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**Critical Reflections on the Structural Legal Power in Human Rights
Law**

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ABSTRACT

In Europe, a wide range of religion-based practices have been at the center of public debate over the last two decades. This paper focuses on one such practice: the wearing of Islamic veils in public spaces in Europe. Through one representative case study, I explore how the Muslim woman is constructed by the European Court of Human Rights. I offer a diagnosis of the Court's ontological position, which, I argue, is shared by the Court's legal-feminist critics. Later, I turn to the fields of cultural sociology, social anthropology, hermeneutics, law, and political theory to develop an 'alternative ontological position', a position that situates Muslim women as neither 'political' nor 'suffering' others, but as morally evaluative humans distinctly and deeply informed by their unique cultural experiences. Having set forth that alternative position, this paper argues that in cases involving Muslim women, the determinations of the European Court of Human Rights, serve to – both actively and passively – maintain, protect, and enforce white power and control as defined by critical race scholars, all under the guise of gender equality.

KEYWORDS:

Human Rights, European Court of Human Rights, Islamic veils, Muslim women, legal feminism

Critical Reflections on the Structural Legal Power in Human Rights Law

1. Introduction

France

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

The Guardian, July 2013

Canada

Fatemeh Anvari, a third-grade teacher in the town of Chelsea, was told earlier this month [December 2021] that she would no longer be allowed to continue in the role because her headwear ran afoul of Bill 12, a law passed in 2019. The law has an outsized impact on Muslim women and in schools in the province, where 74.5% of teachers are women.²

The Guardian, December 2021

Germany

¹ Angelique Chrisafis, *France's headscarf war: 'It's an attack on Freedom'*, The Guardian (July 22, 2013) <https://www.theguardian.com/world/2013/jul/22/frances-headscarf-war-attack-on-freedom>.

² Leyland Cecco, *Outrage as Quebec teacher removed from classroom for wearing hijab*, The Guardian (Dec. 13, 2021) <https://www.theguardian.com/world/2021/dec/13/canada-quebec-teacher-removed-classroom-hijab>.

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

AL Jazeera News, September 2021

The above stories are neither surprising nor new. Over the last two decades, several European countries have enacted national laws prohibiting the wearing of religious symbols in public spaces, such as the Christian crucifix, the Jewish skullcap, and the various types of Islamic coverings (veils), such as the burqa, niqab, or hijab.⁴ In the wake of these controversial laws, many cases involving Islamic veils have reached the European Court of Human Rights (ECtHR), which has had to rule on their compatibility with fundamental rights.⁵

³ Clare Roth, *Muslim Women Struggle with Germany’s ‘Hijab Ban’ in Workplaces*, ALJAZEERA (Sept. 24, 2021), <https://www.aljazeera.com/news/2021/9/24/muslim-women-struggle-with-germanys-hijab-ban-in-workplaces>.

⁴ There are differences between the hijab, niqab, and burqa. All of them are kinds of coverings worn by Muslim women. However, while the hijab covers the head and hair, the burqa is a full-body covering including a mesh over the face, and the niqab is a full-face covering leaving an opening only for the eyes.

⁵ See, e.g., *Dahlab v. Switzerland*, App. No. 42393/98 (Feb. 2, 2001), <https://hudoc.echr.coe.int/eng?i=001-22643> (The Dahlab Case); *Sahin v. Turkey*, App. No. 44774/98 (June 29, 2004), <https://hudoc.echr.coe.int/eng?i=003-1040422-1076658> (The Sahin Case, Judgment of 2004); *Sahin v. Turkey*, App. No. 44774/98 (Nov. 10, 2005), <https://hudoc.echr.coe.int/eng?i=001-70956> (The Sahin Case, Judgment of 2005); *S.A.S. v. France*, App. No. 43835/11 (July 1, 2014), <https://hudoc.echr.coe.int/eng?i=001-145466> (The French Case).

Examination of the ECtHR cases upholding the various bans on wearing Islamic veils reveals an intriguing incongruity between the principles underlying the women's petitions and the reasoning behind the Court's decisions. In most cases, the women argue that these bans violate multiple rights, such as rights to religion, education, work, and equality. The Court, however, has chosen to focus primarily on whether these laws violate the 'freedom of religion' under Article 9 of the European Convention on Human Rights.⁶ The Court has given virtually no attention to Muslim women's advocacy for their rights to equality, work, and education; it has been indifferent to women's opportunity to flourish professionally and personally on their own terms.⁷

The Court's approach rests on two alarming assumptions: *first*, that the veils are a sign of religious oppression; and *second*, that when Muslim women insist that they wear the veil of their own free will, they are not being truthful. The ECtHR suspects that the Muslim women's position—that they wear the veil out of free choice—represents 'false consciousness.' Such assumptions lead the Court to conclude that by upholding the bans on Islamic veils, the Court is actually 'saving' these women or 'liberating' them from the oppression of their religion—Islam—and from Muslim patriarchy. Accordingly, the Court justifies its support of various veil-bans as promoting the principle of gender equality—a principle that, from the ECtHR's

⁶ Article 9 of the Covention: "(1) everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." EUROPEAN COURT OF HUMAN RIGHTS & COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (2013), https://www.echr.coe.int/documents/convention_eng.pdf [Article 9].

⁷ The first time the ECtHR ruled in favor of Muslim women's freedom (of religion) to wear a hijab was in September 2018 in a Belgian case. The Court held that a prohibition on wearing the hijab in the courtroom constituted an infringement of Article 9 of the European Convention on Human Rights. See *Lachiri v. Belgium*, App. No. 3413/09 (Sept. 18, 2018), <https://hudoc.echr.coe.int/eng?i=001-186461>.

perspective, benefits not only these specific Muslim women but also many other women in society.

