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**TITLE: CRITICAL ANALYSIS OF THE FREEDOM TO
MANIFEST RELIGIOUS BELIEF UNDER ARTICLE 9 OF THE
EUROPEAN CONVENTION FOR THE PROTECTION OF
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

GHASEM ZORAB GHAZI

A thesis submitted to the University of Huddersfield in partial fulfillment of the requirements
for the degree of Doctor of Philosophy

The University of Huddersfield

September 2017

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List of Abbreviations

ECHR	European Convention on Human Rights.
ECtHR	European Court of Human Rights.
UDHR	Universal Declaration of Human Rights 1948.
ECOSOC	Economic and Social Council.
ICESC	International Covenant on Economic, Social and Cultural Rights 1996.
1981 Declaration	Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981).
HR	Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights 1966.
ICESCR	International Covenant on Economic, Social and Cultural Rights 1996
OHCHR	Office of the High Commissioner for Human Rights
UNGA	United Nations General Assembly
UN	United Nations
UNCHR	United Nations Commission on Human Rights
US	United States

Abstract

One of the key causes of disharmony on a global scale, throughout human history, has been the disregard for the protection of religious expression. This goes some way to explaining why the international community in the post-war era, particularly after World War II, have enacted legal instruments and implemented policies aimed at promoting religious freedoms at global and regional levels. Regionally, the ECHR with implementation mechanisms has led the way in terms of upholding the protection of religious rights and freedoms. Having progressive and effective mechanisms to protect human rights does not mean that decisions of the ECtHR as a judicial body are free of criticism. For example, the ECtHR has ruled in the number of cases against the practice of religious expression, particularly in cases relating to the wearing of the headscarf. These decisions, the ECtHR argues, were taken on the grounds of secularism and prevention of fundamentalism and intolerance. This research, unlike others written on the subject, examines the concepts of fundamentalism and tolerance through a historical and philosophical approach, which will be used to argue that a restriction on the headscarf cannot legally or logically be justified as the bases used by the court to provide a rationale for the rulings are undefined, ambiguous and often in conflict with the principle of religious expression. The ECtHR often prioritises national policies and political considerations such as secularism over the personal right to freedom of religious expression. Notably, recent policies in Turkey which now allow and encourage the wearing of headscarf in public places call into question the validity of previous judgments of the ECtHR supporting the ban on wearing of the headscarf.

As a part of the qualitative methodology the researcher has chosen three methods to conduct this research including black-letter, historical and comparative themes.

This thesis is critically analysis ECtHR cases relating to freedom of religious expression in the context of the wearing of the headscarf. In doing this thesis further explores the relationship between Article 9 ECHR, the wearing of the headscarf, and the concepts of fundamentalism and intolerance. The researcher argues that the link between the wearing of the headscarf and intolerant or fundamentalist behaviour is a difficult one to prove, and that by supporting the ban on wearing of the headscarf on grounds including intolerance, the ECtHR's decisions are in effect validating intolerance of religious expression.

Table of Contents

TITLE: CRITICAL ANALYSIS OF THE FREEDOM TO MANIFEST RELIGIOUS BELIEF UNDER ARTICLE 9 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS.....	1
DECLARATION	2
List of Abbreviations	3
Abstract.....	4
Table of Contents.....	5
Acknowledgment	9
Dedication.....	10
CHAPTER ONE	11
Background to the study	11
1.1. Introduction.....	11
1.2. Thesis statement.....	12
1.3: Aim and Objectives	13
1.3.1. Aim of Thesis.....	13
1.3.2. Objectives of Thesis.....	15
1.4. Research questions.....	15
1.5. Factual Background to the Cases	15
1.5.1. Dahlab v Switzerland.....	16
1.5.2. Şahin v Turkey.....	19
1.5.3. Refah Party v Turkey	22
1.6. Wearing the headscarves: The perspective of International Human Rights Committee.....	23
1.7. Position of the Hijab from an Islamist and Feminist Perspective	25
1.7. 1. The Hijab in Islam	26
1.7.2. Feminism views on the hijab in Islam	35
1.8. Methodology of the research.....	40
1.9. Ethical dimensions of the research.....	47
1.10. Scope of the research	48
1.11. Outline of the Thesis	48

1.12. Contribution of the Research	50
CHAPER TWO Review of Literature on ECtHR Cases Relating to the wearing of the Head Scarf as a Religious Symbol.....	51
2.1. Introduction.....	51
2.2. Female scholars’ views on religious expression in the context of the wearing of the headscarf.....	54
2.3. Views of Academia in non-Islamic Countries relating to religious expression in Islamic practices ...	73
2.4 .The views of Islamic scholars on religious freedom in the context of Islam.....	84
2.5. Knowledge Gap in the context of Article 9 and the Islamic headscarf.....	91
CHAPTER THREE	96
Freedom of religion under the international legal framework for human rights.....	96
3.1. Development of human rights after World War II.....	96
3.1.1. The United Nations Charter and human rights	97
3.1.2. Religious freedom under the provisions of the United Nations Charter	100
3.2 .The Universal Declaration of Human Rights and how it has influenced the right to religious freedom	102
3.2.1. Background to the Drafting of the UDHR.....	102
3.2.2. Key Provisions of the UDHR.....	104
3.2.3. Religious freedom in the UDHR.....	105
3.3. The International Covenant on Civil and Political Rights and Religious Freedom	108
3.3.1. The implementation mechanisms of the ICCPR	109
3.3.2. Freedom of religion in the ICCPR	112
3.3.3. Forum internum in relation to religious freedom on the ICCPR.....	114
3.3.4. Right to religious freedom as Non-derogable rights.....	115
3.3.5. Coercion as regards the right to religious freedoms under article 18 (2).....	118
3.3.6. External aspect of the religious freedom: the manifestation of religion and its limitations.....	124
3.3.6.1. Limitations must be prescribed by law	125
3.3.6.2. Protection of Public order as a justification for restrictions to religious freedoms	127
3.3.6..3. Public health and public safety as a justification for restricting religious freedoms.....	130
3.3.6.4. Public morality as a justification for restriction of religious freedoms	134
3.3.6.5. The rights and freedoms of others as a justifying restrictions to religious freedoms.....	137
3.4. Declaration Drafting on Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (25 November 1981)	139

3.4.1. Background of the Declaration and its content	139
3.4.2. The Debate on the content of the Declaration.....	140
3.4.3. Discrimination and Intolerance based on religious criteria in the 1981 Declaration	142
3.4.4. Legal Nature of the Declaration.....	144
3.5. Conclusion	147
CHAPTER FOUR.....	149
Critical analysis of the concept of ‘fundamentalism’ which is used as a justification by the ECtHR to ban the wearing of the headscarf	149
4.1. Introduction.....	149
4.2. Key Elements of the ECtHR Reasoning	151
4.3. Prevention of Fundamentalism as a Tool for Restrict Religious Manifestation	154
4.3. 1. The Roots of fundamentalism	155
4.3. 2. Definition of fundamentalism	156
4.3.3. Characteristics of fundamentalism.....	160
4.3.3.1. The Reactionary nature of fundamentalism	162
4.3.3. 2. Sharp boundaries in the moral beliefs of fundamentalists	162
4.3.3.3. Absolutism and inerrancy in relation to fundamentalism	164
4.3.3. 4. Selectivity as an aspect of Fundamentalism.....	166
4.4. Is fundamentalism applicable as a concept in other religions beside American Protestantism?	167
4.4. 1. The Debate surrounding the use of the term fundamentalism in the Islamic context	171
4.5. An Exploration of the Relationship between Fundamentalism and Religious Manifestations in the Decisions of the ECtHR.....	175
4.5.1. Relationship between Fundamentalism and Freedom of Religious Expression	176
4.5.2. An Analysis of Fundamentalism as a Justification for the Restriction of Religious Manifestation in the Context of the ECtHR.....	182
4.6. Conclusion	197
CHAPTER FIVE:	200
A Critical Analysis of the Concept of protection of ‘tolerance’ used as a Justification by the ECtHR to Ban the Wearing of the Headscarf.....	200
5.1. Introduction.....	200
5.2. The Roots and definition of tolerance.....	202
5.3. The Characteristics of tolerance.....	208
5.4. Justifications of Tolerance	213

5.5. Restrictions on Tolerance.....	220
5.6. Protection of tolerance as an ECtHR justification for the ban on wearing of the headscarf.....	223
5.7. Conclusion	237
CHAPTER SIX:	240
Concluding Chapter	240
6.1. Introduction.....	240
6.2: Summary and Findings of the Research	241
6.2.1. Chapter One: Introduction to the Thesis	241
6.2.2. Chapter Two of the thesis	242
6.2.3. Chapter three of the thesis.....	243
6.2.4. Chapter four of the thesis	246
6.2.5. Chapter five of the thesis	248
6.3.1. Summary of Main Contributions:	249
6.4. Recommendations	250
6.5. Limitations and Scope of the Research.....	251
6.6. Conclusion	252
Bibliography	253
Table of Books	253
Table of Journal Articles	263
Table of International Convention and Treaties	292
Table of UN Documents and Reports	294
Table of Cases	296
Internet resources	300
Thesis	300
Conference	308
Reports	308

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Dedication

I would like to dedicate this work to my late father, Zorab Ghazi, who himself was a victim of intolerance. May his soul rest in peace.

CHAPTER ONE

Background to the study

1.1. Introduction

The preservation of religious freedom and freedom of expression are key factors in promotion social cohesion and societal harmony; Religion is considered one of the most vital elements that constitute the identity of believers and define their concept of life.¹ In other words, religious freedom does not only refer to the freedom to hold religious beliefs, but also to the public practice of religion and its associated customs. By protecting private convictions, religious freedom means little if it does not also refer to public religious practice. If one looks at the traditional causes of conflict internationally, religion is a common thread; this has been the case since the beginning of organized religion.² This cause has been observed recently in conflicts between Islamic groups and Christian communities, a phenomenon which stretches back to the Crusades, and the long-standing struggles between Palestine and Israel. Centuries ago, conflict in Europe saw a thirty-year religious war, which only ended in 1648 via the signing of The Peace Treaty of Westphalia; this treaty formed the beginning of the protection of religious freedoms for the sake of harmony in Europe.³

The 1900's brought about further agreements on religious freedom and religious practice, which has seen this right constitutionalized internationally, by the signing of conventions and treaties in which governments have pledged to protect these rights regionally and globally. The Universal Declaration of Human Rights (1948)⁴ and The International Covenant on Civil and Political Rights (1966)⁵ are perhaps the best known of the international instruments on this freedom. As far as regional agreements are concerned, the European Convention on Human Rights

¹ *Kokkinakis v. Greece* (App no 14307/88) (ECHR 25 May 1993) 17 EHRR 397.

² Sara Silvestri and James Mayall, *The Role of Religion in Conflict and Peacebuilding* (British Academy 2015). See also: Christopher A Bayly, 'The Pre-history of 'Communalism'? Religious Conflict in India, 1700–1860' (1985) 19.02 *Modern Asian Studies* 177.

³ Gordon A Christenson, 'Liberty of the Exercise of Religion in the Peace of Westphalia' (2012) 21 *Transnat'l L. & Contemp. Probs* 721.

⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

(ECHR) maintains the preservation of religious freedom⁶, as does the American Convention on Human Rights (1969)⁷ and The Cairo Declaration on Human Rights in Islam (1990). The Cairo Declaration, importantly, is religion specific and protects religious freedom in an Islamic context; Article 10 of the Declaration states that Islam encompasses “true” nature, while the 22nd article denies any freedom of expression which contradicts Shariah law.⁸ Regarding regional mechanism, it is widely accepted that ECHR and its accessional protocols are the most effective mechanisms in the world by virtue of the obligations which it places on European countries to implement all treaties and instruments related to human rights, including freedom of religion⁹. However, it should be noted that the legal obligation and commitment contained in the ECHR and its protocols do not per se prevent the violation of human rights in Europe.

1.2. Thesis statement

The rise of globalization and the ease with which people can migrate has seen a rise in migrants of various religious and cultural backgrounds entering Europe in search of a higher quality of life and, in some cases, a more liberal society. The ECHR, and state legal systems, have seen an increase in the number of cases which involve allegations of human rights abuses relating to religion; this is largely to do with the increasingly diverse European society, particularly the growth of the Muslim population. In an eight year period beginning in 2004, 1060 cases were brought to the French Independent Administrative Authority (FIAA); based on allegation of FIAA attacks on religious freedom; in 2009 alone, cases brought before FIAA which dealt with religious practice constituted 2% of all claims.¹⁰ In view of the role of the European Court of Human Rights (hereinafter ECtHR) in relation to the promotion, protection and guarantee of human rights in the member states of the ECHR, this thesis will aim to outline and assess previous cases involving claims of religious freedoms being impinged upon. This is in the light of the judicial rules of the

⁶ The European Convention for the Protection of Human Rights and Fundamental freedoms (adopted 4 November 1950, entered into force 3 September 1953). ETS 5; 2013 UNTS 221 (ECHR).

⁷ American Convention on Human Rights (adopted 22 November 1969, entered into force July 18, 1978) O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123.

⁸ Cairo Declaration on Human Rights in Islam: Done at Cairo, 5 August 1990 Refugee Survey Quarterly (2008)27 (2):81-86doi:10.1093/rsq/hdn020.

⁹ Carole J Petersen, ‘Bridging the gap: The role of regional and national human rights institutions in the Asia Pacific’ (2011) 13 APLPJ 174, 184.

¹⁰ Amnesty international, ‘Choice and Prejudice’ Discrimination against Muslim in Europe’ (2012) available at: <<http://www.amnesty.eu/content/assets/REPORT.pdf>> accessed 15 February 2017.

ECtHR and its duty to support, preserve and ensure that human rights are upheld across ECHR members of states; the majority of the cases examined in this thesis consist of cases pertaining to the wearing of the headscarf in the context of religious practice, most notably bans on the headscarf, which many consider an affront to international human rights standards, particularly religious freedom.¹¹ Courts have stated, in defense of their decisions regarding the headscarf that they were acting in support of secular society, against fundamentalism and, counter-intuitively, addressing intolerance, all of which can be difficult concepts to define in practice. The controversy surrounding these concepts comes from the fact that it can be challenging to provide evidence that religious freedoms have been infringed upon. This is not helped by the apparent lack of consistency in rulings of this kind and the contrary to judicial precedent.¹²

It also seems that cases related to banning the wearing of the headscarf disregard religious freedoms and limit the actions of the religious community or individual. Furthermore, the decisions of the court appear at odds with the outlined international obligations of ECHR states, as part of their commitment to human rights progress and the protection of religious freedoms.¹³

Thus, in order to provide a thorough analysis of the legal framework under which the ECtHR operates in cases pertaining to religion, one must first of all outline the contexts and basic information of the relevant cases; here, the international perception of the headscarf will be addressed. As the headscarf has long been considered representative of Islam and, for others, a symbol of gender, it is important to approach the headscarf from a feminist and an Islamic perspective, as will be attempted in the final section of this chapter.

1.3: Aim and Objectives

1.3.1. Aim of the Thesis

1. To critically examine and to elaborate on the terms ‘freedom of religion’ and ‘freedom of manifestation’ in light of international human rights law. The purpose of a conceptual grounding for research is to provide an understanding of those concepts named in the work. This research

¹¹ *Dahlab v. Switzerland* (Application no 42393/98) (ECHR 15 February 2001) ECHR 899; *Sahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819; *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.

¹² *Handyside v. United Kingdom* (Application No.5493/72, A/24) (07 December 1976) ECHR 5.

¹³ *Raihon Hudoyberganova v Uzbekistan* Communication no. 931/2000[2004] U.N Doc. CCPR/C/82/D/931/2000.

addresses 'religious freedoms' and elaborates on the discourse surrounding this term in order to embark on an examination of human rights organisations and apparatus. This activity seeks both to give a context and a background to the work, and to outline the philosophical dimension to the research. To elaborate, this process reveals the role of the term 'religious freedom' in a wider context, such as in international instruments and previous research, to give a more detailed picture of the subject of freedom of religion. A component of human rights, the freedom of religious expression is comprised of a few parts; these are internal, external and accepted justifications. Having examined and analyzed the right to religious freedom enables the researcher to examine the wearing of headscarf under related category of the right to religious freedom. In other words conceptual framework helps researcher to organize research design and find a way to solve the problem. This aspect of the research is present through the chapter three of the thesis.

2. A critical evaluation of the decisions of the ECtHR regarding the wearing of the headscarf following the illustration of the concepts of fundamentalism and tolerance from a historical and philosophical perspective. The issue is discussed in the fourth and fifth chapters; in the former, the research will address concept of fundamentalism using a historical lens, while bringing to the fore its ill-defined usage in legal proceedings. By branding all who wear the headscarf an extremist or a holder of fundamentalist views, the ECtHR decisions have raised legal questions. While it may be close to the truth to argue that all Muslim women who preach fundamentalist ideology wear the headscarf, this is by no means an indication that all who wear the headscarf are extremists. Intolerance, a term frequently cited by the ECtHR, has also been outlined here with an aim to put it in historical context, as well as determining its legal usage and philosophical implications. This, it is hoped, will highlight the vagueness of the term, particularly as pertains to its legal usage. To equate the headscarf to intolerance, then, cannot have a solid legal grounding. Therefore, applying the term of intolerance to the wearers of headscarf while they express no intolerant behavior is legally problematic.

3. A critical evaluation and comparative analysis of the ECtHR decisions related to the wearing of the headscarf by Muslim females with a focus on the inconsistent judicial precedent of the ECtHR, as well as other international and national decisions. Judges often rely on the technique of comparing legal systems and cases in order to identify a precedent for cases similar to their own. This process has been termed the 'comparative method', and has also broadened the insight of readers and researcher to deal with the subject of research. This approach can reveal the disparity

between the different rulings of courts in this area, and consequently allows the researcher to put forward useful suggestions for providing harmonization and unification in terms of the wearing of the headscarf. This aspect of the research is present throughout the thesis.

4. To make recommendations based on the findings of the research (in the concluding chapter).

1.3.2. Objectives of the Thesis

A critical analysis and discussion of the term “freedom of manifestation of religious belief” in the context of the wearing of the headscarf based on the international human rights standards and the ECHR criteria, with a consideration of the decisions of the ECtHR and other international judicial bodies.

1.4. Research questions

1. What are the difficulties involved to prove the criteria and concepts which are used as justifications for a ban on the wearing of the headscarf in ECtHR decisions through a legal procedure? The researcher attempts to answer this question in chapters four and five as a main contribution of the current research.
2. Are the decisions of the ECtHR, in terms of the wearing of the headscarf, compatible with international human rights norms and the judicial precedent of ECHR member states? This question is relevant to all chapters of this work, as cases pertaining to the headscarf must be taken from different court proceedings in order to gain a cross-jurisdictional picture of the issue.
3. Is there a harmony and uniformity in the interpretation and application of the ECHR in member states with regard to the freedom of religious expression?

1.5. Factual Background to the Cases

A number of cases have been brought before to ECtHR which deal with the relationship between religious attire and religious freedom. The first case is related to a teacher who had converted to Islam and chose to wear Islamic attire¹⁴; the other case deals with a devout student in Turkey¹⁵ who faced difficult choices in terms of having to choose between removing her headscarf and continuing with her study, or leaving her study to search for another institution which would

¹⁴ *Dahlab v. Switzerland* (Application no 42393/98) (ECHR 15 February 2001) ECHR 899.

¹⁵ *Şahin v. Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.

allow her to practice her religion fully. In another case, the court presented the ban of wearing the headscarf as a requirement for protection of secularism and prevention of fundamentalism.¹⁶ Explanation of these cases with different contexts and backgrounds has provided a better understanding of the legal perspective. In all three cases the applicants based their defence of their right to wear the headscarf on Article 9 of the ECHR deals with religious freedom. The following is its full text:

9.1. *'Everyone has the right to freedom of thought, conscience and religion; this right includes the 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.*

9.2. *Freedom to manifest one's religion or belief 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'.¹⁷*

1.5.1. Dahlab v Switzerland

The first of the abovementioned cases involving religious freedoms (specifically, wearing the Islamic headscarf) was *Dahlab v Switzerland*¹⁸, in which the Court handed down its judgment in 2001. The case concerned a teacher at a primary school in Switzerland, who converted to Islam. After her conversion, she felt the need to change the way she clothed herself by wearing longer and looser clothes and a scarf to cover her hair, but not her face. She dressed in this way for more than four years, including the period during which she was on a maternity leave.¹⁹

During those years, neither her colleagues, nor the children or their parents complained about her appearance. When asked by the students, she said her headscarf was a means of keeping her ears warm. Apparently, the issue of conversion was a very sensitive topic to her, even to the

¹⁶ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899; *Şahin v Turkey* (Application no.44774/98) (2005) ECHR 819; *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.

¹⁷ The European Convention for the Protection of Human Rights and Fundamental freedoms (adopted 4 November 1950, entered into force 3 September 1953). ETS 5; 2013 UNTS 221 (ECHR).

¹⁸ *Dahlab v Switzerland* (Application no 42393/98) (15 February 2001) ECHR 899.

¹⁹ *Dahlab v Switzerland* (Application no 42393/98) (15 February 2001) ECHR 899.

point where she made up an excuse so that she did not have to reveal her Muslim religious beliefs to the students.²⁰

The situation changed when an inspector became involved. In reaction to his report regarding Ms *Dahlab's* clothing, the Director General of Public Education took action. After attempting to settle the matter by mediation, the Director General demanded that she should stop wearing the headscarf having refused the demand, Ms *Dahlab* took the action in the national courts and eventually lost.²¹

The Court partly justified the fact that she was sacked despite the absence of any law explicitly prohibiting the wearing of religious clothing by saying that it was impossible for the law to comprehensively cover all the required behaviours by teachers. It was also stated that allowances could be made in cases where the behaviour was generally considered by the average citizen to be of 'minor importance'. This raises questions as to who, exactly, the average citizen is and how the average citizen interacts with religion and cultural conduct, particularly religious attire.²²

Decisions regarding the issues of human rights, if made on the basis of asserting a majority' beliefs about the importance of a particular matter, can seriously impact religious freedoms, as these are only seldom considered in the judgments. To illustrate the foregoing, one can consider the example of the ban on building minarets in Switzerland.²³

The Swiss Court continued that it was 'scarcely conceivable' that schools could ban crucifixes from being displayed in state schools, as had been the case previously, while allowing religious clothing.²⁴ The fact that teachers were allowed religious pieces of jewelry was considered an issue that did not require further discussion; this may have been because further discussion may have drawn attention to the fact that crucifixes worn by an individual reflect the beliefs of the individual, while a crucifix hung on the wall of an institution reflects the cultural views of the

²⁰*Dahlab v Switzerland* (Application no 42393/98) (15 February 2001) ECHR 899; see also: Oren Fliegelman, 'The European Court of Human Rights Goes to School: The "Headscarf Cases' (Leyla *Şahin* v. Turkey and *Dahlab v. Switzerland*) as Unjustified Restrictions of Religious Practice' (2015) IV. 3. UCULR 134, 140.

²¹ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899.

²² Cochav Elkayam-Levy 'Women's Rights and Religion--The Missing Element in the Jurisprudence of the European Court of Human Rights' (2014) 35.4 Journal of International Law University of Pennsylvania 1175, 1184

²³ Lorenz Langer 'Panacea or Pathetic Fallacy? The Swiss Ban on Minarets' (2010) 43.4 Vanderbilt Journal of Transnational Law 863, 867. 902.907.

²⁴ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899. See also: *Lautsi and others v. Italy* (Application no. 30814/00) (2011) E LR 633, (2011) ECHR 2412, (2012) 54 EHRR 3, (2011) ELR 176, 30 BHRC 429. See also: Claudia Morini 'Secularism and Freedom of Religion: The Approach of the European Court of Human Rights' (2010) 43.03 Israel Law Review 611, .624-625.

whole school. It is undeniable, however, that both are religious symbols. The same rationale may be applied to the case of the headscarf.

In the ECtHR, the case was approached as a question of jurisdiction. According to Switzerland, the nature of the case was too “manifestly ill-founded” to be allowed to proceed to the merits phase.²⁵ The Court approved of the Swiss arguments. After years of wearing clothes according to her religious beliefs without objections from anyone, a woman was dismissed from her job on the basis of her religion despite her flawless employment record.

The ruling of the *Dahlab* case, it has been pointed out, has major inconsistencies with that of *Lautsi and Others v Italy*²⁶, despite both involving a supposed violation of religious freedoms. In the *Lautsi* case, the ECtHR deemed a prominently displayed crucifix in a school as representing merely a passive symbol of Christianity, with no impact on the attitudes of the school as an institution. It was argued by the court that there was no way to prove that the crucifix would indoctrinate students or affect their behaviour in any way. When one examines the *Dahlab* case, it is clear that the courts attitude towards Islamic expression is very different. If one considers the former example merely a passive emblem, then it is difficult, if one follows a comparative and deductive argument, to assert that the headscarf is anything other than a passive symbol too. As with *Lautsi*, the court was unable to prove, in the *Dahlab* case, that the headscarf (here worn by a teacher at a school) had any impact on the religious convictions of the student body. It is interesting to note that the teacher in this case did not express the view that the headscarf was worn as a religious act, instead telling her students that she used the headscarf to protect her ears from the cold.²⁷ Furthermore, in the case of *Lautsi* the court stated that the display of the Crucifix is not associated with compulsory teaching about Christianity. Following the logic of the court it can be said that wearing of the headscarf does not imply Islamic teaching in school. Moreover, in the case of *Lautsi* the Court argued that in reality, whether the state opted to authorize or banned the display of crucifix in an educational institution, the significant factor is the degree to which the curriculum contextualized and taught students pluralism and tolerance; it can be argued that this logic can be applied to the *Dahlab*'s case as well.

²⁵ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899. For further information see: Isabelle Rorive ‘Religious Symbols in the Public Space: in Search of a European Answer’ (2008) 30 *Cardozo L. Rev* 2669, 2679-2680.

²⁶ (Application no. 30814/00) [2011] E LR 633, [2011] ECHR 2412, (2012) 54 *EHRR* 3, [2011] *ELR* 176, 30 *BHRC* 429.

²⁷ Carolyn Evans ‘The Islamic Scarf in the European Court of Human Rights’ (2006) 7 *Melb. J. Int'l L* 1, 8.

From comparative perspective an American case comes to mind. In respect of restriction on religious manifestation the Supreme Court of the U.S.A in the case of *Jehovas' Witness* stated that it is not justifiable to restrain religious expression as long as there is no clear and immediate necessity to protect more important interest of the democratic society which over unrestricted freedom of religious expression.²⁸ As already mentioned before the decision of the Court, *Dahlab* had taught at school for four years; during this time no complaint had been made against her. Taking into account the Supreme Court criteria for restriction of religious expression it can be pervasively argued that there are no compelling grounds for expelling *Dahlab* from the teaching staff.

It was the attitude of the court in the case of *Dahlab v. Switzerland*²⁹ that it would be difficult “*appears difficult to reconcile the wearing of an Islamic headscarf with message of tolerance, respect for others and, above all, equality and nondiscrimination that all teachers in a democratic society must convey to their pupils*”³⁰

In this case, as far as the concept of tolerance is concerned, the Netherlands' committee on Equal Treatment has asserted that “*wearing a headscarf as such as does not imply that a teacher misses the required open attitude*”.³¹ The expulsion of the teacher or student would only be justified when the wearer has displayed intolerant ideas or behavior. It can be submitted that the headscarf is not symbol of intolerance, but it is religious symbol. If the headscarf is against tolerance and if it is discrimination against women and girls, the government needs to take strict measures to prevent wearing it in all public places not just in public institutions.

1.5.2. Şahin v Turkey

The *Şahin v Turkey*³² case, the second one of the above-mentioned was approached more expeditiously by the Court and a decision came from the Grand Chamber almost immediately. The case involved *Leyla Şahin*, a student of the fifth grade of medical studies who, after four years of studying at Bursa University in Turkey, transferred to Istanbul University. She stated that she

²⁸ Leo Pfeffer 'The Supreme Court as Protector of Civil Rights: Freedom of religion' (1951) 275 Annals of the American Academy of Political and Social science. Civil Rights in America 75, 78.

²⁹ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899.

³⁰ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899.p 13.

³¹ Aernout Nieuwenhuis, 'European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Şahin v. Turkey, Decision of 29 June 2004, Application Number 44774/98' (2005) 1.03 European Constitutional Law Review 495,505 *Şahin v. Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.

³² (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.

wore the headscarf during her studies at Bursa University and at the beginning of her studies in Istanbul. After a few months, the Vice-Chancellor of the University released a circular instructing the teachers not to allow students with a beard or wearing the Islamic headscarf to attend lectures, tutorials, and exams. As she refused to stop wearing her headscarf, *Ms Şahin* was banned from sitting several exams and was even excluded from certain subjects.³³ After attempting to attend several lectures, she was warned by the Dean of Medicine. As she was engaged in an activity that the Court depicted as “unauthorised assembly” (a protest of students against the dress code related regulations outside the faculty’s deanery), she was suspended for one semester.³⁴ Even though this penalty was later reverted by a general university amnesty, she decided to leave the university and complete her studies in Austria. In the official complaint that she raised against the Turkish government she stated that by excluding her, the university had violated her religious freedoms. As opposed to the case of *Dahlab*, the Court did not consider the claim manifestly unfounded and, her action was therefore, admissible. Nevertheless, the claim of violation of religious freedom was dismissed by both the Court and the Grand Chamber.³⁵

One may infer from the decision of the court that one may consider the headscarf synonymous with fundamentalist, and that veiling constitutes an attack on democratic values and human freedoms, when the court observes that

*‘The situation in Turkey and the reasoning of the Turkish courts showed that the Islamic headscarf had become a sign that was regularly appropriated by religious fundamentalist movements for political ends and constituted a threat to the rights of women.’*³⁶

In 2007, a questionnaire found that just over 60% of Turkish Muslim women veil themselves and so, if we follow the logic of the court, this equates to nearly two thirds of Muslim women harbouring fundamentalist inclinations.³⁷ The headscarf, argues *Aydin*, is nothing more than a religious garment, within the scope of Article 9 of the ECHR; associating it with radical thought is problematic, as the concept of fundamentalism is undefined and highly politically charged.³⁸ As *Toprak* points out, women who cover their heads are “*aware that secular,*

³³ *Şahin v. Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819, Para 15, 16, 17.

³⁴ *Şahin v. Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819, para 23.

³⁵ *Şahin v. Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819, para 117.

³⁶ *Şahin v. Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819, para 93.

³⁷ Hasan Aydin ‘Headscarf (Hijab) Ban in Turkey: The Importance of Veiling’ (2010) 6.1 *The Journal of Multiculturalism in Education* 1, 11.

³⁸ Carolyn Evans ‘The Islamic Scarf in the European Court of Human Rights’ (2006) 7 *Melb. J. Int'l L* 52, 2.

democratic and plural states guarantee the recognition of their identity rights".³⁹ Moreover, the court presented no evidence for its reasoning that there may be strong link between wearing headscarves and increasing fundamentalism. Further, while basing rulings on the assumption, the relationship between fundamentalism and the veil or hijab is unproven and unfounded. Hypothetically, even if the assumption were true that an individual who wears the hijab or covering has fundamentalist inclinations, it will be difficult to produce evidence for this for use in court. To discern whether or not an individual thinks a certain way or has an allegiance to a fundamentalist view, it is necessary to compel persons to disclose their political and religious convictions and some of the most intimate aspects of their life. However, according to ECtHR any measure to compel a believer to disclose detailed information regarding their religion and philosophical conviction possibly constitutes a violation of Articles 8 (right to respect for private and family life) and 9 ECHR.⁴⁰ Furthermore, human rights organizations criticized the headscarf ban as "an unwarranted infringement of the right to religious practice"⁴¹; the International Humanity Foundation said it is not the place of a state to discern which expression is legitimate as long as it does not violate other people's basic human rights.

In the *Şahin v Turkey* case, it was stated that:

'...the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind 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'.⁴²

The court has attempted to approach the headscarf from an Islamic stance, speaking on the relationship between the religion and acceptance, and the way it interacts with democratic values: *"sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable...it is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on Sharia"*⁴³.

³⁹ Metin Toprak and Nasuh Uslu 'The Headscarf Controversy in Turkey' (2009) 11:1 Journal of Economic and Social Research 43, 53.

⁴⁰ *Folgero and others v Norway* (Application no.15472/02) (ECHR, 29 June 2007) 15472/02, [2007] ECHR 546, [2011] ECHR 2148, [2011] ECHR 2189 para 96.

⁴¹ Krassimir Kanev 'Muslim religious freedom in the OSCE area after September 11' (2004) 15.4 Helsinki Monitor 233,236.

⁴² *Şahin v. Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819, para 108.

⁴³ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495, para 72.

Furthermore, the court stated that the introduction of Sharia thus cannot be compatible and reconcilable with “*the fundamental principles of democracy as conceived in the convention taken as a whole*”. In addition, the court believes that Sharia interferes in all aspects of private and public life.⁴⁴

There has been much academic discussion as to whether the headscarf, from the Islamic point of view, is a religious choice or a religious obligation; this has divided liberal and traditional scholars on the topic. Sharia is considered by the court to be authoritarian and strict; however, the majority of those who follow Islam acknowledge that the Qur’an is open to constantly changing interpretations and should not be taken concretely, which the court often fails to consider. In other words, the Qur’an may be reinterpreted in line with social development; this has been termed Ijtihad, or ‘interpretation’, which is a constant process. Sharia is interpreted only by a religious expert, named the Mojtahid; notable academic *Ibn Aqil* observed that “*it is not possible for an age to be devoid of a Mojtahid*”.⁴⁵ The ECtHR is largely responsible for upholding the standards of the ECHR. Almost all members of the courts are probably non-Muslim and they are legal experts’ not theologians. Consequently, the members of the Courts should exercise restrained in passing judgment on religious texts. It is not obvious which legal mechanisms were used by ECtHR judges, in contrast to Islamic scholars to reach the common view that Islam cannot be compatible with tolerance and human rights. In coming to this conclusion, the court has disregarded its own rationale set out in the case of *Hasan and Chaush v. Bulgaria*.⁴⁶ Here the court determined that it is outside the jurisdiction of the public authority to determine whether religious belief or the means that are used to express such belief are legitimate.

1.5.3. Refah Party v Turkey

One of the most high profile cases involves the Refah Party and their legal battle with the government of Turkey⁴⁷. Since their inception in 1983, the Refah Party have run for a number of elections, winning 10% of the votes in 1989; it was in this year that representatives of the Refah Party came to hold prominent positions, such as town mayors. The percentage of votes gained by

⁴⁴ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495, para 72.

⁴⁵ Wael B Hallaq ‘Was the Gate of Ijtihad Closed?’ (1984)16.01 International Journal of Middle East Studies 3,34

⁴⁶(Application no.30985/96) (ECHR, 26 October 2000) 34 EHR55.

⁴⁷*Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495, para1.

the party began to rise annually, eventually reaching 35% in the 1996 general election. A survey in 1997 concluded that if a general election had been held at that time it was predicted that Refah Party would have won 38% of the votes. Another opinion poll in the same year predicted that Refah would obtain 67% of votes in the next election due in 2001. Due to this impressive showing, and in collaboration with the 'True Path' Party, the Refah Party became part of the coalition government in Turkey in 1996. The following year, the Refah Party encountered opposition from the *Principal State Counsel*, who argued that the Party failed to uphold the separation of religion and state, and called for the dismantling of the party; public declarations made by party leaders were cited as the foundations of this opposition. The Constitutional Court of Turkey, having weighed the arguments, chose in favour of the State Counsel; the Refah Party was dissolved in 1998.⁴⁸ This decision was supported by the ECtHR in 2003. This has a relationship with legal rulings on religious attire as, under this same protection of the separation of religion and state (secularism), items such as the headscarf may be subject to bans and restrictions on the ground of preventing the spread of extremist views.

1.6. Wearing the headscarves: The perspective of International Human Rights Committee

At the level of international law freedom of religion has been incorporated in several international conventions. Most of these conventions have particular mechanism to interpret and to implement the content of the conventions. One of the most important conventions is International Covenant on Civil and Political Rights (ICCPR) which has dedicated Article 18 to freedom of religion.⁴⁹ This covenant has a committee which is composed of 18 independent legal experts who are persons of high moral character, and of recognized competence in the field of human rights.⁵⁰ The Human Rights Committee (hereinafter the HRC) is responsible for providing technical assistance to improve of human rights and it has the jurisdiction to made recommendations based on the standards outlined by the covenant.

⁴⁸ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495, para 23.

⁴⁹ ⁴⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Available at:<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>> accessed 1 December 2013.

⁵⁰ Available at :<<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx>> accessed 1 December 2013).

With regard to religious rights the HRC in General Comment number 22 has emphasized that this freedom includes the right to wear religiously distinctive clothing or head covering.⁵¹ Furthermore, the first optional protocol to the covenant gives the HRC competence to examine individual complaints with regard to alleged violations of the covenant by states parties to the protocol.⁵² Regarding religious manifestation, in the case of *Raihon V. Uzbekistan*⁵³ the HRC stated that rejection of Muslim girl who wore the veil by the Institute of Foreign Languages is considered to be a violation of Covenant rights. In the view of the HRC, Uzbekistan violated article 18, Paragraph 2 of the covenant which guarantees freedom of religious expression. In this case the HRC declared that no valid reason was given by the state authority in order to apply the necessary restriction measure in the light of article 18, paragraph 3, with the aims of protecting public Safety, order, morals or fundamental rights and freedoms of others.⁵⁴ On a related note, the UN Special Rapporteur on religious intolerance who identifies general criteria to assist national and international bodies in their analysis and reviews of laws and draft legislations relating to freedom of religion or belief stated that⁵⁵ “*dress should not be the subject of political regulation and calls for flexible and tolerant attitude in this regard, so as to allow the variety and richness of . . . garments to manifest themselves without constrain.*”⁵⁶ It could be argued that The ECHR, then, has adopted an alternative approach to religious expression than that stated above, deviating from the UN approved view. The ECtHR, then, may have deplored from international standards pertaining to religious freedom, as European states are members of the International Covenant on Civil and Political Rights.

In summary, it may be deduced that the arguments of the court regarding the wearing of the headscarf and the states of the Refah Party are potentially in conflict with international human rights standards. It could also be argued that arguments based on “possibilities”, “hypothesis” and ambiguous terms such as protection of “secularism” and prevention of “totalitarian movement”, “Islamic fundamentalism” and ‘intolerance’ which seem to be difficult to define and to prove in

⁵¹ Human Rights Committee, General Comment 22, Article 18, CCPR/c/21/rev.1/Add4 (30 July 1993) para 4.

⁵² Available at: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPRI.aspx>> accessed 20 January 2014).

⁵³ *Raihon Hudoyberganova v Uzbekistan* Communication no. 931/2000[2004] U.N Doc. CCPR/C/82/D/931/2000.

⁵⁴ *Raihon Hudoyberganova v Uzbekistan* Communication no. 931/2000[2004] U.N Doc. CCPR/C/82/D/931/2000.

⁵⁵ Michael Wiener ‘The mandate of the Special Rapporteur on Freedom of Religion or belief- institutional, procedural and substantive legal issue’ (2007) 2 Journal of Religion and Human Rights 3, 8.

⁵⁶ Bahia Tahzib-Lie ‘Applying a Gender Perspective in the Area of the Right to Freedom of Religion or Belief’ (2000) 3 BYU L. Rev 967, 983.

the legal context. Furthermore, it seems that passing judgment on the nature of the headscarf in Islam and Islam itself as a religion are beyond jurisdiction of the legal body such as the ECtHR.⁵⁷

1.7. Position of the Hijab from an Islamist and Feminist Perspective

Discussions surrounding the Hijab, sometimes referred to as a ‘modesty’ and often more than just a headscarf, have long been ubiquitous in academic literature surrounding Islam. The percentage of Muslims residing in the West is rising, and the September 11th attacks in 2001 has brought the Hijab, considered a symbol of Islam, to the forefront of journalism and academia. Academics writing on the topic of religion range from orthodox Muslims, to reformists, to feminist scholars, both Muslim and non-Muslim; each of these groups, and many more, are in dialogue regarding the wearing of the hijab and its significance. If one were to consider the dichotomy in the discourse, one perspective considers the hijab a spiritual obligation outlined in the Qur’an, while the other sees it as a symbol of oppression and an infringement on women’s rights and human freedom.

The discourse surrounding the hijab does not end with academia; those working in the legal sector have had to ask similar questions due to the ECtHR in supporting of the prohibition of hijab use. The ECtHR argues that these decisions were based on the belief that the hijab and other coverings are not in accordance with modern principles, such as democracy and freedom, and asserted that prohibiting the wearing of the headscarf was an attempt to check fundamentalism and uphold secular values. On the other hand, a number of academics⁵⁸ consider the ban an affront to personal freedoms and an attack on faith. The researcher would argue that, in order to properly evaluate the necessity of the ban and its relevance, one must first gain an understanding of Islam and of feminism to validate any judgement on the Court’s decision. The first section of this research will address the basics of the hijab, and its function and symbolism as a religious garment, while the second will include an overview of feminists’ analyses of the hijab.

⁵⁷ *Hasan and chaush v Bulgaria* (Application no.30985/96) (ECHR, 26 October 2000) 34 EHR55.

⁵⁸ Nisar Mohammad Bin Ahmad, ‘The Islamic and international human rights law perspectives of headscarf: The case of Europe’ (2011) 2.16 *International Journal of Business and Social Science* 161, 171. See also: Daniel Barton, ‘Is the French Burka Ban Compatible with International Human Rights Law Standards?’ (2012) 9.1 *Essex Human Rights Review* 1.

1.7. 1. The Hijab in Islam

The wearing of the hijab, and the act of covering, is a core practice of Islam. It has become one of the most contentious issues of our era, in part due to the ambiguity surrounding its Qur'anic basis. A process of 'ijtihad' must be undergone then, which involves defining the use of the hijab from the Qur'an and other religious sources, whilst placing it in a cultural and national context. The magnitude approaches to the hijab, from feminist discourse to Euro centric arguments has meant that the topic has garnered a high profile globally.

It is important to note that there are no direct references to head coverings in the Qur'an, though large numbers of Muslim women choose to wear them across the world as an act of faith and to engage with their cultural and religious identity. As a part of research, the researcher will attempt to discern the relationship between Islam and the Hijab and other head coverings; in order to do this, the term 'hijab' will be examined. The term comes from an understanding of a verse in the Qur'an, which has been interpreted as an encouragement for Muslim women to cover their hair. Notably, however, the hijab did not originate with Islam but instead began as a cultural practice in the Byzantine Empire and amongst Persian Sassanids.⁵⁹

The term comes from the oral 'hajaba' (root: h-j-b) which can be interpreted a number of ways both theistically and linguistically. One common interpretation of hajab is 'veil', though it can also be taken to mean 'seclude', 'conceal', or 'mask'. Hijab, more specifically, is interpreted commonly as 'cover' or 'veil', but it can also mean 'curtain' or 'obstacle'. Interestingly, the word has also been used to refer to talismans carried as a protection against ills, a common gift for children. An alternative interpretation of 'hijab' is 'eyebrow', more literally 'protector of the eye', while the similarly rooted 'hajib' is the word historically used to describe the individual responsible for choosing those suitable to meet the caliph.⁶⁰

⁵⁹ Rebecca Gould 'Hijab as Commodity form: Veiling, Unveiling, and Misveiling in Contemporary Iran' (2014) 15.3 *Feminist Theory* SAGE 221,225. For further information see, W. Bernard Lukenbill 'Writing about Islam for Youth: A Study of Two Authors and Two World Views' (2016) 15.12 *Journal of Religious & Theological Information* 32, 42. Also see: Paul Eid 'Post-Colonial Identity and Gender in the Arab World: The Case of the Hijab' (2002) 26.2 *Atlantis*, spring/summer 39. Also see: Aisha Wood Boulanour, 'The Notion of Modesty in Muslim Women's Clothing: An Islamic Point of View' (2006) 8.2 *New Zealand Journal of Asian Studies* 134, 140. See also: Emi Goto 'Qur'an Ana the Veil: Contexts and Interpretation of the Relevance' (2004) 1.02 *International Journal of Asian Studies* 277.

⁶⁰ Ziad Elmarsafy and Mustapha Bentaïbi 'Translation and the World of the Text: on the Translation of the Word h Hijab in the Qur'an' (2105) 21.2 *The Translator* 210. See also: Aisha Wood Boulanour 'The Notion of Modesty in Muslim Women's Clothing: An Islamic Point of View' (2006) 8.2 *New Zealand Journal of Asian Studies* 134,144. For further see: Samaa Abdurraqib 'Hijab Scenes: Muslim Women, Migration, and Hijab in Immigrant Muslim Literature' (winter, 2006) 31.4, *Arab American Literature* 55.

It is important to point out that the term ‘hijab’ is expressly referred seven times in the Qur’an; two of these uses are in the form ‘hijiban’, with the remaining five in the form ‘hijab’ (noun). Despite this, none of these instances in the Qur’an refer to the modern hijab nor to a head covering of any kind, prescribed or otherwise. Rather, ‘hijab’ is primarily employed in the Qur’an to refer to the abstract nature of creation. One notable example of Qur’anic use of the term is as follows: ‘Until (the sun) was hidden in the hijab (of Night)’ (38:32). Here, the term is metaphorical, conveying a covering of the sun and a transition into night. The Qur’anic meaning is twofold; hijab may refer either to something which covers, conceals or protects, or to something which acts. An example of the latter is offered in 41:5: ‘they say: Our hearts are under veils, (concealed) from that to which thou dost invite us, and in our ears is a deafness, and between us and thee is a hijab’ (41:5). Here, hijab refers to a symbolic inhibitor which prevents the unreligious from hearing or seeing God’s word. Later in the Qur’an, ‘hijab’ is mentioned again in terms of a metaphorical veil: ‘between them shall be a veil, and on the heights will be men who would know everyone by his marks: they will call out to the Companions of the Garden, peace on you: they will not have entered, but they will have an assurance (thereof)’ (7:46). Here, the veil, or hijab, constitutes a figurative divide between the types of people wishing to enter paradise after death. The hijab has been used to denote both a protector role and a hindrance; which one of these two usages being referred to depend upon the context. Importantly, it is never used in the holy text to describe a garment or a physical covering for women, Muslim or non-Muslim.⁶¹

One factor which complicates the debate surrounding the hijab is the synonymous use of ‘veil’ and ‘hijab’ in modern discussions of the topic; El Guindi observes that in the Arabic linguistic there is no one equivalent to the English term veil. It is pertinent, then, to separate the two terms; one must consider ‘veil’ a generalised term and ‘hijab’ a term intrinsically linked to Islam.⁶² Further, the work of Fernea⁶³ and Roald⁶⁴ suggests that the international conception of ‘hijab’ is very different across different regions and communities; while the term now universally refers to a headscarf or veil worn by Muslim women, the word and its derivative garment may

⁶¹ Samaa Abdurraqib ‘Hijab Scenes: Muslim Women, Migration, and Hijab in Immigrant Muslim Literature’ (winter, 2006) 31.4 Arab American Literature 55. See also: Ziad Elmarsafy and Mustapha Bentaïbi, Translation and the World of the Text: on the Translation of the Word Hijab in the Qur’an’ (2105) 21.2 The Translator 210.

⁶² Cited in Myra Macdonald, ‘Muslim Women and the Veil: Problems of Image and Voice in Media Representations’ (2006) 6.1 Feminist Media Studies, 7, 8.

⁶³ Elizabeth W Fernea and Robert A. Fernea ‘A Look Behind the Veil’ (1979) 2.1 Human Nature 68-77.

⁶⁴ Anne-Sofie Roald, *Women in Islam: the Western Experience* (Routledge, London 2003) 26-285.

vary. The Encyclopedia of Islam cites over 100 words which refer to coverings for women, including the ‘izar’, ‘burqu’, ‘abayah’ and niqab’. Often, then, across different cultures, certain forms of veil will be referred to using alternate words, substituting niqab where it would otherwise be called a hijab, for example. Across nations, then, different variations on the veil are commonly referred to as a ‘hijab’. For Example, a Saudi woman may wear a niqab and call it hijab, an American woman could use a headscarf and also identify it as a hijab. Thus, the veil may be used to refer to any head covering, especially in Western society; however, this does not embrace the intricacies of the issue when it comes to Islam.

Over all, those passages in the Qur’an which seek to prescribe female dress and similar covering can be found below:

1. *‘And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except to their husbands, fathers, their sons, their brothers,.... that they should draw their veils over their bosoms and not display their beauty. . . And that they should not strike their feet in order to draw attention to their hidden ornaments.’ (24: 31)*

2. *‘O Prophet! Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when abroad): this is most convenient, that they should be known (as such) and not molested. And God is oft forgiving, most merciful’. (33: 59)*

3. *Verse ‘oh you who believed, do not enter the house of prophet except when you are permitted is known as the a’yah (verse) of the hijab, in which God says, and when you ask [the Prophet’s wives] for anything ye want, ask them from before a hijab: that makes for greater purity for your hearts and for theirs’. 33:53.⁶⁵*

The first of these verse makes use of the term ‘khomoore henna’ (from khimar), which translates as being covered, erased or veiled. *Asad* notes that the derivative, ‘khimar’ is less of a covering and more of an adornment, worn in the pre-Islamic era; it lay languidly behind the woman.⁶⁶ The trend at the time was for the top of a tunic to lie loosely and openly in the front,

⁶⁵ Emma Tarlo ‘Hijab in London Metamorphosis, Resonance and Effects’ (2007) 12.2 Journal of MATERIAL CULTURE 131.

⁶⁶ Cited in Asgharali Enginee, *The Qur’an, Women, and Modern Society* (Sterling Publishers Pvt. Ltd, 2005) 64-65. Nabila Nali ‘Hadith Rejectors Claim: the Qur’an is Sufficient’ (28 November 2011) available at: <https://www.morocoworldnews.com/2011/11/16713/hadith-rejectors-claim-the-quran-is-sufficient/> Accessed 16 March 2017. See also: Amira El Azhary Sonbol, *Women, the family, and divorce laws in Islamic history* (first edn Syracuse University Press 1996). See also: Jeri Altnu Sechzer ‘Islam and Woman: Where Tradition Meets Modernity’ *History and Interpretations of Islamic Women’s Status*’ (2004) 51. 5-6 Sex Roles 263.

exposing the breasts; this was popular during the time of the Prophet, and the holy text makes a point of asserting that breasts are part of a woman's body which should not be seen publicly, which explains the use of the term 'khimar'.⁶⁷

The second verse includes term 'jalabib' (jilbab), which refers to an external robe or gown which extends the entire length of a person, or which covers the breasts and neck. Along with the aforementioned 'khimar', 'jilbab' indicates a Qur'anic basis for the practice of covering, which most frequently manifests itself in modern times as the wearing of the hijab.⁶⁸

A number of academics, however, have read these terms differently; *Al-Tabari* points out that traditional scholars interpret the first verse as saying something completely different to the second, and that these scholars disagree amongst themselves as to how they relate to modern day veiling practice within Muslim communities. He argues that, according to a number of critics, the first suggests that Muslim women can reveal their faces and hands.⁶⁹ With regard to the second, the same scholarly community argues that this verse advocates a full body covering for women, with the exception of a single eye. It has been argued by *Ibn Kathir* that the terms 'khimar' and 'jilbab' refer to this latter interpretation, in favour of a full body covering.⁷⁰ When one examines the claims of Qur'anic scholars, common approaches are referenced against one another in order to determine their similarities and differences.⁷¹ Professor *Mustafa Benhamza*, a Moroccan academic, criticised the practice of citing the Qur'an without the required depth, context or religious knowledge. *Benhamza* argues that the necessity of veiling, for both genders, and the covering of the head for women, is a staple of Islam and its related texts, which is why it has become such a prevalent concept to those practising and studying Islam. *Roald* argues that 'among

⁶⁷ Marnia Lazreg, *Questioning the Veil: Open Letters to Muslim Women* (Princeton University Press 2009) 20-22
Tabassum F. Ruby, 'Listening to the Voices of Hijab' (2006) 29 *Women's Studies International Forum* 54.

⁶⁸ Hanisa Hassan, Biranul Anas Zaman, and Imam Santosa 'Tolerance of Islam: a Study on Fashion among Modern and Professional Malay Women in Malaysia' (2015) 5.5 *International Journal of Social Science and Humanity* 5.5, 454. Also see: Dima Dabbous-Sensenig, 'To Veil or not to Veil: Gender and Religion on Al-Jazeera's Islamic law and life' (2006) 3.2 *Westminster Papers in Communication and Culture* 60, See also: Ziad Elmarsafy and Mustapha Bentaïbi, *Translation and the World of the Text: on the Translation of the Word h Hijab in the Qur'an* (2105) 21.2 *The Translator* 210.

⁶⁹ Cited in Valerie J Hoffman-Ladd 'Polemics on the Modesty and Segregation of Women in Contemporary Egypt' (1987) 19.01 *International Journal of Middle East Studies* 23, 30.

⁷⁰ Cited in Tabassum F. Ruby 'Immigrant Muslim Women and the Hijab' (2004) *CUISR*, University of Saskatchewan. See also: T Zulfikar 'Understanding Muslim Identity Through Multiple Lenses: Insights from a minority group in Australia' (2017) 1 *Aricis Proceedings* 619.

⁷¹ Cited in Tabassum F. Ruby 'Listening to the Voices of Hijab' (2006) 29 *Women's Studies International Forum* 54-66.

Islamic scholars there is a consensus with regard to female covering but there is no consensus for the actual form of the covering'.⁷²

The argument in favour of the veil takes numerous forms; according to verse 33:59 of the Qur'an, the hijab is a form of self-preservation, as it claims that covering oneself prevents rape and assault. To elaborate, this passage refers to the era in which Saudi men in Medina would abuse the female slaves; some of these women were Muslim women, unbeknownst to the Saudi men. Women should wear coverings, so it is argued in this passage, so that it is apparent that they are Muslim women, which, theoretically, protected them from sexual abuse.⁷³

It has been argued that the opposite sentiment is true today, particularly in the wake of the 2001 terror attacks on the US; this argument is no longer applicable. The figures indicate that Muslim women who wear a hijab or other covering are far more likely to experience verbal abuse and violence⁷⁴, negating its supposedly protective function.

For other commentators, the hijab is a symbol of freedom from the lustful gaze of men, and an act of autonomy over their own body; it is a prominent claim by those women who wear it; rather than a symptom of the patriarchy, the hijab acts as an emancipation from male objectification, aiding women in efforts to go about their lives with comfort and ease.⁷⁵

An alternative view is that provocative clothing and the prevalence of nudity and sexualisation in the Western media creates 'fitnah', or 'temptation'; the Qur'anic interpretation, here, indicates that women must take some responsibility for an impure and adulterated culture.⁷⁶ The researcher argues that the hijab or veil will not protect women, change society or promote purity, as there are numerous other issues involved. The researcher has resided in Iran and Kurdistan for a number of years, later residing in the UK; this experience has uncovered that, for even covered women, being outside of the home after dark can be unsafe in Islamic states. This is

⁷² Cited in Aisha Wood Boulanou 'The Notion of Modesty in Muslim Women's Clothing: An Islamic Point of View' (2006) 8.2 *New Zealand Journal of Asian Studies* 134,140. See also: Rhys H. Williams & Gira Vashi 'Hijab and American Muslim Women: Creating the Space for Autonomous Selves' (2007) 68.3 *Sociology of Religion* 269.

⁷³ Emi Goto 'Qur'an Ana the Veil: Contexts and Interpretation of the Relevance' (2004) 1.02 *International Journal of Asian Studies* 277, 281-282. See also: Asma Barlas, *believing women" in Islam: Unreading patriarchal interpretations of the Qur'an*. (Austin, TX: University of Texas Press 2002). Eli Alshech, 'Out of Sight and Therefore Out of Mind: Early Sunī Islamic Modesty Regulations and the Creation of Spheres of Privacy' (2007) 66.4 *Journal of Near Eastern Studies* 267,275.

⁷⁴ Imran Awan and Irene Zempi 'We fear for our lives: Offline and online experiences of anti-Muslim hostility' (Nottingham Trent University October 2015) available at : <www.tellmamauk.org/wp-content/uploads/resources/We%20Fear%20For%20Our%20Lives.pdf> accessed 16 March 2017.

⁷⁵ Tabassum F. Ruby, 'Listening to the Voices of Hijab' (2006) 29 *Women's Studies International Forum* 54, 66, 62.

⁷⁶ *Ibid*, 58-66.

not so much the case in the UK, as women have more freedom when it comes to how to dress. It is also true that wearing a veil or hijab does very little to prevent abuse, sexual or otherwise, and has no effect on the male gaze. Bangladesh and Pakistan are Islamic nations considered amongst the most culturally traditional in the world, particularly in terms of the treatment of women due to the prevalence of Sharia law; despite this, rates of sexual assault and rape are still high.⁷⁷ *El Fadl* a Muslim scholar, argued against ‘fitnah’ prevention as a motive for the prescription of the hijab, noting that, in the Qur’an, the term denotes non-sexual seduction, usually relating to ‘turbulence, disorder, enticement and opening doors to evil’.⁷⁸ Further, he posited that the veiling was uncalled for on these grounds, as the fault is with the men who succumb to their desires and covet women, as opposed to anything inherently sexual with regard to women’s bodies. In other words, those Islamic jurists who support the act of veiling based on the theory of ‘fitnah’ acknowledge that a woman’s body is inherently sexual and reinforces the female body as an object of lust, which requires the prescription of modesty in the form of the veil.

El Fadl goes on to assert that the prescription of bodily covering addressed to women, to prevent fitnah, is un-Islamic. He points out that fitnah is never referred to in the Qur’an as indicative of womanly lust, nor does it relate fitnah to the female body. According the Qur’an, both males and females should avert their gaze when encountering the opposite sex for reasons of modesty and so this negates the requirement that women cover themselves; a modest society requires from men these standards, rather than from women dressing.⁷⁹

Those strongly in favour of the hijab claim that the garment is not strictly religious, but represents a cultural division along gender lines based on traditional conceptions of Islam and personal faith. The argument goes that if the hijab was merely religious, it would be worn privately as well as publicly, instead of being worn primarily in the presence of non-familial men. To support this, proponents of this view turn to the Arabic root of the term ‘hijab’, which translates more closely to a separation than a covering. Notably, this interpretation is supported by the desires of

⁷⁷ Sharmeen A. Farouk ‘Violence Against Women: a Statistical Overview, and Challenges and Gaps in Data Collection and Methodology and Approaches for Overcoming Them’ (2005) BNWLA.

⁷⁸ Khaled Abou El Fadl, *Speaking in God’s name: Islamic Law, Authority and Women* (Oneworld publication, Oxford, England 2003)230- 242. See also: Sonia D Galloway ‘The Impact of Islam as a Religion and Muslim Women on Gender Equality: A Phenomenological Research Study’ (DPhil thesis, Nova South-eastern University 2014).

⁷⁹ Khaled Abou El Fadl, *Speaking on God’s Name: Islamic Law, Authority and Women* (Oneworld Publications 2003) 232-240. See also: Yvonne Yazbeck Haddad, John L. Esposito, *Islam, Gender, and Social Change* (Oxford University Press 1997) 288. See also: Hammera Khan ‘A Qualitative Exploration of the Meanings, Reasons and perceptions of the hijab among Young Muslim Hijab Wearing Women in Greater Manchester’ (2016) Manchester Metropolitan University1.

those European nations wishing to prohibit the hijab and other coverings; the separation of genders by dress is, they argue, at odds with civilised values.⁸⁰

Al-Qaradawi and *El Guindi*, both important Islamic writers, advocate the hijab on grounds of ‘modesty’. Linguistically, modesty relates to the Arabic word ‘awra’, which translates as ‘inviolable vulnerability’ or that which must be covered; this includes those parts of the body not deemed appropriate for public exposure. For men, ‘awra’ refers to the portion of the body spreading from the bellybutton to the lower thigh. This becomes more complicated when applied to a woman’s body; in a setting where non-familial men are present (those aside from the mahram), the awra consists of all but the hands and the face.⁸¹

On the other hand, some have⁸² argued in favour of a less conservative approach which allows for the protection of women’s rights, while following an interpretation of the holy text.

With regard to 33:53, academics have pointed out that this verse references only the wives of the Prophet, and so it may not prescribe that all women must cover themselves at all.⁸³ The wives of the Prophet are presented as separate from the rest of womankind, as they must follow certain standards outlined by God; these include the refusal to remarry once widowed, and the doubling of reward and sanction for sin, as well as rules on bodily coverings.⁸⁴ Traditional scholars of the Qur’an oppose this approach, arguing that the wives act as the standard to which all women should aspire; this begins with the wives, extends to the daughters, and then to all Muslim women.⁸⁵ It also seems that this proclamation hails from Allah rather than the Prophet, due to the

⁸⁰ Emma Tarlo, ‘Hijab in London Metamorphosis, Resonance and Effects’ (2007) 12.2 *Journal of Material Culture* 131.

⁸¹ Cited in David S Patel, ‘Concealing to Reveal: The Informational Role of Islamic Dress’ (2012) 24.3 *Rationality and Society* 295, 312. See: Fadwa El Guindi, ‘Gendered Resistance, Feminist Veiling, Islamic Feminism’ (2005) 22.1 *the Ahfad Journal* 53. Aisha Wood Boulanour ‘The Notion of Modesty in Muslim Women’s Clothing: An Islamic Point of View’ (2006) 8.2 *New Zealand Journal of Asian Studies* 134

⁸² Asma Barlas, *Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press 2002) 54-56. See also: Valentine M Moghadam, ‘Islamic Feminism and its Discontents: Toward a Resolution of the Debate’ (2002) 27.4 *Signs: Journal of Women in Culture and Society* 1135. See: Amira Mashhour ‘Islamic Law and Gender Equality: Could there be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt’ (2005) 27.2 *Human Rights Quarterly* 562.

⁸³ Jen’nan Ghazal Read and John P. Bartkowski, ‘To Veil or not to Veil? A Case Study of Identity Negotiation among Muslim Women in Austin, Texas’ (2000) 14.3 *Gender & Society* 395, 401,402.

⁸⁴ As’ ad Abu Khalil, ‘Gender Boundaries and Sexual Categories in the Arab world’ (1997)15.1 *Gender Issues* 91. See: Tabassum F. Ruby, ‘Listening to the Voices of Hijab’ (2006) 29 *Women’s Studies International Forum* 54, 55, 56.

⁸⁵ Yvonne Yazbeck Haddad and others, *Muslim Women in America: The challenge of Islamic identity today* (Oxford University Press 2006) 8.

usage of ‘say’, which does not usually appear in the teachings of the Prophet. ‘Say’ it is an unnecessary word if the Prophet just needs to convey this information to his family himself. Furthermore, applying the word of ‘say’ to some extent is logical when somebody believes that the Quran is not the words of God. This lends support to the argument that the Prophet is but a tool of delivery, rather than a source, of holy command. The family of the Prophet consists of all Muslims, so the command extends to all Muslims. Within this, women are referred to using the term ‘nisa’; notably, there is no singular form, and so the implication is that the command is directed at all women.⁸⁶

The verse contains the proclamation ‘*Let down upon them their over-garments*’, which is indicative of jussive Arabic; this refers to commanding a second group, suggesting that this sentiment extends to all Muslim women. The direct command from Allah, then, uses “say” (direct to the Messenger), followed by the passage which begins ‘let down’ for the next group; the second acts (they may be recognized and not annoyed) as an answer to the first, as discussed in the Surah Al Hajj (Qur’an 22:27). All three groups (wives, daughters, and all Muslim women) are the recipients of the command, and so if they do not cover themselves, their personal *iman* is diminished. *Dannia*, which translates as ‘low and near’ serves as the root for the passage ‘let down upon them their over-garments’; this suggests a preference for low hanging clothing, which runs down to the wearers feet. This is supported by the use of ‘*aleihin*’, which means that the whole body must be covered, to the floor. The *jilbab* lies over the top, and hangs loosely and opaquely over the woman’s body. The command is then justified by proclaiming that women of Islam must be represented in their clothing, and this must convey modesty.⁸⁷

The head of the Minaret of Freedom Institute in Bethesda, *Imad ad Dean Ahmad*, rejects traditional interpretations of the Qur’an with regard to the hijab. He argues that “*it’s an inference on the part of Islamic jurists to say that because modesty in the Prophet’s day meant covering the hair, it is therefore immodest for women today to leave hair uncovered*”.⁸⁸ Similarly, modern interpretations and progressive scholars such as Shahrour do not consider a failure to cover an act

⁸⁶ Aisha Wood Boulanouar, ‘Myths and Reality: Meaning in Moroccan Muslim Women’s Dress’ (DPhil thesis, University of Otago, 2011) 43.

⁸⁷ Aisha Wood Boulanouar, ‘The Notion of Modesty in Muslim Women’s Clothing: An Islamic Point of View’ (2006) 8.2 *New Zealand Journal of Asian Studies* 134, 142-143.

⁸⁸ Cited in Syed Ali, ‘Why Here, Why Now? Young Muslim Women Wearing Hijab’ (2005) 95.4 *The Muslim World* 515.

of defiance against God.⁸⁹ Further, *Haida Mubarak*, the head of the US Student Union of Muslims cited the Qur'an when she argued the following: '*It is ultimately each woman's prerogative to decide whether or not she will cover her hair...No one – not a father, husband, or brother – can ever force a woman to cover against her will. For that in fact violates the Qur'anic spirit of 'let there be no compulsion in religion'*' (Qur'_an 2: 256). This, it has been argued, is a landmark statement in popular Islamic culture, and signifies a change in attitude towards the Qur'an and its position on women (l _ a ikr _ ah f_1 al-d_in). Another an example often cited in debates of this nature is the article of the Madina Constitution following: 'all citizens in the Islamic state constitute one political ummah, although they may belong to a plurality of religious affiliations.'⁹⁰ *Mubarak* interprets the supposed rejection of coercion (ikr-ah) present in the Qur'an as in opposition to the prescription of the veil, and this is important in the change in attitude that is being undertaken in academic circles, in both the student body and the teaching staff. However, in reality, many view this interpretation as a slight on the traditions of Islam which stretch back centuries. Despite this, it seems this new interpretations of the holy texts are becoming increasingly popular among educated Muslim women, particularly those in the US.⁹¹

In sum, the agreed upon view amongst traditional commentators and scholars with reference to the Qur'an is that women should cover themselves, though there is disagreement as to the extent to which the body, face or hair must be veiled. The prevailing view among orthodox interpreters is that the whole body must be covered, with the exception of one eye; others maintain that the hands and face may remain uncovered. On the other hand, more liberal approaches to the holy text acknowledge the vagueness present in the verses which relate to covering; thorough analysis is required, argue these scholars, in order to apply the Qur'an to the modern era, particularly with regard to religious dress. These modern scholars⁹² do not take the hijab related verses as untouchable, choosing to ignore the traditional, surface level interpretations of these

⁸⁹ Cited in Dima Dabbous-Sensenig, 'To Veil or Not to Veil: Gender and Religion on Al-Jazeera's Islamic Law and Life' (2006) 3.2 Westminster Papers in Communication and Culture, University of Westminster, London 60, 68.

⁹⁰ Cited in Rebecca Gould, 'Hijab as Commodity form: Veiling, Unveiling, and Miveiling in Contemporary Iran' (2014) 15.3 Feminist Theory SAGE 221.

⁹¹ Ibid, 231.

⁹² Asifa Siraj, 'Meanings of Modesty and the Hijab amongst Muslim Women in Glasgow, Scotland' (2011) 18.6 Gender, Place & Culture 716. See also: Myfanwy Franks, 'Crossing the Borders of Whiteness? White Muslim Women who Wear the Hijab in Britain today' (2000) 23.5 Ethnic and Racial Studies 917. See also: Farha Ternikar, 'Hijab and the Abrahamic Traditions: a Comparative Analysis of the Muslim Veil' (2009) 3.5 Sociology Compass 754. See also: Ellen Wiles, 'Headscarves, Human Rights and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality' (2007) 41.3 Law & Society Review 699.

excerpts. Modern day Islamic scholars have also focuses on the absence of any explicit mentions of face coverings, or hair coverings, for that matter, in the Qur'an, and suggest that Muslim society rethink their rigidity towards prescribed dress based on these reinterpretations.⁹³ As identified by *Asad*, there are a number of legitimate justifications for not stating the precise rules on covering; he states that the nature of society and humanity is under constant development, and asserts that the Qur'an verses may be considered a collection of ethical standards and guidelines which remain applicable over time and across centuries.⁹⁴

1.7.2. Feminism views on the hijab in Islam

The Topic of covering or veiling is not merely a legal issue, as it has been the subject of much debate amongst feminist commentators and academics.⁹⁵ The non-religious approach to feminism has been evident in these debates, even in Muslim states, with regard to promotion of women's rights. That is not to say that feminism inspired by Islam is not gaining ground. This new trend advocates for the coexistence of religious practice and progressive values of gender equality.

Secular feminist, sometimes called Western feminists, have asserted that the headscarf or veil representative of patriarchal values and should be prohibited internationally on human rights grounds.⁹⁶ However, it has been pointed out that this approach assumes that Western values are universally applicable, which may not be the case.⁹⁷ In addition, feminist scholars have put forward this view that freedom for women lies in secular education arguing that a complete ban on the hijab would complete this process.⁹⁸

⁹³ Dima Dabbous-Sensenig, 'To Veil or Not to Veil: Gender and Religion on Al-Jazeera's Islamic Law and Life' (2006) 3.2 Westminster Papers in Communication and Culture, University of Westminster, London, 60.

⁹⁴ Muhammed Asad, 'The message of the Quran' available at :< <http://muhammad-asad.com/Message-of-Quran.pdf>> accessed 08 June 2017. See also: Tabassum F. Ruby, 'Listening to the Voices of Hijab' [2006] 29 Women's Studies International Forum 54, 57-58.

⁹⁵Linda Duits, & Liesbet Van Zoonen, 'Headscarves and porno-chic: Disciplining Girls' Bodies in the European Multicultural Society' (2006) 13.2 European Journal of Women's Studies 103. See also: Charles Hirschkind, & Saba Mahmood, 'Feminism, the Taliban, and politics of counter-insurgency' (2002) 75.2 Anthropological Quarterly 339. See also: Myfanwy Franks, 'Crossing the Borders of Whiteness? White Muslim Women who Wear the Hijab in Britain Today' (2000)23.5 Ethnic and Racial Studies 917.

⁹⁶ Rachel Anderson Droogsma, 'Redefining Hijab: American Muslim Women's Standpoints on Veiling' (2007) 35.3 Journal of Applied Communication Research 294. See also: Jasmin Zine, 'Unveiled sentiments: Gendered Islamophobia and experiences of veiling among Muslim girls in a Canadian Islamic school' (2006) 39.3 Equity & Excellence in Education 239.

⁹⁷ Jane Freedman, 'Women, Islam and rights in Europe: Beyond a Universalist/Culturalist Dichotomy' (2007) 33 Review of International Studies 29.

⁹⁸ Hiadeh Moghissi, *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* (Zed Books 1999) 117. See also: Norani Othman, 'Muslim Women and the Challenge of Islamic fundamentalism/extremism: An

In France in 1989, for example, a prominent feminist solicitor and predecessor deputy *Gisele Halimi* stood down from the radical group called *SOS-Racisme* when this organization first supported the girls who were disallowed education due to wearing hijab in Creil. She argued that ‘there cannot be integration without respect for the laws of the receiving country. There cannot be a change in mentalities without women’s dignity equalling that of men.’⁹⁹ Similarly, the former Minister for Women’s Rights argued that any attempt to tolerate the headscarf is ‘*equivalent to saying yes to the inequality of women in French Muslim society*’.¹⁰⁰ With regard to the hijab, secular feminism, whether from a Western scholar or one from the Middle East, posits that the headscarf is symbolic of inequality along gender lines. During a speech in Rome, Egyptian Islamic feminist *Sha’rawi* cited not the hijab but the burqu’ (burqa), which covers the entire neck, face, hair and body, as an obstacle to progress in terms of equality.¹⁰¹ Within feminist groups, there have been disagreements as to whether the hijab should be prohibited entirely in the name of liberty, or whether this view disregards the wishes and experiences of Muslim women who choose to cover themselves. The academic consideration of the issue has also come under scrutiny simplifying the issue; under secular feminism, it can be argued, all Muslim women become homogenised, spoken for by a group of Western women who know little of their lived experience. To remedy this problem of representation, general perception is that Muslim women who wear the hijab should have their voices heard on the matter, because these women can provide the deepest insight into the issue. In this regard, Edwin points out the importance of Western women listening to the religious factors inherent in the practice before attempting to speak on the subject.¹⁰²

Some such as *Hayette Bounjema* from *SOS-Racisme* and *Zahia Ramani* and *Nadia Amioni* from *France Plus* organizations have said that there is very little to distinguish the secular approach to that of racist ideologies, as the practise of refusing education to women and girls who wear the

Overview of Southeast Asian Muslim Women's Struggle for Human Rights and gender equality’ (2006) 29.4 Women's Studies International Forum, Pergamon, 339.

