannot be used to prohibit a woman from a practice she appears to

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297. On the dangers of polarization in the headscarf debate, see Dilek Zaptcioglu, Turkey, *Dividing the Nation* (Patrick Lanagan trans.), QANTARA.DE, Dec. 29, 2003, [http://qantara.de/webcom/show\\_article.php?wc\\_c=549&wc\\_id=12&wc\\_p=1](http://qantara.de/webcom/show_article.php?wc_c=549&wc_id=12&wc_p=1).

298. Note, for example, the counterargument in Natasha Walter, *When the Veil Means Freedom*, GUARDIAN, Jan. 20, 2004, at 21.

have freely adopted. “Equality and non-discrimination,” she submits, “are subjective rights which must remain under the control of those who are entitled to benefit from them.”<sup>299</sup> On this basis, she castigates the Court for “paternalism.”<sup>300</sup> This is thought-provoking, but also troubling. Would a person from a racial minority group who had been raised in a racist environment and had internalized the notion of her own inferiority be deemed not to be discriminated against by racist policies? Theorists have clearly identified the problem of the naturalization of hierarchy and the potential inability to articulate self-victimization in a caste society.<sup>301</sup> Precisely, those who have faced the most subordination may be least able to articulate it. Others question the appropriateness of such paradigms by pointing to positive meanings of the headscarf and the fact that some women who cover in some contexts feel independent and empowered, a fact not disputed here.

For Judge Tulkens, the Turkish circular is an unlawful violation of Leila Şahin’s right to freedom of religion.<sup>302</sup> Her conviction seems entirely grounded in the reports of hostility towards Muslims in Europe documented by the European Commission against Racism and Intolerance (ECRI), with which she concludes her opinion.<sup>303</sup> However grave and justified ECRI’s concerns in the broader European context, it is unclear how they implicate the Turkish circular. Those rules were issued by a government institution in “Turkey, a secular, multiparty democracy, the majority of whose population is Muslim.”<sup>304</sup> This projection of the legitimate non-Muslim context concern with Islamophobia onto internal debates in Muslim countries and communities also surfaces in the views of the Court’s NGO critics and should be avoided. It disappears ongoing struggles over and conflicting interpretations of such clothing, including whether or not it is even mandated by religion. Still, in her dissent, Judge Tulkens

299. *Şahin*, Grand Chamber, *supra* note 3, ¶ 12. This is particularly interesting given that the victim’s subjective judgment that a practice *is* discriminatory is not dispositive.

300. *Id.*

301. This problem was acknowledged, for example, in *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954) (citing K.B. Clark, *Effect of Prejudice and Discrimination on Personality Development*, in MID-CENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH (1950)); M. Deutscher & I. Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHO. 259 (1948); GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944). One needs to be careful of pushing this analogy too far since the material cited largely concerns children whilst Ms. Şahin is an adult. Some authors have also warned of the danger of charges of “false consciousness” in regards to this issue. See BANDA & CHINKIN, *supra* note 90. Still, given that the prohibitions of race and sex discrimination come together in most of human rights law’s bans, it warrants noting that this methodology, suggested by Judge Tulkens, raises concern in the race area.

302. *Şahin*, Grand Chamber, *supra* note 3, ¶ 13.

303. *Id.* ¶ 20.

304. Benhabib, *supra* note 128, at 157 n.26.

undoubtedly makes points that any supporter of the Şahin jurisprudence on women's human rights grounds needs to account for. The dialogue must continue.