These series of judgments on hijab bans have given rise to considerable ongoing public and legal academic debate. Much scholarship within and beyond Europe has criticized the Court's judgments. Critical voices have arisen among legal experts on religion and minorities' rights, legal-feminist scholars, constitutional law scholars, and many others—all strikingly united in their opposition to the Court's judgments.

A significant portion of the academic literature has focused on critically examining the ECtHR interpretation of the freedom of religion,⁸ joining an ongoing scholarly discussion calling for 'protection' of religious minorities, asserting that the historical trajectory and continuing vulnerability of these minorities require that their rights receive special protection.⁹ Another significant portion of the literature has focused on the Court's seeming antipathy toward the practice of wearing the hijab. This literature argues that the ECtHR's stance is based on stereotypes and contributes to Islamophobia.¹⁰ Some scholars saw this approach of the Court toward Islam and the practice of wearing the hijab as an expression of its wider Eurocentric outlook¹¹—a critique frequently directed at the human rights corpus and institutions.¹²

⁸ See, e.g., Christopher Bebelieu, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the Sahin Judgment*, 12 COLUM. J. EUR. L. 573 (2005); Benjamin Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey*, 91 CORNELL L. REV. 129 (2005); Talvikki Hoopes, *The Leyla Şahin v. Turkey Case Before the European Court of Human Rights*, 5 CHINESE J. INT'L L. 719 (2006); Tom Lewis, *What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation*, 56 INT'L & COMPAR. L. Q. 395 (2007); Dawn Lyon & Debora Spini, *Unveiling the Headscarf Debate*, 12 FEMINIST LEGAL STUD. 333 (2004).

⁹ See, e.g., Natan Lerner, *The Nature and Minimum Standards of Freedom of Religion or Belief*, BYU L. REV. 905 (2000); NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* (2nd ed. 2003).

¹⁰ See, e.g., Lourdes Peroni, *Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising*, 10 INT'L J. L. IN CONTEXT 195 (2014).

¹¹ See, e.g., Ergul Celiksoy, *A Critical Analysis of the Jurisprudence of the ECtHR on Islamic Headscarves and Religious Symbols*, 8 HUM. RTS REV. 81 (2018).

¹² Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001).

Comparing the Court's judgments on the hijab bans with other cases in which restrictions on Christian symbols were brought before the Court reinforced these critiques. In the latter cases the Court ruled in favor of the Christian applicants, protecting their freedom of religion under Article 9.¹³

Other criticism, especially from legal feminist scholars, referred to the case of Muslim women as a unique one due to—borrowing from Kimberlé Crenshaw¹⁴—their intersectionality. According to these critiques, gender equality must be understood as challenging multiple and intersectional forms of disadvantages. Therefore, from their perspective, the formalistic conceptualization of discrimination and the Court's simplistic and paternalistic understanding of gender equality is insensitive to the Muslim women's intersectionality.¹⁵

By focusing on one such representative case, *Lucia Dahlab v. Switzerland*,¹⁶ this paper seeks to challenge the Court's view of Muslim women as victimized, lacking agency, and perhaps even religiously-obsessed. According to this paper's analysis, in cases involving Muslim women the determinations of the ECtHR serve to —both actively and passively— maintain, protect, and enforce white power and control, all under the guise of gender equality. I argue that by justifying the various veil bans by relying on the principle of “gender equality” and the purported promotion of the goal of “saving” and “liberating” Muslim women, the courts and

¹³ The Case of *Lautsi v. Italy*, known as the “Crucifix Case”, the Court accepted Italy's position that crucifix is considered as a religious symbol and having them in public schools is not harmful. In another case, *Ewida v. United Kingdom*, the Court accepted the petition of a British Airways employee who was asked to cover up a necklace with a Christian cross. The Court found that her rights had been violated under Article 9 of the European Convention on Human Rights. See: *Lautsi v. Italy*, App. No. 30814/06 (Mar. 18, 2011), <https://hudoc.echr.coe.int/eng?i=001-104040> (The *Lautsi* case); *Eweida v. UK*, App. No. 48420/10 (Jan. 15, 2013), <https://hudoc.echr.coe.int/eng?i=001-115881>.

¹⁴ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139 (1989).

¹⁵ See, e.g., Ivana Radacic, *Gender Equality Jurisprudence of the European Court of Human Rights*, 19 EUR. J. INT'L L. 841 (2008).

¹⁶ The *Dahlab* Case, Judgment of 2001.

government are maintaining and preserving white supremacy, as defined by critical race scholars.

To advance this argument, this paper examines the Court's ontological position that views the Muslim woman as always embedded in power struggles, passively shaped and created by her religion and culture, a woman who lives in a false consciousness and makes choices not out of free choice. In response, an alternative approach will be suggested. This alternative approach recognizes that Muslim women are embedded in worlds of meaning and significance, worlds that not only represent part of a culture, but that also invest the individual with the agency to choose to use her culture and religious tools to fulfill her needs and meet the challenges of different situations in life. For this purpose, I apply principles from the disciplines of law, political theory, anthropology, and cultural sociology devoted to understanding and exploring how people perceive and act in the world. Later, this paper analyzes how white supremacy drives judgments of the European Court of Human Rights in the case of *Lucia Dahlab*, by using critical race theory (CRT) insights devoted to understanding how racism has shaped public policy and exploring the idea that race is a social construct embedded in legal systems and policies.

2. Case Law: *Lucia Dahlab v. Switzerland*

This section presents the case of *Lucia Dahlab v. Switzerland* (2001), adjudicated at the European Court of Human Rights,¹⁷ focusing on it as representative of many other cases dealing with similar laws banning Muslim women in Europe from wearing the hijab.