⁹⁹ Krista Hunt, Kim Rygiel, *The Headscarf Debate: Muslim Women in Europe and the ‘War on Terror (En) gendering the War on Terror: War Stories and Camouflaged Politics* (Routledge 2016) 182.

¹⁰⁰ Ibid, 182.

¹⁰¹ Cited in Fadwa El Guindi, ‘Veiling Resistance, Fashion Theory’ [1999] 3.1 The Journal of Dress, Body and Culture 51-80.

¹⁰² Shirin Edwin, ‘Veiling the Obvious: African Feminist Theory and the Hijab in the African Novel’ (2008)29.1 Third World Quarterly199, 2013.

hijab, as in the French example above, only seeks to marginalise these women further, almost punishing faith.¹⁰³

Islamic feminists have, in recent years, taken a similar approach to secular feminist in their attempts to preserve freedoms for women and promote women's legal and social rights, in conjunction with interpretations of the Qur'an. Where they differ is that Islamic feminists are against the idea that feminist thought need to incorporate Western culture in order to be valid; the cultural and religious texts of Islam, argue this group, may provide a sound foundation for feminist arguments, particularly within a Muslim context.¹⁰⁴ These feminists argue for the coexistence of feminist values and Muslim values. The proponents of the phrase 'Islamic Feminism' include *Laila Ahmed*¹⁰⁵, *Riffat Hassan*, and *Fatima Mernisi*; these scholars advocate the above position. *Moghadam* argues that feminism is not inherently negated by Islam, as the religion is fundamentally in favour of the equal rights of men and women. It is only due to misinterpretation and misapplication that these values have been ignored in favour of an incorrect interpretation which permits the subjugation of women.¹⁰⁶ This sentiment has been supported by *Majid*, who argues that the two approaches are not at odds, or inherently contradictory.¹⁰⁷ Islamic feminism is built upon a desire to see women govern their own lives, and to interpret the holy texts independently.

It can be argued, therefore, that Islamic feminism is in line with modern approaches to Islam, which attempt a constant reassessment and reinterpretation of the Qur'an for legal and cultural use. These scholars are often human rights activists and are pushing for a law which

¹⁰³Cited in Cathie Lloyd, 'Rendez-vous manqués: Feminisms and Anti-racisms in France' (1998) 6.1 *Modern & Contemporary France* 61. See also: Jane Freedman, 'Secularism as a Barrier to Integration? The French dilemma' (2004) 42.3 *International Migration* 5, 14-16.

¹⁰⁴ Valentine M Moghadam, 'Islamic Feminism and its Discontents: Toward a Resolution of the Debate' (2002) 27.4 *Signs: Journal of Women in Culture and Society* 1135. See also: Alimatul Qibtiyah, 'Self-identified Feminists among Gender Activists and Scholars at Indonesian Universities' (2010) 3.2 *ASEAS - Austrian Journal of South-East Asian Studies* 151.

¹⁰⁵ Ahmed L, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Yale University Press 1992).

¹⁰⁶ Valentine M Moghadam, 'Islamic Feminism and its Discontents: Toward a Resolution of the Debate' (2002) 27.4 *Signs: Journal of Women in Culture and Society* 1135.

¹⁰⁷ Anouar Majid, 'The Politics of Feminism in Islam' (1998) 23.2 *Signs: Journal of Women in Culture and Society* 321-361. See also: Alimatul Qibtiyah, 'Self-identified Feminists among Gender Activists and Scholars at Indonesian Universities' (2010) 3.2 *ASEAS - Austrian Journal of South-East Asian Studies* 151,155. See also: Elizabeth Fernea, 'Challenges faced by Muslim women: An Evaluation of the Writing of Leila Ahmed' (DPhil thesis, University of South Africa 2010).

respects these human freedoms; they claim that these values are rooted in Islam and do not necessarily require the input of Western feminism or secular ideology.¹⁰⁸

The Iranian feminist writer, *Afsaneh Najmabadi*, explained this perspective as a “*radical decentring of the clergy from the domain of interpretation, and the placing of woman as interpreter and her needs as grounds for interpretation*”.¹⁰⁹ Muslim feminist have countered the traditional Islamic approaches which limit women to the sphere of the home and the family; this approach, dictated by Islamic rule, strips women of marital rights and limits female inheritance, to name but two restrictions of women’s rights. In the words of *Nayereh Tohidi*, this form of feminism is “*a movement of women who have maintained their religious beliefs while trying to promote egalitarian ethics of Islam by using the female-supportive verses of the Qur’an and holy texts in their fight for women’s rights, especially for women’s access to education*”.¹¹⁰

In relation to the hijab, both *Fatima Mernissi* and *Leila Ahmad*, Moroccan and Egyptian respectively, have been prolific on the subject; the former argues that the rules governing the veil were only designed to be applied to the Prophet’s wives, while the latter disregards the headscarf as entirely unnecessary for Muslims’ women.¹¹¹

Much as non-religious feminism has been the target of religious criticism, Islamic feminism has been criticized for being too liberal with the concrete rules and traditions of Islam, which are dictated, argue the traditionalists, by the holy texts. A number of academics disagree that the veil can be reconciled with women’s rights and autonomy; the veil is a symbol, argue these critics, of cultural and religious imprisonment.¹¹² Advocates of this view assert that the rigidity of the codes of Islam prescribes the behaviour and duties of women without objection. These roles limit women to the home, to their husband, to their children, disadvantages them in court proceedings and limits their societal rights. Any notion of women finding their own feminist

¹⁰⁸ Anne-Marie Hilsdon and Santi Rozario, ‘Introduction Special Issue on Islam, Gender and Human rights’[2006] 29 Women’s Studies International Forum 331.

¹⁰⁹ Cited in Valentine M Moghadam, ‘Islamic Feminism and its Discontents: Toward a Resolution of the debate’ (2002) 27.4 Signs: Journal of Women in Culture and Society 1135, 1144.

¹¹⁰ Cited in Sophie Chamas, ‘Sayyid Muhammad Hussein Fadlallah: Muslim Cleric and Islamic Feminist’ (2009)1.2 Journal of Alternative Perspectives in the Social Sciences 246, 247,248.

¹¹¹ Cited in Anne Sofie Roald, *Women in Islam: the Western experience* (Routledge 2001)339,259-262. See also: T Zulfikar ‘Understanding Muslim Identity Trough Multiple Lenses: Insights from a Minority Group in Australia’ (2017) 1 Aricis proceedings 619, 623. See also: Aisha Wood Boulanour, ‘The Notion of Modesty in Muslim Women’s Clothing: An Islamic Point of View’ [2006] 8.2 New Zealand Journal of Asian Studies 134. Also see: Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Yale University Press 1992) 162-168.

¹¹² Hannah Blakeman, ‘The Muslim Veil in America: A Symbol of Oppression or Empowerment?’ (2014) Honers College, 1, 9-12.

meaning in the Qur'an is overpowered by traditional conceptions of Islam, which are deeply rooted.¹¹³

The incompatibility of feminist thought and Islamic teaching is further exemplified by the difference in the fundamental approach; feminism is a term free of religion, while the former is based on faith. Speaking on the concept 'Islamic feminism', *Hammed Shahidin* argues that this phrase constitutes a contradiction in terms.¹¹⁴

Consequently, traditional Muslim groups have set themselves up in opposition to feminist thought, both Islamic and secular feminism. The former argue in favour for women's rights from the perspective of Islamic culture and Qur'anic interpretation, while the latter takes the traditionally Western view of feminist arguments.

It is concluded that in terms of the hijab within a Muslim context, it is a matter of debate as to whether this garment is a something which all Muslim women are required to wear as an act of religious dedication, or simply a personal choice made by women to represent their beliefs. This debate has divided opinions among both sides, by both liberal and traditional commentators. Even within traditional factions, there have been disagreements over the extent to which women should cover themselves.

On the other hand, a more liberal readings of the Qur'an reveals a significant vagueness as to the intent of these verses, and the desired interpretations. The Qur'an requires deep linguistic analysis in order to glean any sort of clear interpretation, which is difficult to achieve with any holy texts. As for the sections which refer to veiling, they often negate and contradict traditional teachings when it comes to religious covering; there are no direct references to head, face or hair covering in these religious texts. Thus, a number of critics have argued for a new interpretation of Muslim dress with a focus on a newer, more linguistic approach to Qur'anic exegesis.¹¹⁵

The feminist approach, on the other hand, is formed of two main perspectives, that of Muslim feminism and that of secular feminism, both of which has been vocal in the debate

¹¹³ Cited in Sophie Chamas, 'Sayyid Muhammad Hussein Fadlallah: Muslim Cleric and Islamic Feminist' (2009) 1.2 *Journal of Alternative Perspectives in the Social Sciences* 246, 248. See also: Dawn Lyon, & and Debora Spini, 'Unveiling the Headscarf Debate' (2004) 12.3 *Feminist Legal Studies* 333.

¹¹⁴ Cited in Alimatul Qibtiyah, 'Self-identified Feminists among Gender Activists and Scholars at Indonesian Universities' (2010) 3.2. *ASEAS - Austrian Journal of South-East Asian Studies* 151.

¹¹⁵ Dima Dabbous-Sensenig, 'To Veil or Not to Veil: Gender and Religion on Al-Jazeera's Islamic Law and Life' (2006) 3.2 *Westminster Papers in Communication and Culture*, University of Westminster, London 60, 68. See also: Asma Barlas, *Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an*. (University of Texas Press 2002).

surrounding the hijab. It is also true that both perspectives have been the subject of much criticism themselves; secular feminists views on the subject have been challenged by more traditional commentators and even by other religious feminists who argue that the secular view is poisoned by Western values and is unfairly biased against Islamic faith, some going as far as to say that this is a conspiracy act. Muslim feminism also has its critics, with traditional interpreters branding these feminists a defecting group who are attempting to bend the rules outlined in the Qur'an. The influence of traditional Islamic voices has limited the impact made by voices for equality; feminism has been largely ineffectual in this matter, as Muslim society is still conditioned by a patriarchal and suppressive culture.

Following on from an exploration of the headscarf as it exists in Islamic ideology and feminist ideology, it is clear that the veil, hijab or headscarf is nothing more than a symbol of faith, with no tangible links to intolerance or fundamentalism; this renders the rulings of the ECtHR questionable. On the other hand, it has been put forward by some feminist schools of thought that some women who wear the headscarf are victims of a fundamentalism regime which strips them of their autonomy, such as that imposed by Islamic State or the Taliban.

1.8. Methodology of the research

One of the most important requirement of conducting successful research is choosing an appropriate methodology. Methodology is considered a road map during the process of doing research; in other words, without clear and appropriate methodology, academic research cannot be conducted successfully. Methodology is defined as a “systematic way to solve a problem.”¹¹⁶ It is also defined as “a science of studying how research is to be carried out.”¹¹⁷ The researcher in this thesis critically analyses the ECtHR's decisions related to the freedom of religious expression. Therefore, this research is library based and employs the black-letter law, historical and comparative themes. The use of these themes included the review of literature, and comparing the decisions of the ECtHR with international and national approaches related to the freedom of religion. In other words the qualitative methods have been used for this thesis.

¹¹⁶ Chakravanti Rajagopalachari Kothari, *Research methodology: Methods and Techniques* (New Age International 2004) 5. See also: Wayne Goddard, Stuart Melville, *Research methodology: An introduction* (Juta and Company Ltd 2004) 148.

¹¹⁷ Chakravanti Rajagopalachari Kothari, *Research Methodology: Methods and Techniques*. (New Age International 2004) .5. See also: Perri 6, Christine Bellamy, *Principles of Methodology: Research Design in Social Sciences* (1st ed, GB: Sage Publications Ltd 2011-2012).

The researcher also considered, but discounted quantitative research or analytic statistics. The quantitative methodology relies on statistical data in order to measure particular events or phenomena, and then the researcher analyses the data to discover and test the relationship between the variable by using a deductive approach. This method produces legitimate and scientific answers related to the subject of the research.¹¹⁸ However the main purpose of the current research is not identifying the figures involved in the decisions of the ECtHR regarding freedom of religion and whether or not they guarantee or violate religious manifestation. In fact, the main goal of conducting this research is to critically analyse the decisions of the ECtHR in terms of the freedom of religion in the legal framework. Although some statistics data have been used in this research study, they have not greatly influence the outcome of the research, which is why these statistics are taken from secondary sources and they are not generated by the researcher in the form of primary data.

It should be noted that the ECtHR's judges often have varying perceptions and interpretations of cases under investigation. Consequently, there are often dissenting views in some of the cases. To put it in another way, there is no single reality, despite the claims of quantitative research in the natural sciences.¹¹⁹ Thus, the causal model, which is applied in the natural sciences, cannot be applied to analyse and reach conclusion about legal cases. As aforementioned, judges often hold differing views on the same case. The judgments of the ECtHR and the findings of the research, as human actions and social interaction, probably cannot be predicted or replicated like research in natural science would require. Due to this fact, contrary to the quantitative method, the findings of the current research cannot be considered an absolute truth and also cannot be generalized.¹²⁰

In the quantitative approach, the reality is external and objective; therefore, this method ensures that there is no relationship between the subjective biases of the researcher and the objective reality that he or she investigates. Therefore, in this kind of approach, the research is conducted as much as possible in a value-free way. In the quantitative paradigm, the researcher

¹¹⁸ Linda T Carr, 'The Strengths and Weaknesses of Quantitative and Qualitative Research: What Method for Nursing?' (1994) 20.4 *Journal of advanced nursing* 716, 716-724.

¹¹⁹ Nahid Golafshani, 'Understanding Reliability and Validity in Qualitative Research' (2003) 8.4 *The qualitative report* 597.

¹²⁰ For further information regarding the generalization of research review: Thomas R. Black, *Evaluating Social Science Research: An Introduction* (Reprinted, Sage Publications Ltd 1996) 183.

attempts to explain and describe reality as it exists, not as what it ought to be.¹²¹ To put it another way, a researcher avoids normative analysis. It cannot be denied that part of this study describes and explains the reality or the situation of religious manifestation based on the decisions of the ECtHR, or in the some legal systems in the ECHR member states. However, this study has not restricted itself to just describing reality. The main purpose of this research is to critically assess and apprise of the decisions of the ECtHR in terms of religious expression. Through this critical analysis, the researcher makes normative recommendations to improve the situation of religious manifestation among the European members of the ECHR.

As a part of the qualitative methodology the researcher has chosen three methods to conduct this research.

Firstly the researcher has chosen Black–Letter law method as one of the most appropriate approaches to conduct this research. This legalistic approach focuses on analysing the primary sources of law, namely case law, statutes, and, to a lesser extent, academic commentary. In contrast to the social and natural sciences' methods, which are concerned with empirical data or experimentation, (either as a basis for its theories, or as a means of testing them), the black-letter theme deals with the analysis and seeks understanding of theoretical legal concepts in research.¹²² Furthermore, the findings of black-letter law are not validated based on the empirical effects in the real world. Instead, its validity relies on developing a consensus among the academic community.¹²³ It can be said that this methodology focuses on the law in the books rather than the law in action. The Black-Letter approach concentrates on the rules of law in the particular context of how they have been applied in particular cases. In this type of research, the questions take the form of asking, “what is law?” in particular context.¹²⁴ Furthermore, this approach critically examines the contradiction between case law and the claimed societal purposes of the law.

¹²¹ Aliyu Ahmad Aliyu and others, ‘Positivist and Non-Positivist Paradigm in Social Science Research: Conflicting Paradigms or Perfect Partners?’ (2014) 4.3 *Journal of Management and Sustainability* 79.

¹²² Erika M Serfontein, ‘Inclusivity towards Legal Research: A Historical and Future Perspective’ (2012) 64 *New Contree* 79, 91. See also: Paul Chynoweth, *Legal Research.* *Advanced Research Methods in the Built Environment* (2008) Wiley-Blackwell, Oxford 28.

¹²³ Shazia Qureshi, ‘Research Methodology in Law and Its Application to Women’s Human Rights Law.’ (2015) 22.2 *Journal of Political Studies* 629. See also: Paul Chynoweth, *Legal research. Advanced Research Methods in the Built Environment (Wiley-Blackwell Oxford* 2008) 28, 30.

¹²⁴ Paul Chynoweth, *Legal research. Advanced Research Methods in the Built Environment (Wiley-Blackwell Oxford* 2008) 28, 30. See also: Gestel, Rob Van, Hans-W. Micklitz, and Miguel Poiaras Maduro, ‘Methodology in the New Legal World’ (2012) EUI Working Papers, Department of Law, European University Institute.

Moreover, the critical aspects of black-letter research also emanates from exploring internal inconsistencies within the body of case law. Based on this fact, it seems that applying Black-Letter law is the best approach for this particular research topic. The thesis claims that there is inconsistency in the judgments of the ECtHR relating to interpretation of article 9 of the ECHR. Furthermore, the researcher highlights the potential of the some of the court's judgments to be restriction on the freedom of religious expression which is enshrined in article 9. These decisions damage the relation and peaceful coexistence of different religions groups in the European community.

The black-letter law enables investigators to analyse religious expression from a legal perspective by overlooking the sociological and political implications while focusing solely on judicial pronouncements. Furthermore, analysing the decisions of the ECtHR and legal statutes in terms of the freedom of religion helps the researcher to understand what the law is in the context of article 9 of the ECHR. Understanding the legal dimensions of concepts such as freedom of expression, fundamentalism and tolerance, which are included in this research, clears a pathway to conduct logical and legal research. It should be noted that this research is not based merely on the black-letter law method; at the same time, in order for legal research to have a potential practical value, the researcher use historical themes and comparative legal methods alongside with the black-letter law theme.

Another research methodology applied in this research is the historical theme. This approach, as a scientific method, examines the developmental and evolutionary process of the selected area of the law in a chronological and systematic way.¹²⁵ Analyzing historical and philosophical developments in the past, in order to grasp the main basis of a legal regime and to profoundly examine different approaches towards the law, not only extends one's insights but also improves one's skill as a critically thinking researcher.¹²⁶ In other words, in this approach, a researcher examines documents and other sources that include facts in terms of the research subject

¹²⁵ Torou Elena, et al 'Capturing the Historical Research Methodology: an Experimental Approach' (2009) Proceedings of International Conference of Education, Research and Innovation, Madrid. See also: James Mahoney, Erin Kimball, and Kendra L. Koivu, 'The Logic of Historical Explanation in the Social Sciences (2009) 42 (1) Comparative Political Studies 114.

¹²⁶ Torou Elena, et al 'Capturing the Historical Research Methodology: an Experimental Approach' (2009) Proceedings of International Conference of Education, Research and Innovation, Madrid. See also: Bruce L. and others, *Qualitative research methods for the social sciences* (8th edn, Pearson 2014).

with the aim of achieving a better understanding of current trends and future possibilities.¹²⁷ The background of the decisions of the ECtHR and legislation in terms of religious manifestation must be taken into consideration when interpreting existing cases because the current law or fact is a combination of old and new endorsements. In the historical theme, an investigator is able to understand the context and backdrop for current legal issues. This method proves that law is not simply a trade but a discipline with a rich tradition.¹²⁸ Whilst utilizing the historical theme, the researcher puts a legal stipulation in the context of its traditional roots, which helps the researcher to understand the exact means and purposes of the legal rules and texts.¹²⁹ Thus, studies that interpret legal concepts in the historical context and provide a deeper understanding of these concepts are not only useful for historians, but also useful for a legal researcher. Moreover, this method explains why the law has assumed its present form, which adds a philosophical approach to the research.¹³⁰ Therefore, this method concurs with the nature of this thesis. This Research attempts to explain and analyse the historical context and development of the freedom of religion in international documents and disputes that appeared during preparation of drafts, adoption of the instrumental and international documents in terms of religious freedom.

The third theme that can be applied to this research is the comparative approach. The comparative method of legal research is that systematic and jurisprudential method which we apply to gain new knowledge about the legal systems in respect of which we apply it, by taking cognizance of the similarities and differences of those legal systems.¹³¹ Among other methods, such as survey, participation, observation, and life history, the comparative method has been

¹²⁷ Norman Blaikie, *Design Social Research* (second edn, Plity Press 2010).

¹²⁸ Erika M Serfontein, 'Inclusivity towards Legal Research: A Historical and Future Perspective' (2012) 64 *New Contree* 79, 81.

¹²⁹ Erika M Serfontein, 'Inclusivity towards Legal Research: A Historical and Future Perspective' (2012) 64 *New Contree* 79. See also: Harold Cooke Gutteridge, *Comparative Law: an Introduction to the Comparative Method of Legal Study and Research* (Vol. 1, CUP Archive 2015)

¹³⁰ Erika M Serfontein, 'Inclusivity towards Legal Research: A Historical and Future Perspective' (2012) 64 *New Contree* 79. See also: James Mahoney, 'Comparative-Historical Methodology' (2004) 30 *Annu. Rev. Sociol.* 81.

¹³¹ Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: towards a new model for comparative law (1998) 47.03 *International and Comparative Law Quarterly* 495. See also: Albin Eser, 'The Importance of Comparative Legal Research for the Development of Criminal Sciences' (1998) *Nouvelles Études Pénales*.

regarded as the core method of social science. So far it can be said that all empirical social research deal with a comparison of some sort.¹³²

Like other methods of legal research, the comparative method attempts to obtain rich legal information. This method presupposes that there are different legal rules and institutions in different legal jurisdiction. In other words, it believes in the pluralism of law.¹³³ Comparatists believe that, in order to understand law, it is not sufficient simply to study law as set forth in black-letter law (treaties, legislation, and case law). Alongside this, a researcher needs to consider beyond the law as written formally in text. In other words, a researcher has to examine precisely the sub-structural elements that influence law. These substructures, or invisible powers, include history, religion, geography, morals, customs, philosophy, and ideology.¹³⁴ In order to compare legal systems neutrally and critically, researchers need to keep a distance from their own culture and prejudices, from the society under study, and the biases of their informants.¹³⁵

As aforementioned, comparative law has not focused only on the words on the pages but it also focused on the context. A contextual trend investigates the interpretation and application of law in action, or the law in practice. Through the analysis of the substructure of law, an investigator is able to understand and analyze law in a more comprehensive manner. A law in action, or a functionalist comparative approach assumes that law has social purposes. Due to this fact a functionalist comparative examination attempts to discover how different legal systems deal with the same kinds of problems in the context of their own societies.¹³⁶ With the proliferation of regulatory regimes at the international level, this methodology has expanded its focus to include international law.¹³⁷ With this explanation, this methodology can be applied to compare regional

¹³² “Comparative Methodology and Corporate Law Research” This work was presented at Corporate Law Teachers’ Annual Conference (8-10 Feb.2004). Canberra, Australia.p.8.see also: Frankenberg Gunter, ‘Critical Comparisons: Re-thinking Comparative Law’ (1985) 26 Harv. Int’l. LJ 411.

¹³³ Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)’ (1991) 39.1 The American Journal of Comparative Law 1, 5. See also: Harold Cooke Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Vol. 1. CUP Archive, 2015) 226.

¹³⁴ Edward J Eberle, ‘The Method and Role of Comparative Law’ (2008) 8.3 Washington University Global Atudies Law Review 451. See also: Walter Joseph Kamba, ‘Comparative Law: A Theoretical Framework’ (1974) 23.03 International and Comparative Law Quarterly 485.

¹³⁵ Edward J Eberle, ‘The Method and Role of Comparative Law’ (2008) 8.3 Washington University Global Studies Law Review 451. See also: Mathias Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ (2002) 50.4 The American Journal of Comparative Law 671.

¹³⁶ Dana Raigrodski, ‘What Can Comparative Legal Studies Learn from Feminist Legal Theories in the Era of Globalization’ (2014) 43 Baltimore Law Review 349, 358.

¹³⁷ Elen Hey, Mak Elaine ‘Introduction: The Possibilities of Comparative Law Methods for Research on the Rule of Law in a Global Context’ (2009) 2 (3) Erasmus Law Review 287.

regimes' handling of human rights in terms of the freedom of religion to how ECtHR handles such matters as a universal regime which is reflected in the International Covenant on Civil and Political Rights by the Human Rights Committee. In order to compare these two legal systems, the researcher needs to answer some questions beyond the legal framework. In other words, the comparative approach must concentrate upon the law in action, not simply the law in the books. This might be considered as a call for deeper research into legal sources and the social context around legal rules.¹³⁸

Researchers need to study background, history, structure, social, political, moral, and cultural justifications behind the ECHR and ICCPR in terms of religious manifestation. It is obvious that the decisions of the ECtHR regarding religious expression are different from those of the HRC. To compare these two legal regimes, a researcher cannot ignore the effects of elements such as geography, religion, and the history of the members states to both treaties. For example, the majority of the members of the ECHR are Christian, and the political systems of these countries are inspired by the concept of secularism. In contrast, the members of the ICCPR are composed of different religions, and they are states with different political systems. All of these elements can affect the insights of the ECtHR and the CCPR in terms of religious manifestation. Furthermore, among members of the ECHR, different approaches are followed regarding religious expression. For instance, in the UK the right of religious manifestation is politically and legally guaranteed. However, in France, in order to protect secularism and preserve the neutrality of the government, religious expression is restricted by law. In order to compare these two legal systems, researchers must go beyond considering the letter the law and examine the spirit of law as well. A researcher needs to analyse legal rules and practices in terms of the freedom of religion based on the social function and cultural contexts, such as historical background, and culture. It can be argued that simply comparing two legal systems without considering these subjects would detract from the value of the thesis, making it incomplete. It would also appear naïve not to do so.

The main aim of comparison between ICCPR and ECtHR decisions is to extend awareness and insights to the ECtHR judges about the way that the other system deal with the cases related to the wearing of the headscarf. As long as, in the both systems, wearing the headscarf is a main subject of dispute, in comparing the reasons of judgments by the ICCPR as a near universal mechanism

¹³⁸ Vernon Valentine Palmer, 'From Leretholi to Lando: Some Examples of Comparative law Methodology' (2005) 53.1 *The American Journal of Comparative Law* 261, 264.

with ECtHR as a regional mechanism, we may be able to pave the way for unification and harmonization in a way that guarantees and protects the rights and freedom of the wearer based on human rights criteria.

1.9. Ethical dimensions of the research

As with all human activities, social research is subjected to individual, community, and social values. It is a necessity that researchers be aware of the ethical dimensions of the research and apply them in appropriate ways. Ethical aspects of the research examine what normally and legally should be done during the conducting of the research.¹³⁹ It can be said that research ethics include the “moral principles guiding research from its inception through to completion and publication of results.”¹⁴⁰ The degree of importance and effectiveness of ethical principles, depending on the subject, are different. For instance, with research where humans are the subject of the study, ethical principles play an important role. In this type of research, ethical principles emphasize that research is not a collection of data, but is also concerned with the dignity, rights, safety, and well-being of participants in research.¹⁴¹

Nowadays, awareness of ethical principles and applying them proficiently in the research are as critical as being able to think creatively and logically when planning, conducting, completing, and validating research.¹⁴² In order to collect data regarding religious manifestation, the researcher does not plan to utilize interviews, questionnaires, focus groups, and ethnography methods. Instead of collecting this type of primary data, the researcher attempts to critically analyse the decisions of the ECtHR through the study and identification of secondary data such as cases, conventions, statues and review of secondary scholarly literature. A critical review and analysis is an example of secondary data with no participants intervention involved. However, there are several ethical principles that need to be observed in all research.¹⁴³ For example, a researcher needs to strive to

¹³⁹ Marilyn Aita and Marie-Claire Richer ‘Essentials of Research Ethics for Healthcare Professionals’ (2005) 7.2 Nursing & Health Sciences 119, 119, see also: Stephen D. Lapan, *Qualitative research: An Introduction to Methods and Designs* (1. Aufl. 1; ed, Hoboken: Jossey- Bass 2011).

¹⁴⁰ The British Psychological society, *Code of Human Research Ethics* (2010) Leicester.p.5.

¹⁴¹ Jane Stuart and Jacqueline Barnes, ‘Conducting Ethical Research’ (2005) National Evaluation of Sure Start 1, 5.

¹⁴² Marilyn Aita, Marie-Claire Richer, ‘Essentials of Research Ethics for Healthcare Professionals’ (2005)7.2 Nursing & health sciences 119,119. See also: H. Russell Bernard, *Social Research Methods: Qualitative and Quantitative Approaches* (Sage Publications, Inc 2000) 659.

¹⁴³ Robert L. Miller, John D. Brewer, *The A-Z of Social Research* (Sage Publications Ltd 2003)345, 97-99. See also: Kenneth D. Bailey, *Methods of Social Research* (The Free Press 1994) 456.

avoid personal bias and opinions that may affect the study. Also, the findings of the research must be presented as accurately as possible. The present research is guided by these principles.

1.10. Scope of the research

One of the first tasks of a researcher is to define the scope of the area of study; having narrowed the scope of study can be time-consuming and lets us clarify the problem and study it at greater depth. This thesis aims to critically analyse the decisions of the ECtHR regarding the headscarf only, but it has not examined the other religious symbols like burqa and niqab which are both highly concealing religious attires as a result of them being less common in the ECHR members and justifiability of the ban them in academic sphere due to the importance of facial expression and eye contact in the process of teaching and learning. In its decisions the ECtHR used the concepts of fundamentalism and tolerance as justifications to ban the headscarf in the educations sittings. The main concern of this study is not like previous scholars to prove whether the applicants of the cases were fundamentalist or intolerant, but the research will examine whether it is possible to apply above-mentioned concepts in these specific legal cases. To conduct this research, qualitative methodology has been used as the most suitable approach.

1.11. Outline of the Thesis

The thesis is divided into six chapters:

In **Chapter One**, after an introduction and general statement on the decisions of ECtHR regarding the wearing of headscarf, the factual background of the relevant cases will be presented, followed by an outline of the view of international bodies, such as the HRC of, on the wearing of the headscarf. The headscarf is a religious and gender-specific symbol and so the researcher examines the view of Islamic scholars and feminists on the wearing of the headscarf.

Chapter Two reviews the key literature resources on the research topic. This chapter analyzes the views of female scholars, Islamic scholars and non-Islamic scholars on the background of the relationship between freedom of religion and the wearing of headscarf. In order to identify knowledge gaps, literature from authors regarding religious expression, particularly in Muslim cases, will be critically analyzed and reviewed. Unlike the first chapter , which focused on the issue of the headscarf using both Islamic and feminist ideology, this chapter addresses the legal applications of arguments surrounding the headscarf and assesses the legitimacy of rulings by the

ECtHR on the matter. To this end, the researcher hopes to draw attention to the existing gap in literature relating to cases of this kind. In the existing literature, many argue that the rulings of the ECtHR are problematic, as they are in themselves intolerant of religious expression and are an affront to freedom and liberty. Further, this research asserts that the use of fundamentalism and intolerance as terms which justify the decision to restrict the headscarf cannot have a legal grounding. This is discussed further in Chapters four and five of this thesis. It could be said, then, that this chapter outlines the evidence for research problem.

Chapter Three attempts to shed light on the distinction between two aspects of the freedom of religion. The first is freedom to adopt and hold a religion. This is considered the ‘internal aspect’ of the freedom of religion. The second involves the freedom of practice, teaching, worship and observance, or the ‘external aspects’ of religious freedom. Furthermore, this chapter will include an analysis of debates and disputes which have emerged with regard to the term ‘freedom of religion’ during the preparation of drafts and international treaties. This chapter is primarily aimed at presenting a conceptual framework for understanding the underlying philosophy of the research. It is essential for one to first understand these in order to fully comprehend the research as a whole.

Chapter Four includes a critical analysis of the decisions of the ECtHR on the wearing of the headscarf in educational institutions. First, the concept of fundamentalism will be examined from its historical and philosophical backgrounds. Then, based on this discussion, the decisions of the ECtHR regarding the wearing of the headscarf will be critically analyzed. This complement the literature review exercising in chapter two in providing of the research problem and putting in the context judicial influence and development of this area of law.

Chapter Five discusses and critically analyzes the concept of tolerance used as a justification to ban the wearing of the headscarf by Turkey, Switzerland, and France. In this chapter, the researcher explores the concept of tolerance from a historical and philosophical perspective. Then, based on the findings, the decisions of the ECtHR are critically analyzed. Alongside these decisions, the judicial decisions of a number of secular and non- European countries will be analyzed and compared, acting as supplementary support and clarification to criticize the decisions of the ECtHR. In this chapter the researcher attempts to determine whether it is possible to prove tolerance view in the related cases through court proceedings. After the historical and philosophical approach of the concept has been outlined, this research will assess the legitimacy of the rulings of the Court in cases pertaining to the headscarf.

Chapter Six concludes the thesis, by exploring some of the major implications of the analysis undertaken in the preceding five chapters. Here, the main finding and recommendations are together with a mapping of the research contributions.

1.12. Contribution of the Research

The existing literature on the topic of the headscarf and religious expression as addressed by the ECtHR is largely fixed on legal process, largely ignoring the concepts cited and the historical background.¹⁴⁴ This thesis attempts to address the ambiguity of tolerance and fundamentalism, both of which have been used as a justification by the court for restriction. This has been aided by an ideological and wider historical and social exploration of the concepts involved. The previous literature, then, has too frequently attempted an argument against the decisions of the courts without examining the language of the court or defining the concepts they are attempting to argue for or against, namely fundamentalism and intolerance. Therefore, this thesis set out has to outline the key definitions and their history, ideological implications and generally accepted meaning. In this way, the legal aspects of the issue can be addressed with the knowledge of the origin of these arguments and the contexts which are being drawn upon by all parties; Thus, interpreting these and other legal terms whilst considering their historical contexts can be particularly useful not just for legal historians but also for researchers of legal matters. This benefit is compounded by presenting a philosophical dimension of these terms that helps one to understand how these terms have developed into their current form. In other words, this method adds a philosophical approach to the research. In more direct terms, the conclusions reached in this thesis could be considered by judges in order to come to decisions which are more in line with human rights standards and true tolerance.

¹⁴⁴ Discussion on concepts see, Henrik Palmer Olsen, 'The Right to Freedom of Religion: A Critical Review' (2000) *Scandinavian Studies In Law* 228. For further see: Alice Donald, and Erica Howard, 'The Right to Freedom of Religion or Belief and its Intersection with other Rights' (2015) *A Research Paper for ILGA-Europe. School of Law, Middlesex University* 1. See also: Sylvie Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR' (2006) 55. *O4 International and Comparative Law Quarterly* 929-944. Also see: Dawn Lyon, and Debora Spini, 'Unveiling the Headscarf Debate' (2004) *Feminist Legal Studies* 12.3: 333-345.

CHAPER TWO

Review of Literature on ECtHR Cases Relating to the wearing of the Head Scarf as a Religious Symbol.

2.1. Introduction

The main aim of this chapter is to review the existing publications and materials pertaining to the topic under examination, in order to create a conceptual basis for further study and place the current work in its academic context; this exercise will aid the researcher in gaining a fuller understanding of the research area. A literature review also provides sources for the research, allowing a well-informed investigation and the ability to identify research gaps; the latter is the key aim of the literature review in this research, focusing on approaches neglected when tackling the issue of the headscarf under the context of the ECtHR. Until now, most of the research has revolved around the rulings of the court on cases involving the headscarf. The researcher found that most of the existing research has neglected to consider the historical and philosophical context of the concepts of ‘fundamentalism’ and ‘intolerance’ which are used as justifications for the restrictive rulings. This research, then, aims to assess the rulings of the ECtHR through an assessment of these terms using the aforementioned approaches.

Not respecting religious freedom, especially in the context of religious manifestation of a person’s beliefs, has been at the core of a plethora of conflicts in the history of humankind. Out of necessity to address this issue, a number of agreements were reached by European powers in the 17th and 18th centuries, namely the Peace of Westphalia (1648) the Treaty of Vienna (1606) and the Treaty of Paris (1763).¹⁴⁵ In the more recent history, more specifically in the aftermath of World War II, we can observe focused efforts within the international community to establish more universally applicable and upheld guidelines regarding religious freedom. Consequently, the subject of religious freedom has been mentioned in various conventions and declarations both at the regional and global level. Regarding the former, one convention stands out above others in

¹⁴⁵ Javid Rahman, ‘Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities’ (2000) 7 International Journal on Minority and Group rights 139, 142.

terms of the relative effectiveness of its mechanism: the ECHR (1950).¹⁴⁶ This convention and its principles are institutionally implemented by the ECtHR thereby promoting some degree on consistency and uniformity in its member states- hence the reason for its perceived effectiveness.

In this context, the author's aim is to evaluate seemingly contentious decisions of the ECtHR with respect to cases involving Muslims.¹⁴⁷ As it will be demonstrated, the attribute of contentiousness can be ascribed to these cases based on the notion that violation of one's religious freedom is considerably difficult to prove given the current procedural requirements under which ECHR operates. Furthermore, the analysis of the pertinent cases will highlight the posited view that the ECtHR's decisions based on prevention of fundamentalism and intolerance actually indirectly assist in restricting and violating religious freedom of an individual or even a community. Additionally, such decisions can be perceived as not adhering to the international standards and obligations of ECHR's member states regarding the protection of human rights and religious freedom.¹⁴⁸ Given the importance of the aforementioned issues, it is obvious that numerous studies have attempted to analyse the existing decisions of the ECtHR concerning cases revolving around religious freedom.

Having critically analysed the existing body of literature concerning the decisions of the ECtHR, the researcher has been able to provide a sound justification of his decision to conduct legal research regarding this very specific area of law. In addition, it is important to highlight how the present study complements the previously conducted studies. In terms of the time period which is covered in the present study, the researcher has decided to analyse pertinent literature published since 2000, as this is a year when the ECtHR issued decisions regarding the wearing of headscarf. Analysing studies conducted in this period has allowed the researcher to assess the depth and width of the existing research on the topic in question. Furthermore, the researcher has been able to identify with greater clarity the research problem that should be focused on within the existing gap in the literature. Finally, by evaluating the previously conducted studies, the researcher has gained a valuable insight into the choice of the most suitable research design for the present study.

¹⁴⁶ Carole J Petersen, 'Bridging the gap: The Role of Regional and National Human Rights Institutions in the Asia Pacific' (2011) 13 APLPJ 174, 184.

¹⁴⁷ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899 *Şahin v Turkey* Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819; *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.

¹⁴⁸ *Raihon Hudoyberganova v. Uzbekistan* (2004), Communication No. 931/2000 U.N Doc. CCPR/C/82/D/931/2000.

Another important function of the literature review is to identify and formulate the link between the existing body of literature and the research problem whilst also assisting the researcher in narrowing the focus on issues and aspects revolving around the wearing of religious symbols that have not been previously dealt with. Therefore, unlike the previously conducted studies, the present study explores in greater depth the concept of tolerance and fundamentalism taking into account also the development and evolution the meaning of these two terms over the time. To put simply, the researcher aims to clarify the relationship between the individual and the concept of fundamentalism and tolerance. The researcher seeks to question and to challenge the idea of using these concepts as a justification for banning the wearing of headscarf by the ECtHR. This is particularly due to the failure by the Court to present a convincing *ratio decidendi* supporting its decisions to justify its rulings by employing the abovementioned terms. Besides this, to go one step further, the researcher also debates the possibility of limiting one's religious freedom purely due to having ideas of fundamentalism or intolerance whilst not causing any harm to other people.

To evaluate thoroughly the existing body of literature, the researcher analysed relevant studies in several phases. In the first phase, given the main subject of the present study, the focus was on female researchers, followed by analysing the work of authors from non-Muslim countries. In the final phase, the researcher reviewed studies conducted by Muslim authors with respect to the question of religious freedom and a woman's right to wear a headscarf.

Across every stage, the researcher examines the rulings of the ECtHR on cases pertaining to the headscarf using different approaches. It has been put forward by some of the authors reviewed that the rulings of the court contradict with principles of gender equality and non-discrimination, while others argue that the rulings of the court fall short of the requirement for 'necessity' and 'proportionality' set out by the ECR in article 9. Western liberalism aims to promote diversity and harmony, though the ECtHR enforces this to a somewhat extreme degree, and ends up restricting the freedoms such religious manifestation which it claims to protect. A number of academics reviewed in this chapter have argued against the rulings of the ECtHR, claiming that terms such as extremism and tolerance are used without proof whether the wearers of the headscarf are members of any fundamentalist groups or not.

2.2. Female scholars' views on religious expression in the context of the wearing of the headscarf

Since the core subject of this dissertation comprises of a set of issues related to women's right to wear a headscarf, it is appropriate to commence the literature review by analysing the views of female scholars regarding this very issue. The sample of analysed scholars includes both female researchers in general and also those who have been directly affected by a particular decision regarding the legality of the ban on wearing a headscarf.

One of such scholars is *Hilal Elver* who elaborated on her experience and other issues related to wearing a headscarf in her book 'The headscarf controversy: Secularism and freedom of religion'.¹⁴⁹ This book consists of two parts. Following the introductory part presenting the basic context the book's topic, Chapters 2, 3 and 4 deal with the development of the Turkish government's policies and the debate within the public regarding wearing a headscarf covering the period from 1980 together with an analysis of pertinent decisions by both national and supranational courts, namely ECtHR. In the second part framed by Chapter 5 and Chapter 9, *Elver* shifts her focus away from the Turkish experience towards global perspectives and trends. For instance, Chapter 5 deals with the strong anti-Islamic sentiment that emerged post 9/11 and that redefined the essentially liberal framework in which wearing a headscarf was discussed, towards an environment which is informed by a sense of fear, Islamophobia and intolerance. The next three chapters within the second part of the book analyse how the question of legality of wearing a headscarf has been approached in three different countries: the USA, Germany and France. The last chapter of the second part concludes the whole book. The following section will examine each part of the book in more details.

In her introduction, *Elver* outlines the issue of wearing a headscarf and how it is positioned within a wider discourse of human rights, secularism, and Islamic fundamentalism with ensuing Islamophobia, gender discrimination and the world's governments' legal responses to various issues within this context. The author does not shy away from clearly defining her own position in the pertinent debate by stating her rejection of the decisions made by both Turkish courts and ECtHR. She accuses these institutions of prioritizing the over-arching concepts of secularism and prevention of fundamentalism over one's religious freedom, whilst maintaining that international

¹⁴⁹ Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford University Press 2011) 304.

law has acted contrary to its core principles by failing to uphold the rights of Muslim women to manifest their beliefs.

In Chapter 2 the author details the context in which the headscarf controversy has been unfolding in Turkey. The main point emphasised by the author in this regard is the strong opposition of the Constitutional Court towards any effort of the political parties to strike a balance between the countries's founding principle of secularism and the right of its citizens to religious freedom. *Elver* documents the institutionalised opposition towards certain aspects of religious freedom in Turkey by highlighting cases where Turkish women or even men faced repercussions based on their or their spouse's wearing of a headscarf. In concluding chapter, the author formulates an argument maintaining that institutionalised secularism in Turkey is anti-liberal and poses a threat to women's right in the country.¹⁵⁰

Within Chapter 3, the author criticises ECtHR's decisions regarding cases involving religious freedom and its manifestation by duly analysing the logical and legal framework in which European and Turkish secularism has been historically positioned. In this context, she maintains that the presence and influence of secularism in Turkey is informed by different historical experience than in case of other European countries. More specifically, the secularisation in the West originated from a complex transformation of Western society and thus represented a continuous, down-top process which mostly guarantees right to religious manifestation. On the other hand, the secularisation in Turkey was imposed on the society as essentially a political decision by the 'founders' of modern Turkey, namely *Kemal Atatürk*, whereby secularisation was supposed to be the key for emulating the power and progress of the West.¹⁵¹ As a top-down process, the secularisation process in Turkey has never been truly integrated into the Turkish society as one of its cornerstones, or at least not by the majority of Turks.¹⁵²

The author then moves on the main subject of the book – the issue of wearing a headscarf as an expression of Turkish women's specific religious beliefs. The analysis of this issue is

¹⁵⁰ Ibid, 18-36. See also: Andrew Moravcsik, HILAL ELVER, *The Headscarf Controversy: Secularism and Freedom of Religion* (2012)91(5) *Foreign Affairs* 192.

¹⁵¹ Zehra F Arat, 'Turkey – Headscarf politics in Turkey: A Postcolonial reading' (2011) 65(4) *The Middle East Journal* 686.

¹⁵² Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford University Press 2011) 304-44-51. See also book review: Vrinda Naraina, 'Veiled threats?' (2014) 26(1) *Canadian Journal of women & the law* 170.

supported by the author's academic background and is further enriched by her own personal experience and observation as a Muslim scholar. As a result, the author's findings have significant value in terms of their validity. In the core of her argument, the author asserts that although wearing a headscarf can be a manifestation of not only specific religious but also cultural, political or social values and beliefs, none of these factors constitutes a reason to justify institutionalised discrimination of women wearing headscarf in the way it can be observed in Turkey.¹⁵³ The chapter concludes with an analysis of ECHR's decision from the perspective of the Turkish legal system, whereby the author emphasises the absence of any legal document or custom authorising the ban of wearing a headscarf in Turkey.

Having analysed the legal system in Turkey, Chapter 4 is devoted to the criticism of certain ECtHR's decision from a legal point of view. More specifically, the author evaluates the role of the court in various cases, namely *Dahlab v. Switzerland*¹⁵⁴, *Şahin v. Turkey*¹⁵⁵, *Dogru v. France*¹⁵⁶, *Kervanci v. France*¹⁵⁷, and *El Morsli v. France*¹⁵⁸. First, Evler criticises the factors considered by the court as decisive in the process of arriving at a decision that favoured the banning of wearing of a headscarf. Some of these factors include considering the headscarf a means of proselytization, as a way to instigate gender inequality, as promoting a tendency towards fundamentalism, or as an expression of disrespect and intolerance towards the dominant culture. Another problematic aspect of the above-mentioned cases is the tendency of the court to favour national legal systems in case of a discrepancy between a national and supranational law – a phenomenon called the margin of appreciation.¹⁵⁹ The author furthermore argues that decisions taken by ECtHR with respect to the cases mentioned above were substantially governed by a set of prejudices, stereotypes, presumptions and politically infused considerations. Moreover, the court seems too often to neglect or even to ignore the nuances of each case, evidence of which can be found in the uniform approach taken by the court in explaining its decisions.¹⁶⁰

¹⁵³ Hasan Aydin, 'Headscarf (Hijab) Ban in Turkey: The Importance of Veiling' (2010) 6 (1) The Journal of Multiculturalism in Education 1.

¹⁵⁴ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899.

¹⁵⁵ *Şahin v Turkey*, (Application no. 44774/98 (ECHR, 10 November 2005) ECHR 819)

¹⁵⁶ Application no 27058/05 (ECHR, 4 December 2008) ECHR 1579.

¹⁵⁷ Application no 31645/04 (ECHR, 4 December 2008).

¹⁵⁸ Application no. 15585/06 (ECHR, 4 March 2008).

¹⁵⁹ Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford University Press 2011) 75-78.

¹⁶⁰ See review on the book by: Shana Cohen, 'Hila Elver, *The Headscarf Controversy: Secularism and Freedom of Religion*' (2014) 117(1) *Journal of Theology* (Norwich) 46.

To put simply, the author maintains that the court has adopted “one size fit all” attitude in dealing with the pertinent cases.¹⁶¹ Finally, she argues that in the post 9/11 era, the court’s decisions in cases dealing with Islam or Muslims can no longer be considered entirely objective and neutral.¹⁶² Additionally, the factor that the ECtHR is located in France, which has shown inclination towards the banning of wearing a headscarf, should be also taken into account.¹⁶³ She duly observes that the justification for the ruling in the case of the Refah Party, which centred upon the prevention of Islamic fundamentalism, could not possibly be applied in states with a non-Muslim majority population, unlike Turkey.

In light of the questionable commitment demonstrated by Turkey in the arena of human rights, the author has criticized the ECtHR for allowing the ‘margin of appreciation’ to the national courts of Turkey over these cases. The author argues that ‘margin of appreciation’ only worsens the human rights landscape of Turkey, arguing that the ECtHR as a supranational body should be more proactive in such controversial cases, including those pertaining to the headscarf.

In Chapter 5, *Elver* provides a comprehensive summary of the development of a strong anti-Islamic sentiment that is currently permeating the wider discourse regarding the freedom of manifestation of one’s religious beliefs in general and the wearing of a headscarf in particular. The author rightly points out that such sentiment is in stark contrast with the values on which modern European states are based.

Chapter 6 discusses the current socio-economic conditions in France. In this context, the author highlights that there is a popular narrative concerning a headscarf being a symbol of fundamentalism, radical Islam and aggressive Islamism. Furthermore, she underlines the fact that Muslims in France often face problems of social and economic exclusion and have to deal with widespread manifestations of racism. *Elver* analyses the work of the Stasi Commission in France and emphasises the way in which political secularism can be held responsible for introducing the ban of a headscarf in French public schools in 2004. To put simply, the rationale for passing this law is according to *Elver* purely political.¹⁶⁴ Not shying away from using strong words, the author

¹⁶¹ Supra no 156, 77-88.

¹⁶² See review on the book by: Helen Hall, ‘Review of ‘The Headscarf Controversy: Secularism and Freedom of Religion’ (2014) 16 Ecclesiastical Law Journal 374.

¹⁶³ Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford University Press 2011) 304, 94.

¹⁶⁴ Ibid, 111-118.

claims that this law originated the widespread Islamophobia that fuels the hysteria that Islam and Muslims aim to destroy French culture and the foundations of the French republic.¹⁶⁵

Using France as her first case study, *Elver* continues by analysing the situation regarding wearing a headscarf in Germany whilst comparing and contrasting both countries. The fundamental difference in this regard is, according to the author, the fact that relevant cases in Germany revolved around teachers rather than students and converts rather than the second or third generation of Muslim immigrants. Her analysis of the case *Ludin v. Germany*¹⁶⁶ is particularly illuminating. In this case, although the German Federal Constitutional Court first accepted the arguments of a Muslim school teacher,¹⁶⁷ it later provided states with a right to ban the wearing of a headscarf in schools. The author also duly stressed the fact that as people of Turkish origin constitute the biggest minority in Germany, the pertinent discourse is considerably shaped by the relationship between the Turkish minority and the state. Another difference between Germany and France stems from the character of their political systems, whereby the federal system in Germany provides individual states with a significant degree of autonomy. She concludes this chapter by arguing that since ‘German values’ are less institutionally defined than ‘French values’, there is more of an opportunity in Germany than in France to create more pluralistic environment that would respect religious freedom.

The last country to be analysed by *Elver* is the USA where there is not such a direct focus on wearing a headscarf, as this is rather an element of a broader discussion regarding Islam’s position in the country. And yet, in the post 9/11 America and with two wars waged in Muslim countries – Iraq and Afghanistan – a strong current in this discussion revolved around the USA’s ‘mission’ to liberate oppressed Muslim women, with the headscarf seen as an outer manifestation of this oppression. On the other hand, American Muslim women perceive headscarf as the symbol of their American Islamic identity which has so far been respected by the American judicial system. In this regard, the author emphasises that although no case involving wearing a headscarf has been discussed by the Supreme Court, American Muslims have to face various forms of deep-seated Islamophobia that is spreading across the country with an increasing intensity.¹⁶⁸

¹⁶⁵ Ibid, 124-126.

¹⁶⁶ *Ludin v Baden-Württemberg*, Federal Constitutional Court, Germany (BVerfG), 24 September 2003, 2 BvR 1436/02.

¹⁶⁷ *Supra* no 160, 128-142.

¹⁶⁸ To understand further how the U.S.A deal with wearing of the veil see: Danial Gordon, ‘Why There No Headscarf Affair in the United States’ (2008) 34.3 *Bergham Journals* 38, 39. The clearest example to which illustrates

To conclude the book, *Elver* once again underlines her key argument that there is an institutionalised effort expressed through judicial, legislative and administrative decisions and policies that represent a form of discrimination against women based on what they wear. As a result, these women are often prevented from fully participating in the social and economic life of a given country.¹⁶⁹

Based on the overview in the section above, it can be argued that the core of *Elver's* argument considers secularism and fear of fundamentalism as the main instigators in this regard. According to the author, secularism inevitably introduces elements of inequality and discrimination against women and accuses Muslims women of fundamentalism and intolerance; whereas it could be argued that these women merely wish to manifest their religious beliefs.

In this context, she extrapolates from her own experience of being a Turkish woman, thus she condemns not only Turkish but also Western secularism. However in doing so, she fails to recognise the existence of more liberal and tolerant secularism. Similar notions can be observed in *Denli's* argument that secularism is not neutral in its approach towards all religions and beliefs active within a given society¹⁷⁰. Rather, as she maintains, secularism is 'a normatively prescriptive model that favours certain forms of modern religion at the expense of the religions that are equally legitimate.'¹⁷¹

Furthermore, there are some paradoxes in *Elver's* arguments, insofar as on the one hand, she is very pessimistic about a future in which secular parties ban expression of religious beliefs, while emphasising how AKP and Islamist political parties are fighting against inequality and discrimination against women. Yet, on the other hand, she presents statistical data showing that

differences between countries regarding the freedom of religion and perception of secularism may be the case Nashala Hearn in America that was mentioned by Gordon. In this case the girl who wore headscarf suspended from attending classes. According to the school's regulation students were forbidden from wearing caps, hats, bandanas, plastic caps, or hoods on jackets inside the building of school. However, after the staff of the school realized that wearing of the headscarf is a part of religious belief, they allowed the girl to attend the school wearing her hijab. It is worth stressing that in this case the school never referred to protection of secularism as a justification for suspending the student from school, and the regulation was applied for believers and non-believers equally.

¹⁶⁹ For further see: Hera Hashmi, 'Too Much to Bare-A Comparative Analysis of the Headscarf in France, Turkey, and the United States.' (2010)10 U. Md. LJ Race, Religion, Gender & Class 409.

This article was written during her externship in Ankara, Turkey at the Human Rights Agenda Association, during which she experienced Turkey's headscarf ban. She says that the headscarf does not limit a women's ability to think or her ability to participate in public life and as an active member of her community. Their desire is not to contradict secularism and democracy, but rather to be able to enjoy the freedoms that democracy offers. Instead, the headscarf ban violates a women's autonomy, choice, privacy, self-expression, and ability to work and study.

¹⁷⁰ Özlem Denli, 'Between Laicist State Ideology and Modern Public Religion: The Head-Cover Controversy in Contemporary Turkey' (2004) *Facilitating Freedom of Religion or Belief: A Deskbook*. Springer Netherlands 497.

¹⁷¹ *Ibid.*

the participation of women in economic, political and social life has been at its lowest level during the reign of AKP.¹⁷² In order to justify the poor performance of the AKP in their efforts to promote women in government, the present author would suggest that this low percentage of women in the public sector may be partly due to cultural factors and the failure of the previous secular governments. Despite of optimistic expectations of the AKP party, however, Turkey continues to score lowly when assessed for markers of human development in compare with other ECHR member states.¹⁷³

To conclude the assessment of *Elver's* book it should be emphasised that she provides a useful summary of various attitudes and policies of different countries with respect to secularism and headscarf. *Elver* uses in her analysis logical and legal arguments which render her claims and assertion quite convincing. However, similar to a number of other researchers working in this field, she fails to define and clarify terms such as secularism, discrimination, extremism, fundamentalism, intolerance and court's neutrality which she and others employ in the discussion regarding the legality of banning the wearing of a headscarf. This lack of clarity in employing terms which are not properly defined is what this dissertation aims to avoid in discussing its main subject.

The review of *Elver's* book demonstrates that despite the author's attempt to critically evaluate the ECtHR's decision with respect to the wearing of headscarf, the book fails to clearly state, by using sound and strong arguments, its opposition towards the way in which the Court justified its decision. She rightly criticises the decisions of the court to restrict religious manifestation in the name of secular values and prevention of fundamentalism and intolerance, all of which are broad and controversial. *Elver* however, like previous researchers, avoids illuminating the concepts of fundamentalism and tolerance to prove that the use of these terms in the cases related to the wearing of the headscarf is logically and legally wrong. When analysing Court's decisions regarding cases from Turkey, *Elver* rightfully looks closer at the concept of secularism within the historical context of the Turkish society. Using the historical theme to analyse concepts such as secularism, provides a more comprehensive understanding of the concept and also enables the researcher to evaluate the Court's decisions' compatibility with the socio-historical

¹⁷² Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford University Press 2011) 190-192.

¹⁷³ 2015-01 Human development index in Europe available at: <<http://eucham.eu/charts/146-2015-01-human-development-index-in-europe>> accessed 08 June 2017.

development of the term. It is therefore apparent that one of the main strengths of *Elver's* research is positioning the concept of secularism into its historical context. By doing so, *Elver* presents the reader with valuable insight into the development of secularism as a concept in Turkey, and partially in France, which the researcher can utilise when discussing in the present study secularism and the evolution in the understanding of this term in the last few decades.

One other female researcher, *Susanna Mancini*, in her article¹⁷⁴ focuses on comparing the use of the headscarf or hijab by Muslims against the wearing of a crucifix in Italian schools. The court case surrounding this latter issue considered the crucifix to be a cultural symbol, and that the wearing of a cross does not interfere with human rights or democracy. Therefore, the image of the crucifix is secularised, a view which the Catholic Church rejects due to the importance of the crucifix as a religious, rather than a national or socio-cultural, symbol.¹⁷⁵

Nonetheless, in the decision of the court, a crucifix has a more transcendent meaning among both Christians and non-Christians, meaning it is permitted to be hung in classrooms and halls at schools without causing offence to any student or adult. This is argued from the stance that the cross has a religious interpretation for Christians and a national and cultural meaning for non-Christians.¹⁷⁶ Mancini argues against this decision, stating that this symbolisation serves only to perpetuate the colonial and homogeneous image of European society in opposition to the emergence of multi-cultural states and nations across the continent. As commented by *Evans*, to position a religious symbol as holding national and cultural meaning for all minorities, regardless of whether it is a majority position, has severe consequences for religious freedoms and human rights.¹⁷⁷ For instance, the ECtHR in the case *Dahlab* stated that it is 'scarcely conceivable' that teachers were allowed to wear religious items but the school itself was banned from displaying crucifixes. In this case, teachers were able to wear 'small pieces of jewellery' without any particular fuss, without consideration of the fact that additional discussion would have demonstrated that these pieces of jewellery were very often crucifixes, which are considered to have a different place discretely worn

¹⁷⁴ Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence* (2008) 30 *Cardozo L. Rev* 2629.

¹⁷⁵ Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life—Crucifixes in the Classroom?' (2011) 11.3 *Human Rights Law Review* 451

¹⁷⁶ Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2008) 30 *Cardozo L. Rev* 2629, 2631-2631. See also: Camil Ungureanu, *Between Pluralism and Majoritarianism: the European Court of Human Rights on Religious Symbols and Education* (Department of Political and social sciences, University Pompeu Fabra 2011).

¹⁷⁷ Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 *Melb. J. Int'l L.* 52, 8,9.

around a teacher's neck than placed on a wall and held to demonstrate the school's values.¹⁷⁸ *Mancini* added that the judges do not argue against the concept of secularism, but interpret it in a manner that is suitable with the permissions given to Christianity, alongside the example of other cases of countries including, Italy, Germany and Switzerland which are permitted to display crosses within schools.¹⁷⁹

Mancini examines this decision of the ECtHR in regards to the cross alongside the discussions related to the use of headscarves by Muslim women. In contrast with the symbolism of the crucifix, headscarves have been viewed as a cultural symbol too, but also a political one, which in both senses opposes the values of democracy, human rights, and 'European' society.¹⁸⁰ Furthermore, *Mancini* argues that this approach to secularism may compromise the success of diversity and pluralism across Europe, and so threatens the staples of peace and stability. Importantly, she adds that the concept of secularism by the state in terms of addressing religious affairs is important across all treatments of religions; it is illogical for the state to at once permit the wearing of a crucifix but to simultaneously oppose the use of a headscarf. It is not only an offence against state neutrality, but is also an opposition to freedom of religion.¹⁸¹

In her article, *Mancini* disagrees with the French Stasi Commission in its conceptualisation of headscarves as symbols of inequality, discrimination and intolerance. For a state to uphold its requirements to respect human rights, it is necessary for them to commit to the protection of religious freedoms, rather than banning religious symbols. This can be discerned in a paragraph of the report led by the Stasi Commission, which links gender equality to the image of a woman as a sexual object, such as the stereotypical image of a man forcing a woman or girl to wear Muslim dress and head coverings, and to not look at or talk to other men, in order to avoid being considered a whore. The report uses double standards to deal with the right of women to choose their clothing; on the one hand, the state is concerned that some girls might be forced to adorn the headscarf,

¹⁷⁸ See also: Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 *Melb. J. Int'l L.*

¹⁷⁹ Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2008) 30 *Cardozo L. Rev* 2629, 2631-2638. See also: Esra Demir Gürsel, 'The Distinction Between the Freedom of Religion and the Right to Manifest Religion: A Legal Medium to Regulate Subjectivities' (2013) 22.3 *Social & Legal Studies* 377, he states in this stance of secularism, only those religions have opportunity to express that consonant with governments' perception of secularism.

¹⁸⁰ *Supra* no 176, 2631-2641; see also: Camil Ungureanu, *Between Pluralism and Majoritarianism: the European Court of Human Rights on religious symbols and education* (Department of Political and social sciences, University Pompeu Fabra 2011).

¹⁸¹ *Ibid* p 2641-2642.

while on the other, the state assumes that it is better for a women to be bare headed than for her to cover her head.¹⁸²

Therefore, *Mancini* considers that preventing citizens from wearing religious clothing or symbols should not and cannot be linked to any objective characteristic of the religious symbol itself. A student or teacher who wears the hijab may by their actions violate the right and freedom of others, but it is such infringement that should be punished, not the fact of wearing of religious symbol. To assert that the symbol of the headscarf opposes gender equality is an assertion based on assumptions rather than clear evidence. If a student or teacher is to wear a religious symbol such as a hijab or headscarf, they should be punished from infringing another person's right; rather than for wearing that particular item of clothing.¹⁸³ This is true for cases where manifestations of a religious nature affect the ability to do their job. For example, a school may implement a rule by which teachers may not preach or indoctrinate students towards a certain religion.

Although the author presents a strong argument in terms of the case study of the crucifix in comparison with the Muslim headscarf, her argument is weaker in her comparison of this within the cases of *Otto-Preminger-Institute v Austria*¹⁸⁴, *Wingrove v. United Kingdom*¹⁸⁵, and *Handyside v United Kingdom*.¹⁸⁶ In three last cases what is restricted is not religious expression of the applicants, but the freedom of expression. In contrast to the wearing of the headscarf or crucifix which are religious symbols, what were the forbidden in the aforementioned cases were dissemination of the film which may offend the belief of the believer but does not threaten religious freedom.¹⁸⁷

It has been additionally argued by Mancini that the ECtHR is unable to validate claims that Islamic principles are at a conflict with human rights. It is perhaps surprising that similar claims have been made by the author without providing proper explanation regarding other monotheistic

¹⁸² Ibid.

¹⁸³ Ibid, p 2651-2656; see also other article of author: Susanna Mancini, 'Patriarchy as the Exclusive Domain of the other: The Veil Controversy, False Projection and Cultural Racism' (2012)10.2 International journal of constitutional law 411.

¹⁸⁴ (Application No.13470/87)(20 September 1994) ECHR 26.

¹⁸⁵ (Application No. 17419/90) (25 November 1996) ECHR 60.

¹⁸⁶ (Application No.5493/72, A/24)(07 December 1976) ECHR 5.

¹⁸⁷ Supra no177, 2660 See also: Susanna Mancini, Michel Rosenfeld 'Unveiling the limits of tolerance: Comparing the treatment of Majority and Minority Religious Symbols in the Public Sphere' (2010) 309 Cardozo Legal Studies Research Paper 1, 18.

faiths with non-negotiable dogmas such as Christianity. These claims imply that the faiths are undemocratic, but no sufficient explanation is provided for the claims.

It has been stated by *Mancini* that if the wearing of the headscarf is one such practice that violates fundamental rights and freedoms, it should be restricted.¹⁸⁸ Nonetheless, the idea of ‘fundamental rights and freedom’ has not been clearly defined in a collective way that takes into account each specific socio-cultural context in which it is applied. After all, out of necessity the definition of fundamental rights and freedoms must vary somewhat and carry nuances in accordance to each individual place.

The most important aspect of *Mancini*'s study is the comparison between the crucifix and headscarf as two religious symbols in order to support the notion that both equally constitute a form of religious manifestation that should be respected and not prosecuted by the state. The author goes even further when asserting that imposing secularisation upon women in terms of dictating what they can or cannot wear contradicts the contemporary understanding of the concept of secularism as being supportive of religious pluralism. Despite her strong arguments in some places, the author is less persuasive in discussing the apparent contradiction between religious freedom and secularism from a legal perspective. Moreover, *Mancini* seems to predominantly focus on the comparison between the wearing of a headscarf and crucifix whilst neglecting to some degree other legal case that are linked with the issue of religious freedom and the ECtHR's approach to dealing with this issue. Also, by pointing at cases related to the freedom of expression as a means of criticising the Court's decision in cases involving some form of religious manifestation, the author is perhaps unduly mixing two distinctive issues. In the proceedings for the *Lautsi* case, it was argued that the crucifix was representative of harmony and tolerance, and went some way to preventing fundamentalist thought. When the headscarf was considered by the ECtHR¹⁸⁹, another religious symbol, it was linked to the promotion of fundamentalist thought. The author has failed to demonstrate a philosophical and historical understanding of the concept of the fundamentalism, in order to critique the decisions of the court. It is relevant that the concept of fundamentalism was first observed in Christianity while using the crucifix as a symbol of their religion. Later on fundamentalism became a global phenomenon.

¹⁸⁸ *Ibid*, 2660.

¹⁸⁹ *Lautsi and others v. Italy* (Application no. 30814/00) (18 March 2011) Eq LR 633, [2011] ECHR 2412, (2012) 54 EHRR 3, [2011] ELR 176, 30 BHRC 429.

Based on the abovementioned strengths and potential weakness of *Mancini's* study, the researcher has decided to critically evaluate the obvious clash between secularism and manifestation of one's religious beliefs in the context of the ECtHR's decision and also to compare these decisions with decisions of other international and national judicial bodies with respect to the public display of religious symbols. This allows the researcher to compare the legal perspectives of various legal bodies regarding the pertinent issue whilst also the assisting researcher in identifying possible factors and substructures influencing the differences in these perspectives, particularly in the context of decisions regarding the wearing of religious symbols. Thus, the researcher can present a more precise in-depth analysis of the Court's decisions in pertinent cases.

Another author whose work should be reviewed is *Carolyn Evans*, a professor that is well known regarding her research on women and religion. In her article¹⁹⁰, she explores and analyses the case studies of *Leyla Şahin v Turkey*¹⁹¹ and *Dahlab v Switzerland*¹⁹², paying specific attention to the decisions taken by the ECtHR on the matter. Within her introduction, she firstly highlights how the conversation surrounding the wearing of the headscarf is deeply entrenched in both political and legal debate. She then subsequently analyses the donning of the scarf from within a religious right paradigm. From this, she draws the conclusion that the wearing of the 'headscarf' very much falls under the category of the right to 'practice' religious freedom. Therefore, similarly to the HRC it is necessary that the European institutions protect the religious rights of the individuals involved, thereby ensuring that they are able to wear religious garments of their choice without any interference from another party.¹⁹³

More specifically, in the case of *Dahlab v. Swiss*¹⁹⁴, the Swiss court supported the prohibition of a primary school teacher regarding the wearing of her headscarf, claiming that the scarf was a 'powerful external symbol' that would influence the children. As a result, the teacher involved was expelled from the school even though there were no existing laws within the legal system that supported these claims and gave authority for the action that was subsequently taken. Following this logic of the court the researcher argues that the court's decision is implicitly

¹⁹⁰ Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 Melb. J. Int'l L.

¹⁹¹ *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.

¹⁹² (Application no 42393/98) (15 February 2001) ECHR 899.

¹⁹³ *Supra* no 187, 4, 5.

¹⁹⁴ (Application no 42393/98) (15 February 2001) ECHR 899.

incompatible with the important principle of ‘No one shall be held guilty of any criminal offence on account or omission which did not constitute a criminal offence under national law at the time when it was committed.’¹⁹⁵

The author asserts that if the ECtHR allows the wearing a crucifix which is seemingly just a piece of jewellery, then it is clear that the court has a tendency to consider and value beliefs of the Christian majority to a higher degree than is the case with Muslims or other religious minorities. This, according to Evans, is tantamount to a form of discrimination and preference of one religion over others.¹⁹⁶

Following this, the author examines the main reasons behind the court’s support of the decision to expel the teacher and student from the school.¹⁹⁷ One of such reasons is prevention of proselytization. In this context, she highlights the fact that there is no clear direct or indirect evidence that could justify the court’s reasoning that this expulsion was a means of preventing proselytization in educational institutions. To put simply, it was not explained by the court how wearing a headscarf constitutes proselytising. To support her claim, the author refers to *Dahlab*’s reply to students asking her about the reason for wearing the headscarf in which she stated that she just wants to keep her ears warm, thus avoiding any notion of religion.¹⁹⁸

Another contested point mentioned by *Evans* revolves around the court’s argument that banning the wearing of a headscarf is a way to prevent inequality and discrimination. To counter this argument, the author points at the fact that both *Dahlab* and *Leyla* are experienced teachers with a high level of integrity who addressed the court to reject what they consider as injustice being done on them. Moreover, she duly emphasised that in countries where both women reside, no benefits, either social or economic, are provided based on the fact whether a woman is wearing a headscarf.¹⁹⁹

¹⁹⁵ See further about this principle in, Julia Christan, ‘The Principles of Legality “nullum crimen, nulla poena sine lege” And Their Role’ (2010) 5 *Effectus Newsletter* 1.

¹⁹⁶ Carolyn Evans, ‘The Islamic Scarf in the European Court of Human Rights’ (2006) 7 *Melb. J. Int’l L.* 3-22

¹⁹⁷ *Dahlab v. Switzerland* (Application no 42393/98) (ECHR 15 February 2001) ECHR 899; *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.

¹⁹⁸ *Supra* no 193, 11, 12, 13.

¹⁹⁹ *Ibid*, 17, 18.

In the spirit of *Gandhi's* quote that '*intolerance is itself a form of violence and an obstacle to the growth of a true democratic spirit*²⁰⁰, the author argues that the court failed to provide evidence that both women were in any way, shape or form intolerant towards others.

Finally, *Evans* rejects the other argument presented by the court, maintaining that protection of secularism, used as a basis for the court's last argument supporting the ban, has not served to guarantee equality between different theistic and non-theistic beliefs followed by the country's citizens, but rather, it was exploited to prefer one specific modern religion (she deems secularism as religion) over all the others.²⁰¹ In this context, it is worth considering *Heimbach's* assertion that public authorities normally interpret the principle of secularism in a way that guarantees and protects the interests of the states rather than of human rights.²⁰²

The court has argued that a religious wearing of the headscarf should be limited due to the link between the headscarf and extremist ideology. With this in mind, and like the previous scholars, the author makes her arguments based on purely legal reasons without profoundly examining the concepts which the court uses as justification to restrict religious manifestation. In order to establish whether or not a connection exists between the headscarf and fundamentalism, there must be an examination of the context behind both to ascertain whether it is a relevant claim. Although *Evan* has provided numerous clear logical and legal arguments undermining the correctness of the court's decision concerning the two pertinent cases, the author failed to introduce comprehensive yet usable definitions of the terms employed very extensively in her work in general and in her arguments in particular. Among these terms are words such as proselytise, discrimination, intolerance and legal understanding and implications of the concept of secularism. For instance, the term proselytise is addressed by *Evan* in both *Dalhab's* and *Kokkinakis's* case and comparison is made between these two cases. However, it should be noted that whilst *Dalhab* was a teacher at a primary school where children are much more susceptible to teacher's influence in terms of creating their value system, *Kokkinakis* worked with adults who have a much greater degree of autonomy to filter information whilst their belief system is much more stable.²⁰³

²⁰⁰ Mahatma Gandhi Quotes Available at <<http://www.brainyquote.com/quotes/quotes/m/mahatmagan160709.html>> accessed 02 June 2015.

²⁰¹ Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 *Melb. J. Int'l L.* 1, 17,18,19

²⁰² Daniel R. Heimbach, 'Contrasting Views of Religious Liberty: Clarifying the Relationship between Responsible Government and the Freedom of Religion' (1994) 11.2 *Journal of Law and Religion* 715.

²⁰³ *Kokkinakis v. Greece* (Application No. 14307/88) (25 May 1993) ECHR 20.

Notwithstanding the fairly extensive provision of legal evidence employed by the author as a means of supporting the wearing of the headscarf, *Evan's* research does not offer a deep enough insight into the way the Court justifies banning the wearing of headscarf from a socio-historical perspective. Similarly, in the author's attempt to use a comparative approach, there is an evident over-dependence on comparing between the crucifix and headscarf. This leads to the author neglecting the precedents set by the ECtHR together with a host of other international and national legal bodies with respect to forms of religious manifestation. Ignoring these precedents then undermines the author's attempt to evaluate the Court's decisions in the context of the international human rights standards.

