RELIGIOUS SYMBOLS AND CLOTHING IN PUBLIC SCHOOL AND UNIVERSITIES: A DWORKINIAN CRITIQUE

Devlet Okulları ve Üniversitelerde Dini Sembol ve Kıyafetler: Dworkin Gözünden Bir Eleştiri

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Research Article

Abstract

Freedom of religion is a fundamental right guaranteed not only in the European Convention on Human Rights but also in many other national, regional and international mechanisms. The importance of freedom of religion has been emphasised on a number of occasions by the European Court of Human Rights. However, some of the Court's decisions can be criticised for their controversial reasoning, and there are several areas, such as the regulation of the wearing of religious clothing in public sphere, which remain controversial. The aim of this article is not to add directly to the substance of that controversy. Rather, the present article uses Dworkin's theory of law as a theoretical lens to read the Court's case-law on freedom of religion. This article is aimed at critically engaging with the issue of religious symbols and clothing in the public place within the case-law of the ECtHR and Dworkin's theory of law is the theoretical lens chosen to perform this task.

Keywords: European Court of Human Rights, Freedom of Religion, Ronald Dworkin.

Özet

Temel bir insan hakkı olarak din özgürlüğü, sadece Avrupa İnsan Hakları Sözleşmesi ile garanti altına alınmamış olup, aynı zamanda birçok ulusal, bölgesel ve uluslararası mekanizmalar aracılığıyla korunmaktadır. Din özgürlüğünün önemi, Avrupa İnsan Hakları Mahkemesi tarafından defalarca vurgulanmıştır. Ancak, mahkemenin gerek dini kıyafetlerin kamusal alanda giyilmesiyle ilgili aldığı bazı kararları, gerekse de devlet okullarında kullanılan dini sembollerle ilgili aldığı kararlar tartışmaya açık gerekçelendirilmeleri sebebiyle eleştirilebilir. Bu makalenin amacı doğrudan bu tartışmaya katılmak değildir. Onun yerine, bu makalede Ronald Dworkin'in hukuk teorisi kullanılarak mahkemenin belirtilen alandaki kararları tartışılmıştır. Sonuç olarak, bu çalışmada Avrupa İnsan Hakları Mahkemesi'nin, kamusal alanda dini kıyafetlerin kullanılmasıyla ilgili aldığı kararlar, Dworkin'in hukuk teorisi ışığında incelenmiştir.

Anahtar Kelimeler: Avrupa İnsan Hakları Mahkemesi, Din Özgürlüğü, Ronald Dworkin, İnsan Hakları Hukuk

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INTRODUCTION

The importance of freedom of religion has been underlined on a number of occasions by the European Court of Human Rights (hereinafter, referred to as 'the Court' or 'the ECtHR'). According to the Court's case-law, freedom of thought, conscience and religion is "one of the most vital elements that go to make up the identity of believers and their conception of life".[1] The Court accepted that freedom of thought, conscience and religions as enshrined in Article 9 of the European Convention on Human Rights (hereinafter, referred to as 'the ECHR' or 'the Convention') is one of the foundations of a "democratic society" and such freedom is also considered as a "precious asset for atheist, agnostics, sceptics and the unconcerned".[2]

Over the years, however, some European countries like Switzerland, Turkey, Italy and France have legislated restrictions on wearing Islamic clothing, putting forward different arguments such as: i) ensuring state's religious neutrality in the state-school; ii) promoting gender equality; iii) upholding state secularism at the state-university. Therefore, the issue of religious symbols and clothing in the public place has become a source of legal and political contention within Europe over recent years.[3]

This article is aimed at critically engaging with those arguments and Dworkin's theory is chosen to perform this task. This article is divided into three main sections. Section I provides a legal framework in which religion is protected by Article 9 ECHR. It then briefly presents the ECtHR's case-law on Article 9 ECHR, with a specific emphasis on the displaying religious symbols in public schools and universities. Section II discusses the issue of the separation of religion and state. Freedom of religion, as enshrined in Article 9 of the ECHR, imposes that states must be religiously neutral. This does not mean that states might not have official religions. Rather, in the Court's own words: "the obligation under Article 9 of the Convention incumbent on the State's authorities to remain neutral in the exercise of their powers in this domain".[4] This suggests that the Court attached particular importance to the need for state neutrality in the exercise of power in this context.[5] According to the Court then,

1 *Kokkinakis v Greece*, Series A no 260-A, 25 May 1993, para 31; *Leyla Şahin v Turkey* (GC), Application no 44774/98, ECHR 2005-XI, para 104.

2 *Leyla Şahin v Turkey* (n 2) para 104.

3 See Isabella Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer' (2009) 30 *Cardozo Law Review* 2669.

4 *Religionsgemeinschaft Der Zeugen Jehovas and others v Austria*, Application no 40825/95, 31 July 2008, para 92.

5 For a critical discussion regarding state neutrality on religious matters in public see Dimitrios Kyritsis and Stavros Tsakyrakis, 'Neutrality in the classroom' (2013) 11 *International Journal of Constitutional Law* 200.

states have a duty to remain neutral and impartial in exercising its discretion in the context of Article 9 of the Convention. This means that there is a strong correlation between the notions of state neutrality and religious freedom in the context of the ECHR. The purpose of this section is to compare and contrast these two concepts -secularism and neutrality- by engaging in analyses of the Court's decision in the cases of *Dahlab*, *Şahin* and *Lautsi* in light of Dworkin's theory of neutrality.

Section III discusses the way in which the ECtHR has dismissed the choices of women who were denied the right to wear headscarves in educational institutions. This discussion is important for two reasons. First, in banning religious clothing, such as the Islamic headscarf, the Contracting States often argue that while this restriction limits women's freedom and their choices, this is actually good for their liberation.[6] States 'somehow' have established a link between the protection of the dignity of women and the prohibition of the wearing of the headscarf. Consequently, bans were seen as a solution to the threats against to the dignity of women. This approach will critically be examined through the lens provided by Dworkin's theory of dignity.