Lucia Dahlab was born in 1965 as a citizen of Switzerland and worked as a primary school teacher in Geneva. In March 1991, two years after her teaching appointment began, she converted to Islam and began wearing the hijab. Four years after her conversion, in May 1995,

¹⁷ The Dahlab Case, Judgment of 2001.

the school inspector for the Vernier district informed the Canton of Geneva Directorate-General for Primary Education that Dahlab regularly wore a hijab at school. The inspector added that she had never received any comments from parents on the subject. However, in June 1996, Dahlab was asked by the Director-General for Primary Education to cease wearing the hijab while carrying out her professional duties as a teacher, as the practice contravened Section 6 of the Geneva Public Education Act¹⁸ and constituted “an obvious means of identification imposed by a teacher on her pupils in the public secular education system.”¹⁹ In August of 1996, Dahlab appealed that decision to the Geneva Cantonal Government, which dismissed her appeal on the grounds that:

Teachers must [...] endorse both the objectives of the State school system and the obligations incumbent on the education authorities, including the strict obligation of denominational neutrality [...] The clothing at issue [...] represents [...] regardless even of the appellant’s intention, a means of conveying a religious message in a manner which in her case is sufficiently strong [...] to extend beyond her purely personal sphere and to have repercussions for the institution she represents, namely the State school system.²⁰

After all the state proceedings had been exhausted, the case went on to be heard in the ECtHR. Dahlab argued that a ban on wearing the hijab while performing her teaching duties violated her freedom to manifest her religion, as protected under Article 9 of the European Convention on Human Rights.²¹ Dahlab further reasoned that the prohibition discriminated on

¹⁸ Section 6 of the Geneva Public Education Act provides: “The public education system shall ensure that the political and religious beliefs of pupils and parents are respected.”

¹⁹ *The Dahlab Case*, Judgment of 2001, at 1.

²⁰ *Id.* at 2.

²¹ *Article 9, supra* note 6.

the basis of gender, as set forth under Article 14 of Convention (Prohibition of Discrimination),²² in that a man belonging to the Muslim faith could teach at a Swiss state school without being subjected to any form of prohibition. She also averred that the Swiss courts had erred in accepting that the measure had a sufficient basis in law and in considering that wearing a hijab presented a ‘threat’ to public safety and to the protection of public order. She observed that the fact she wore a hijab did not appear to have caused any disturbance within the school.

The ECtHR chose to concentrate its examination on whether the ban violated Article 9. The allegation of violation of the right to equality under Article 14 received minimal attention and, in the end, was rejected:

The Court notes in the instant case that the measure by which the applicant was prohibited, purely in the context of her professional duties, from wearing an Islamic headscarf was not directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the State primary-education system. Such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith. The Court accordingly concludes that there was no discrimination on the ground of sex in the instant case.²³

In its judgment, the Court balanced the freedom of religion with the arguments of Switzerland, accepting that the aims of the hijab ban were legitimate for the purposes of Article 9(2), stating:

²² Article 14 of the Convention (Prohibition of discrimination): “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” EUROPEAN COURT OF HUMAN RIGHTS & COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (2013), https://www.echr.coe.int/documents/convention_eng.pdf [Article 14].

²³ *The Dahlab Case*, Judgment of 2001, at 14.

The applicant further argued that the measure did not pursue a legitimate aim. Having regard to the circumstances of the case and to the actual terms of the decisions of the relevant authorities, the Court considers that the measure pursued aims that were legitimate for the purposes of Article 9 § 2, namely the protection of the rights and freedoms of others, public safety, and public order.²⁴

The Court offered three main rationales. First, it argued that the hijab is a powerful external symbol and, therefore, the contention that it may influence young children aged between four and eight could not be dismissed outright:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils.²⁵

Second, the Court contended that the wearing of the hijab was forced upon women:

... it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Quran and which, as the Federal Court noted, is hard to square with the principle of gender equality.²⁶

Third, the Court asserted that wearing the hijab is difficult to reconcile with the values that teachers should convey to their pupils, concluding:

²⁴ *The Dahlab Case*, Judgment of 2001, at 12.

²⁵ *Id.* at 13.

²⁶ *Id.*

It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.²⁷

The European Court of Human Rights ruling in the case of Lucia Dahlab affected a number of subsequent Court rulings. For instance, in the case of Leyla Sahin v. Turkey,²⁸ a case of a Muslim woman, born in 1973 in a traditional Islamic family, considered it her religious duty to wear the Islamic hijab. It was in her fifth year of study at the Faculty of Medicine at Istanbul University that the university issued a directive regulating students' admission onto the university campus, banning students from wearing the Islamic hijab, and forbade other students with beards from entering lectures.

After being dismissed by the Turkish constitutional court, the case went on to be heard in the ECtHR. As in the case of Lucia Dahlab, here too, the ECtHR accepted Turkey's position that the ban was intended to fulfill the legitimate purpose of protecting the rights of others and promoting public order. Referring in its ruling to the *Dahlab* case, it determined that wearing the hijab is a practice imposed on women, not chosen by them.²⁹ On the question of whether the ban was "necessary in a democratic state," the Court accepted Turkey's position that the ban was indeed necessary for the protection of secularism, because it constituted a necessary basis for the protection of democratic values and gender equality in Turkey. Similar to the Dahlab case, here too, the Court accepted the argument that allowing women to wear a hijab could affect others and serve as a means of pressuring other women who chose not to wear it.

3. The Victim Myth: The Muslim Woman Subjectivity and Agency

²⁷ *Id.*

²⁸ The Sahin Case, Judgment of 2004.

²⁹ The Sahin Case, Judgment of 2004, ¶97.

A review of the European Court of Human Rights judgments and reasoning in cases concerning Muslim women, such as the *Lucia Dahlab* case, reveals a troubling ontological position wherein Muslim women are presented as perennial victims and treated as inferiors. Applying interdisciplinary theories,³⁰ this section seeks to shatter this victim myth, arguing that Muslim women are neither in need of “saving” nor “liberating,” and that, as I will show later, European governments and courts are using this justification for other political purposes, such as maintaining white power, control and supremacy.