Using the above-mentioned findings with the intention of avoiding related shortcomings, the researcher's inquiry goes beyond the provision of sound evidence and focuses primarily on analysing and critically evaluating the Court's decision and concepts that influenced them.

Karen Armstrong's seminal work 'The Battle for God' addresses extremism, in particular religious fundamentalist thought and behaviour, across its ten key sections.²⁰⁴ Unlike her contemporaries, *Armstrong* maintains a strong focus on traditional conceptions of fundamentalist thought and the way interpretations have changed over time. The nature of this work aids those interested in the subject to cultivate an understanding of the concept and the variety of approaches towards it. It is also true that *Armstrong's* previous experience and academic background, as well as her style of analysis, has contributed greatly to the corpus of academic work on the subject of fundamentalist activity. *Armstrong*, it has been argued, addresses those topics and approaches neglected in the existing literature, as her work is supported and strengthened by the attention it has garnered from other important academics.²⁰⁵

In her examination of fundamentalism, *Armstrong* first outlines two important terms: 'mythos' and 'logos'. According to *Armstrong*, these are the two elements key to uncovering truth, as they offer a foundation for the way in which people understand their lives. Myths provide a means of interpretation and understanding, via faith, mysticism and bigger questions of human nature. These myths were not provable or supported by fact, but provided an answer to universal questions; myths allow human beings to consider their own lives in relativity to the divine or to the universe

²⁰⁴ Karen Armstrong, *The battle for God: Fundamentalism in Judaism, Christianity and Islam*, (HarperCollins UK, 2001) 442.

²⁰⁵ Book Review of Jana Riess, 'the Battle for God' (2000) vol. 247, PWxyz, LLC, New York. See also: Carolyn M Craft, 'Born of Common Hungers: Benedictine Women in Search of Connections' (1997) 122.16 *Library Journal*, 87.

through tradition, ritual and inherited memory. It is the nature of myth that it cannot be approached with empiricism as it is not based on science or fact; instead, the myth imbues human life with a purpose, whether imagined or otherwise.

The alternative to mythos, claims *Armstrong*, is logos, which refers to logical reality. Logos addresses the physical world and its patterns, with a scientific basis. While mythos relies on ancient beliefs and long-standing traditions, logos is forward-thinking, always attempting to find new perspectives. Using both mythos and logos, *Armstrong* compares modern and traditional approaches to understanding, with a strong religious focus. She maintains that human nature has changed very little in essence, with the notable exception of faith and spirituality. This is where the two concepts come into play, as myth and logos impact how people live, behave, think and express themselves. Mythos and logos are both utilised when pursuing truth, with each interacting with the other to establish human beliefs and human behaviour. Traditionally, myth has always been the dominant approach. *Armstrong* outlines the terms in the opening of ‘The Battle for God’ and suggests that fundamentalists base their worldview in myth rather than the fact-based approach of logos.

After her examination of the key terms and concepts, *Armstrong* addresses the treatment of the Jewish population of Spain at the hands of King Ferdinand after the reclamation of Granada.²⁰⁶ Jewish communities were forced to embrace Christianity or face exile from their home; similar numbers chose to leave as chose to convert. Europe was in a state of upheaval during this time, as several national populations were rising up against conservative rule, action which was largely successful. This success, it has been argued, has brought about an era of industrial advancement and forward-thinking politics, based in reason and scientific fact. Much of the Jewish population forced into exile struggled to integrate themselves into new communities. As a result of this, many embraced a secular way of life. Those who did not attempt to integrate into life in the West considered this way of life an affront to faith, as they believed that capitalist ideology and the rise of technology would replace Judaism. Dogmatic belief became the refuge for these communities, the way in which their religious truths would be preserved. This included a denial of modern interpretations of the Torah, instead clinging on to traditional and direct interpretations of the text.

²⁰⁶ Supra no. 201, part one, section 1 the book under review.

Armstrong goes on to address a comparable Muslim example of such rationale, centering on communities in Egypt, Iran and the former Ottoman Empire.²⁰⁷ The Ottoman Empire, claims *Armstrong*, made great efforts to create a contemporary society, and were largely fruitful in these attempts; the Ottoman Empire was considered forward-thinking when compared to other global empires. The author argues that state development in organizational terms and policy may not result in advancement in every area. As *Armstrong* asserts, a modern approach may not result in a forward-thinking society; in a number of Islamic nations, attempts to modernize governance have not translated to a change in general attitude. When it comes to Western states, modernization has come from changes in government practice and national ethos, and has trickled down to community and societal attitude; a big part of this has been the establishment of secular practice. On the other hand, in predominantly Muslim states, governments have essentially dictated changes in national ethos and forcibly implemented them. For instance, the governments of Iran and Egypt have long bought arms from the West, which has strengthened their military influence on an internal scale. The dominance of Western and secular states, however, have caused dejection in Muslim states and the failure of somewhat imperial attempts by the West to introduce democracy and western law to these nations has led many to embrace fundamentalist Islam in response to a perceived attack. The Egyptian ‘Muslim Brotherhood’ is a prime example of this approach; this radical group uses violent means to spread Sharia law and make it the national standard. This has included assassinations (of Western thinking academics, politicians and journalists) and terror attacks (on cinemas, museums, and other sites of Western influence). Iran, on the other hand, has been taken over by religious groups after the fall of the ruling house of Pahlavi. From this movement, the cry of the people became “*No East, No West, Islam is the Best*”, and the literal interpretation of the Holy texts became the foundation of rule. Following this, the rights of women were virtually non-existent, with all females required to adorn full-body coverings and treated unequally in courts of law and in political matters. Women were unable to attain any positions of power, either vocationally or socially. *Armstrong* asserts that communities embraced a fundamentalist worldview as a direct result of the imperialist legacy of the West, the defeat of secular states and a perceived attack on Muslim values²⁰⁸.

²⁰⁷ Ibid, part one section 2 the book under review.

²⁰⁸ Supra no. 204, p 325-350. See also: Fakhreddin Soltani and Reza Ekhtiari Amiri, ‘Foreign policy of Iran after Islamic revolution’(2010) 3, 2 J. Pol. & L. 3 199,201

The author then goes on to address Christian fundamentalism across the USA and large parts of Europe. This, she argues, is indicative of the effect of science and technology on traditional communities. It is pertinent to note that the term ‘fundamentalism’ and its associated concepts were first conceived in the West and spread from there. For example, *Armstrong* notes the beginning of innovation of print and its impacts on culture, social and religious attitude; before the prevalence of the printed word, religion was restricted to small, isolated clergies, of which a few were able to access and, therefore, interpret Holy texts. It allowed those with access the ability to take their own meaning from the word of God for the first time. Individual readings of the text provided a release from dictated interpretation by the church and encouraged personal faith. This development, coupled with the rise of industry and technology, forced many to realise the inconsistency of literal readings with modern life experiences. Science, as we now know it, began in concurrence with religious teachings; as scientific method and empirical measures became more ubiquitous, however, the myths were rejected and rational thought was coveted. *Descartes* famous proposition ‘Cogito ergo sum’ or ‘I think, therefore I am’, is indicative of this school of thought.

It is important to note that the influence of moderation on religion often has different outcomes depending on circumstance, due to the dividing nature of ideology. *Wesley* asserts, much like Kant, that religion should be considered entirely separate from fact, claiming that it resides not in the mind but in the heart, despite its basis in rules and code.²⁰⁹

The author argues that the differentiation between approaches to fundamentalism is not restricted to Europe, as demonstrated by the Christian right in the US. It has been evidenced that a large portion of Americans turn to faith in times of crisis, and this has been the case for centuries.²¹⁰ In the 1700’s, Christianity was the dominant ideology, spread across different denominations (Baptists, Quakers, etc.), most notably the Protestant Church, which saw a resurgence during this period. Although these denominations differed in certain key aspects, there existed a common thread between the offshoots, who shunned the authority of the central church, while carefully selecting their own leaders. Personal crises and feelings of alienation led large numbers to organised religion; while religious leaders often equate the mythos and logos of religion, modern day fundamentalist faith has a tendency to reject logos entirely, and it has been argued that this is

²⁰⁹ Cited in Karen Armstrong, *The Battle for God: Fundamentalism in Judaism, Christianity and Islam*, (HarperCollins UK, 2001) 442. See also: Mark A Noll, *Science and Religion: A Historical Introduction* (JHU Press 2002) 401, 265.

²¹⁰ *Ibid*, part one section 3 of the book.

true of both Christian and Muslim collectives. However, it seems that to apply the word ‘logos’ to Islam from academic perspective can be problematic, and it is necessary to first explore its contrasting basis in Christian fundamentalism.

The summary provided by ‘The Battle for God’ presents *Armstrong’s* position as one which warns of the threat of fundamentalist activity on human freedom. She also describes fundamentalist thought as an affront to human rights, gender equality, and the subjugation of minority groups; this is illustrated by the discussion over the wearing of the headscarf. In *Armstrong’s* work, however, there exist some contradictions. She, in one instance, describes fundamentalist action as a part of late 20th century social movement. One Christian fundamentalist leader, *Pat Robertson*, who was prominent in the 1980s, once claimed that fundamentalists were the majority in America and so could elect a representative. This indicates that fundamentalism may coexist with peaceful processes, such as democracy, indicating a lack of motivation to suppress the freedoms of any sector of society. However, *Armstrong* also argues that violent fundamentalists of all religions exist, and frequently attempt to spread their ideology as the pure and right way of life. The outcomes of fundamentalist thought may be primarily influenced by the approach of the state in question towards personal and religious freedom. On a more thorough examination of her work, *Armstrong* frequently neglects to differentiate between violent fundamentalism and non-violent religious action, as she admonishes both in equal measure.

Armstrong attempts to analyse the various approaches put forward by other academics as to the link between fundamentalism and Islam; she writes that Islamic fundamentalism has much in common with fundamentalist belief and behaviour within other religions, Christianity in particular. It is these similarities which allow us to brand certain facets of Islam ‘fundamentalism. It is also noted, on the other hand, that Western extremist religious thought manifests itself differently due to societal and cultural differences, and has differing results. The literature indicates that Western fundamentalism has less violent outcomes and is often in line with democracy, while Jewish and Muslim extremist communities tend to warrant the term ‘fundamentalist’ largely due to the violence of the methods employed to convert or spread ideology²¹¹.

²¹¹ Supra no. 208, p6-7, 45. See also: Ruud Koopmans, ‘Religious Fundamentalism and Hostility against Outgroups: A Comparison of Muslims and Christians in Western Europe’ (2015) 41:1 Journal of Ethnic and Migration Studies, 33.

Armstrong, to support her arguments, refers to the act of hostage-taking, which occurred during an Iranian raid on US diplomats; there is a confusion of theological and political incitement for this act. Taking hostages, the author asserts, is a fundamentalist act, though the afore-mentioned case had a political rather than faith-based justification²¹². If purely religious in motive, the incident would have been repeated due to the existence of the current political condition of Iran.

It is clear, then, that *Armstrong* places fundamentalism within its traditional conceptions and its historical interpretation; herein lies the weight of this approach. This facilitates an understanding of how fundamentalist thought and behaviour emerges, particularly with regard to Monostich religions. The results of her work are of great use to academics wishing to analyse an aspect of fundamentalism, and relate closely societal debates surrounding the headscarf or hijab. It also allows one to assess legal decisions of the ECtHR in light of the social history of extremism and fundamentalist religious thought; this provides a solid base on which to present an argument.

While this approach links the hijab or headscarf with fundamentalism, it is important to make clear that by no means does wearing the headscarf necessarily indicate an extremist inclination. Evidence in favour of this can be found in a 2013 poll undertaken in Egypt and Tunisia by the University of Michigan's Institute for Social Research, which found that over half of respondents support the wearing of headscarf by women.²¹³

2.3. Views of Academia in non-Islamic Countries relating to religious expression in Islamic practices

As a result of the events of September 11th, 2001, some European countries such as France, Turkey and Switzerland were embroiled in arguments over Muslim head coverings. The deliberations were further inflamed by a decision by the ECtHR on the question of when women could or could not wear a headscarf; the question had always been treated as a public issue, but the European Court made it a question of legality.

One academic who wrote on the ECtHR decision was *Paul M. Taylor*. In 2005, he wrote a book entitled "Freedom of religion: UN and European Human Rights Law and Practice"²¹⁴, which

²¹² David Patrick Houghton, 'Explaining the Origins of the Iran Hostage Crisis: A Cognitive Perspective' (2006) 18:2 *Terrorism and Political Violence* 259, 265. See also: Mohammad Ayatollahi Tabaar, 'Causes of the US Hostage Crisis in Iran: The Untold Account of the Communist Threat' (2017) 26:4 *Security Studies* 665, 667.

²¹³ Mansoor Moaddel, 'A report: The Birthplace of the Arab Spring: Values and Perceptions of Tunisians and A comparative Assessment of Egyptian, Iraqi, Lebanese, Pakistani, Saudi, Tunisian, and Turkish publics' (2013).

²¹⁴ Paul M. Taylor, *Freedom of Religion: UN and European Human Rights law and Practice* (Cambridge University Press 2005) 355.

delves intimately and intelligently into what he perceives as often unjust treatment of religious freedoms by international courts of law. The text centres on three main ideas: freedom of choosing a specific religious belief (s), conscientious rights (or “*forum internum*”), and the right for outward expression of one’s beliefs (or “*forum externum*”), together with analysing how the manifestation of religious beliefs can be legally limited. The book goes on to cover the European Convention of Human Rights by the Council of Europe, specifically Article 9, and compare it to the ICCPR Article 18, as instituted by the United Nations. *Taylor* analyses both aspects of religious freedom to speak out against the prejudicial public outcry and legislation against Muslim citizens in America and Europe alike after the 9/11 tragedy²¹⁵. He asserts that because of an overly-paranoid attitude toward religious fundamentalism, not to mention xenophobia and bigotry, national and international courts have unjustly imposed limitations upon the expression of Muslim beliefs.²¹⁶

In chapters two and three of his book, *Taylor* goes into further detail about what circumstances may lead a country to limit its citizens' right to select, manifest and, if desired, to change their own religion in the way they see fit. Based on the analysis of the travaux preparatoires, the author specifically discuss the advocating against the “right to change religion” which resulted in the reconfiguring of the ICCPR'S article 18. Many opponents cited situations where people were forced into changing religions, such as through proselytization, missionary activities, and other forms of forceful imposition of religious beliefs. Although the international bodies such the ECtHR and the HRC have spoken extensively on the issue overall, the author duly criticises this discussion as not being so much on the grounds of *forum internum*. Many countries which oppose proselytizing do so because they view it as akin to political campaigning or merchandise hawking; perhaps not inherently harmful, but a pervasive method. However, other countries seek to preserve the dominant national religion or sect because of how important it is to the social fabric, and therefore limit proselytizing for other belief systems. Proselytizing is an aspect of religious freedom, but since some view it as an offence, its processes can be legally controlled. *Taylor* therefore encourages narrowing down the interpretation of what constitutes a ‘rights and freedom of others ‘especially in case of proselytization, insofar as this can assist in protecting individuals against coercion that would deprive them of the freedom to choose their religion or religious belief.

²¹⁵ Evelyn Alsultany, *Arabs and Muslims in the Media: Race and Representation after 9/11* (nyu Press, 2012) 133.

²¹⁶ *Ibid*, 1-3.

Chapter three covers *Taylor's* dissection of the HRC ' argument, which says that the rules on coercion are only applicable to affairs of state and when it comes to *forum internum*. Both the Special Rapporteur and the ECtHR, meanwhile, assert that coercion can also come from the general public or from privatised corporations. This coercion can be direct or indirect. This chapter goes on to reinforce the fact that every person should have the unalienable right to choose whichever religion they want, as well as to convert to another if they wish.

Forum internum is closely related to matters of religious expression and the usual restrictions that come with it. *Taylor's* fourth chapter examines the different kinds of religious expression that an individual may choose to take part in. This includes public or private worship, religious study, and the celebration of holidays with particular attention to the permissible limitations that may be imposed by governments.

This book is an especially revealing discourse on the subject of religious expression because of how exhaustive its analysis is. It delves deeply into *travaux preparatoires*, or “preparatory works”; this allows the writer to understand the real meaning of a text behind all the religious and doctrinal jargon.²¹⁷ The text also goes in-depth into the verdicts rendered by both the ECtHR and the HRC, not to mention extraneous comments from both sides.

Taylor is also highly astute when it comes to dissecting the two international agencies by comparing and contrasting their statutes and limitations. Of all the matters on the legislative table, one of the more heated cases involved the right of Muslim women to dress modestly in non-Islamic majority countries. Both the HRC and the European Courts deliberated on the matter, and Taylor describes both of their processes, but he offers a fairly scanty amount of legal information given how extensive and inflammatory these types of cases were. When he describes the court cases *Kalaç v Turkey*²¹⁸, *Refah Party v Turkey*²¹⁹, and *Yanasik v Turkey*²²⁰, he does so almost in passing without attempting to provide an insight regarding whether religious manifestation is an individual or communal right. In short, he does not explicitly analyse the nature of this right. This is understandable, as *Taylor's* primary focus in this book is not whether or not religious expression

²¹⁷ Ibid, 313-314.

²¹⁸ (Application No.20704) (01 July1997) 27 EHRR 552, 558.

²¹⁹ (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.

²²⁰ (Application No.145224/89) (06 January 1993) 74 DR 14.

in those cases is just and lawful; instead, he focuses on the concept of pluralism and the responsibility of states to protect secularism.²²¹

When it comes to cases which pertain to fundamentalism, the author rightly points out that the court often fails to note the difference in context between civil cases and those related to military; he argues that fundamentalism is not a strong enough or well supported enough argument to justify restriction of religious expression. As an internal aspect of religion, fundamentalist thought cannot be identified and proven legally as there is an absence of evidence for religious thought. Any attempt to enforce individuals into stating their religious convictions constitutes a violation the individual's liberties and human rights.

In some situations within this book, *Taylor* neglects to adequately define many of the terms which he uses, or even to provide a context in which the term may be used in a helpfully efficacious sense. One instance is when he fails to qualify or define the term "democratic" which is problematic mainly due to the presence of this term in one of his sub-headings "...necessary in a democratic society".²²² Furthermore, when he uses the term 'necessary', there is no link made between this term and the concept of democracy which renders the pertinent sub-heading fairly confusing. Notwithstanding the problems with clearly defining employed terms, the majority of Taylor's argument holds up.

Despite the discussed ambiguity and insufficiency in author's dealing with some aspects of religious freedom, particularly religious manifestation, it can be argued that *Taylor's* book serves as a valuable point of reference for the postgraduate scholars and researchers in various pertinent subjects, namely 'proselytizing in religion' and 'coercion in religion'. Another point that increases the book's credibility is the incorporating of views of various well-known researchers in the field of the religious freedom such as *Malcolm Evans*, *Carols Evans*, *Bahiyyih Tahzib* and *Natan Lerner*.

Furthermore, the author did not take into account the analyses which examine whether it is legitimate of the court to make restrictions regarding manifestation of religious beliefs. Nevertheless, the author refers to various documents related to international human rights agenda, as well as freedom of religion, which are accepted by the judicial authorities on the international

²²¹ Supra no 208, 237-242. For example the author mentioned the cases without any legal analysis analysis.

²²² Ibid, 305-320.

level and provide information that aid the understanding of terms such as ‘freedom of religion’, ‘coercion in religion’ and ‘proselytize’.

A far more subjective exploration of Muslim freedom in the western world can be found in the book by *Fetzer and Soper*.²²³ In only six chapters, the two authors describe how Muslims in western European nations are largely confined because of the time-honoured tradition of merging church and state. As a result, non-Christian citizens, especially Muslims, are discriminated against. Structurally, the book consists of six chapters. In its first chapter, the book’s aim is presented as proving the assertion that the discussed trio of countries – Britain²²⁴, France²²⁵ and Germany²²⁶, to examine how they have treated their religious minorities’ especially Muslim populations as far as public policy is concerned.²²⁷ According to the authors, these countries treat Muslims with a markedly different attitude than their counterparts in the European Union, and they promise to explain how and why.

The political treatment of Muslims' right to express their beliefs has been affected by various factors. The first factor revolves around the kind of relationship between church and state and the interaction between them. The second set of factors are based on the type of ideology (the pre-existing opinions about state and purpose of the state, view on nationality and citizenship) and the manner in which political institutions shape the advancement of their interests and the ensuing policies. The final set of factors is informed by the manner in which all of the concepts mentioned above play an important role in how each country attempts to aid Muslims in expressing their faith in whatever way they wish (political opportunity or structure theory).²²⁸

These ideas are detailed by *Fetzer and Soper* as a result of their assertion that Muslim citizens are afforded a great degree of freedom of expression upon examination of the state's allowance of Islamic education, the preservation of Muslim practices, the teaching of Islamic tenets in public schools (not to mention the establishment and financial support for singularly

²²³ Joel S Fetzer, J. Christopher Soper, *Muslims and the State in Britain, France, and Germany* (Cambridge University Press, 2005).

²²⁴ *Ibid*, p 38-42; see also *Mandla and other v Dowell lee and others* (1983) UKHL, 2AC 548.

²²⁵ *Ibid*, p 78-85, the author examines policies and cases that ended to expelling girls from school because of wearing of the headscarf.

²²⁶ *Ludin v Baden-Württemberg*, Federal Constitutional Court, Germany (BVerfG), 24 September 2003, 2 BvR 1436/02.

²²⁷ *Supra* n 216, 2-6.

²²⁸ *Ibid*, p 13-14.

Islamic schools), and the sheer number of mosques built in the West. The authors chose the degree of the accommodation of Muslim religious practice as the dependent variable.

The rest of the book's chapters delve into how Britain, France, Germany deal with their Muslim citizens on a case by case basis, drawing comparisons and contrasts along the way. In order to make the comparisons more accurate, each country's diplomatic attributes are outlined.²²⁹ The first line of thought examined is the historical background of the Western governments' dealing with their Muslim citizens, as well as how the Muslims settled in the country. The second parameter is an overview of the context of the situation, including how all of the countries have unique relationships with their churches of choice; Britain took the route of establishment, France engaged in radical disestablishment, and Germany went with multiple establishments. Furthermore, each of these methods grew a life of its own, resulting in different social constructs, alternate interpretations of what constitutes free speech and religious representation, and how successfully or not the country has managed to bring a semblance of separating church and state.

The writers go on to describe how effectively the Muslim community has historically been able to express its faith, especially when it comes to spiritual celebrations in government-funded schools, and for publicly raising money for Islamic schools and mosques.²³⁰ Numerous particular events are provided which clarify the experiences in each of the three nations. The authors are of the opinion that the United Kingdom is the best of the three in terms of allowing Muslims to express their faith; the UK allows religious dress in public venues and provides funding to build mosques among other things.²³¹ They attribute this to the relationship between various established churches and state (establishment) being so strong that Britain is comfortable enough to support other religions in some sense, and also their status as extremely multicultural. In fact, the country has been actively inviting Muslims to expect greater accountability from the government in regard to their treatment.

France, meanwhile, is considered as worst of the three countries in question with respect to its treatment of the Muslim minority.²³² This is mainly due to the strong ideals of secularism which constitute the foundation of the republic and which have had 'disastrous' impact on the position

²²⁹ Ibid, p 25-98.

²³⁰ Ibid, 38-42, 78-90, 111-119, 142-147.

²³¹ *ibid*, p 57-60; see also: Sara Ohly, 'Muslims and the State in Britain, France and Germany' (2005) 39.3 *International Migration Review* 758.

²³² *Supra* no 216, 62-97.

of Muslims in France. Meanwhile, Germany is not as understanding of Muslim customs as the United Kingdom, but more so than France.

The author's analysis of data across the continent shows some degree of correlation with many of the ECtHR cases involving Muslim defendants; many of the cases which pertained to public religious expression (pertaining to the veil and other garments, predominantly) were successful in the United Kingdom²³³ and in Germany²³⁴, but not so much in France.²³⁵

In chapter 5, the writers explore data gathered about how the European public perceives the treatment of Muslim citizens, courtesy of the Roper Europe Religion and State Surveys from 2001 and 2002. In terms of education, it is found to be an element encouraging accommodation.²³⁶ Thus education is a factor indicating strong support for Muslim, which the authors suggest that those favouring accommodation should support multicultural education. It is apparent from the results of the two surveys that those who practise religion themselves are more supportive of Muslim goals, whilst most secular respondents support public displays of Islamic faith, especially when these displays are organised with the state's support. This appears paradoxical at first, but the authors hypothesize that "*despite the philosophic similarities between practicing Christians and Muslims, Muslims might be better served to join political forces with the large number of pro-multicultural secularists than with a small band of Orthodox Christians*".²³⁷

Chapter 6 focuses on summarising the key findings, comparing the level of accommodation in the three countries that might be predicted by each of the theoretical models (resources, structures, ideology and church-state). In general, the church-state model advanced by the authors is a better predictor of the actual situation than any of the theories considered on their own. They also highlight the limitations of the other theories whilst acknowledging the insights each of them provides. Although the authors only research the political challenges of accommodation and integration of religious claims of Muslims in Europe, raises issues that would be equally valid with regard to religious groups in other nations.²³⁸

²³³ *ibid*, p 41-42.

²³⁴ *Ibid*, p 115-116.

²³⁵ *ibid*, p 80-85.

²³⁶ *Ibid*, p 141-142.

²³⁷ *Ibid*, p 145.

²³⁸ Book review by: Paula Reimers, Joel S. Fetzer, and J. Christopher Soper, 'Muslims and the State in Britain, France, and Germany' (2006) 48.3 *Journal of Church and State* 689.

While *Fetzer* and *Soper* present compelling evidence for their theories of how the church-state relationship impacts treatment of non-Christian sections of that state, their ideas are not perfectly aligned. For example, they assert that if certain standards for secularism are met in one nation, any nation which meets those standards will invariably have the same level of religious freedom afforded to Muslims. This claim represents a form of unsubstantiated extrapolation, insofar as the authors' findings are limited only to three European nations. This notion is also an unpleasant one for French activists; they seek to make their country a better climate for welcoming people of other religions, but *Fetzer* and *Soper's* argument implies that France's intersectional relations cannot improve without first improving the standards of secularism in the country which is certainly a gigantic and unpopular task. Furthermore, the evidence and historical consideration regarding the secularism in France show that structure of the church-state and the position of secularism together with its interpretation have been continuously evolving and changing. Of course, these alterations are very gradual, sometimes taking place over generations, but they are accelerated through a discourse regarding secularism that is led by academics and public officials. For example, the authors correctly point to the different perception of the wearing of the veil by the Conseil d'Etat in 1989 and the Commission of Statsi between 2003-2004.²³⁹ They also differentiate between hard and soft secularism, as some nations step away from explicit religious control more than others do.

The truth of the matter is that wide arrays of countries have different laws about whether or not Muslim women can wear the veil, so alternate national courts have no uniform compass to adhere to. The United States of America, for instance historically has a more lenient opinion of religious display than France does.²⁴⁰ This difference cannot be only ascribed to church-state influence, but also to the individual mind sets of the judges assigned to these types of cases, and also the political and cultural climate of the nation at the time. For example, the United States' rulings from a political point of view became far less lenient after the 9/11 atrocities. Given this reality, the findings of the books cannot be generalised as the authors claim, and the church-state

²³⁹ See review on the book by: Anthony M Messina, 'Muslims and the State in Britain, France, and Germany' (2006) 4.01 Perspectives on Politics 209. The reviewer criticizes the view of the Fetzer and Soper on this bases that "the evidence pointing to a pattern of enlightened state policy toward Muslims in the British case goes back only a couple of decades or so. In any event, Muslims have migrating to the UK in significant numbers in 1960s. If British state policy has been relatively enlightened, why did the government approve the first Muslim state primary school only in 1970?"

²⁴⁰ See brief view on the book by: J. Christopher, 'Soper, Joel S. Fetzer, 'Religious institutions, church-state history and Muslim mobilisation in Britain, France and Germany' (2007) 33.6 Journal of Ethnic and Migration Studies 933.

relationship is not the only factor determining the states in question's different treatment of their Muslim minority. The authors go into more details about the various cases which the ECtHR deliberated upon, particularly with respect to the court's justification for limiting religious freedom under certain conditions. However, like numerous researchers before, the authors just mention the concepts that are used to justify the limitation of religious manifestation without legally and critically analysing these concepts. It seems that applying this method to assess the accommodation of Muslims in these countries can sometimes lead to contradictory results.

The analysis of the court's decision concerning the manifestation of religious beliefs was used by the author to assert that the situation in the ECtHR indicates discord and tension when it comes to secularism and manifestation of religious beliefs. The researcher believes the solution to this discord must start with explaining the term secularism, both in terms of philosophy and the basic meaning. To address this task, the researcher suggests that term should be analyzed from a historical point of view. Regardless of the restrictions that the methodology proposed by *Fetzer & Soper* has, the examination of secularism in the history of three different countries, particularly France, delivered constructive results relevant to the research and also promising for the future development and perception of secularism.

The social liberties afforded to a population are heavily reliant on the ideology and political inclination of the state itself. However, this should not be used as a justification to restrict the legal rights of certain groups; while important, the separation of religion and secular statehood should not serve as a basis for limiting religious rights under the unsupported guise of the prevention of extremist ideology and the encouragement of tolerance.

Westerfield discusses in her article 'Behind the veil: An American Legal Perspective on the European Headscarf Debate' how France deals with Muslim displays, but compares and contrasts the country against Turkey and the United States.²⁴¹ The first section of her work discusses the historical and legal debate over wearing of the hijab in Europe. The next part goes over how secularism has become peculiarly fundamentalist, and describes certain cases where this happened. In the *Şahin* case, for instance, *Westerfield* states that the result was strongly affected by the ECtHR's unjustified support of fundamentalist secularism in Turkey.

²⁴¹ Jennifer M Westerfield, 'Behind the Veil: An American Legal Perspective on the European Headscarf Debate' (2006) 54.03 *The American Journal of Comparative Law* 637.

The third part examines how the United States Supreme Court heard a case about banning all religious garments in public schools, arguing that the clothes would compromise the schools' safety, but the court refused to place a ban until they could prove these claims.²⁴² The final part two rationales under which the *Sahin* case might have been decided differently, drawing on the U.S. case law in Part III by way of comparison. The article summarizes itself by stating that should a French case involving the wearing of the Islamic headscarf come before the ECtHR, the court should not merely follow its precedent in the *Sahin* case, and referring to France's probable argument that laicite or secularism requires a school ban on religious clothing.

The author discusses how some people see the veil as oppressive, intolerant and opposing democracy, whilst Muslims and their supporters champion the veil as part of their time-honoured religious tradition, and a kind of freedom in its own right. Such variety of views is even reflected in the decisions of the international judicial bodies. For instance, whereas the HRC upheld the right of wearing a headscarf, the ECtHR has supported some states' decision to ban the wearing of the veil. Even in the situation of France and Turkey, there is a question of whether or not France even had the right to ban religious garb in public schools; the author highlights that according to Conseil d'Etat, the ban was unnecessary.²⁴³

Regarding the case *Sahin v Turkey*²⁴⁴, *Westerfield* has attempted to critically analyse the court's justification of its decision. In terms of protection of secularism as justification to ban the wearing of the veil, *Westerfield* employed a historical analysis of the concept of secularism, concluding that secularism has embedded in itself strong support for religious expression.²⁴⁵ As an argument to support this claim, the author highlights the case of Ataturk's wife who was wearing a headscarf even when the whole country was in the process of complex secularisation.

Similarly to *Elver*, *Westerfield* divides secularism into two categories: liberal and fundamentalist secularism. He then uses the case of *Sahin v Turkey*²⁴⁶ as an example of the latter, whereby the state assumes a position where it controls and even limits religious freedom. Furthermore, the author rejects the court's argument that wearing a headscarf can have a negative

²⁴² Ibid.

²⁴³ For further see: Rik Torfs, 'Church and State in France, Belgium, and the Netherlands: Unexpected similarities and hidden differences' (1996) 1996.4 *BYU L. Rev* 945.

²⁴⁴ *Sahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.

²⁴⁵ Jennifer M Westerfield, 'Behind the Veil: An American Legal Perspective on the European Headscarf Debate' (2006) 54.03 *The American Journal of Comparative Law* 637, 646-654.

²⁴⁶ *Sahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.

impact on students not wearing a headscarf as the court did not substantiate this claim sufficiently.²⁴⁷ The author also duly criticises the court's justification regarding the notion that wearing a headscarf facilitates somehow the spread of fundamentalism in the country, as once again, the court's claims are not supported by clear and sound evidence. In this regard, *Gibson's* assertions can be used to support *Westerfield's* criticisms, insofar as *Gibson* argues that in terms of fundamentalism, all "fundamentalist" Muslim women might wear headscarves, whereas not all Muslim women who wear headscarves are necessarily "fundamentalist".²⁴⁸ Finally, in her critique of the court's argument that wearing a headscarf violates the principle of equality together with human rights, *Westerfield* underlines the comment made by the judge *Tulkens* that the court ignored in its decision-making processes the views of women as the key subject of the pertinent debate.²⁴⁹

It can be concluded that whilst *Westerfield* does provide a compelling argument, she lacks an in-depth explanation of how secularism in the West has worked over the years. Her criticism of fundamental secularism is well-founded, but when it comes to liberal secularism, she has very little to say and she fails to emphasise that this form of secularism has historically been a protector of religious freedom. Equally, *Lovejoy* in his discussion about the history of secularism states that secularism has been traditionally used to defend freedom of expression.²⁵⁰ This is in a stark contrast to the current form of secularism in France that is according to *Lovejoy* restrictive with respect to religious freedom. Furthermore, her primary objection is that all arguments and justifications in support of banning religious expression are highly subjective and should not stand up in court, but she does little to explain the legal precedence to readers which labels such arguments subjective. Ironically, these are similar to the shortcomings that can be found in the court's reasoning and justifications of its decisions.

The author nevertheless has important views to offer on the topic of religious freedom, which are on the whole well-reasoned. The outcome of fundamentalist secularism as Human Rights Watch has predicted may come out with "zero-sum philosophy of despair" exemplified in the *Sahin*

²⁴⁷ Jennifer M Westerfield, 'Behind the Veil: An American Legal Perspective on the European Headscarf Debate' (2006) 54.03 *The American Journal of Comparative Law* 637, 655.

²⁴⁸ See further in, Nicholas Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (2007) 66.3 *The Cambridge Law Journal* 657, 673.

²⁴⁹ Jennifer M Westerfield, 'Behind the Veil: An American Legal Perspective on the European Headscarf Debate' (2006) 54.03 *The American Journal of Comparative Law* 637, 657.

²⁵⁰ See further by: C. D Lovejoy, 'Glimpse into the Future: What *Şahin v. Turkey* Means to France's Ban on Ostensibly Religious Symbols in Public Schools' (2006) 24 *A. Wis. Int'l LJ* 661, 675-684.

case: the fear "that recognizing the rights of devout Muslims threatens the rights of others."²⁵¹ The author duly points out that if states wish to promote democracy, they should do so by upholding the ideals of liberty, egalitarianism and dignity; governments should, therefore, make every effort to practice tolerance towards religious belief and expression, regardless of the state's position on these beliefs.

Presumably, the reason for the author's criticism of the ECtHR's reasoning in case of wearing headscarf is that it relates primarily to solid evidence, completely ignoring the context in which the decision was made. For example, the criticism of the court's decision based on 'prevention of fundamentalism and intolerance' or 'protecting the rights and freedoms of others' is rightfully criticised, as the court failed to provide any compelling reason supporting the claim against the applicants. Despite this, the current research will not rely on pure legal evidence and documentation. It will also examine the concepts of fundamentalism and tolerance from a historical and philosophical point of view in order to assess the legitimacy of their use in a legal context and whether these concepts are rightly used as the basis to restrict of religious expression. To address this task of understanding an issue surrounded by such controversy, it might be advisable to follow the *Westerfieldian* perception of secularism, particularly what is referred to as fundamentalist secularism²⁵² which is emphasised in France, Switzerland and Turkey owing to fear of Islamic fundamentalist and intolerance.

2.4 .The views of Islamic scholars on religious freedom in the context of Islam

The ECtHR's decision to prohibit the wearing of the veil has become a source of reflection for Muslim scholars. There are two possible causes for this period of reflection. The first reason is the ruling of the court that the headscarf is a symbol of misogyny and systematic oppression of women in Muslim society. The second is that the court overstepped its bounds by attempting to interpret the nature of Islam. According to the court, Islam is a doctrine that is incompatible with the very idea of human rights, democracy and tolerance. As a result of these facts, a group of Islamic scholars have challenged the court's views from the legal perspective and also vis-à-vis the relationship between Islam, and human rights. Another group is, through analysis of Islam, making an effort to demonstrate that modern Islam is in accordance with human rights, especially

²⁵¹ Supra no 242, 677.

²⁵² Paul F Campos, 'Secular fundamentalism' (1994) 94 *Colum. L. Rev.* 1814.

freedom of religion. To put it another way, this group is trying to discover an internal solution to the issue of human rights violations, and freedom of religion.

Among the most highly regarded of these scholars is *Tahzib*. He attempts in his article, “Applying a gender perspective in the area of the right to freedom of religion or belief,”²⁵³ to analyse the legal ramifications of the ECtHR’s decision regarding the headscarf. After he introduces the topic, he goes on to dedicate the second section to assessing the supposed violations of a woman’s rights to freedom of religion or creed. The thesis of the paper is that rights to religious freedom can be violated in both an external and an internal manner. The former means the violation of the right to manifest one’s beliefs externally whilst the latter constitutes the violation of the right to have, adopt and change one’s religious beliefs. He claims that, in spite of the non-derogable nature of the right to change, have and adopt religion, this right is still violated in many different ways all over the world. He cites instances of women being abducted, and forcibly converted to another religion, or being coerced into adopting the religion of her husband, as an example. In regard to how women’s external or religious expression is violated which is the article’s primary subject, the author avers that any restriction of religious expression can only be examined in line with the three conditions that fall under the umbrella of the ICCPR and ECHR. These restrictions must be (1) prescribed by law, (2) in pursuance of one or more compelling state interests-namely public safety, order, health, morality, or the fundamental rights of others; and (3) necessary in order to safeguard one or more interests of the aforementioned state. *Tahzib* closely examines these three reasons for restriction of religious expression one by one. The first case applies to female genital mutilation; he correctly demonstrates that due to short term and eventual negative effects on the health of the victims, the state has proper grounds to ban FGM because it satisfies the three principles.²⁵⁴

Secondly, the author criticises the court’s justifications, on grounds of public order and morality, for banning the wearing of the veil by public employees. He claims that these principles, public order and morality, are ambiguous by nature, and differ between disparate eras, countries, and cultures. Therefore, the state is unable to prove beyond a shadow of a doubt that wearing a headscarf disturbs a society’s public order or morality. *Tahzib* further claims that in regards to this

²⁵³ Bahia Tahzib-Lie, ‘Applying a Gender Perspective in the Area of the Right to Freedom of Religion or Belief’ (2000) 2000. 3 BYU L. Rev 967.

²⁵⁴ *Ibid.* pp. 970-978.

case of religious garb, the state faces extreme difficulty in proving that the second and third conditions of restriction have been properly met. In support of this claim, he cites the views of the Special Rapporteur, that attitudes towards religious garb must embrace flexibility and tolerance.²⁵⁵

Thirdly and lastly, *Tahzib* supports the idea that women should have the total freedom to dress in any way they choose to. In addition to criticising the decisions of the ECtHR, he condemns the restrictive actions of Sudan, Iran, Saudi Arabia, and other non-secular states, that force women to only dress in ways that cover them from head to toe. He asserts that in countries such as these, the public sphere is the sole possession of the state, and that women are not allowed to have a place within it²⁵⁶.

It is reasonable to state that the author's criticisms of the court's claims in regard to women's religious expression constitute persuasive arguments. The state has legitimate reasons to forbid female genital mutilation, *Tahzib* says, because the negative effects of this practice have been proven by decades of rigorous scientific study. He contrasts this ban, on legal and logical grounds, with the ban on religious garments, as a criticism of the court's justification of such on grounds of public order and morality. He avers that public order and morality are convoluted and ambiguous in nature, and therefore these restrictions on religious freedom put in place cannot be adequately justified under the three principles as required by law. By condemning the measures taken by the states to pass religiously motivated laws restricting the women's freedom of choice of clothing, the author shows inclination towards secularism. Author in his methodology uses the texts of article 18 of the ICCPR and the article 9 of the ECHR for logical and, in legal terms, acceptable criticism of the court's conclusion regarding the headscarves (pure legal). In general, the outcome of this research constitutes a solid base for evaluating the decisions of the ECtHR in the light of the international human rights criteria. This thesis will attempt to criticise the European court's decision not only on legal grounds, but it will further evaluate the concepts of intolerance and fundamentalism from a historical perspective in order to demonstrate that the Court's decision is not in line with, or supportive of, the right to religious expression for Muslim women.

Professor *Javid* is another highly regarded Muslim scholar. An article he wrote, entitled "The Sharia, Freedom of religion and European Human Rights law,²⁵⁷" is split into three different

²⁵⁵ Ibid. pp.977-983.

²⁵⁶ Ibid.

²⁵⁷ Javid Rehman, 'The Sharia, Freedom of Religion and European Human Rights Law' (2011) 22 (1) Irish Studies in International Affairs 37.

sections. He begins by pointing to the myriad ways in which religious freedom has been violated in Europe throughout history, and the measures taken within Europe to correct this matter. These struggles began as early as the 13th century, but remain contentious to this day. He correctly argues that the history of Europe is teeming with instances of religion being used as an instrument of oppression, and as a means to restrict the rights of religious minorities such as Jews and Muslims. The author then cites Islamic history in order to demonstrate that the Muslim world has been more tolerant of other religions than Europe. Lastly, he cites the ECtHR's decisions in the cases of the Refah Party, *Leyla Şahin*, and *Dahlab* as examples of its longstanding bias against Muslims.

One could reasonably expect, judging by the article's title, that the author would go into detail about Sharia, freedom of religion, and European jurisprudence, but the author does not give the reader a proper grounding in the legal problems. The author accuses the ECtHR of allowing anti-Islamic bias to influence its verdict, but at the same time offered an idealised image of Islamic history. Even if one accepts that Islamic society was progressive for its day and age, it does not necessarily follow that said system is copacetic with modern views on human rights. For example, conditional religious freedom was only extended to followers of Judaism and Christianity (ahl al kitab). Additionally, although the author avers that the Court's views on Islam and women's rights are grounded in prejudice; his own views also seem to be derived from Islamic bigotry²⁵⁸ when he cites the history of Islam in order to condemn the state of modern human rights. He claims that the government of the UK has taken an adversarial and prejudiced stance toward its Muslim minorities in every arena.²⁵⁹ He cites the example of the stated positions of former Prime Minister *Margaret Thatcher* towards Muslims, that Muslims did not condemn the terrorist attacks on London strongly enough.²⁶⁰ He also mentions statistics regarding unemployment of Muslim citizens, and the case of *Shabana Begum*, in which the court supported the school's view that all students can only wear the school's uniform.²⁶¹

²⁵⁸ See further, Mustafa Abu Sway, 'Islamophobia: Meaning, Manifestations, Causes' (2005) 12.2-3 Palestine-Israel Journal of Politics, Economics, and Culture 15.

²⁵⁹ Javid Rehman, 'The Sharia, Freedom of Religion and European Human Rights Law' (2011) 22 (1) Irish Studies in International Affairs 37, 47-49.

²⁶⁰ *ibid*, p.49. See also: Krassimir Kanev, 'Muslim Religious freedom in the OSCE Area after September 11' (2004) 15.4 Helsinki Monitor 233-243. German Interior Minister Otto Schily asks for extrajudicial executions of Muslim terrorists in their homes.

²⁶¹ Javid Rehman, 'Accommodating Religious Identities in an Islamic state: International law, Freedom of Religion and the Rights of Religious Minorities' (2000) 7(2) International Journal on Minority and Group Rights, 139.

In the article, *Javid* clarifies the development which led to establishment of the religious freedom in the international human rights documents.²⁶² The most significant difference between *Javid's* perspective and that of most Muslims is that whilst they believe wearing religious clothes to be obligatory, he considers it to be an aspect of women's freedom of expression. According to the ECtHR, both Islam and Sharia are dogmatic beliefs and are thus incompatible with human rights, democracy and tolerance.²⁶³ To appropriately react to this notion, rather than suggesting new solution to the discord between human rights and Islam, he pointed out the historical context when Islamic rulers, particularly those of the Ottoman Empire, granted certain privileges and freedom to people of other religions. Even though granting certain religious freedom might seem a progressive step in that era, such analogy cannot be applied nowadays, as it is incompatible with the criteria presented by international human rights such as equality between men and women and non-discrimination. In spite of the fact that the author fails to provide a solution to the discord between Islam and human rights, emphasis on the privileges that the Ottoman Empire provided to religious minorities permits an interpretation of Islam as a religion that is capable of addressing the human rights criteria. Moreover, this view can be used as a reason to critique the decisions of the ECtHR regarding the Islam. The general overview of Islam should not be decided solely by the ECtHR, as in such state it is incompatible even with some of Islam's teachings.

Although contemporary interpretations of Islamic law in Muslim countries has led to the violation of human rights, many Islamic scholars, unlike the ECtHR, are in concordance that there is no inherent incompatibility between Islam and human rights. Essentially, Islam is able to incorporate modern laws of human rights. *Bardin* and *Arifan* assert that human rights are not simply derived from Western and Christian thought, but have their conception in the ideas of philosophers and politicians who witnessed the suffering caused by the World Wars. In his article,²⁶⁴ *Badrin* quotes the views of famed Islamic scholar *Abdullahi*, who claimed that values such as democracy, human rights, and pluralism are universal, and that Islamic countries must embrace them. He also argues that violations of human rights cannot simply be waved away or

²⁶² *ibid*

²⁶³ *Dahlab v Switzerland* (Application no 42393/98) (15 February 2001) ECHR 899; *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.

²⁶⁴ Mashood A Baderin, 'Abdullahi An-Na'im's Philosophy on Islam and Human Rights. Islam and Human Rights: Selected Essay of Abdullahi AN-NA'IM' (2010) Ashgate Publishing.

justified by dint of cultural relativism.²⁶⁵ Through internal debate, and contemporary interpretation of Sharia, true integration of Islam and human rights is possible. He asserts that Islamic law can be reformed by reinterpreting Sharia through a modern lens, which would be more effective than a secular approach at advancing the cause of human rights.²⁶⁶ He writes that the assumed incompatibility between secularism and Islam has its roots in confusion of definitions and terminology, which must be deconstructed. In order to dismantle this definition of secularism, he claims that the accepted view of secularism that totally discards or diminishes the public role of religion is a problematic one. He also condemns the assumption that secularism is limited to Western European and North American Christian nations, and shows that secularism “*has come to Africa and Asia in the suspect company of colonialism*”. According to *Badrin*, secularism should be defined as a dialogue between the state and religion, instead of the specific ways in which that relationship has developed in certain countries. After deconstructing this definition of secularism, he then calls for Muslim states to re-embrace secularism, and argues that the most important reason for an Islamic version of secularism is the necessity of pluralistic nations to protect freedom of religion for Muslims and non-Muslims alike. In other words, freedom of religion is more likely to be restricted in a state that actively promotes any particular religious dogma, as opposed to one that remains truly secular.²⁶⁷ He also adds that Islamic jurists of the seventh century managed to fit Islam to their particular circumstances, so contemporary Muslim jurists have a duty to interpret scripture in a way that adapts religious practice to modern circumstances.

In contrast to *Badrin*, who favours modern interpretations of Islam, *Arifan* references Islamic sources that demonstrate that human rights and tolerance have already been extant within Islam. According to Arifan, violations of religious freedom stems from meddling by society, and the state in particular. He also claims that freedom of religion falls under the umbrella of civil and political rights. By this definition, the state should stay out of any question as to how an individual exercises his or her right to religion.²⁶⁸ Therefore, according to this analysis, forcing a woman to wear or remove her headscarf constitutes a violation of the right to religious freedom. *Arifan* bases his views of the interactions of society with religious freedom on the theories of Professor *Fatima*.

²⁶⁵Mashood A Baderin, ‘Abdullahi An- Na’ im’s Naim’s Philosophy on Islam and Human Rights’ (2010) 10 Legal Studies research paper series, University of Kondon, London.

²⁶⁶ Ibid, p. xvii.

²⁶⁷ Ibid, p. xx.

²⁶⁸ Syamsul Arifin, ‘Indonesian Discourse on Human Rights and Freedom of Religion or Belief: Muslim Perspectives’ (2012) 3.4 *BYU L. Rev.* 775, 86-787.

Fatima asserts that there are two disparate groups of interpretation. The first are Muslim societies which believe that its religion is exclusive, meaning that believers must reject other religions, and that Islam is the only true religion, and therefore must become the only religion. In these societies tolerance and religious freedom are unable to co-exist. The other group takes an inclusive attitude towards religion. They assert that although Islam is the true religion, other religions do and should exist that can allow a human being to achieve salvation.²⁶⁹

To support the notion of Islam's compatibility with the concept of human rights, *Arifan* makes references to various historical documents and events in the context of Islamic history. For instance, he references the Prophet's speech during his last pilgrimage in which he emphasizes the importance of protecting one's property, dignity and honour. Furthermore, the author highlights one of the objectives of Islamic law (*maqasid al deen*) being protection of the religion itself which can only be achieved if people have the opportunity to manifest their beliefs and exercise their religious rights freely. Another point of reference is an order of *Omar*, the second caliph, banning the ruler of Egypt from unjustified punishing of his subjects. In total, the author employs three different sources on which he builds his argument that there is a high degree of compatibility between Islam and the concept of human rights.²⁷⁰

To formulate a final assessment of *Arifan's* work, it can be said that his legal analysis of the concept of religious freedom implies that the author himself believes strongly in the freedom of religion, whereby he perceives this freedom as a part of essential human rights. Moreover, he argues that both state and non-state actors should avoid trying to impose their own version of a particular religious belief²⁷¹. Yet, it should be noted that such 'modern' understanding of Islamic traditions is not shared by the majority of Muslim scholars. Nonetheless, *Arifan's* views and arguments constitute a platform on which different views of Islam and its need for self-reflection can be discussed. In addition, although the author succeeded in critically evaluating the absence of a proper legal framework allowing the ban of wearing a headscarf, pointing out the articles 18 and

²⁶⁹ Cited in, Syamsul Arifin, 'Indonesian Discourse on Human Rights and Freedom of Religion or Belief: Muslim Perspectives' (2012) 3.4 *BYU L. Rev.* 775, 787. "See further, Daniel R Heimbach, 'Contrasting Views of Religious Liberty: Clarifying the Relationship between Responsible Government and the Freedom of Religion' (1994) 11.02 *Journal of Law and Religion* 715. This views are like to the view of Religious Idealism. This view historically associated with pre-Vatican II Roman Catholicism, the Orthodox Church, forms of militant Islam, and Communism, begins with one fundamental principle: only truth has rights, and error is without rights.

²⁷⁰ *Supra* no 260, 789-800.

²⁷¹ Mohammad H Zarei and Azar Safari, 'the status of non-state actors under the international Rule of law: a search for Global Justice' (2015) *Rethinking International Law and Justice* 233.

9 in ICCPR and ECHR respectively, he nonetheless failed to assess in more depth the court's justifications.

Generally speaking, *Bardin* and *Arifan* appear to have problems with interpreting Islam with its internal mechanisms as a religion compatible with human rights. In order to achieve this, the authors approach secularism, as well as human rights, as achievements of the whole of humanity rather than Christianity related achievements. Moreover, they comprehend the Islamic society together with the position Islam has in it, and they work with resources of primarily Islamic origin as the basis of a Muslim human rights agenda. From this perspective, *Arifan* successfully uses the hadith and Prophet's speeches, as well as various examples from the history of Islam. At the same time, the modern approach demonstrates the fact that many Islamic scholars perceive wearing religious clothing, such as veils, as a rather personal matter and not a mandatory condition. It even indicates that, as opposed to the view presented by the ECtHR, Islam as a religion is capable of addressing the human rights question. There is no doubt that such perspectives offer substantial knowledge with respect to the subject of the research if they continue to perform a critical evaluation of the Court's approach to Islam.

Before identifying the knowledge gap, it should be noted that both the *John Stuart Mill* and *John Lock* books have been influential on the research, but the researcher has avoided reviewing their works as part of the literature review due to their lack of relevance to the ECtHR cases relating to wearing of headscarves.

2.5. Knowledge Gap in the context of Article 9 and the Islamic headscarf

Based on the review of various relevant works, it is apparent that there is not a lack of literature dealing with issues of religious freedom, or more specifically with the right to manifest outwardly one's religious beliefs. A considerable number of sources have focused on analysing the case the *Refah Party v. Turkey*²⁷² and cases involving the ban of wearing a headscarf in countries like Turkey, France and Switzerland. The majority of scholars have criticised relevant decisions of the ECtHR as constituting a clear case of discrimination against women and those exhibiting their right of religious freedom. And yet, having reviewed a considerable number of

²⁷² *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.

relevant sources, it can be argued that there is absence of works basing their assertions on compelling legal arguments.

In this context, the aim of this thesis is to formulate and support an argument that the decisions of the ECtHR in cases involving Muslims and their right to religious expression represent a serious legal problem. First and foremost, the researcher's goal is to provide evidence that protection of the principle of secularism as result of fear of fundamentalists as a justification for banning the wearing of a headscarf is highly problematic and as such, it has proved to be difficult to justify through the existing legal principles. This is particularly due to existence of a plethora of definitions and understandings of the term secularism whilst its application differs substantially among European states. Reviewing previously conducted studies has revealed that the court's use of the 'protection of secularism' as a core of their rationale has been heavily criticised, for the exact nature of what should be 'protected' remains unclear. In this regard, the author of this thesis argues that analysing the principle of secularism from a logical and legal standpoint requires evaluation of the philosophical and historical context from which this term originates. More specifically, it is essential to clarify whether secularism's fundamental aim is separation of state from religion, including or excluding individuals. Also, does allowing the wearing of religious clothes affects the state's neutrality towards all religions, and can a person wearing such clothes be prohibited from to perform public services?

In the case of *Leyla v. Turkey*, the court expressed implicitly that there is a correlation between wearing a headscarf and increasing religious fundamentalism in the country. This justification has been duly criticised as not being sound, insofar as no clear evidence was presented implying that *Leyla* belonged to a specific religious group, let alone that she was a fundamentalist. In this context, there have been numerous studies conducted recently that tried to clarify the term fundamentalism; in this regard, it has been suggested that most world's religions are more or less fundamentalist.²⁷³ To put simply, the majority of believers following some form of theism maintain the exclusivity of their particular religion with respect to eternal salvation. Building on this argument, it is becoming apparent that restriction of one's manifestation of religious beliefs based purely on the fear of fundamentalism might be unjustifiable. It seems only obvious that any court should base its decision on the existing legal framework in a given country rather than on poorly

²⁷³ Dilawar Sherzai, 'Fundamentalism' The daily Afghanistan Ma (01 August 2015).
<http://outlookafghanistan.net/topics.php?post_id=12727> accessed on 23 March 2017.

defined concepts such as fundamentalism. Furthermore, during the court hearing, individuals were asked to reveal their religious belief, which constitutes breaking of the rule established by the ECtHR after a precedent in the case *Folgerø v. Norway*,²⁷⁴ whereby the court acknowledged that trying to compel a person to reveal their beliefs contradicts basic human rights. Besides the legal flaws in the arguments of the court in Turkey, there are also gaps in elementary logic. If one assumes that wearing a headscarf can facilitate spread of extremism within society, then there should be a documented high number of female terrorists actively perpetrating terrorist acts. By the same logic, since reportedly, the majority of individuals involved in terrorist attacks are male with long beards, the state should regulate the amount of facial hair on its male population's faces.²⁷⁵ Despite the evident illogicality of such suggestion, a similar logic was used in Turkish courts' decisions justifying the ban of wearing a headscarf.

With respect to wearing a headscarf, the ECtHR maintains that there is a degree of incompatibility between the idea of tolerance and open manifestation of one's religious beliefs. Yet, the Treatment Committee in Holland countered by stating that the openness towards all beliefs that is required from a teacher is not affected by wearing a headscarf.²⁷⁶ The only case in which a headscarf would be a contributing factor is a situation when a person wearing a headscarf committed an act of open hostility or intolerance towards a specific religion or belief. It is evident from the aforementioned that it is crucial to define terms, such as religious tolerance or religious freedom, which are often employed in arguments regarding the pertinent cases.

This position of the court has been rightly criticised from various angles, but mainly by focusing on the court's failure to consider views of women themselves. For instance, it would be beneficial if the court analysed views of women who converted to Islam in Western countries and who wear a headscarf without being forced to do so. The rulings of the court which rely on the argument for the preservation of secular society have been widely challenged by scholars; these scholars propose that secularism is the avenue to pluralism and the acceptance of difference. The argument against this has cited the position of France and Turkey towards religious manifestation, which has been termed 'fundamentalist secularism'. This form of secularism, it has been argued,

²⁷⁴ (Application no.15472/02) (29 June 2007) ECHR 29 para 96.

²⁷⁵ 'Report of the Official Account of the Bombings in London on 7th July 2005' <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/11_05_06_narrative.pdf> accessed on 23 March 2017.

²⁷⁶ Aernout Nieuwenhuis, 'European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Şahin v. Turkey, Decision of 29 June 2004, Application Number 44774/98' (2005) 1.03 *European Constitutional Law Review* 495,505.

infringes on the liberties of women. It has also been put forward by reviewed authors that the presentation of a Christian symbol, such as a cross, has been allowed in schools, while the headscarf has been prohibited. This constitutes a disregard for human rights, as this amounts to unequal treatment between religions. They argue that the ECtHR should uphold the principle of objectivity in their rulings, and that when the court prohibits the headscarf on the grounds that the court must preserve the rights and freedoms of others, the ECtHR should be required to present legal reasons that the headscarf impinges on these rights and freedoms. These arguments and reasons must be legally compelling and should avoid conjecture and possibility. Other reasons presented as justification for the prohibition of the headscarf include the concept of public order and morality, despite the ambiguity of this ill-defined and divisive term. The ECtHR has failed to provide any real and compelling line of reasoning which indicates that the headscarf is intrinsically threatening to the social cohesion or public morals and order.

On the other hand, some, including Islamic critics, have challenged the rulings of the court as pertain to the headscarf by arguing that the justifications are nothing more than prejudice against Muslims and their faith, a symptom of the post-9/11 Islamophobia in the West. Using an Islamic context, both through an examination of past treatment of Muslims and a reading of the Qur'an, these critics attempt to understand modern day human freedoms through the lens of Islam which is compatible with secularism and democracy. They rally against the claims of the court that the headscarf signifies female oppression and marginalization; rather, they assert that in cases such as these, the testimony and voice of the women in question often goes unheard and there should be more attention paid to the experiences of hijabi women. The headscarf is often considered as a personal choice under the category of civil and political rights. It should be noted that the nature of political and civil rights is passive; in other words, in order to be implemented, states are required to avoid interfering in these rights.

As well as supplementing and reinforcing that outlined above, this work aims to address a key area that was previously neglected in the literature: an analysis of fundamentalism and tolerance as justifications for prohibiting the headscarf by the ECtHR. To this end, the researcher will address the terms 'tolerance' and 'fundamentalism' in a historical and ideological context, including an analysis of their etymologies and varied interpretations. Following an examination of the findings of this analysis, the researcher will then apply this argument to the decisions of the ECtHR to determine how questionable these decisions have been. For instance, 'intolerance' and

‘fundamentalism’ may involve forcing others to adopt a belief, but those who have been the subject of the court decisions have not been in a position of power in order to indoctrinate or impose ideas, as they were merely attempting to practice their personal faith. It can be argued that the court, then, has based a number of its rulings on conjecture. For example, the recent shifts in the policy regarding the headscarf in Turkey, in which the headscarf has been accepted and supported complicate the issue further, and raises a real question about political and legal context of the debate regarding the wearing of the headscarf.

CHAPTER THREE

Freedom of religion under the international legal framework for human rights

3.1. Development of human rights after World War II

It would be an incomplete task to examine the question of freedom of religious manifestation under the ECHR without also examining the overall international legal context, which is what this chapter aims to do. Following WWII, the growth in advocacy for human rights has been substantial; a wide array of international conventions and declarations regarding the improvement of human rights both worldwide and regionally has been established. States have also ratified many of these documents. Cultural, economic, civil, social, and political rights, along with the rights of children²⁷⁷, the disabled²⁷⁸, migrant workers²⁷⁹, minorities²⁸⁰, and women²⁸¹ have been included. Specialist treaties have centered on disability, torture²⁸², and also racial discrimination.²⁸³ In addition, the idea of human rights and its definition have been interrogated and analysed repeatedly during the past several decades. Within academic literature about human rights, contrary to the time prior to the Second World War, individual rights have received considerable awareness. Despite utilising organisations and treaties, international society has been encountering difficulties with creating and maintaining an efficient way to oversee human rights outside of their own national borders. Previously, states had absolute jurisdiction in regard to their citizens, whereas today states legally must operate according to human rights standards imposed under international human rights law, and the shield wall of the absolute principle of sovereignty

²⁷⁷ Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 (1989), corrected at 29 I.L.M. 1340 (1990) (entered into force Sept. 2, 1990).

²⁷⁸ UN, convention on the rights of person with disability, Resolution 61/106, 13 December 2006 and UN, Optional protocol to the convention on the rights of person with disabilities, Resolution 61/106 13 December 2006.

²⁷⁹ UN, International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families, G.A. Resolution. 45/158, 18 December 1990.

²⁸⁰ UN, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, 18 December 1992.

²⁸¹ UN, Convention on the Elimination of All Forms of Discrimination against women, G.A. Res.34/180, 1979.

²⁸² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).

²⁸³ UN, International Convention on the Elimination of all Forms of Racial Discrimination ,G.A. Resolution.2106(xx)21 December 1969 , entry into force 4 January 1969.

has crumbled.²⁸⁴ Moreover, in the second half of the 20th century, additional rights have been included, an example being collective rights²⁸⁵, which were not previously incorporated in international law. Since then there has been growth in international human rights law which become the main development in that period. Although overall the circumstances regarding human rights have improved, citizens still have their rights breached, especially when considering religious freedom and in particular freedom of religious expression such as the wearing of the headscarf. Thus, religious freedom and tolerance is a key in the struggle for human rights.

This means that the right to religious expression must be examined; this is what this research aims to achieve. This has been undertaken through an examination of this right according to the UN and under three relevant legal frameworks. In order to better understand the complexity of this right and its related terms, these terms have been tackled individually and related to the current discussion. This is aided by legal documents, case studies and the academic commentary which followed many of the cases cited. Further, there will be an argument made regarding the use of terms including public order, health, morality and right and freedom to others to justify restriction. This allows the researcher to better understand and, therefore, better assess the usefulness of these terms in a legal setting, as relates to religious freedom. In sum, the above outlined plan will allow the researcher to find out whether provisions within article 9 of ECHR have been applied in a legal and logical way to restrict religious manifestation.

3.1.1. The United Nations Charter and human rights

During WWII, the systematic and appalling abuse of human rights was pervasive. The League of Nations did not have an extensive policy regarding human rights, and neither managed to defend those rights nor avert the ensuing international crisis.²⁸⁶ For instance, in the 1919 peace treaties, the “Minority Treaties,” and in President *Wilson’s* “Fourteen Points,” nations’ and minority groups’ rights were mentioned. However, this did not prevent a failure on the side of the League of Nations regarding protection of European Jews. Moreover, many states had a tendency to disregard the notion of an individual citizen and his human rights being under the protection of

²⁸⁴ William Magnuson, ‘Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection under International Law’ (2010) 43 *The. Vand. J. Transnat’l L.* 255.

²⁸⁵ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Resolution 61/295, 13 September 2007. Example of those rights are self-determination, cultural rights and minorities’ rights.

²⁸⁶ Rhona Smith, *Textbook on International Human Rights*. (6th ed, Oxford University Press 2014) 26.

international law. The treatment of their citizens was according to a number of countries, exclusively an internal matter of the state.²⁸⁷ Having witnessed the dire consequences of the absence of the League of Nations' real power to implement satisfactory protection of human rights and peace, the world community decided to found the United Nation Organization in 1945.

In the preparatory sessions on drafting the United Nations' charter, positions about human rights differed. During the Dumbarton Oaks conference, the first conference to discuss the charter, human rights received limited consideration, with the main focus being on structuring the organization and quality of the dynamics between smaller and larger countries. Generally, during the charter's drafting, two main perspectives emerged. One perspective was supported by the United States, multiple Latin American states²⁸⁸, NGOs, and civil society and human rights advocacy groups, which was a perspective that stressed the placement of human rights in the charter, advocating for the Bill of Rights to be included as well. The Soviet Union and Britain supported the second perspective, which was not as focused on human rights. The Soviet Union thought that including human rights would allow other countries to interfere with its domestic affairs, whilst Britain was concerned that their inclusion would make Britain's dynamics with its colonies troublesome.

Ultimately the charter included human rights in the preamble and eight of the articles, with Article 3 relaying that one of the central aims of the United Nations is "... *encouraging respect for human rights and for the fundamental freedoms for all...*" Whilst human rights were highlighted in the charter as one of its main purposes, the drafters purposely refrained from adding legal and binding language such as obligation to fulfill, obligation to protect and obligation to respect in regard to countries having obligations concerning human rights.²⁸⁹ Instead, words such as "promotion," "encourage," "recommend," and so on were utilized. These terms are arguably not legally binding, and the violation of these terms may be considered more a political issue than a legal one. *Schwarzenberger*, as commentator, held that "in the Charter clear distinction is drawn between the promotion and encouragement of respect for human rights, and the actual protection

²⁸⁷ Myres S McDougal and Gerhard Bebr, 'Human Rights in the United Nations' (1964) 58 Am. J. Int'l L. 603,611.

²⁸⁸ Asbjørn Eide, 'The Historical Significance of the Universal Declaration International' (1998) 50.158 *Social Science Journal* 475, 477.

²⁸⁹ United Nations Human Rights Office of the High Commissioner, International Legal Protection of HR in Armed Conflict. UN Human Rights Office of the High Commissioner (New York and Geneva 2011) *available at*: <http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf> accessed 25 September 2017, p.18.

of human rights”.²⁹⁰ It seems that the utilization of these generalized terms indicates that the point of the charter was simply to relay hopes, not undertakings, not even programmes. Moreover, provisions within and the background of articles, 3, 62, and 76 show that a majority of the formulas focus on the goals and functions of the United Nations and its main organs instead of member requirements.²⁹¹ Another instance of this is in Article 13, which states that the General Assembly shall initiate studies and make recommendations for the purpose of:

“..Promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”

Instead of national requirements, the power of assembly is addressed in this article, and recommendations put forth by the General Assembly lack binding power.²⁹² The Chief of the United States’ delegation at San Francisco, Mr. *Edward*, said, *“because the UN is an organization of sovereign states, the General Assembly does not have legislative power. It can recommend, but it cannot impose its recommendations upon the member states.”* Essentially, whilst General Assembly members have equal rights, they do not have equal influence on decision-making. As a result, when the General Assembly deliberates about certain cases, there will also unavoidably be political deliberation regarding matters and actions. This will not foster the “neutral principle,” which is often relevant and should be appropriately utilized;²⁹³ instead, if this reasoning is used, then it is arguable that in an attempt to encourage “respect for and observance of human rights,” no significant part of the U.N. has been given legislative and executive power.²⁹⁴

Articles 55 and 56 of the charter vary from the above-mentioned articles concerning this matter. These articles are more focused on the activities of U.N. members when they are not working within the framework of the U.N. and allow the matter of human rights to remain a

²⁹⁰ Zenon Stavrinides, ‘Human Rights Obligations under the United Nations Charter’ (1999) 3 (2) The International Journal of Human Rights 38, 39, 40.

²⁹¹ Bernhard Schlüter, ‘The Domestic Status of the Human Rights Clauses of the United Nations Charter’ (1973) 61.1 California Law Review, 110,117.

²⁹² Manley O. Hudson, ‘Charter Provisions on Human Rights in American Law’ (1950) 44.3 The American Journal of International Law 543.

²⁹³ Louis Henkin, L, ‘The United Nations and human rights. International Organization’ (1965) 19(03) international organization 504,516.

²⁹⁴ Manley O. Hudson, ‘Charter Provisions on Human Rights in American Law’ (1950) 44.3 The American Journal of International Law 543, 546.

concern of individual countries.²⁹⁵ Legally, the protection of rights drawn from the charter would only be enforced within the context of the national laws of that citizen's country, and human rights would be still regarded as an internal subject.

Another aspect to consider is that "human rights," and "fundamental freedom" as terms are difficult to negotiate, since they are both contentious and broad. Whilst these terms are mentioned in Articles 1(3), 55, 62 (2), and 76, there is no scholarly consensus on their precise meaning.²⁹⁶ Still, pulling together abstract and workable definitions of these terms is accomplishable; the more challenging task is to negotiate, agree and ratify a document with particular human rights listed and have such a document enforceable by the courts.²⁹⁷

Overall, these contentions have resulted in a multitude of viewpoints on what is considered a human right and/or a fundamental freedom, with one society believing one definition, and another society believing another. This division seems fitting with the charter's thinly developed stance regarding human rights. In this regard, *Ernst Hass* said that the U.N.'s attempts to enforce human rights standards "do not work."²⁹⁸

3.1.2. Religious freedom under the provisions of the United Nations Charter

During the period between WWI and WWII, advances were made concerning the right to religious freedom for religious minorities. The oft-but-unjustly criticized Minority Treaties in 1919 provided a plan to protect ethnic, cultural, national, and/or religious minorities, with multiple provisions included. However, when the League of Nations collapsed, so did these treaties. It is impossible to determine how these treaties would have fared had WWII not occurred. After the war, the U.N. was formed as a consequence of the systematic abuse of human rights, as well as the government-sanctioned oppression and execution of 6 million Jewish people by the Nazi regime. International communities and NGOs, before the drafting of the charter, anticipated that the U.N.'s focus would be on protecting human rights with an emphasis on religious freedom. The 1942 Conference and the Moscow Declaration of 1943 proclaimed human rights and protection of

²⁹⁵Bernhard Schlüter 'The Domestic Status of the Human Rights Clauses of the United Nations Charter' (1973) *California Law Review*, 110, 112-117.

²⁹⁶ Manley O. Hudson, 'Charter Provisions on Human Rights in American Law' (1950) 44.3 *The American Journal of International Law* 543,546.

²⁹⁷ Bernhard Schlüter 'The Domestic Status of the Human Rights Clauses of the United Nations Charter' (1973) *California Law Review*, 110,143.

²⁹⁸ David P Forsythe, 'The United Nations and human rights, 1945-1985' (1985) 100.2 *Political Science Quarterly* 249, 267.

religious freedom;²⁹⁹ however, upsetting assumptions, the U.N.'s charter did not clearly include freedom of religion in the 1945 San Francisco draft. This was despite the appeals from representatives of Chile, Cuba, New Zealand, Norway, Panama, and 42 NGOs to include comprehensive language regarding the freedom of religion into the draft. However, this did not work, partly because of inadequate support, and partly because of inadequate time.³⁰⁰ In the new system, the U.N. Charter stressed individual rights and freedoms whilst practically excluding group rights. The members of the U.N. who supported this position believed that laws about non-discrimination and the protection of individual rights would satisfactorily protect those whose rights were threatened or breached due to a group trait such as race, religion, ethnicity, nationality, culture, or language. Essentially, the U.N.'s charter barely offered provisions for the freedom of religion.³⁰¹

Whilst there are insufficient provisions for the freedom of religion and human rights, the U.N. is still the organization that plays the main role in the promotion and protection of human rights. The UN through its organs, particularly the Economic and Social Council (hereinafter ECOSOC) and its specialized agencies, has taken significant steps to standardize and set norms of human rights and religious freedom. There are three important documents promulgated by the UN which refer to religious freedom. These are: the 1948 the universal "Declaration of Human Rights," the 1966 "International Covenant on Civil and Political Rights," and the 1981 the "Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Belief and Religion", which more clearly outlined the right to religious freedom. Arguably, the U.N.'s original charter supplied a basis for the later development of provisions for human rights, particularly the freedom of religion and religious expression.³⁰²

²⁹⁹ Myres S McDougal & Gerhard Bebr, 'Human Rights in the United Nations' (1964) 58 *Am. J. Int'l L.* 603.

³⁰⁰ Bahiyyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Vol. 44 Martinus Nijhoff Publishers, 1996) 66-67.

³⁰¹ Natan Lerner, 'Proselytism, Change of Religion, and International Human Rights' (1998) 12 *Emory Int'l L. Rev* 477, 499-500.

³⁰² Bahiyyih G Tahzib, *Freedom of religion or belief: Ensuring effective international legal protection* (Vol. 44 Martinus Nijhoff Publishers, 1996), 66-67.