Second, it seems highly interesting to analyse the Court's approach in such cases through the lens of Dworkin since he finds the foundations of the right to freedom of religion in the key value of ethical independence.[7] He points out that there is a fundamental right to ethical independence in moral issues that protects people's responsibility to define and find value in their lives.[8] This means that the right of religious freedom protects the principle of personal responsibility which holds that "each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him".[9] Such principle requires a tolerant secular state in which people are allowed to choose their religion and follow its practice. This suggests that people should be allowed to take personal moral responsibility for their religious convictions. On this view, religious freedom is based on human dignity and personal moral

6 This pointed out by Judge Tulkens, "wearing the headscarf is considered to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women". See *Leyla Şahin v Turkey* (n 2), dissenting opinion of Judge Tulkens, para 11.

7 Ronald Dworkin, *Religion Without God* (Harvard University Press, 2013); See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) chapter 12. See also Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 2001) chapter 3 and chapter 6.

8 See also Cecile Laborde, 'Dworkin's Freedom of Religion Without God' (2014) 94 *Boston University Law Review* 1255.

9 Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press, 2008) 10.

responsibility.[10] Section III thus provides an examination of the principle of personal responsibility of women in the Islamic clothing cases.

1. Religious Freedom in the European Convention on Human Rights

1.1. The Legal Framework

Freedom of religion is enshrined in the ECHR under Article 9 that provides the basic legal framework for freedom of religion. Article 9 of the ECHR provides that:

> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[11]

One can say that there are two elements to Article 9 ECHR. First, the right to hold and change religious belief has absolute protection. This means that the private freedom of thought, conscience and religion is an absolute right which does not allow any limitation (forum internum). As the structure of Article 9 makes it clear that one's inner religious freedom or belief cannot be limited by the state. Hence, privately held beliefs are 'untouchable' which means it cannot be interfered with by the state.[12]

Second, the manifestation of religion or belief can be subject to limitations under paragraph 2 of the Article (forum externum). This implies that under Article 9(2), Contracting States are allowed to impose restrictions on such manifestations of religion or belief. A reason for this is that Article 9 requires a proper balance to be established between the rights of individual and

[10] ibid chapter 3; Dworkin, *Religion Without God* (n 8). For a critical discussion on Dworkin's argument on religion see Rafael Domingo, 'Religion for Hedgehogs? An Argument against the Dworkinian Approach to Religious Freedom' (2012) 2 *Oxford Journal of Law and Religion* 371.

[11] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 ('European Convention on Human Rights'), Article 9.

[12] Tom Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395, at 400.

competing common goals. In order to strike such balance, as Article 9 allows, freedom to manifest one's religion can be subject to limitations.[13] For instance, the ECtHR recognised that in democratic societies, in which different religions coexist, "it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected".[14] Yet, such restrictions must pursue "a legitimate aim", be "prescribed by law, and be "necessary in a democratic society".[15]

1.2. Case-Law on the Wearing of Religious Clothing and Symbols in Public Education: *Dahlab, Şahin, and Lautsi*

In *Dahlab v. Switzerland*, the applicant was a primary school teacher, who abandoned the Catholic faith and converted to Islam and began wearing a headscarf to school.[16] Interestingly, she was permitted to wear the headscarf in class for three years and had never received any complaints about the headscarf from her colleagues, her pupils or their parents. This point has been emphasised by Carolyn Evans: "a woman with an otherwise spotless employment record who had spent years wearing Islamic clothing to which no-one objected had been effectively sacked because of her religion. But the issue was so clear that it did not even deserve a full and proper consideration by the Court".[17] However, after a school inspector informed the Director General of Primary Education that Ms. Dahlab wore an Islamic headscarf consequently the applicant was prevented from wearing an Islamic headscarf in class.

While the Court convinced that there had been an interference with Article 9(1) of the Convention, ruled that there had been no violation of Article 9. In reaching this conclusion, the Court relied on the margin of appreciation doctrine to conclude that the Swiss Federal Court's arguments for upholding the restriction on wearing the headscarf were relevant, sufficient, and proportionate to the stated legitimate aims. The Court, therefore, held that such an interference was necessary in a democratic society.

[13] In the words of Malcom Evans: "the claim that an activity is a bona fide manifestation of religion or belief is not a 'trump' card: it is merely a factor to be taken into account when balancing up conflicting interest". See Malcolm D Evans, 'Believing in Communities, European Style' in Nazila Ghananea-Hercock (ed) *The Challenge of Religious Discrimination at the Dawn of the Millennium* (Springer, 2004) 141

[14] *Leyla Şahin v Turkey* (n 2) para 106.

[15] David J Harris and others, *Law of the European Convention on Human Rights*, 3rd edn. (Oxford University Press, 2014) 605; Alastair R Mowbray, *Cases and materials on the European Convention on Human Rights* (Oxford University Press, 2012) 617.

[16] *Dahlab v Switzerland*, Reports of Judgements and Decisions 2001-V, 15 February 2001.

[17] Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52, at 60.

In the case of *Leyla Şahin v. Turkey* of 29 June 2004, the applicant was a Muslim student at the University of Istanbul.[18] On 23 February 1998 the Vice-Chancellor of Istanbul University issued a circular, which stated:

> By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose 'heads are covered' (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials.[19]

Following a circular issued by the Vice-Chancellor banning the wearing the Islamic headscarf, the applicant was refused access to a written examination because she was wearing the headscarf. Subsequently, she was denied admission to a lecture, again for the same reason. Consequently, she argued that the circular prohibiting wearing the Islamic headscarf amounted to a violation of her rights under Article 9 ECHR.