The Muslim Woman Subject

The Court appears to hold that the foundation of the social realm comprises relationships of power and control between autonomous individuals. These individuals are trapped, to varying degrees, in systems of oppression, such as religion, nationality, gender, and social class.³¹ Therefore, according to the Court’s ontological position, Muslim woman’s will is necessarily trampled by religious and masculine oppressive forces. Trapped within tyrannical power structures, she suffers under the discriminatory demands of religion, culture, and nation.

This is reflected in the court’s ruling in the case of *Dahlab*, where the Court contended that the hijab appears to be “imposed” on women by a precept and does not correspond to the principle of gender equality. The same reasoning informs the *Leyla Sahin* case, where the court suspected that the Muslim woman’s position that she wore the hijab out of free will and choice was not truthful, identifying the wearing of the hijab with female oppression. Accordingly, the Court contended that, by upholding these laws banning Muslim women from wearing the hijab

³⁰ This interdisciplinary approach is consistent with CRT’s interdisciplinary character, in which the intersection of race (in the broad sense) and the law crosses disciplinary boundaries. *See, e.g.,* SAGE RESEARCH METHODS FOUNDATIONS (Paul Atkinson et al., eds., 2019).

³¹ Andrew Abbott, *The Future of the Social Sciences: Between Empiricism and Normativity*, 71 ANNALES HISTOIRE SCIENCES SOCIALES [English ed.] 343 (2016).

in public spaces, it was actually protecting them—and other women in European society—from ‘external pressure.’

Rather than viewing the Muslim woman only as subjugated by oppressive forces, I propose that the Muslim woman is also a subject immersed in a world of meanings, and embedded in social layers of significance within which her moral life and her experiences and worldview are shaped.

Robert Post appropriately warns that rejecting the ontology of individualism is not meant “to imply [...] the persons in communities are robots, automatons programmed inevitably to follow fixed social norms.”³² Rather, subjects in communities are agents who find themselves already in a world even as they actively participate in shaping and creating the social meanings and norms of that world. That is, agency does not imply a contextless individual, for no such subject exists. An individual has agency when the context within which she finds herself is open to multiple possibilities and the choice among those possibilities is constitutive, in part, of the character of the subject.

The idea of the subject as necessarily immersed in layers of meaning and unable to be disconnected from them echoes the communitarianism approach that grew in response to John Rawls’ overly individualistic conception of the self. Charles Taylor, for instance, opposed Rawls’ liberal view that “men are self-sufficient outside of society.”³³ Instead, Taylor defended the Aristotelian view: “Man is a social animal, indeed a political animal, because he is not self-sufficient alone, and in an important sense is not self-sufficient outside a polis.”³⁴ A similar

³² Robert Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *DEMOCRATIC COMMUNITY: NOMOS XXXV* 163, 167 (John W. Chapman & Ian Shapiro eds., 1993).

³³ Charles Taylor, *Philosophy and the Human Sciences*, in *PHILOSOPHICAL PAPERS* 2, 13 (1985). CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

³⁴ Taylor (1989), *Id.*, at 190.

ontology can be found in Paul Kahn's book *Putting Liberalism in Its Place*.³⁵ Kahn finds that traditional liberal theory, especially as expressed by Rawls, does not provide an adequate explanation of the world of meaning upon which a liberal community depends.

Most modern political theory, however, fails to fully address the idea that it is impossible to divorce subjects from the layers of meaning in which they are embedded. This concept is central to the fields of social anthropology and cultural sociology, both of which view culture as a critical component for explaining social phenomena.

The cultural sociology scholarship, the development of which can largely be credited to Jeffrey Alexander, is a good example of this approach, which differs in specific ways from that of the sociology of culture.³⁶ While the latter considers culture to be a dependent variable that is a product of other factors, such as economics and politics, the former sees culture as an independent variable that possesses relative autonomy in shaping actions. While the sociology of culture paradigm tends to conceptualize individuals as constantly embedded in power struggles and material inequality, cultural sociology illuminates the powerful role that culture plays in shaping social life. For this school of thought, there is no individual prior to the social, no singular individual confronting power. Conflict is not individual versus power or society; rather, conflict is experienced by persons who find themselves to be members of multiple communities that make competing claims or to occupy different and incompatible functions within the same community.

My alternative ontology also draws on the work of Saba Mahmood, an anthropologist who taught at Berkeley, was influenced by Talal Asad, and wrote on gender, religious politics, secularism, and Muslim and non-Muslim relations in the Middle East. Making a particular claim

³⁵ PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* (2005).

³⁶ JEFFREY C. ALEXANDER, *THE MEANINGS OF SOCIAL LIFE: A CULTURAL SOCIOLOGY* (2003).

about Muslim women, Mahmood's work shows what can go wrong when one brings an incorrect ontology to the study of these women who belong to a religious non-liberal group. In her article, *Feminist Theory, Embodiment, and the Docile Agent*, she explores how a particular notion of human agency in feminist scholarship—one that seeks to locate the political and moral autonomy of the subject in confrontation with power—is brought to bear on the study of Muslim women involved in patriarchal religious traditions. Mahmood argues that this model of agency restricts feminist scholars' ability to understand and neutrally interrogate the lives of Muslim women whose desires, affect, and will have been shaped by such non-liberal traditions.³⁷

In her book, *Politics of Piety: The Islamic Revival and the Feminist Subject*, about the women's mosque movement in Egypt, Mahmood begins with the question many Western feminists ask about women who support pro-Islamic efforts: "Why would such a large number of women across the Muslim world actively support a movement that seems inimical to their own interests and agendas?"³⁸ Mahmood challenges the framework from within which such a question is asked. Her ethnographic study exposes assumptions made by both feminist theory and secular liberal thought about the nature of the self, agency, and politics. Mahmood suggests we consider other ways of conceptualizing the self, authority, and tradition—and, in particular, that we endeavor to identify multiple forms of agency beyond that of subversion.