3.2 .The Universal Declaration of Human Rights and how it has influenced the right to religious freedom

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on 10th December 1948, was the first initiative to express human rights as inherent and fundamental for all human beings. Before the adoption of the UDHR, no declaration existed that so strongly advocated the recognition of human rights and freedoms, and which supported such rights to be recognized across the whole world.³⁰³ Therefore, the Universal Declaration, under Resolution UNGA 217A (III), has been widely considered to be the most fundamental resolution to have ever been declared by both the UN and by any intergovernmental organization.³⁰⁴ It was introduced in 1948 by Eleanor Roosevelt, President and Chair of the Commission on Human Rights, at the end of the Second World War and as a reaction to the experience of wartime and post-war abuse of human rights. The UN ECOSOC therefore sought to develop a commission that examined human rights, which began working on a draft declaration in 1946. The draft was finalized in 1948. Since then, the UDHR has shown itself to have evolved in relevance and importance as a “living document” over the last sixty years.³⁰⁵ For instance, a key principle of the Declaration is that it protects the inherent dignity, and the equal and inalienable rights, of all members of the human family which is the foundation of freedom, justice and peace. Acknowledging this as a birth right which cannot be questioned or violated under any circumstances, any violation would constitute an affront to equality, freedom and harmony. Freedom and dignity are, clearly, intrinsically linked but nowadays, for millions of people from different religions and beliefs, freedom from violence, torture and the freedom to express their religious beliefs are far from reality.

3.2.1. Background to the Drafting of the UDHR

The Commission on Human Rights was authorized by the Economic and Social Council (ECOSOC) to organize an “international bill of rights”.³⁰⁶ The initial commission consisted of

³⁰³ Michael Cooper, ‘The Birth of the Universal Declaration of Human Rights’ (1998) 62(5) Social Education 302, 302.

³⁰⁴ Asbjørn Eide, ‘The Historical Significance of the Universal Declaration International’ (1998) 50.158 Social Science Journal 475,475.

³⁰⁵ Michael Cooper, ‘The Birth of the Universal Declaration of Human Rights’ (1998) 62(5) Social Education 302, 302.

³⁰⁶ Mary Ann Glendon, ‘John P. Humphrey and the Drafting of the Universal Declaration of Human Rights’ (2000) 2.2 Journal of the History of International Law 250, 250.

eighteen members, which has expanded since then. Within these original eighteen seats, five seats were provided for the main world powers (the United Kingdom, the United States, China, France, and the Soviet Union), and thirteen seats were accordingly designated across other revolving countries.³⁰⁷ The initial step in creating the Universal Declaration of Human Rights was the formation of a board of eight members, who assembled the drafted declaration. The initial meeting for this board was organized to take place in June 1947, following four months of preparation by *John Peters Humphrey* (Director of the UN Division of Human Rights) and his team in assembling a draft, collecting suggestions given to the UN, and examining the existing national constitutions and charters across the world.³⁰⁸ The committee then assembled 48 articles, based on almost 200 years of effort that preceded the field of human rights around the world, to establish a succinct compilation of fundamental and universal human rights.

The draft of the UHDR took into account a range of issues over the history of human rights. Firstly, it begins with the 'first generation' or 'blue rights' of liberty and freedom in the political sphere, examining the civil rights discussed in American and French 18th century revolutionary constitutions. It also looked at the 'second generation' or 'red rights' of economic and social human rights, sourced from 19th and early 20th century national constitutions such as the rights observed in the Constitution of Norway (1814), which demanded officials recognize the rights of all citizens to be able to earn a living through their work. Several other constitutions were examined in the course of drafting the UDHR. These included the General Law Code for the Prussian States, which held the State accountable for offering food and welfare to those who could not earn a living to fully support themselves, as well as the inspiration behind the Mexican Revolution's examples of Christian socialism in governance³⁰⁹, and several constitutions across Latin America which provide basic resources for those in need.³¹⁰

One of the most important questions examined by the committee was how to present the document. It was widely debated within the committee and the UN, as well as by other nation states, whether it should be a list of recommended rights, a manifesto for nations and individuals to aspire to, or a legal document. According to *Humphrey*, it was Chang from China who

³⁰⁷ Mary Ann Glendon, 'Knowing the Universal Declaration of Human Rights' (1997) 73 *Notre Dame L. Rev.* 1153, 1157.

³⁰⁸ Mary Ann Glendon, 'John P. Humphrey and the Drafting of the Universal Declaration of Human Rights' (2000) 2.2 *Journal of the History of International Law* 250, 253.

³⁰⁹ *Ibid*, 257.

³¹⁰ *Ibid*, 254.

considered the document as being threefold, and that it stood at once as a declaration, a plan of implementation, and a treaty.³¹¹

The issue was debated across the committee and states. For example, President Roosevelt advised the US to consider it as an “international bill of rights”. The US supported the concept of a universal declaration, but also questioned the nature of its legality, advocating it to be a declaration only as opposed to a legal constitution. Many were opposed to the legalization of human rights entirely, with members of *Roosevelt's* cabinet, such as *Cordell Hull* (Secretary of State), preferring to view the idea of human rights as a rhetoric of war time.³¹² Additionally, although France at first backed the universality of human rights, the final draft of the UDHR led it to admit concerns for how it would affect the French empire in North Africa and further afield.³¹³ Due to international concerns on the binding force and legality of a human rights document, the concept of a non-binding declaration was seen as more attractive, with its implementation popular worldwide. From the drafters’ perspectives, the creation of a statement of human rights norms seemed to be a natural prerequisite for the establishment of mechanism such as an international court of human rights. Although the commission hoped its Bill of human rights would eventually contain both a declaration of rights and a binding convention, it also acknowledged the necessity of allowing states to gradually accede to the convention. Therefore, the UDHR was compiled as a Resolution, and given approval by the United Nations General Assembly.³¹⁴

3.2.2. Key Provisions of the UDHR

The UDHR contains an introduction followed by thirty articles that attempt to consolidate the fundamental and universal human rights. The declaration has been often compared to the structure of a Greek temple's portico, and encompasses a foundation, facade, steps, columns, and a pediment (gable). The foundation is composed of liberty, equality, dignity and fraternity, as mentioned in the first two articles. The facade is composed of four columns, which are compared to the following four categories of rights: the rights of the individual, including the right to life (articles 3-11); the rights of an individual in the political and physical sphere (articles 12-17); the

³¹¹ Susan Eileen Waltz, ‘Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights’ (2001)23(1) *Human Rights Quarterly* 44, 60.

³¹² Susan Waltz, ‘Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights’ (2002)23(3) *Third World Quarterly* 437, 439.

³¹³ *Supra* no 302, 70.

³¹⁴ Brian R. Farrell, *Habeas Corpus in International* (Cambridge University Press 2016) 33.

right to spiritual, religious, and public freedoms (articles 18-21); and the economic, cultural and social rights (articles 22-27). The pediment, which completes the structure and makes it stable, is made of the three final articles 28-30, which examine how an individual and wider society function together, and the duties of the citizen to its nation or society.³¹⁵ These human rights, as laid out in the UDHR, were intended to be a complete and heterarchical set of rights, where no single pillar is to be seen as more important than any other.³¹⁶

3.2.3. Religious freedom in the UDHR

Whilst compiling the UDHR, the issue of religious freedom was considered to be one of the most sensitive and contentious topics. Religion is often one of the most important spiritual, political and cultural issues for a range of countries and individuals, with religious liberty often considered as the very first freedom.³¹⁷ As the committee responsible for formulating the Universal Declaration was very aware of the religious discrimination of World War 2, and with up to 170 million people killed due to ethnic cleansing through the duration of the 20th century as a result of religious persecution and fundamentalism, there were a range of problems to consider in developing the declaration.³¹⁸

Johan D. van der Vyver comments that the abuse of the right to religious freedom “almost invariably” leads to the abuse of other rights, such as the following:

*“the right to life, liberty and security of the person; the right to freedom from torture or cruel, inhuman, or degrading treatment or punishment; the right to freedom from discrimination; the right to fair and public hearing by an independent and impartial tribunal; the right to freedom of movement and residence; the right to freedom of opinion and expression; freedom of assembly and association; and the right to privacy.”*³¹⁹

³¹⁵ Mary Ann Glendon, 'Knowing the Universal Declaration of Human Rights' (1997)73 Notre Dame L. Rev. 1153, 1163.

³¹⁶ Akira Iriye, and others, *The Human Rights Revolution. An International History* (New York: Oxford Univ. Press 2012)8.

³¹⁷ Kristine Kalanges, *Religious Liberty in Western and Islamic Law: Toward a World Legal Tradition* (Oxford University Press 2012)1.

³¹⁸ Derek H Davis, 'the Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (2002) 2 BYU L. Rev. 217, 219.

³¹⁹ Johan David Van der Vyver & Johan D. Van der Vyver, eds, *Religious Human Rights in Global Perspective: Religious Perspectives* (Vol. 1. Martinus Nijhoff Publishers, 1996) XLVI.

Therefore, the right to religion is embedded in the body of human rights, and is as important as other rights in the Universal Declaration.³²⁰ The committee responsible for formulating the declaration had at first wanted to proceed with a draft that only mentioned belief sparingly, but Roosevelt commented that any text wanting to uphold religious freedom should use the term 'religion'. Therefore, Article 18 does not only uphold religious freedom; it also recognizes the right to expression of religious beliefs by both individuals and in a wider community with others.³²¹

Even in 1948, when the committee first examined the draft of the declaration, an edit was submitted to delete the phrase “freedom to change his religion”. Saudi Arabia, Yemen, Afghanistan and Egypt argued against the repletion of this wording, with Saudi Arabia commenting that the edit was to stop missionaries from exploiting the right for political reasons, and that a change like this would destabilize their nation and its cultural structure.

Although Egypt at first doubted the amendment, it eventually voted for the change to be made, with the only contention being that: “*By proclaiming man’s freedom to change his religion or belief, the Declaration would be encouraging, even though it might not be intentional, the machinations of certain missions well known in the Orient*”.³²²

In terms of concerns by countries on its citizens converting to other religions, it is important to note that countries have many different viewpoints on the necessity of regulating or playing any role in affecting religious individual choices. In certain countries, changes in beliefs could have a wide-scale effect, whereas others may see very little impact on the social structure and only experience a private impact. Therefore, the practices of a country will generally mirror the choices and judgments of its overall society, and will attempt to support the societal structure and its foundations. Whether or not the country's rights allow for individuals to change their beliefs demonstrates in what way a country or state can be considered open to change in terms of religious structure and in terms of allowing a range of different religions.³²³ For example, in some Arab countries such as Saudi Arabia and Sudan, it is difficult for Muslims to convert to another religion due to pressures by society, and in certain countries such as Sudan and Iran, religious conversion

³²⁰ Supra no 309, 59-63.

³²¹ Supra no 307, 1166.

³²² Natan Lerner, ‘Proselytism, Change of Religion, and International Human Rights’ (1998)12 Emory Int'l L. Rev 477, 502.

³²³ Tad Stahnke, ‘Proselytism and the Freedom to Change Religion in International Human Rights law’ (1999)1 BYU L. Rev., 251, 253.

from Islam is legally prohibited.³²⁴ Therefore, it is difficult for states with a settled religious context to allow enough religious freedoms for their citizens to convert to another religion; this is the reason for their opposition to Article 18.

Furthermore, many Islamic states opposed the right to change religion advocated by Article 18 of the Universal Declaration because in some countries, leaving Islam for another religion can lead to severe consequences, including the death penalty. Western countries retorted, saying that it was necessary to refer explicitly to the right to change religion in order to prevent incorrect and religiously motivated interpretations. Although many Muslim states, such as Pakistan and Egypt, opposed the UDHR rights that dealt with marriage, family, and the right to alter religion, it was only Saudi Arabia in the end that opposed the right to religious freedom, and it was the only Muslim nation to abstain from voting for the declaration. The Universal Declaration of Human Rights was adopted with 48 votes, 8 abstained votes, and no opposition.³²⁵

Although the UHDR is not a legal binding instruments, it has had a significant social, political and legal impact throughout the world. It has had a great effect on post-war human rights legislation in many countries. Every United Nations human rights resolution from there on, along with more localized human rights declarations in Europe and America as well as the African Charter, has been influenced by the UHDR. Practically all international instruments on human rights, both by the UN and outside, make reference to the declaration.³²⁶ The Universal Declaration attempts to safeguard all people and their religious beliefs, and has since been the framework for further instruments that support religious freedom, such as the “Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief” and “the UN Covenant on Civil and Political Rights”. Although there is more work to be done before religious freedom can become possible for all citizens and in all states, these three documents have helped to support the legalization of religious freedom as well as the right to free belief internationally.³²⁷

³²⁴ Heiner Bielefeldt, ‘Muslim Voices in the Human Rights Debate’ (1995) 17 (4) Human Rights Quarterly 587, 599,600.

³²⁵ John Witte Jr & M. Christian Green, ‘Religious Freedom, Democracy, and International Human Rights’ (2009) 23 Emory Int’l L. Rev. 583, 587.

³²⁶ Mary Robinson, ‘The Universal Declaration of Human Rights: A living Document’ (1998) 52.2 Australian Journal of International Affairs. 117, 118.

³²⁷ Noel Villaroman, ‘Freedom of Religion or Belief in International Human Rights Law and the Provenance of a Distinct Right to Establish and Maintain Places of Worship’ (23th September 2011) Law and Religion Scholars Network (LARSN) Doctoral Students Conference, Oxford Brookes University, United Kingdom, p.2.

3.3. The International Covenant on Civil and Political Rights and Religious Freedom³²⁸

The development of human rights in the context of the modern history is closely related to the UN Charter. As mentioned before, this Charter is perceived by many as a constitution without a bill of rights and with only a mention of human rights' whilst highlighting that one of the key UN's objectives is to promote and encourage 'respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. However, when considered in its totality, the Charter does not refer to human rights in a systematic and comprehensive way with a large majority of these references being rather 'promotional and programmatic' in their nature.³²⁹ Therefore, the absence of more specific focus on the issue of human rights spurred a concentrated effort to deal with the above-mentioned problem. One of the first implications of this effort was issuing the UDHR in 1948 by the General Assembly. This Declaration encompassed a wide array of references to a broad spectrum of human rights including those of a social, economic, cultural, civil and political character. Subsequently, this document became a platform on which two major international human rights agreements were based: the International Covenant on Economic, Social, and Cultural Rights (ICESC) and the International Covenant on Civil and Political Rights (ICCPR) with both being signed in 1966 and coming into force in 1976.³³⁰ It is worth noting at this point that having two treaties tackling two categories of rights was in line with the general division of human rights into two classes: the so called 'first generation rights' including civil and political rights, and the 'second generation rights' encompassing economic, social and cultural rights. And yet, it needs to be emphasized that such categorization to some extent neglects the complexity of the interconnectedness of rights from both classes.

Hence, to distinguish between ICESC and ICCPR it can be said that regarding the former, the obligation of states to implement human rights is progressive (step by step) and based on the states' resources. For example, the expectations with respect to the developed states like UK to provide jobs and health services are higher than concerning developing countries such as Somalia. Furthermore, due to this complicated nature of these rights, it is usually difficult to measure

³²⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

³²⁹ Benjamin V Cohen, 'Human Rights under the United Nations Charter' (1949) 14 *Law & Contemp. Probs* 430, 431.

³³⁰ Antoon De Baets, 'the Impact of the Universal Declaration of Human Rights on the Study of History' (2009) 48.1 *History and Theory*. Wesleyan University. 20, 20.

objectively implementation of the broad range of rights that are promoted in ICESCR.³³¹ In contrast to ICESCR, ICCPR places an obligation on member states to implement the convention promptly. The rights incorporated in this convention usually do not require resources for their implementation.³³² For example, guarantee and protection of the right to have and adopt a religion does not necessitate considerable resources. In other words, the lack of the resources is not an acceptable justification to ignore implementation of the rights incorporated in the Covenant.

Given the focus of this thesis, it is important to highlight that article 18 of ICCPR deals specifically with the right to religious freedom. This right is perceived as belonging to the category of civil rights. In their essence, civil rights' objective is protection of an individual against any harm to their integrity, both physical and mental. In addition, civil rights are implemented to ascertain that no individual is exposed to any kind of discrimination and is treated fairly by other individuals and the state. To retain their effectiveness, civil rights have a tendency to act as a buffer against the power of the state in cases where this power can encroach on an individual's liberty.³³³ The next section examines in more details the process of implementing the ICCPR.

3.3.1. The implementation mechanisms of the ICCPR

The ICCPR as a legally binding instrument and is one of the main sources of international law which envisaged two primary mechanisms for implementation which are reporting procedures and interstate complaints procedures. The treaty's article 40 stipulates that states are required to provide reports for the Human Rights Committee of the manner in which they have implemented various 'measures and policies in order to give effect to the rights recognized in the covenant and on the progress made in the enjoyment of those rights'. The HRC has a very important role in assessing these reports and providing states with relevant comments in order to enable each state to improve the implementation of human rights in the state's specific context. Although the importance of monitoring and assessing countries' progress in terms of abiding by the ICCPR is considerably higher with respect to countries that have a history of abusing human rights, even the

³³¹ Amrei Müller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health Related Issues in Non-international Armed (Conflicts)* (MartinusNijhoff Publishers 2013) 67-68.

³³² Frederick E Snyder & Surakiart Sathirathai, eds, *Third World attitudes toward international law: an introduction* (BRILL 1987) 296.

³³³ Alex Conte & Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Routledge, 2016) 3.

most developed states can benefit from a continuous evaluation of their policies and practices in the context of upholding and promoting human rights.³³⁴

At the same time, a considerable number of voices from the academic community have raised an issue with the quality and value of these reports and related monitoring. Their objections revolve around several points. Firstly, since the reports are administered by the state officials, the objectivity of the information provided is likely to be compromised. This was observed in the case of countries from the former Soviet Bloc which claimed to be upholding human rights, although there was enough evidence rendering this claim at least questionable if not completely lacking in merit. Additionally, there were states that did not fulfill their reporting duties adequately or were significantly late with the submission of their reports. For example, the HRC's 1996 report noted that at that time 86 states were in arrears on their reports. Some state reports are more than twelve years overdue.³³⁵

In its Article 41, ICCPR stipulates conditions for utilizing mechanisms and procedures regarding complaints and objections raised by one state against another. One of the key conditions is that both parties to the dispute have to acknowledge the HRC's jurisdiction with respect to interstate communications. ICCPR, through its Optional Protocol that was enacted in 1976, also enables individuals to raise objection and complain against a specific state in front of the HRC if they believe their rights, as stipulated by the Covenant, were not upheld appropriately or if these individuals were even denied some of these rights. However, it is common for non-democratic states to prevent their citizens from suing their governments for violation of their human rights.³³⁶ Furthermore, it should be noted that whatever decision the HRC takes, this decision will not have the binding force equal in authority to a ruling made by a court of law.³³⁷ It is possible to assert that the implementing and supervising functions that are present in the Covenant have yet to prove

³³⁴ Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it make a difference in human rights behavior' (1999)36(1). *Journal of Peace Research* 95, 97-100.

³³⁵ Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior' (1999)36(1). *Journal of Peace Research* 95, 98.

For further information about the process of the reports in the states refer to: Navanethem Pillay, 'Strengthening the United Nations Human Rights Treaty Body System—A Report by the United Nations High Commissioner for Human Rights' (United Nations—Human Rights: Office of the High Commissioner 2012) available at: <<http://www2.ohchr.org/english/bodies/HRTD/docs/HCREportTBStrengthening.pdf>> accessed 25 September 2017.

³³⁶ State parties to the Optional Protocol to the ICCPR available at: <<http://www.ccprcentre.org/individual-communications/follow-up-to-the-individual-communications-under-the-first-optional-protocol/>> accessed 16 June 2015. The map in this website shows that majority of Islamic countries are not member of the First optional protocol.

³³⁷ Gino J Naldi, 'Interim Measures in the UN Human Rights Committee' (2004) 53.2 *International and Comparative Law Quarterly*, 445, 446.

their effectiveness. This is particularly due to their inability to initiate proceedings whilst being dependent on data provided by governments, NGOs and individuals who present petitions to a court. Being a party to human rights treaties for some states can be a symbolic act rather than emblematic of their unshakable determination to uphold human rights.³³⁸ It is apparent that international human rights bodies should be more assertive in preventing states from violating human rights. Moreover, they should be tirelessly urging all countries to commit themselves to the protection of human rights. One possible way of being more direct in terms of guarding the respecting of human rights is through the role of the Special Rapporteur who can personally evaluate cases of violations of human rights in countries that have signed treaties dealing with human rights issues.³³⁹

Regardless of the aforementioned shortcomings considering the way in which ICCPR can be implemented, it is generally acknowledged that there are several benefits of enacting ICCPR. The first benefit is the clear formulation of international standards with respect to human rights that each state should strive to uphold, if not surpass. Secondly, monitoring and providing subsequent feedback can help states to improve their policies regarding human rights whilst enabling identification of states with a record of violating human rights and ill-treatment of ethnic, religious or cultural minorities.³⁴⁰ In other words, it is assumed that adopting ICCPR should have a considerably positive effect on a given state's approach towards human rights. This is particularly because states that have signed ICCPR are from that moment under significant international scrutiny. Hence, there is a degree of pressure put on these states by the international community to improve their standing in the context of upholding human rights.³⁴¹

³³⁸ Emilie M Hafner and others, 'International Human Rights Law and the Politics of Legitimation Repressive States and Human Rights Treaties' (2008) 23(1) *International Sociology* 115.

³³⁹ Syrgay P.Subedi and others, 'The role of the special rapporteurs of the United Nations Human Rights Council in the development and promotion of international human rights norms'(2011) 15(2)*The International Journal of Human Rights* 155.

³⁴⁰ Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it make a difference in human rights behavior' (1999)36(1) *Journal of Peace Research* 95, 99-100.

For further debate on the positive effects of the enactment of the human rights treaties see: Ryan Goodman & Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003)14(1) *European Journal of International Law*171. In this articles the authors demonstrates that "an important goal of human rights regimes is the capacity-building of international and national monitoring mechanisms. That is, improved human rights documentation and reporting are themselves part of the process of incorporation".

³⁴¹ Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it make a difference in human rights behavior' (1999)36(1). *Journal of Peace Research* 95.

3.3.2. Freedom of religion in the ICCPR

Given the focus of this thesis, it is vital to discuss in more detail the article 18 of the ICCPR, insofar as it represents a legal framework for dealing with the right of the religious freedom. In its essence, this article follows the fundamental principles of the UDHR, albeit it does so without mentioning directly one's right to change to another religious belief. This is particularly the result of pressure from several Muslim countries, including Saudi Arabia, Yemen, Egypt and Afghanistan that objected in 1948 the explicit notion of one's right to change their religion.³⁴² The objection from Muslim countries was based on the notion that Islam forbids believers to change their religion – that is to leave the fold of Islam. Saudi Arabia particularly continued to argue the seemingly total incompatibility of the wording of Article 18 with the Islamic law as understood and practiced in this country during conferences discussing ICCPR that took place in 1954 and 1960.³⁴³

It should be highlighted that the core of Saudi Arabia's opposition towards the explicit notion of one's right of religious freedom was firmly rooted in the prevailing interpretation of Islam's key tenets according to which leaving Islam is paramount to a major sin. Consequently, a person committing such sin deserves to be punished by 'worldly' authorities and face a severe penalty.³⁴⁴ This has been in a stark contrast to the position of Western countries that insisted on an explicit notion of the right of religious freedom as a guarantee that would limit the possibility of biased or vague interpretations. Another point in the original version of article 18 that the Saudi delegation contested revolved around the Saudi government's fear that allowing religious freedom would open ways to missionary activities in the Kingdom, spreading either other major religion's beliefs or promulgating anti-religious ideas. As a result, the Saudi representative formally asked for an amendment to the text of article 18, whereby the words "*to maintain or to change his religion or belief, and freedom*" were to be deleted. However, this amendment was later dropped, since Saudi Arabia decided to support a similar amendment requested by Brazil and the Philippines that suggested changing the words from "*to maintain or to change his religion or belief*" to "*to have a religion or belief of his choice*". In practice, such wording enabled some states to avoid

³⁴² Natan Lerner, 'Proselytism, Change of Religion, and International Human Rights' (1998)12 Emory Int'l L. Rev. 477, 512.

³⁴³ Abdulhamid A Al-hargan, 'Saudi Arabia and the International Covenant on Civil and Political Rights 1966: A stalemate situation' (2005)9(4) The International Journal of Human Rights 491, 491-492.

³⁴⁴ Rudolph Peters & Gert JJ De Vries 'Apostasy in Islam' (1976) 17.1/4 Die Welt des Islams, 1, 4-5.

full recognition of one's right to become a member of another religion and by doing so, these states are able to limit the extent of their citizens' religious freedom.

Subsequently, some Western countries raised strong objections against the proposed amendment as being static and preventive rather than being protective of religious freedom. A delegate from the UK therefore suggested a compromise, whereby a clause "or to adopt" would be incorporated in the text of the already mentioned proposal from the Brazilian and the Philippine delegation. The Afghani delegation asked for a separate vote on the amendment suggested by Britain. The result was that the amendment was retained with 54 votes to non-with 15 abstention. Subsequently, article 18³⁴⁵ with all discussed amendments was voted for as a whole by 70 votes to none with two abstentions on the 18th of November 1960 as below.

'1. 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 his religion or belief in worship, observance, practice and teaching'

2. 'No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice'

3. 'Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or moral or the fundamental rights and freedom of others.'

4. 'The states parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own conviction.'

In 1966, the General Assembly adopted ICCPR through unanimous consent in its entirety. In terms of its dealing with the notion and practical issues related to religious freedom, article 18 of ICCPR comprises of two essential parts. In the first part, the focus is on the right of an individual to have or to adopt any religion or a set of beliefs (forum internum), whereas the second part deals

³⁴⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 18.

with the right of every individual for the manifestation of their religion or a set of beliefs. The following section discusses in more detail the first part of article 18.³⁴⁶

3.3.3. Forum internum in relation to religious freedom on the ICCPR

The way religion is perceived can constitute an important factor with respect to various legal aspects of an individual's life. In this regard, Article 18 of ICCPR in its first paragraph deals with the concept of freedom of thought, one's religious beliefs and conscience. The fundamental point of this first paragraph is the guarantee of every individual's right to "*have, to adopt, a religion or belief of his choice*". Such right is all so more important if one considers the far-reaching impact of following certain religious beliefs on one's way of life. By the same token, rather than representing just a formalised list of practises and dogmas, religion has come to constitute a key cornerstone of people's life philosophy.³⁴⁷ In this context, the inclusion of the term 'belief' together with religion in the above-mentioned quote is of paramount importance, insofar as this part of article 18, and most importantly its objective, encompasses theistic, non-theistic and atheistic world views at the same. In addition, such wording acknowledges a right of an individual not to formally follow any specific religion or a set of beliefs. Finally, both 'religion' and 'belief' as terms are to be interpreted in their broadest sense in order to be inclusive not only towards the major religion and beliefs as they are professed currently around the world. Another rationale for such interpretation is to ensure the 'timelessness' of article 18, whereby the terms 'religion' and 'belief' are sufficiently inclusive to allow currently forming, or as of now formally non-recognised religions and beliefs to be protected in the same way as traditional religions and beliefs are. The foregoing is further supported by General Comment No.22 in which it is stated that recognising a particular religion as an official state's religion does not in any way justify non-acceptance or let alone repression of other religions and beliefs professed within a given state or of those who do not wish to follow this particular religion.³⁴⁸

Regardless of the afore-mentioned effort to formulate article 18 in the way that is as inclusive as possible, there is one issue that remains a concern for human rights activists. This problem revolves around the vagueness that surrounds the definition of what constitutes religion

³⁴⁶ Natan Lerner, 'Proselytism, Change of Religion, and International Human Rights' (1998)12 Emory Int'l L. Rev 477, 512.

³⁴⁷ Joe Julian, 'On Religious Freedom and Civic Learning' (2000) 1.2 Intercultural Education 137, 140.

³⁴⁸ General comment 22- the Right to Freedom of Thought, Conscience and Religion (Art 18), UN Doc ICCPR/c/21/Rev.1/ Add.4. General Comment 22(1993) para10.

in its most common understanding.³⁴⁹ Existing and in some places even dominant schism within religions further compounds this problem, insofar as various sects and denominations often usurp the right to determine what defines their religion and who is and who cannot be considered as being a member of a particular religion. A very contemporary example of the foregoing can be found in the Middle East with various Sunni and Shia groups fighting each other both on a theological and political level. *Evans* very accurately summarizes the problem ensuing from the absence of a widely recognized definition of the term ‘religion’ by asserting that there is always a chance that those who call for religious freedom will in their effort include only those religions and beliefs that they are familiar with whilst ignoring religions or beliefs that they oppose or consider as alien to their beliefs.³⁵⁰

On the other hand, *Sullivan* argues that the very fact that there is no one fundamental definition of religion is beneficial to the application and enforcement of the right to religious freedom.³⁵¹ He supports his argument in multiple ways. Firstly, he underlines the difficulty anybody encounters if attempts to come up with a definition of religion or beliefs for that matter that would be broad enough to accommodate all the different religions or beliefs that are currently being professed in the world. Secondly, even if such definition was created, it is very likely that some states would be able to find a loophole in this definition big enough not to include into their legal framework administering the right for religious freedom a specific belief or religion professed in their territory that they do not agree with.³⁵²

Given the scale and significance of the issues discussed above, there have been various attempts to find a practical solution. One of the possible ways of how to circumvent the problem ensuing from the absence of the definition of religion is to develop case laws regarding religious freedom at national, regional and international level.

3.3.4. Right to religious freedom as Non-derogable rights

In the context of the framework in which states administer policies regarding human rights, including the right to religious freedom, it is important to pay particular attention to the issue of

³⁴⁹ T. Jeremy Gunn, *The Complexity of Religion in Determining Refugee Status* (Emory University, USA 2002) 54, 6-10.

³⁵⁰ Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Vol. 1, Oxford University Press 2001)18.

³⁵¹ Donna J Sullivan, ‘Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination’ (1988) 82 Am. J. Int'l L. 487, 491-492.

³⁵² *Ibid.*

derogability of some of these rights under specific conditions and circumstances. This issue is covered by article 4 of ICCPR. It stipulates that in case of emergency the government, if it is in the public interest and under the condition that no obligations stipulated in international law will be avoided, can temporarily cease its adherence to the Covenant whilst having to ascertain that no portion of the population is discriminated against based on their race, colour, sex, religion, culture, ethnicity or socio-economic background. However, in the same article there are specific rights with respect to laws that cannot be derogated. These laws are listed in article 4 (2) and include the right for religious freedom. This limitation is in line with the Minimum Standards of Human Rights Norms, a document issued by the International Law Association in 1984 which stipulates that those rights that are listed as non-derogable in article 4 of ICCPR (including right to religious freedom), article 15 of ECHR and article 27 of American Convention on Human Rights cannot be suspended under any circumstances.³⁵³ Furthermore, from the HRC's perspective any state that decides to derogate any human right has to do so under a fundamental condition that its actions will be consistent with its obligation as stipulated by international human rights law, international humanitarian law and international criminal law.³⁵⁴

Having discussed non-derogable rights, it is vital to clarify the distinction between these rights and rights that are considered absolute. Essentially, the difference between these two types of rights – non-derogable and absolute – is that absolute rights have been considered so important that they cannot be limited or suspended under any circumstances. Some examples of such rights are the right to be free from torture, prohibition of slavery and the right to fair trial³⁵⁵. In other words, all absolute rights are non-derogable rights, whereas, non-derogable rights can be absolute or non-absolute. The non-absolute non-derogable rights, although prohibited from being suspended, can to a certain degree be limited in terms of their day-to-day application. For instance, the right to religious freedom is specified as being non-derogable, as it is listed as such in article 4 of the ICCPR; yet simultaneously, article 18(3) includes a provision through which this right can be limited. Article 6 of the ICCPR, which protects the right to life is another example of a non-derogable right. This right, however, is expressed in part as freedom from 'arbitrary' deprivation

³⁵³ Richard B Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' (1985) 79.4 American Journal of International Law, 1072, 1072.

³⁵⁴ General comment 29- Derogations during a State of Emergency (article 4), UN Doc ICCPR/c/21/ Rev.1/ Add.11. General Comment 29(2001) para.9.

³⁵⁵ Lawrence Gostin and others, 'Towards the Development of a Human Rights Impact Assessment for the Formulation and Evaluation of Public Health Policies' (1994) 1.1 Health and Human Rights 58, 70.

of life. The use of the term ‘arbitrary’ indicates that circumstances may justify taking of life, where reasonable and necessary and if done in a manner proportionate to the given circumstances. In addition to the basic distinction between non-derogable and absolute rights, it should also be highlighted that absolute rights are formulated in absolute legal language. This can be illustrated by the example of article 7 of the ICCPR that stipulates “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*”, whereby the use of ‘no one’ clearly indicates that there are no exceptions in this regard.³⁵⁶

In addition to the afore-mentioned, there are specific rights within customary international law that were determined by the HRC as non-derogable. Among these rights is the right of an individual to belong to a certain minority, which includes a religious minority as well (in the line with article 27). Moreover, article 20 of ICCPR stipulates that any form of inciting of national, racial or religious hatred or supporting of war propaganda is prohibited. In the commentary to article 27, the HRC has made it clear that states are obliged to ascertain that the right to be a member of a religious minority is fully defended and protected.³⁵⁷

The HRC, in recognizing the importance of religious freedoms, has stated in General Comment No.24 the reservations which would conflict with the ICCPR's objects and are therefore not possible to legally enforce. These reservations include the restriction of the freedom of religion, as well as restrictions against discrimination in terms of religion or sex. Any reservations made on this basis are impermissible and unable to stand alongside the purposes and objects of the ICCPR.³⁵⁸

This protection of religious freedoms by the International Human Rights Committee demonstrates that the right to freely express and follow religious beliefs is regarded as highly important to the issue of human rights, in order to protect individual rights and to promote peaceful interactions between religions and societies across the world.

³⁵⁶ Alex Conte & Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Routledge, 2016) 40-42.

³⁵⁷ General comment 24- Reservations to the ICCPR, UN Doc ICCPR/c/21/ Rev.1/ Add.6. General Comment 24(1994) para.8.

³⁵⁸ General comment 24- Reservations to the ICCPR, UN Doc ICCPR/c/21/ Rev.1/ Add.6. General Comment 24(1994) para.8.

3.3.5. Coercion as regards the right to religious freedoms under article 18 (2)

The role of coercion within religion, which has had a long history, can be viewed as the direct opposition to religious freedom. Within article 18 (2) of the ICCPR, coercion is prohibited: “*No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice*”. As a result, if an individual is forced or compelled by a state, community or individual to practice a certain religion or follow certain beliefs, then it is considered coercion. In other words, that person is not acting of his own volition and he cannot be considered to be truly free³⁵⁹.

The right to freedom of religion and belief without coercion, as outlined in article 18(2), has some influence from the advocacy of Muslim countries towards maintaining and controlling an individual's religious beliefs, for the same reasons as were given for resisting an express right to change religion. Its roots come from an amendment requested by Egypt in 1952 at the eighth session of the commission which comprises of two parts: the first is to support the right of the ‘*freedom to maintain or to change his religion or belief*’, and the second that ‘*no one shall be subject to any form of coercion which would impair his freedom to maintain or to change his religion or belief*’. The amendment was considered by the sponsors to be “mainly psychological”, and stemming from the imbalance of the current drafting, which only made reference to individuals having the freedom to change religion, and not mentioning any freedom to maintain religion (in other words, an individual had the freedom to alter their religious beliefs, but there was no set wording to allow them to continue their existing beliefs). It was hoped that the Egyptian amendment might allay doubts expressed by representatives of various Islamic countries during the third session of the General Assembly which had resulted in Saudi Arabia completely abstaining from voting on the declaration. Saudi Arabia had argued in the third committee that to single out a right to change religious belief might be interpreted as giving missionaries and proselytizers free rein. The suggestion for the amendment was partially influenced by the then articles 12, 13 and 16 within the Egyptian constitution, which allowed citizens to convert from Islam if they had had three discussions with a minister on their conversion³⁶⁰.

³⁵⁹ A/ HRC/ 31/ 18 submitted by Heiner Bielefeldt, Report of the Special Rapporteur on freedom of religion or belief, Human Rights Council. Twenty first session.

³⁶⁰ For more information see: Natan Lerner, *Religion, Secular Beliefs and Human Rights* (Second Revised Edition, Martinus Nijhoff Publishers 2012).

The amendment to article 18(2) was widely supported, but only if it were interpreted in one way: that the amendment was making something explicit that was already existing within the original text, and that it was not encouraging any further restrictions or limitations. In other words, it could in no way be limiting a person from changing their belief or religion as they wished, neither could it endanger or limit the freedoms of religious practice, teaching, or worship. In line with this, the delegate from Australia requested that the term 'coercion' would not involve any persuasions or suggestions made to an individual's conscience. The delegate from Lebanon only gave support to the amendment if it would allow for the right of individuals to preach to others or to influence them in a way that may lead them to maintain their current religion or to change it accordingly. The UK delegate also rejected any interpretations that would limit any religious debate or discussion. In using the word coercion, this latter point was addressed sufficiently, and also addressed the other delegates' points in that appeals to the conscience or that preaching in order to influence the person either maintain or change a religion were not considered as coercive. Following this discussion between delegates, the two-part amendment suggested by Egypt was adopted into the covenant, meaning that coercion to maintain or change a religion as debated had been prohibited.³⁶¹

Part of the issue surrounding the ambiguous nature of coercion is that there are many different definitions of the term in existing literature. For example, *Adhar* considers religious coercion being the use of, or the threat of, force by the coercer or by government in order to persuade the coerced into involving themselves within (or not involving themselves in) a certain religious practice, belief, or ritual.³⁶² The author here focuses on the types of coercion, rather than what exactly coercion is.

In his opinion, coercion as relevant to this discussion comes in two different forms. The first form, which will be considered at length and with the use of an example, is the form of coercion which is both “direct”, and “legal”. This type of coercion involves an explicit and obvious pressure by the state or coercer in order to pressure individuals and citizens to either involve themselves in certain religious practices or not (as is appropriate). It is a “legal” coercion as failure

³⁶¹ Paul M Taylor, *Freedom of Religion: UN and European human rights law and practice* (Cambridge University Press 2005) 43-44.

³⁶² Rex J Ahdar, ‘The Nature of Religious Coercion’ (2009) *ExpressO*, University of Otago 45, 5.

to comply with these expected religious duties is seen as a breach of the state's law, and involves a penalty or a fine against the individual for not complying.

Coercion is “direct” when the state or coercer is actively and intentionally involved with presenting an individual with the religious activities to which they are expected to comply, and with enforcing penalties for individuals not adhering to these. In this instance, the two parties in this relationship are the coercer and the coerced.

One example of this situation in practice is the case of *Kang v Republic of Korea*.³⁶³ Here, the HRC addressed the “ideology conversion system” of the State, which the Republic of Korea was unable to demonstrate was necessary for any of the reasons as outlined in articles 18 and 19. The HRC therefore ruled that, through the guise of political stance the coercer was restricting religious freedoms through limiting the freedom of expression. As a result, the Republic of Korea was found to be in violation of article 18 (1) and article 19 (1), together with Article 26.

One of the shortcomings of *Adhar*'s analysis is that not all direct coercions are considered. In other words, the author did not examine in full the direct but illegal coercion which may take place between a group and an individual, or between two individuals. Therefore, although states are considered as being direct coercers, less wide-ranging forms of coercion between individuals and small groups are not examined in detail.

The second form of coercion, according to *Ahdar*, is “indirect” religious coercion.³⁶⁴ Here, a state or country involves a third party in order to coerce an individual or community into maintaining particular religious practices, or into changing their beliefs. In this case, more subtle forms of coercion are used which have a psychological effect on the coerced, particular between private groups and individuals. In this form, and due to the nature of it, no legal penalties are enforced on the non-complying individual. Additionally, the involvement and compliance of an individual to these religious practices is, although encouraged, voluntary.³⁶⁵ This version of coercion is a much more subtle and vague form which affects individuals through a range of social and psychological pressures, rather than pressures which are legally binding or direct. Nonetheless, a person who is dominated by such pressures may feel that they are expected to take on these beliefs and practices, or to change their beliefs accordingly.³⁶⁶ An example of this is a

³⁶³ *Kang v Republic of Korea* Communication No. 878/1999, UN Doc CCPR/c/78/D/878/199(2003). Para7.2.

³⁶⁴ Rex J Ahdar, ‘The Nature of Religious Coercion’ (2009) *ExpressO*, University of Otago 45, 5.

³⁶⁵ *Ibid*.

³⁶⁶ *Ibid*, 9.

case was brought before a Canadian Court³⁶⁷, where reading the Lord's prayers and any other hymns in public schools is a form of coercion and therefore a violation of the freedom of religion. Additionally, reading the Bible within schools can be considered a way of imposing Christian practices and observances onto other religions. In combining article 18(2) and 17 (privacy), it can be argued that the declaration additionally agrees that individuals are not required to reveal their beliefs.³⁶⁸ Therefore, a school does not have the right to force students into discussing their religion or their individual beliefs, and a student cannot be penalised for declining to read the Bible or from being absent at a time of reading it.³⁶⁹

From *Adhar's* analysis it can be perceived that although the author provides a thorough examination of forms of coercion, he is more focused on the involvement of the state and the individual rather than groups and organizations in coercing an individual. This is problematic in many examples, not least the recent example of Jews leaving France in vast numbers due to the influence of Islamic groups and organizations, none of which are state governed or permitted by the state to act in such a way.³⁷⁰

Gunn considers more thoroughly the direct coercion of individuals, without examining them as being legal or illegal.³⁷¹ Firstly, he looks at coercion that interferes with religion. Examples of these can be the disruption of religious ceremonies, damage done to buildings or shrines that have religious worth, or disruptions that may involve a danger or loss of life. These actions may take place for a range of reasons, including hatred and discrimination, or targeting a community directly. One example of this most recently is the involvement of ISIS in destroying the religious buildings and places of worship of the Kurdish Yezidian and of Christians, forcing them to abandon their communities and livelihoods.³⁷²

The second form of religious coercion he considers is conformity to religious rules within a given group or community. This situation can be seen in the example of a state or a smaller

³⁶⁷ *Zylberberg v. Sudbury Board of Education*, [1988] 52 D.L.R. (4th) 577 (Can.).

³⁶⁸ Ben Clarke, 'Freedom of Speech and Criticism of Religion: What are the Limits?' (2007) 14.2 eLaw J. 94.

³⁶⁹ *Folgero and others v Norway* (Application no.15472/02) (ECHR, 29 June 2007) **15472/02**, [2007] ECHR 546, [2011] ECHR 2148, [2011] ECHR 2189.

³⁷⁰ Hugh Schofield, 'French Jews Increasingly Question their Future' (Paris 9 March 2015).

<<http://www.bbc.co.uk/news/world-europe-31707102>> access 10 March 2015.

³⁷¹ T. Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003).16 Harvard Human Rights Journal 189.

³⁷² Iraq conflict: Christians and Yazidis Flee amid Islamic State Warning (7 August 2014).

<<http://www.bbc.co.uk/news/world-middle-east-28698586>>Accessed 10 March 2015.

community attempting to force citizens to follow particular religious rules, or cultural rules which are affected by religion. Such coercion ranges in its extremities, from a parent punishing a child for not conforming, to an individual being executed or tortured. In religious communities, women are often targeted as objects of conformity more often than men.³⁷³ For instance, in Iran and Saudi Arabia, women are expected to dress exactly according to their perception of Islamic criteria, (which are arguably more confining and conforming than the dress code for men), as well as fulfill certain roles and sacrifice certain freedoms.³⁷⁴

Although *Gunn's* analysis was particularly detailed in terms of clarifying religious coercion and its different forms, there are some criticisms that can be made of this model. For example, his analysis appears to suggest that coercion is solely a direct process, meaning he does not adequately address the indirect and more subtle forms of coercion that occur within society between the roles of state, community and individual. This defies general consensus on the power of indirect coercion as explored in *Lee v. Weisman*, where the Supreme Court of US were in agreement that public pressure, as well as peer pressure, . . . though subtle and indirect, can be as real as any overt compulsion.³⁷⁵

In contrast to this, the HRC takes a much more general view of coercion within article 18(2). Coercion, in views of the HRC, is not only any attempt to restrict the maintenance of a set of existing beliefs or current religion, or any attempt to prevent the adoption of a religion or a set of beliefs, but also an attempt to pressurize the maintenance or suggest the adoption of any religion or belief. This coercion can be performed through a range of different forms, including the use or the threat of physical force or physical violence, the use or threat of legal restrictions in order to criminalize any unauthorized religious activities or beliefs, and the use of policies or practices which restrict any freedoms or rights of an individual, including their rights to vote (article 25) and to education or medical care.³⁷⁶ The HRC particularly focuses on the involvement of state actors in this coercion, especially in terms of “restricting access to education, medical care and

³⁷³. T. Jeremy Gunn, ‘The Complexity of Religion and the Definition of Religion in International Law’ (2003).16 Harvard Human Rights Journal 189.

³⁷⁴. ‘Women’s right to Choose their Dress, Free of Coercion’ (2010) Amnesty International, available at: <https://www.amnesty.nl/content/uploads/2017/02/womens_right_to_dress_boerkaverbod_3.pdf?x59805>accessed 3 April 2017.

³⁷⁵ (1992), 505 U.S. 577.

³⁷⁶. General comment 22- the Right to Freedom of Thought, Conscience and Religion (Art 18), UN Doc ICCPR/c/21/ Rev.1/ Add.4. General Comment 22(1993) para.5.

employment”, as such policies are under the authority of the state. However, the prohibition of religious coercion also applies to groups and individuals within the said state.

The HRC is also clear that coercion may come under a range of guises, and may not be only “blatant” or direct, which involves a range of sanctions, threats or penalties for failing to adhere, but also indirect.³⁷⁷

Notwithstanding the effort of the authors to define the term ‘coercion’ and regardless of the interpretation of this term by the HRC, one can observe that the understanding of this term does not encompass religious duress. Within their interpretation of the pertinent term, the HRC emphasizes that the victim is often threatened by physical threat or other kind of penalty by virtue of resisting to accept certain religious beliefs. However, duress is defined as a situation when the victim has to endure being threatened by immediate death or serious personal violence to the extent where it is not humanly possible to endure.³⁷⁸ Therefore, it is apparent that the term duress implies higher intensity of forced conversion than coercion. For instance, since 2014, a considerable number of Kurdish Yezidis in Iraq have been forced to change their religion whilst many Yezidi women have been forcefully married to members of the terrorist group Isis; in case of resisting the conversion or marriage, they were threatened with a death penalty. One of the suggestions how to address the problem with the absence of emphasis on the element of duress in the convention is to adopt a broader interpretation of the term ‘coercion’ that would encompass religious duress. In this regard, Gilbert underlines the fact that the terms ‘duress’ and ‘coercion’ are often employed in legal texts interchangeably³⁷⁹.

Overall, there is an awareness that coercion may be conducted by state institutions in a direct manner, that this coercion may be done via a third party or through more subtle means, or that it may not be conducted by states but by a range of individuals or organizations. Nonetheless, whether the coercion is by the state or not, it still remains the duty of the state to monitor and prevent all instances of coercion by individuals and organizations.

³⁷⁷. Rex J Ahdar, ‘The Nature of Religious Coercion’ (2009) *ExpressO*, University of Otago 45, 6.

³⁷⁸William Wilson, *Criminal Law: Doctrine and Theory* (fourth edition Pearson Education 2011) 237-238

³⁷⁹ Jérémie Gilbert, ‘Justice not Revenge: The International Criminal Court and the ‘Grounds to Exclude Criminal Responsibility’ – Defences or Negation of Criminality?’ (2006) *The International Journal of Human Rights* 143.

3.3.6. External aspect of the religious freedom: the manifestation of religion and its limitations

The Right to religious freedom is complete when a person can freely practice the religion of their choice and are able to freely express their religious beliefs. Under the ICCPR, the right to freedom of religion is protected. As expressed by article 18 of the convention the freedom to manifest religion or belief may be exercised 'either individually or in community with others and in public or private'.

This freedom to express one's religion or beliefs covers a range of different acts. For example, individuals and communities are free to worship through rituals, rites, traditions and other ceremonial acts. They are also able to express their religious beliefs in other ways, such as building churches, mosques and other buildings for religious activities, using symbols or objects considered to have a religious meaning, and observing days of rest or holidays. Other religious practices and customs include following certain dietary practices, wearing particular clothing styles or head coverings, participating in with rituals and customs on a regular basis, praying at certain times and in certain areas, and using ritualistic language which is an integral part of religious worship. Furthermore, individuals and communities are free to engage in other activities to support their religion, including being free to choose a religious leader of their choice, joining groups or schools of their religion or belief, and distributing pamphlets, texts and promotional materials pertaining to their religion.³⁸⁰

The external aspect of religion may be subject to limitations that are prescribed by law and are necessary to protect public safety, order, health morals or the fundamental rights and freedoms of others. When Interpreting the scope of permissible limitations clauses, states parties should proceed from the need to protect the rights guaranteed under the covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26³⁸¹. These limitations should be enforced only by the relevant bodies of law and order, and not through any means or by any parties that would violate those rights as mentioned in article 18 of ICCPR. The HRC confirms this, stating that article 18(3) should be firmly adhered to, and that the “*freedom to manifest religion or belief in worship [and the] observance, practice and teaching encompass a*

³⁸⁰ General comment 22- the Right to Freedom of Thought, Conscience and Religion (Art 18), UN Doc ICCPR/c/21/Rev.1/ Add.4. General Comment 22(1993) para.4.

³⁸¹ Javier Martinez-Torron, ‘Limitations on Religious Freedom in the Case Law of the European Court of Human Rights’ (2005) 19 Emory Int'l L. Rev. 587.

broad range of acts that must be protected".³⁸² Any restrictions to religious freedoms that are not mentioned as a type of exception are not permitted, even if they would be allowed as restrictions to other rights protected in the covenant such as national security. There must also be no restrictions based on discrimination, or restrictions which are made for discriminatory reasons.³⁸³ The following sub-sections examine the reasons why limitations to religious freedoms may be made, in accordance to article 18(3). It begins by examining the conditions which must be satisfied before such limitations can be considered legitimate.

3.3.6.1. Limitations must be prescribed by law

One main condition in terms of restricting religious freedoms and beliefs is that any limitations must be prescribed by law. This means that restrictions and limitations cannot be performed in an arbitrary way, neither can they be done in a way that violates article 18(1) of the ICCPR, as well as those stated under article 18 (3) which says that limitations must be connected to the purpose of the limitations and done so proportionately. However, the notion of non-arbitrary on its own cannot protect human rights in general and religious freedom in particular. For example, during the Nuremberg trials, which had a large impact on the development of the international human rights and international criminal law, prosecuted war criminals referred to the existence of specific laws of the time period as being justifications for their crimes. However, these domestic laws were disregarded by the court in favour of natural and universal human rights law, as the court did not recognise the laws of the Nazis as a legitimate form of legal system.³⁸⁴ A second example is the laws under the Iran Constitution, where only Shia Muslims may run as candidates for leader and presidency in Iran.³⁸⁵ As the acts of perpetrators in Nazi Germany were based on the existing laws in Germany at that time, they may be perceived as being technically lawful. The same logic can be then applied to the laws depriving non-Shia candidates from running for a position of a leader or a president. However both these law are incompatible with the covenants' principles of non-discrimination and equality. The HRC have therefore had to further develop the term of 'arbitrary' and 'non-arbitrary' in order to clarify the provisions of article. The HRC considers

³⁸² *Boodoo v Trinidad and Tobago*, Communication No.721/1997. Para6.6.

³⁸³ *Supra* no 370, para 8.

³⁸⁴ Judah B Murray, 'Natural Law and Legal Positivism in the Nuremberg Trials' (2014) Liberty University1, 13,23,26,31.

³⁸⁵ Iran constitution. Available at:< <https://faculty.unlv.edu/pwerth/Const-Iran%28abridge%29.pdf> > Accessed 3 February 2015.

that 'arbitrariness' should not specifically be equated to 'against the law', but must be understood as meaning an 'unjust' method which is considered inappropriate, unfair and unpredictable.³⁸⁶ These criteria are further developed in the General Comment No 35.³⁸⁷ The meaning of 'injustice', as described by the HRC, seems to refer to the principles of natural law and its importance in the creation of human rights law. Adding to this, the HRC made further adjustments following the case *Jeong-Eune Lee v Republic of Korea*:

*“The Committee observes that, in accordance with article 22, paragraph 2, any restriction on the right to freedom of association to be valid must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be “necessary in a democratic society” for achieving one of these purposes.”*³⁸⁸

The HRC therefore supports a range of associations, including those which peacefully promote ideas which are not supported by the majority of the population, and counts these as part of the fabric of a democratic society.

The HRC also mentions elsewhere, in *Toonen v. Australia*³⁸⁹, that following the General Comment 16 on article 17, the usage of the term 'arbitrariness' demonstrates that a law or government cannot involve itself with the restriction of religious freedoms except in very specific circumstances: *“The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances”*.³⁹⁰

Arbitrariness is defined further by the European Commission in a range of cases, including *Sunday Times v United Kingdom*.³⁹¹ From the results of this case, two requirements were found for something to be considered 'non-arbitrary'. Firstly, accessibility is important, meaning that the law

³⁸⁶ *Hugo Van Alphen v. The Netherlands*, Communication No. 305/1988, U.N Doc CCPR/c/39/D/305/1988(1990) para 5.8. See also: *Fungum Gorji-Dinka v Cameron*, Communication No. 1134/2002. U.N. Doc. CCPR/C/83/D/1134/2002. (2005). Para.5.1. See also: *Rafeal Marques de Morais v Angola*. Communication

No. CCPR/C/D/1128/2002. para 6.1. Also see: *Peltonen v Finland* Communication No. 492/1992

³⁸⁷ UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, para 12.

³⁸⁸ Communication No. CCPR/C/84/D/1119/2002. Para 7.2.

³⁸⁹ Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

³⁹⁰ General comment 16- Right to privacy (17), UN Doc ICCPR/C/21/ Rev.1/ Add.6. General Comment 16(1988) para.3, 4.

³⁹¹ (Application no, 6538/74) (26 April 1979) 2 EHRR 245 para. 48.

should be able to be accessed readily in order for the citizen to understand whether or not their rights are restricted by the law. Therefore, it is necessary that an individual is able to obtain information on the legalities, and whether or not they are breaking them. Secondly, foreseeability is required, meaning that the law is to be formulated so that an individual can monitor their own behaviour, and foresee whether or not the consequences of their actions may be impinged by any legality.³⁹²

Additionally, to this, being prescribed by law is a necessary condition for limitation of religious freedom and it must be followed at all times even in particular context of derogations that may happen based on article 4 of the ICCPR.³⁹³

As a result, any law that accepts restrictions to religious expression must consider a range of factors, such as justice and proportionality, before implementing such a change.

3.3.6.2. Protection of Public order as a justification for restrictions to religious freedoms

The protection of public order is a consideration which may account for restrictions to a number of rights and freedoms. Public order, however, is a vague legal concept which has no common definition and particular pattern across all societies.³⁹⁴ The HRC has taken a generally restrictive approach to the application of this ground of limitations. As a result, the HRC must consider limitations to freedoms carefully when made for reasons to protect public order, in order to ensure the limitations are both required and that they are proportional to the possibility of harm or danger in a given situation. Although the definition of 'public order' is varied and must be interpreted differently depending on what right or freedom is being restricted, there are two key features which are common to the idea of public order: 1) A set of principles which maintains the peaceful running of a society; 2) A respect for the rights and freedoms of those individuals and

³⁹² *Silver and Others v The UK* (Application nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75) (11 October 1980) 3 EHRR 475 para 85. See also: *Malone v the UK* (Application no, 8691/79) (2 August 1984) 7EHRR4 para.66. For further see: *Steel v the UK* (Application no 24838/94) (23 September 1998) 28 EHRR 603, para 45.

³⁹³ General comment 29- state of emergency (article4), UN Doc ICCPR/C/21/ Rev.1/ Add.11. General Comment 29(2001) paras. 2,13,16,17.

³⁹⁴ Saba Mahmood & Peter Danchin 'Religious Freedom in the Jurisprudence of the Egyptian and European Court of Human Rights' (2014) 113 South Atlantic Quarterly1, 9-21.

communities.³⁹⁵ The case *Gauthier v. Canada*³⁹⁶ demonstrates the first point, where a reporter appealed that the House of Parliament denied him access to the building. Although the limitations made on the right to free expression were indeed found to be out of proportion, the HRC concurred that protecting Parliament could be viewed as an acceptable aim of public order. The second point was demonstrated with a contentious case, *Wackenheim v. France*, which examined a range of questions regarding when a practice is to be considered discriminatory or not, and what are the restrictions to one's occupation and private life. *Wackenheim*, who had dwarfism, appealed against a law which banned dwarf tossing, considering this from stopping him from working and therefore contravening his human rights. The HRC agreed with France that the prohibition was important in order to maintain public order and in respecting the human rights of all individuals with dwarfism. The HRC considered that “*human dignity is a part of public order*” even if it may affect local areas and if the individual's consent was not found.³⁹⁷

The relevance of public order in terms of religious freedoms is most often that the state may attempt to protect public order in relation to a range of threats and social situations. At the same time, any state involvement in the restriction of religious freedoms must be done with some awareness and respect of the faith's stance on a given issue.³⁹⁸ The function of the public authority is to preserve public order and not to pass judgments on the religion in question. Even when actions leading to disorder are caused by religion, the duty of the state is to protect public order and not to expose the perceived falsity of the given religious belief. For example, in Islam, Muslim men are able to practice polygamy and take up to four wives. However, in France as well as many other countries, this is illegal, and it is contrary to public order.³⁹⁹ In this regard the function of the public

³⁹⁵. Alex Conte and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Routledge, 2016) 56-57.

³⁹⁶. Communication No. 633/1995/U.N. Doc CCPR/ C/ 65/D/633/1995 (1995). Paras 13.5, 13.6., and *Joana v Madagascar* Communication. No. 132/1982, U.N. Doc. CCPR/C/OP/2 at 161 (1990).

³⁹⁸. John Finnis, *Religion and Public Reasons: Collected Essays* (Vol. 5 Oxford University Press 2011) 421, 99-100

³⁹⁹. Veronica Federico, ‘Europe Facing Polygamy: Italy, France and the UK Accept the Challenge of Immigration’ (2014) University of Florence, Department of Legal Sciences 1, 1, 4, 8. For further refer to: Allison Pearson, ‘Did Victoria Climbié’s Death Teach us Nothing about Multiculturalism?’ Available at: <http://www.telegraph.co.uk/news/uknews/immigration/11665301/Allison-Pearson-Did-Victoria-Climbies-death-teach-us-nothing-about-multiculturalism.html> accessed 11 June 2015. In this article author points to case that an 18- year-old raped 13-year-old girl. Adil Rashid (applicant) said he didn’t know underage sex was illegal and counted as rape because of his sheltered education in an Islamic school.

authority is not to make a value judgment but to prohibit the practice of polygamy as an unlawful action.

With reference to the case of *Şahin v Turkey* and *Dahlab v Switzerland*, the preservation of public order was cited as the reason for a restriction on the wearing of the headscarf. Despite this, there was no argument made as to how, exactly, the headscarf disrupts public order. As outlined above, public ‘order’ is an ill-defined concept and so nations which do not impose a rigid definition can use this term flexibly to undermine the rights of minorities. For instance, there have been a few cases in France in which the headscarf was restricted or prohibited, particularly in schools (for example, three girls were dismissed for refusing to remove their hijabs in Creil in 1989)⁴⁰⁰. At the time of the case, the Minister of Education took this case through to the highest level to bring the headscarf debate to public attention. The ruling was that the headscarf was permitted as long as these students did not actively threaten the ‘public order’. Therefore, the headscarf ceased to be a legal matter until 2004⁴⁰¹, the year in which the French government imposed a ban on religious manifestation in places of education. Public order, then, can be used with some flexibility and has been used to question the religious rights of certain communities. This raises the question as to why headscarves suddenly became a threat to public order in 2004; due to the fluid nature of the concept of public order⁴⁰², the use of this term as a justification for prohibiting the headscarf should be employed with high degree of objectivity. For instance, if we use this justification, the forcible adornment of the hijab or niqab in certain states, the KSA for example, must also be accepted on the grounds that it protects public order. The researcher argues, then, that religious garments should not be restricted if there is no legally and logically sound reason to do so. As a result, one can see that the justifications for public order may attempt to validate restrictions to religious freedoms, and that, in a conflict between religious freedoms and public order, public order is normally favoured. However, due to the ambiguous and imprecise nature of this concept, it must be monitored with some care by public authorities, in order to respect as much as possible the freedoms of individuals and their religious views.

⁴⁰⁰ Joan W Scott, ‘Symptomatic politics: The banning of Islamic head scarves in French public schools’ (2005) 23.3 *French Politics, Culture & Society* 106.

⁴⁰¹ Dawn Lyon and Debora Spini, ‘Unveiling the headscarf debate’ (2004) 12.3 *Feminist Legal Studies* 333.

⁴⁰² Saba Mahmood & Peter Danchin ‘Religious Freedom in the Jurisprudence of the Egyptian and European Court of Human Rights’ (2014) 113 *South Atlantic Quarterly* 1, 9-21.

3.3.6..3. Public health and public safety as a justification for restricting religious freedoms

Public health and public safety are both considered in Article 18 (3) of the ICCPR as being two legal justifications for restricting religious freedoms. 'Public health' and 'public safety', in terms of their overall purpose, are normally considered as interlinked concepts. However, their precise meanings differ. Public safety concerns the protection of persons from threats to their life, physical integrity and property, and assists this by upholding law and order. Public health relates more precisely to ensuring that peoples stay healthy, and explores ways of improving the physical and mental health of citizens.

The protection of public safety is therefore often raised to justify to use and employment of criminal convictions which may have an impact on the rights enjoyed under the ICCPR. Public safety must not only assist in governing the actions that have or may have a physical effect on citizens, but also those that may have a psychological effect. For instance, on the Ashura (a day commemorating the martyrdom of the grandson of the prophet *Mohammad, Husayn ibn Ali*), Shia Muslims cut the foreheads of their children, which have some a significantly adverse impact on children both physically and psychologically.⁴⁰³

The protection of public health is also considered an issue which restricts religious freedoms. Health is considered a widely important issue, to the extent that an administrator of WHO Jonathan Mann maintained that people were unable to fully enjoy their rights if they were unhealthy.⁴⁰⁴ However, the existing terminology related to health is not entirely clear, with much debate both on its practical and theoretical application. As defined by The Institute of Medicine, reporting on the *Future of Public Health*, it considers public health as being “*what we, as a society, do collectively to assure the conditions for people to be healthy*”.⁴⁰⁵ This definition considers the collective and societal means of improving public health as being more important than the role of an individual or particular organisation. The World Health Organization is considered to have the generally accepted definition, considering “*public health as widely an ideal state of physical and*

⁴⁰³ Ollie Gillman, ‘The Moment a Small Boy has a Gash Cut into his Head as Part of Shi’ite Muslim Ritual Commemorating the Death of the Prophet’s Grandson’ Available::< <http://www.dailymail.co.uk/news/article-2819307/Screaming-fear-moment-small-boy-gash-cut-head-Muslim-ceremony-commemorating-death-Prophet-s-grandson.html#ixzz3U21aG4YO> > Accessed 10 March 2015.

⁴⁰⁴ Cited in Lawrence O Gostin, ‘Public Health, Ethics, and Human Rights: A Tribute to the Late Jonathan Mann’ (2001)29(2) *The Journal of Law, Medicine & Ethics* 121, 121.

⁴⁰⁵ James F Childress and others, ‘Public Health Ethics: Mapping the Terrain’ (2002) 30.2 *The Journal of Law, Medicine & Ethics* 170-178.

*mental health to a more concrete listing of public health practices”.*⁴⁰⁶ This definition considers a range of means to improve public health, which includes individual and collective measures. In other words, this definition is not confined to any particular approach or measure. In terms of legalities surrounding public health, it is narrow in its scope; it is only invoked as a legal issue or a limitation in order to allow a state to confront a serious issue threatening health of the population or individual members of the population. These measures must be directed to preventing illness or injury, or in providing services for those who are injured or ill.⁴⁰⁷

Many countries have implemented both public health and public safety laws in order to prohibit certain religious practices from taking place that may in some way endanger individuals or populations. For instance, female genital mutilation (FGM), which is performed for religious and traditional reasons, has been banned in a wide range of countries as it has been considered a significant endangerment to the health of women and girls.⁴⁰⁸ The HRC often considers public safety and public health to prevail in importance over religious rights. For example, in the case *Malakhovsky and Pikul v. Belarus*⁴⁰⁹, the HRC confirmed that it was important for both health and safety for a religious association's registration to be approved only if conforming to fire and health standards. The HRC ruled also, in *Karnel Singh Bhinder v Canada*⁴¹⁰ regarding the use of Sikh headwear in a construction industry, that if the requirement of a hard hat contravened article 18's reference to religious freedom, that it was justified by article 18(3) and its reference to public health and safety. The HRC did not consider it a valid reason, as given by the victim, that the safety risks he would experience by not wearing a hard hat would be personal to him alone. Characterizing public health as a utilitarian sacrifice of fundamental personal interests is as unfair as characterizing liberalism as a sacrifice of vital communal interests.

There is therefore some opposition between the state's liberal attempt to provide the maximum amount of individual freedom, and the system of public health which examines the interests of a wide collective. This does not necessarily contribute towards attaining the public health objectives, as a utilitarian sacrifice of fundamental individual interests would be unfair if

⁴⁰⁶ Supra no 392, 122.

⁴⁰⁷ Alex Conte and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Routledge, 2016) 58.

⁴⁰⁸ Supra no 394, 121.

⁴⁰⁹ *Malakhovsky and v Belarus*. Communication No. 1207/2003, U.N. Doc. CCCPR/ C/ 84/ D/ 1207/ 2003/ (2005) .para.7.5.

⁴¹⁰ Communication Nos. 208/1986, U.N.Doc.CCPR/C/37/D/208/1986 (1989).paras 2.8 (b) and 6.2.

one considers liberalism a sacrifice of collective and community interests.⁴¹¹ Public authorities are better seen as an enforcement of accepted laws and a regulator of individuals and collectives in order to ensure they are not undertaking risks that may impact upon health and safety. It can therefore be argued that public health and public safety is more about ensuring the collective health and wellbeing the population as whole and to a lesser extent about the health of individuals- and that this goal is reached by a generally high level of safety and health throughout society. The logic here is that through maintaining the health of collectives, the health of individuals can be maintained too. Therefore, limitations regarding religious freedom are permitted when such limitations are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.⁴¹² Public health and safety must therefore be shown by the government to demonstrate a link between the objective – providing overall welfare to citizens – and the methods leading to these results, such as systematic procedures, approaches, approved benchmarks, and requirements regarding confinement.⁴¹³ As a result, within this overall system providing maximum health and safety for the widest population, certain religious freedoms are bypassed for the integrity of the system and for providing healthcare to all individuals. In Canada, for example, a Jehovah's Witness couple tried to stop blood transfusions for their one-year-old daughter who was critically ill. Although the court recognized the religious freedoms of the parents and their freedoms as parents to determine their child's interests, the baby was nonetheless ordered by the court to be given blood transfusions under ward of the state. The court accepted this was a limitation of religious freedoms, but that it was justifiable.⁴¹⁴

As a result, it can be seen that the state, in upholding commitments to public health and public safety, are able to accordingly restrict religious freedoms if they feel that such freedoms in any way contravene the health and safety of citizens. Therefore, certain practices such as female genital mutilation and the refusal of blood transfusions for minors, or the wearing of a turban when

⁴¹¹. *Supra* no 394, 126.

⁴¹². Lawrence O Gostin 'Public Health, Ethics, and Human Rights: A Tribute to the Late Jonathan Mann' (2001)29(2) *The Journal of Law, Medicine & Ethics* 121, 127.

⁴¹³. Laura Davidson, 'Human Rights v Protection English Mental Health Law in Crisis' (2002) 25.05 *International Journal of Law and Psychiatry* 492, 506.

⁴¹⁴. *B. v Children's Aid Society of Metropolitan Toronto* (1995) Case No.23298.

a hard hat is required, may be seen as endangerments to public health and public safety and can therefore be restricted accordingly.

When tackling the issue of the headscarf, it is important to examine two relevant cases concerning Christian religious expression in the workplace. These cases concerned a British Airways (BA) employee from London and a nurse from Exeter, respectively, and both were asked to cover or remove their cross necklaces. After bringing cases against their employers, both lost their cases in Britain after being refused the right to wear a cross as a symbol of faith under their employers' uniform policy. In these cases, Article 9 of the ECHR, in which religious freedom is addressed, was applicable and Article 14, which protects against discrimination based on, among other things, faith. These applicants argued that prohibiting the cross in the workplace while allowing other religious symbols, such as the headscarf in Islam, was discriminatory. It is important to acknowledge that, in these cases, the ECtHR rightly assessed the context surrounding the wearing of the cross. In the former case, the ECtHR stated that the cross worn by the individual was small and unassuming, and did not appear unprofessional. Nor did the cross, or other forms of religious manifestation, affect the reputation of BA detrimentally. The court states that

*“Ms Eweida’s cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways’ brand or image...”*⁴¹⁵ The court therefore ruled that the applicant in this case could wear the cross necklace.

In the latter case, involving the nurse, the ECtHR had a different view, asserting that the cross had to be removed for health and safety reasons in a hospital environment, which had a bigger impact on professionalism than in the former case. Further, they argued that hospital managers were in a better position to know the impact of this behaviour on everyday safety than the members of the Court, particularly a court in possession of very little relevant information or evidence.⁴¹⁶

In the latter case, in response to the charge of discrimination, a spokesman for Berkshire Healthcare NHS Foundation Trust responded that the headscarf is a garment necessary to practice

⁴¹⁵ *Eweida and Others v. The United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) (ECHR 27 May 2013) *ECHR* 37, Para.94.

⁴¹⁶ *Ibid*, par.99.

ones faith and does not pose a risk to staff or patients. A Christian employee, on the other hand, is not required to wear a cross to fully practice their faith, and so this becomes a matter of health and safety rather than restriction of religious practice.⁴¹⁷

From these cases, it can be deduced that banning the headscarf on the basis of preserving the public health and safety would be legally unsupportable.

3.3.6.4. Public morality as a justification for restriction of religious freedoms

The term morality, which comes from the Latin word *moralitas*, refers to the differentiation of good behaviour, values and decisions from those that are considered bad or wrong. Morality is governed by a range of customs, traditions, and cultural contexts which may shape what is considered good and what is considered bad.

Public morality therefore refers to the ethics, morals, and values which are upheld by a given society or state. This may be framed by existing traditions and customs and which, overall, defends a society's shared values and visions, demonstrates its ethos, and regulates the enforcement of these values and ethics by both the individual and the collective.⁴¹⁸ This is often to some extent entwined with, supported by, or contrasted with religious morality, where individuals and communities follow a religious framework of morality and its own coded system of ethics and values, such as those given by the Ten Commandments.⁴¹⁹ Furthermore, both public morality and law do regulate the relationship between individual and between individuals and the community or the state. Public morality therefore defines the way in which an individual should behave within

⁴¹⁷ Jonathan Wynne-Jones, 'Nurse Faces the Sack for Refusing to Take Off her Cross' (19 Sep 2009) available at: <<http://www.telegraph.co.uk/news/religion/6209892/Nurse-faces-the-sack-for-refusing-to-take-off-her-cross.html>> accessed 2 August 2017. Also see: Jonathan Peter 'Muslim nurses CAN cover up... but Christian colleagues can't wear crucifixes' [12 April 2010] available at: <http://www.dailymail.co.uk/news/article-1265136/NHS-relax-superbug-< safeguards-Muslim-staff--just-days-Christian-nurse-banned-wearing-crucifix-health-safety-reasons.html >> accessed 2 August 2017. For further see: John Bingham, 'Christian Wins Right to Wear Cross at Work' [15 Jan 2013] Available at: <<http://www.telegraph.co.uk/news/religion/9802067/Christian-wins-right-to-wear-cross-at-work.html>> accessed 2 August 2017. Also see: Jamie Grierson, 'European Court of Human Rights Rejects Christians' Cases that their Religious Rights were Violated by Employers' 28 May 2013 available at: <<http://www.independent.co.uk/news/uk/home-news/european-court-of-human-rights-rejects-christians-cases-that-their-religious-rights-were-violated-by-8634687.html>> accessed 2 August 2017.

⁴¹⁸. J. M Waliggo, 'Law and Public Morality in Africa: Legal, philosophical and Cultural issues' (2005) In the Alraesa Annual Conference 1, 1.

⁴¹⁹. Steve Clarke, *The Justification of Religious Violence* (Vol. 52 John Wiley & Sons 2014) 272, 81

society, and the regulations to which they should adhere.⁴²⁰ Just the same as the legal system being different in each country, public morality may differ across societies. One example of this is how polygamy is both legally and morally considered inappropriate within the United States.⁴²¹ However, in Kurdistan, although it is against the law to practice polygamy, this does not reflect the current traditional and religious morality within Kurdistan. Despite the prohibition of polygamy on legal grounds, it is still practiced by Kurdish citizens who view the practice as morally and religiously acceptable.⁴²²

In General Comment No. 22, “The right to freedom of thought, conscience and religion”, the HRC said:

“the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”.