The ECtHR accepted that there had been an interference with the applicant's right to manifest her religion yet ruled that there had been no violation of Article 9. The ECtHR examined two key questions in reaching its conclusion: (1) whether the prohibition on the right to wear the Islamic headscarf in universities constituted an interference with the right of Leyla Şahin to manifest her religion; (2) if so, whether such restriction is necessary in a democratic society within the meaning of Article 9 (2).

With respect to the first question, the ECtHR acknowledged that the headscarf ban had constituted an interference with the applicant's freedom to exercise her religious conviction under Article 9. Indeed, the Court did not examine whether the applicant's choice to wear a headscarf carried out a religious task. This means that the Court did not focus on whether the Islamic headscarf is a requirement of Islam. Rather, it relied on the assumption that the restriction in issue interferes with the applicant's right to freedom to manifest her religion:

> Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion.[20]

18 *Leyla Şahin v Turkey* (n 2).
19 ibid para 16.
20 ibid para 78.

Once the ECtHR recognised such governmental interference, it then went on to consider whether the interference was prescribed by law, pursued a legitimate aim and was "necessary in a democratic society". Once again, in its judgement, the Court invoked margin of appreciation and held that the banning of the wearing of the Islamic headscarf at the University of Istanbul did not violate Article 9 ECHR.

The case of *Lautsi v. Italy* arose from a complaint lodged by a parent against the presence of a crucifix in the state-school classrooms.[21] Following the rejection by the school's governors to comply with her demand, the applicant brought administrative proceedings. The Administrative Court dismissed the application and advocated that "although the crucifix was undeniably a religious symbol", it should also be considered "a symbol of a value system underpinning the Italian Constitution".[22] The applicant claimed that the display of a crucifix in the state-school classroom attended by her children was contrary to the principle of secularism by which she wished to raise her children. This was because, as the applicant explained, the presence of the crucifix is a sign which implies that the state supports one religion over others.[23] Therefore, relying on Article 2 of Protocol No.1 (right to education)[24] and Article 9, the applicant argued that the presence of a religious symbol constituted an interference incompatible with the ECHR.

However, the Grand Chamber recognised a wide freedom for Italian authorities to decide whether crucifixes should be present in state-school classrooms.[25] In doing so, the Grand Chamber reversed the decision of the Chamber. The Grand Chamber decided, by 15 votes to 2, that there had been no violation of the Convention, on the grounds that the Italian authorities had acted "within the limits of the margin of appreciation" granted to the state.[26] In reaching such conclusion, the Grand Chamber accepted that national authorities are better placed to examine whether crucifixes should be present

21 *Lautsi v Italy*, Application no 30814/06, 3 November 2009; *Lautsi and others v Italy* (GC), Application no 30814/06, 18 March 2011.
22 *Lautsi and others v Italy* (n 22) para 25.
23 The applicant also added that: "in a State governed by the rule of law, no-one should perceive the State to be closer to one religious denomination than another, especially persons who were more vulnerable on account of their youth". See *Lautsi and v Italy* (n 22) para 31.
24 Article 2 of Protocol No. 1 provides: No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. See Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 ('European Convention on Human Rights').
25 *Lautsi and others v Italy* (n 22) para 61.
26 ibid para 76.

in state-school classrooms. This means the Grand Chamber's ruling relied on the margin of appreciation doctrine. On the one hand, the Grand Chamber decision was considered as a victory either for the Italian Government or for the Vatican. On the other hand, such decision has attracted a large amount of criticism focusing on different angles of the decision.[27]

This section briefly presented the Court's case-law on the wearing of religious clothing and symbols in public sphere. Those three cases (*Lautsi*, *Şahin* and *Dahlab*) all bring up the main issue of the State's duty of neutrality and impartiality in public schools. The next section critically deals with cases in which the ECtHR addressed issues of secularism, neutrality and intolerance.

2. Intolerance, Secularism, and Neutrality: *Dahlab, Şahin and Lautsi*

It could be argued that one of the main principles established by the Court is that of state's obligation of neutrality.[28] The Court for the first time, in *Hasan and Chaush v. Bulgaria,* ruled that states have an obligation to be neutral in religious issues.[29] It stated that "facts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention".[30] This means that the principle of religious neutrality has been recognised by the Court. As Julie Ringelheim has observed the Court, in a 2000 judgment, clearly established that religious freedom entails that states have a duty to be neutral in religious matters.[31] State neutrality remains as a core principle of the Court's case-law in religious matters. Therefore, this section aims to shed light on how the ECtHR has constructed the concept of states' denominational neutrality.

It should be noted that the European Court of Human Rights endorsed the findings of the judgement of the domestic court in the *Dahlab* case, so that it might be necessary to resort to the judgement of the Federal Court. According to the Federal Court in *Dahlab*, freedom of religion is understood as requiring 'the State to observe denominational and religious neutrality' which implied that 'in all official dealings it must refrain from any denominational or religious considerations that might jeopardise the freedom of citizens in a pluralistic society… In that respect, the principle of secularism seeks both to preserve individual freedom of religion and to maintain religious harmony in a spirit of tolerance".[32] Given the applicant's role and status, the Federal Court also noted that this neutrality is particularly important in State schools simply because teachers are representatives of the State, "it is therefore especially important that they should discharge their duties… while remaining denominationally neutral".[33] The Federal Court's reasoning for this approach seems to be that the applicant's freedom of religion and belief must be balanced against the public interest in the principle of denominational neutrality.