Mahmood describes the "women of the mosque" as moral agents rooted in a religious, non-liberal, cosmological logic. Their experience of agency is also radically different from that presumed by a liberal conception of agency. It is an experience that is nurtured by a connection to tradition rather than defiance of it, by fulfilling duties rather than exercising rights, and by

³⁷ Saba Mahmood, *Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival*, 16 CULTURAL ANTHROPOLOGY 202 (2001).

³⁸ SABA MAHMOOD, POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT 2 (2005).

sanctifying the existing order rather than seeking to dismantle it. This interpretive shift enables Mahmood to re-examine the ontological position of liberal feminism, which presupposes a necessary connection between the personal autonomy of the individual and self-fulfillment. Mahmood emphasizes that the work of radical feminist scholars, such as Judith Butler, also suffers from these limitations. These scholars also tend—despite their critical stance—to focus on actions that seek to disrupt social norms by challenging the existing social order.³⁹ These limitations, Mahmood contends, also characterize post-colonial approaches, such as that of Gayatri Chakravorty Spivak, best known for her essay *Can the Subaltern Speak?*⁴⁰ and considered one of the most influential post-colonial intellectuals.

More examples of the above were appeared in the interviews I conducted with Muslim women. When I asked, *Amal*,⁴¹ a Muslim student, “What does the hijab mean to you?” she offered a variety of different answers. From Amal’s answer, we can learn that not only is each woman able to ascribe different meanings to a hijab, but also one woman may ascribe various meanings at the same time. As Amal put it:

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

Eman,⁴² another Muslim student, repeated similar observations that had emerged in my conversation with Amal about the various meanings associated with the hijab. However, she

³⁹ *Id.* at 23.

⁴⁰ Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Cary Nelson & Lawrence Grossberg eds., 1988).

⁴¹ Amal, a 20-year-old Muslim student in her first year of studies at Tel Aviv University.

⁴² Eman, a 24-year-old Muslim student in her second year of studies at Tel Aviv University.

emphasized her surprise when she was asked about her hijab by secular women who study with her:

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

Regarding the encounter between Muslim women and secular Israeli Jewish women, *Heba*⁴³ expressed a sense of discomfort when she meets secular women colleagues on Zoom:

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

These examples show that what is missing in the discussion of the states and the courts is the voice of women, who made independent choices to either wear or not wear the hijab. According to the interviews, the hijab has many deep meanings, and represents something far more than a sign of oppression, as concluded by the Court. Perhaps in the eyes of the secular, western European, the hijab is a symbol of oppression, but in the eyes of others, especially those who choose to wear it, it has several layers of meanings. My attempts to have the Muslim women's voices heard in the discussion is consistent with Mari Matsuda's suggestion that those

⁴³ Heba, a 23-year-old Muslim student in her second year of studies at Tel Aviv University.

who have experiences with discrimination speak with a special voice to which we should listen.⁴⁴ According to Matsuda, “looking to the bottom – adopting the perspective of those who have seen and felt the falsity of the liberal promise – can assist critical scholars with the task of fathoming the phenomenology of law and defining the elements of justice.”⁴⁵

While I agree with the methodology Matsuda suggested, I think we should be aware of two things. *First*, we must be cognizant of the terminology that we use. The principle of linguistic relativity, known as the “Sapir-Whorf Hypothesis,” and the relation between language and thought has received attention in different academic fields, such as anthropology and philosophy. According to this principle, the structure of a language affects its speakers’ worldviews or cognition, and, consequently, people’s perceptions reflect their spoken language.⁴⁶ Put differently, the very use of the terminology of “bottom” to refer to certain groups makes these groups vulnerable to a constant hierarchy, in which they are indeed at the “bottom.” *Second*, we should be aware of and sensitive to the factors that might affect or shape people’s answers. Heba’s answer, for instance, raises a concern about how secular members of society, who are usually part of that society’s cultural hegemony, could make others, the non-secular, hesitate and question themselves. The secular reaction could put the non-secular individuals into a situation of wanting to satisfy the other by adjusting their actions or choices so that the other won’t find them “strange” or “abnormal.” Some scholars have noted this phenomenon,

⁴⁴ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations* 22 HARV. C.R.-C.L. L. REV 323 (1987).

⁴⁵ *Id.*, at 324.

⁴⁶ See, e.g., Paul Kay & Willett Kempton, *What is the Sapir-Whorf Hypothesis?*, 86 AM. ANTHROPOLOGIST 65 (1984); Wittgenstein also noted how the words we choose to use to describe or to conceptualize things affect the way we perceive these things. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (Gertrude Elizabeth & Margaret Anscombe eds. & trans., Blackwell rev. 3rd ed., 2001) (1953).

characterizing it as part of the colonial project which aims to effect changes not only physically but also consciously.⁴⁷

The Muslim Woman's Agency

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

Current sociological theories reflect a new conception of the relationship between people and the culture (or religion) to which they belong. In the 20th century, theoreticians viewed culture as a unified system, working hierarchically downwards from above, instructing people how to act and dominating how people shape the various meanings they give to their lives. Challenging this approach, recent cultural sociological theories have begun to adopt a notion of culture as something to be used by people. These new theories submit that people don't merely live within a culture, passively absorbing its attributes, but actively draw upon elements of that culture to inform their behavior and decision-making. They thus use "cultural equipment" to make sense of their world.⁴⁸ Other scholars sharing this approach suggest that people selectively use culture to inform or justify behavior rather than simply being affected by it without question. Alexander,⁴⁹ for example, posits that culture is not only a product of meaning-making processes, but itself possesses a relative autonomy in shaping actions and institutions.

⁴⁷ Allen Chun, *Introduction: (Post) Colonialism and its Discontents, or the Future of Practice*, 14 CULTURAL STUD. 379 (2000).

⁴⁸ See, e.g., Melissa A. Milkie & Kathleen E. Denny, *Changes in the Cultural Model of Father Involvement: Descriptions of Benefits to Fathers, Children, and Mothers in Parents' Magazine, 1926-2006*, 35 J. FAM. ISSUES 223 (2014).