These limitations, as said by the HRC, must therefore be considered in terms of overall principles, without discriminating against particular tradition or religion.⁴²³ A state therefore has the discretion to define its moral code based on the underlying traditions and customs. For example, in the case *Hertzberg et al v Finland*⁴²⁴ which examined the censorship of homosexuality in TV and radio, the HRC made the following comment:

The HRC feels, however, that the information before it is sufficient to formulate its view on the communication. It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.⁴²⁵

This therefore demonstrates that the HRC, as well as states in general, recognise the different existence of moral codes throughout the world, how these too can be interpreted differently by the individual, and the inability to recognise any code as a universal standard.

⁴²⁰ J. M Waliggo, ‘Law and public morality in Africa: Legal, philosophical and Cultural issues’ (2005) In the Alraesa Annual Conference 1, 2.

⁴²¹ Donald A Giannella, ‘Religious Liberty, Nonestablishment, and Doctrinal Development. Part I. The Religious Liberty Guarantee’ (1967)80. 07 Harvard Law Review, 1381, 1404.

⁴²² Matt Frazer, ‘Iraqi Kurdistan Enforces the New Polygamy Law’ (Erbil, 26th September 2011) Available at: <http://www.ekurd.net/mismas/articles/misc2011/9/state5458.htm>.> accessed on 11 March 2015.

⁴²³ UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34 para.32.

⁴²⁴ Communication No. 61/1970, U.N. Doc.CCPR/C/ OP/late 124 (1985).

⁴²⁵ Communication No 61/1979, U.N. Doc CCPR/ C/ OP/ 1 at (1985).para. 10.3.

Therefore, allowing states the right to limit the freedoms of a citizen due to the desire to uphold public morality may impose some limits on their human rights.⁴²⁶ In this above case, *Torkel* in his individual opinion considered that the state should not be permitted to merely refer to Article 19 (3) of ICCPR in order to justify the limitations of freedoms, as violating this article and its terms on public morality should only be deemed acceptable if seen as absolutely necessary.⁴²⁷ As a result, the opposition commented that a state which uses the example of public morality in order to limit human rights and freedoms should be able to show that these restrictions are fully necessary in order to support the essential values and customs of a community.⁴²⁸

In comparison to this, in the case *Toonen v Australia*⁴²⁹ where Toonen opposed Tasmanian law which criminalised sex between two adult males, the HRC took a somewhat different stance. In examining whether the state has the right to restrict rights in order to uphold public morality, the HRC noted that it could not accept that moral issues were only a matter relevant to the domestic state, as this would prevent the HRC from being able to examine a large number of cases related to the role of human rights.⁴³⁰ From the point of view of the HRC, although states are able to limit the religious freedoms of citizens for the good of public morality, this authority cannot be considered absolute, and the HRC must be allowed some measure of involvement in examining the ways states restrict the freedoms of their citizens. Although public morality is considered one way for states to restrict the freedoms as declared in the ICCPR, they cannot be restricted for reasons of discrimination or for arbitrary, whimsical reasons.

It has been common for the ECtHR⁴³¹ to support the interference regarding religious rights in the name of preserving “public morals”. This is a difficult term to define, as morals change across time and geography, as well as between communities. The ECtHR holds the view that state apparatus is better equipped to decide their own morality cases, as they best understand the complexity of their society. Similarly, the UNHRC asserts that there is no universal conception of

⁴²⁶ Sedef Çakmak, ‘No Living on Land or in Air: Discourse of Public Morality and Human Rights Violation of Transgender Individualism in Turkey’ (2013) 11.4 Turkish policy Quarterly 141, 143.

⁴²⁷ Communication No 61/1979, U.N. Doc CCPR/C/OP/1 at (1985) Appendix.

⁴²⁸ Mark Wu, ‘Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine’ (2008) 33 Yale J. Int’l L. 215, 230.

⁴²⁹ Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992(1994).

⁴³⁰ Communication No.488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). Para.8.6

⁴³¹ *Wingrove v. United Kingdom* (Application No. 17419/90) (25 November 1996) ECHR 60; *Otto-Preminger-Institut v. Austria* (Application No.13470/87) (20 September 1994) ECHR 26.

‘morality’.⁴³² On the other hand, the state does not have absolute dominion of the governance of morals, as moral restriction must meet the necessity and proportionality standards. In relation to the headscarf, public morality has not yet been claimed as justification. It is, however, true that ‘public morals’ is a flexible phrase and it may be applied in future to ban the headscarf under these terms. For example, Belgian members of parliament stated ‘morality’ alongside national security as justification for banning the burqa.⁴³³ Governments must therefore be careful to manage both the freedoms and human rights of their citizens as well as maintain their system of public morality.

3.3.6.5. The rights and freedoms of others as a justifying restrictions to religious freedoms

In maintaining the balance between person's rights and the rights of another, it is important for states to recognize that a citizen's membership in a society means not only that person is entitled to their own rights, but that said citizen must recognize the rights of others and respect and exercise responsibility towards them. The preamble of the ICCPR recognizes this, in that every person has responsibilities to other individuals and to the community to which he belongs (realizing that the individual, having duties to other individuals and to the community to which he belongs, is under responsibility to strive for the promotion and observance of the rights recognized in the present covenant).⁴³⁴ As mentioned in earlier sections, religious freedoms and rights are protected, but are not completely unrestricted. In the limitation of rights described in article 18(3) of the ICCPR, the exercise of the right to freedom of religion and belief carries with it particular duties and responsibilities.

This is a matter which has been subject to much consideration before the HRC in the context of wearing of the veil. Although the HRC⁴³⁵ recognizes the rights to wear this headwear, there have been notable instances where the use of headwear has been prohibited, including in France and Turkey. In the case of *Bikramjit Singh v. France*⁴³⁶ the HRC recognized that restricting religious dress in this case “*serve[d] purposes related to protecting the rights and freedoms of*

⁴³² Religion, Morality, Blasphemy and Obscenity’ available at: <<https://www.article19.org/pages/en/religion-morality-blasphemy-obscenity-more.html>> accessed on 08 September 2017.

⁴³³ Nike Robertson and Stephanie Halasz, ‘Belgium’s Lower House Votes to Ban Burqa’ (30 April 2010) available at: <<http://edition.cnn.com/2010/WORLD/europe/04/29/belgium.burqa.ban/index.html>> Accessed 08 September 2017.

⁴³⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁴³⁵ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899.

⁴³⁶ Communication No. 1852/2008. Para. 8.6. And 8.7.

others, public order and safety”, as it was aimed at assisting the prevention of tensions and incidents in regards to religious harassment within schools. In this case, however, the HRC considered the state as not having fully demonstrated that the religious dress in this instance had demonstrated a threat to rights and freedoms of others or to public order at the school, nor did it consider Singh’s permanent expulsion as being proportionate and necessary.

This case helps to demonstrate the extent to which the manifestation of religious freedoms may violate the freedoms of other persons, and the power of the state in restricting or allowing these freedoms accordingly. The scope of the rights and freedom of others that may act as a limitation upon rights in the covenant extends beyond the rights and freedoms recognized in the covenant. If a conflict arises between a right which is recognised and protected within the covenant, and a right which is not, it must be first established that the covenant attempts foremost to protect the fundamental human rights of individuals. Therefore, with this assumption, importance must be given to those rights which are not subject to restrictions within the Covenant.⁴³⁷ In cases of limitations and restrictions, states must give strong justification for the reasons behind limiting religious freedoms in order to protect the rights of others. This justification must suggest the restriction as being “necessary” and being proportionally linked to the needs and situation identified⁴³⁸.

Overall the ICCPR is the legal and fundamental document which has a universal bearing on religious freedoms and rights. Despite addressing a range of human rights and not just religious rights, it serves to provide a universal clarification of the rights to religious freedoms. Although there is only one article in the document which relates to religious freedom, the HRC has provided additional resources and guidance through their General Comments and through the use of this article in a range of communications, to which reference has already been made in this analysis through the use of illustrative examples. The document is therefore a useful tool in providing universal protections of religious rights and freedom. However, there are still some difficulties in elaborating and clarifying the religious rights of individuals alongside concepts and situations such

⁴³⁷Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2014) p.361.

⁴³⁸. Foreign & Commonwealth Office, ‘Freedom of Religion or Believe – How the FCO can Help Promote respect for this human rights’ Available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/561516/Freedom_of_Religion_or_Belief_Toolkit_-_2016.pdf> accessed 22 September 2017.

as public health and public safety, public order, and the rights and freedoms of others. It is hoped that, given time, the range of judicial cases and the HRC's role within them will be able to clarify religious freedoms and rights in regards to these concepts.

3.4. Declaration Drafting on Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (25 November 1981)

3.4.1. Background of the Declaration and its content

The maximum protection of religious freedom is necessary in order to maintain stability and peace internationally. Accordingly, efforts to ensure this protection have been persisting, and have resulted in the inclusion of the right to religious freedom in multiple documents regarding human rights. Nevertheless, these human rights documents typically cover human rights in general; they are not solely devoted to the matter of religious freedom. In fact, one perspective posits that the Declaration on Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief 1981 is the singular document wholly devoted to the right to religious freedom, and may be one of the most significant religious freedom documents internationally. This significance is determined not by its enforceability or its quality, but by its comprehensiveness regarding religious freedom rights, and how it is utilised to define the right to religious freedom by many nations.⁴³⁹ In 1981, after twenty years of work subsequent to the U.N.'s December 7, 1962 mandate, the General Assembly enacted the Declaration.⁴⁴⁰ The multiple setbacks to reaching an agreement about the document are indicative of the underlying political power play dynamics within the U.N., as well as the controversy regarding the very topic. Eight articles comprised this document, which incorporated the following main principles:

- 1) Descriptions of religious rights for both individuals and institutions.
- 2) Language regarding religious intolerance, discrimination, or abuse
- 3) Provisions specifically regarding parents' and children's religious rights and,
- 4) Clear implementation principles⁴⁴¹.

⁴³⁹ Derek H Davis, 'the Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (2002) 2 *BYU L. Rev.* 217, 228.

⁴⁴⁰ Bahiyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Vol. 44. Martinus Nijhoff Publishers, 1996)163.

⁴⁴¹ Gordon Smith, 'Protecting the Weak: Religious Liberty in the Twenty-First Century' (1999) *BYU L. Rev.*, 479, 481.

Essential components concerning religious freedom emphasised in the Declaration are the right to assemble, the right to establish and preserve places to worship, the right to write, publish, and disseminate religious texts, the right to teach about religion or beliefs, and the right to practice days of rest or holy days.⁴⁴²

3.4.2. The Debate on the content of the Declaration

Throughout the preparation stage, the creators of the 1981 Declaration confronted multiple contentious matters. An example of this was when Eastern European and communist states raised the issue of the vagueness of religion as a term, contending that incorporating religion as a term meant that atheism and non-belief were not also protected, and they should be. They also believed that the use of religion as a term gave preferential treatment to belief versus non-belief. Westerners answered this concern by saying that the Declaration was designed to protect religion, and that atheism was not a religion; however, they also said that atheism would presumably discover a way to be protected within the language of the Declaration regardless.⁴⁴³ The two sides came to an agreement; “whatever” would precede instances of the word “belief” in the preamble and Article 1 (1), for example article 1 (1) is drafted “... *the right shall include freedom to have a religion or whatever belief of his choice..*”⁴⁴⁴ It could be argued that when compared to the provisions of the UDHR and ICCPR, the agreement has proved to be clear and beneficial; there is an understanding from the text of article 1(1) that most beliefs, religious and non-religious, including agnosticism, atheism, and rationalism, are protected. Compared to the 1981 declaration which explicitly includes all belief, the capacity and scope of Article 18 (1) of the ICCPR is decided by the HRC by virtue of General Comment No. 22.⁴⁴⁵

Another contentious matter addressed by Muslim representatives was whether a person’s right to convert from one religion to another religion ought to be protected, a matter that had previously raised problems throughout the drafting of the UDHR as well as the 1966 Covenant. As already discussed some argued against this, as typical Muslim law defines conversion from

⁴⁴² Declaration on the Elimination of All Forms Intolerance and of Discrimination Based on Religion or Belief. G.A. Res 36/55, U.N. GAOR, 36th Sess., 73d plen.mtg. UN. Doc.A/36/684 (Nov, 25, 1981).

⁴⁴³ Christian Walter, ‘The Protection of Freedom of Religion within the Institutional System of the United Nations’. Universal Rights in a World of Diversity the Case of Religious Freedom’ (2012)17 Pontifical Academy of Social Science 588, 591.

⁴⁴⁴ Ibid.591.

⁴⁴⁵ Jose Luis Soberanes Fernandez, ‘Mexico and the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief’ (2002).2 BYU L. Rev., 435, 445-446.

Islam to another religion as apostasy. Due to this view, many Muslim governments have little patience for other religions' missionaries, believing these missionaries' and proselytises would tempt Muslims to be apostate by converting. These views, most notably expressed by Islamic delegates from Saudi Arabia, led to the elimination of language about the right to convert religions from the preamble and Article 1 of the 1981 Declaration. This was a move away from the explicit protection in the UDHR and to some extent even from Article 18 of the 1966 ICCPR, with the phrase "*freedom to have or to adopt a religion or belief of his choice*". As a result, the language of the 1981 Declaration became less powerful in its wording. In order to appease those who opposed the elimination of this phrase (right to change religion), Article 8 was added, which stated "*nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the UDHR and the International Covenants on Human Rights.*"⁴⁴⁶ Since the UDHR and 1981 declaration technically are not binding documents and therefore do not create legally binding, states that do not ratify' Covenant are seem to suggest that the right to convert is not international law, despite its incorporation in the UDHR and the 1966 Covenant. Supporters of the right to convert were displeased with this interpretation, but argued that the right to convert was not completely downgraded in the document. One perspective even proposes that the revised Article 8 maintains that the right to convert is a basic right. Scholar *Benito* analysed the unified impact of the UDHR, the 1966 Covenant, and the 1981 Declaration, and determined that whilst each document's phrasing was a bit different, all had the same essential meaning; individuals have a right to convert religions. He believed that, no matter how it is displayed, this right is implied in the language that discusses the right to freedom of thought, conscience, religion, or belief.⁴⁴⁷ Still Saudi Arabia's abstention regarding the UDHR, the elimination of the phrase "*change of religion*" due to Muslim opposition, from the ICCPR, and the 1981 Declaration's language, have made the status of the right to convert to ambiguous. This ambiguity may allow some Islamic countries to disregard the right to convert or manipulate how they will interpret and apply it; an instance of this

⁴⁴⁶ Christian Walter, 'The Protection of Freedom of Religion within the Institutional System of the United Nations'. *Universal Rights in a World of Diversity The Case of Religious Freedom* (2012)17 Pontifical Academy of Social Science 588, 591.

⁴⁴⁷ Cited in Derek H *Davis*, 'the Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (2002) 2 *BYU L. Rev.* 217, 230.

is in Iran and Mauritania, where one may convert to Islam, but one cannot convert from Islam to another religion.⁴⁴⁸

Similar to the ICCPR, Article 1(3) of the 1981 Declaration discusses religious manifestation, which, according to the Declaration, is only allowed to be restricted when prescribed by law, or when it is essential for the protection of public safety, order, health, or morals. Also, it may be restricted when it endangers others' fundamental rights or freedoms.

3.4.3. Discrimination and Intolerance based on religious criteria in the 1981 Declaration

Article 2 of the 1981 Declaration focuses on religious discrimination and intolerance. It says, "*No one shall be subject to discrimination by any State, institution, group of persons, or person, on the ground of religion or belief.*" When considering international law, this article has extensive implications. Whilst many commitments drawn from treaties and resolutions typically bind the State, Article 2(1) binds all people, groups, and institutions, which includes both religious groups and institutions.⁴⁴⁹

If one reads paragraph 1 of Article 2 which prohibits discrimination by "any state, institution, group of persons, or person along with Article 3, which describes discrimination between human being as an abuse of human dignity, and together with paragraph 1 of Article 4, which discusses how states will prevent discrimination in all areas, such as civil, economic, and cultural areas, then one would conclude that the prohibition ought to be applied to both public and private actions. This interpretation reflects Article 2(1) of the UN Declaration on the Elimination of All Forms of Racial Discrimination, where discrimination by any "*state, institution, group, or individual,*" is banned. This means that discriminatory actions of "private" non-governmental institutions, governmental authorities, and (due to the inclusion of the word "person" in the singular) individuals are also subject to the provisions of Article 2. Article 3 of the 1981 declaration supports this position, with phrases denouncing discrimination "between human beings." Also, Article 2(2) 1981 Declaration differs from the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁴⁵⁰ in that it omits the phrase that prohibits discrimination

⁴⁴⁸ Brian O'Connell, 'Constitutional Apostasy: The Ambiguities in Islamic Law after the Arab Spring' (2012)11 .1 Nw. UJ Int'l Hum. Rts.83.

⁴⁴⁹ Carolyn Evans, 'Time for a Treaty-The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination' (2007) 3 BYU L. Rev. 617, 626

⁴⁵⁰ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations' available at: <<http://www.refworld.org/docid/3ae6b3940.html>> accessed on 31 July 2017.

in “political, economic, social, cultural, or any other field of public life.” Still, other language within the ICERD illustrates that its aim was to cover private action also.⁴⁵¹

As aforesaid, state, individual, and non-governmental organization discrimination may occur. However, in order to preserve public order and public safety, according to Article 4, states (not individuals) have a responsibility to intervene against religious discrimination.⁴⁵²

Paragraph 1 of article 2 solely addresses discrimination, but paragraph 2 also includes intolerance, defining intolerance in a way that it becomes interchangeable with discrimination. However, in previous drafts of the 1981 Declaration, the two terms were employed separately, with discrimination put in later.⁴⁵³ Two perspectives have risen concerning the definition of “intolerance” and its importance within the Declaration. During the drafting stage, one perspective argued that “intolerance” does not have juridical meaning and indicates a mind-set or prejudice.⁴⁵⁴ Afterwards, this has been highlighted regarding education provisions in order to promote the 1981 Declaration.⁴⁵⁵ The other perspective argues that intolerance is defined as both actions that are the result of hatred or prejudice stemming from religion or beliefs, as well as a mind-set. It includes other human rights violations, like physical attacks.⁴⁵⁶

The argument that intolerance includes emotional, psychological, philosophical, and religious views that may instigate discriminatory acts or the infringement upon religious freedom is a compelling one. Nevertheless, another argument contends that “discrimination” as a term is a legal one, and whilst not completely clear, it does supply an applicable and comprehensive formula for identifying discrimination⁴⁵⁷, whereas “intolerance” is currently a more ambiguous term, in that it merely indicates emotional, psychological, philosophical, and other viewpoints that may

⁴⁵¹ Donna J Sullivan, ‘Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination’ (1988) 82 Am. J. Int'l L. 487, 503.

⁴⁵² Donna J Sullivan, ‘Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination’ (1988) 82 Am. J. Int'l L. 487, 503-504.

⁴⁵³ UN Docs. E/3925. Annex, at 3 (1964) (defining “intolerance” as a mental attitude or psychological state); A/ 4134, at 5 (1973) (stating that “intolerance” refers primarily to a subjective attitude).

⁴⁵⁴ See, e.g., UN Docs. E/3925. Annex, at 3 (1964) (defining “intolerance” as a mental attitude or psychological state); A/ 4134, at 5 (1973) (stating that “intolerance” refers primarily to a subjective attitude).

⁴⁵⁵ See: United Nations Seminar Encouragement of Understanding, Tolerance and Respect in Matters Relating to Freedom of Religion or Belief, UN Doc. ST/HR/ SER. A/ 16, at 7 (1984) (defining tolerance as acceptance by individuals of the right of others to hold different views, i.e., an act of understanding); Odio Benito report, supra note 11, at 64.

⁴⁵⁶ Sub Comm'n Res. 1983/31, UN Doc. E/CN.4/ Sub.2/1983/43, at 98. The final report by Special Rapporteur Odio Benito was issued as UN Doc. E/CN.4/Sub.2/ 1987/26. See also: UN Doc.E/CN.4/Sub.2/ 1985/28 (progress report by Special Rapporteur Odio Benito).

⁴⁵⁷ John Claydon, ‘Treaty Protection of Religious Rights: UN Draft Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief’ (1972) 12 The. Santa Clara Lawyer 403.

instigate discrimination, hatred, or persecution.⁴⁵⁸ Thus, the lack of a workable definition and precarious position of the term “intolerance” in international judicial cases are making it difficult to use as a term as proof that intolerance occurred in a legal context. Article 4(2) of 1981 Declaration supports this perspective, where it refers to various ways in which states can manage discrimination and intolerance and highlights the difference between the two; it stipulates that legislative action ought to be taken against discrimination whereas states ought to take “all appropriate measures” against intolerance. Intolerance can instigate actions such as murder, property destruction, and more, which are infringements upon international human rights, and they typically also breach national law. If intolerance instigates the infringement of religious freedom, then this intolerance and resulting acts violate the rights protected under the 1981 Declaration.⁴⁵⁹

3.4.4. Legal Nature of the Declaration

The 1981 Declaration is the most significant document in regard to the right of religious freedom, nevertheless, the 1981 Declaration is not legally binding, and it has no power to create legal obligations. As a result, the Special Rapporteur for the Commission on Human Rights which it was replaced by the United Nations Human Rights Council (HRC) in 2006, as well as some states, such as the former Soviet Union and the Philippines suggested the creation of an open-ended working group in the commission in order to prepare a convention. They argued that a convention and its mandatory provisions would place an obligation on states to fulfil duties like submitting reports about the implementation of such provisions. Completing duties such as these may inspire more respect for religious rights and religious freedom. *Angelo Vidal d’Almeida Ribeiro*⁴⁶⁰ and *Abdelfattah Amor*⁴⁶¹, the Special Rapporteurs, claimed that the 1981 Declaration does not have adequate power to obligate states to fulfil these duties, and find continuing the status quo a fruitless effort. Since the Special Rapporteurs are important members in the implementation procedures, they are the ones who typically observe and report examples of noncompliance regarding the Declaration. As a result, they especially understand the necessity of more stringent enforcement of the 1981 Declaration and how noncompliance is higher than it should be. When

⁴⁵⁸ Ibid,

⁴⁵⁹ Carolyn Evans, ‘Time for a Treaty-The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination’ (2007) 3 BYU L. Rev. 617, 626.

⁴⁶⁰ E/CN.4/1988/45 Report submitted by Mr Angelo Vidal d’ Almeida Ribeiro, Special Rapporteur appointed in accordance with Commission on Human Rights resolution 1986/20 .para 55.

⁴⁶¹ E/CN.4/1996/95 Report submitted by Mr Abdelfatah Amor, Special Rapporteur appointed in accordance with Commission on Human Rights resolution.para69. See E/CN.4/1993/25.

analysing the Special Rapporteurs' reports, one can observe these examples of noncompliance particularly regarding the right to have a religion, to worship unobstructed, to convert religions, and to observe religious holidays.⁴⁶²

Several nations, however, did not agree with the formation of a convention, arguing that their national sovereignty and independence in the management of their own affairs would be threatened. They do agree that the 1981 Declaration is useful for guidance and for consistent implementation concerning religious freedom, which is why the Declaration is considered one of the most esteemed international human rights documents, to which standards for religious freedom are conformed. Scholar *R.S. Clark* stated that, in regard to the utilisation of the Declaration, it is best for supplying more explicit information to be included in the UDHR and the ICCPR.⁴⁶³ Accordingly, it may be employed when States Reports are being reviewed in the context of the ICCPR, or when complaints are being analysed in the context of its Optional Protocol. Also, the 1981 Declaration is applicable when accusations of the abuse of human rights were being investigated by the Commission on Human Rights⁴⁶⁴ with its "Confidential 1503"⁴⁶⁵ procedure or its "Public 1235"⁴⁶⁶ procedure, as well as when the Secretary General is utilising his good offices

⁴⁶² UN .Doc. E/CN .4/ 1992/52 Report submitted by Mr Angelo Vidal d' Almeida Ribeiro, Special Rapporteur appointed in accordance with Commission on Human Rights resolution 1986/20 .para167 and E/CN.4/1987/35.Report submitted By Mr. Anelo Vidal d' Almeida Ribeiro, para. 49.

⁴⁶³ Cited in Derek H *Davis*, 'the Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (2002) 2 *BYU L. Rev.* 217, 232.

⁴⁶⁴ The Commission was replaced by the UN Human Rights Council.

⁴⁶⁵ Instead of "1503" procedure, On 18 June 2007, the Human Rights Council on 18 June 2007 approved resolution 5/1 entitled "Institution-Building of the United Nations Human Rights Council" by which a new complaint procedure was established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances. Like the former "1503" procedure, this procedure is confidential, with a view to enhance cooperation with the state concerned. See: Marc Limon & Hilary Power, *History of the United Nations Special Procedures Mechanism: Origins, Evolution and Reform* (Universal Rights Group 2014) 54. Also see: Complaint Procedure of the United Nations Human Rights Council: Available at: <http://www.ohchr.org/Documents/HRBodies/ComplaintProcedure/FAQComplaintProcedure_en.pdf> accessed on 1 August 2017.

⁴⁶⁶ The "Public 1235" was perceived by developing countries as unfair and discriminatory; based on this view only states that were accused of violating of human rights by UN Rapporteurs were faced by condemning resolution of HRC. However, in the new system of the Human Rights Council the 'Universal Periodic Review' (UPR) is established. The UPR is an effective procedure which is based on equal treatment for all member states. The UPR procedure provides reviewing the improvements and concerns of human rights in all countries and also it provides technical assistance to improve and overcome challenges to the enjoyment of human rights.

to address human rights issues, or when he is acting in a manner comparable to the ombudsman-like work of the proposed United Nations High Commissioner for Human Rights.⁴⁶⁷

There is a view which contends that whilst the Declaration does not have adequate power to enforce its provisions, it may be utilised to aid the legally binding ICCPR by clarifying more obligations of the signatories' party of treaty.⁴⁶⁸ In this manner it would be both helpful and authoritative for settling disputes concerning definitions of terms in the ICCPR. Essentially, the Declaration would not have legal force, but it would nonetheless have a legal influence.

The 1981 Declaration can also be utilised with international customary law by employing terms that imply legal obligation rather than simple aspirations. Instances of this include utilising phrases like, “*everyone shall have the right,*” “*no one shall be subject to discrimination,*” and “*all States shall take effective measures*”.⁴⁶⁹ When these kinds of phrases are utilised, it demonstrates that nations should not have disagreements regarding the importance of the right to religious freedom. Also, the Declaration implores nations to employ actions to protect religious freedom. The 1981 Declaration also has a legal influence without carrying legal force because it was passed with the approval of many nations from diverse political systems, legal systems, and regions, with Islamic, Communist, and Western states participating in the drafting process.⁴⁷⁰ *Sullivan* wrote that the UN General Assembly aimed for the 1981 Declaration to be not only hortatory, but normative, which is highlighted in Articles 4 and 7.⁴⁷¹ In Article 4, it says that states must “*make all efforts to enact or rescind legislation*” as well as to act against religious discrimination. Article 7 is more definitive, stating that the rights and freedoms in the Declaration should be incorporated into national legislation so all citizens are able to exercise those rights and freedoms.⁴⁷²

Eventually, the Declaration's drafters discussed the idea of creating a convention regarding religious freedom and determined that “*it was more difficult to legislate on religious intolerance*

⁴⁶⁷ Derek H Davis, ‘the Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief’ (2002) 2 *BYU L. Rev.* 217, 232.

⁴⁶⁸ Malcolm David Evans & Peter Petkoff, and Julian Rivers, *The Changing Nature of Religious Rights Under International Law* (Oxford University Press, USA, 2015) 94-99.

⁴⁶⁹ Carolyn Evans, ‘Time for a Treaty-The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination’ (2007) 3 *BYU L. Rev.* 617, 629.

⁴⁷⁰ Carolyn Evans, ‘Time for a Treaty-The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination’ (2007) 3 *BYU L. Rev.* 617, 629.

⁴⁷¹ Donna J Sullivan, ‘Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination’ (1988) 82 *Am. J. Int'l L.* 487, 489

⁴⁷² *Ibid.*

*than on racial discrimination, since a convention on religious freedom impinged upon the most intimate emotions of human beings”.*⁴⁷³

In general, whilst it must be recognised that the Declaration is not a legally binding document in the context of international law, it is beneficial to have a comprehensive document on religious freedom. The accomplishment of completing this document is commendable, especially considering the difficult issues which arose throughout its creation. The document is significant and useful for interpreting more formal and binding international assurances regarding the freedom of religion, and is therefore relevant in even the most basic of religious freedom cases. As Bahiyyih Tahzib has commented, “*States regard the 1981 Declaration, or at least some of its provisions, as normative in nature and part of customary international law*”.⁴⁷⁴

3.5. Conclusion

The twentieth century saw significant growth in the recognition of religious rights and freedoms. The very first endeavour to establish a human rights document, which also encompasses religious rights, was the UDHR. Even in the face of ideological conflicts between countries and states, particularly communist and capitalist powers at the time of the UDHR, it was still possible to reach a consensus on the subject of human rights. Although the UDHR is not legally binding, it can be argued that it still a living document which is relevant to the issues of 21st century such as mass immigration and globalization that lead to more population interaction, cultural and religious diversity. For instance, articles 3 (right to life) article 12 (right to privacy) and article 18 (right to religious freedom) of the UDHR are all reproduced in the ECHR which the ECtHR has been justified its decisions based on these texts of articles. The UDHR is comprised of a wide range of rights, from economic, social and cultural rights to civil and political rights. Therefore, it is composed of and regulates both first-generation human rights and second-generation. In doing so, the declaration has established a clear position in terms of religious freedoms and rights. Additionally, unlike other international documents such as the ICCPR and the 1981 religion declaration which indicate the freedom to change religion implicitly, the UDHR referred to the right to change religion unambiguously. The declaration therefore is an explicit stance on human rights, which aims to protect religious rights and freedoms.

⁴⁷³ Cited in Bahiyyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International legal protection* (Vol. 44. Martinus Nijhoff Publishers, 1996)600,146.

⁴⁷⁴ Ibid, 187.

The absence of a completely legally enforceable document in regards to human rights has led to a range of treaties in order to protect the rights and freedoms of individuals. 18 years after the UDHR was formally accepted, the ICCPR was introduced as a covenant protecting the civil rights and political. It is used to monitor compliance with civil and political rights among the parties through annual reports. However, as the reports from the ICCPR are obtained from states not from the Human Rights Committee, and the approval of the jurisdiction of the HRC is derived from the acceptance of the states, many consider that the system cannot force member governments to actualise civil and political rights within their nations. Nonetheless, the HRC, through providing a variety of General Comments and judicial stances, have made considerable progress in establishing human rights governance and monitoring.

It is important to note that we are currently at a time in history where that mass influx of immigrants and refugees and population movements is leading to more cultural interaction and religious conflicts. As a result, the importance of respect for religious rights has become more fundamental than ever in avoiding conflict between countries and to enforce trust and respect between religious communities. The international community found it difficult to regulate these conflicts until 1981. When the General Assembly initiated a declaration, which opposed discrimination and intolerance based on individuals or community's religions or beliefs. This decision came after over twenty years discussing religious rights and freedoms. The three documents together play an important part in regulating and improving the importance of religious freedoms and rights across the international community, and are used to guide a range of legal processes, including within the ECHR and ECtHR. This chapter has examined in depth the freedoms and rights of religion and beliefs in the light of relevant international instruments such as the UDHR.

In the next chapter, religious freedoms will be discussed in the context of the concept of fundamentalism and in the light of the decisions of the ECtHR in relation to wearing of Islamic headscarf.

CHAPTER FOUR

Critical analysis of the concept of ‘fundamentalism’ which is used as a justification by the ECtHR to ban the wearing of the headscarf

4.1. Introduction

It appears that much can be revealed by a headscarf. Immediately after a Muslim woman wraps one around her head, her identity and her attributes become disclosed to a cross-section of society - from reporters, to politicians and scholars, etc. Regardless of the fact that a head covering has, in a variety of forms, been a regular part of Muslim and non-Muslim women’s clothing for hundreds of years, headscarves seem to attract significant attention in the world. Official reactions range from the changes in French regulations concerning the wearing of headscarves by schoolgirls were covered by the media, to controversy surrounding a case in Denmark, where women check-out operators were dismissed from their jobs;⁴⁷⁵ a case in Britain, where a schoolgirl considered their school’s uniforms insufficiently strict from a Muslim perspective;⁴⁷⁶ another case in New Zealand, where a witnesses credibility was challenged on the basis of her wearing a headscarf when providing evidence in a trial concerning car theft⁴⁷⁷, or the case in Australia, where a referee refused to allow a soccer player to participate in the game as long as she wore a headscarf.⁴⁷⁸

It is necessary to note that the discussion in this work revolves around issues related specifically to wearing the headscarf and not other types of Islamic attire such as burqa or niqab. This is mainly due to the fact that wearing the burqa and niqab is not common in the concerned states.⁴⁷⁹ Furthermore, it can be argued that from a legal and logical perspective, the banning of the niqab and burqa can be justified by the need to protect public order and achieve a higher level

⁴⁷⁵ Peter A. Kraus, and Peter Kivisto, *The Challenge of Minority Integration: Politics and Policies in the Nordic Nations* (Walter de Gruyter GmbH & Co KG, 2015) 82-83.

⁴⁷⁶ *Begum v Denbigh High School SESSION 2005–06* [2006] UKHL 15 on appeal from [2005] EWCA Civ 199.

⁴⁷⁷ Natasha Bakht, ‘In Your Face Piercing the Veil of Ignorance about Niqab-Wearing Women’ (2014)1-23 *Social & Legal Studies* 1.

⁴⁷⁸ Rachel Wells, Michael Lynch, ‘Soccer Game Called off Over Headscarf’ available online at: <http://www.theage.com.au/articles/2004/04/26/1082831497725.html?from=storyrhs>. Accessed on 6 January 2016

⁴⁷⁹ The Islamic Veil across Europe, available online at: <http://www.bbc.co.uk/news/world-europe-13038095>. Accessed 28 March 2016. For further information see: *S.A.S. v. FRANCE* (Application no. 43835/11) (2014) ECHR 695 pars 145,146. See also: European Court upholds French full veil ban, available online at: <http://www.bbc.co.uk/news/world-europe-28106900>. Accessed 28 March 2016.

of security.⁴⁸⁰ Similarly, both above-mentioned pieces of clothing are not accepted in educational environments where verbal communication, of which seeing someone's face is an indispensable part, between the teacher and students is a crucial element in the process of learning. Example of the foregoing is the case of *Azmi v Kirklees Metropolitan Borough Council*⁴⁸¹ where the Respondent's Education Service observed that:

"We believe the following principles are appropriate to our circumstances. Obscuring the face and mouth reduces the non-verbal signals required between adult and pupil, both in the classroom and other communal parts of the School. A pupil needs to see the adult's full face in order to receive optimum communication. Schools are professional settings where communication is vital, both between adults and pupils and between adults. It follows that for teachers or support workers wearing a veil in the workplace will prevent full and effective communication being maintained. In our view the desire to express religious identity does not overcome the primary requirement for optimal communication between adults and children."

The legal and political discussion related to public display of religious clothing, especially in schools, universities, public service bureaus, and other institutions of similar kinds, eventually reached the ECtHR represented by two cases. In the first case, *Dahlab v Switzerland*⁴⁸², administration of a primary school forbade one of its teachers to continue teaching because of her modest and traditional way of dressing which included a headscarf. In the second case, *Şahin v Turkey*⁴⁸³, a university student was not allowed to study because of her wish to wear a headscarf during lectures and exams. The *Şahin* case is especially important, since it was the first decision related to the matter of religious clothing that the Grand Chamber ever took. It is vital to emphasise that in the period after the *Şahin*' case, almost 100 similar petitions were refused by the ECtHR.⁴⁸⁴ Therefore, whilst *Şahin* is more important in legal terms, *Dahlab* can be considered a landmark case of any issue related to religious freedom in terms of the outcome for the applicant.

⁴⁸⁰ *S.A.S. v. FRANCE* (Application no. 43835/11) (2014) ECHR 695. For further information see: Lora Moftah., 'Chad Burqa Ban: Islamic Face Veils Outlawed in Muslim-Majority State Following Boko Haram Suicide Bombings.' Available online at: <<http://www.ibtimes.com/chad-burqa-ban-islamic-face-veils-outlawed-muslim-majority-state-following-boko-haram-1972200>>. Accessed 28 March 2016.

⁴⁸¹ UKEAT/0009/07/MAA; [30 March 2007] IRLR 484.

⁴⁸² (Application no 42393/98) (ECHR 15 February 2001) ECHR 899.

⁴⁸³ (Application no.44774/98)(2005) ECHR 819.

⁴⁸⁴ Dia, Anagnostou, and Evangelia Psychogiopoulou, *The European Court of Human Rights and the rights of marginalised individuals and minorities in national context* (eds Brill, 2010) 178.

*Refah Party v Turkey*⁴⁸⁵ was another case that could be considered relevant to the issue of the relationship between the wearing of the headscarf and fundamentalism. Even though it concerned the dissolution of a Turkish political party, several sections of the Court's decision referred to headscarves as a sign of fundamentalism prevalent in society and a threat to the secular setting of the country.

In each of these cases, the Court offered several arguments to justify the ban on the wearing of headscarves in workplaces and educational institutions, but the limited extent of this thesis does not allow analysis and evaluation of each of these claims in suitable details. Therefore, after reviewing the Court's arguments in favour of restricting religious manifestation, the researcher selected two controversial arguments - 'prevention of fundamentalism' and 'intolerance'. This chapter aims to critically examine the argument – 'prevention of fundamentalism' – which the ECtHR (cited in its decision to ban headscarves) to determine their legal verifiability and validity. In order to do so, the thesis analyses and assesses all of the above mentioned cases, as well as other similar cases adjudicated by the European Judicial bodies such as *Kalaç v Turkey*⁴⁸⁶ and *Engel and others v The Netherlands*.⁴⁸⁷ Moreover, from the researcher's point of view, a logical evaluation and analysis of the Court's decision requires illustrating and considering the arguments first in philosophical and historical terms, then in the legal context.

4.2. Key Elements of the ECtHR Reasoning

In reference to those instances whereby the headscarf was directly involved, court proceedings were handled with very little consideration as to the key concerns of the two parties, instead addressing the ability of the state to defend their decision to ban or restrict religious attire with reference to the criteria set out in article 9(2) of the 'ECHR'. In the case of *Ms Dahlab*, the core argument to restrict religious expression was 'protection of the rights and freedoms of others' which is incorporated in article 9(2), with the court stating, with reference to the ECHR, that it should "...weigh the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused".⁴⁸⁸

⁴⁸⁵ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.

⁴⁸⁶ (Application No.20704) (01 July1997) 27 EHRR 552, 558.

⁴⁸⁷ (Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (ECHR, 8 June 1976) 1 EHRR 647.

⁴⁸⁸ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899.

This phrase has been objected to as being overused and formulated in a way that clearly favours those who have rights and liberties, whilst *Ms Dahlab*'s role is reduced to that of the accused one. This wording strips *Ms Dahlab* of her rights and liberties, painting her as a perpetrator of an offence towards the 'others'.⁴⁸⁹ Due to this fact, it is worth quoting this important extract at length as it constituted the ground for the decision:

*"During the period in question there were no objections to the content or quality of the teaching provided by the applicant, who does not appear to have sought to gain any kind of advantage from the outward manifestation of her religious beliefs. The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as wearing 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. In those circumstances, 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 Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. 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."*⁴⁹⁰

With respect to the tolerance, according to the Court, there exists a clear correlation between a higher level of intolerance and the wearing of headscarf which is why *"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"*.⁴⁹¹

While *Şahin* is a Grand Chamber judgment, and did deal with the issues in a little more detail, the Grand Chamber relied in part on the decision in *Dahlab* with respect to gender equality and tolerance.

⁴⁸⁹ Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 52.73 *Melb. J. Int'l L.* 52, 62. See further: Pierr Bosset, 'Complex Equality, Ambiguous Freedoms. Lessons from Canada (and Québec) on Human Rights in Plural Societies' (2011) 29.1 *Nordic Journal of Human Rights* 4. For further information see: Jean-François Renucci, *Article 9 of the European Convention on Human Rights: freedom of thought, conscience and religion* (vol. 88. Council of Europe 2005).

⁴⁹⁰ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899.

⁴⁹¹ *Ibid.*

From paragraphs quoted above, one can identify certain assumptions made by the court: that the headscarf may, intentionally or otherwise, convert children (proselyte effects), that it is incompatible with gender equality, and that it represents an affront to integration and tolerance.⁴⁹² In the *Şahin*'s case the first assumption, that the headscarf may have a proselytizing effect, has very little weight in the final verdict, as far more emphasis was put on the other reasons such as gender equality, religious tolerance, combating fundamentalists group and protection of secularism.⁴⁹³ In terms of fundamentalism and groups subscribed to extremist ideology that seek to forced their ideas on society, the court states that

“The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts ... It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (see Refah Partisi (the Welfare Party) and Others,). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university”.

The court added that:

Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated ..., this religious symbol has taken on political significance in Turkey in recent years⁴⁹⁴.

While *Şahin* cites influence on students as a factor, it is not for fear of conversion, as the majority of the students are likely to be of the same religion as the teacher, even if they may have a different perception of its requirements. The main weight of the decision seems to be rooted, then, in the protection of the rights and liberties of others. The court in this regard comments that:

⁴⁹² For more on the gender equality see: Sara Tonolo, ‘Islamic Symbols in Europe: the European Court of Human Rights and the European Institutions’ (2014) 5 *Stato, Chiese e pluralismo confessionale*. See: Ivana Radacic, ‘Gender Equality Jurisprudence of the European Court of Human Rights’ (2008) 19.4 *European journal of international law* 841. Also see: Anastasia, Vakulenko, ‘Islamic Headscarves’ and the European Convention on Human Rights: an Intersectional Perspective’ (2007) 16.2 *Social & Legal Studies* 183.

⁴⁹³ For more on the secularism as a justification to ban wearing of the headscarf see: Claudia Morini Claudia, ‘Secularism and Freedom of Religion: The Approach of the European Court of Human Rights’ (2010) 43.03 *Israel Law Review* 611, 618-823.

⁴⁹⁴ *Şahin v. Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819 para115.

“... the Court is able to accept that the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order, a point which is not in issue between the parties.”⁴⁹⁵

The final case is related to the *Refah Party v Turkey* in which the adornment of the headscarf is equated to exerting pressure on females who did not follow that practice, which may lead to discrimination based on religion and belief. There was also a concern amongst the court that covering with a headscarf, particularly the implementation of mandatory covering, threatens the freedoms of others, public order and public safety.⁴⁹⁶ It was noted by the court that the actions of certain universities were aimed to avert extremist beliefs and the groups which hold them in order to preserve religious or non-religious freedom, in line with article 9 of the ECHR.⁴⁹⁷ The court also stated that

*“In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention. In that context, secular universities may regulate manifestation of the rites and symbols of the said religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others”.*⁴⁹⁸

The following section will attempt to provide an understanding of the nature and main characteristics of fundamentalism, in order to determine its legitimacy as a reason for the restriction of religious garments and symbols.

4.3. Prevention of Fundamentalism as a Tool for Restrict Religious Manifestation

With the advent of the 21st century religious fundamentalism has become more and more prevalent on a global scale across religious groups; due to the extreme nature of the attacks on the

⁴⁹⁵ (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.para 99.

⁴⁹⁶ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.paras 27, 92.

⁴⁹⁷ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495. Paras 27, 92, 93.

⁴⁹⁸ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.paras 95.

US in 2001⁴⁹⁹, Islamic extremism has received the most coverage in recent years. One should note that while the rise in extremist belief and activity has had a significant influence on the theological and political landscape of many nations, it has only recently entered the legal world as a justification for court decisions. While fundamentalism and extremism has been cited as a reason for rulings against religious attire, including in judgments by the ECtHR, the most high profile cases have been exclusively related to the head coverings of Muslim women.⁵⁰⁰ On examining the subject, it is clear that the term ‘fundamentalism’ is difficult to pin down, conceptually and definitively, particular in relation to Islam. Many have attempted the challenging task of creating a schema for the concept by which the historical context, national interpretation and individual ideology behind fundamentalism are taken into consideration. This research will aim to discover whether this is a concept common to a number of religions, and how the perception of the concept of ‘fundamentalism’ differs when applied to religions other than Islam. The way in which the ECHR legal system approaches fundamentalism and religious rights is the primary aim of this research; before this examination, however, an comprehension of several interpretations of ‘fundamentalism’ must be achieved. Furthermore, an exploration of the historical and philosophical elements of the term will be undertaken, and the approach this research is to adopt elucidated. With this context established, an analysis of the court system in relation to fundamentalism can be undertaken.

4.3. 1. The Roots of fundamentalism

The word ‘fundamentalism’, in recent years, has come to be inextricably linked to Islam in the mind of the public; however, the term has its origin in the US in Protestant communities in the late 19th and early 20th centuries, where it was used to refer to more devout protestants, even by the group themselves.⁵⁰¹ In 1920, this term was first publicly used by *Curtis Lee Laws* in 1920, as the ‘fundamentalist’ Protestants associated with the Niagara Falls Conference organised into a

⁴⁹⁹ Michael O Emerson & David Hartman, ‘The Rise of Religious Fundamentalism’ (2006) 32 Annual Review of Sociology 127, 127-128. For further information see: David G Kibble, ‘The Attacks of 9/11: Evidence of a Clash of Religions?’ (2002) 32.3 Parameters 36, 37.

⁵⁰⁰ Şahin v. Turkey (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819. See also: Dahlab v Switzerland (Application no 42393/98) (2001) ECHR 899. See also: Refah party and other v Turkey (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495. See also: KalaÇ v Turkey (application no. 20704/92) (ECHR 1 July 1997)27 EHHR 552. See also: Engel and others v The Netherlands (Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (ECHR, 8 June 1976) 1 EHRR 647.

⁵⁰¹ Domenico Losurdo, ‘What Is Fundamentalism?’ (2004) 17.1 Nature, Society, and Thought 5.

group named the ‘World Christian Fundamentals Association’. Between 1910 and 1915, this group published the series “*The Fundamentals of the Christian Religion*”, in which the mandatory rules of Christianity were described in adherence with the teachings of early 20th century evangelical religious figures.⁵⁰²

The terms ‘fundamentalist’ was not here taken to be derogative, but instead as referring to the ‘fundamentals’ of the faith; these were considered to be the laws dictated by the bible, a belief in miracles, and the acceptance of Christ as the giver of redemption. Those who did not live according to these fundamentals were deemed unchristian by the fundamentalist Protestants.⁵⁰³

It is perhaps pertinent that fundamentalist communities, with their roots in the US, have not been a threat to a political system. The Christian right-wingers of the 1900s, for example, have their ideological roots in personal belief and religious bigotry. They did not target the state, but rather other communities, and it was not their aim to bring down the government and replace it with a government of their own. More recently, fundamentalism has become a more complicated term, as it now spans religions and cultures; there is now Islamic fundamentalism and Jewish fundamentalism. Fundamentalism has become politicised, particularly with regard to Islam, since the late 1970s with the Iranian revolution. Fundamentalism is no longer just a theological idea, as it is now being used as grounds to prohibit religious expression in legal cases.

4.3. 2. Definition of fundamentalism

As with any conceptual research, the concept must first be defined; this is particularly difficult in the case of ‘fundamentalism’ due to its prevalence in the media, politics, and in society, by whom it is used most commonly and widely to refer to extremist activity associated with certain segments of adherents to Islam. Due to this muddying of the terms by popular culture, there is no clear definition of the term for use by scholars which is recognized and accepted by all in the field, as it is interpreted differently between academics.⁵⁰⁴ Fundamentalism has been considered by academics to be, among other things, an ideological movement, a political stance, a purely

⁵⁰² R. Scott Appleby & Martin E. Marty, ‘Fundamentalism’ (2002) 128 *Foreign Policy* 16. For further information see: Douglas Pratt, ‘Terrorism and Religious Fundamentalism: Prospects for a Predictive Paradigm’ (2006) 11.1 *Marburg Journal of Religion* 1, 2, 3.

⁵⁰³ Luca Ozzano, ‘A Political Science Perspective on Religious Fundamentalism: Totalitarian Movement and Political Religions’ (2009) 10. 3-4 *Routledge* 339, 340-345.

⁵⁰⁴ For more on the different perception of fundamentalism see: Rolland D, McCune, ‘The Self-Identity of Fundamentalism’ (1996) 1 *Detroit Baptist Seminary Journal* 9. Also see: Heidi Hadsell & Christoph Stückelberger, ‘Overcoming Fundamentalism: Ethical Responses from Five Continents’ (2009) 2 *Globethics.net Series*

religious movement, or a socially created concept. It is a term which must be interpreted within the context by which it is used; fundamentalism must be considered as inseparable from modernity.⁵⁰⁵

Marsden suggested considering fundamentalism as a very heterogeneous group of cobelligerents that are unified through their strong opposing views regarding the effort of modernists to render Christianity more compatible with the modern society.⁵⁰⁶ Alternatively, *Martin Riesebrodt* considers fundamentalism a

“radical patriarchalism... an urban movement directed primarily against the dissolution of personalistic, patriarchal notions of order and social relations and their replacement by depersonalized principles caused primarily by the dramatic reduction in chances of the traditionalist milieu to reproduce itself culturally under conditions of rapid urbanization, industrialization, and secularization”.⁵⁰⁷ It has been argued that this definition is not specific enough to provide uniformity in academia, as well as suggesting that fundamentalism aspires to preserve tradition; these traditions are assumed to be those dictating day to day life and behaviour. This assumption is largely incorrect, as these traditions and conducts are not, in and of themselves, merely religious in origin, instead acted upon by complex social and cultural factors. According to the definition provided by *Riesebrodt* above, extreme behaviour by religious groups, such as the KKK and Al Qaeda, can be branded fundamentalism as easily as parents calling for tighter online security for their children in the classroom.

Lionel Caplan has proposed a more narrowly defined and probably even more useful definition of fundamentalism by positioning it within a modern context; he asserts that fundamentalists are engaged in a very dynamic interaction with their environment and its social elements and are thereby accepting benefits ensuing from the emergence of new technologies and employing these benefits in the pursuit of their own interests.⁵⁰⁸ According to *Caplan*, then,

⁵⁰⁵ Michael O Emerson & David Hartman, ‘The Rise of Religious Fundamentalism’ (2006) 32 Annual Review of Sociology 127, 128. For more information see: Larry Ray, ‘Fundamentalism’, modernity and the new Jacobins’ (1999) 28.2 Economy and society 198.

⁵⁰⁶ George M Marsden, *Reforming fundamentalism: Fuller Seminary and the new evangelicalism* (Wm. B. Eerdmans Publishing 1995) 4, 5.

⁵⁰⁷ Martin Riesebrodt, *Pious passion: “The Emergence of Modern Fundamentalism in the United States and Iran* (Vol 6. Univ of California Press 1993) 9. For more information see: Martin Riesebrodt & Kelly H. Chong, ‘Fundamentalisms and Patriarchal Gender Politics’ (1999) 10.04 Journal of Women's History 55.

⁵⁰⁸ Lionel Caplan, *Studies in religious fundamentalism* (SUNY Press 1987) 7.

fundamentalism is impossible without modernity, a view supported by Bruce Lawrence, who stated that “fundamentalists are modern but not modernist”.⁵⁰⁹

In 1989, Lawrence in his work foresaw the importance of religious fundamentalism in society, though asserting that it was ideological rather than theological in nature, at odds with modernist thought.⁵¹⁰ This was revolutionary in sociological circles as fundamentalism was recognised as belonging to no culture in particular whilst having deep roots in the development of people and their societies.⁵¹¹ With these suggested definitions in mind, fundamentalism should be considered an ideology not unlike communism or nationalism: a belief system which should be allowed to exist and be expressed.

It is important to note that a number of academics see fundamentalism as a political affiliation, the aim of which is to achieve power.⁵¹² The organisation ‘Women Against Fundamentalism’ has described fundamentalism as a political force which operates under the guise of religious motive to obtain social power. Fundamentalist groups also tend to position themselves against the government, and profess that the religious doctrine that they follow is the true way; this doctrine is then spread through political methods.⁵¹³

Fundamentalism has a symbiotic relationship with modernity, operating on an international scale. The most active type of fundamentalism nowadays is the Islamic fundamentalism. Based on the political perception of fundamentalism it can be argued that fundamentalism is a broader ideology which operates in opposition to the secular government, pushing instead for a theocracy and the abolition of the separation of religious and state bodies.⁵¹⁴ This sort of system has been evidenced in the Iranian political system, by which the Supreme leader is chosen by the Assembly of Experts on the basis of political *and* religious power; this process is less than democratic, as the

⁵⁰⁹ Cited in Luca Ozzano, ‘A Political Science Perspective on Religious Fundamentalism: Totalitarian Movement and Political Religions’ (2009)10. 3-4 Routledge 339, 359.p.342.

⁵¹⁰ Ibid.

⁵¹¹ Michael O Emerson & David Hartman, ‘The Rise of Religious Fundamentalism’ (2006) 32 Annual Review of Sociology 127, 132-133. For further information: Amritha Venkatraman, ‘Fundamentalism and its Stereotypes’ (2006) 58. 1-2 Medjunarodni problemi 7.

⁵¹² Sabah Mofidi, ‘Political Religion: Outcome and Continuity of Religious Fundamentalism’ (2014) 2.5 IJRANSS 161.

⁵¹³ Rayah Feldman & Kate Clark, ‘Women, Religious Fundamentalism and Reproductive Rights’ (1996) 4.8. Reproductive Health Matters, Fundamentalism, Women's Empowerment and Reproductive Rights 12, 12. For further information see: Bassam Tibi, *The challenge of fundamentalism: Political Islam and the New World Disorder* (Vol. 9. Univ of California Press 2002).

⁵¹⁴ Luca Ozzano, ‘A Political Science Perspective on Religious Fundamentalism: Totalitarian Movement and Political Religions’ (2009)10. 3-4 Routledge 339,348.

Assembly is chosen by the Guardian Council officials chosen by the Supreme Leader of Iran, resulting in the indirect self-appointment of the leader.⁵¹⁵

The explanations of the terms outlined above are, of course, broad and fundamentalist groups can, and have, risen to positions of authority in democratic ways, as has been observed in Egypt (Muslim Brotherhoods) and in Tunisia by the An-Nada movement.⁵¹⁶ However, this process is often coupled with the use of violent force, as evidenced by the Taliban and Islamic State, by which democracy is bastardised and corrupted.⁵¹⁷ The influence of fundamentalist groups in politics cannot be understated, though this is not always a tragic occurrence; fundamentalist political parties will not necessarily bring with them mandatory religious laws. In the US, fundamentalist churches have, in recent years, become incredibly popular, with just under a third of Americans showing support for fundamentalist political representatives.⁵¹⁸

It has been argued, conversely, that the link between fundamentalism and politics is unfounded, that it is a purely religious phenomenon separate from political movements. This brings more specificity to the term, which is useful for academic applications but risks oversimplifying the concept.

There is an argument that considers fundamentalism to be a solely religious phenomenon that is in its essence a “*religious way of being...a strategy by which beleaguered believers attempt to preserve their distinctive identity as a people or group in the face of modernity and secularization*”.⁵¹⁹ This stance takes a unique approach to the historical context of fundamentalism, in that the protestant fundamentalist group of the early 1900’s were not directly opposed to the government, but rather opposed to other, less devout protestant group who they deemed to be

⁵¹⁵ Elliot Hen-Tov, ‘Understanding Iran’s New Authoritarianism’ (2007) 30.01 The Washington Quarterly 163, 163-164. For further information see: Terence Duffy, ‘Iranian politics and conservative/reformist conflict: Civil society and the state in contemporary Iran’ (2002) 37.1 Representation 48, 55-57.

⁵¹⁶ Alison Pargeter, *The Muslim Brotherhood: from Opposition to Power* (Saqi 2013). For more information on political fundamentalism see: Jeff Haynes, ‘Religion, Fundamentalism and Ethnicity A Global Perspective’ (1995) 65 Unrisd 1, 21-29. For further information: Eva Bellin, ‘Drivers of Democracy: Lessons from Tunisia’ (2013) 75 Middle East Brief 1. Also see: Alexis Arieff, ‘political transition in Tunisia’ (2014) Congressional Research Service 1.

⁵¹⁷ Dian Dassanayake, ‘slamic state: What is ISS and why are they so violent’ Available online at <<http://www.express.co.uk/news/world/558078/Islamic-State-IS-what-is-ISIS-why-are-ISIL-so-violent>> Accessed 07- January-2016.

⁵¹⁸ Phillips E Russell & G. Ano Gene, ‘A re-examination of Religious Fundamentalism: Positive Implications for coping’ [2015] 18.4 Mental Health, Religion & Culture ahead-of-print 299, 300. For more information on influence of fundamentalists on political see: Burak Evren, Influence of the religious right on American politics in the post-911 era (DPhil thesis, İstanbul Bilgi Üniversitesi 2007).

⁵¹⁹ Lynn Davies, ‘Gender, Education, extremism and security’ [2008] 38. 5 A Journal of Comparative and International Education 611, 612.

unchristian, which included the large majority of protestants who were attempting to become more liberal and modern.⁵²⁰

Antoun, in his 2001 work⁵²¹, considers fundamentalism a conflict between modernism and religion; one could describe fundamentalism, according to this theory, as a violent reaction against social change and growing secularism. *Bruce*, similarly, argues that "*Fundamentalism is the rational response of traditionally religious peoples to social, political and economic changes that downgrade and constrain the role of religion in the public world*".⁵²² Some equate "fundamentalism" with violent extremism. When fundamentalism is understood as a form of violent extremism, it is impossible to distinguish between militants, who may not necessarily employ violence, and terrorists who usually do. Furthermore, this association of fundamentalism with extremism and then with violence also renders the terms 'fundamentalist' and 'terrorist' synonymous.⁵²³ By the same token, *Karen Armstrong*⁵²⁴, a professor of religious studies at Oxford University, perceives fundamentalism as both 'embattled forms of spirituality' and 'militant piety'. On the whole this way of looking at the question implies that the use of violence is understood as being a core part of fundamentalism.

From the above, nothing resembling a standard definition of fundamentalism exists in academia, though the prevailing opinion is that religion is used as a rationalisation of fundamentalist action. The multitude of interpretations of the term amongst scholars creates difficulty in discerning which definition applies within a legal scenario, particularly when making judicial rulings which may interfere with the religious freedoms of groups and individuals.

4.3.3. Characteristics of fundamentalism

The attempt to discern the definition of fundamentalism and its relationship (if any) with the wearing of the headscarf has been largely to provide a framework within which to approach

⁵²⁰ Griffin Leslie C, 'Fundamentalism from the Perspective of Liberal Tolerance' (2002) 24 *Cardozo L. rev.* 1631, 1635.

⁵²¹ Richard T. Antoun, 'Fundamentalism, Bureaucratization, and the State's Co-Optation of Religion: A Jordanian Case Study' (2006) 38.03 *International Journal of Middle East Studies* 369, 370.

⁵²² Ruud, Koopmans, 'Religious fundamentalism and hostility against out-groups: A comparison of Muslims and Christians in Western Europe' (2015) 41.1 *Journal of Ethnic and Migration Studies* 33, 37

⁵²³ Gabriel A Almond and others, *Strong religion: The Rise of Fundamentalisms Around the World* (University of Chicago Press 2003) 14.

⁵²⁴ Karen Armstrong, *The Battle for God: A History of Fundamentalism* (Alfred A. Knopf, New York.2010)5, 6. For further information see: Thomas Schirrmacher, *Fundamentalism: When Religion becomes Dangerous* (vol 14, Verlag für Kultur und Wissenschaft2013) 14.

such a complex subject. A commonly agreed upon set of characteristics needs to be established in order to identify a concept and explore it with any success; without a framework, a complex phenomenon is impossible to assess due to the sheer scale of it. The complexity of the concept of fundamentalism is based on the fact that scholars have perceived it from a political, social, religious and ideological perspective. This logically renders any analysis of this concept in the legal context in which it was used as a justification of banning the wearing of headscarf particularly difficult. It is therefore necessary to establish a set of characteristics of fundamentalism that can then enable the researcher to assess more precisely the legality of ECtHR's pertinent decisions. The review of the existing body of relevant literature has revealed the existence of several key characteristics of fundamentalisms. First, fundamentalism is perceived as a form of reaction to the trend of diminishing the role of religion in the society, whereby fundamentalists seek the preservation of a strong position of religion in this regard. Second, fundamentalists have a tendency to perceive the world as being divided between the good and the bad side where those on the bad side are condemned to eternal damnation. By the same token, to belong to the good side means, particularly in case of women, to comply with a set of strict rules of conduct accompanied by a specific dress code.⁵²⁵ Third, fundamentalists maintain infallibility of their holy texts which inform every aspects of believers' life and have to be applied in their literal meaning. Finally, fundamentalism is often marked by existing contradiction in their approach to modernists where they are being very selective in interpreting available information whilst, as mentioned above, they believe in the exactness of their religious texts. In addition, fundamentalists are often quite tech-savvy people who do not shy away from using technology and more recently social media, for disseminating their beliefs.⁵²⁶

The researcher hopes that the above-mentioned key characteristics of fundamentalism will help to provide a better and more accurate analysis of the ECtHR's decisions regarding the cases involving the wearing of the headscarf.

⁵²⁵ Claudia Derichs & Andrea Fleschenberg, *Religious Fundamentalisms and their Gendered Impacts in Asia* (Friedrich-Ebert-Stiftung, Department for Asia and the Pacific 2010) 18-26. Also see: Doret De, Ruyter, 'Fundamentalist Education: A Critical Analysis' (2001) 96.2 *Religious Education* 193.

⁵²⁶ Jakobus M, Vorster, 'Perspectives on the Core Characteristics of Religious Fundamentalism Today' (2008) 7.21 *Journal for the Study of Religions and Ideologies* 44,51-52. For further information on characteristics of fundamentalism see: Mike Friedman, and W. Steven Rholes, 'Religious fundamentalism and terror management: Differences by Interdependent and Independent Self-Construal' (2009) 8.1 *Self and Identity* 24, .25, 26. Also see: Ernest Gellner, *Postmodernism, Reason and Religion* (Psychology Press.1992) 2-5.

4.3.3.1. The Reactionary nature of fundamentalism

A common characteristic observed in fundamentalist groups and movements is its reactionary nature; in most cases, this is in response to secularization or an “actual or perceived” threat to religion and religious identity.⁵²⁷ Lawrence sees fundamentalisms as reactions to the effects of the Enlightenment, which expresses itself as modernism and modernist thinking.⁵²⁸ Fundamentalists are in opposition to all those individuals or institutions that advocate Enlightenment values and wave the banner of secularism or modernism.⁵²⁹

With this in mind, *Marty* puts forward the view that fundamentalist thought does not allow for deviation, as they constitute an absolutist answer to relative ethics and liberal society. Fundamentalism is thorough and focused on moral detail.⁵³⁰ In fundamentalist communities, attempting to act outside of the outlined standards is forbidden and warrants a strong punishment; in the case of ISIS, women must cover themselves completely, with any deviation from this resulting in a public beating.⁵³¹

4.3.3. 2. Sharp boundaries in the moral beliefs of fundamentalists

Moral absolutism is another major feature of fundamentalist thought, by which their beliefs are right and moral, and differing thoughts are wrong and immoral, often unreligious. There is little room for deviation away from the rules and beliefs set out by the fundamentalist, and any behaviour which differs, however slightly, from the set system results in being considered no longer a person of faith in the eyes of the fundamentalist group. Fundamentalist belief systems often promote an idea of a moralistic god who punishes and rewards human behaviour in accordance to scripture.⁵³²

Fundamentalist thought, it should be noted, may remain as a private conviction, or may manifest itself in ways which have no effect on others. However, the binary oppositions put

⁵²⁷ John Dadosky, ‘Sacralization, secularization and religious fundamentalism’ (2007) 36.3-4 *Studies in Religion/Sciences Religieuses* 513, 514, 515.

⁵²⁸ Cited in Andrew Charles Hoffmeister, *Fundamentalism and Modernity: A Critique of the "Anti-Modern" Conception of Fundamentalism* (Religious Studies Theses. Georgia State University 2006) 2.

⁵²⁹ *Ibid.*

⁵³⁰ Martin E Marty, ‘Fundamentalism as a Social Phenomenon’ (1988) 42.2 *Bulletin of the American Academy of Arts and Sciences* 15, 22.

⁵³¹ Ted Thornhill, ‘When women lived FREE in Afghanistan: Pictures show how they were once able to study, wear skirts and mix freely with men - before civil war, invasion and the Taliban enslaved them’ (23 January 2014) available online at: <<http://www.dailymail.co.uk/news/article-2543902/Photos-just-free-women-Afghanistan-Taliban-rule.html>> accessed on 22 August 2017.

⁵³² Luca Ozzano, ‘Religious Fundamentalism and Democracy’ (2009) 3.1 *Politics and Religion* 127, 128, 129.

forward by modern fundamentalist groups are exemplified most typically in the activity of the Taliban and Islamic State. Even in the case of Iran, which has been affected by fundamentalism in the past, religious freedom has been relatively present, with marginalised groups allowed to freely practice their religion.⁵³³ The promotion of moral and religious absolutism requires the creation of set rules and codes for behaviour; these often include restricted or compulsory dress, restricted speech, the criminalisation of certain sexual behaviours, restrictions on food and drink, bans on certain films and music, and many others.⁵³⁴

Fundamentalist groups are, without exception, intolerant of homosexuality, deviations from gender norms, and non-normative heterosexuality, while also imposing virginal standards on women and dress code, proclaiming secular women to be unvirtuous and idolatrous, the product of a godless western culture.⁵³⁵

The rules that are to govern an individual's behaviour as outlined by fundamentalist groups tend to impose a powerful affective dimension, an imitative, conforming dimension, by which traditional gender, familial and social norms are forcibly upheld, as well as the regulation of literature and media. Fundamentalist groups which hold beliefs relating to religious apocalypse rapture, and similar theories of annihilation are also prevalent. Gender roles and norms are a large component of much fundamentalist belief, with an emphasis on motherhood, patriarchal rule, and strict parenting.⁵³⁶

Another common characteristic of fundamentalism is a chosen congregation who are defined by their devotion to the scripture and to religious practice. Some fundamentalist groups are even more exclusive, with an innermost circle of followers surrounded by lesser ranking devotees. While these movements often encourage a cognitive separation of followers and unbelievers, this can sometimes go as far as the implementation of rules demanding the physical

⁵³³ Stacie I Strong, 'Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence' (1997) 19 Mich. J. Int'l L. 109, 152, 153.

⁵³⁴ Charles S Liebman, 'Extremism as a Religious Norm' (1983) 22.1 Journal for the Scientific Study of Religion 75, 77-79. For more information see: Cassandra Balchin, Deepa Shankaran, and Shareen Gokal, 'Religious Fundamentalisms on the Rise: A case for action' (2008) AWID (Association for Women's rights In Development) available at: Available at: <https://www.awid.org/sites/default/files/atoms/files/religious_fundamentalisms_on_the_rise_a_case_for_action.pdf> accessed 15 September 2017.

⁵³⁵ Lynn Davies, 'Gender, Education, Extremism and Security' (2008) 38. 5 A Journal of Comparative and International Education 611,619. For more information see: Judy Brink and Joan Mencher, *Mixed blessings: Gender and Religious Fundamentalism cross Culturally* (Routledge 2014).

⁵³⁶ Luca Ozzano, 'A Political Science Perspective on Religious Fundamentalism: Totalitarian Movement and Political Religions' (2009)10, 3-4 Routledge 339, 345. For more information see: Hiadeh Moghissi, *Feminism and Islamic Fundamentalism: The limits of Postmodern Analysis* (Zed Books 1999).

isolation of the believers from the rest of society, claiming their own land through often violent means.⁵³⁷ Those fundamentalist groups who are opposed to other religious groups often seize control of the land of these communities in order to establish a dedicated state for themselves and assert their dominion over other religious groups; this has been evidenced in Israel⁵³⁸, as well as by Hindu communities in India. The conflict over territory tends to be in holy locations or areas of particular religious significance to the fundamentalist group, though sometimes manifesting itself as the destruction of places of worship sacred to other religious sects.⁵³⁹ For instance, this activity has been observed in the conflict between ISIL and the Christian and the Yezidi population present on the Kurdish lands⁵⁴⁰. As relates to religious dress, the ‘haredim’ of Israel consists of strictly orthodox Jewish women who advocate for the wearing of full body covering, comparable to the burqa; this belief has been spread through the education system in some areas of Israel.⁵⁴¹

4.3.3.3. Absolutism and inerrancy in relation to fundamentalism

Fundamentalist thought tends to encompass the belief that the holy text is without fault, that it is the exact teaching of the divine, true and accurate in all particulars. Fundamentalist thought also tends to ignore, if not actively oppose, contemporary reading of the text or later revisions, refusing to acknowledge any interpretations developed by secularized philosophers. The word of the sacred text, then, is absolute and inerrable, with any attempt to modernise its words an affront to the text itself. Fundamentalist groups often claim to hold exclusive insight into the words and teaching found in the text, the standards to which they then hold society.⁵⁴² In cases such as Hinduism, in which the sacred text is not clearly delineated, one scripture is chosen as the holy text and abided by.⁵⁴³

⁵³⁷ Quintan Wiktorowicz, ‘Anatomy of the Salafi movement’ (2006) 29.3 *Studies in Conflict & Terrorism* 207, 219.

⁵³⁸ William Spencer, *Islamic Fundamentalism in the Modern World* (Twenty-First Century Books 1995) 19.

⁵³⁹ Pelletiere Stephen C, *A Theory of fundamentalism: An Inquiry into the Origin and Development of the Movement* (DIANE Publishing 1995) 19.

⁵⁴⁰ A/HRC/28/18, “Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups”: Human Rights Council. Twenty eighth session Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General.

⁵⁴¹ Jacob Lupu, *New Directions in Haredi Society: Vocational Training and Academic Studies* (Floersheimer Institute for Policy Studies, Limited Book 2005) 73.

⁵⁴² John Goldingay & James Barr, ‘on Fundamentalism’ (1977) 9.1 *Churchman* 295, 295.

⁵⁴³ Michael O Emerson & David Hartman, ‘The Rise of Religious Fundamentalism’ (2006) 32 *Annual Review of Sociology* 127, 134. See further: Balagangadhara, Rao & Jakob De Roover, *The Dark Hour of Secularism: Hindu*

This devout religiosity extends to the government, state and military component, as these bodies, too, must follow the laws and codes of behaviour dictated by the holy text; this was illustrated most notably by the Taliban and their operations in Afghanistan. While not every fundamentalist group extends their beliefs to their militaries and state apparatus, it is clear that these groups consider religion and state operation to be one and the same, that the state should prioritise religion in its political aims-. Failing this unity between religion and state, fundamentalist groups will attempt to create their own system of religious governance separate from that of the state government.⁵⁴⁴

While worshipping only the divine entity, or entities, of their religion, fundamentalist groups often center on an individual who represents the group, often a charismatic individual who can strengthen the number of the group through recruitment; this individual often claims to be divinely elected, with direct access to the divine. These organisations, then, can be said that have no bureaucracy in the sense of rational-legal division of power and competence.⁵⁴⁵ According to the work of Schlesinger, this strict adherence to the sacred text, without fail, results in violence and terror; if those who do not adhere to the text are considered heathens and against God, then those who believe themselves as acting according to God's will may have little remorse when inflicting violence upon the 'godless' to further the perceived cause⁵⁴⁶. He goes on to argue that "*fundamentalists of all faiths will continue to believe that they are serving God by mayhem and murder*".⁵⁴⁷ An example of this phenomenon can be found in the events in Mosul following the Islamic State occupation; the Christian population of the area were told to either pay a huge sum of money, convert, or die, and were so forced to flee, despite the historic presence of Christian communities in this area for thousands of years. It is also worth citing the words of *David Saperstein*, an Ambassador for the IRF (International Religious Freedom), "*There is an absolute and unequivocal need to give voice to the religiously oppressed in every land afraid to speak of what they believe in; who face death and live in fear, who worship in underground churches,*

Fundamentalism and Colonial Liberalism in India' (2013) Making sense of the secular: critical perspectives from Europe to Asia: 111-130.

⁵⁴⁴ John Dadosky, 'Sacralization, secularization and religious fundamentalism' (2007) 36.3-4 Studies in Religion/Sciences Religiousness 513, 519.

⁵⁴⁵ Jakobus M. Vorster, 'Perspectives on the Core Characteristics of Religious Fundamentalism Today' (2008)7.21 Journal for the Study of Religions and Ideologies 44, 55.