According to the ECtHR, pupils and parents may be influenced or offended by the teacher's faith. However, as the Federal Court explicitly noted that "admittedly, there have been no complaints from parents or pupils to date".[34] In a similar vein, there was no evidence that the applicant wanted to promote her religious belief in the classroom. For instance, even the Federal Court acknowledged that the applicant only wanted to wear the Islamic headscarf "in order to obey a religious precept…"[35] Nevertheless, merely the wearing of the Islamic headscarf was considered as a threat to the peace at schools. The Federal Court explained:

> Her pupils are therefore young children who are particularly impressionable. Admittedly, she is not accused of proselytising or even of talking to her pupils about her beliefs. However, the appellant can scarcely avoid the questions which her pupils have not missed the opportunity to ask. It is therefore difficult for her to reply without stating her beliefs. Furthermore, religious harmony ultimately remains fragile in spite of everything, and the appellant's attitude is likely to provoke reactions, or even conflict, which are to be avoided.[36]

As the citation reveals, there is a clear suggestion in the Federal Court's judgement of an association between the Islamic headscarf and provocative actions which can lead to conflict.[37] Carolyn Evans points out that, first of all,

27 Kyritsis and Tsakyrakis, 'Neutrality in the classroom' (n 6); Eugenio Velasco Ibarra, 'Why Appearances Matter. State Endorsement of Religious Symbols in State Schools in Europe After *Lautsi*' (2014) 3 *UCL Journal of Law and Jurisprudence* 262; Lorenzo Zucca, 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber' (2013) 11 *International Journal of Constitutional Law* 218; Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty' (2010) 6 *European Constitutional Law Review* 6; Paolo Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber ruling in *Lautsi v Italy*' (2011) 3 *Ecclesiastical Law Journal* 287.

28 See Julie Ringelheim, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' (2017) 6 *Oxford Journal of Law and Religion* 24. See also Kyritsis and Tsakyrakis, 'Neutrality in the classroom' (n 6).

29 *Hasan and Chaush v Bulgaria* (GC), Application no 30985/96, ECHR 2000-XI.

30 ibid para 78.

31 Ringelheim, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' (n 29) 24.

32 *Dahlab v Switzerland* (n 17).

33 ibid.

34 ibid.

35 ibid.

36 ibid.

37 It has to be stressed that the Federal Court's arguments have been essentially accepted by the ECtHR.

it must be accepted that "the evidence of direct proselytising by Ms. Dahlab was non-existent".[38] While there was no evidence to suggest that the applicant intended to convert her pupils to Islam, the ECtHR held that "it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect".[39] Such language, according to Nehal Bhuta, is the "marker of an absence of evidence, and effectively reverses the burden of demonstrating the necessity of the rights restrictive measures".[40] Therefore, the 'evidence' of proselytising was solely based on the wearing of the Islamic headscarf.

In reaching its conclusion the Court reasoned that the headscarf was a 'powerful religious symbol' and that teachers may have a serious influence on their pupils.[41] In that connection, the Court found 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" therefore it is difficult "to reconcile the wearing 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".[42] In the light of those considerations, the Court concluded that the measure banning the applicant wearing the Islamic headscarf in class was 'necessary in a democratic society'.

There are two key elements to this reasoning. First, the Islamic headscarf is considered as a 'powerful religious symbol' that may have a negative influence on pupils. Second, the headscarf is characterised as a symbol of gender inequality, which cannot be compatible with respect for others. These arguments presented by the Court might be subject to different criticisms on the basis of Dworkin's defence of state neutrality.

Dworkin begins by saying that "government must be neutral on what might be called questions of the good life".[43] Adding further specification to this claim, Dworkin argues that "political decisions must be independent of any conception of the good life or what gives value to life".[44] This position assumes that political decisions should be 'independent' of ideas of the 'good' and justifications of such decisions should be neutral.[45] A reason for this is that each individual follows a complex conception of the good life or what makes

38 Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 18) 62.
39 *Dahlab v Switzerland* (n 17).
40 ibid.
41 ibid.
42 ibid.
43 Dworkin, *A Matter of Principle* (n 8) 191.
44 ibid 191.
45 See *Ludvig Beckman, The Liberal State and the Politics of Virtue* (Transaction Publishers, 2001) Chapter 3 and Chapter 7.

value to life. Individuals, then, should be free in their personal private life to act as they choose. This implies that government ought to be neutral to the different interpretations of the good life as adopted by its citizens.

Neutrality, then, entails that government should take no position with regard to the various ideas of the good life. Fundamental to this neutrality based on equality is an essential condition for a state to treat its citizens as equals. This means that the Dworkinian notion of neutrality seems to have a principle of equality at its heart.[46] This is because he draws attention to the idea that there is a connection between the concept of neutrality and equality. Indeed, he establishes a link between the ideal of state neutrality and the ideal of equality. Therefore, once the Islamic headscarf is associated with gender inequality and intolerance to the others by the State, this can easily be shown to violate the principle of state neutrality in Dworkin's sense.

The Court's reasoning in *Şahin* can be found less convincing for a couple of reasons. The Turkish government argued that in order to protect human rights and democracy within the state, the principle of secularism must be essentially preserved. The Court accepted this ill-defined argument and added that the principle of secularism, as interpreted by Turkey's Constitutional Court, was undoubtedly one of the key principles of the Turkish State, "which are in harmony with the rule of law and respect for human rights".[47] Hence, according to the Court, upholding this principle is crucial to protect the democratic system in Turkey. However, no argument has been put forward as to how prohibiting students to wear the Islamic headscarf is necessary for the protection of the democratic system in Turkey.

It can be argued that the ECtHR was too deferential to the Turkish Government's interpretation that the headscarf ban is necessary to defend the principle of secularism.[48] The Turkish Government advocated that the prohibition of wearing an Islamic headscarf in the state school was necessary to maintain the constitutional values of secularism. The government, then, referred to the case-law of the Turkish Constitutional Court, which had held that "secularism in Turkey, as the guarantor of democratic values, was the meeting point of liberty and equality".[49] In addition to this, the Constitutional

46 Indeed, the concept of equality is at the core of Dworkin's theory neutrality. See also Rae Langton, *Sexual Solipsism: Philosophical Essays on Pornography and Objectification* (Oxford University Press, 2009) 165.
47 *Leyla Şahin v Turkey* (n 2) para 114.
48 Benjamin D Bleiberg, 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Sahin v. Turkey'* (2005) 91 *Cornell Law Review* 129, at 151.
49 *Leyla Şahin v Turkey* (n 2) para 113.