⁴⁹ ALEXANDER, *supra* note 36.

Ann Swidler pioneered this new approach to culture, perceiving culture as a frame of reference to be used by individuals, offering them different toolkits for constructing their action strategies,⁵⁰ providing individuals with a certain degree of freedom of choice and actions for navigating the world, and enabling each person to find the most suitable course. Swidler shifted the focus to a cultural toolkit of symbols, stories, rituals, and worldviews as motivators of strategies of actions that people use to cope with various kinds of problems. Consequently, culture's significance lies not in determining ends of action, but in providing cultural components that can be used to construct strategies of action. By referring to culture as a toolkit offering certain choices, we can better ascertain how people act within their cultures in the course of creatively applying the culture's selection of elements to meet the challenges of diverse situations and contexts.

A practical example of the above, involving how Muslim women use their hijab for their own interests, I encountered during the interviews I conducted. For instance, when I asked *Suha*,⁵¹ a student who used to appear in some of her virtual classes without the hijab, about her choice to do so despite wearing the hijab on a regular basis, she responded:

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

Suha's response, however, aroused my curiosity about the other women who chose to wear the hijab in our virtual meetings, despite the fact that we were all Muslim women.

⁵⁰ Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOCIO. REV. 273 (1986).

⁵¹ *Suha*, a 23-year-old Muslim student in her first year of studies at Tel Aviv University.

Therefore, when I asked these Muslim women about this I received very revealing and original answers. *Abeer*,⁵² for example, emphasized how the hijab help her to feel the same “formality” she had felt in the physical classroom before the pandemic:

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

Unlike Suha, Abeer chose to wear the hijab, despite having the option and choice not to wear it, because wearing it helped her feel and appear as a more “serious” student. Another Muslim woman student, *Faten*,⁵³ gave a different answer, explaining that when she puts on the hijab, she feels more “adult,” or “educated” and therefore people perceive her as such, and that she doesn’t want to be a “little girl anymore”; she wants to be an “educated” woman:

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

From these answers we can learn that some women perceive the hijab as attire that signifies modernity and education, lending them more credibility or a heightened sense of formality.

Other examples of how the hijab can be used in creative ways by Muslim women can be found in several ethnographic works carried out by anthropologists studying gender in Muslim communities. For example, in her ethnography of women in the mosque movement in Egypt, anthropologist Saba Mahmood, referenced earlier, has shown that this form of dress is perceived

⁵² *Abeer*, a 21-year-old Muslim student in her second year of studies at Tel Aviv University.

⁵³ *Faten*, a 20-year-old Muslim student in her second year of studies at Tel Aviv University.

as part of a bodily means of cultivating virtue, the outcome of their professed desire to be close to God.⁵⁴ Other examples appear in the work of anthropologist Hanna Papanek who described the burqa as a “portable seclusion,”⁵⁵ and following her, anthropologist Abu-Lughod referred to the burqa as “mobile homes,” noting that many saw the garb as “a liberating invention because it enabled women to move out of segregated living spaces while still observing the basic moral requirements of separating and protecting women from unrelated men.”⁵⁶

The previous sections sought to challenge the way Muslim women are presented by the ECtHR – as victims and as women always subjected to oppression. Instead, I suggested an alternative position, positing the Muslim woman as a subject embedded in a world of meanings, shaped by it, but also using it for her own needs and interests. In this way, I sought to shatter the victim myth, to point out in the next part that reversion to this myth is part of a broader political rhetoric the purpose of which is to maintain, perhaps strengthen the white power, interests, and supremacy.

4. Unveiling the Real Problem: White Supremacy, Not Islam, Nor the Veil

The term “white supremacy” refers to the belief that white people are superior to those of other races and should therefore dominate these “lesser” races. This belief favors the maintenance and defense of any power and privilege held by white people. In the context of Critical Race theory (CRT), white supremacy also refers to a social system in which white

⁵⁴ Saba Mahmood, *Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival*, 16 CULTURAL ANTHROPOLOGY 202 (2001).

⁵⁵ Hanna Papanek, *Purdah in Pakistan: Seclusion and Modern Occupations for Women*, in SEPARATE WORLDS: Studies of Purdah in South Asia 190 (Hanna Papanek & Gail Minault eds. 1st ed. Columbia: South Asia Books, 1982).

⁵⁶ Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and its Others*, 104 Am. Anthropologist 783, 785 (2002). Some scholars criticized both Abu-Lughod and Papanek ideas that the burqa is not an object of women’s oppression but rather of their liberation. These critics argue that there is something inherently misogynistic about the burqa. See, e.g.,: Karina Jouglia, *The Ideology of the Veil: Fundamentally Misogynistic or Fundamentally Misunderstood?*, 10 MORNINGSIDE REV. 40 (2014), <https://journals.library.columbia.edu/index.php/TMR/article/view/5431>.

people enjoy structural advantages and privilege greater than those of, and even at the expense of, other ethnic groups.

Although CRT developed in American legal academic circles,⁵⁷ it can be applied beyond the national boundaries of the United States. As Douzinas and Gearey put it: “CRT provokes a critical thinking that is not limited to a historical time and place, but confronts law’s complicity in the violent perpetuation of a racially defined economic and social order.”⁵⁸ Within European legal scholarship, however, CRT has received very little attention. Mathias Moschel has scrutinized the narrow legal definition, interpretation, and implementation of what constitutes racism and racial discrimination according to European legislators and courts. Focusing on the case of French Republican color-blindness, he suggests that CRT can contribute to a critical thinking on race and law in Europe.⁵⁹ According to him, “the result is that from a socio-legal point of view Europe emerges as a place of racism without race and without (or with very few) racist. This approach can be defined as a European color/race-blindness.”⁶⁰

This section will continue with the approach suggested by Mathis Moschel, tracing different examples of white supremacy within the European Court of Human Rights’ judgments. First, it shows how the interests and perceptions of white subjects are placed at the center of the legal discussion and are assumed as “normal.” And, second, it critically scrutinizes the Court’s insistence on focusing on Article 9’s Freedom of Religion, while giving only minimum attention to the women’s arguments about violations of other rights, such as the right to equality.