⁵⁴⁶ Cited in Danial O. Conkle, 'Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in contemporary America' (1995-1996) 12.2, Journal of Law and Religion 337, 341.

⁵⁴⁷ Cited in Armando Favazza, *PsychoBible: Behaviour, Religion & the Holy Book* (Pitchstone Publishing, Charlottesville, 2003) 326.

mosques or temples, who feel so desperate that they flee their homes to avoid killing and persecution simply because they love God in their own way or question the existence of God”.⁵⁴⁸

Fundamentalist thought dictates that there will be an end point to their worship and devotion, which will involve their reward and the punishment and suffering of non-believers; some groups have taken it upon themselves to enact the judgement of their religion.

The leaders of these groups are almost exclusively male, who take the word of the holy texts as direct commands which govern the rules of society, including dress codes for men and women. Rather than focusing on the rights of the people, religious duty is the focus; for example, the leaders of the Iranian Revolution made the hijab mandatory following the removal of the Shah⁵⁴⁹. Khomeini implied that the state knows better the interests of women than the women themselves. The ECtHR, then, supports the national courts in deciding what it is best for Muslim women to wear, which some have argued is a violation of freedom of choice and constitutes the oppression of women. In both cases, including that of the Iranian regime and ECtHR, women are deprived of the decision as to how to manifest their religion.

4.3.3. 4. Selectivity as an aspect of Fundamentalism

Fundamentalist groups are often very particular about their codes of behaviour and worship. Despite considering the word of the holy text absolute, fundamentalists often put more emphasis on certain elements of the text than on others, usually more extreme selections from the sacred text, in order to remain distinct from the rest of religious society.⁵⁵⁰ Despite being vocally opposed to modern interpretation, fundamentalist groups, more often than not, adopt modern means of implementing and enforcing their religious views, such as the use of communication technology and high-tech weapons when involved in armed conflicts. Further, there is also a selection of behaviours exhibited by those they believe to be godless which fundamentalists take an extreme opposition towards, such as homosexuality or abortion.⁵⁵¹ While denouncing many

⁵⁴⁸ Cited in ‘Executive Summary 2014 International Religious Freedom Report’ available at: <https://www.state.gov/documents/organization/238390.pdf> accessed on 20 September 2016. See further: Armando Favazza, *PsychoBible: Behaviour, Religion & the Holy Book* (Pitchstone Publishing, Charlottesville, 2003).

⁵⁴⁹ Rhoya Selden, ‘Women and the Moral Politics of Dress in Twentieth Century Tehran’ (2016).p.25-30.

⁵⁵⁰ Douglas Pratt, ‘Terrorism and Religious Fundamentalism: Prospects for a Predictive Paradigm’ (2015) 11.1 Marburg Journal of Religion 1, 4.

Also refer to: Claudia Derichs, & Andrea Fleschenberg, *Religious Fundamentalisms and their Gendered Impacts in Asia* (Friedrich-Ebert-Stiftung, Department for Asia and the Pacific 2010)28.

⁵⁵¹ Richard T. Antoun, ‘Fundamentalism, Bureaucratization, and the State's Co-Optation of Religion: A Jordanian Case Study’ [2006]38.03 International Journal of Middle East Studies 369, 370,371.

forms of modernity, fundamentalist groups will adopt certain modern amenities if they aid in furthering the cause; in other words, fundamentalist thought is very accepting of modern goods and services, but strictly opposed to modern ideologies, values and cultures.

It is clear that fundamentalist thought does not adhere strictly to archaic versions of religious practice, though it opposes almost all form of modernity except those which can be utilised in the name of the divine. Interpretations of the texts, then, select key causes and practices which are then taken on as staples of the fundamentalist movement, such as head coverings or the acquisition. In other words, fundamentalist are selective in relation to modernity, accepting most of its material features particularly those related to technology, media and institutions, but categorically rejecting its cultural relativism and religious pluralism and secular values in the society.⁵⁵² Many have argued that the actions of fundamentalist groups tend to interpret the scripture to fit their own political, rather than religious, motives. The key to fundamentalist thought, then, can be found by observing the teachings and interpretations of the group leaders and those who brand themselves as being divine, instead of turning to the holy texts themselves. Some of the ideals held by fundamentalist groups are often unrelated to the scripture, as in the case of Buddhists in Sri Lanka where fundamentals of the movement were found to be from traditional poems and non-religious texts, rather than from any holy book.⁵⁵³

4.4. Is fundamentalism applicable as a concept in other religions beside American Protestantism?

The term fundamentalism can be often misleading. As already mentioned, it was originally employed in a discourse of American Protestants who sought to strengthen and protect the 'fundamentals' of their faith. This was essentially in response to liberal Protestants who were seen as non-conforming elements within the church that could threaten the purity of the faith.⁵⁵⁴ However, fundamentalism as a term is often used outside of the above-mentioned historical context. More specifically, it has been employed regularly when referring to different strands within Judaism, Islam or other religions. As such, this term has been broadened to encompass

⁵⁵² Luca Ozzano, 'A Political Science Perspective on Religious Fundamentalism: Totalitarian Movement and Political Religions' (2009)10. 3-4 Routledge 339, 352.

⁵⁵³Martin E Marty & R. Scott Appleby. *Fundamentalisms Comprehended*. (Vol. 5 University of Chicago Press, 2004)52.

⁵⁵⁴ Henry Munson, 'Fundamentalisms' Compared' (2008) 2.4 Religion Compass 689, 691

certain attitudes that persist more or less in all religions.⁵⁵⁵ Consequent to the wide-spread use of the term ‘fundamentalism’ with respect to an array of religious beliefs, there is an ongoing debate regarding the appropriateness of employing such a term in discourses focusing on contemporary issues within world’s major religions.

When examining a very pertinent question ‘what is meant by fundamentalism in contemporary discourses?’ Karen Armstrong⁵⁵⁶ in her probe into the history of religious fundamentalism offers a very useful starting point. According to her, this term is very closely related to a type of thinking that is considered reactionary and a hindrance to progress. However, the very essence of this term, based on its origins in North American Protestantism, revolves around the effort by adherence a religion to preserve the ‘purity’ of their religious teaching by interpreting religious texts literally.⁵⁵⁷ Although having its meaning significantly widened since its origins, the term ‘fundamentalism’ is still sourced to one specific religion – Christianity – which should logically limit its usage with respect to other religious traditions. Otherwise a literal translation of the term ‘fundamentalism’ without taking into consideration its contextual understanding can render quite dramatic changes in meaning. Among many reasons supporting this limitation, one factor stands out. The term ‘fundamentalism’, if understood outside its historical context (as going back to fundamentals of religion) and employed in non-Western settings and discourses, as for example in the context of Islam, can acquire a very strong positive connotation, representing a high level of obedience and compliance with religious teachings. Such understanding of fundamentalism then can paradoxically be synonymous for a large number of Muslims with piety. Moreover, acknowledging that obedience to traditions and core teachings constitutes a positive qualitative attribute - in other words being an obedient Muslim equals being a pious Muslim - means that any deviation within Islam that might challenge these traditions and teachings is inevitably perceived negatively.⁵⁵⁸ However, the main concern is the emergence of

⁵⁵⁵ Douglas Pratt, ‘Terrorism and Religious Fundamentalism: Prospects for a Predictive Paradigm’ (2015)11.1 Marburg Journal of Religion 1. For more information on debate on applicability of fundamentalism to other religions see: Malise Ruthven, *Fundamentalism: The Search for Meaning* (OUP Oxford 2005) 246

⁵⁵⁶ Karen, Armstrong, *The Battle for God: A History of Fundamentalism* (ALFRED A. KNOPF, NEW YORK 2010).5, 6.

⁵⁵⁷ Gurnam Singh & Stephen Cowden, ‘Multiculturalism’s New Fault Lines: Religious Fundamentalisms and Public Policy’ (2011) 31.3 Critical Social Policy 343, 354-355. For further information see: John, Dadosky, ‘Sacralization, Secularization and Religious Fundamentalism’ (2007)36.3-4 Studies in Religion/Sciences Religieuses 513, 514, 515.

⁵⁵⁸ Singh Gurnam & Stephen Cowden, ‘Multiculturalism’s New Fault Lines: Religious Fundamentalisms and Public Policy’ (2011)31.3 Critical Social Policy 343, 355. For further information see: Bassam, Tibi, *The Challenge of Fundamentalism: Political Islam and the New World Disorder* (Vol. 9. Univ of California Press 2002)

intolerant behavior among religions, not trend towards piety and purity. In this respect, *Bhatt* emphasises the necessity to distinguish between fundamentalism signifying ‘a return to fundamentals’ and deep-seated intolerance towards everything foreign or new. The author therefore employs the term ‘religious absolutism’ to refer to fundamentalism as a new religious movement seeking the absolute truth within their religious beliefs.⁵⁵⁹

It is apparent that the way in which the term ‘fundamentalism’ is being employed in academic discourses has led to an array of controversies. The potential issues related to using this term can be summarise into four key points. First, as was already discussed, the origins of this term are very specific and are bound to the context of North American Protestantism which might render the use of this term with respect to other religious beliefs highly problematic.⁵⁶⁰ To deal with the limitation related to its Christian origins, *Wacker* suggests that the use of the term ‘fundamentalism’ outside this context does not necessarily have to pose a problem. Not only such usage has become more and more common both in public and academic discourses, but any issue concerning this matter can be avoided by employing the term ‘historic fundamentalism’, denoting the origins of fundamentalism both as a concept and a term.⁵⁶¹ The foregoing might be a helpful means of differentiating between various strands within Christianity; yet, this does not answer the criticism aimed at the decisions adopted by the ECtHR⁵⁶² with respect to wearing the headscarf. The reason for this is the fact that the Court has employed the concept of fundamentalism in general, thus not making a clear distinction in terms of the specific type or concept of fundamentalism involved. Second, the term has clear conceptual flaws given its ambiguity, vagueness and the tendency to be interpreted in a large number of ways, thus decreasing its value

⁵⁵⁹ Chetan Bhatt, ‘The Fetish of the Margins: Religious Absolutism, Anti-racism and Postcolonial Silence’ (2006) 59 *New formations* 98. For further information see: Singh Gurnam & Stephen Cowden, ‘Multiculturalism’s New fault lines: Religious Fundamentalisms and Public Policy’ (2011) 31.3 *Critical Social Policy* 343, 355.

⁵⁶⁰ *Supra* no 547. For further information see: Anne Aly & Jason-Leigh Striegher, ‘Examining the Role of Religion in Radicalization to Violent Islamist Extremism’ [2012]35.12 *Studies in Conflict & Terrorism* 849. Also see: Mitchell D Silber and others, *Radicalization in the West: The Homegrown Threat* (New York: Police Department 2007) 92. Also see: David H Watt, ‘Muslims, fundamentalists, and the Fear of the Dangerous other in American Culture’ (2010) 12 *Journal of Religion & Society*1, 5.

⁵⁶¹ Grant Wacker, ‘The Rise of Fundamentalism’ (Duke University Divinity School) Available online at: <<http://nationalhumanitiescenter.org/tserve/twenty/tkeyinfo/fundam.htm>> accessed 04 April 2016. For more on the ‘historical fundamentalism’ see the following: Luca Ozzano, ‘A Political Science Perspective on religious Fundamentalism: Totalitarian Movement and Political Religions (2009)10. 3-4 *Routledge* 339, 341

⁵⁶² *Şahin v. Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819. See also: *Dahlab v. Switzerland* (Application no 42393/98) (ECHR 15 February 2001) ECHR 899. See: *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495. See *Kalaç v Turkey* (Application No.20704) (01 July1997) 27 EHRR 552, 558. See also *Engel and others v The Netherlands* (Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (ECHR, 8 June 1976) 1 EHRR 647.

in domain-specific academic discourses and judicial application in cases. It has been suggested that the conceptual flaws in the term ‘fundamentalism’ revolve around the phenomenon known as ‘concept overstretching’. This is in simple terms a conflict between either defining a concept very narrowly, thus preventing the wider application of this term, or, to broaden the conceptual basis of the term whilst risking that the term becomes too vague to offer any value in a judicial context. In case of the term ‘fundamentalism’ both extremes are observed. However, it should be noted that this can be said for most concepts employed in social sciences including ‘democracy’, ‘religion’; hence, the alleged conceptual flaws should not prevent the use of the term ‘fundamentalism’ in academic and public discourses.⁵⁶³ The main concern is using these ambiguous concepts in the legal context, as it is clear judicial bodies have to make decisions based on the solid and precise evidence.

Third, as the term is predominantly based on religious narratives, its use in political discourses is substantially limited. The apparent lack of the term’s relevance in discussions regarding political questions can be countered by highlighting the primary focus of ‘fundamentalists’. They, as opposed to traditionalist who are more concerned with preservation of their religious beliefs’ purity, focus predominantly on widening the role of religion in the public sphere whilst guarding their teachings and practices from being diluted through interaction of their communities with other elements of the public and political sphere⁵⁶⁴ - thus emphasizing the role of religion in public sphere.

Fourth, the contemporary term ‘fundamentalism’ is connected with prejudices and biases towards religions particularly Islam.⁵⁶⁵ This phenomenon can be illustrated by the example of media’s largely negative coverage of anything related to the Islamic fundamentalism.

It has been shown in this section that there is currently no consensus among scholars regarding the appropriateness of applying the term fundamentalism in contexts other than the one in which it historically originates. However, since this term has been commonly employed in the contemporary discourse regarding Islam and Islamic movements, it is vital to elaborate on the ongoing discussion of the usability of the term fundamentalism in the context of Islam.

⁵⁶³ Gabriel Ben-Dor & Ami Pedahzur, ‘The Uniqueness of Islamic Fundamentalism and the Fourth Wave of International Terrorism’ (2003) 4.3 Totalitarian Movements & Political Religions 71, 72, 73.

⁵⁶⁴ Carter Haynes, ‘A Case for Flexible Epistemology and Metamethodology in Religious Fundamentalism Research (2010)6.3 Integral Review 36, 37, 38.

⁵⁶⁵ Anwar Alam, ‘Political Management of Islamic Fundamentalism A View From India’ (2007)7.1 Ethnicities 30, 32, 33.

4.4. 1. The Debate surrounding the use of the term fundamentalism in the Islamic context

It seems that the most frequent target of statements regarding the term ‘fundamentalism’ of recent has been Islam and Muslim communities all around the world. According to the available body of literature on this subject, the use of this term in relation to Islam was however almost non-existent prior to the Iranian revolution in 1979.⁵⁶⁶ One of the few exceptions in this regard was a work of *Hamilton Gibb* that discussed Wahhabism and the Islamic movements that were a part of religious reawakening during the 18th and 19th century.⁵⁶⁷ In addition, *Arnold Toynbee* applied this term in 1931 to refer to ‘traditionalist’ Muslims.⁵⁶⁸ Among Islamic scholars, *Aziz Ahmad*, one of the prominent academic figures in 1960s, employed the term ‘fundamentalism’ to denote the religious views of *Shah Waliullah* (1703-1762) living in India and *Mohamad Ibn Abd al Wahhab* (1703-1787) residing in Najd, a part of present day Saudi Arabia.⁵⁶⁹ In the aftermath of the Islamic revolution in Iran, the term fundamentalism began to be used both in reference to different cultures and religions (gradually extending from Protestantism to Islam and later to other religious traditions) and with a pejorative bias.⁵⁷⁰ One can go even further and argue that the popular use of this term in the West has over time focused exclusively on Islamic fundamentalism. Such a perception of the term has been encouraged by Western governments which have repeatedly highlighted Islamic fundamentalists as being the major post-Cold War security threat.⁵⁷¹ Moreover, this narrowly defined and understood concept of fundamentalism is strongly related to persisting and ever-growing Islamophobia in the West, whereby although having clear negative connotations, the term is still being applied indiscriminately to the majority of the Muslim population in Western countries.⁵⁷² However, the foregoing is not only a rhetorical and academic

⁵⁶⁶ Fred Halliday, ‘The Politics of ‘Islam’—A Second Look’ (1995) 25.03 *British Journal of Political Science* 399, 400, 401. For further information see: Lawrence, Kaplan, *Fundamentalism in comparative perspective* [Univ of Massachusetts Press 1992] 184. For more information on discussion about fundamentalism in the Islamic context see: Timothy D, Sisk, *Islam and Democracy: Religion, Politics, and Power in the Middle East* (US Institute of Peace Press 1992) 84.

⁵⁶⁷ Cited in Rosemary R, Corbett, ‘Islamic “Fundamentalism”: the Mission Creep of an American Religious Metaphor’ (2015) *Journal of the American Academy of Religion* 1, 11, 12

⁵⁶⁸ Cited in Martin Kramer, ‘Coming to Terms: Fundamentalists or Islamists?’ (2003) 10.2 *Middle East Quarterly* 65. Also see: Lina Khatib, ‘Communicating Islamic Fundamentalism as Global Citizenship’ (2003) 27.4 *Journal of Communication Inquiry* 389, 390-394.

⁵⁶⁹ Discussed in Malise Ruthven, *Fundamentalism: A very Short Introduction* (Vol. 155. Oxford University Press 2007) 4, 9, 19, 20, 35.

⁵⁷⁰ Henry Munson, ‘Fundamentalism ‘Ancient & Modern’ (2003) 132.3 *Daedalus* 31, 33.

⁵⁷¹ Andrew Heywood, *Political ideologies: An introduction* (5th edition, Palgrave Macmillan, 2012) 392.

⁵⁷² Emr Ye Bagdagul Ormanci, ‘Mediterranean Security Concerns and NATO’S Mediterranean Dialogue’ (1998) *Mediterranean Security Concerns and NATO’S Mediterranean Dialogue* 1, 22. For further information see: Wasif

issue, but as seen in the example of the ECtHR's decisions where the notion of Islamic fundamentalism has been used to endorse calls for restricting religious manifestation, particularly the wearing of the headscarf in the absence of any compelling evidence. The arbitrarily made correlation between Islam and fundamentalism can have considerably negative consequences for the Muslim minority.⁵⁷³ As already mentioned, the term fundamentalism and fundamentalist have acquired very negative connotations; hence its use to label large sections of population is particularly problematic. The foregoing arguments has served as an impetus to a considerable number of scholars within the Islamic world to promote the use of terms such as 'Islamism' or 'political Islam, integrism, neo- traditionalism, Islamic nativism, Jihadism, Militant Islam; although, none of these terms is completely free of criticism.

For instance, 'Islamism' which has been promulgated by many scholars as an alternative term for 'fundamentalism' can be confusing given the fact that this term was once applied by scholars in France in 18th century as a word synonymous with Islam. Munson goes further and criticises the term 'Islamism' for being a form of unfortunate neologism.⁵⁷⁴ In addition, the term 'Islamism' is arguably quite broadly defined, general and a vague term, whereby its widespread use might be dismissive towards the complexity of Islam and its array of various strands, schools and trends.

Similarly, the term 'Political Islam' often fails to acknowledge various dimensions of fundamentalism. More specifically, the reason why Political Islam cannot encompass the term fundamentalism in its essence is because the latter incorporates dimension of not only political, but also religious, social and ideological character. Moreover, the notion that all groups bearing

Shadid & Pieter S. van Koningsveld, 'The Negative Image of Islam and Muslims in the West: Causes and Solutions: Religious freedom and the neutrality of the state: the position of Islam in the European Union' (2002) Leuven: Peeters 174. Also see: Ramon Grosfoguel. 'The multiple faces of Islamophobia' (2012) 1.1 Islamophobia Studies Journal 9

⁵⁷³ *Şahin v. Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819. See also: *Dahlab v. Switzerland* (Application no 42393/98) (ECHR 15 February 2001) ECHR 899. See: *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495. See *Kalaç v Turkey* (Application No.20704) (01 Julay1997) 27 EHRR 552, 558. See also Engel and others v The Netherlands (Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (ECHR, 8 June 1976) 1 EHRR 647

⁵⁷⁴ Cited in Ruthven Malise, *Fundamentalism: The Search for Meaning* (Oxford: Oxford University Press 2004) 35. For further information see: Nezar AlSayyad, & Mejgan Massoumi, *The Fundamentalist City? Religiosity and the Remaking of Urban Space* (eds, Routledge 2010)328. Also refer to: Martin Kramer, 'Coming to Terms: Fundamentalists or Islamists?' (2003)10.2 Middle East Quarterly 65. Also see: Jeffrey M, Bale, 'Islamism and Totalitarianism' (2009) 10.2 Totalitarian Movements and Political Religions 73. For information on the term 'Islamism' see: Wolfgang et al Wagner, 'The veil and Muslim women's identity: Cultural Pressures and Resistance to Stereotyping' (2012) 18.4 Culture & Psychology 521, 10 -11.

characteristics of political Islam are essentially fundamentalist is erroneous. For instance, besides fundamentalist parties, there are political groups employing rhetoric and means of a moderate version of political Islam, including calls for transformation of the society and the political system based on democratic principles. A good example in this regard is Tunisia, where the Ennahda party became the first Islamist movement to gain power in the aftermath of the Arab 'spring' in 2011. More importantly, this very party did not hesitate to acknowledge its defeat in the last elections and enabled a peaceful exchange of executive power within the country.⁵⁷⁵

Another term proposed as an alternative to fundamentalism is Jihadism. This term has gained the tragic events of prominence particularly after 9/11. The key problem with Jihadism in this regard is its inevitable connection with violence and terrorism, whereas fundamentalism does not necessarily imply acts of violence or terror.⁵⁷⁶ To put it simply, although there exists a large group of devoted Muslims for whom Islam is the only way to eternal salvation, they do not intend to impose their views on others in a violent way or cause harm to others for not sharing these views.

There is a consensus among scholars that in the Qur'an, the word Jihad is used to call upon believers to surrender their properties and themselves in the path of Allah to make it succeed. The principal purpose of this is to 'establish prayer, give *Zakat*, command good and forbid evil'. It also enjoins believers to struggle against unbelievers to convert them to Islam. The first type, which entails peaceful means has been described as 'jihad of tongue' and 'jihad of pen' and are regarded as 'the greater jihad'. The second type, involving struggle and aggression, is regarded as 'the smaller jihad'. It is worth noting that the verses related to the 'the greater jihad' are primarily 'instructive'; regarding 'the smaller jihad' unlike the 'instructive' orientation of earlier verses, these verses are oriented to 'motivating' and 'mobilising' the believers to participate in jihad. Furthermore, there is deep disagreement among scholars whether the Qur'an allows fighting the unbelievers as a defence against aggression or under any circumstances.⁵⁷⁷

⁵⁷⁵ Kasper Ly Netterstrøm, 'The Islamists' Compromise in Tunisia' (2015)26.4 Journal of Democracy 110, 110. For more information on political Islam in Tunisia see: Sarah R, Loudon, 'Political Islamism in Tunisia: A History of Repression and a Complex Forum for Potential Change' [2015]4.1 Mathal 1

⁵⁷⁶ Erin Saltman, & Charlie Winter, 'Islamic State: The Changing Face of Modern Jihadism' (2014) London: Quilliam 1, 22. (report) For further information see: David H Watt, 'Muslims, Fundamentalists, and the Fear of the Dangerous other in American Culture' (2010) 12. Journal of Religion & Society 1,5

⁵⁷⁷ Shahram Akbarzadeh, and Fethi Mansouri, *Islam and Political Violence: Muslim Diaspora and Radicalism in the West*. (Vol. 34. IB Tauris 2010) 272, 125,126. For further discussion on Jihad in Islam see: Gabriele Marranci, *Jihad Beyond Islam* (Berg Publishers 2006)192.

The leader of the Iranian Revolution of 1979, the late *Ayatollah Ruhollah Khomeini*, placed much emphasis on the greater jihad arguing that man's worst enemy is his "lower self" and that this is the root cause of "human depravity." To rally the masses further, *Khomeini* used early Muslims throughout history as examples of how they conquered the jihad within before waging jihad against nonbelievers. Thus, one sees that Islam's historical eschatological elements have always held the belief that the oppressed would arise victorious against the oppressors.⁵⁷⁸ So the term of 'Jihadism' instead of 'fundamentalism' leads to different perception among people. Not all adherents of jihadism subscribe to the use of violence as part of religious practice.

According to *Lewis*, it can be misleading to employ the term fundamentalism with respect to characterising Islamic movements. This is because changes in how Islam is practiced, and movements to modernise Islam, are shunned by fundamentalists, whose views do not represent all of Islam.⁵⁷⁹ Further, *Esposito*, who has been in a vocal opposition towards employing this term, claims that using this term portrays Islam as a regressive, stagnant, intolerant and violent religion. As an alternative, he proposed the term 'Islamic revivalism'.⁵⁸⁰

It has been argued by a number of scholars⁵⁸¹ that another misleading aspect of using the term fundamentalism with reference to Islam and Muslims is its historical meaning and the link between this meaning and Protestants' adherence to Bible as the unmediated word of God. In the context of Protestantism, fundamentalists were those believing in biblical inerrancy whilst more liberal Protestants opposed this idea. However, applying such distinction with respect to Islam is fallacious as all Muslims maintain that the Qur'an is the word of God which is thus flawless and irreproachable. Hence, in this respect, all Muslims could be marked as fundamentalists; this however would not only be erroneous but it would also prevent making a necessary distinction between militant Islamic groups whose ultimate goal is to Islamize the society and those Muslims who do not share such ambitions and are completely focused on building their relationship with

⁵⁷⁸ Inafuku Eric. 'How Does the 1979 Iranian Revolution Affect Current Iranian Fundamentalism and International Politics?' (2010) 5.3 Journal of Applied Security Research 414, 416

⁵⁷⁹ Lewis Bernard, *Faith and Power: Religion and Politics in the Middle East* (Oxford University Press 2010) 59. For more information on apply the term of fundamentalism to Islam see: Barbie Zelizer and Stuart Allan, *Journalism after September 11* (London, Routledge, 2002) 287

⁵⁸⁰ Esposito John L, *The Islamic Threat: Myth or Reality?* (Oxford University Press 1999) 5,6

⁵⁸¹ Martin Kramer, 'Coming to Terms: Fundamentalists or Islamists?' (2003)10.2 Middle East Quarterly. See also: William L Cleveland & Martin Bunton, *A History of the Modern Middle East* (Hachette UK, 2016).

God through piety and devotion including engaging in religious practices and expression of their faith through the use of attire such as Muslim women wearing the headscarf.⁵⁸²

4.5. An Exploration of the Relationship between Fundamentalism and Religious Manifestations in the Decisions of the ECtHR

Though fundamentalist thought once separated itself from contemporary society, modern religious fundamentalists have begun to incorporate societal factors into their ideas and ideologies; no longer are their discourses insular processes, relating only to anomalous organisations, instead they wish to spread these ideas and promote them as the ideal. In efforts to spread these ideas, modern fundamentalist groups have increased their activities in the wider community. While these groups consider themselves to be primarily political in motive, there is almost always religious dogma at the heart of these movements. There has been much disagreement between academics as to the extent to which theological freedom of expression and the implementation of fundamentalist thought is a necessary part of belief and religious community. There is an academic question, as well as a highly debated judicial question, as to whether fundamentalist teachings should be censored outright, or whether each case of possible fundamentalist preaching should be taken individually, as it has been argued that not all individuals or groups attempting to spread fundamentalism are doing so at the detriment to the rights of others. Contextually, European legal institutions have not, historically, differentiated between different ‘fundamentalist’ communities and individual, often curtailing religious manifestation across the board without examining the details of how and why fundamentalism was being spread, and what exactly was being proclaimed. Moreover, with respect to fundamentalism, a distinction was not made by the ECtHR between an individual actively participating in the fundamentalist group engaged in illegal activities and an individual wearing the headscarf purely out of personal devotion.⁵⁸³ By the same token, both individuals got sacked from education institution and relieved of their military responsibility.

It is important to highlight that given the way in which ‘religious manifestation’ and ‘fundamentalism’ have been previously understood, the occurrence of legal issues revolves around

⁵⁸² Lewis Bernard, *Faith and Power: Religion and Politics in the Middle East* (Oxford University Press 2010) 5. For further information see: Guilain Denoeux, ‘The forgotten swamp: Navigating Political Islam’ (2002) 9.2 Middle East Policy 56.

⁵⁸³ *Kalaç v Turkey* (Application No.20704) (01 July 1997) 27 EHRR 552, 558. See also: *Engel and others v The Netherlands* (Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (ECHR, 8 June 1976) 1 EHRR 647. Also see: *Karaduman v. Turkey* (Application no. 16278/90) (ECHR 1993) 74 DR93.

public expression of individual's and group's beliefs. Hence, a more precise analysis of the ECtHR's decisions can be assisted by comprehensive elaboration of the terms in question.

4.5.1. Relationship between Fundamentalism and Freedom of Religious Expression

Religious freedom is widely acknowledged to be a basic right, and can be taken to mean the right to express one's own religious or ideological set of beliefs without fear of persecution. There has, however, been much debate in academia and government as to how this relates to fundamentalist expression, as it has been argued that the spread of fundamentalist belief is at odds with, even a threat to, the freedom of other individuals and groups. Many have argued, however, that fundamentalist beliefs should hold the same right to be expressed as other religious beliefs on the condition that their expression does not infringe on the rights of others in society.⁵⁸⁴ Consequently, fundamentalism must be considered from two different perspectives, from the interior and the exterior, where the former is a fundamental right and the latter can, in some instances, be restricted. Thus, in this section the main focus will be on the relationship between fundamentalism and religious manifestation in general without considering ECtHR cases.

Fundamentalist belief, considered internally, is based on a purely literal understanding of religious text, whereby any deviation is dismissed;⁵⁸⁵ this aspect of fundamentalism is problematic in terms of human rights, as it can be argued that much of the Islamic doctrine seems to be at odds with much of the human rights legislation which must be adhered to globally. To provide an example, the Salafi movement is based on a word for word interpretation of Islamic texts, that, according to the Hadith which is one of the primary sources of sharia, "Every bid'ah (innovation) is a going astray and every going astray is in Hell-fire"; this ideology dismisses any attempt to advance human rights which does not adhere exactly to the text as 'un-Islamic', as any command in a religious text can be considered holy, and therefore higher than any command given by a human establishment.⁵⁸⁶ Further, fundamentalist groups use religious texts as justification to impose archaic ideas of societal order, rigid instructions on dress, steeped in patriarchy and strict moral judgement.

⁵⁸⁴ See, for example, Lawrence A. Uzzell, 'Religious Human Rights Discrimination?' (2005) 28.3 Report Public Justice, 2.

⁵⁸⁵ Lyman Kellstedt, & Corwin Smidt, 'Measuring Fundamentalism: An Analysis of Different Operational Strategies' (1991) 30.3 Journal for the Scientific Study of Religion: 259, 260-265.

⁵⁸⁶ Ahmad Moussalli, 'Wahhabism, Salafism and Islamism: Who is the Enemy?' (2009) 1 A Conflict Forum Monograph. For further information on the views of Salafi see: Quintan Wiktorowicz, 'Anatomy of the Salafi movement' (2006) 29.3 Studies in Conflict & Terrorism 207

This form of fundamentalist expression, often termed ‘idealistic fundamentalism’, focuses on the involvement of religious bodies in public activities, often based in morality and tradition informed by religion; these beliefs are often expressed by moralistic preacher and vocal religious figures.⁵⁸⁷ This imposition of fundamentalist ideas onto public life and law often extends to controlling how individuals interact, dress, and go about their daily lives; these regulations most commonly affect women⁵⁸⁸, as the ideal fundamentalist society tends to be informed by patriarchy, causing many feminists to fiercely oppose the expression of some fundamentalist beliefs.

Such opposition has been expressed by journalist *Polly Toynbee*, who criticised Islam, alongside Christianity and Judaism, as upholding beliefs which explicitly express a hatred of the female body; she cites rituals of humiliation, churching (i.e. ritual after child birth), the regulation of reproductive rights, arranged marriages, a disparity in the marriage rights of men and women, purifying baths, and the ostracisation of ‘unclean’ women as just a few of the acts decreed by religious doctrine which oppress women. She argues that “*all extreme fundamentalism plunges back into the dark ages by using the oppression of women (sometimes called ‘family values’) as its talisman*”.⁵⁸⁹

While some may argue that the testimony of a white, British journalist may hold little credibility in the context of Islamic fundamentalism, this view has been supported by the WAF (Women’s Action Forum), based in Pakistan, who have expressed their belief that “*at the heart of the fundamentalists’ agenda is the control of women’s minds and bodies. [All] support the patriarchal family as a central agent of such control. They view women as embodying the morals and traditional values of the family and the whole community*”.⁵⁹⁰

Elsewhere in the Middle East, there have been similar assertions; two scholars at Birzeit University, *Rema Hammami* and *Islah Jad*, have written that “*the commonality between movements profoundly lies in their obsessive focus on the rights, rules and behaviour of women as*

⁵⁸⁷ Ruthven Malise, *Fundamentalism: The Search for Meaning* [Oxford: Oxford University Press 2004] 4, 9, 19, 20

⁵⁸⁸ Sophia Korb, ‘Mothering Fundamentalism: the Transformation of Modern Women into Fundamentalists’ (2010) 29.2 *International Journal transpersonal Studies* 68, 74. Also see: Lisa Blaydes, & Drew A. Linzer, ‘The political Economy of Women’s Support for Fundamentalist Islam’ (2008) 60.4 *World Politics* 576

⁵⁸⁹ Polly Toynbee, ‘Behind the Burka’ (2001) 10.4 *Women’s History Review* 575, 576. For more information see: Lynn Davies, ‘Gender, Education, Extremism and Security [2008]’ 38. 5 *A Journal of Comparative and International Education* 611, 618.

⁵⁹⁰ Sheila Jeffreys, *Man’s Dominion: The Rise of Religion and the Eclipse of Women’s Rights* (Routledge, 2013) 232, 33.

pivotal to both their strategy of rule and as an aim in itself".⁵⁹¹ Similarly, Gita Saghal (writer, journalist, activist with Amnesty International) and Nira Yuval-Davis (Women rights activist and lecturer), in their work *Refusing Holy Orders, Women and Fundamentalism in Britain*,⁵⁹² have explained that the way in which fundamentalism operates revolves around social order, which relies heavily on the religious subjugation of women. This order is established and maintained through categorising women, based on their actions and behaviours, into proper and improper women; in addition to this, women also hold a cultural burden, as it is their responsibility to teach the traditions of the society to the next generation. To ensure this process is effective, marriage guarantees that the offspring of 'proper' women exist within this collective, ensuring a biological and ideological 'purity'.

These beliefs have very real consequences, as demonstrated by an incident in 2001 which led to the death of 15 girls in Jeddah boarding school when a fire began in their sleeping quarters. These girls were enclosed in the dormitory by the religious police, who enforced them back into a blazing building because they were not adhered to the strict dress code of the religion. The eye witnesses said that religious police stopped men who tried to help girls escape from the building, saying, "*It is sinful to approach them*".⁵⁹³ In response, the executive Director of the Middle East and North Africa division of Human Rights Watch, Hanny Megally, released a statement which said the following: "*women and girls may have died unnecessarily because of extreme interpretations of the Islamic dress code. State authorities with direct and indirect responsibility for this tragedy must be held accountable*".⁵⁹⁴

On the other hand, fundamentalists often approach their preaching in a way which directly, sometimes aggressively, opposes other religious communities and personal faiths; this process often involves the acquisition of land through violent means, as observed in Israel.⁵⁹⁵ In another

⁵⁹¹ Rayah Feldman & Kate Clark, 'Fundamentalism, Women's Empowerment and Reproductive Rights' [1996] 4 RHM 12, 13. For further information see: Islah Jad, 'Islamist Women of Hamas: Between Feminism and Nationalism' (2011) 12.2 Inter-Asia Cultural Studies 175, 175.176,177.

⁵⁹² Sahgal Gita & Nira Yuval-Davis, *Refusing Holy Orders: Women and Fundamentalism in Britain* (Virago Press 2000) For further information see: James Donald & Ali Rattansi, 'Race, Culture and Difference' (Vol. 1 Sage 1992)284, 285.

⁵⁹³ '15 girls die as zealots 'Drive Them into Blaze' (15 May 2010) available at: <<http://www.telegraph.co.uk/news/worldnews/middleeast/saudi-arabia/1387874/15-girls-die-as-zealots-drive-them-into-blaze.html>> Accessed 25 August 2017.

⁵⁹⁴ 'Saudi Arabia: Religious Police Role in School Fire Criticized' available at: <<https://www.hrw.org/news/2002/03/14/saudi-arabia-religious-police-role-school-fire-criticized>> accessed 24 September 2017).

⁵⁹⁵ Ian S Lustick, 'Israel's Dangerous Fundamentalists' (1987) 68 Foreign Policy 118, 118-120. For more information see: Israel Shahak & Norton Mezvinsky, *Jewish Fundamentalism in Israel* (London: Pluto Press, 1999).

example, an attack by fundamentalist Hindus on Christians in Orissa, India claimed 60 lives taken and 50,000 Christians were driven away through persecution in 2008. The collection of eyewitness accounts includes numerous stories depicting the brutality of the attackers, whereby the victims faced threats and beatings through which they sustained serious injuries. Among these victims were also children, the elderly or even people with disabilities. The crowd's violence was specifically aimed at those representing the Church, such as pastors, priests or nuns who became targets for torture, humiliation and killing.⁵⁹⁶ In addition, in Iraq and Syria, ISIL have been torturing and murdering those who did not follow the 'true way' or those, of whatever faith, or they have destroyed sacred landmarks or relics. There have also been numerous reports of sexual violence and hostage taking by ISIL against ethnic minorities in the area of Iraq and Syria which are under ISIL control. This strict perception of religious texts and subsequently intolerant behaviour towards other religions can be illustrated by the Kurdish Yazidi girl of 17 kidnapped by ISIL, who reported being kept as slave, physically abused and raped on a daily basis, and forced them to follow their dress code along with around 40 other women, by the fighters; the ISIL members rationale for this abuse and ownership was to brand the women 'non-Muslims' due to their marginally differing beliefs, justifying them as property.⁵⁹⁷

An additional complication in understanding how to deal with the right to religious freedom is recognising the legal rights of two religious groups whose ideas about what society should entail are so diametrically opposed, such as is the case with Hindus and Muslims in India, or Shia and Sunni Muslims in Iran, where the majority religion incites the persecution of minority religions.⁵⁹⁸ Fundamentalist religious groups often regard their holy doctrine as the 'one true way', a clear set of truths and a guide to how to live; any deviation from this text is a deviation from the divine word and is, as such, considered by them to be anti-religious.⁵⁹⁹

⁵⁹⁶ Joanna Malec, 'Anti-Christian violence in the Indian State of Orissa in 2008 in the reports of non-governmental organizations' (2011) 3.9 *Orientalia Christiana Cracoviensia* 91, 100, 101.

⁵⁹⁷ Nick Squires, 'Yazidi Girl Tells of Horrific Ordeal as Isis Sex Slave' (Rome, the Telegraph Sep 2014) available at: < <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/11080165/Yazidi-girl-tells-of-horrific-ordeal-as-Isil-sex-slave.html> > accessed 22 September 2017 For further information on atrocity behaviour of ISIL see: Joseph Spark, *Atrocities Committed By ISIS in Syria & Iraq: ISIL/Islamic State/Daesh* (Conceptual Kings 2014) 78.

⁵⁹⁸ Hussein D Hassan, 'Iran: Ethnic and Religious Minorities' (2007) Library of Congress Washington DC L Congressional Research Service CRS-1. For further information see: Rupert Shortt, *Christianophobia: A Faith under Attack* (Random House 2012).

⁵⁹⁹ Scott Morrison, 'The Resurgence of Religion: A Comparative Study of Selected Themes in Christian and Islamic Fundamentalist Discourses' (2007) 39.3 *International Journal of Middle East Studies* 459, 460. For further information see: Russell Powell, and Steve Clarke. 'Religion, Tolerance and Intolerance: Views from across the Disciplines' (2013) *Religion, intolerance and conflict: A scientific and conceptual investigation*: 2, 14.

Any attempt to disprove the word of the sacred text is to denounce the entire work, and, consequently, the entire ideology; this is deemed unacceptable, and so puts a limitation on the freedom of expression both by other religious groups and by a large number of individuals of the religion in question.

The word of sacred texts often needs little explanation, as commands can often be taken literally and applied to daily life; the Salafi community, for example, adhere to the ideology laid out in the Qur'an and Sunna, taking the exact word as absolute holy truth in order to reject any human conceptions of morality.⁶⁰⁰ From the Salafist point of view there is only one legitimate interpretation; Islamic pluralism does not exist.

This adoption of the exact word of the doctrine means that it cannot be adapted as society progresses; as an illustration of the foregoing, one can consider the printing press was first created in Europe in 1440, and was immediately banned by Muslim rulers in order to prevent works which stood in opposition to Islamic belief⁶⁰¹, leading to a lack of knowledge surrounding culture, science, art and philosophy, which were all undergoing major changes in the West. Medical advancement in the Middle East also suffered because of this ban, as there were little to no up-to-date medical works in Arabic and other languages of the region; the only physiological text which existed in the late 1700's which had an Arabic translation related to cures for syphilis, written two centuries previously.⁶⁰²

Both privately and externally, ideas surrounding the negative effect of fundamentalism on knowledge, scientific or otherwise, are based upon the assumption that debate is a necessary part of scientific or social progress. If we subscribe to this assumption, fundamentalism of any kind is thus detrimental to such progress, as it tends to reject any evidence based information which,

⁶⁰⁰ Quintan Wiktorowicz, 'Anatomy of the Salafi movement' (2006) 29.3 *Studies in Conflict & Terrorism* 207, 211-222.. For further information on Salafi views see: Zachary Wright, 'Salafi Theology and Islamic Orthodoxy in West Africa' (2015) 35.3 *Comparative Studies of South Asia, Africa and the Middle East* 647.

⁶⁰¹ Toby E Huff, *The Rise of early Modern Science: Islam, China, and the West* (Cambridge University Press, 2017) 452, 231. Also see: Ekrem Buğra Ekinçi, 'Myths and Reality about the printing press in the Ottoman Empire (8June 2015) available at: <<https://www.dailysabah.com/feature/2015/06/08/myths-and-reality-about-the-printing-press-in-the-ottoman-empire>> accessed 23 August 2017.

⁶⁰² Dick Taverne, *The March of Unreason Science, Democracy and the new Fundamentalism*. (2005, Oxford University Press) 33-39. For further information on relationship between Islam and science see: Pervez Hoodbhoy, *Islam and Science: Religious Orthodoxy and the Battle for Rationality* (London: Zed books, 1991)

though useful, is at odds with the teachings of whichever ideology that the fundamentalism belongs to.⁶⁰³

Fundamentalism, then, at its core, chooses to actively ignore the new, the modern and the progressive, instead attempting to preserve a way of life which existed at the time the holy texts were written; continuity, along lines of time and communities, is the fundamentalist bedrock, which is used, in part, to challenge their own ‘otherness’. This sameness is in relation to religious ritual across geographical lines (which God to worship and how to worship them) as well as sameness with regard to religious ritual along the timeline of that religion; this sameness is extremely important, with many martyring themselves for this cause. There is a link between the aforementioned and what Freud understood to ‘the narcissism (excessive in admiration itself) of minor differences.’⁶⁰⁴

For example, from the point of view of the Salafi community, culture is the antithesis to Islam; fundamentalist collectives such as these strive for what Olivier Roy termed “deculturation”, attempting to entirely remove Islamic doctrine from modern culture by decrying any tradition not explicitly called for in the holy text.⁶⁰⁵

Some have argued that fundamentalism is simply a religion-led interpretation of totalitarianism, not dissimilar to the regime enforced during Stalinism in the Soviet Union.⁶⁰⁶ Philosopher and social anthropologist *Ernest Gellner* has put forward that fundamentalism “*repudiates the tolerant modernist claim that the faith in question means something much milder, far less exclusive, altogether less demanding, and much more accommodating; above all something quite compatible with all other faiths, even, or especially, with the lack of faith*”.⁶⁰⁷ Examining fundamentalist collectives, it is clear that the members all feel connected through a common aim, common beliefs, and a shared sense of dedication to the cause; this gives its members a sense of actualisation in community.⁶⁰⁸

There is another school of thought which does not differentiate between fundamentalist communities and other fascist or otherwise extreme-right political institutions, which they deem a

⁶⁰³ Danial O. Conkle, ‘Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in contemporary America’ (1995-1996) 12.2, *Journal of Law and Religion* 337.

⁶⁰⁴ Grahame F. Thompson, ‘Exploring Sameness and Difference: Fundamentalism and the Future of Globalization’ (2006) 3.4 *Globalizations* 427,429.

⁶⁰⁵ Quintan Wiktorowicz, ‘Anatomy of the Salafi Movement’ (2006)29.3 *Studies in Conflict & Terrorism* 207, 210.

⁶⁰⁶ Israel Shahak, & Norton Mezvinsky, *Jewish Fundamentalism in Israel*. (London: Pluto Press 1999) 155

⁶⁰⁷ Ernest Gellner, *Postmodernism, Reason and Religion* (Psychology Press 1992) 3.

⁶⁰⁸ *Ibid*

comparable threat to the quality of life and human rights.⁶⁰⁹ A pre-9/11 work by *Armstrong* interprets the term ‘fundamentalist’ as an organisation or person who rejects “*democracy, pluralism, religious toleration, peacekeeping, free speech, [and] the separation of church and state*”.⁶¹⁰

These interpretations of fundamentalism primarily concern the public elements of the movement, i.e. the ways in which it attempts to spread its religion as the true way. The sum of these perceptions of fundamentalism illustrates that to apply or even impose its ideas can constitute a threat to the universal and unalienable rights and freedoms of every member of a given society. The aforementioned leads to a discussion regarding whether expressing the ideals of fundamentalism should totally be prohibited and whether wearing headscarf can be, from a legal point of view, deemed as threatening to any member of the society. This leads us to a deeper exploration of the judicial side of fundamentalist expression.

4.5.2. An Analysis of Fundamentalism as a Justification for the Restriction of Religious Manifestation in the Context of the ECtHR

Fundamentalism as mentioned above might have a number of undeniable negative consequences, including the oppression of minority communities, the suppression of human rights, and a significant threat to societal security. In reality, though, the intricacies of the problem can be difficult to navigate, when determining the legality of religious dress in an academic setting, for example; the wearing of such attire in an academic setting is by no means an indication of adherence to fundamentalist belief, as in the cases of *Leyla Şahin* and *Karaduman v. Turkey*.⁶¹¹

The law regarding fundamentalism according the courts in European countries differs on a case by case basis; in the *Kalaç v Turkey*⁶¹² (a case concerning a military judge who was involved in the fundamentalist group) applies the principle established in the case of *Engel v the Netherlands*⁶¹³ that military discipline and codes imply by its very nature, the possibility of placing some limitation on the rights and freedoms. In other words, it is possible, then, for a state to enforce

⁶⁰⁹ Nora Langenbacher & Britta Schellenberg, *Is Europe on the “Right” Path?* (Bonn: Friedrich-Ebert-Stiftung 2011) 11, 54.57.89.

⁶¹⁰ Karen Armstrong, ‘The Battle for God’ (2000) *New York Times Book Review*, 13: 33-33.p5.175 .For further information see: James Bohman, ‘Reflexive Public Deliberation Democracy and the Limits of Pluralism’ (2003) 29.1 *Philosophy & social criticism* 85, 97. Also see: Larry Jay Diamond, ‘Toward Democratic Consolidation’ (1994)5.3 *Journal of democracy* 4, 6, 7.

⁶¹¹ *Karaduman v. Turkey* (Application no. 16278/90) (ECHR 1993) 74 DR93.

⁶¹² *Kalaç v Turkey* (Application No.20704) (01 July1997) 27 EHRR 552, 558.

⁶¹³ *Engel and others v The Netherlands* (Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (ECHR, 8 June 1976) 1 EHRR 647.

a regulation banning certain behaviours and beliefs that are at odds with the ideology of the military and what a soldier is expected to be.⁶¹⁴ To return to the Turkey case (*Kalaç v Turkey*), the legal proceedings were put into motion by the Süleyman sect, which was considered to practice fundamentalist activity, which was deemed illegal by Turkish authorities. Paper evidence supplied to the court suggested that Süleyman members had provided legal aid, helped to train soldiers, and had helped its members to secure a place in the military.⁶¹⁵ The ECtHR found, that the military judge involved in this activity was guilty of the charges, that he had adopted a set of beliefs that had fundamentalist connotations, and that his behaviour was not that expected from somebody in his post, particularly in a country in which there was a clear separation of religion and state; the court called for the judge's immediate retirement from service.⁶¹⁶ According to the court,

*"... His compulsory retirement was not an interference with his freedom of conscience, religion or belief but was intended to remove from the military legal service a person who had manifested his lack of loyalty to the foundation of the Turkish nation, namely secularism, which it was the task of the armed forces to guarantee. The applicant belonged to the Süleyman sect, as a matter of fact, if not formally, and participated in the activities of the Süleyman community, which was known to have unlawful fundamentalist tendencies. Various documents annexed to the memorial to the Court showed that the applicant had given it legal assistance, had taken part in training sessions and had intervened on a number of occasions in the appointment of servicemen who were members of the sect."*⁶¹⁷

It is important to point out that, in the Turkish army, the soldiers are provided with the opportunity to openly practice their faiths, including the facilities for Muslims to pray five times a day and fast during Ramadan.⁶¹⁸ The ECtHR claimed that the judgement was not made on the basis of religious opinions, personal ideology or the way one performs their religion, but rather

⁶¹⁴ *Engel and others v The Netherlands* (Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (ECHR, 8 June 1976) 1 EHRR 647 para 57. For more information on restriction for military forces see: R. Chuck Mason & Cynthia Brougher, 'Military Personnel and Freedom of Religious Expression: Selected Legal Issues' (2010) Library of Congress Washington DC L Congressional Research Service 21.

⁶¹⁵ *Kalaç v Turkey* (Application No.20704) (01 July1997) 27 EHRR 552, 558 paras 25, 28

⁶¹⁶ *Kalaç v Turkey* (Application No.20704) (01 July1997) 27 EHRR 552, 558 paras 7, 31. For further information regarding the restriction on military forces in terms of religion see: David E Fitzkee, 'Religious Speech in the Military: Freedoms and Limitations' (2011) 41.3 Parameters 41.3: 59.

⁶¹⁷ *Kalaç v Turkey* (Application No.20704) (01 July1997) 27 EHRR 552, 558 para 25.

⁶¹⁸ *Kalaç v Turkey* (Application No.20704) (01 July1997) 27 EHRR 552, 558 para 24. For information on European Criteria for religious freedom among armed forces see: Directorate General of Human Rights and Legal Affairs Council of Europe Strasbourg, 'Human rights of members of the armed forces Recommendation CM/Rec (2010) 4 and explanatory memorandum' (2010)1, 12, 48, 49, and 50.

related to the way in which he conducted himself in the role of military judge.⁶¹⁹ With respect to the foregoing, the court commented that

*“The Supreme Military Council’s order was, moreover, not based on Group Captain Kalaç’s religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude (see paragraphs 8 and 25 above). According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism.”*⁶²⁰

Though the individual on trial would usually have the protection of article 9 of the European Convention of Human Rights, due to the military context, the presence of possible fundamentalist activity could not be covered by this legislation, as these beliefs posed a threat to the values of the army and upset the hierarchy inherent in the military system.⁶²¹ Due to the difficulty in enforcing this sort of regulation in the case of the military, it has been decreed by the ECtHR that the army can impose limitations on the religious activity of its members, including preventing soldiers from participating in any activity with groups considered religiously ‘fundamentalist’ in its conduct. This rule has been similarly applied both regarding the issue of wearing the headscarf and an active involvement in the fundamentalist group engaged in illegal activities notwithstanding the clear discrepancies in both cases’ surrounding circumstances. For instance, the commission argued in the case of *Karaduman* that

“The Commission takes the view that by choosing to pursue her higher education in a secular university a student submits to those university rule; which may make die freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs. Especially in countries where the great majority of the population owe allegiance to one particular religion, manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion. Where secular universities have laid down dress regulations for students, they may

⁶¹⁹ *Kalaç v Turkey* (Application No.20704) (01 July1997) 27 EHRR 552, 558 para 30. For more information on differences between *forum internum* and *forum externum* aspects of religion see: Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* [Portland, OR: Hart 2008] 320, 96-100.

⁶²⁰ *Kalaç v Turkey* (Application No.20704) (01 July1997) 27 EHRR 552, 558 para 30.

⁶²¹ *Karaduman v. Turkey* (Application no. 16278/90) (ECHR 1993) 74 DR93; *Kalaç v Turkey* (Application No.20704) (01 July1997) 27 EHRR 552, 558 para 25. For a discussion of the fundamentalism among armed forces see: James E, Parco & Ronald. Lindsay, ‘For God and Country: Religious Fundamentalism in the US Military’ [2013] Center for Inquiry, Inc 37.

ensure that certain fundamentalist religious movements do not disturb public order in higher education or impinge on the beliefs of others.”⁶²²

This move has been widely criticised. It has been argued that the *Kalaç* case was initiated by the military, which had its own strict set of values and rules. This sentiment was reinforced by the US Supreme Court, who stated that

“The essence of military service is the subordination of the desires and interests of the individual to the needs of the service... [W]ithin the military community there is simply not the same [individual] autonomy as there is in the larger civilian community. While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it”.⁶²³

It is also important to note that the role of the military is, one could argue, to ensure the safety of the public from the actions of organizations or nations which may risk the security of the country in question.⁶²⁴ The individual investigated in the court proceedings was part of a technically illegal collective which was considered dangerous to the safety of the public that the military serve to protect; the ruling was largely based on a confession by the individual that confirmed that he was an active participant in the group’s activity.⁶²⁵

During the *Şahin* case, no proof was provided as to the connection between fundamentalist thought or action, and religious headwear;⁶²⁶ even if the belief was present that applicant had fundamentalist ideals, this phenomenon could not be proven through the judicial process. In order to provide proof, there must be some sort of confession of membership to a fundamentalist group or ideological community, or an interrogation of their personal beliefs, all of which is a violation of privacy and religious rights i.e. article 8 and 9 of the ECHR.⁶²⁷ Human rights organisations,

⁶²²*Karaduman v. Turkey* (Application no. 16278/90) (ECHR 1993) 74 DR93.

⁶²³ *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

⁶²⁴Derek Lutterbeck, ‘Between Police and Military: The New Security Agenda and the Rise of Gendarmeries’ (2004) 39.1 *Cooperation and conflict* 45, 46-48.

⁶²⁵ *Kalaç v Turkey* (Application No.20704) (01 July1997) 27 EHRR 552para 25, 28.

⁶²⁶ Frédérique Ast and Riem Spielhaus, ‘Tackling Double Victimization of Muslim women in Europe: The Intersectional Response’ (2012) 16 *Mediterranean Journal of Human Rights* 357, 364-365.

⁶²⁷*Folgero and others v Norway* (Application no.15472/02) (ECHR, 29 June 2007) 15472/02, [2007] ECHR 546, [2011] ECHR 2148, [2011] ECHR 2189 para 96. For more information on enforce parents to disclose their beliefs

Human Rights Watch most notably, argued that the ban on the religious symbols was “an unwarranted infringement of the right to religious practice”;⁶²⁸ the IHF (International Humanity Foundation) stated that the state had no right to legislate on religious expression which did not threaten the rights of others.⁶²⁹

Furthermore, the application the reasoning in military cases to the case of *Leyla Şahin* does not make an awful lot of sense and, at worst, borders on illegality as it can be argued a headscarf gives no indication of an affiliation to a fundamentalist group.⁶³⁰ Further, while in the military context, , this sort of ruling is at least understandable to some degree, this is not the case with regard to the *Şahin v Turkey* battle, as the site of the incident was a university, supposedly an inclusive and progressive environment.

In light of the information that majority of Turkish Muslim women cover themselves in some way, therefore, from the ECtHR ruling in the *Şahin* case it can be deduced that over half of the Muslim women in Turkey to be fundamentalists. As Aydın comments, wearing the headscarf is a religious practice that is encompassed in Article 9(2) of the ECHR⁶³¹; it must be acknowledged, however, that the terms ‘extremism’ and ‘fundamentalism’, to some extent, can be ambiguous and have political connotations.

In accordance with the ECHR, the ECtHR acknowledged the difference between personal opinions and beliefs and fundamentalist behaviour in the case of *Kalaç*. As outlined in Article 9 of the ECHR, both internal and external freedoms are protected, though to different extents; the former is an unconditional freedom, as strongly held personal beliefs and convictions that are forged in a person’s individual conscience and cannot, in and of themselves, pose a threat to the rights of others or the security of the public, and so cannot be limited. From a legal standpoint, the

see: Jonathan Cooper & Alién McColgan, *European Human Rights Review* (Issue 1 Thomson Sweet & Maxwell 2008) 169.

⁶²⁸ Adnan A Amin, ‘The Hijab and its Faces’ (16 August 2013) available at :< <http://www.thedailystar.net/news/the-hijab-and-its-faces>> accessed 24 August 2017.

⁶²⁹ Cited in Krassimir Kanev, ‘Muslim Religion Freedom in the OSCE Area after September 11’ (2004)15.4 Helsinki Monitor 233, 236. For more debate on ban of headscarf and whether it related to fundamentalism or not see: Adrién Katherine Wing & Monica Nigh Smith, ‘Critical Race Feminism Lifts the Veil: Muslim Women, France, and the Headscarf Ban’ (2005) 39 UC Davis L. Rev. 743.

⁶³⁰ Benjamin Bleiberg, ‘Unveiling the Real Issue: Evaluating the European Court of Human Rights’ Decision to Enforce the Turkish Headscarf Ban in *Leyla Şahin v. Turkey*’ (2005) 91 Cornell L. Rev.129, 149.

⁶³¹ Hasan Aydın, ‘Headscarf (Hijab) Ban in Turkey: The Importance of Veiling’ (2010) 6.1 The Journal of multiculturalism in Education1, 11. See: Valorie K, Vojdik, ‘Politics of the Headscarf in Turkey: Masculinities, Feminism, and the Construction of Collective Identities’ (2010)33 Harv. JL & Gender 661, 667. Also see: Umut Azak, ‘Beyond the Headscarf: Secularism and Freedom of Religion in Turkey’ (2008) 15 International Studies in Gender, State and Society 514.

view of internal freedom is more or less identical; any form of internal belief or private ideology is legal, and unable to be made illegal. In other words, the ECHR protects a person's private sphere of conscience but not necessarily any public conduct inspired by that conscience. As The ECtHR in the case regarding the freedom of expression claims that freedom of expression refer to not only ideas which "*are favourably received or regarded as inoffensive or as a matter of indifference, but also ...those that shock, offend or disturb the State or any sector of population*".⁶³²

On a related note, having fundamentalist ideas is an internal aspect of religious freedom⁶³³ which must be protected from any violation, allowing that it does not violate or threaten the rights and freedoms of other members of the society. Similarly, human rights activists, *Marthoz* and *Saunders*, consider having a fundamentalist idea as an internal part of religious freedom that should be protected. They argue that human rights movement should do more to defend freedom of religion even for fundamentalists, "*including those who would threaten liberal conceptions of rights if they were in power, so long as they do not physically attack or otherwise impinge on the rights of non-believers*".⁶³⁴ In the *Şahin* case, the judge *Tulkens* dissents from the consensus of the court, arguing that the decision was made based on the danger of

"Extremist political movements" attempting to "impose on society as a whole their religious symbols and conception of a society founded on religious precepts"; this decision was considered in the court to be "a measure intended to ... preserve pluralism in the university".⁶³⁵

In court cases which cite fundamentalism as a factor in the ruling, it is argued that fundamentalists tend to impose their views and symbols on society. It is important to acknowledge that even if one wished to push their religious views on a student body, simply wearing a headscarf would not grant one the ability to do so. Taking the case of *Leyla* into consideration, it can be said

⁶³² *Handyside v. United Kingdom* (Application No.5493/72, A/24) (07 December 1976) ECHR 5. For more discussion on the scope of the freedom of expression see: Eva Brems, 'The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights' (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240, 258-268.

⁶³³ For more on the internal and external aspects of religious freedom see: Jim Murdoch, *Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights* (Series: Council of Europe Human Rights Handbooks. Council of Europe: Strasbourg) 18, 41. Also see: Anat Scolnicov, *The Right to Religious Freedom in International Law: Between group rights and individual rights* (Routledge 2011).

⁶³⁴ Jean-Paul Marthoz & Joseph Saunders, 'Religion and the Human Rights Movement' (2005) *Human Rights Watch, World Report* 40. For further information see: Lawrence A. Uzzell, 'Religious Human Rights Discrimination?' (2005) 28.3 *Report Public Justice* 1, 2.

⁶³⁵ *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819 para115.

that the only way to spread fundamentalist ideas is through a discussion with the students, whereby the beliefs are explained; discussions such as these are a basic component of a democratic society.

Judge *Tulkens* is in agreement with the notion that states are obliged to actively engage radical Islam; however, her objection is that the simple act of wearing a headscarf should not be synonymous with a manifestation of fundamentalism. Furthermore, she argues, it is crucial in this regard to make a distinction between those merely just wearing a headscarf and those actively promoting the imposition of the obligation to wear one; such distinction is commonly made in case of symbols of other religions.⁶³⁶

Through his article, *Golder* expressed an agreement with Judge *Tulkens*. *Golder* argues that regardless of whether one acknowledges that Turkey is a special case given the country being more sensitive vis-à-vis religious fundamentalism, the Court's duty of supervision was still to be enforced. More specifically, the Court was supposed to demand from the Turkish Government clear examples of what constitute a threat to public order and how rights and freedom of others are limited. The failure to do so is evident in the Court's employment of very different criteria in order to evaluate whether a measure is necessary, than the criteria applied in cases of measures violating freedom of expression as stipulated in the Convention's Article 10. Arguably, the Court's approach in the *Şahin* case as well as in previous cases went directly against the principle of pluralism protected by Article 9. In other words, the Court and the European Commission's decision to treat religious freedom in a different manner than the Convention's other rights and to conclude that the wearing of headscarf is not consistent with the Convention amounts to a severe limitation of religious minorities' right to profess their religion freely.⁶³⁷

External freedoms, on the other hand, must be taken subjectively, in that some expressions of faith can be considered a threat to the safety or fundamental rights of other individuals or groups.⁶³⁸ The ECtHR acknowledges that freedom of religious thought does not necessarily extend to religious action; private belief is protected, public behaviour is often not, particularly when this

⁶³⁶ *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819, para 15. Dissenting Opinion of Judge Tulkens para 10. For more information on the religion's freedom cases in the ECtHR see: Research Division: Overview of the Court's Case-law on Freedom of Religion. [2013] Council of Europe. (Report).

⁶³⁷ Cited in Keith Golder, 'Limitations on the Wearing of Religious Dress: An Examination of the Case Law of the European Court of Human Rights' (2012) 1 UK L. Students' Rev. 21, 26, 27.

⁶³⁸ *Metropolitan Church of Bessarabia and others v. Moldova* (Application No. 45701/99) (13 December 2001) ECHR ECHR 860 Para 114. See: *Kokkinakis v. Greece* (App no 14307/88) (ECHR 25 May 1993) 17 EHRR 397 para 31-33. Also see: *Thorgeir Thorgeirson v. Iceland* (Application no. 13778/88) (25 June 1992) para.55. Also see: *Bladet Tromsø and Stensaas v. Norway* (Application no. 21980/93) (ECHR 20 May 1999) ECHR 29, para 49, 50.

behaviour breaks national or state laws.⁶³⁹ However, in the case of *Leyla* the court, contrary to its precedent in the case *Kalaç* did not distinguish between faith and fundamentalist behaviour. The court disregarded the reality stemming from the social circumstances of a huge number of women who wear headscarf in Turkey, insofar as the court considered wearing of headscarf purely as an outward manifestation of fundamentalist behavior.⁶⁴⁰

One particular case, *Refah v Turkey*⁶⁴¹, exemplifies the way in which external freedoms can be legislated in a way internal freedoms cannot, as the *Refah Party* attempted to create a Sharia state, an act which is in direct defiance of the European Convention of Human Rights. In this case, the decision was taken to make this group and its activity illegal due to the threat it posed to the security of Turkey and its national values.⁶⁴² It is undeniable that political fundamentalists groups are real threats to the rights and freedoms of humanity. In relation to this subject, historian and academic *Daniel Pipes* has argued that with “*Communists and fundamentalists being invariably hostile to us, we should show not empathy but resolve, not good will but will power*”, calling for the “containment and rollback” of fundamentalist Islam.⁶⁴³ He goes on to say that fundamentalists challenge the West more profoundly than Communists did and do. “*The latter disagree with our politics but not with our whole view of the world including the way we dress, mate and pray*”.⁶⁴⁴ The court in its decision added that

“in a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements

⁶³⁹ *Pichon and Sajous v. France* (Application no. 49853/99) (ECHR 2 October 2001) ECHR 898. For further information on the level of protection for religiously motivated action see: Henrik Palmer Olsen, ‘The Right to Freedom of Religion: A Critical Review’ (2000) 50.303 Official Journal of the European Communities 227,239

⁶⁴⁰ Ivana Radačić, ‘The Ban on Veils in Education Institutions: Jurisprudence of the European Court of Human Rights’ (2008) 4.4 Croatian Yearbook of European Law and Policy 267, 279.

⁶⁴¹ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.

⁶⁴² *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495 Paras 12, 29, 33,39,85,94,120. For more information on Islamic parties in Turkey see: Alev Çinar, ‘Secularism and Islamic Modernism in Turkey’ (2006) 10.1 Etnográfica 85.

⁶⁴³ Cited in Masood Kazemzadeh, ‘Teaching the Politics of Islamic Fundamentalism’ (1998) 31.01 PS: Political Science & Politics 52, 53. For more information on Islamic extremist groups on state see: Zachary Devlin-Foltz & Binnur Ozkececi-Taner, ‘State Collapse and Islamist Extremism: Re-Evaluating the Link’ (2010) 31.1 Contemporary Security Policy 88.

⁶⁴⁴ Cited in Fawaz A Gerges, *America and political Islam: Clash of cultures or clash of interests?* (Cambridge University Press, 1999) 24.

from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention."⁶⁴⁵

It is clear that fundamentalist groups and individuals pose a number of legal and ideological questions; however, due to the ambiguity and vagueness of the concept of fundamentalism Judge *Khovler* in his dissenting view has asked that this concept not be used during the process of legal casework even in the political cases. *Khovler* was reported as saying that:

"What bothers me about some of the Court's findings is that in places they are unmodulated, especially as regards the extremely sensitive issues raised by religion and its values. I would prefer an international court to avoid terms borrowed from politico-ideological discourse, such as 'Islamic fundamentalism' (para. 94), 'totalitarian movements' (para. 99), "threat to the democratic regime" (para. 107), etc., whose connotations, in the context of the present case, might be too forceful".⁶⁴⁶

Similarly, (on the cases related to the wearing of the headscarf) Pimor demonstrates that the court *'rather than focusing on the Muslim applicants' actual freedom to manifest their religion, national and European authorities diverted the dialogue towards political considerations'*.⁶⁴⁷

The use of these ideas did not go entirely unopposed, particularly in the wake of the controversies brought about by the *Refah* case, particularly the grounds on which the dismantling of the party was achieved, with preventative methods cited as the justification.

It is important to establish that all human rights treaties give priority to the rights rather than duties of the individuals. The main goal of the treaties is protection of certain individual fundamental interests not only from arbitrary interference of the state but also often protect the individual rights in excuse of protection of common interest. However, implementation of those rights and freedoms protected by the ECHR are not entirely rigid, as the articles contained within it can be avoided under mitigating or extenuating circumstances. This has been the case most notably with regard to articles 8 to 11, which lend themselves to subjectivity through their wording; they contain the phrase 'proportional' and the clause 'necessary in a democratic society', which

⁶⁴⁵ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495, Para.95.

⁶⁴⁶ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495, concurring opinion of judge Kovler.

⁶⁴⁷ Cited in Erica Howard, 'Banning Islamic Veils: Is Gender Equality a Valid Argument?' (2012)12.3 International Journal of Discrimination and the Law 147, 157.

provide a certain amount of leeway. This wording is necessary for the protection of public interests, indicated in article 8 to 11.⁶⁴⁸ *Rolv Ryssdall*, the former president of the ECtHR, stated that

“*[t]he theme that runs through the Convention and its case law is the need to strike a balance between the general interest of the community and the protection of the individual’s fundamental rights.*”⁶⁴⁹

It is crucial then that the ECtHR allows for proportionality and necessity verdicts when ruling on religious cases if the state is to minimise interference with the rights and freedoms of people. Further, this ‘proportionality’ followed by the ECHR and, consequently, the ECtHR, is used to determine whether action which infringes on a right will obtain its aim, whether the action is *necessary* for achieving that aim, and whether the detriment to the individual outweighs the benefits that achieving the aim will bring.⁶⁵⁰ In the case of *Şahin*, the aim was to protect secular values, the rights and freedoms of others and to prevent a rise of fundamentalism through the removal of religious attire; this case was fallacious in a number of ways. In terms of secularism, it can be said briefly that wearing of headscarf does not imply that its wearer opposes secularism. For example, in the parliamentary election in Kurdistan held on 21 September 2013, Islamic Parties obtained 17 out of 111 seats with secular parties gaining 94 seats.⁶⁵¹ In view of the fact that 97% of Kurds are Muslim,⁶⁵² many members of the secular parties support the wearing of the veil whilst a considerable number of Kurds at the same time support secularism.

⁶⁴⁸ Steven Greer, *The exception to Articles 8 to 11 of the European Convention on Human Rights* (Council of Europe Publishing 1997) 14-18. See further, Douwe Korff, *The Standard Approach under Article 8-11 ECHR and Article 2 ECHR* (London Metropolitan University 2008). See: *Metropolitan Church of Bessarabia and others v. Moldova* (Application No. 45701/99) (13 December 2001) ECHR 860 Para 114. And also *Kokkinakis v. Greece* (App no 14307/88) (ECHR 25 May 1993) 17 EHRR 397 para 31-33. Also see: Jean-François Renucci, *Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion*, (Vol 88 Council of Europe 2005) 113, 43-49.

⁶⁴⁹ Cited in Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7.3 *International Journal of Constitutional Law* 468, 475. For more information on principle of proportionality see: Charlotte Bagger Tranberg, ‘Proportionality and Data Protection in the Case Law of the European Court of Justice’ (2011) 1.4 *International Data Privacy Law* 239. Also see: Julian Rivers, ‘The Presumption of Proportionality’ (2014) 77.3 *The Modern Law Review* 409.

⁶⁵⁰ Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7.3 *International Journal of Constitutional Law* 468, 472, 477. For further information see: Davor Šušnjar, *Proportionality, Fundamental Rights, and Balance of Powers* (1st ed, NL: Martinus Nijhoff 2010; 2009).

⁶⁵¹ KRG Election Results (4 October 2013) Available at: <<http://www.iraq-businessnews.com/2013/10/04/krge-election-results/>> Accessed 28 February 2016. For more discussion on relationship between ben of the headscarf and secularism see: Umut Azak, ‘Beyond the Headscarf: Secularism and Freedom of Religion in Turkey’ (2008) 15 *International Studies in Gender, State and Society* 514.

⁶⁵² The World Fact book, Available at: <[library/publications/the-world-fact-book/geos/iz.html](https://www.cia.gov/tions/the-world-fact-book/geos/iz.html)> Accessed 5 January 2014.

To address the argument that *Şahin*'s headscarf was an affront to the secular sensibilities of her classmates and to the academic institution, it is important to note that there were no complaints made by her peers. In addition, the concept of infringing upon the rights of others is a very open one; if the 'others' refer to her classmate, then this claim is arguably false, and it was unnecessary of the government or teaching institution to take this action on their behalf. As Gunn points out, "[we] would not normally expect a human rights tribunal to be more solicitous of the sensibilities of those who do not like religious expression (which is not guaranteed by the European Convention) than on the right to manifest religion (which is guaranteed by the Convention)."⁶⁵³ If it refers to the Turkish public, then this is contradicted by the fact that most Turkish women wear headscarves.⁶⁵⁴ Furthermore, religious attire does not indicate a hatred of unbeliever and non-religious individuals and, while some fundamentalists do wear headscarves, it is not a charge that anybody can level at every headscarf wearer with any justification. Although it naturally follows that a female fundamentalist wears the headscarf, it should not be assumed in the same way that each female wearing headscarf is necessary a fundamentalist. As for the second point, the banning of the headscarf does not go any way towards reducing fundamentalist activity; one could argue that the persecution one feels when asked to remove ones religious attire for the safety of others may lead an individual to seek education elsewhere, leaving them more exposed to radicalization.⁶⁵⁵

Though arguably necessary to protect the public and their rights in the military case⁶⁵⁶, (as the mandatory retirement of the applicant was a necessity to eradicate the threat of the situation), the process undergone by the Turkish judicial system in its dealings with *Leyla Şahin* was built upon unjustified assumption about religious wear and fundamentalism, and the inconvenient argument to fight for its removal on the grounds that the headscarf was a threat to public order,

⁶⁵³ Jennifer M, Westerfield, 'Behind the Veil: an American Legal Perspective on the European headscarf debate' (2006) 54.3 *The American Journal of Comparative Law*: 637, 656.