Court added that "freedom to manifest one's religion could be restricted in order to defend those values and principles".[50] According to the ECtHR:

> This notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey.[51]

While the ECtHR correctly emphasised the importance of the concept and practice of secularism in the Turkish context, it failed to adequately assess Turkey's interpretation of secularism.[52] In making a judgement about what is secular, the ECtHR relied upon adherence to the state's domestic interpretations of secularism.[53] The consequence of this is that "any action Turkey takes to limit religious freedom in the name of secularism must be in harmony with human rights, since secularism -as an element of democracy- is itself in harmony with human rights."[54] The Court accepted that this understanding of secularism was compatible with the values underpinning the Convention. Therefore, it can be said that the ECtHR's necessity test began with the presumption that the wearing of the Islamic headscarf is incompatible with secularism. The immediate question, then, becomes how is banning of religious dress in state universities might help to preserve secularism?

However, the ECtHR neither analysed secularism in this context nor critically evaluated why the headscarf constituted a threat to the principle of secularism. In other words, secularism has not been defined by the ECtHR. Rather, deferring to the Turkish Constitutional Court's interpretation of secularism, the ECtHR hold that "this notion of secularism to be consistent with the values underpinning the Convention," and convinced that upholding secularism is "necessary to protect the democratic system in Turkey."[55] This implies that the ECtHR reiterated the Turkish Constitutional Court's Interpretation of secularism and acknowledged it at face value. The rulings in both cases -*Dahlab* and *Şahin* - were held to maintain the neutrality of the state. However, the legal basis of the headscarf's incompatibility with secularism has remained largely absent in the ECtHR's rulings.

[50] ibid para 113.
[51] ibid para 114.
[52] This failure lies in how the ECtHR itself interpreted secularism in the instant case.
[53] James Arthur, 'Secular Education and Religion' in Phil Zuckerman and John R Shook (eds), *The Oxford Handbook of Secularism* (Oxford University Press, 2017) 408.
[54] William P Simmons, *Human Rights Law and the Marginalised Other* (Cambridge University Press, 2011) 64.
[55] *Leyla Şahin v Turkey* (n 2) para 114.

Furthermore, in *Dahlab*, the applicant was not permitted to wear her headscarf in public school as a necessity of the principle of neutrality applicable at the Canton of Geneva. According to the Swiss authorities, such prohibition was necessary in order to uphold the secular nature of state institution:

> The Federal Court took into account the very nature of the profession of State school teachers, who were both participants in the exercise of education authority and representative of the State, and in doing so weighed the protection of the legitimate aim of ensuring the neutrality of the State education system against the freedom to manifest one's religion.[56]

The essence of this argument is that state school teachers are considered as representatives of the State, and therefore, they should tolerate proportionate limitations on their freedom of religion to maintain the right of State school pupils "to be taught in a context of denominational neutrality".[57] Malcom Evans criticises this understanding of neutrality: "the call for 'impartiality' and 'neutrality' has increasingly been taken to mean that the State must present itself, through its servants, in a neutral fashion, where neutrality means non-religious, and the mere presence of the religion is seen as a threat to the perception of neutrality".[58] It has to be stressed that the Court in *Şahin* makes no distinction between teachers and students as it does in *Dahlab*, which concerned a state-school teacher as a representative of the State. However, in *Şahin*, while the applicant was a student, the Court failed to distinguish the facts of the cases. Consequently, the judgements in both cases were held to preserve the neutrality of the state.[59]

In *Lautsi v. Italy* the main issue was the permissibility of the display of crucifixes in state-school classrooms. The applicant argued that the presence of crucifixes in state-school classroom was incompatible with her freedom of religion, as protected by Article 9 ECHR. The Grand Chamber of the ECtHR ruled that the display of the crucifix on the classroom walls of Italian state school is compatible with freedom of thought, conscience and religion (Article 9 ECHR) under ECHR. While secularism is not clearly embodied in the Constitution, the Italian Constitutional Court admitted that secularism is to be

[56] *Dahlab v Switzerland* (n 17).
[57] ibid.
[58] Malcolm D Evans, 'From Cartoons to Crucifixes: Current controversies concerning the freedom of religion and the freedom of expression before the European Court of Human Rights' in Esther D Reed and Michael Dumper (eds), *Civil liberties, National Security and Prospects for Consensus* (Cambridge University Press, 2014) 83-113, at 112.
[59] In brief, in *Şahin* and *Dahlab*, the Islamic headscarf was perceived as a threat to secularism and the neutrality of public space, and therefore it should be kept at a distance from the state.

considered as one of the main principles of the Italian legal system.[60] However, it should be stressed that in Italy secularism does not mean neutrality, rather it means "a positive or welcoming attitude towards all religions communities".[61]

According to the Chamber, "the symbol of the crucifix has a number of meanings among which the religious meaning is predominant".[62] Quoting the *Dahlab v Switzerland* decision,[63] the Chamber argued that the crucifix can be considered as a 'powerful external symbol', so that the display of it can be interpreted by pupils as a religious sign.[64] The Court reasoned that crucifixes, in the context of public education, were perceived as an integral part of the school environment, thus they were considered as 'powerful external symbols'. In doing so, the Court interpreted the crucifix as a 'powerful' religious symbol, namely "a sign that is immediately visible to others and provides a clear indication that the person concerned belongs to a particular religion".[65] This means that it is impossible to ignore the crucifix, whose religious meaning is predominant.[66] This implies that the presence of the crucifix may have an influence on pupils in a way that they have been educated "in a school environment marked by a particular religion".[67] The Court found that such a powerful religious symbol can have an emotional influence on pupils who belong to religious minorities, and hence they may be 'emotionally disturbing'.[68]