⁵⁷ See, e.g.,: Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991).

⁵⁸ COSTAS DOUZINAS & ADAM GEAREY, *CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE* 259 (2005).

⁵⁹ Mathias Möschel, *Race in Mainland European Legal Analysis: Towards a European Critical Race Theory*, 34 ETHNIC RACIAL STUD. 1648 (2011).

⁶⁰ *Id.* at 1650.

Who Matters and Who Does Not?

An analysis of the European Court of Human rights judgment in the case of Lucia Dahlab reveals to what group the priority is given. The judgment raises a disturbing picture in which the rights of non-actual others (i.e., “the public order,” “the public safety,” “other women,” “pupils in school”) are taken into account rather than the rights of the actual woman in the case. These non-actual others are actually white people who belong to the hegemony in Europe, and who are given more priority by the court than are the actual women, those standing in the courtroom.

In the case of Lucia Dahlab, the court argued that the hijab is a “powerful external symbol,” so much so that it cannot be denied outright that it may have an effect on young children aged between four and eight, an age at which, according to the court, children wonder about many things and are also more easily influenced than older pupils. While I do agree with the claim that pupils are most influenced at these ages, as much research shows,⁶¹ However, the possibility of taking advantage of this impressionable age to educate pupils, especially in a plural and democratic society, to respect and accept the other who comes from a different culture, has been overlooked. This possibility of being influenced could be used to present the other as not abnormal, but as acceptable; normal, also, in the sense of an “other” who simply belongs to another community, without hierarchy between groups. Instead, the school, supported by the law and courts, chose to maintain this perception of Muslims as the abnormal other, the other that wears a “powerful external symbol” that negatively affects young pupils.

In the same Lucia Dahlab case, the court also argued that wearing the hijab is difficult to reconcile with the messages of tolerance and respect and that wearing the hijab is difficult to

⁶¹ See, e.g., UNDERSTANDING PEER INFLUENCE IN CHILDREN AND ADOLESCENTS (Mitchell J. Prinstein & Kenneth A. Dodge eds., 2008).

reconcile with the message of equality and non-discrimination that all teachers in a democratic society must convey to their pupils. This example reveals not only the court's negative image of Muslim practice, but also presents who does and does not receive priority. While the court gave priority to abstract principles, such as the message of equality, tolerance and respect, it paid no attention to the very principles the actual Muslim women were trying to uphold. While the applicant Lucia Dahlab argued that her right to equality had been violated, the Court virtually ignored her position, barely giving it any consideration in its examination. Even when the Court did make mention of the principle of equality, it did so in the context of the white European society, with no reference to these women's right to equality for which they had asked. This indicates, who, from the Court's perspective, was deemed worthy of having their right of equality guaranteed and who was not.

Furthermore, in the case of Lucia Dahlab, and, subsequently, in the case of Leyla Sahin, the state governments, followed by the Court, argued that the hijab can be considered a threat to the "public order" and that it could harm others, such as other non-actual women who choose not to wear the hijab, or school pupils of an impressionable age.⁶² What do we mean when we say "public order," "public safety," "other women," or "pupils in school"? To which public do we refer? Moreover, who defines what is harm and whether there was, or could be? The answer seems to be evident: the public, and those who define the harm are those who belong to the hegemony – the white European society.

Arguments about the harm being normative is not new within the legal discussion.

Nejaime and Siegel's article *Religious Accommodation, and Its Limits, in a Pluralist Society*,⁶³

⁶² The Dahlab Case, Judgment of 2001; The Sahin Case, Judgment of 2004; The Sahin Case, Judgment of 2005.

⁶³ Douglas NeJaime & Reva Siegel, *Religious Accommodation, and Its Limits, in a Pluralist Society*, in *RELIGIOUS FREEDOM AND LGBT RIGHTS: POSSIBILITIES AND CHALLENGES FOR FINDING COMMON GROUND* 69 (William N. Eskridge Jr. & Robin Fretwell Wilson eds., Cambridge Univ. Press 2018).

challenges the arguments of the governments and the courts' that the very wearing of the hijab might harm the other. In their discussion of claims for religious exemptions from laws that protect contraception, abortion, and same-sex relationships, in which they seek to reconcile commitments to religious freedom, reproductive rights, and LGBT equality, they distinguish between claims for religious exemptions from laws that protect contraception, abortion, and same-sex marriage, and claims involving ritual observance in dress or prayer, such as wearing a hijab. According to Nejaime and Siegel, while accommodation claims of the first kind have the capacity to inflict targeted harms on other citizens who don't share the claimant's beliefs, the second kind, involving ritual observance, are less likely to harm other citizens.⁶⁴ The recent December 2021 Canadian case, with which I opened this paper, serves as a good example. In this case, the parents were opposed to the law that resulted in the firing of a teacher wearing a hijab in the classroom.⁶⁵

The court, in its judgment and reasoning, primarily took the interests of European white people into account. The interests of others, such as Muslim women, who belong to a group historically exposed to discrimination, did not occupy a significant place in the European court of human rights judgments. These state laws, and the European Court of Human Rights' judgment, not only resulted in banning these women from wearing the hijab, but also in actively – aggressively, even – excluding them from the public sphere, and preventing them from pursuing professional and personal progress and prosperity, a result contrary to the key principles of numerous forms of liberalism. Some of these women probably chose to stay at home in the

⁶⁴ *Id.*

⁶⁵ Cecco, *supra* note 2.

private sphere, where the patriarchy dominates, and where no one knows what may happen to these women.⁶⁶

The Focus on Religion

Although Lucia Dahlab based her opposition to the ban against wearing the hijab on different articles from the Convention on Human Rights—such as the right to equality—the Court chose to examine the ban, following the government’s arguments, almost exclusively in terms of whether it violated Article 9 protecting freedom of religion. This is true not only in the Dahlab case, but also in other cases, where applicants claimed that rights in addition to freedom of religion had been violated, but the court focused only on examining Article 9 of the Convention.⁶⁷ This section critically and skeptically scrutinizes the Court’s insistence on focusing on Article 9’s Freedom of Religion, while giving only minimum attention to the women’s arguments about violations of other rights. For this, I will draw on some of the historical record showing that negative discourse about Islam and the mobilization of Muslim women was deliberately engaged in to promote broader political policies aiming to strengthen the white power and control.