*B. A Final Word: Uncovering the Way Forward*

Long ago Frantz Fanon warned of the "cult of the veil" that could form in the face of French colonial opposition to Algerian women wearing the *haik*. "The attention devoted to modifying this aspect . . . weave[s] a whole universe of resistances around this particular element of the culture."<sup>305</sup> While this analogy applies more accurately to the French law than to the Turkish rules, particularly because Turkey is a majority Muslim country, the removal of colonialism or a post-colonial dynamic does not entirely vitiate the observation. However, the critics of the French and Turkish approaches have also failed to convince, precisely because they have failed to offer an alternative vision of the defense of secularism or even to acknowledge its importance or to recognize in more than a token fashion the very real threats to women's human rights from fundamentalisms.<sup>306</sup>

One of the problems in trying to find the best possible approach to this difficult issue is the lack of a coherent human rights theory of secularism.<sup>307</sup> The ECtHR prepared some of the groundwork for that in *Şahin*, though this is complicated by the sensitivity of the issue at stake, and the regional nature of the European Convention. Further steps in this direction are being taken, as the Canada-based International Centre for Human Rights and Democratic Development held an unprecedented meeting of anti-fundamentalists and human rights organizations in the summer of 2005, a conversation which should continue.<sup>308</sup> A coherent gender sensitive human rights

305. FRANTZ FANON, *STUDIES IN A DYING COLONIALISM* 47 (1965).

306. For an example of a simple critique of the French law, which did not consider risks to secularism or the rights of others potentially implicated by such symbols, especially the headscarf, see AMNESTY INT'L, *supra* note 159. This Amnesty report raised legitimate concerns about the possibility of "disproportionate" enforcement against Muslim girls. For feminist critique of the inadequate response to fundamentalism from progressive and human rights circles more generally, see Seyla Benhabib, *Unholy Wars*, 9 *CONSTELLATIONS* 34 (2002), and Rosalind Petchesky, *Phantom Towers: Feminist Reflections on the Battle Between Global Capitalism and Fundamentalist Terrorism*, in *NOTHING SACRED: WOMEN RESPOND TO RELIGIOUS FUNDAMENTALISM AND TERROR*, *supra* note 15, at 357.

307. See Michael Freeman, *The Problem of Secularism in Human Rights Theory*, 26 *HUM. RTS. Q.* 375 (2004). Freeman discusses related issues, but never gender or women's human rights, a significant omission.

308. See RIGHTS AND DEMOCRACY, *FUNDAMENTALISMS AND HUMAN RIGHTS: REPORT OF THE MEETING* (May 12–14, 2005), [http://www.dd-rd.ca/site/PDF/publications/fundamentalism\\_hr.pdf](http://www.dd-rd.ca/site/PDF/publications/fundamentalism_hr.pdf). The American Society of International Law also hosted its first ever panel on Human Rights and Fundamentalisms at its 2006 Centennial Meeting. See

theory of secularism could be a valuable tool for negotiating between freedom of religion and gender equality, especially in today's climate of religious extremism. In the meantime, use of a careful, contextual approach to resolving these seemingly intractable conflicts offers the possibility of uncovering results more conducive to a broad enjoyment of human rights.

## IX. EPILOGUE

I end as I began, on a personal note. I confess that I have struggled with this issue. I reject fundamentalisms' absolutes and must reflect on my own. In the spirit of Angela Harris, "I invite the critique and subversion of my own generalizations."<sup>309</sup> Still, I also reflect on another drive into Algiers with my father during the terrible Algerian civil war of the 1990s. It echoed my first glimpse of a veiled woman years before, with which I started this Article. The fundamentalist armed groups on one side of the civil war killed many women who went out unveiled. I asked my father, who was himself receiving death threats from such groups for his secular views, if I should cover my head when I visited him. He insisted that I did not have to. At that time, when I saw covered women on the street, I no longer focused on shame. I knew that my bare head, like those of the thousands of Algerian women who refused to submit, was marked with a target by my not being veiled. Not-being-veiled is a condition that can only exist in the presence of veiling. Though not in any way the responsibility of individual veiled women whose human rights I also respect, in that context their covering was my uncovering.

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*Human Rights and Fundamentalisms*, 100 PROC. AM. SOC. INT'L L. 407–21 (2006).

309. Harris, *supra* note 1, at 585.