Moreover, the Chamber pointed out that, the state has an obligation to uphold 'confessional neutrality' in state-school classrooms.[69] This means that the state is bound to provide religious neutrality in public education, where school attendance is compulsory.[70] In other words, in a neutral state, in Dimitrios Kyritsis' words: "citizens can legitimately expect that state will not use the school environment to champion any parochial position on religious matters".[71] In addition to that, the Court further held that parents had the right

60 Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life –Crucifixes in the Classroom?' (2011) 11 *Human Rights Law Review* 451, at 465.
61 Mancini, 'The Crucifix Rage: Suprational Constitutionalism Bumps Against the Counter-majoritarian Difficulty' (n 28) 6 at 9.
62 *Lautsi v Italy* (n 22) para 51.
63 *Dahlab v Switzerland* (n 17).
64 *Lautsi v Italy* (n 22) para 54.
65 *Dahlab v Switzerland* (n 17).
66 *Lautsi v Italy* (n 22) para 51.
67 ibid para 55.
68 ibid para 55.
69 ibid para 56.
70 It is worth noting that according to the Court's case-law, the Contracting State are restricted to impose beliefs "in places where persons were dependent on it or in places where they were particularly vulnerable, emphasising that the schooling of children was particularly sensitive area in that respect". *Lautsi v Italy* (n 22) para 31.
71 Kyritsis and Tsakyrakis, 'Neutrality in the classroom' (n 6) 211.

to educate their children according to their convictions and children had the right to decide whether to believe or not believe. The Court concluded that:

> …It is of the opinion that the practice infringes those rights because the restrictions are incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education.[72]

Consequently, the Court unanimously concluded that there had been a violation of Article 2 of Protocol no 1 taken together with Article 9 ECHR.

However, the Grand Chamber overturned the Second Chamber's decision and concluded that the presence of the crucifix is compatible with the right of parents to have their children educated compatibly based on their own philosophical and religious convictions. As will be discussed in the following section, the Grand Chamber failed to explain how the display in state-school classrooms of a crucifix could serve the preservation of educational pluralism that is one of the essential conditions for the maintenance of democratic society under the Convention.

2.1. The Grand Chamber Reasoning in *Lautsi*: Active Symbol vs Passive Symbol

The Grand Chamber explicitly refused the characterisation made in the previous decision that the crucifix should be seen as a 'powerful' external symbol, as firstly recognised in *Dahlab*. In *Dahlab*, the Islamic headscarf of a teacher had been recognised as a powerful external symbol, and therefore it had been banned. The prohibition on wearing an Islamic headscarf was justified in order to "protect the religious beliefs of the pupils and their parents and to apply the principle of denominational neutrality in schools enshrined in domestic law".[73] In *Dahlab*, the Court specifically took into account that pupils were between the age of four and eight, "an age at which children wonder about many things and are also more easily influenced than older pupils".[74]

Contrary to the Chamber's decision, the Grand Chamber said that that there was no evidence to support that the presence of a religious symbol on the classroom walls had an influence on pupils. In other words, the Grand Chamber disagreed with the Chamber on the basis that: "there is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonable be asserted that it does or does not have an effect on young persons whose convictions are still in the

72 *Lautsi v Italy* (n 22) para 32.
73 *Dahlab v Switzerland* (n 17).
74 The ECtHR identified specific principles regarding the relationship between religion and children. In particular, the Court had consideration for 'the tender age of children', aged between four and eight, therefore, in the Court's view they need special protection. *Dahlab v Switzerland* (n 17).

process of being formed".[75] Accordingly, the Grand Chamber demanded that concrete evidence ought to be submitted, to the Court, to prove that a religious symbol had an emotional impact. This point has also been supported by Judge Power: "given the critical role of "evidence" in any Court proceedings, the Grand Chamber has correctly noted that there was no evidence opened to the Court to indicate any influence which the presence of a religious symbol may have on school pupils".[76] Therefore, the applicant is asked to adduce evidence to show any negative influence of the state-sponsored crucifix on her children.

It has to be born in mind that in *Dahlab*, there was not any evidence that the Islamic headscarf had any influence on pupils. In addition to that, the applicant had never been accused of 'proselytising'. Nevertheless, in ruling on *Dahlab*, the Court relied on a speculative argument which suggests:

> The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children… it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect.[77]

This means that the presence of a religious symbol, associated with a teacher, at a State school was sufficient grounds for the ECtHR to ban it in the classroom.[78]

However, the Grand Chamber in *Lautsi*, considered that the crucifix lacks impact and influence on pupils. In reaching this understanding, the Grand Chamber reasoned that "a crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality".[79] The upshot is that the crucifix was interpreted as a 'passive' symbol by the Grand Chamber. In other words, while the Islamic headscarf is a powerful external symbol, the crucifix is a passive symbol.[80] One may think that the principle of neutrality can be invoked to restrict minority symbols but cannot be invoked to prohibit majority symbols.[81] In the words of Lorenzo Zucca: "some symbols are more neutral than others".[82]

Furthermore, in *Dahlab*, the ECtHR clarified that "a powerful religious symbol – that is to say, a sign that is immediately visible to others and provides

75 *Lautsi and others v Italy* (n 22) para 66.
76 ibid, concurring opinion of Judge Power.
77 *Dahlab v Switzerland* (n 17).
78 In *Dahlab*, the nature of the religious symbols and its impact on young pupils were specifically taken into account by the ECtHR.
79 *Lautsi and others v Italy* (n 22) para 72.
80 Zucca, 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber' (n 28) 220.
81 ibid.
82 ibid 221.

a clear indication that the person concerned belongs to a particular religion".[83] In *Lautsi*, the Chamber considered the crucifix as a powerful symbol because "it is impossible not to notice crucifixes in the classrooms. In the context of public education, they are necessarily perceived as an integral part of the school environment and may therefore be considered "powerful external symbols"'.[84] However, the Grand Chamber rejected this analogy without giving adequate reasoning, and by doing so, failed to provide a clear definition of what a passive symbol is.