Lila Abu-Lughod, an American anthropologist who has devoted more than twenty years of her life to studying women and gender in the Middle East, specifically in Egypt, makes an argument about the mobilization of Muslim women, particularly female symbols in the U.S. war

⁶⁶ Matteo Antonio Sacco et al., *The Impact of the Covid-19 Pandemic on Domestic Violence: The Dark Side of Home Isolation During Quarantine*, 88 *Medico-L. J.* 71 (2020).

⁶⁷ For instance, in the Turkish Leyla Sahin case, Sahin alleged that a ban on wearing the hijab in institutions of higher education in Turkey violated her rights and freedoms under *Article 8* (Right to Respect for Private and Family Life), *Article 9* (Freedom of Thought, Conscience and Religion), *Article 10* (Freedom of Expression), *Article 14* (Prohibition of Discrimination) of the Convention, and *Article 2* of Protocol No. 1 (Right to Education) to the Convention for the Protection of Human Rights and Fundamental Freedoms. Notwithstanding Sahin’s identification of extensive possible violations of the Convention, the European Court of Human Rights chose to concentrate its examination on whether the ban violated Article 9 (Freedom of Religion).

against terrorism following September 2001.⁶⁸ One of her examples is Laura Bush's 2001 speech calling on women to justify the American bombing and intervention in Afghanistan, saying: "Because of our recent military gains in much of Afghanistan, women are no longer imprisoned in their homes. They can listen to music and teach their daughters without fear of punishment. The fight against terrorism is also a fight for the rights and dignity of women."⁶⁹ Abu-Lughod suggests one should be sceptical about the focus on the "Muslim women" or "culture" and particularly Islam's religious beliefs and treatment of women. According to her, such cultural framing prevents the serious exploration of the roots of human suffering, and artificially divides the world into binary spheres, such as West versus East, or American versus Muslims.

Other scholars have made observations similar to those of Abu-Lughod in different contexts. For example, Leila Ahmed, an Egyptian-American scholar working on women and gender in Islam, has outlined the notion of colonialism in the guise of feminism.⁷⁰ Calling it "Colonial Feminism," Ahmed pointed out that this kind of feminism was ostensibly concerned with the plight of Egyptian women, focusing on the Islamic hijab as a sign of oppression, but gave no support to women's education and other paths to flourishing. Ahmed also analyzes the veiling of Muslim women in the United States, rejecting her own earlier and others' current critiques of the veil as sexist, and promoting the idea of the veil, when it is voluntarily chosen, as a progressive and feminist act.⁷¹

These examples are not limited to the United States, Afghanistan, and Egypt. Marnia Lazreq, makes a critical shift from traditional studies of Algerian women—which usually

⁶⁸ Abu-Lughod, *supra* note 56.

⁶⁹ Abu-Lughod referring to Laura Bush words, *supra* note 56, at 784.

⁷⁰ LEILA AHMED, WOMEN AND GENDER IN ISLAM (2021).

⁷¹ LEILA AHMED, A QUIET REVOLUTION (2011).

examine female roles in relation to Islam—to an interdisciplinary approach, arguing that Algerian women’s position is affected by different structural factors, including colonial domination in Algeria, nationalism, and capitalist economy. Lazreq, like Abu-Lughod, also makes a connection with broader political disruptions in the twentieth century, such as the attacks on New York and other events related to the “Arab Spring.”⁷²

5. Conclusion

By focusing on one such representative case, *Lucia Dahlab v. Switzerland*, this paper critically examined how the ECtHR presented the Muslim woman as always embedded in power struggles, passively shaped and created by her religion and culture. This paper presents an alternative approach, one that recognizes that Muslim women are embedded in worlds of meaning and significances, worlds that not only represent part of a culture, but that also invest the individual with the agency to choose to use her cultural and religious tools to fulfill her needs and meet the challenges of different situations in life.

This paper did not simply challenge this view of Muslim women. Further, it traced examples of the support of white power and control that can be found in the judgments of the ECtHR. For example, it showed how the interests and perceptions of white subjects are made central in policy making and are assumed to be the accepted “norm.” In addition, it critically and skeptically scrutinized the Court’s insistence on focusing on Article 9’s Freedom of Religion provision, while giving only minimum attention to the women’s arguments about violations of their other rights, such as the right to equality. As I presented, these authorities deliberately drew on and engaged historically negative discourses about Islam and the mobilization of Muslim

⁷² MARINA LAZREQ, *ELOQUENCE OF SILENCE: ALGERIAN WOMEN IN QUESTION* (1994).

women to promote broader political policies aimed at maintaining and strengthening white power and control.

This paper sought to shed the light on the role of courts in entertaining and upholding states' claims for religious and non-white culture's limitations and restrictions. Finally, it suggests that instead of continuing to take this approach, courts should consider whether supporting state edicts will promote equality or perpetuate inequality, especially when the subject of legislation and regulations are groups of citizens who historically have been subject to discrimination. Therefore, courts, especially the European Court of Human Rights, should take a broader perspective, and be self-critical and not frustrate the aim of creating a more egalitarian society.