⁶⁵⁴ Valorie K, Vojdik, 'Politics of the Headscarf in Turkey: Masculinities, Feminism, and the Construction of Collective Identities' (2010) 33 *Harv. JL & Gender* 661, 667. For further information see: Jill, Marshall 'Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate' (2008) 30.30 *Human Rights Quarterly* 631, 632, 635, 646.

⁶⁵⁵ Erica Howard, 'Banning Islamic veils: Is Gender Equality a Valid Argument?' (2012)12.3 *International Journal of Discrimination and the Law* 147, 147.

⁶⁵⁶ *Kalaç v Turkey* (Application No.20704) (01 July1997) 27 *EHRR* 552.

safety, health and gender equality.⁶⁵⁷ In fact, during these proceedings, it is only the removal of *Şahin* from the education system which qualifies as a genuine affront to human rights and public order, an argument which is supported by the response of *Şahin*'s fellow students, who boycotted class to protest this decision.⁶⁵⁸ The argument that the headscarf posed a threat to the security and/or health of the public is therefore not a compelling one. Further, in some other countries, including the UK, there are no laws or regulations to ban headscarf based on protection of public order or health.⁶⁵⁹ Similarly, in the Netherlands, restrictions on religious dress, the headscarf most notably, is considered from the point of view of avoiding discrimination rather than upholding free religious expression; in the early 2000's, it was agreed that places of education could enforce a uniform policy on the condition that it does not discriminate on any basis, that the uniform policy is clear on any literature pertaining to the school, and that punishment for deviating from the uniform are not excessive.⁶⁶⁰ A related example, greatly discussed in Western media in recent years, is the banning of the burka in a number of European countries due to issues of security and communication in schools, as well as its unsuitability for taking part in mandatory PE lessons; the latter point was deemed a valid justification for the ban in schools which did not amount to discrimination.⁶⁶¹ Furthermore, in 2003 the Dutch Equal Treatment Commission ruled in favour of a ban on the niqab; the niqab restricts communication between teachers and pupils.⁶⁶² In the West, the Burka is often confused with the niqab; the niqab is a garment which is worn with a headscarf and provides a gap for the individual's eyes whereas the burka covers the entire face and body, with a mesh eye veil which allows the individual to see out.⁶⁶³ The headscarf is the most

⁶⁵⁷ *Supra* no 644; for more discussion on justifications of the ECtHR to ban of headscarf see: Cindy Skach, 'Şahin v. Turkey. App. no. 44774/98;" Teacher Headscarf." Case no. 2BvR 1436/02' (2006) 100.1 *The American Journal of International Law* 186.

⁶⁵⁸ *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.

⁶⁵⁹ Joan Squelch 'Banning Religious Dress and Symbols in Public School: Implications for Schools Policy Makers' (2010) 15.2 *International Journal* 7, 20. For more also see: An Equinet Report. "Equality Law in Practice: a Question of Faith: Religion and Belief in Europe" [2011] p.13 (report).

⁶⁶⁰ Equality Law in Practice a Question of Faith: Religion and Belief in Europe" An Equinet Report (2011). For further information of the policy of the Netherlands regarding the wearing of headscarf see: Odile Verhaar, 'Accommodation Policies in the Netherlands: Headscarves and Turbans for Police Men' (2001) ECPR Joint Sessions, Grenob.

⁶⁶¹ Gerhard Van der Schyff & Adriaan Overbeeke, 'Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans' (2011) 7.03 *European Constitutional Law Review* 7.03: 424, 434.

⁶⁶² *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819, para.64. For further information on legal situation of burqa in Europe see: Alessandro Ferrari & Sabrina Pastorelli, *The Burqa Affair across Europe: Between Public and Private Space* (New ed. GB: Ashgate Publishing Ltd.2013).

⁶⁶³ Nisar Mohammad Bin, Ahmad, 'The Islamic and International Human Rights Law Perspectives of Headscarf: the Case of Europe' (2011) 2.16 *International Journal of Business and Social Science* 161, 162, 163. For further

common form of Islamic headwear, and poses no difficulty in terms of identification and no security implication.

The Turkish state's interference is not based on a belief that the headscarf encourages fundamentalism⁶⁶⁴, as this policy to remove the headscarf is not enforced outside of the university environment, or at the lower levels of the education system where individuals are more prone to be radicalised by 'fundamentalists'. Studies in a number of Islamic countries have shown, that those who are less educated are, in fact, more at risk of radicalisation than their university educated peers. For instance, in six states in Nigeria, the participants of the study determined that one of the fundamental factors affecting whether young adopt extreme religious views was high level of illiteracy. The level of illiteracy in Gombe state was highlighted as being the second most important factor out of 16 with similar results in Yobe state. In Borno state, illiteracy ranked 4th as a factor contributing to extremism and violence among the youth. Moreover, 75% of the participants in Kano state identified illiteracy as being an important contributing factor. The foregoing can be explained by highlighting how illiteracy prevents people from accessing further education, hence their ability to critically evaluate information and distinguish facts from propaganda or doctrine of extremist is significantly low.⁶⁶⁵

The ECtHR provides its member states with a high degree of autonomy in dealing with the issue of religious clothing based '*margin of appreciation*'. In the case of *Şahin*, the dissenting judge challenged the member states' authority to make decision vis-à-vis issues revolving around religious attire by questioning the principle of '*margin of appreciation*' that was used as a justification of the claim that "*the university authorities are in principle better placed than an international court to evaluate local needs.*"⁶⁶⁶ As a response, this judge put forward two arguments as a critique of the majority's analysis, particularly concerning the claim that a wide margin of appreciation was necessary given "*the diversity of practice between the states on the issues of regulating the wearing of religious symbols in educational institutions*". First, the judge

information see: What's the difference between a hijab, niqab and burka? Available online at: <<http://www.bbc.co.uk/newsround/24118241>> Accessed 11 December 2015.

⁶⁶⁴ *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819; *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.

⁶⁶⁵ Freedom C, Onuoha, 'Why Do Youth Join Boko Haram?' (2014) The United States Institute of Peace Special Report 348. See further, Kartika Bhatia and Hafez Ghanem. 'How Do Education and Unemployment Affect Support for Violent Extremism?' (2017) Brookings Global Working Paper Series 1, 11.

⁶⁶⁶ *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.

pointed out that none of the member states have enacted a ban on religious attire at universities. The diversity of state practice underlying the majority position simply did not exist. Secondly, regardless of whether the majority opts to deal with these issues by employing a margin of appreciation, the court should have not ignored its duty to facilitate provision of the required 'European supervision' in this context. In other words, the issue raised in the application ... is not merely a 'local' issue but one of importance to all member states. European supervision cannot, therefore, be avoided simply by invoking the margin of appreciation.⁶⁶⁷

Concerning the case of teacher and student, the court had to deal with a question of the most appropriate candidate for deciding the pertinent issues: local government authorities or international courts. In some aspects, these cases demonstrate the increasingly tension ensued from the internationalization of law, including "one of the most cosmopolitan, and controversial, trends in constitutional law: using foreign and international laws as an aid to interpreting"⁶⁶⁸ domestic constitutional law. Both cases including Şahin and *Dahlab* then illustrate the problems of enacting and maintaining something resembling a 'European Jurisprudence of religious freedom' according to Article 9 (2) of ECHR, particularly given the diversity of laws applied across the members' states.⁶⁶⁹ This article guarantees religious freedom but also establishes the possibility of legally restricting religious freedom in the name of protecting public order and the rights and fundamental freedoms of others.

Though the threat of fundamentalist Islam (which tries to impose its ideas on society) at its most extreme is very real and the prevention of radicalisation paramount, there is a plausible case to be made that there is the world of difference between a Muslim who chooses to wear the hijab, or headscarf, and a religious fundamentalist who wishes to attack others for a religious cause.⁶⁷⁰

⁶⁶⁷ *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.para115. Dissenting Opinion of Judge Tulkens para 3. For more discussion on 'Margin of Appreciation' see: Tom Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56.2 *International and Comparative Law Quarterly* 395. Also see: Nilufar hañpanahi, 'Margin of Appreciation in Context of Freedom of Religion (Article 9 of the European Convention on Human Rights) in the interpretation of the European Court of Human Rights' (DPhil Thesis University of Toronto, 2011).

⁶⁶⁸ Cindy Skach, 'Şahin v. Turkey. App. no. 44774/98;" Teacher Headscarf." Case no. 2BvR 1436/02' (2006) 100.1 *The American Journal of International Law* 186, 194. For more information on critical analyse of the margin of appreciation see: Paolo Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*' (2011) 13.3 *Ecclesiastical Law Journal* 287, 295, 296.

⁶⁶⁹ *Ibid.*

⁶⁷⁰ Jennifer M Westerfield, 'Behind the veil: an American Legal Perspective on the European Headscarf Debate' (2006) 54.3 *The American Journal of Comparative Law* 637, 656, 657. For more information see: W Cole Durham, *Islam, Europe and Emerging Legal Issues* (GB: Ashgate Publishing Ltd 2012; 2013).

Compelling argument was not provided to support claims that the headscarf represented an attack on secularism, and one could argue that an educated young woman is more equipped than most to resist radicalisation, though there was no evidence provided of any such attempt. While there is a rising concern surrounding fundamentalist activity, the right of the individual to express their religion through their dress cannot be infringed upon due to fear alone.⁶⁷¹

The department of the UN which concerns itself with religious persecution has created a gauge of legislation regarding religious freedom which can be used to assess whether such legislation is discriminatory or not⁶⁷², which outlines that “*dress should not be the subject of political regulation and calls for flexible and tolerant attitude in this regard, so as to allow the variety and richness of . . . garments to manifest themselves without constrain*”.⁶⁷³

On this basis it may be deduced that the decisions of the court regarding the *Leyla Şahin* and *Refah Party* contradict international human rights criteria. Also, this decision is based on ‘possibilities’, ‘hypothesis’ and ambiguous terms such as ‘*secularism*’, ‘*totalitarian movement*’, ‘*Islamic fundamentalism*’⁶⁷⁴ which seem to be difficult to define and apply in the legal context. Furthermore, it seems that these decisions are beyond jurisdiction of the ECtHR particularly when it made a value judgment about the nature of Islamic religion. It would be more conceivable if the judges had passed judgment on the specific instruction of Islam that relate to the wearing of headscarf and not Islamic religion as a whole.

It is vitally important the Court is clear about the distinctions to be made. *Gibson* states that such differentiation is crucial particularly with respect to Turkey as the country is duly worried about the imposition of fundamentalist ideas on those not willing to adopt or share them. By the same token, the country should assure that devout Muslims are protected from a secular fundamentalist’s form and any attempts to force its secular view of the world on society.⁶⁷⁵

⁶⁷¹ Benjamin Bleiberg, ‘Unveiling the Real Issue: Evaluating the European Court of Human Rights’ Decision to Enforce the Turkish Headscarf Ban in *Leyla Şahin v. Turkey*’ (2005) 91 *Cornell L. Rev.* 129, 166-169

⁶⁷² Michael Wiener, ‘*The mandate of the Special Rapporteur on Freedom of Religion or belief- institutional, procedural and substantive legal issue*’ (2007) 2.1 *Journal of Religion and Human Rights*. Martinus Nijhoff Publishers. 3, 8.

⁶⁷³ Bahia, Tahzib-Lie, ‘Applying a Gender Perspective in the Area of the Right to Freedom of religion on belief’ (2000) 2000. 3 *Brigham Young University Law Review* 967, 983.

⁶⁷⁴ *Hasan and chaush v Bulgaria* (Application no.30985/96) (ECHR, 26 October 2000) 34 EHR55

⁶⁷⁵ Nicholas Gibson, ‘Faith in the courts: religious dress and human rights’ (2007) 66.03 *The Cambridge Law Journal* 657, 691.

4.6. Conclusion

Though ‘fundamentalism’ is a word with a number of socially and politically cemented connotations most frequently used when talking about Islam, it is also a concept present in other religions. The term is a nuanced one, both in academia and in law, as it is either used to refer to a series of unconnected organisations and ideologies, or as a moniker for terrorism in the name of Islam. There is also little delineation in most of the literature regarding fundamentalism between orthodox theism and fundamentalist belief. Many of the ECtHR’s decisions have faced the criticism that orthodox religiousness has been mistaken for extremist behaviour, with oppressive acts often stemming from the latter but rarely from the former, which usually promotes tolerance and peace.⁶⁷⁶

The inextricability of fundamentalism from religion means that connotations of the term should not trigger extreme responses from the general public towards those who practice orthodox religion; it is also important to differentiate between personal or collective orthodox faith and organised fundamentalist activity which encroaches on the rights of others. There are a number of individuals who turn to strict, one could call it ‘fundamentalist’, religious groups in order to achieve self-actualisation, personal wellbeing, and sense of community, or perhaps even to proclaim their purity; these individuals are not a danger to security nor to the rights of others. In a number of Islamic nations, religious dress is more of a traditional or cultural act than a religious one, as is the case in Turkey. Even those who express fundamentalist beliefs or live their lives in a way which could be considered fundamentalist are not necessarily a threat to anybody, as religious expression and freedom should be protected as long as these beliefs are not expressed in a way which infringes on the rights of others.⁶⁷⁷

In the current geo-political environment, conflict is often centred on religious disagreement, or clashes of culture which have their foundation in deeply rooted prejudices; this

⁶⁷⁶ Mårtensson Ulrika & others, *Fundamentalism in the Modern World: Fundamentalism and Communication: Culture, Media and the Public Sphere* (IB Tauris 2011) 66, 67. For further information see: Ruud Koopmans, ‘Religious Fundamentalism and Hostility against Out-Groups: A Comparison of Muslims and Christians in Western Europe’ (2015) 41.1 *Journal of Ethnic and Migration Studies* 33, 35.

⁶⁷⁷ W Cole Durham, *Islam, Europe and Emerging Legal Issues* [GB: Ashgate Publishing Ltd 2012; 2013] 162-165, 209-226.

has been most notably observed in Balkan⁶⁷⁸, India and in Middle Eastern nations⁶⁷⁹, where large numbers of people are being radicalised by extremist religious groups and oppressive political parties. It is not the religious expression of individuals that pose a threat to security, rather large organisations that strive for power and use extremist rhetoric to recruit. In this regard it is of significant importance that international judges do not just simply assume that they understand perceptions and opinions of Muslims based solely on them wearing or not wearing headscarf. It needs to be emphasised that a large number of Muslims are opposed to fundamentalism and wish for the international community to acknowledge that they themselves are the target of fundamentalists.

A more subjective element of the argument surrounding fundamentalism is that of legislating the same behaviours in different nations, as it is difficult for both international judges and lawmakers to amend these ideas of fundamentalism for very different and equally complicated cultures and national values. Countries often differ in their interpretation of ‘fundamentalism’, and so it is near impossible to create a system of human rights legislation which can be applied universally.⁶⁸⁰

It is observed that in the cases that the states do not have a common understanding on the subject of complaint, states have wide margin of appreciation. As the court in the case *Open Door and Dublin Well Woman v. Ireland* observed.⁶⁸¹ However it doesn’t imply that states limit the circle of the rights and freedoms in the society. To identify the extent of the margin of appreciation, the Court has to consider the significance of the whole situation surrounding the case, mostly the necessity to protect religious plurality as a cornerstone of liberal democracy. Furthermore, in its role of a supervisor, the Court has to take into account the interference complained of on the basis of the facts as a whole”.⁶⁸²

⁶⁷⁸ Evan F Kohlmann, *The Role of Islamic Charities in International Terrorist Recruitment and Financing* (DIIS working paper 2006) 23.

⁶⁷⁹ Jenin Palestine, ‘Stereotyping Islam in Western Perceptions between Fundamentalism and Phobia: Analytical and Critical Reading’ (2013) 1 (1) *Journal of Islamic Studies and Culture* 12, 16, 17. See further: Ben Smith, ‘ISIS and the Sectarian Conflict in the Middle East’ (2015) 15/16 *House of Common Library*

⁶⁸⁰ Steven C, Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Vol. 17. Council of Europe, 2000) 58. See: Tom Lewis, ‘What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation’ (2007) 56.02 *International and Comparative Law Quarterly* 395.

⁶⁸¹ (Application no. 14234/88) (29 October 1992) ECHR 68 para 68.

⁶⁸² *Metropolitan Church of Bessarabia and others v. Moldova* (Application No. 45701/99) (13 December 2001) ECHR ECHR 860 para 119. See also: (*Cha’are Shalom Ve Tsedek v. France* (Application no. 27417/ 95) (27 June 2000) para 84 and JOINT DISSENTING OPINION OF JUDGES Sir Nicolas BRATZA, FISCHBACH, THOMASSEN, TSATSA-NIKOLOVSKA, PANȚÎRU, LEVITS AND TRAJA.

In conclusion, legal objectivity cannot solve problems of religious fundamentalist expression, as this risks the state becoming an agent of oppression and subjugation; it is true that the law is often lacking the nuance demonstrated by the society it is attempting to govern.⁶⁸³ In terms of fundamentalism, the judicial system must place a greater focus on those acts which are undeniably illegal, in that there is a consensus of its wrongfulness. Alternatively, it should also direct its attention to those acts which are widely determined by the public to be a threat to them, which would require further investigation. When it comes to an issue as complex as religious freedom, the judicial system should at the very least be aware of its incapability to deal with the complexity such an issue presents, or risk exacerbating the problem it wishes to eradicate. Hence, the right to express views that might be considered fundamentalist is a part of the freedom of expression but only under the condition that 'words do not turn into violent deeds'. As *McDonough* argues the important issue concerning fundamentalism is not what fundamentalists believe, but what they do on the basis of their beliefs.⁶⁸⁴

⁶⁸³ Chayanika Shah, 'Hindu Fundamentalism in India: Ideology, Strategies, and the Experience of Gujarat' (2004) *Warning Signs of Fundamentalisms* 61, 61.

⁶⁸⁴ Richard McDonough, 'Religious Fundamentalism: a Conceptual Critique' (2013) 49.04 *Religious Studies* 561, 565.

CHAPTER FIVE:

A Critical Analysis of the Concept of protection of ‘tolerance’ used as a Justification by the ECtHR to Ban the Wearing of the Headscarf

5.1. Introduction

Over the last century, scholars in the field of politics, such as *Walzer* and *Rawls*, have come to the conclusion that toleration was a ‘done deal’ and it is a fundamental element of any democratic state⁶⁸⁵. This concept has been upheld by a number of countries, particularly in the West, with some even going as far as including it in their constitutions. It can be argued, however, that tolerance with regard to religious beliefs is far from a ‘done deal’. Intolerance persists on a global scale, and religious intolerance has been at the core of some of the most significant conflicts in human history, including a series of religious wars ravaging Europe for 30 years in 17th century. Although wars like these are a thing of the past, many assert that religious intolerance is as ubiquitous as ever.⁶⁸⁶ It is generally accepted that intolerance derives from the belief that one’s own dogma or lifestyle has more value than that followed by others. The impact of intolerance can vary from rudeness and hostility towards people wearing religious attire such as the headscarf, to institutional marginalisation and subjugation, such as that demonstrated during the Apartheid system in South Africa. In extreme cases, intolerance can lead to the destruction of cultures and peoples through genocide or ‘ethnic cleansing’.⁶⁸⁷

In recent years, there has been a palpable increase in intolerant behaviour and conflict on an international scale, often leading to attacks on minority groups; this has been most notably observed in Myanmar⁶⁸⁸, India⁶⁸⁹ and a number of Middle-Eastern nations.⁶⁹⁰ Due to its current

⁶⁸⁵ Cited in Steve Clarke and others, *Religion, Intolerance, and Conflict: A scientific and conceptual investigation* (Oxford University, 2013) 2-3.

⁶⁸⁶ Russell Powell, and Steve Clarke, *Religion, Tolerance and Intolerance: Views from across the Disciplines* (A Scientific and Conceptual Investigation OUP Oxford, 2013) 3.

⁶⁸⁷ Donatus I Njoku, and Nkechi C. Njoku, ‘Appraisal of Religious Intolerance in Nigeria’ (2013) 5 *International Journal of Theology & Reformed Tradition* 121, 125-126.

⁶⁸⁸ Min Zin, ‘Anti-Muslim Violence in Burma: Why Now?’ (2015) 82.2 *Social Research: An International Quarterly* 375-397.

⁶⁸⁹ Herbert Hofer, ‘Why are Christians Persecuted in India? Roots, Reasons, Responses’ (2001) 18.1 *International Journal of Frontier Mission* 7.

⁶⁹⁰ The Open Doors Reports, ‘Freedom of Religion and the Persecution of Christians’ (2016). Available at: <<https://www.opendoorsuk.org/persecution/documents/ww-report-160113.pdf>> accessed 10 September 2017.

day relevance, issues of tolerance and intolerance has been widely discussed by those who study the social sciences, politics and theology, as this issue has a significant impact on all of these fields. Attempts to better understand tolerance and intolerance have been universal and, on a more official level, a number of treaties and proposals have been promulgated by world governments in order to address intolerance.⁶⁹¹ One of the challenges faced by those attempting to tackle intolerance is a lack of a standard definition or overall conception of the term, which means that states may struggle to cooperate on matters of intolerance. This problem is exacerbated by religious factors, as an attempt to place legal or universal parameters on religious expression and religious intolerance often proves extremely challenging. While interpretations of the term may vary, it is generally agreed that tolerance must be considered a fundamental element of international and national peaceful-coexistence. The Director-General of UNESCO has posited that tolerance should be “*integral and essential to the realisation of human rights and the achievement of peace... tolerance is affording others the right to have their persons and identities respected*”.⁶⁹² It is clear then that tolerance should not be merely an end goal but a process through which societies come to be more internally peaceful and understanding, as tolerance is a necessity for peace. It has been put forward that tolerance is one of the biggest steps left to make towards a more harmonious and peaceful society, and can only be undertaken gradually and through the evolution of a culture of peace.⁶⁹³

These issues often have their roots in deep-seated historical perceptions, though it has been widely acknowledged that tolerance is conducive to religious freedom rather than an affront to religion. Therefore, tolerance must be encouraged for the safety of minorities and to avoid oppressive political systems. Work by *Adeney* (1926), included in the *Encyclopaedia of Religion and Ethics*, argues that ‘toleration’ both legally and theologically refers to the avoidance of subjugation and persecution.⁶⁹⁴ More recently, the issue of religious intolerance has come to the

⁶⁹¹ Examples of International document include: Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), proclaimed by GA Res. 36/55 of 25 November 1981, UN Doc. A/36/51 (1982)). Also see: A/HRC/28/47 “Combating intolerance, negative stereotyping, stigmatization of, and discrimination, incitement to violence and violence against persons on religion or belief”, Report of the United Nations High Commissioner for Human Rights. Also see: Promotion of Religious and Cultural Understanding, Harmony and Cooperation. A/Res/60/11.

⁶⁹² B. A Reardon, ‘Tolerance: The Threshold of Peace, a Teaching/Learning Guide for Education for Peace, Human rights and Democracy’ (1994). UNESCO 1, 12.

⁶⁹³ Ibid, 12, 14.

⁶⁹⁴ A.T. Talib & Sarjit S. Gill, ‘Socio-Religious Tolerance: Exploring the Malaysian Experience’ (2012) 12.8 Global Journal of Human Social Science 48, 50.

fore with the increase in debates surrounding the headscarf and its contextual appropriateness whilst a number of countries have attempted to impose legal restrictions on the wearing of religious garment. In the case of *Dahlab*, the ECtHR observed “...*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*”.⁶⁹⁵ This research aims to determine whether the concept of the protection of tolerance is in principle to be used as a justification to ban the wearing of headscarf.

5.2. The Roots and definition of tolerance

Much of the previous literature⁶⁹⁶ on this topic relies heavily on pure legal arguments and largely ignores the context and subjectivity of the concept of tolerance; this research will transcend purely legal conceptions and attempt to consider tolerance under a wider, more longitudinal and more philosophical framework. Once the concept of tolerance is placed within its context, this allows the processes and consequences of tolerance to be better understood. Furthermore, it allows a consideration of the term as it relates to the ECtHR cases, which will be discussed further in the following sections. The absence of a historical framework for that which underlies tolerance means that any study on the topic is bound to suffer from an incomplete assessment of ECtHR policy. To this end, the thesis includes a historical overview of the concept as well as a semantic interpretation of the term, alongside a consideration of the term’s societal significance. In order to elaborate on a proposed definition, a discussion of attributes of tolerance will be provided, as this is crucial to identifying the phenomenon in context and in discerning whether the term was appropriately used in court cases. In summary, this chapter will present a discussion as to whether the wearing of a headscarf as a part of religious manifestation creates a culture of intolerance.

In a historical sense, the term ‘toleration’ had been used predominantly by politician during the 17th and 18th century and was a key term in Enlightenment discourse. It has been argued that the prominence of the term can be attributed to John Locke (1632-1704), who included it in the titles of his works *The Letter Concerning Toleration* (1688) and *Essay on Toleration*, which was

⁶⁹⁵ *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899.

⁶⁹⁶ Henrik Palmer Olsen, ‘The Right to Freedom of Religion: A Critical Review’ (2000) 50 Official Journal of the European Communities 227. For further see: Alice Donald, and Erica Howard, ‘The Right to Freedom of Religion or Belief and its Intersection with other Rights.’ (2015). A research paper for ILGA-Europe. School of Law, Middlesex University 1. See also: Sylvie Langlaude, ‘Indoctrination, Secularism, Religious Liberty, and the ECHR.’ [2006] 55.04 International and Comparative Law Quarterly 929. Also see: Dawn Lyon, and Debora Spini, ‘Unveiling the Headscarf Debate.’ (2004) 12.3 Feminist Legal Studies 333.

published posthumously. Similarly to the philosopher's other work, there is an appreciation for the separation of church and state and the necessity of such a separation when establishing a tolerant society with regard to religious expression.⁶⁹⁷ A movement of 'religious toleration' was observed in Europe as early as the latter half of the 16th century; this movement has been considered a reaction to religious conflict.⁶⁹⁸ The concept of toleration, however, was termed an embarrassment across Christian denominations, with Protestant and Catholic churches calling for its end. Toleration was maintained, however, as it was considered important to the long-term strategy for the restoration of unity.⁶⁹⁹ The general attitude towards toleration or tolerance is evidenced by its entry in the first edition of the *Dictionnaire de l'Académie française* (1694), which defined the term as sufferance, forbearance that one has for what one cannot prevent.⁷⁰⁰ Tolerance was considered the other side of the coin of intolerance; when intolerance of religious transgression could not be legally upheld, measures of tolerance could be enforced through official channels. Tolerance initially emerged as a side-effect of the inability to impose religious conformity, contrary to how we understand the term today, i.e. as an embracement of religious diversity.⁷⁰¹ Modern day conceptions of the term position tolerance as a state virtue and a component of rights surrounding religious expression which supports religious diversity, rather than religious uniformity. Semantically, 'tolerance' has its etymological origins in Latin, with the word '*tolerare*', which means 'to endure'. The way in which each language has adapted the word from its Latin origin has led to a slight variation in definition across national borders, according to historical and cultural context. In cases where there is no Latin root due to the language having a different origin, there are separate synonyms used in its place which, again, have different connotations. It is hard to pinpoint an exact definition of 'tolerance', as its meaning varies

⁶⁹⁷ King Preston, '*Toleration*' (New Edition by Frank Cass Publishers, 1998) 237, 87-90. See also: 'Defining Tolerance', (1997) The United Nations Educational, Scientific and Cultural Organization.p.56. For further information on the roots of tolerance see: Jürgen Habermas, 'Religious Tolerance—the Pacemaker for Cultural Rights' (2004) 79.01 Philosophy 5.

⁶⁹⁸ Lynn Avery Hunt, 'The Enlightenment and the Origins of Religious Toleration' (2011) Department of History, University of California, Los Angeles *HolaPress* Communicatie 1, 4. See also: Juan Pablo Dominquez, 'Introduction: Religious Toleration in the Age of Enlightenment' (2017) 43.4 History of European Ideas, 275, 28.

⁶⁹⁹ Benjamin J Kaplan, '*Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe*' (Harvard University Press 2006; 2009; 2007) 432, 143.

⁷⁰⁰ *Supra* no 685, 7. See further, Andrew Jason Cohen, 'What Toleration Is' (2004) 115.1 Ethics, The University of Chicago Press 68.

⁷⁰¹ Lynn Avery Hunt, 'The enlightenment and the origins of religious toleration' [2011] Eds. Claudette Baar-de Weerd, Kornee van der Haven, and Alexander JP Raat. *Werkgroep 18e Eeuw* 1, 7.

according to who is using it, why they are using it, and under what conditions.⁷⁰² This has been evidenced by discussions surrounding tolerance which have taken place in recent years within the official languages of the UN.

Tolerance has been defined by the ‘Oxford Concise Dictionary’ as a noun which refers to a “*Willingness to tolerate*” or “*forbearance*” or a verb which means to “*Endure, permit (practice, action, behaviour), allow (person, religious sect, opinion) to exist without interference or molestation [. . .] Allowing of difference in religious opinions without discrimination*”. Alternatively, Chinese definitions have defined ‘tolerance’ as follows: to “*Allow, admit, to be generous towards others*”. Across the world tolerance has been given the following synonyms: to pardon, indulgence, mercy, clemency, forgiving. In Russia, ‘tolerantnost’ refers to the “*ability to tolerate (to endure, bear, stand; put up with) something or somebody, that is, to admit, accept the being, existence of something/somebody, to reconcile oneself to something/somebody, to be condescending, lenient to something/ somebody*”.⁷⁰³ In general, the definitions of tolerance stated above do not explicitly perceive tolerance as an act of embracing transgressive opinions. However, the inclusion of words like ‘to admit’ and ‘to allow’ indicates that dissenting views are accepted.

When considered in a broad sense, tolerance can be taken to mean an acceptance of “*individuals and groups that abide by a set of values, norms, customs, and political goals that is different from one’s own*”.⁷⁰⁴ This is true only if one accepts a broad definition of the term, unaffected by cultural context; this may refer to any religious group or anti-religious group under any social conditions. The work of *Bernard Williams* argues that “*A practice of toleration means only that one group as a matter of fact puts up with the existence of the other, differing, group. . . . One possible basis of such an attitude . . . is a virtue of toleration, which emphasizes the moral good involved in putting up with beliefs one finds offensive. . . . If there is to be a question of toleration, it is necessary that there should be some belief or practice or way of life that one group thinks (however fanatically or unreasonably) wrong, mistaken, or undesirable*”.⁷⁰⁵ Promotion of

⁷⁰² A.T. Talib & Sarjit S. Gill, ‘Socio-religious Tolerance: Exploring the Malaysian Experience’ (2012) 12.8 *Global Journal of Human Social Science* 48, 50. For more information see: Kelly James Clark, ‘Perils of Pluralism’ (1997) 14.3 *Faith and Philosophy* 303.

⁷⁰³ B. A. Reardon, ‘Tolerance: The Threshold of Peace. A Teaching/Learning Guide for Education for Peace, Human Rights and Democracy’ (1994) UNESCO 1, 21.

⁷⁰⁴ John L. Sullivan, James Piereson, and George E. Marcus, *Political Tolerance and American Democracy* (University of Chicago Press 1993) 278, 4, 5. For further see: Steve Clarke and others, *Religion, Intolerance, and Conflict: A scientific and conceptual investigation* (Oxford University, 2013) 282, 17.

⁷⁰⁵ Cited in Brian Leiter, ‘Why Tolerate Religion?’ (2008) 25.1 winter, *Constitutional Commentary* 1, 2.

tolerance cannot rely solely on universal standards of morality, as this is no accurate way to measure true tolerance whilst this method is too subjective and fails to take into consideration variation in societal context. Morality, as a concept, is extremely subjective and changeable, as pointed out by the ECtHR⁷⁰⁶; while one interpretation of morality may be the accepted norm, this can change very over time. For example, norms which dictated that women were not fit for work which involved logical reasoning were once commonplace though, thankfully, such prejudicial views in some societies have become antiquated. Such norms still prevail in some societies and even in some communities in Western countries. This is evidence, if any were needed, that dominant attitudes must adapt and change over time, as old attitudes may no longer apply to a rapidly changing society.⁷⁰⁷ One must seek a more stable foundation on which to base conceptions of tolerance.

The work of *Talib* and *Gill* conceives of religious tolerance as an openness to accepting differences in religious attitudes and practices under any societal or cultural circumstances without prejudice (even if it is in one's power to reject or deny it), in order to achieve 'well-being' and a 'harmonious'.⁷⁰⁸ While widely accepted, there has been some debate over the accuracy of this definition, as it can be argued that those who hold prejudicial views may not necessarily be 'intolerant'. Tolerance, while implying an acceptance of difference, does not necessarily mean there are no prejudices present. Prejudice and intolerance, then, do not always exist together, as someone with prejudices might be outwardly tolerant, assuming that they acknowledge their prejudices and so tolerance can exist as long as prejudice is contained.⁷⁰⁹ In other words, in situations where stereotyping and preconceptions create a negative evaluation, it does not follow

⁷⁰⁶ *Handyside v. United Kingdom* (Application No.5493/72, A/24) (07 December 1976) ECHR 5 para 48. For more discussion on the moral attitude as a justification to restrict rights and freedoms see: Amedeo Francesco Cappuccio, 'Article 10 and Restrictions on Pornography: Shifting the Rationale from Protection of Morals to Cultural Harm' (2012) 2 Queen Mary Law Journal 1. Also to consider fluidity of the concept of moral see: Margaret J, Zube, 'Changing Concepts of Morality: 1948–69.'(1972) 50.3 Social Forces 385.

⁷⁰⁷ Should we Judge People of Past Aras for Moral Failings? (20 August 2013) Available online at: <<http://www.bbc.co.uk/news/magazine-23772194>>accessed 26 April 2016. For more discussion on moral basis for tolerance see: Anna Elisabetta Galeotti, 'Do we Need Toleration as a Moral Virtue?' (2001) 7.03 Res Publica 273. Also see: Peter Balint, 'Acts of Tolerance: A Political and Descriptive Account' (2014) 13.3 European Journal of Political Theory 1264, 1266-7.

⁷⁰⁸ A.T. Talib & Sarjit S. Gill, 'Socio-religious Tolerance: Exploring the Malaysian Experience' (2012) 12.8 Global Journal of Human Social Science 48, 51. For more details on the views of authors see: Ahmad Tarmizi, and other 'Religious Tolerance: The Key between One ASEAN One Community' (2013) 10.4 Life Science Journal 1382, 1383.

⁷⁰⁹ Corwin Smidt & James M, 'Penning, 'Religious Commitment, Political Conservatism, and Political and Social Tolerance in the United States: A longitudinal Analysis' (1982) 43.3 Sociological analysis, 231, 232.

that such beliefs will lead to hostile actions; tolerant actions and prejudicial thoughts towards a certain group can coexist in the same person.⁷¹⁰ Tolerance is often considered alongside the concept of ‘well-being’ and this concept is supported by a number of factors, most notably a desire to maximise positive outcomes and achievements. Well-being has been interpreted by the World Health Organisation to mean a process by which one can achieve “*one’s physical, emotional, social, mental and spiritual potential*”. There are variations in the way different groups and individuals prioritise the different processes of well-being; these can range from a spiritual fulfillment to the improving one’s social life.⁷¹¹

Toleration has been defined by *Colin Gunton* as a willingness to allow attitudes, beliefs and practices in others which the individual or group themselves does not believe to be true whilst this can be accepted for the sake of ‘higher good’- especially the well-being of human society’.⁷¹² These definitions, though useful to a certain extent, still utilise terms such as ‘wellbeing’ or ‘higher good’ which are highly subjective and are conditioned by factors such as to culture, language and the temporal context under which they are used.

Alternatively, *John Christian Laursen* argued that “*Toleration is a policy or attitude toward something that is not approved and yet is not actively rejected*”.⁷¹³ *Laursen* later supplemented this definition with concepts of ‘dominant’ groups and ‘disfavoured’ ones in order to better apply to current social conditions and the actualities of social dynamics. This updated definition applies a “principle of toleration” in cases where ‘dominant’ groups, who are supported by prevailing hegemonies, take a negative stance against the practices or beliefs of a different group, which then becomes the ‘disfavoured’ group. The dominant group, in most cases, has power over the disfavoured group and may either marginalise or suppress that group or attempt to change their beliefs to better suit the prevailing ideology. Social harmony relies on the acknowledgment by the dominant group that, in the interest of peace and acting ethically, one should not restrict the expressions of the disfavoured group; in other words the dominant group acknowledges that there are moral or epistemic reasons (that is, reasons pertaining to knowledge or truth) to permit the disfavoured group to keep on believing and doing what it does; this constitutes what is known as

⁷¹⁰ John L, Sullivan and others, *Political tolerance and American democracy* [University of Chicago Press 1993] 278, 4, 5.

⁷¹¹ ‘Measuring Well-being, A literature Review (Coram voice, Hadley Centre for Adoption and Foster Care Studies, University of Bristol 2015) available at: <http://cdn.basw.co.uk/upload/basw_30249-5.pdf> Accessed 15 April 2017

⁷¹² Cited in Paul AB, Clarke, and Andrew Linzey, *Dictionary of Ethics, Theology and Society*. (Routledge 2013) 826.

⁷¹³ *Supra* no 697.

a pure/principled toleration.⁷¹⁴ The use of the terms ‘dominant’ and ‘disfavoured’ in this definition is in favour of terms such as ‘majority’ and ‘minority’, as being the largest group does not always add up to being the most influential group in a given culture. This is apparent in societies such as that of *Saddam Hussein’s* Iraq, in which the Sunni sect were simultaneously the minority group in terms of numbers and yet the most powerful group in terms of influence; this led to a suppression of a Shia community; this was also the case in Bahrain, where the Shia majority is similarly oppressed by an influential Sunni minority.⁷¹⁵ Problems arise with this definition when one questions the terms ‘ethical’ or ‘moral’ with regard to the motivations behind toleration, as these are highly subjective concepts dependent on culture and ideology.⁷¹⁶

This definition has also made use of the term ‘epistemic’, which relates to conceptions of truth; when used in theological terms, the concept of ‘truth’ cannot be empirically defined or determined and so must rely on the way in which individuals and groups interpret it.⁷¹⁷ Harell posits that “*tolerance is traditionally understood to imply restraint when confronted with a group or practice found objectionable*”⁷¹⁸. A more generally agreed upon definition of tolerance has been presented by *Andrew Cohen*, who proposed that “*An act of toleration is an agent’s intentional and principled refraining from interfering with an opposed other (or their behaviour, etc.) in situations of diversity, where the agent believes she has the power to interfere*”⁷¹⁹.

It can be argued that tolerance is only really applicable when the individual or group choosing to be tolerant has a capability to actively oppose the practices or convictions of other individuals or groups. When attempting to apply the concept of tolerance to legal systems,

⁷¹⁴ Brian Leiter, ‘Why Tolerate Religion?’ (2008) 25.1 winter, *Constitutional Commentary* 1, 5. For further information see: Brian, Leiter. *Why Tolerate Religion?* (Princeton University Press 2013) 13. For more information on tolerant by socially dominant group see: Gatriona Mc Kinnon and Dario Castiglione, *The Culture of Toleration in Diverse Societies, Reasonable Tolerance* (Manchester University Press 2003) 72-74

⁷¹⁵ Mari Luomi, ‘Sectarian Identities or Geopolitics?’ (2008) 56 Working Papers, The Finnish Institute of International Affairs 1. For more information about sectarian conflict in Bahrain see: Jane Kinninmont, *Bahrain: Beyond the Impasse* (Chatham House/Royal Institute of International Affairs 2012) 42. For more information about Iraqi sectarian conflict see: Joost Hiltermann, ‘A New Sectarian Threat in the Middle East?’ [2007] 89.868 *International Review of the Red Cross* 795.

⁷¹⁶ For discussion on relativity of moral see: Jesse Prinz, ‘The Emotional Construction of Morals’ (2007) 69.4 *Analysis*, Oxford University Press 701. For further information see: Margaret J Zube, ‘changing concepts of morality: 1948–69.’ [1972] 50.3 *Social Forces* 385

⁷¹⁷ J. Judd, Owen, ‘Locke’s Case for Religious Toleration: Its Neglected Foundation in the Essay Concerning Human Understanding’ (2007) 69.1 *The Journal of Politics* 156, 156.

⁷¹⁸ Allison Harell. ‘The Limits of Tolerance in Diverse Societies: Hate Speech and Political Tolerance Norms among Youth’ (2010) 43. 02 *Canadian Journal of Political Science* 407, 408.

⁷¹⁹ Cited in Nur Muhammad Sajjadul Hoque, Sumon, ‘Terrorism, Religious Intolerance and Ethnic Conflict Issues in the National Education Policy (NEP)-2010 of Bangladesh: An Exploratory Study’ (2015) 5.1 *Journal of Education and Research* 25, 39.

problems arise due the lack of a widely agreed upon definition; the only official international recognition of tolerance comes in the form of the ‘Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief’ 1981, which neglects to provide a definition of ‘tolerance’. It does, however, detail the differences between actions designed to combat ‘discrimination’ as compared to actions which address ‘intolerance’. The aforementioned declaration states that nations should “make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination” while fighting intolerance through an implementation of “all appropriate measures”.⁷²⁰ This creates a legal idea of ‘discrimination’ on which policy can be based, as it suggests specific actions to be taken, which is not the case with ‘intolerance’ as the declaration suggests simply the ‘appropriate measures’ be implemented to address this issue. This is indicative of the lack of legal parameters and definitions in place for the concept of intolerance.⁷²¹

5.3. The Characteristics of tolerance

The sheer number of proposed definitions with regard to tolerance strips the terms of any practical application; one can discern, however, from the suggested definitions, a number of common characteristics which are present in most interpretations of the term. Parsing these common characteristics makes the concept of tolerance more transparent and so renders applications of the term to the issue of the headscarf with reference to the ECtHR altogether easier. Of these common characteristics, amongst the most important is that tolerance may only exist in situations where there is a difference, as one can only be tolerant of a group, a belief system or a practice which varies in some way from one’s own. In order for one to be tolerant of another group, one must consider their ideology or way of life "wrong, mistaken, or undesirable" but allow it to exist without disruption.⁷²² In a uniform society with no religious or ideological disparities, tolerance would be a redundant sentiment, as one cannot tolerate something which one believes to be true or correct. Tolerance, then, is the acceptance of others’ way of life in a manner which allows them to express and practice it in the way they wish to; however, one can respond to what

⁷²⁰ Declaration on the Elimination of All Forms Intolerance and of Discrimination Based on Religion or Belief. G.A, Res 36/55, U.N. GAOR, 36th Sess., 73d plen.mtg. UN. Doc.A/36/684 (Nov, 25, 1981, article 2.

⁷²¹ Carolyn Evans, ‘Time for a Treaty-The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination’ (2007) 3 BYU L. Rev., 617, 626.

⁷²²Amelie Mummendey and Michael Wenzel, ‘Social discrimination and tolerance in intergroup relations: Reactions to intergroup difference’ (1999) 3.2 Personality and Social Psychology Review 158. For further information see: Brian, Leiter. ‘*Why Tolerate Religion?*’ (Princeton University Press 2013) 8, 9.

is considered 'other' in a variety of, (often negative), ways.⁷²³

Toleration does not apply to groups that are largely disinterested in the beliefs or practices of each other. For instance, I do not "tolerate" my neighbors who are religious or who are white just because I am *indifferent* as to the race or religious orientation of other members of the society. These cases are merely about indifference; consequently, they cannot be included within the scope of tolerance. Tolerance, according to most definitions, also involves an active discomfort with that which is different and so in order to tolerate another group, there must be an awareness and a reaction to the beliefs or practices of another group or collection of groups. One could argue that having a disinterest in or feeling indifferent about the beliefs and practices of others is a healthier and more socially agreeable notion than tolerating difference, as the former involves less judgement and no negative feelings which are simply being kept to oneself, as is often the case with 'tolerance'.⁷²⁴ Because of the depth of feeling about matters of fundamental human concern, it is easy to see why human beings seem naturally inclined to intolerance. We invest ourselves into the things we care about and those who believe in different values sometimes deny that our concerns are worthy of such care and investment. Religious and moral disagreements are threats because of this devaluing of the others' beliefs and practices. When we find the other a burden, we naturally wish to preserve our own cares and investments. This often leads to oppression, marginalisation or persecuting people with differing practices and beliefs.⁷²⁵ It may also be the case that one could display an opposition to another's beliefs while still accepting them as a person, for tolerance may be interpreted as an acknowledgment of the value of another human being despite their core beliefs or practices. Many have interpreted tolerance as a need to remove barriers between people and create connections between those with fundamentally different lives and identities. One who is tolerant, then, must value those with different beliefs on a human level if not on an ideological level. There must be an acknowledgement on the part of the 'dominant' group that differences do not warrant the loss of rights or personhood and so allowing these groups to exist grants these

⁷²³ Stephen Macedo, 'Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?' (1995) 105.3 *Ethics* 468, 473- 478, See also: Dalal Farhad, 'The Struggle to Live and Let Live: The Psychology, Ethics and Politics of Tolerance, or, Why Discrimination is Preferable to Tolerance' [2013] 17.2 *Journal of Psychotherapy Aotearoa New Zealand* 159.

⁷²⁴ Brian Leiter, 'Foundations of Religious Liberty: Toleration or Respect?' (2010) 47 *San Diego L. Rev.* 935, 940. Also see: Brian Leiter, 'Why Tolerate Religion?' (2008) 25.1 winter, *Constitutional Commentary* 1, 2, 3.

⁷²⁵ Kelly James Clark, 'Belief and Tolerance: Friends, Not Enemies' (2000) 2.1 *Global Dialogue* 11. For more details see author's book: Kelly James Clark, *Abraham's Children: Liberty and Tolerance in an Age of Religious Conflict* (Yale University Press 201) 300, 11-12.

individuals their freedom. Conversely, intolerance equates differences of identity to fundamental human difference and so seeks to dehumanise that which is different; it is personal and often aggressive in nature.⁷²⁶

It has been made clear that tolerance cannot exist without an opposition between two groups, whether mutual or singular. The question has been raised, then, as to the severity and nature of this opposition. For example, disliking a certain food may be considered an opposition but one is not described as tolerant for not taking direct action against it. Alternatively, if one dislikes their partner's haircut and it causes them embarrassment, but they do not urge their partner to change it and they remain good friends, can this be considered tolerance?

The issue is complicated further when applied to religion and race, as if we consider 'tolerance' an allowance of those we dislike, a racist who does not act on his prejudice may be considered a tolerant individual according to this definition. This definition needs adapting, then, as one who is a racist cannot be tolerant, only restrained in their prejudice. Tolerance then, has been repositioned by some as not being about dislike but, instead, about disapproval; the former merely refers to one's preferences, which often have harmless roots and illogical foundations. Preferences cannot be separated into right and wrong, as preferences are not verifiable, whereas disapproval, on the other hand, often has logical foundations and is often based on selective reasoning which supports one individual's view and discredits the other. This explains the way differences of view matter to us identified by the fact that the disapproval at the heart of tolerance can be on moral or non-moral grounds.⁷²⁷

Thirdly, it should also be made clear that tolerance can only exist in a group that has the ability to actively oppose those beliefs which are different to those held by said group.⁷²⁸ To put it another way, the group must perceive themselves as influential enough to change or remove those beliefs which oppose their own; tolerance is the choice to refrain from doing this. In order to tolerate something, there must be a perception that one could influence it if they were so

⁷²⁶ Allison Harell. 'The Limits of Tolerance in Diverse Societies: Hate Speech and Political Tolerance Norms among Youth' (2010) 43. 02 Canadian Journal of Political Science 407, 408. See further, Kelly James Clark, 'The Good of Diversity and the Virtue of Tolerance' (2009) 1.1 Philosophical Meditations (Iran). For further information see: Kelly James Clark, *Abraham's Children: Liberty and Tolerance in an Age of Religious Conflict* (Yale University Press 2012) 300, 11-12.

⁷²⁷ David Heyd, *Toleration: An Elusive Virtue* (Princeton: Princeton University Press 1996; 1998) 280, 34, 35. See also: Dalal Farhad, 'The Struggle to Live and Let Live': The Psychology, Ethics and Politics of Tolerance, or, Why Discrimination is Preferable to Tolerance' (2013) 17.2 Journal of Psychotherapy Aotearoa New Zealand 159, 166

⁷²⁸ John Horton, & Susan Mendus, *Toleration, Identity and Difference* (Basingstoke: Macmillan 1999) 200, 18-20, 142.

inclined.⁷²⁹ If one does not consider a difference in attitude or belief to be disagreeable then they would be disinterested which, as has already been established, cannot describe a process of tolerance.⁷³⁰ This leads onto the next characteristic of tolerance, which is that one must not employ any action against the group that is to be tolerated.⁷³¹ In order for tolerance to exist, then, there must be the presence of power but with the refusal or reluctance to use it to subdue another group. Tolerance relies on opting out of the opportunity to control or constrain groups which believe or practice differently. In other words, we cannot tolerate that which we cannot influence – we can only resign ourselves to it. The lack of interference must be deliberate and clear, and must be based on an acknowledgement of disapproval, as inaction without disapproval is disinterest and indifference. For example, one might privately oppose a belief or practice and have a desire to see it stop; if this person does not take action due to indolence (unless, perhaps, I endorse laziness as a value) then tolerance does not apply, as tolerance must have a basis in a principle of some kind.⁷³² There must be a cognitive process by which an individual considers the way in which they are going to treat those who live differently. Also, it should be pointed out that this decision cannot be forced by others, made unwillingly or made with the promise of personal reward. This principle has been expressed in a number of ways including assertions that tolerance should be “necessarily selective”, “purposeful and intentional”, and “a rational and conscious act”.⁷³³

Also key to understanding tolerance is the importance of ‘non-interference’, though specifically deliberate and active non-interference. To provide an example, someone from one denomination of Christianity may disapprove of the way in which other denominations worship but not take any measures against the act. If this individual preaches to those of another denomination, encouraging them to follow what they consider to be the true way of worship then they may consider themselves to be not directly intervening; this, however, is not considered to be

⁷²⁹ Peter Balint, ‘Acts of Tolerance: A Political and Descriptive Account’ (2014) 13.3 *European Journal of Political Theory* 264, 268. For further information see: Andrew Jason Cohen, ‘What Toleration is’ (2004) 115.1 *Ethics* 68, 68, 69, 72, 93.

⁷³⁰ David Heyd, *Toleration: An Elusive Virtue* (Princeton: Princeton University Press. 1996; 1998) 280, 28, 32, 35.

⁷³¹ Peter A Balint, ‘Avoiding an intolerant society: Why Respect of Difference May not be the Best Approach’ (2010) 42.1 *Educational philosophy and theory* 129. Also see: Frederick Schauer, ‘On the Utility of Religious Toleration’ (2016) 10.3 *Criminal Law and Philosophy* 479.

⁷³² Andrew Jason Cohen, ‘What Toleration Is’ (2004) 115.1 *Ethics* 68, 71-74.

⁷³³ Ade Kearns, & Jon Bannister, ‘Conceptualising Tolerance: Paradoxes of Tolerance and Intolerance in Contemporary Britain’ (2009) 2 *Italian journal of sociology of education* 126, 138. See also Dalal Farhad, ‘The Struggle to Live and Let Live: The Psychology, Ethics and Politics of Tolerance, or, Why Discrimination is Preferable to Tolerance’ (2013) 17.2 *Journal of Psychotherapy Aotearoa New Zealand* 159, 166, 167.

indirect tolerance by a number of scholars as aiming to convert is interference, though some would argue that rational debate cannot be considered intolerance.⁷³⁴ The ECtHR has suggested that in some cases, such as that of *Kokkinakis v. Greece*⁷³⁵, attempts to convert may be divided into acceptable and unacceptable, in some cases illegal, forms. The court in the above-mentioned case observed that “...a distinction has to be made between bearing Christian witness and improper proselytism”. The Court also observed that Greek legislatures are reconcilable with the principle of human rights if and in so far as “they are designed only to punish improper proselytism”⁷³⁶. While forced conversion through threat of violence or other coercion may be considered unlawful, attempts to convert through the logic and conversation cannot, in most cases, be considered a violation of human rights.

Finally, tolerance is usually considered an active, rather than a passive, pursuit and so care must be taken when translating this into the legal arena. In other words, there must be awareness that human judgement and conception is highly fallible and any attempt to apply these concepts to the judicial system should be underpinned by an acknowledgement that absolute truth cannot be discerned. While different belief systems can often be reconciled, any attempt to apply a concept of universal truth to state legal proceedings cannot be anything other than unhealthy for a society.⁷³⁷ Tolerance relies on the ability of human beings to make an active and conscious effort to see past differences and accept other people for their core virtues, those which all people share. *Kofi Annan* has phrased this sentiment thusly: “tolerance cannot simply mean passive acceptance of other peoples’ perceived peculiarities”.⁷³⁸ Tolerance cannot be fully realised without an element of kindness and generosity; “Generosity as a component of tolerance means that we must not see others’ viewpoints and virtues as temporary inconvenience that we allow until converted into our own; rather, generosity means an acceptance and celebration of another’s right and ability to think and exist”.⁷³⁹ Difference cannot be considered a barrier to be overcome. Instead, tolerance

⁷³⁴ Andrew Jason Cohen, ‘What the Liberal State should Tolerate within its Borders’ (2007) 37.4 Canadian journal of philosophy 479. See: Andrew Fiala, ‘Stoic Tolerance’ (2003) 9.2 Res Publica 149.

⁷³⁵ *Kokkinakis v. Greece* (App no 14307/88) (ECHR 25 May 1993) 17 EHRR 397.

⁷³⁶ *Kokkinakis v. Greece* (App no 14307/88) (ECHR 25 May 1993) 17 EHRR 397, para 48.

⁷³⁷ Carlos Valderrama Adriansén, ‘Tolerance and Religious Freedom: The Struggle in Peru To Tolerate Multiple Cultures in Light of Principles of Religious Freedom’ (2007) 3 BYU L. Rev. 775, 776-778.

⁷³⁸ ‘Secretary General calls for active effort to learn about each other, in message to mark International Day of Tolerance’ UN. Doc.SG/SM/10208 (Nov. 11, 2005) Available at: <<https://www.un.org/press/en/2005/sgsm10208.doc.htm>> accessed on 04 September 2017.

⁷³⁹ Carlos Valderrama Adriansén, ‘Tolerance and Religious Freedom: The Struggle in Peru To Tolerate Multiple Cultures in Light of Principles of Religious Freedom’ (2007) 3 BYU L. Rev. 775, 776-778.

must support and accept the fundamentals of humanity and embrace difference if there is to be societal harmony.⁷⁴⁰ It can be argued that tolerance is a term that requires further specification as it encompasses several characteristics. This means that there are specific criteria according which one can deem certain behaviour as a demonstration of tolerance. It has been discussed that tolerance is a term that requires further specification as it encompasses several characteristics. This means that there are specific criteria according which one can deem certain behaviour as a demonstration of tolerance. Among the most important of these is the presence of awareness regarding the differences of others, accompanied by disapproval of these differences, and the ability to influence disfavoured groups but referring to apply it.

5.4. Justifications of Tolerance

From the very first conceptions of ‘tolerance’, academics have interpreted the term differently depending on cultural and personal context; there has also been much debate over the role of tolerance in modern society. Opinions on tolerance range from those who see it as an unfortunate necessity in combatting civil unrest, while others take the view that being tolerant is preferable to the risks and disadvantages associated with suppressing problem groups.⁷⁴¹ Most, however, interpret tolerance as a virtue which leads to a more open and cooperative society, and it helps to reveal the truth.

Toleration is commonly thought of in pragmatist terms, as professed by the philosopher David Hume⁷⁴²; while one collection of people, usually the majority, may privately object to the conventions or practices of other groups, attempting to ban or discourage these practices risks causing societal conflicts and, in some cases, violent behaviour. When one weighs up the pros and cons of acting to suppress the practices of others, often it is the most beneficial course of action to tolerate these behaviours in order to maintain peace, in spite of personal objections.⁷⁴³ Toleration, in its current manifestation, first emerged due to a frustration with the religious unrest of the

⁷⁴⁰ *Ibid*, 779.

⁷⁴¹ Juan Pablo Domínguez, ‘Introduction: Religious Toleration in the Age of Enlightenment’ (2017) 43.4 *History of European Idea* 273, 282. See further in: Perez Zagorin, *How the Idea of Religious Toleration came to the West* (Princeton University Press, 2003).

⁷⁴² Cited in Andrew Sabl, ‘The last Artificial Virtue: Hume on Toleration and its Lessons’ (2009) 37.4 *Political Theory* 511, 511-512.

⁷⁴³ Jürgen Habermas, ‘Intolerance and Discrimination’ (2003) 1.1 *International Journal of Constitutional Law* 2.2. Also see: Daniel O Conkle, ‘Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty’ (2011) 32 *Cardozo Law Review* 1755. Also see Robert M Hayden, ‘Antagonistic Tolerance’ (2002) 43.2 *Current Anthropology* 205.

reformation, so argues Herbert Butterfield.⁷⁴⁴ While certainly not the remedy to these conflicts, toleration acted as a last ditch attempt to minimise the impact of religious disharmony, whereby toleration was the way forward “*for those who often still hated one another but found it impossible to go on fighting anymore.*”⁷⁴⁵ This same worldview was shared by those involved in the 16th century conflicts between the Catholic Church and the Lutherans, which was eventually resolved in 1555.⁷⁴⁶

In these instances, toleration can be considered pragmatic in nature, as this form of tolerance does not take a principled or moralistic approach; instead, this toleration is effected for practical reasons and the pursuit of self-preservation.⁷⁴⁷ Those who advocate religious tolerance have criticised the pragmatic approach for being too dependent on unfixed and unpredictable factors. Pragmatism offers toleration as the best option only in cases where there are significant enough disadvantages of suppression to warrant tolerance; this can all change if barriers to suppressing the disfavoured community are lifted⁷⁴⁸. It has been argued then that tolerance should be thought of not as a tool to be picked up when convenient but as a characteristic and value which promotes peace and harmony across communities. When one weighs up the practical benefits of tolerance rather than accepting it as a part of a civilised society, one risks infringing on the maintenance of basic human rights through the justification of oppressive actions.

One key failing of the pragmatic approach to tolerance is that there are moments when the behaviour of zealous citizens cannot be dictated by rational thought. Often, even if it is the most practical possible solution, groups are not willing to allow practices which they deem to be unfavourable; in fact, where religious intolerance is concerned, the true believer does not lay down the sword of God just to avoid unpleasant confrontations. Indeed, some groups or individuals may consider the opportunity to confront disfavoured behaviour a chance to test and demonstrate a commitment to their own religion.⁷⁴⁹ To provide an illustrative example of this, groups such as ISIL often act with aggression towards any groups which they disagree with on an ideological level despite the arguments in favour of tolerance as the most practical approach.

⁷⁴⁴ Herbert Butterfield, ‘Toleration in Early Modern times’ (1977) 38.4 *Journal of the History of Ideas* 573, 573-574.

⁷⁴⁵ Perez Zagorin, *How the Idea of Religious Toleration came to the West* (Princeton University Press 2003) 371, 10

⁷⁴⁶ *Ibid.*, 10. See also: Herbert Butterfield, ‘Toleration in early modern times.’[1977] 38.4 *Journal of the History of Ideas* 573, 573.

⁷⁴⁷ Brian Leiter, ‘Why tolerate religion?’ (2008) 25.1 winter, *Constitutional Commentary* 1, 3. See also: Brian Leiter, ‘Foundations of Religious Liberty: Toleration or Respect’ (2010) 47 *San Diego L. Rev.* 935, 940,941.

⁷⁴⁸ Andrew Sabl, ‘The Last Artificial Virtue: Hume on Toleration and its Lessons’ (2009) 37.4 *Political theory* 511.

⁷⁴⁹ Steven D. Smith, ‘The Restoration of Tolerance’ (1990) 78.2 *California Law Review* 305, 336.

Having presented the views of pragmatists, it is pertinent to discuss John Locke's argument that intolerance is an impractical pursuit and often does little to achieve change or progress. Locke puts this sentiment thusly:

*"The care of souls cannot belong to the civil magistrate, because his power consists only in outward force: but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force. Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgement that they have framed of things."*⁷⁵⁰

In other words, attempts to suppress groups on the basis of religious practice do little to change or prevent these practices, which operate in the sphere of ideas and beliefs. Locke believed that enacting changes in thinking relied on acting rationally rather than emotionally, as the latter often results in violence; he puts forward the view that *"only light and evidence that can work a change in men's opinions; and that light can in no manner proceed from corporal sufferings, or any other outward penalties."*⁷⁵¹ Locke uses the example of religious heresy in Christianity and argues that if one wishes to attain salvation, a high degree of faith is required. Yet, this faith cannot be acquired through coercion, as this is not true faith and would not save one's soul from damnation. Therefore, *Locke* argues, the imposition of religious belief or practice by force is entirely nonsensical if one wishes to enact actual change.⁷⁵² This argument, however, is based upon the assertion that the imposition of belief and attacks on religion cannot influence the beliefs and practices of others; *Waldron* argues that this assertion is largely false.⁷⁵³

While pragmatic arguments for tolerance may be useful in a theoretical sense, they often fail to hold up when applied to complex real-life situations in which actual communities are being attacked and converted through coercion. Even if one assumes that altering religious belief through coercion is impossible, it is possible to use this fear to prevent one from practicing their religious beliefs openly or using legal apparatus to prevent one from openly preaching and raising awareness

⁷⁵⁰ John Locke, *Letters on Toleration* (Education Society's Press, 1867) 7. See further: Ade Kearns, & Jon Bannister, 'Conceptualising Tolerance: Paradoxes of Tolerance and Intolerance in Contemporary Britain' (2009) 2 Italian journal of sociology of education 126.

⁷⁵¹ *Ibid*, 37. For further information on the view of Locke on tolerance see: Reid Mortensen, 'Specious Delusions: John Locke, knowledge and Religious Toleration' (2014 33) U. Queensland LJ 335.

⁷⁵² Cited in Steven D. Smith, 'The Restoration of Tolerance' (1990) 78. 2 California Law Review 305, 336.

⁷⁵³ Cited in Paul Bou-Habib, 'Locke, Sincerity and the Rationality of persecution' (2003) 51.4 Political Studies 611, 612-616.

of the practices and from effectively transmitting religious practices to future generations. Those who attempt to suppress disfavoured religious thought may consider this a satisfactory outcome. The French theologian *Castellio*⁷⁵⁴ was a prominent proponent of toleration and condemned religious suppression as an unreligious action which advocates violence against others is either an evil act or taints the virtue of religion as a whole.⁷⁵⁵ Some have put forward the view that the arguments made by *Locke* are not disparaging intolerance on the grounds that it is ineffective, but rather because it is a behaviour disfavoured by God. Clearly, this is not an empirical basis for discussions of toleration and so the unreligious may not accept this argument.⁷⁵⁶ From this interpretation presented by Locke emerged a closer focus on the specificities of the term (tolerance) during this time: this view was no longer considered applicable to those who preached intolerance, to Muslims (due to their allegiance to a foreign ruler), and to the non-religious. Locke went on, however, to promote the affording of rights to so called ‘pagans’ in the US.⁷⁵⁷ The arguments put forward by Locke, particularly those pertaining to the inability of intolerance to influence belief, are usually applicable to the devout or orthodox believer not all believers. Furthermore, those in a position of dominance through their power are able to undermine and demonise the practices of minorities, or they are able to use their power to coerce minorities into changing how they express their religion with the promise of reward or the threat of punishment.

Having presented key arguments of pragmatists and Locke regarding the importance of religious tolerance, another perspective through which to discuss this topic is that offered by *John Stuart Mill*.⁷⁵⁸ Most notably, *Mill* argued that the idea of religious tolerance is one which centres upon the search for truth. *Mill* has been a prominent critic of arguments purporting that state bodies also serve the purpose of promoting and protecting beliefs that are deemed crucial for the state’s

⁷⁵⁴ Cited in E. Gregory Wallace, ‘Justifying Religious Freedom: The Western Tradition’ (2009) 114.2 *Pen State Law Review* 485, 555.

⁷⁵⁵ A.T. Talib & Sarjit S. Gill, ‘Socio-religious Tolerance: Exploring the Malaysian Experience’ (2012) 12.8 *Global Journal of Human Social Science* 48, 50.

⁷⁵⁶ Micah Schwartzman, ‘The Relevance of Locke’s Religious Arguments for Toleration’ (2005) 33.5 *Political Theory*, Sage Publications, Sage CA: Thousand Oaks, CA 678, 685. See also: Russell Powell, and Steve Clarke, *Religion, Tolerance and Intolerance: Views from across the Disciplines Religion, intolerance and conflict* (OUP Oxford, 2013) 304, 6. Also see: John Marshall, *John Locke: resistance, religion and responsibility* (Cambridge University Press 1994) 485. Also see: Jakob De Roover, & S. N. Balagangadhara, ‘John Locke, Christian Liberty, and the Predicament of Liberal Toleration’ (2008) 36.4 *Political Theory*, Sage Publications, Sage CA: Los Angeles, CA 523.

⁷⁵⁷ Cited in Lynn Avery Hunt, ‘The Enlightenment and the Origins of Religious Toleration’ (2011) Eds. Claudette Baar-de Weerd, Kornee van der Haven, and Alexander JP Raat. *Werkgroep 18e Eeuw* 1, 11. Also see: King Preston, *Toleration* (London: Allen and Unwin 1976) 87, 88. Also see: Lois G Schwoerer, ‘Locke, Lockean Ideas, and the Glorious Revolution’ (1990) 51.4 *Journal of the History of Ideas* 531.

⁷⁵⁸ John Stuart Mill, *On Liberty* (1859) (Electric Book Company 2000) 28-78.

prosperity. *Mill* in this regard asserts that such argument is problematic since it might be difficult to objectively assess the usefulness of a particular belief. Furthermore, tolerating other people's opinions can be supported by arguing that both correct and false opinions are important in social discourses.⁷⁵⁹ It is pertinent to note that the assertions of *Mill* relate mainly to the beliefs presented by *Rawls* and *Kant*, in that they insist that human beings must be given the freedom to form their own beliefs, and so it is the responsibility of the state to allow this to happen with as little intervention as possible.⁷⁶⁰

Mill, in his work pertaining to liberty and the state, advocates for a secular basis to tolerance as he argues that within the religious sphere there exists insufficient rational grounds for verifying religions' claims of knowing the truth. Essentially, being religiously tolerant means, according to *Mill*, acknowledging that there are no verifiable universal truths.⁷⁶¹ There is also a consideration in *Mills'* work of the negative consequences of stifling expression; *Mill* offers the possibility that some hidden opinions are correct though, due to the commonness of human error, this is no basis on which to advocate the determination of universal human morality. *Mill* also asserts that the only way for one to know that his convictions are true is if they are open to criticism by others, as accurate judgement can only be formed through a process of exchange and openness. The worth of a conviction is determined largely by how well it stands up to scrutiny, a process which requires the conviction to be public and available for assessment; this is the only process through which the value and validity of a conviction can be tested, if there is the presentation of alternative and opposing positions.⁷⁶² The argument often cited by proponents of the epistemic approach, that tolerance is conducive to the illumination of truth, is most notably found in the writing of *John Stuart Mill*. He asserts that toleration often leads to truth-finding, which is important to epistemic thinkers as it is a key component of maximising utility; he also asserts that truth, or understanding the concept of truth in a useful way, can only be found in cases where there is a multitude of

⁷⁵⁹ Ibid.

⁷⁶⁰ Cited in John, Christman, 'Autonomy in Moral and Political Philosophy' (2008) Stanford encyclopaedia of philosophy.

⁷⁶¹ Supra no 745. See further: Donald A, Carson, *The Intolerance of Tolerance* (Wm. B. Eerdmans Publishing 2012) 196. See also: Irene M Ten Cate, 'Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses' (2013) 22.1 Yale Journal of Law & the Humanities 35, 37, 38. See also: Kevin C O'Rourke, *John Stuart Mill and Freedom of Expression: the genesis of a theory* (Routledge 2003).

⁷⁶² John Stuart Mill, 'On liberty. A Selection of his Works' (1996) 25 Harvard Classics Volume 1. See also: Paul G. Chevigny, 'Philosophy of language and Free Expression' (1980) 55.2 Law Review, New York University 157. See also: George Wright R, 'A Rationale from JS Mill for the Free Speech Clause' (1985) The Supreme Court Review 149.

differing opinion and the capacity for these opinions to be both expressed and scrutinised.⁷⁶³

Mill emphasises, in his conception of toleration, that moral considerations are paramount, as one should not only care about finding truth, or at least finding the truths which *Mill* expresses as the correct truths, but also about using this knowledge to overall utility.⁷⁶⁴ It is important to understand, in this regard, that when *Mill* refers to ‘truth’, he is referring to both factual, empirical truth and truths relating to moral truths and those relating to how one should live; the epistemic approach considers these two types of truth to be highly comparable.⁷⁶⁵

Both truths should be considered with knowledge of the fact that human beings are contradictory, complicated and prone to error. This is one reason to listen to and tolerate alternative opinions, as there is a significant possibility that our own convictions are false. Further, if we assume that there is at least some truth in our own convictions, there is significant value in considering alternative beliefs, which may be used to supplement our own in order to understand more widely and come closer to finding ‘truth’. It has also been suggested⁷⁶⁶ that if ones convictions are entirely true, they are most likely to be held for positive reasons and so can be considered less fallible as they are more likely to have been formed with tolerance and an openness to differing viewpoints, wrong or otherwise. The above- mentioned reasons are all cited by *Mill* as justification for the promotion of tolerance and openness towards differing or opposing views.

With regard to truths which pertain to ethics and lived experience, they are more complicated, as they must be considered with more breadth; this is because they concern one’s actions and practices, as well as one’s personal beliefs. *Mill* argues that if one is to find truth, one cannot be content with just encountering other beliefs but also that the “experiment of living” allows for “*the worth of different modes of life [to] be proved practically*”.⁷⁶⁷

Mills asserts, then, that if we are to ascertain how one should ideally live their life, it is not

⁷⁶³ Ibid 9-15.

⁷⁶⁴ Cited in Brian, Leiter. *Why Tolerate Religion?* (Princeton University Press 2013) 19. See also: Richard Reeves, *John Stuart Mill: Victorian Firebrand* (Atlantic Books 2015).

Nietzsche, among others, denies the moral premise: the “truth is terrible,” says Nietzsche, by which he means precisely that sometimes knowing the truth is incompatible with life, *a fortiori*, with utility (though utility was not, of course, Nietzsche’s particular concern).

⁷⁶⁵ Brian, Leiter. *Why Tolerate Religion?* (Princeton University Press 2013) 19. See also: Bican Đsahin, *Toleration* (US Lexington Books 2010).

⁷⁶⁶ Raphael Cohen-Almagor, *Liberal Democracy and the Limits of Tolerance: Essays in Honor and Memory of Yitzhak Rabin* (University of Michigan Press 2008; 2009) 135. See also: Joseph Hamburger, *John Stuart Mill on Liberty and Control* (Princeton University Press 1999; 2001). See also: David Heyd, *Toleration: An Elusive Virtue* (Princeton: Princeton University Press 1996; 1998) 48.

⁷⁶⁷ Cited in Brian, Leiter. *Why Tolerate Religion?* (Princeton University Press 2013) 20, 21.

enough to for one to be just aware of different opinions and beliefs since it is necessary that one experiences a life lived according to these opinions to understand what is the ideal way of life for them. *Mill* provides the example of observing, or ideally experiencing, the lives of a satisfied animal and a dissatisfied human (*Mill* uses the example of a pig and Socrates). From this one realises that the human life is superior due to the higher threshold for satisfaction and the higher capacity for pleasure.⁷⁶⁸

In terms of popular discourse surrounding *Mill*, his assertion that there should be a right to religious expression and open practice is often the most referred to amongst modern day scholars and liberals. This is based on the argument that self-determination is an important freedom for human coexistence and personal autonomy, which many have argued should be considered a fundamental human right.⁷⁶⁹ However, from the researcher's perspective, *Mill's* approach is not free of criticisms. *Mill* does have his critics, particularly in terms of his key principle that tolerance illuminates truth, as the concept of truth is highly dependent on cultural relativity and personal circumstance. Moreover, since religious beliefs are often dealing with supernatural concepts, they cannot be proven right or wrong by using methods of science or logic. *Mill* is also vague on who determines the level of 'truth' and under what circumstances; further, those who are firm in their views tend to accept their own opinions as fact and do not hesitate in using aggression to spread what they believe to be the 'true way'.⁷⁷⁰ To put this into context, *Bill Clinton* the former US president addressed an audience at Harvard in November of 2001: "*The Taliban and bin Laden, like fundamentalist fanatics today and everywhere and throughout time immemorial, believe they have the truth. They have it, the whole truth . . . We believe the limits of the human condition prevent anyone from having the absolute truth.*"⁷⁷¹

Having presented various ways through which tolerance can be approached, it is apparent that whichever method one uses in order to advocate tolerance, there are a number of positive effects of the practice. Oftentimes tolerance, whether intentionally or otherwise, ends up

⁷⁶⁸ Cited in Brian, Leiter. '*Why tolerate religion?*' (Princeton University Press 2013) 15-20. See also: Brian Leiter, '*Why tolerate religion?*' (2008) 25.1 winter, Constitutional Commentary 1.