The Grand Chamber held that the organisation of the school environment and content of education fell within the competence of the Contracting States unless these teachings do not constitute to indoctrination of pupils.[85] The Grand Chamber emphasised that the ECtHR shows respect to the Contracting States' decision in relation to education and teaching as long as such decisions "do not lead to a form of indoctrination". The immediate question, then, becomes what does the display of a religious symbol on classroom walls mean in this context?[86] First, it is difficult to accept that the presence of the crucifix is 'neutral'.[87] Second, it should be admitted that the crucifix is an explicit symbol of the dominant religion in Italy.[88] Importantly, even the Grand Chamber

83 ibid.
84 *Lautsi and others v Italy* (n 22) para 54 and 73.
85 It is worth noting that the ECtHR has made clear that "the state, in fulfilling the functions assumed by it in regard to education and teaching must take care that information or knowledge included in the curriculum is conveyed in an objective critical and pluralistic manner". *Folgerø and others v Norway* (GC), Application no 15472/02, ECHR 2007-III, para 84
86 Heiner Bielefeldt, the Special Rapporteur on freedom of religion or belief, provides an overview of the issue of religious symbols in the school context: "a teacher wearing religious symbols in the class may have an undue impact on students, depending on the general behaviour of the teacher, the age of students and other factors. In addition, it may be difficult to reconcile the compulsory display of a religious symbol in all classrooms with the State's duty to uphold confessional neutrality in public education in order to include students of different religions or beliefs on the basis of equality and non-discrimination". See Heiner Bielefeldt, 'Report of the Special Rapporteur on freedom of religion or belief' (2010) A/HRC/16/53 *UN General Assembly*, para 44.
87 See Zucca, 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber' (n 28) 220 and 221.
88 Susanna Mancini makes this point: "the crucifix, despite the judges' effort, does not become a purely cultural symbol but rather a "semi-secular" symbol that very effectively represents the "new" and "healthy" forms of the alliance between religion and state power… But this "cultural" or "diffused" Christianity that supposedly pervades the Constitution produces an unacceptable discriminatory effect in that non-believers are excluded from the religious meaning of the cross". See Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2009) 30 *Cardozo Law Review* 2629, at 2639.

recognised that "the crucifix is above all a religious symbol".[89] However, the presence of the crucifix in public school has been considered as compatible with the principle of neutrality by the Grand Chamber.

A neutral state, as Dworkin notes, should treat all its citizens "as free, or as independent, or with equal dignity".[90] What does, then, this imply? Dworkin's conception of neutrality entails that the state is required to treat each individual with equal concern and respect. This is because, all individuals have equal moral worth, so that the state must treat each individual as a moral equal. This implies that the liberty to determine and pursue one's own conception of the good life is entailed by the idea of equal respect.[91] A neutral state, then, does not promote a particular way of life or conception of the good life. Therefore, the state can be neutral as long as it treats its citizens as equal.

Dworkin explains: "since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group".[92] If the government were to favour a particular conception of the good life, this would illustrate a failure to show equal respect and concern for all of its citizens. This entails that state neutrality is required by the 'equal concern and respect' principle. It can be concluded that in *Lautsi*, the state failed to show equal concern and respect for all its citizens.

Moreover, the justifications for religious freedom can be divided into two main groups such as instrumental and deontological.[93] According to an instrumental justification, religious freedom has been understood to refer to the tolerance of different opinions concerning religion. From this perspective, such religious toleration is seen as necessary to maintain social order and prevent conflicts between people from different belief systems. For instance, one of the main arguments for religious toleration was advanced by John Locke:

> It is not the diversity of opinions (which cannot be avoided), but the refusal of toleration to those that are of different opinions (which might have been granted) that has produced all the bustles and wars that have been in the Christian world, on account of religion.[94]

89 *Lautsi and others v Italy* (n22) para
90 Dworkin, *A Matter of Principle* (n 8) 66.
91 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2013) 63.
92 Dworkin, *A Matter of Principle* (n 8) 191.
93 Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (n 13) 401.
94 John Locke, 'Letter Concerning Toleration', in David Wootton (ed), *John Locke Political Writings* (Penguin, 1993) 390.

Ronald Thiemann notes that the truth behind the separation of church and state comes from the principle of state neutrality.[95] Such principle implies that government should not prefer one conception of the good over another. It could be argued that the central concept of this principle is the idea of equality. Indeed, this approach reflects on the idea that while the meaning of life may be different for each individual, each human life is equally important. Therefore, as Dworkin explains, government [state] "must not only treat people with concern and respect, but with equal concern and respect… It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's."[96] This, then, means that a state is neutral as long as it does not interfere with the individual conceptions of the good life.[97] In other words, state neutrality is required by "the principle of equal concern and respect", which suggests that all individuals have the right to equal concern and respect from government. Thus, government can be neutral as long as it remains morally and religiously neutral.

According to this understanding of neutrality, each individual should be allowed to find his or her own good life. This is because, each individual has a different conception of the good life and in order to implement their conceptions of the good life, the state must remain neutral in religious matters. However, unlike the Chamber in the first *Lautsi* decision, the issue of state neutrality and impartiality have been abandoned by the Grand Chamber.[98] This means that the state-school classroom as a public sphere is not bound to be religiously neutral provided that this does not imply to indoctrination.[99] As Julie Ringelheim points out, the way the Court applied the concept of state neutrality in religious matters throughout its case-law has been subject to criticism.[100] In particular, the Court has failed to hold a consistent approach in its interpretation to state religious neutrality in public institutions. Therefore, the Grand Chamber decision in *Lautsi* demonstrates not only the inconsistency with *Dahlab* but also the state's failure to show equal concern and respect for all its citizens.