Mill in Utilitarianism wrote: "It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied".

⁷⁶⁹ Russell Powell, and Steve Clarke, *Religion, Tolerance and Intolerance: Views from across the Disciplines* Religion, intolerance and conflict (OUP Oxford, 2013) 6.

⁷⁷⁰ Wibren Van Der Burg 'Beliefs, Persons and Practices: Beyond Tolerance' (1998) 1.2 Ethical Theory and Moral Practice, Kluwer Academic Publishers, Dordrecht 227, 238.

⁷⁷¹ Cited in J. Judd Owen, 'Locke's Case for Religious Toleration: Its Neglected Foundation in the Essay Concerning Human Understanding' (2007) 69.1 The Journal of Politics 156, 156.

remedying the after effects of conflict and, in some cases, it goes so far as preventing potential catastrophe⁷⁷². It is true, however, that when one attempts to support tolerant attitudes there is an underestimation of human will and complexity, as human behaviour and attitudes differ according to culture, race, background and national identification. In this regard, it should be highlighted that tolerance is required not only based on arguments of practicality, but also because tolerance is a key ingredient for preserving human rights. This is particularly true in the modern cosmopolitan and multicultural world where it is necessary to respect each other's differences as achieving homogeneity of people's opinions and beliefs is impossible. It has been asserted by UNESCO that "*consistent with respect for human rights, the practice of tolerance does not mean toleration of social injustice or the abandonment or weakening of one's convictions. It means that one is free to adhere to one's own convictions and accepts that others adhere to theirs. It means accepting the fact that human beings, naturally diverse in their appearance, situation, speech, behaviour and values, have the right to live in peace and to be as they are. It also means that one's views are not to be imposed on others*".⁷⁷³

There is no doubt that the rejection of coercion in religious beliefs and practices, inherited from the thoughts of scholars like *Lock* and *Mill*, has developed the concept of tolerance in the modern era and strengthened the religious diversity and peaceful coexistence of different sects and religions in the West. Taking into consideration the philosophy of tolerance and placing the views of *Lock* and *Mill* in a present-day context, it can be argued that the view of the ECtHR, which considers the wearing of the headscarf tantamount to intolerance, is a violation of the principle of tolerance.

5.5. Restrictions on Tolerance

It must be acknowledged that, currently, human existence is defined by pluralism and so it is commonly agreed that religious practice and thought should be embraced with openness as a valid way of life. Despite this, there are many who still need clarification on how one should, in reality, implement standards of tolerance. It has been suggested by a number of academics that there cannot be a blanket acceptance of all behaviour and even those most vehemently in support of tolerance would not advocate the toleration of certain acts. In particular, when it comes to

⁷⁷² Charles Selengut, *Sacred fury: Understanding religious violence* (Rowman & Littlefield, 2017).

⁷⁷³ Cited in Carlos Valderrama Adriansén, 'Tolerance and Religious Freedom: The Struggle in Peru To Tolerate Multiple Cultures in Light of Principles of Religious Freedom' (2007) 3 *BYU L. Rev.* 775, 779.

religious tolerance, opinion differs as to where one should draw the line. For instance, Richard Dawkins, amongst the most famous of Western atheist thinkers, argues that religion is a tool by which communities can suppress one another and spark conflict, and so should be removed from civilised society or at least considered less important to everyday life.⁷⁷⁴ Difficulties emerge when attempting to find the line with regard to religious tolerance, and particular attention has been given in the literature to the headscarf and ECtHR decision regarding its relationship with conceptions of tolerance. For example, prudential argument asserts that tolerance is a fundamental component of cohesive societies which contain a number of religiously and ethnically diverse communities.⁷⁷⁵ Due to this, states should judicially support the practices of those who do not act according to the hegemonic order, to the extent that members of society dispute the norms' validity. A prominent example is in regard to sexual preference; if opinions regarding sexual conduct vary widely, then different attitudes regarding sexual behaviour should be fully accepted under the law of all states. This, then, should also apply to religious freedoms, particularly if a community has within it a breadth of different religions. The approach known as the 'prudential approach' accepts that tolerance may be overruled by cultural or local agreement on what is acceptable. This approach, then, does not include tolerance of the few, or of small groups who deviate from what is generally acceptable, especially when this diversion is in regard to religious practice.⁷⁷⁶

When considering the human rights viewpoint, the application of prudential theory on the pertinent cases revolving around the issue of wearing headscarf is questionable. This is mainly due to this theory's argument that ideas or behaviours that are different are tolerated by the society to a certain limit if they are first accepted as being within the range of what they deem as 'normal' by the members of society. Therefore, protecting human rights of individuals and minorities cannot be governed solely by the principle of acceptance by the majority. A good example of the foregoing is the decision of the Swiss government to hold a referendum on the question of building minarets, where the majority, out of their lack of acceptance, voted for banning minarets in the country. This

⁷⁷⁴ Richard Dawkins, *The God Delusion* (Penguin Random House, UK 2016) 496 ; See also: John Wolffe and Gavin Moorhead, *Religion, Security and Global Uncertainties* (Department of Religious Studies, The Open University, Walton Hall, Milton Keynes 2015) 48, 19. See also: Matt Rossano, *Supernatural selection: How religion evolved* (Oxford University Press 2010).

⁷⁷⁵ Steven D. Smith, 'The Restoration of Tolerance' (1990) 78.2 California Law Review 305, 342,343.

⁷⁷⁶ Ibid 342,343.

was done in spite of strong objections from human rights organisations.⁷⁷⁷

Within the two approaches outlined above, the line is drawn dependent on the attitude of the state towards a practice as it relates to the national community. Laws and attitudes are then established based not on thought and belief but on the public practices which accompany beliefs. Whether a state follows the attitude of *Mill* or that of other thinkers, they must accept religious difference, which includes the belief of some groups that those who do not believe as they do are immoral sinners. State governments, however, are not required to accept religious action, particularly that which is violent and infringes on the rights of others. Extreme cases such as murder and torture are simpler to apply to toleration approaches, as the unacceptability of these actions is clear; it is far more complicated to try and place practices which are unclear and uncertain in their relationship to others, and whether or not they violation the freedoms of other groups. The ruling of the ECtHR was more in line with the latter, as the court did not put forward a convincing argument for the argument that the headscarf constitutes a violation of the rights of others.

Determining whether a religious practice has an overall harmful effect on a society is, therefore, extremely difficult. To return to *Mill*, he argues that “[E]ven opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act.”⁷⁷⁸

This sentiment has been cemented by the US judicial system, which professes that expression which can be considered as having a "clear and present danger" is open to state intervention. This indicates that one can believe whatever they wish and express it openly, except in cases where there exists a tight causal nexus between speech and action.⁷⁷⁹ The *Rawlsian* approach is similar in its outcome, though the metaphors Rawls employs are different: stating that the threat to freedoms and rights is “securely established by common experience”. This approach allows that the infringement not be as direct as *Mill* asserts, or as tangible as that dictated by the US government, as it allows for the relationship between attitude and action to be “securely

⁷⁷⁷ Savannah D. Dodd, ‘The Structure of Islam in Switzerland and the Effects of the Swiss Minaret Ban’ (2015) 35.1 *Journal of Muslim Minority Affairs* 43. See also: David Miller, ‘Majorities and Minarets: Religious Freedom and Public Space’ (2016) 46.02 *British Journal of Political Science* 46.02: 437. Also see: Steven D. Smith, ‘The Restoration of Tolerance’ (1990) 78.2 *California Law Review* 305, 342,343.

⁷⁷⁸ Cited in John Harris, ‘Life in the Cloud and Freedom of Speech’ (2013) 39.5 *Journal of medical ethics* 307, 307. See also: Nicholas Shackel, ‘The Fragility of Freedom of Speech’ (2013) 39.5 *Journal of medical ethics* 316

⁷⁷⁹ John A. Gorfinkel, & Julian W. Mack, ‘Dennis v. United States and the Clear and Present Danger Rule’ (1951) 39.4 *Cal. L. Rev* 475. Joshua Wallenstein, ‘Punishing Words: an Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide’ (2001) 54.2 *Stanford Law Review* 351.

established”, which must be both ‘immediate and imminent’. For example, the practice of carrying a Sikh kirpan (a ceremonial knife or sword) as a religious symbol or requirement of faith is not banned in Canada due to the importance of religious diversity and the putatively slight risk of harm.⁷⁸⁰

5.6. Protection of tolerance as an ECtHR justification for the ban on wearing of the headscarf

In the past, some cultures have attempted to remove religious discourse from its state apparatus and public life. Attempts to suppress religious expression have been observed in the spheres of education, health, law enforcement and other secular bodies. It is generally accepted that, despite the often personal nature of religious belief, religious manifestation can be suppressed or prevented by citing ECHR codes of conduct, article 9 in particular. In this article, the means by which these expressions can be controlled should not be interpreted broadly, as any restrictions on religious manifestations often require specific evidence and justification. Therefore, for any judicial body to take action against religious expression there must be the provision of specific evidence; this may be difficult due to the shaky concept of acceptable religious expression. Tolerance, then, is a useful concept when attempting to defend various forms of religious expressions. In addition, legal establishments often see tolerance and related virtues as being highly civilised and democratic. This can be evidenced by the observations of the ECtHR, who asserted that Pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”.⁷⁸¹ Despite the foregoing, the ECtHR in some cases has used the concept of ‘protection of tolerance’ as a justification to restrict religious manifestation, most notably wearing of headscarf by Muslim females. For example, the court stated during the proceedings for *Dahlab v Swiss* that:

“...In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an

⁷⁸⁰ *Multani v. Commission scolaire Marguerite-Bourgeois* [2006] 1 S.C.R. 256.2006 SCC 6 (Canada) For further information about the view of Mill on the restriction on religious freedom see: Frederick Schauer, C. Mantzavinos, and Ralf Poscher, ‘Modeling Tolerance/Comment’ (2014)170.1 *Journal of Institutional and Theoretical Economics* 83, 86: Also see: Marie A Eisenstein, *Religion and the Politics of Tolerance: How Christianity Builds Democracy* (Baylor University Press 2008).

⁷⁸¹ *S.A.S. v. FRANCE* (Application no. 43835/11) (1 July2014) ECHR 695.

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.”⁷⁸²

This was also true of *Leyla v Turkey*.⁷⁸³ With reference to the *Refah* case, ‘tolerance’ was cited as a vital component of any democratic state. One should keep in mind that in the two aforementioned cases, the judges stated that governments were largely responsible for the upkeep of cooperation and cohesiveness in society. The ruling in the case *Şahin* of also stated that:

*“...The Court has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs and that it requires the State to ensure mutual tolerance between opposing groups.”*⁷⁸⁴

Focusing on the *Refah* proceedings, the court asserted that attempts to establish a Sharia-based judicial code was an effort based on inequality, subjugation, and violence, and was a detriment to harmony and progress. The court stated that:

*“... such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs”*⁷⁸⁵.

⁷⁸² *Dahlab v Switzerland* (Application no 42393/98) (2001) ECHR 899, p.13.

⁷⁸³ *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819.

⁷⁸⁴ *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819, para 107; *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495 para 91. See also European Court of Human Rights, *Cha’are Shalom Ve Tsedek v. France* (27417/95) (27 June 2000) IHRL 2966. See for further; *Metropolitan Church of Bessarabia and others v. Moldavia* (Application No. 45701/99) (13 December 2001) ECHR ECHR 860.

⁷⁸⁵ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495 para 119. See *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (Application nos. 9214/80; 9473/81; 9474/81) (judgment of 28 May 1985) 7 EHRR 471.

While ‘tolerance’ was cited in both instances, it is important to distinguish between politically charged cases such as the Refah case, and that which relates to the headscarf and its place in educational environments. In the former case, the Refah Party, like all political parties, sought to control societal norms and gain political power in order to impose its vision of a social order on the rest of society. It is perhaps unsurprising, then, that political organisations which have religious foundations are frequently accused of infringing on freedoms and attacking human rights. There were some academics and lawyers like Professor *Boyle* who disapproved of the methods and reasons used to issue the order to dissolve the Refah Party⁷⁸⁶; if one assumes the eventual ruling to be based on fact, and the Refah party did stand a chance at achieving real political power and to implement Sharia law within the state, one would agree that the ruling was fair and that the party represented a significant attack on liberty and tolerance. As in the characteristic of the tolerance mentioned, tolerance can only exist if there is an actual possibility of suppressing the group being tolerated, but the tolerant group avoids to use the opportunity to suppress. Experience proves that political parties based on religious ideology most likely use the power to crackdown on dissenting views and they have no tolerance for religious minorities. Examples of this include Iran⁷⁸⁷, Saudi Arabia, the Taliban in Afghanistan⁷⁸⁸ and ISIL⁷⁸⁹ that have no tolerance except for the dominant religion. Thus, its ability to gain power in parliament together with its consistent promotion of Sharia as a legitimate system rendered the Refah party dangerous to groups which did not adhere to practices prescribed by Sharia within Turkey. It is also important to point out that intolerance against religious expression may sometimes be embedded into state policy. In other words, restriction on religious expression is not merely confined to states with religious bases, but this policy is actively pursued by states like China and North Korea. For example, Tibetan Buddhists and Chinese Catholics have two sets of leaders, one set appointed by the Chinese

⁷⁸⁶ Kevin Boyle, ‘Human Rights, Religion and Democracy: The Refah Party case’ (2004) 1.1 Essex Human Rights Review 1. See also: Giorgia Baldi, ‘The ‘Humanity’ of the Secular Legal Subject’: Reading the European Court of Human Rights’ Decisions over the Practice of Veiling’ (2016) 03 paper work, Institute of European Law, Birmingham Law School. See also: Yasin Aktay, ‘European Values and the Muslim world: Turkish Cases at the European Court of Human Rights’ (2008) 20.1 Global Change Peace & Security 99

⁷⁸⁷ Con Coughlin, *Khoeini’s Ghost*, (An Imprint of HarperCollins Publisher 2009).

⁷⁸⁸ Francis Fukuyama, ‘Has History Started Again?’ (1986) 18.2 Policy. See also: United States commission on International Religious Freedom (USCIRF) Annual Report about Saudi Arabia (2105).

⁷⁸⁹ M. I. M Thowfeek, ‘Understanding Religious Tolerance in Islamic Perspective’ American National College (ANC), Sri Lanka 1. Also see: Hanna Nouri Josua, ‘A future region without Christians?’ (2014) 7. 1/2 International Journal for Religious Freedom, 127.

government, and another shadow clergy chosen outside China's borders.⁷⁹⁰ Regarding the wearing of Islamic symbols authorities in Xinjian banned people wearing hijabs, niqabs, burqas or clothing with the Islamic star and crescent symbol from taking local buses.⁷⁹¹ It is also true that tolerance applies to subjects that people care and are concerned about. Alongside the attempts to implement a judicial system based on Sharia, the Refah party publicly expressed its intention to re-enact laws obliging women to wear headscarf, with one of their key legal stances being the lifting of the ban on headscarves in Turkey. Erbakan, the then chairman of the Refah party, was very vocal about a return to the wearing of the headscarf, stating that:

*"... when we were in government, for four years, the notorious Article 163 of the Persecution Code was never applied against any child in the country. In our time there was never any question of hostility to the wearing of headscarves ..."*⁷⁹²

At the end of 1995, he also stated that:

*"... [University] chancellors are going to retreat before the headscarf when Refah comes to power."*⁷⁹³ The words of the leader of the Refah Party demonstrate a significant concern with regard to the issue of the wearing of the headscarf. Hence, if the Refah Party assumed a position of power, the party may have exerted pressure on Muslim females who were not wearing the headscarf to take up the practice. The Turkish government is required by ECtHR to follow principles of neutrality and impartiality in dealing with their citizens.⁷⁹⁴ Therefore, if a government insists that Turkish women wear the headscarf, this would violate the principle of equal treatment amongst its citizens. As the leader of the Refah Party approached the wearing of headscarf from a religious perspective, he considered it a religious virtue that gives women dignity. This implies

⁷⁹⁰ Lizzie Dearden, 'China Bans Burqas and 'Abnormal' Beards in Muslim Province Xinjiang' (Thursday 30 March 2017) available at: <<http://www.independent.co.uk/news/world/asia/china-burqa-abnormal-beards-ban-muslim-province-xinjiang-veils-province-extremism-crackdown-freedom-a7657826.html>> Accessed 17 April 2017. See also: Matt Payton, 'Ramadan 2016: China Bans Civil Servants and Students from Fasting in Mainly Muslim region' (Tuesday 7 June 2016) available at :< <http://www.independent.co.uk/news/world/asia/ramadan-2016-china-bans-civil-servants-and-students-from-fasting-in-mainly-muslim-region-a7068481.html>> accessed 17 April 2017. Also see: China's control of religion in Tibet, available at :< <https://www.freetibet.org/beyond-belief>> Accessed 17 April 2017.

⁷⁹¹ Lizzie Dearden, 'China Bans Burqas and 'Abnormal' Beards in Muslim Province Xinjiang' (Thursday 30 March 2017) available at: <<http://www.independent.co.uk/news/world/asia/china-burqa-abnormal-beards-ban-muslim-province-xinjiang-veils-province-extremism-crackdown-freedom-a7657826.html>> Accessed 17 April 2017.

⁷⁹² *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495 para 119, para 27.

⁷⁹³ *Ibid*, para 27.

⁷⁹⁴ *Ibid*, para 91, See also : Ayşe Ezgi Gürcan, 'The Problems of Religious Education in Turkey: Alevi Citizen Action and the Limits of ECTHR' (2015) Sabancı University, Istanbul Policy Center; Stiftung Mercator Initiative1

that women who do not wear the headscarf are, according to the Refah Party's position, deprived of this virtue. Such a view automatically divides a society into those who are more virtuous and less virtuous believers. Therefore, equating to a form of intolerance against the latter⁷⁹⁵.

While considered by some to be a pre-emptive strike against the Refah party and inspired by the desire to support the public safety, order and secularism⁷⁹⁶, the decision can be justified to some extent if one acknowledges that some attributes of the party together with its rhetoric are not compatible with the concept of religious tolerance. This is due to the perception of the party as an extremist religious group which aimed to marginalise and eradicate other beliefs and practices through discriminative legal and individual action.

Although there is a substantial difference between the goals and structure of the political parties and education institutions, the court has equally used the concept of protection of religious tolerance to restrict religious manifestation in both political parties and education institutions. Political parties primarily wish to govern a country and gain access to power; however, the main mission and objective of education systems is to ensure the transition of knowledge. It is generally accepted that the role of education should go beyond the development of knowledge, and education institutions are now forums for personal development and attitude building, as education encompasses matters of community and social cohesion, aiding the youth to embrace tolerance and acceptance of differences.⁷⁹⁷ From the ECtHR perspective the headscarf has been a point of contention as it has not been embraced under the umbrella of 'tolerance' in a number of institutions. If one agrees with the assertion that schools should be places of tolerance and open mindedness, it is difficult to argue this point with regard to the headscarf issue. As already established, tolerance can only be achieved if that which is being tolerated is different from one's own beliefs or practices. In the aforementioned cases, the applicants who initiated legal proceedings had fundamentally different convictions than the other group. Especially with reference to *Dahlab* and *Leyla*, it is important to note, the Muslim women concerned may have considered the religious expressions of those at their schools to be incorrect; it is true, however,

⁷⁹⁵ For more see: Alev Çınar, 'Subversion and subjugation in the public sphere: secularism and the Islamic headscarf' (2008) 33:4 *Signs: Journal of Women in Culture and Society* 891.

⁷⁹⁶ Dicle Kogacioglu, 'Progress, unity, and democracy: dissolving political parties in Turkey' (2004) 38:3 *Law & Society Review* 433, 441-442.

⁷⁹⁷ 'Global Citizenship Education, Preparing learners for the challenges of the twenty-first century' (2014) UNESCO.France.p.9.

that the argument presented by the court did not encompass other facets of tolerance, including the ability to take action against what is perceived to be incorrect, inappropriate or immoral. In the presented cases, even if *Dahlab* and *Leyla* wished to object to a practice or promote an agenda, there was no power to do so.⁷⁹⁸ This was because both cases occurred in countries where the majority of women do not wear headscarf *in the area of work*, therefore the applicants did not represent a dominant party. In addition, laws in Turkey and Switzerland oblige the staff in educational institutions not to discriminate against any belief or practice and maintain their neutrality with respect to different religions and their manifestations. It is also against code of conduct for teachers to attempt to promote religious agendas to the students and/or to state matters of belief as matters of fact, which may be considered indoctrination.

In the reviewed cases, then, the roles of the applicant and the defendant were not accurately established. If one applies conceptions of tolerance to this process, it is clear that the power lies in the hands of the state to be either tolerant or intolerant towards religious dress. In the related cases, for example, the wearers of the headscarf are not the parties with power and they are not able to suppress the rights and freedoms of others. If one adheres to the outlined definitions of tolerance, *Leyla* and *Dahlab* and their religious expressions are surely the ones which are to be tolerated, rather than to adopt a judicial approach which itself leads to intolerance. Taylor asserts that the claim that *Dahlab* was attempting to promote a religious agenda through the wearing of the headscarf raises doubts as to the presence of pluralism in the state; pluralism is not compatible with a regime in which one is condemned for expression their religious inclinations openly.⁷⁹⁹ The ban on religious dress in academic settings, particularly if the individual is from a minority group, means then that the individual is the subject of the intolerance rather than the instigator. It is also notable that so much of the ECtHR's reasoning is based in mere speculation; the court, in this case, returned again and again to the presence of a "proselytising effect" which they claimed could not be ruled out.

In most cases, the ECtHR emphasized the need to "*ensure mutual tolerance between*

⁷⁹⁸ It should be noted that restrictive secular systems, such as France, focus more on banning the religious symbols rather than the actual power to impose specific religious view. Hence, even in the above example, it is the religion symbols that are banned. In this chapter, the researcher challenges the rationale behind applying the concept of tolerance to justify the ban of the headscarf, not secularism itself.

⁷⁹⁹ Paul M. Taylor, *Freedom of religion: UN and European human rights law and practice* (Cambridge University Press, 2005) 255,256.

*opposing groups*⁸⁰⁰, which refers to the impartiality of the state when it comes to matters of belief; they are also required to create a space in which opposing beliefs can be expressed, discussed and challenged in a contained manner. When it comes to matters of religion, toleration is based upon the assumption that the groups in question must peacefully co-exist within the same societal space, even in cases where one group or both groups are reluctant to do so. Tolerance, then, can be considered more a matter of societal harmony than an issue of personal expression.

When considered in relation to human rights and equality, states may not show a bias towards any one religious or ethnic group, or preference of any one belief over another. In most societies, an element of unease between groups with differing beliefs and practices is commonplace, and it is the responsibility of the government to allow these groups to live alongside one another without infringing on principles of pluralism and democratic process. An example of this can be found in the case of *Handyside v UK*⁸⁰¹, in which the court stated that freedom of expression can also be extended to those ideas which offend, are deemed to be unpalatable or those which outrage. Ideally, a society should accept that intercommunity tension exists and may never be completely eradicated, only managed; attempts should not be made to eradicate this tension then, for fear that fundamental rights may be attacked, but instead attempts should be made to ensure that coexistence is achieved and that “...*the competing groups Tolerate Each other*”.⁸⁰² As asserted by *Lord Walker*, the way in which the court often treats human rights, means that there is very rarely a “liberal tolerance only tolerant liberals”.⁸⁰³ In addition, Judge *Tulkan* highlighted the need for openness and tolerance if democracy and peace is to be preserved, when she stated the following:

“pluralism, tolerance and broadmindedness are hallmarks of a democratic society and this entails certain consequences. The first is that these ideals and values of a democratic society must also be based on dialogue and a spirit of compromise, which necessarily entails mutual concessions on the part of individuals. The second is that the role of the authorities in such circumstances is not to remove the cause of the tensions by eliminating pluralism, but, as the Court

⁸⁰⁰ *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819, para 107.

⁸⁰¹ *Handyside v. United Kingdom* (Application No.5493/72, A/24) (07 December 1976) ECHR 5.

⁸⁰² *Serif v. Greece* (Application no.38178/97) (14 December 1999) EHRR 561, para 53.

⁸⁰³ Cited in Mark Hill ‘Interpreting the European Convention on Human Rights in the United Kingdom Courts: The Impact for Religious Organisations’ (2007) Centre for Law and Religion, Cardiff University, p 1, 26.

again reiterated only recently, to ensure that the competing groups tolerate each other”.⁸⁰⁴

The ECtHR, through the aforementioned legal proceedings, have considered religious garments an indicator of religious intolerance; not only this, but they have also questioned the tenets or principles of Islamic faith when commenting that:

“...it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. 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”. On a similar note, with regard to the Refah proceedings, the court asserted that “sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable...it is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on Sharia”.⁸⁰⁵

Further, the court stated that “the fundamental principles of democracy as conceived in the convention taken as a whole” could not coexist with Sharia law, which inevitably manifests itself in both private and public ways.⁸⁰⁶ It could be argued that the court has been rather harsh in its assessment of Islam; it is true, however, that the court puts into practice what is set out in the convention and must make rulings based on these principles. If a judge, then, initiated proceedings over holy texts, this would be inappropriate, even if there was a regulatory body of experts present. Problems with interpreting religious texts are frequent and conflict exist over this process even within the religious group themselves; it is therefore even more difficult for the state and court to involve themselves in matters of religious interpretation. In the Quran, some assert that there are passages which profess that Muslim woman must dress ‘modestly’; however, interpretations of these sections are a matter of much discussion within the Islamic community. Some Muslim women take these passages to mean the wearing of the headscarf, while others take this to mean

⁸⁰⁴ Dissenting view of Tulkán in the case *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819. See also: *Ouranio Toxo and Others v. Greece* (Application no. 74989/01) (20 October 2005) EHRR 8, IHRL 2806.

⁸⁰⁵ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.

⁸⁰⁶ *Refah party and other v Turkey* (Application nos. 41340/98, 41342/98, 41343/98, 41344/98) (ECHR, 13 February 2003) ECHR 491, ECHR 87, ECHR 495.

full body coverings, which has been a matter of much legal discourse in the cases of ‘Begum’⁸⁰⁷ and ‘X’.⁸⁰⁸

Often the way in which the individual chooses to dress is matter of textual and traditional interpretation. The head of the UK Committee for Inter-Faith maintains that appropriate religious symbols and dress are subject which must be discussed within the community themselves, rather than by outside legal bodies.⁸⁰⁹ In this regard *Lord Bingham* in the case of *Begum* said “*It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgement on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it. And I see no reason to disturb their decision.*”⁸¹⁰

As such, those in the court should not have jurisdiction over religious text, particularly as the vast majority of members are non-Muslim and are often uninformed with regard to the specificities of Islam. It is not obvious which legal mechanisms were used when the ECtHR judges arrived at their conclusion, in a stark contrast with some Islamic scholars, that wearing of the headscarf and Islam cannot be compatible with tolerance and human rights. The decisions of the court are contradictory with judicial precedent, as evidenced by the decisions made in the case of *Hasan and Chaush v. Bulgaria*⁸¹¹; here, the court asserted that it was outside the jurisdiction of the public authority to determine whether religious beliefs, or the means used to express these beliefs, are legitimate.

The best way to deal with the issue of religions is to encourage countries to avoid types of religious interpretation that lead to violence and suppression against women, as well as not appointing themselves religious scholars tasked with interpreting the religion of others. In this regard, PACE, or the Parliamentary Assembly of the Council of Europe, has encouraged Muslim groups to move away from highly conservative or traditional conceptions of Islamic text, as these

⁸⁰⁷ (*On the application of Begum (by her litigation friend Rahman)) v Headteacher and Governor of Denbigh High School* (20006) UKHL 15 (22 March 2006); Heather Marie Akou, ‘Interpreting Islam through the Internet: making sense of hijab’ (2010) 4 *Cont Islam* 331. See also: Tabassum F. Ruby, ‘Listening to the Voices of Hijab’ (2006) 29 *Women’s Studies International Forum* 54. See also: Lacey Sloan, ‘Women’s Oppression or Choice? One American’s View on Wearing the Hijab’ (2011) 26(2) *Affilia: Journal of Women and Social work*, Sage 218.

⁸⁰⁸ *X v Y School* [2007] EWHC 298 at [26 et seq]

⁸⁰⁹ Sylvie Bacquet, ‘Manifestation of Belief and Religious Symbols at School: Setting Boundaries in English Courts.’ (2009) 4.2 *Religion & Human Rights* 121, 132.

⁸¹⁰ (*On the application of Begum (by her litigation friend Rahman)) v Headteacher and Governor of Denbigh High School* [20006] UKHL 15 (22 March 2006). Para.34.

⁸¹¹ *Hasan and chaush v Bulgaria* (Application no.30985/96) (ECHR, 26 October 2000) 34 EHR55.

interpretations often advocate for the suppression of women and their rights.⁸¹²

The UN Special Rapporteur, when addressing religious disharmony, stated the following: “*dress should not be the subject of political regulation and calls for flexible and tolerant attitude in this regard, so as to allow the variety and richness of . . . garments to manifest themselves without constrain*”⁸¹³. If one wears a headscarf, then, this is not an indication that tolerance has been abandoned, or that there is not an appreciation of other beliefs and practices.⁸¹⁴ A commission in the Netherlands which concerns itself with Equal Treatment puts forward that if one holds beliefs which are represented by the headscarf, this “*does not preclude her having an open attitude and being capable of teaching in accordance with the character of the school as a public educational institution*”.⁸¹⁵

Intolerance, often stems from an intentional and pre-existing negative conception of a group of people; it does not happen suddenly or as a result of a specific event but, instead, exists in private thought before emerging in oppressive public speech or action. Although the headscarf may be worn as a result of pre-existence awareness and personal faith, the headscarf itself, as a piece of material, does not imply any hostility or intolerant message toward other religions. As such, it poses no legitimate danger, as it is an inactive signifier of religion, much like a necklace with the cross for Christians; it cannot actively suppress the beliefs or practices of others.

When considering the case of *Dahlab* to that of *Lautsi v Italy*⁸¹⁶, one notices that there is a significant difference in how these cases were treated by the court. In the latter, the court accepted that the cross or the crucifix in this case, was not an imposition on student faith when displayed in the classroom. The court, then, admits that passive symbols of faith are not an issue of intolerance; it can be argued, then, that there is an inconsistency that the court consider the headscarf differently, as was the case with *Dahlab*. The crucifix and the headscarf, if one conducts a comparative and deductive assessment, are extremely alike in that they are both passive symbols

⁸¹² Resolution 1743(2010) of the Parliamentary Assembly of the council of Europe page 24 Para 16. <<http://www.assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=17880&lang=EN>> accessed 10 September 2017.

⁸¹³ Cited in Bahia Tahzib-Lie, ‘Applying a Gender Perspective in the Area of the Right to Freedom of Religion or Belief’ (2000) 2000. 3 BYU L. Rev 967, 983.

⁸¹⁴ Sawitri Saharso, ‘Culture, Tolerance and Gender: a Contribution from the Netherlands’ (2003) 10.1 European Journal of Women's Studies 7, 16.

⁸¹⁵ Cited in Sawitri Saharso, ‘Headscarves: a comparison of public thought and public policy in Germany and the Netherlands’ (2007) 10.4 Critical review of international social and political philosophy 513, 520.

⁸¹⁶ (Application no. 30814/00) [2011] Eq LR 633, [2011] ECHR 2412, (2012) 54 EHRR 3, [2011] ELR 176, 30 BHRC 429.

of faith. In neither case concerning Muslim individuals wearing headscarves in schools did the court provide compelling reasons that the garment imposed any religious conviction onto the students.⁸¹⁷ The crucifix, on the other hand, was not considered by the court to be a symbol necessary for Christian education and so it is perhaps unreasonable to assume that the headscarf acts as a teaching tool for Islamic thought. The court also professed, in the case of *Lautsi*, that the presence of religious imagery did not concern the court particularly, as the important factor was the virtues of tolerance and openness being taught in schools, an argument which can also be used in the case of *Dahlab*, a fact overlooked by the court. Further, *Tulkens* points out the contradictions present in the cases of *Gündüz* and *Sahin*, as the state of Turkey initiated legal proceedings against *Gündüz*⁸¹⁸ on the grounds that he promoted Sharia law on public television, despite the fact that he did not advocate any violent acts; the state, then, were acting in breach of Article 10. As pointed out by *Tulkens*, “*manifesting one’s religion by peacefully wearing a headscarf may be prohibited whereas, in the same context, remarks which could be construed as incitement to religious hatred are covered by freedom of expression*”.⁸¹⁹

It could be argued that the court’s decision, somewhat wrongly, portrays Muslim women, as preaching intolerance through their dress. It is the logic of the court, then, that Islamic nations should address intolerance in their societies, as the court argues that that tolerance should be practiced in all areas of life. It is also true that the UDHR describes educational spaces as those which must “*promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace*”⁸²⁰. If one posits, as the court does, that the headscarf, when worn by an educated woman,

⁸¹⁷ Carolyn Evans, ‘The Islamic Scarf in the European Court of Human Rights’ (2006) 7 *Melb. J. Int’l L* 1, 8. For further information see: *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009) (No. 07-665 (US)). Also see: Leslie C Griffin, ‘Fighting the New Wars of Religion: The Need for a Tolerant First Amendment’ (2010) 62.1 *University of Houston Main Law Review* 23. Regarding this case Leslie C observed that First Amendment of the U.S. constitution imposes two requirements that the Court has ignored: first, it recognizes that crosses and the Ten Commandments retain their *religious* character and are not secular; second, it allows such religious displays to stand only if they are surrounded by other *religious* monuments and symbols, such as, the Summum Aphorisms, the Buddhist stupa, the Jewish Star of David, the Muslim crescent and star, or the Wiccan pentacle. Instead, the Court has employed a “tyranny of labels”.

⁸¹⁸ *Gündüz v. Turkey* (27633/02) (2006) ECHR 709.

⁸¹⁹ *Şahin v Turkey* (Application no. 44774/98) (ECHR, 10 November 2005) ECHR 819, Dissenting opinion of Judge Tulkens; see also: Nicholas Gibson, ‘Faith in the Courts: Religious Dress and Human Rights’ (2007) 66.03 *The Cambridge Law Journal* 657, 675. For more information see case: *Eweidand Chaplin v. UK* (Application no. 48420/10) (12 April 2011) ECHR 738 the nation court followed idea that invisible cross is not sighing of indoctrination. *Gündüz v. Turkey* 27633/02) (2006) ECHR 709 at para. 46- 51.

⁸²⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 26(2).

is a sign of intolerance when worn in a school, then it is fair to assume that the court considers this more of a threat when practiced by an individual with a lower level of education in the public space.

Legal issues concerning the headscarf have been a topic of much debate in the West, particularly in the UK, the US and Canada, where Muslim women can wear what they choose. In Canada specifically, some religious symbols like kirpan which can be considered a threat to health and safety are tolerated, as the rights and freedoms of the people have been prioritised by the government and the court. The Canadian court has been forthright in advocating tolerance in all areas; in the case of the Sikh kirpan⁸²¹, some students argued that a fellow student's possession of the blade was unfair while they themselves were prohibited from carrying knives, but the court argued that schools more to educate students on religious diversity and tolerance. If the kirpan was to be banned in the school, this indicates to the students that some religious traditions are not as important or as worthy of preservation than others, such as the presence of a crucifix in the classroom. Gurbaj Singh was permitted to carry the Kirpan if he adhered to a number of conditions, which demonstrates a high level of tolerance on the part of the school and the court and a respect for the principle of freedom of religious expression.⁸²²

In a US hiring standards case⁸²³, *Samantha Elauf* wore a headscarf to the interview for a job in retail; later, the interviewer, *Heather Cooke*, stated that *Elauf* was a good and fit candidate for the job but questioned other managers in the store with regard to the headscarf and its connection to *Elauf's* faith. Cooke was then informed by the district manager that *Elauf* would not be hired due to the headscarf, which it was claimed would be at odds with the image of the company. Legal proceedings which followed ruled in favour of *Cooke* and the company, arguing that individuals are required to explain any religious reasons for their choice of dress or garments, and that the employer has the right to refuse employment on the basis that an item of clothing breaches company policy. It is true, however, that in this case there was no consensus amongst the judges in the appeal court as to the final verdict; Judge Alito, for example, asserted that:

“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire .

⁸²¹ *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6.

⁸²² *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6; See also: Lori G. Beaman, ‘It was all slightly unreal’: What's Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?’ (2011) 23.2 *Canadian Journal of Women and the Law* 442.

⁸²³ *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores*, 575 U.S. (2015).

. . . any individual . . . because of [any aspect of] such individual's . . . religious . . . practice . . . unless an employer demonstrates that he is unable to reasonably accommodate to [the] employee's or prospective employee's religious . . . practice . . . without undue hardship on the conduct of the employer's business".⁸²⁴

The US Supreme Court, notably, which prides itself on the virtues of freedom and tolerance, ruled in favour of *Elauf. Jenny Yang*, the head of the Equal Employment Opportunity Commission, responded to this ruling by stating the following: “*This ruling protects the rights of workers to equal treatment in the workplace without having to sacrifice their religious beliefs or practices*”.⁸²⁵

The UN Special Rapporteur *Abdelfattah Amor* expressed a similar sentiment, though with more emphasis on increased tolerance towards religious dress in public institutions.

Amor has also highlighted, following an official visit to Iran, that religious practice and dress should be treated with open mindedness and respect, but conceded that this should not be used as a political tool. He also asserted that religious expression should be encouraged and embraced to avoid a culture of fear and repression, or of religious indoctrination. When it comes to matters of education, he encouraged teachers and students to adorn religious dress, though only for certain purposes and under certain conditions.⁸²⁶ If religious dress is culturally non-offensive and if it is used primarily to express personal faith without proven correlation between wearing of headscarf and intolerance then there should be no problems raised with it, even by state bodies.⁸²⁷

As far as the freedom of religious manifestation is concerned, these practices should only be suppressed according to the exceptions outlined in the Covenant (second paragraph, article 9). Any attempt to suppress religious expression must be supported by a legitimate claim that the practice is a threat to “*public safety, order, health, or morals or the fundamental rights and*

⁸²⁴ Lawrence Hurely, ‘U.S. top court backs Muslim women denied job over head scarf’ (Washington 1 June 2015): Available online at: <<http://english.alarabiya.net/en/News/world/2015/06/02/U-S-top-court-backs-Muslim-woman-denied-job-over-head-scarf.html>> Accessed 13 May 2016

⁸²⁵ Cited in Jana Kasperkeveh, ‘Top US court Rules for Muslim Woman Denied Abercrombie Job over Hijab’ (New York 1 June 2015) Available online at:

<<http://www.theguardian.com/law/2015/jun/01/supreme-court-rules-favor-muslim-woman-hijab-abercrombie-fitc>> Accessed 13-05-2016. Similarly in the case *Sumayyah Mohammed v. Moraniec* (1995) 49 WIR 37; (action 3000A of 1994) in Trinidad and Tobago related to hijab the Supreme Court observed that enforce the girl to remove hijab is irrational and unlawful.

⁸²⁶ UN Doc. E/CN.4/1996/95/Add.2 (1996), para. 97 (Iran).

⁸²⁷ UN Doc. E/CN.4/2001/63 (2001), p. 7, para. 17 (Azerbaijan). And also see: (UN Doc. A/56/253 (2001), p. 48, para. 2 (Azerbaijan).

freedoms of others". Further, these attempts must be approached within the scope of 'proportionality'⁸²⁸, as even in cases where there is a legitimate threat, the degree to which the state should impose restrictions must be minimal. In other words, the limitation of freedoms must always be confined to the minimum degree of interference that is necessary to pursue a legitimate goal. This is primarily in the interest of preserving values of tolerance and religious freedom, even in extreme cases. The response given to a perceived violation of these principles should, then, be comparable to the importance of the principle being threatened.

The ECtHR employs the principle of proportionality in all of its jurisprudence; an element of proportion is needed to justify any response to a potential violation. This proportionality is reliant on three factors: effectiveness/suitability, necessity, and the requirement of proportionality in the strict sense.⁸²⁹ In terms of effectiveness and necessity, this refers to how aims and apparatus interact to form a response to a threat. If intervention is found to be unnecessary, ineffective or inappropriate, then the intervention should not take place; this may be because the means are inexistent or that a less severe approach may prove to be more successful.

When one analyses the history of the ECtHR with regard to court decisions on the headscarf, alongside conceptions of tolerance cited during these court proceedings, several inconsistencies emerge. If the restrictions on the headscarf were imposed for the sole aim of promoting tolerance and protecting freedoms, then this contrasts with common interpretations of tolerance, which consist of coexistence and an embracing of diversity⁸³⁰, which the ban directly opposes. Harmony and peace cannot come from strictness with regard to what can be worn, for what reason and by whom, regardless of the setting. If the aim of the ban was to maintain tolerance, then this measure cannot be deemed appropriate. It is, however, important to note that there may have been other considerations which influenced the ECtHR's decisions apart from tolerance, such as secularism.

As mentioned previously, the third factor was that proportionality is not absolute, and is dependent on how the factors at work interact. This factor is concerned with an equivalency being

⁸²⁸ Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16:2 European Law Journal, 158.

⁸²⁹ Janneke Gerards, 'How to Improve the Necessity test of the European Court of Human Rights' (2013) 11.2 International journal of constitutional law 466, 469. See also: Tor-Inge Harbo, 'The function of the proportionality principle in EU law' (2010) 16.2 European Law Journal 158.

⁸³⁰ Kristen Deede Johnson, *Theology, Political Theory, and Pluralism: Beyond Tolerance and Difference*. (Vol. 15. cambridge university press, 2007).

struck between positive outcomes of the intervention and the potential harmful consequences; this is arguably the most important factor to members of the court. Again, religious freedoms may be restricted if they constitute a threat to freedoms of others, as per Article 9, (2); and this may present itself in a number of very different ways and to different degrees.⁸³¹ It can be argued, however, that the ECtHR does not uphold this principle well in cases which involve the headscarf, as previous examples has demonstrated arguably disproportionate measures to intervene despite few interests being served by the measures. It is thus submitted that the cases which have been discussed demonstrate the frequency with which the courts suppress the religious manifestation of one group without producing any significant benefits for other groups involved.

5.7. Conclusion

From the inception of the term, toleration towards the religious beliefs of other people was a requirement in European nations to remedy the issue of religious conflict and civil unrest. This came about due to the realisation that true religious belief could not be coerced or formed involuntarily, and so religious conflict with the aim to conformity to the dominant religion was futile; tolerance arose as an alternative to violence.

Modern day religious unrest and unease is not a geographically specific phenomenon, but rather a global occurrence which presents itself in a number of ways. The absence of tolerance can lead to atrocious acts, such as murder, violence, torture, terrorism and attacks on human rights; this is still the case in areas of Syria and Iraq. As a consequence, most nations have identified the need for immediate action to prevent acts of intolerance and promote cooperation between different religious groups. This has been evidenced by the creation of multiple policies and acts in support of tolerance, and the UN and its related bodies have explicitly stated their commitment to addressing intolerance. The Human Rights Conventions and other related organisations have been proactive in advocating tolerance and opposing oppression on religious grounds where they find it and consider tolerance a virtue which must exist on a global scale if peace is to be secured. Tolerance is vital to any society which wishes to be considered developed and the UN assert *“tolerance and pluralism as indivisible elements in the promotion and protection of Human*

⁸³¹ *Metropolitan Church of Bessarabia and others v. Moldavia* (Application No. 45701/99) (13 December 2001) ECHR ECHR 860; *Kokkinakis v. Greece*, (14307/88) [25 May1993] ECHR 20; *Serif v. Greece* (Application no.38178/97) (14 December 1999) EHRR 561.

Rights".⁸³² The UN acknowledges that tolerance is a vital component of any democratic process and also of overall civil wellbeing. It has also equally been acknowledged by the UN that acceptance and diversity is essential to the maintenance of a peaceful and successful nation, as it enhances national culture.

While there are concrete answers and legitimate empiricism in science, where one solution will be agreed upon as correct, matters of ethics and religion are far more divisive and often never result in objective truths.⁸³³ Truths which relate to morality and lived experience are only agreed upon in societies which enforce a specific way of life. When groups of people are given the freedom to come to their own conclusions about morality and faith, tolerance and difference thrive. This has been illustrated by the history of political philosophy where in current circumstances; our central question is not *Plato's* question - 'what is the best way to live?' – but rather the most fundamental question is 'how should we live together given that we cannot agree about the best way to live?'.⁸³⁴ It can be argued that these affirmations have been largely set aside by the ECtHR in its rulings, as they have been using tolerance as a tool with which to further undermine Muslim women by curtailing their autonomy and freedom of choice with regard to the wearing of the headscarf. In apparent disregard of general conceptions of tolerance, the court has presented a form of religious expression, wearing of the headscarf, as an affront to tolerance, which to this researcher seems a self-contradictory pattern of thought.

Tolerance, on a fundamental level, is based on an appreciation of religious or ethical convictions and centres upon acceptance. Accepting that others have different beliefs and practices is a cornerstone of harmonious societies and personal wellbeing; this requires individuals to rid themselves of their mistrust of the 'other' and accept difference. Those who disapprove of tolerance argue that diversity threatens the integrity of a society, though they themselves may be the subject of intolerant behavior.⁸³⁵ The legal system, however, purports to be an institution

⁸³² 25 April 2002, UN Doc. E/CN.4/2002/200 (2002).

⁸³³ Wibren Van Der Burg 'Beliefs, Persons and Practices: Beyond Tolerance' (1998) 1.2 Ethical Theory and Moral Practice, Kluwer Academic Publishers, Dordrecht 227, 238.

⁸³⁴ Elizabeth Burns, Coleman, and Kevin White, *Religious Tolerance, Education and the Curriculum* (Springer Science & Business Media 2011) 3-5.

⁸³⁵ Martha Minow, 'Putting up and Putting down: Tolerance Reconsidered' (1990) 28 *Osgoode Hall LJ* 409. See also: Benjamin L. Berger, 'The Cultural Limits of Legal Tolerance' (2008) 21.02 *The Canadian Journal of Law and Jurisprudence* 245.

committed to evidentiary justice, logical and legal reasoning. However, on closer examination its processes uncover a number of inconsistencies in this approach. Particularly in the cases involving Muslim women and the headscarf, it can be argued that the findings and conclusions regarding the relationship between intolerance and the wearing of the headscarf were based on conjecture and presumption, and the court failed to present a sound and sustainable rationale for its claim. The rulings made also seems to disregard the principle of proportionality which is the fundamental aim of intervention with regard to religious practice; there has not, in these cases, been an established or proven equivalency in the threat observed and the measures taken, nor between the harm done to one group and the benefit received by the other. The thinking surrounding tolerance tends to have the maintenance of peace as the key objective or outcome and most scholars consider tolerance conducive to harmonious coexistence. It can be argued that the ban on the veil, which is supposedly due to the protection of tolerance, has been unsuccessful in this aim, as it has only promoted division and eroded mutual respect between different sections of society.

Differences in religious belief and religious practice exist in all areas of life, including in education, and questions as to whether the headscarf is appropriate in an educational setting should not be met with suspicion, fear and suppression, but rather with respect and acceptance. It is, a fundamental right for students and staff to be able to practice their religion in the way that they choose to, which includes the wearing of religious clothing and adornments. The acceptance of religious items in schools creates the idea early on that people are diverse in their thoughts and actions, and prepares children for the diversity of the wider world. In this sense, guaranteeing the freedom of manifesting one's religious beliefs and prevention of religious suppression can raise levels of awareness and tolerance, thus promoting the observation and preservation of fundamental human rights.

CHAPTER SIX:

Concluding Chapter

6.1. Introduction

This thesis has explored the role of the headscarf in the rulings and policy decisions of the ECtHR and within the framework of article 9 of the ECHR; the ECtHR has cited the protection of tolerance and democracy, as well as the importance of safeguarding against fundamentalism, as the reasoning behind their decisions in key cases such as *Şahin* and *Dahlab*. The motivation for this research originated from a fascination with adjudicative the processes institutions have gone through in order to address whether there is a direct, or indirect, relationship between the following three phenomena: the headscarf, fundamentalism, and intolerance. Key to this work is the argument that ECtHR has not conclusively established the link between the headscarf, and those who wear it, and a rise in fundamentalism, dogmatism and intolerance. Based on this argument, one could further submit that the court decisions concerning the ban the headscarf, on the ground it represents a symbol of fundamentalism and tolerance intolerance, may be considered as unfounded, an affront to human rights and inconsistency with other the ECtHR judicial decisions such as *Handyside v UK*, *Chaush v Bulgaria* and *Folgerø v. Norway*.⁸³⁶

This chapter, the conclusion, will present the findings and recommendations of the thesis. Beginning with the introduction, this research outlined and evaluated the basic context of the topic and addressed the relevant case studies. The first chapter dealt with international approaches to the headscarf and the surrounding legal issues, as well as touching on the two key stances addressed in this thesis: the feminist approach and the traditional religious approach regarding the wearing of the headscarf. The second chapter moved on to an overview of the existing literature on the topic, with a greater focus on a few key sources, chosen from both Islamic and secular writers; these sources were assessed and key approaches identified which were missing from the existing literature. The third chapter followed on from this by addressing the concept of religious freedom and applying it to the wearing of the headscarf as a religious symbol, with reference to internal and external aspects of religious freedom, alongside an assessment of the argument for restricting

⁸³⁶ (Application No.5493/72, A/24) (07 December 1976) ECHR 5; (Application no.30985/96) (ECHR, 26 October 2000) 34 EHR55; (Application no.15472/02) (29 June 2007) ECHR 29 para 96.

religious practice and attire. The thesis contributions can be found in the fourth and fifth chapters; the fourth chapter attempted a major assessment of the argument of the court to ban the wearing of the headscarf on the grounds of curtailing extremism and fundamentalism while the fifth moved on to a criticism of the argument, presented by the ECtHR, that the wearing of the headscarf as a religious symbol has a direct link to an attitude of intolerance towards other members of society.

The conclusion will summarise the points outlined in the thesis and reassess the arguments as a whole, as well as identifying the limitations of the thesis in order to make recommendations for further research. The final step will be to make suggestions as to how the ECtHR may re-visit and re-evaluate their stance on the headscarf in light of the arguments presented, according to the objectives put forward in the first section.

6.2: Summary and Findings of the Research

6.2.1. Chapter One: Introduction to the Thesis

The first chapter presented a number of case studies with regard to the disagreement between different national and international bodies on the question of a universal approach to religious freedom and its importance in promoting harmony and social cohesion.

The majority of European states profess religious diversity and a variety of beliefs as something to be protected and celebrated. Heterogeneity within a society has been upheld legally on a state level and by international bodies, most notably by the ECHR. This document was enacted in 1953 and is widely acknowledged as the most influential apparatus for upholding human rights internationally. The success of this legal instrument is perhaps surprising given the difficulty international bodies have faced historically in applying legislation universally though, in the case of the religious expression particularly religious symbols, it seems that legal cases have been marred by a lack of consistency in process and ruling, as well as an apparent disregard of fundamental human rights. In the introduction, a comparative and deductive assessment of the rulings of the Court in terms of the wearing of the headscarf with the displaying of crucifix has been presented alongside a selection of other relevant ECtHR proceedings. This discussion indicated that the court did not adhere to legal consistency and contradicts the standards prescribed by UN bodies such as the Human Rights Committee.

The headscarf has been presented both as a religious symbol by the Muslim community and as a representation of gender, and so it was the choice of the researcher to approach the

headscarf from both an Islamic and a feminist point of view as a necessary step to determine the legitimacy of court decisions regarding related cases. By approaching the topic through these two perspectives, one religious and one secular, it was found that there was internal division within the two groups thus highlighting both the symbolic and legal status of the headscarf, highlighting the complexity of the topic. With regard to the approach taken by Islamic scholars towards the headscarf and the disagreements present within this group, it is difficult for anyone, no matter how well qualified they may be, to make value judgment about religion and religious symbols particularly from legal body such as the ECtHR which its members are legal experts.

6.2.2. Chapter Two of the thesis

Following on from the assessment of the literature on the subject of religious freedom and the ECtHR's approach to the question, the author considers that there is legitimate reason to analyze the decisions of the Court with regard to the headscarf. Further, this assessment was necessary in order to determine how this thesis fits into the existing body of work. For one to examine and understand this corpus, literature review was grounded into distinct categories. The first focused on women academics and their writing on the topic, then provided a non-Muslim viewpoint. The third concerned Muslim writers and commentators who had written prominently on religious expression and religious dress, in relation to human rights and legal institutions.

With regard to the chronological scope of the current thesis, the author has limited the literature cited to 21st century works as the Court began presiding over cases pertaining to the headscarf in the closing stages of twentieth century. In isolating this period, the collection of relevant cases may be examined in greater depth, allowing a deeper understanding of the relationship being explored. It also allows the author to determine where the gaps in the literature lie and how best to focus the objectives of the thesis.

On examining the existing literature, it is clear that previous studies have analysed the decisions of the court based purely on the legal process itself, in this way that they condemned the decisions of the ECtHR based on the fact that the court failed to prove that *Leyla* and *Dahlab* were the members of fundamentalist groups or the they behaved in intolerant attitudes. The ECtHR often disregarding the historical and philosophical context of tolerance and fundamentalism, both used in the decisions of the court as justifications to ban the headscarf. This thesis argues that any position on court rulings on religious expression, particularly pertaining to the headscarf, which are removed from discussions of the historical and philosophical context of concepts such as

fundamentalism and tolerance lacks weight and validity. In other words, the main concern of the current thesis is not to prove whether the applicants of the cases were fundamentalist or intolerant, but the main concern is to critically consider whether it is legally acceptable to apply the concepts of fundamentalism and intolerance in these specific cases.

6.2.3. Chapter three of the thesis

Chapter three addressed the concept of human rights, the freedom of religious expression primarily, in relation to relevant international instruments. Here, the author attempted to discuss the conflict between state governments and international bodies on human rights standards and religious rights with regard to the UN Charter. It also outlines the reliance of states on the principle of sovereignty and their own national interests the consequence of which was the creation of international human rights documents which were not legally binding. This chapter also saw the author present the state of religious freedom and its protection in the UDHR. Though there has been disagreement amongst Muslim countries with the view to allow religious conversion, the main bulk of the document does directly allude to this right. The UDHR presents a firm statement on religious freedom, arguing for the importance of its protection; however, the document does not hold any state legally responsible in any concrete way for their lack of adherence to the standards outlined therein. These standards were legitimized as a declaration and the Charter was created due to the reluctance of powerful states to agree to any legal obligations which would risk undermining their influence over the colonial territories. In these parts the researcher gives a brief account of the history and position of the rights of religious freedom generally in the above-mentioned documents as an introduction to narrow it down to focus on the right to religious expression.

After the Second World War, there was no legally binding document to protect civil or political rights and so nations were forced to forge their own legislation, and two decades later the Convention on civil and political rights was ratified. Unlike the Convention on Economic, Social and Cultural rights, which holds obligations which are progressive and vary dependent on the available resources of member states, the ICCPR outlines standards which must be implemented and with little leeway once a state has joined. While the Declaration includes the right to change religion, the ICCRP faced difficulties with this inclusion due to the objections of the majority of Islamic states; it was reworded for the ICCRP as the rights to hold “a religion...of his choice”,

avoiding the wording of the Declaration. Despite being a legally binding document, it does not have the power or influence that the ECtHR has on member states to the ECHR as its process requires states to submit reports relating to progression of human rights in their countries; ruling on legal cases rely on the consent of both parties to a dispute. This chapter also delineated between one's right to have or adopt a religious belief and one's right to publicly practice said belief. The former is considered an absolute right which cannot be limited by national governments under any conditions. The latter, on the other hand, is far more complicated and may be restricted according to a number of circumstances. The author assessed this using a number of illustrative examples exploring these circumstances and how these limitations impinged on religious expression and human freedoms. Included here was the argument that the General Comment of the HRC neglects the matter of 'duress', citing cases in North Iraq in which Yazidis were forced to convert on the threat of death; this comprises duress not coercion.

The researcher analysed and examined the legitimate excuses, according to the ICCPR article 18 (3), under which religious expression can be limited, including the maintenance of public order, public safety, and 'health and moral and protection of the rights and freedoms of others reasons'. These concepts are complex and lack concrete definitions, and so the potential for them to be misused is high. Therefore, it is important that nations consider the concept of religious freedom broadly; the limitation of freedoms must always be restricted to the minimum degree of interference that is necessary to pursue a legitimate cause. With presenting the cases from the Committee of Human Rights and ECtHR the researcher assesses the wearing of the headscarf in the context of legitimate restriction clauses to consider whether wearing of the headscarf disturbs public order, moral, health, safety and rights and freedoms of others. Through the examination, it would appear that the ban of the wearing of headscarf based on the restriction found in clauses of article 18 (3) is legally problematic and questionable.

The third chapter concluded by addressing the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on religion or Belief, widely considered amongst the most influential documents on religious freedom; it is one of the only documents to address international religious freedom directly and at length. On the other hand, the multiple setbacks to reaching an agreement about the document are indicative of the power politics present in the UN at that time as well as the controversy surrounding the very topic.

Those who had a hand in the creation of the Declaration had to overcome a number of obstacles, not least arguments as to the exact meaning of religion raised by the Communists and nations of Eastern Europe; there was a discussion as to whether secular approaches to religion, such as agnosticism and non-belief would be protected in a similar manner, as they were not mentioned in the document. It was also argued by some states that the focus on religious freedom prioritised the rights of the religious over those of atheists and non-believers. It was countered by the West that it was, by design, a declaration for *religious* freedoms, and should not include atheism as this was not a religion. It was also pointed out that atheism is implicitly protected under the Declaration anyway. It was decided, as a compromise, that instead of ‘belief’, which indicated religion, the Declaration would state ‘whatever belief’, which suggests a wider usage. For example, the first article states: “... *the right shall include freedom to have a religion or **whatever belief of his choice**...*”.⁸³⁷ This has been accepted by both parties, an outcome which was not predicted by the bulk of the ICCPR and UDHR drafters. The amendment provides a reassurance that all convictions, whether religious or non-religious, would be protected by the Declaration. The Declaration does, however, neglect to reference religious conversion directly, though it is included in the UDHR. Phrased as a ‘change’ in religion, this wording has been criticised by some, particularly Muslim scholars, as lacking power when compared to the ICCPR. The ‘right to change religion’ was to be removed but protest amongst some groups forced the addition of Article 8, which stipulated that “*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*”.⁸³⁸ The feeble and vague wording of this statement has opened it up to interpretation; there are worries that Islamic states may use this as justification to either ignore or compromise the right to convert. This has been the case in Iran, as conversion to Islam is permitted but conversion from Islam to an alternative religion is prohibited.⁸³⁹

This research explores the use of ‘intolerance’ as a crutch to restrict religious freedom and so it is important to highlight the unclear definition of the term; it may refer to any number of personal, social, theological, ideological or psychological stances which contribute to

⁸³⁷ Walter, C “The Protection of Freedom of Religion within the Institutional System of the United Nations”. *Universal Rights in a World of Diversity* (2012) The case of religious freedom. Pontifical Academy of Social Science. P.591

⁸³⁸ *Ibid*

⁸³⁹ O’Connell, B, ‘Constitutional Apostasy: The Ambiguities in Islamic Law after the Arab Spring’ (2012) 11 *Nw. UJ Int’l Hum. Rts.*, 83, 83.

marginalisation and hate.⁸⁴⁰ The absence of a universally acknowledged interpretation and definition of the term “intolerance” and its precarious position in international judicial cases has drawn attention to its potential for misuse when applied in a judicial or legal context. Evidence for this may be found in Article 2 of 1981 Declaration, in which the methods by which governments and courts may address intolerance or discrimination are outlined, with delineation between these terms. While discrimination, the article asserts, usually requires legal action, intolerance should be tackled using “all appropriate measures”, suggesting recourse beyond the legal system.

The declaration lacks legal status but this does not diminish its power over legal action; this has been highlighted by *Bahiyih Tahzib*, who points out that “*States regard the 1981 Declaration, or at least some of its provisions, as normative in nature and part of customary international law*”.⁸⁴¹

The documents outlined in this section combine to form an overarching legal model on which the global protection of human rights rests, particularly with regard to religious freedoms; the clarity of these documents and a strong understanding of their impact are vital to assessing legal cases pertaining to freedom of religion.

6.2.4. Chapter four of the thesis

The fourth chapter, as with Chapter 5, attempts to present the wider implications of the research. The former addresses the two primary reasons often cited by the ECtHR in cases of religious freedom, particularly relating to the ban on the wearing of the headscarf: preventing intolerance and preventing fundamentalism. The chapter questions whether these reasons can provide a sound legal justification for the restrictive rulings. This was achieved through an examination of two prominent cases (*Şahin v Turkey and Dahlab v Switzerland*), supported by periphery case studies on European court process. Further, this thesis argues that a methodical and analytical approach to analysing the court’s decisions depends on first understanding the historical and ideological context of the concepts of fundamentalism and tolerance.

Fundamentalism, too, is a challenging term to define rigidly, and this becomes more complicated still in discussions of Islam. An approach to the term has been attempted a number of times, with

⁸⁴⁰ Claydon, J, ‘Treaty Protection of Religious Rights: UN Draft Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (1972) *The. Santa Clara Lawyer*, 12, 403.

⁸⁴¹ Bahiyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Vol. 44. Martinus Nijhoff Publishers, 1996) 600, 187.

a focus on history, culture, and personal faith. This thesis attempts to question how prevalent fundamentalism is across different faiths and how the concept is viewed when applied to non-Islamic faiths. The objective of this chapter is to determine how fundamentalism is viewed by the ECtHR and the effect this has on religious freedom; in order to achieve this, approaches to defining fundamentalism must be explored with an emphasis on historical and philosophical context. It is the hope of the researcher that this will provide clarity as to what the term is and how it should be used.

This chapter discussed fundamentalism as a concept with a number of socially-dependent firm definitions, most of which related to Islamic fundamentalism; some instances, however, referred to other religions. It is a complicated term, then, and the need for a workable definition for both scholarly and legal use is desired. It may be used to describe religious fundamentalism across disparate faiths and communities, or it may be used to refer solely to Islamic extremism and terrorist activity. When one considers the characteristic of fundamentalism's reactionary nature, sharp boundaries in moral belief, absolutism and selective, it would be obvious that none of the above-mentioned traits can be legally acceptable as justifications for the ban of the wearing of the headscarf in the case of *Leyla*. It is notable that the bulk of the literature presents little distinction between traditional religious belief and fundamentalist religious belief and this has been reflected in the decisions of the ECtHR; the court has often equated religious strictness or piety with fundamentalism with regard to religion, despite the fact that oppressive acts often stemming from the latter but rarely from the former, which usually promotes tolerance and peace.⁸⁴²

The decisions of the ECtHR must be given weight by fact and evidence as followed in the case of *Kalaç* the military judge who was actively involved in the fundamentalist group; vagueness as to the exact definition of fundamentalism makes it difficult to identify and raise the question as to whether it should be used in reference to Islamic practice. Based on the findings of this chapter it could be argued that the court has applied an unclear concept (prevention of fundamentalism) in

⁸⁴² Mårtensson, Ulrika and Jennifer Bailey, and Priscilla Marie Ringrose, *Fundamentalism in the Modern World: Fundamentalism and Communication: Culture, Media and the Public Sphere* (2011 IB Tauris) p66.67. For further information see: Ruud, Koopmans, 'Religious fundamentalism and hostility against out-groups: A comparison of Muslims and Christians in Western Europe' (2015) *Journal of Ethnic and Migration Studies* 41.1: 33-57.p35. For further information on difference between religious orthodoxy and fundamentalism see: Ulrika Martensson, Priscilla Ringrose and Jennifer Bailey, *Fundamentalism in the Modern World: Fundamentalism and Communication: Culture, Media and the Public Sphere* (London: I.B.Tauris, 2014)49.70.

order to prohibit the headscarf despite the lack of compelling evidence linking its use with a tendency towards fundamentalism by the wearer.

6.2.5. Chapter five of the thesis

Similar to the discussion of fundamentalism outlined in Chapter Four, the fifth chapter entailed a discussion of the term ‘tolerance’ and the way in which its protection has been used as by the ECtHR a justification for restrictive rulings on the headscarf.

In the *Dahlab* case the ECtHR observed that it “*appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance etc.*”⁸⁴³ This thesis argues that if one approaches the term ‘tolerance’ within its ideological and historical context, a greater understanding of the concept may be gained. This is particularly useful when examining the legal application of the term.

When one examines the core of the concept, tolerance equates to embracing difference of the different; further, it requires an acknowledgement of difference and an implied unease, which must be accepted. In order for there to be tolerance, therefore, there must be knowledge of the activities or beliefs to be tolerated. The concept also assumes that those displaying tolerance must perceive themselves to be capable of removing or changing beliefs which oppose their own if they so decided; tolerance stems from resisting this behaviour.

This understanding of tolerance has not been applied by the ECtHR in their decisions. Instead, the term protection of tolerance has been applied in order to restrict freedoms of Muslim women and limit their available forms of religious expression such as wearing of the headscarf. In ignoring the aforementioned understanding of tolerance, the court has placed the headscarf, a symbol of religion, in opposition to the concept of tolerance, which the researcher argues against. The argument presented in this chapter posits that the foundation of tolerance is an acceptance of religious belief and expression, and an acknowledgment that beliefs different to one’s own are equally valid and contribute to a society’s cultural diversity. Acceptance promotes personal and societal wellbeing and is a requirement of any peaceful, trusting multicultural community. The opponents’ enemies of tolerance would posit that celebrating difference only dilutes a society, despite perhaps being tolerated themselves. The decision of the ECtHR in the cases related to the wearing of the headscarf seems contrary to the judgment of the court in the case of *Handyside v*

⁸⁴³ *Dahlab v Switzerland* (2001) 42393/98.

*United Kingdom*⁸⁴⁴ which asserted that freedom of expression not only covers views which are favourable or inoffensive but it also includes those views which shock, disturb the state or any part of society.

Tolerance, as a concept, is closely related to the concepts of power, harmony and so tolerance is considered a fundamental quality necessary for a peaceful society. Legislation which restricts the headscarf and other religious manifestations in the name of tolerance does nothing to promote peace, causing only division and disillusionment. Based on the traits of tolerance it can be argued that tolerance is only really applicable when the individual or group choosing to be tolerant has an ability to actively suppress the disfavored practices or beliefs of other individuals or groups but referring to apply it. Thus, the role of power between the sides of tolerance in the judgments of the court should be taken into consideration which the court failed to do.

A number of scholars have defined tolerance as the requirement to connect with other people despite difference and to find similarities outside of race and religious belief. These factors are present in all aspect of daily life, from work to school to the home, and the role of religious expression across these areas should not differ. In the case of education, the presence of a hijab should not shock and threaten, or be under scrutiny, but should be accepted as a personal choice. To reiterate, the right to freely practice religion is a protected human right and the headscarf exists under this right. It is ever more important that religious expression be demonstrated in schools as the earlier we can instil the virtue of acceptance and tolerance in children, the sooner they will begin to understand the breadth of humankind and embrace difference; this is only practical, as the world is a diverse place. By protecting the right to religious expression and refraining from restricting this right, tolerance will be protected and human rights will be maintained.

6.3.1. Summary of Main Contributions:

In addressing the gaps identified in the existing literature the main research contribution can be summarised as follows:

⁸⁴⁴ (Application No.5493/72, A/24) (07 December 1976) ECHR 5

1-Analysis of the concept of religious expression within the context of international human rights law and the scope of legitimate limitations which can be lawfully imposed on religious freedom **(Chapter 3)**

2- Taking into consideration the traits and definitions of fundamentalism, the researcher argued that it is difficult, considering existing human rights principles, to justify banning the headscarf based on the concept of fundamentalism **(Chapter 4)**.

3- By exploring the historical and philosophical aspects of the term 'tolerance' and referring to the ambiguity of this concept in legal documents, the researcher argued that the supposed link between the wearing of the headscarf and intolerant attitudes contradicts the nature of 'tolerance' and is therefore legally problematic and unsustainable **(Chapter 5)**.

6.4. Recommendations

This section will present some suggestions to the ECtHR in relation to legal proceedings involving the headscarf.

The first is that the court should refrain from employing vague, ill-defined concepts such as intolerance or fundamentalism without being clear on their usage; these terms have little universal application and clear, well-defined concepts (such as discrimination) must be used if an authoritative legal ruling is to be achieved.

Further, as the court is made up of legal authorities rather than theologians, it may be pertinent for the court to refrain from making value judgments about a particular religion (Islam) and its compatibility or otherwise with democratic values.⁸⁴⁵

Finally – there is an inconsistency between the views of the ECtHR and those of the HRC regarding the wearing of the headscarf. This research suggests that the ECtHR should bring its future judgments into line with the HRC's pronouncements which offer wider protection to religious expression, including the wearing of headscarves and similar attire in a religious context.

⁸⁴⁵ See supra, page 11 of the thesis.

6.5. Limitations and Scope of the Research

This thesis aimed to assess the rulings of the ECtHR on cases pertaining to the headscarf, particularly in academic settings. The research has, notably, not touched on the recent prohibitions on Islamic beach wear, which has seen particular controversy in France. This is, in part, due to the difference between this setting and that of a classroom, as the contexts are too dissimilar to be properly compared. It may be put forward that places of education may set their own standards with regard to their codes of conduct and so everyone is held to the same standards. The public setting of the beach, on the other hand, poses a more complex question as to whether restrictions should ever be applied here.

While omitting it from the current study, the issue of the Islamic bikini is an important one with regard to the debate over public places and personal freedom of expression; the researcher acknowledges the potential for further research here. Another reason for its omission is the fact that this matter has not been submitted for adjudication to the ECtHR to date, and this thesis is concerned with the cases of this court.

Notably, this thesis is also does not include the debate surrounding the Niqaab and the Burqa, both highly concealing forms of religious dress, across Europe, though most notably in France. As this thesis is concerned primarily with the cases related to the wearing of the headscarf, these forms of religious attire were not addressed. It has been argued⁸⁴⁶ that the prohibition of the complete covering, as with the burqa, is justified in academic settings due to the practicalities of teaching and learning; facial expression and eye contact are deemed very important here, as social skills and interactivity are also being learnt. Furthermore, in terms of limitation, developments regarding the politics behind the headscarf cannot be disregarded, particularly in the light of the current Turkish government's change of policy. Abolishing the ban on headscarves raises a very important question about the legality of the rulings of the ECtHR relating to headscarf restrictions, and raises even more questions about the future of the headscarf.

⁸⁴⁶ Frances Perraudin, 'Schools Can Decide whether to Ban full-face Veils, Says Morgan' (19 January 2016) available at: <<https://www.theguardian.com/education/2016/jan/19/schools-can-decide-whether-to-ban-full-face-veils-says-morgan>> accessed 20 September 2017; see further, Jess Staufenberg, 'Germany Bans Muslim Student from Wearing Niqaab Face in School' (23 August 2016) available at: <<http://www.independent.co.uk/news/world/europe/germany-muslim-student-banned-niqab-face-veil-school-islam-a7204671.html>> accessed 20 September 2017.

6.6. Conclusion

In the last few years, religious conflict has been more frequently debated by scholars and social commentators due to its ubiquity in modern life. Religious debate has always been widely accepted due to the protection of free speech. However, the legal side of this debate, it has been argued, should be considered with more care as rulings often have significant real-world effects on religious communities. A pragmatist approach together with the proportionality principle require public authority to make a balance between the rights and freedoms of individuals and public interest; in a way that the court needs to determine whether the action is necessary for achieving the aim, and whether the cons to the individual outweighs the benefit that achieving the aim will bring. Prevention of fundamentalism and intolerance as two aims of the judgments of the court will not be achieved through banning the passive symbol of religion such as headscarf; fundamentalist and intolerant attitudes are violent and aggressive actions that emerge from prior belief and awareness. In the cases related to wearing of the headscarf it seems that the court made judgments based on assumption, prediction and strict perception of secularism and political motivations rather than legal reasoning. The different positions of the Conseil d'Etat and Stasi Commission towards dealing with headscarf and recent political development in Turkey which has removed the ban on the wearing of the headscarf in public space has brought the legality of the decisions of the court into question. In the case of the headscarf, which has been frequently restricted by the court on the ground of the protection of tolerant society and prevention of fundamentalism, a consideration of the philosophical and historical background of the associated concepts can inform the legal process. Limiting religious practice and manifestation for Muslim women based on those concepts is from legal standpoint problematic, as there is no rational justification for assuming a link between the headscarf and extremist ideology or intolerant behaviour. This thesis, by exploring the historical and ideological background of these concepts, has sought to provide a deeper understanding of the rationale behind court decisions and has argued for a reassessment of the underlying philosophical considerations which have influenced judicial reasoning on the subject.

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