95 Ronald F Thiemann, *Religion in Public Life: A Dilemma for Democracy* (Georgetown University Press, 1996) Chapter 7.
96 Dworkin, *Taking Rights Seriously* (n 8) 272 and 273.
97 Rafael Palomino 'Religion and Neutrality: Myth, Principle, and Meaning' (2011) 2011 *BYU Law Review* 657, at 668.
98 Jeroen Temperman, *The Lautsi Papers* (Martinus Nijhoff, 2012).
99 Esther D Reed, *Theology for International Law* (Bloomsbury Publishing, 2013) 293.
100 See Ringelheim, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' (n 29) 26.

3. Gender Equality and Headscarves: *Dahlab* and *Şahin*

The tension between gender equality and religious freedom is considered as one of the most controversial debates in this context.[101] For instance, according to Christine Chinkin, this tension between freedom of religion and gender equality principles is common in states where 'there are significant minorities of a different religious persuasion from that of the majority population'.[102] With regard to the principle of gender equality, the ECtHR made an assertion that the Islamic headscarf "appears to be imposed on women by a precept which is laid down in the Koran and which is hard to square with the principle of gender equality".[103] Hence, bans on the wearing of Islamic headscarves are often thought to be compulsory for the promotion of gender equality.[104] Therefore, the Court seems to have taken a paternalistic approach towards women.[105]

In *Dahlab*, the Court justified its decision as follows: the wearing of a headscarf "appears to be imposed on women by a precept which is laid down in the Koran and which is hard to square with the principle of gender equality".[106] This explanation clearly means that the wearing of the Islamic the headscarf is incompatible with the principle of gender equality.[107] This understanding of the Islamic headscarf has been used in later decisions of the ECtHR to justify restrictions on wearing the headscarf in state institutions. However, it should be noted that none of those points were properly supported by either concrete evidence or facts.[108] Yet, such decision had a significant importance because its legal reasoning was used in *Şahin*. Indeed, such arguments -gender equality and tolerance- were considered, without much consideration, as the main grounds for the Court's conclusion in *Şahin*. This means that the Grand Chamber in *Şahin* relied on the judgement in *Dahlab* with specific respect to gender equality and tolerance.

In *Şahin,* the prohibition was based on two principles: secularism and gender equality. On this basis, the wearing of the Islamic headscarf was found

101 Cochav E Levy, 'Women's Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights' (2014) 35 *University of Pennsylvania Journal of International Law* 1175, at 1222.

102 Christine Chinkin, 'Women's Human Rights and Religion: How do they Co-exist?' in Javaid Rehman and Susan Breau (eds), *Religion, Human Rights and International Law* (Nijhoff, 2007) 56.

103 *Dahlab v Switzerland* (n 17); *Leyla Şahin v Turkey* (n 2).

104 See Howard Erica, 'Banning Islamic veils: is gender equality a valid argument?' (2012) 12 *International Journal of Discrimination and the Law* 147.

105 See Kyritsis and Tsakyrakis, 'Neutrality in the classroom' (n 6) 210 and 217.

106 *Dahlab v Switzerland* (n 17) para 1.

107 See Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 18) 62.

108 Hilal Elver, *The headscarf Controversy: Secularism and Freedom of Religion* (Oxford University Press, 2012) Chapter 4.

incompatible with the principle of gender equality. What emerges strongly from *Şahin* is that the Court reinforced that the wearing of an Islamic headscarf was incompatible "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".[109] In doing so, the Court established a link between the symbolic meaning of the Islamic headscarf and anti-democratic values in the Turkish context. This is because the Court accepted that the Islamic headscarf was 'somehow' inconsistent with the value of equality, the principle of secularism and democracy. This approach, however, was strongly criticised by Judge Tulkens in her dissenting opinion:

> It is not the Court's role to make an appraisal of this type – in this instance a unilateral and negative one – of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant.[110]

Nevertheless, the Court's decision in *Şahin* can be explained on the basis of the need to protect secularism and democracy from extremist movements in Turkey.[111] The Court noted that "it is the threat posed by extremist political movements seeking to impose on society as a whole their religious symbols and conception of a society founded on religious precepts".[112] In the Court's view, manifesting one's religion by peacefully wearing a headscarf can be restricted in order to prevent 'radical Islamism'. Although there was no legal proof of the applicant having a political agenda, what comes out from this decision is an implicit suggestion of a correlation between the Islamic headscarf and militant forms of Islam.[113] This means that the Court considered that all women who wear the headscarf are potentially fundamentalist, and therefore they pose a threat to preserve pluralism in the society.[114]

109 *Dahlab v Switzerland* (n 17) para 1; *Leyla Şahin v Turkey* (n 2), dissenting opinion of Judge Tulkens, para 111.

110 *Leyla Şahin v Turkey* (n 2), dissenting opinion of Judge Tulkens, para 12.

111 See Elver, *The headscarf Controversy: Secularism and Freedom of Religion* (n 109).

112 *Leyla Şahin v Turkey* (n 2) para 115.

113 Peter Cumper and Tom Levis, 'Taking Religious Seriously Human Rights and Hijab in Europe Some Problems of Adjudication' (2008) 34 *Journal of Law and Religion* 599, at 609.

114 Indeed, such an approach implies that the ECtHR's judgement seems driven by the fear of Islamic Fundamentalism. For instance, in *Refah Partisi* (the Welfare Party) and *Others*, the Court said 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". *Refah Partisi (The Welfare Party) and others v Turkey* (GC), Application nos 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II) para 95. In *Şahin*, this approach has been criticized by Judge Tulken in her dissenting opinion: "Merely wearing

In favour of the Court's position, one could plead that the ECtHR explicitly recognised the importance of the principle of gender equality. Such principle is described as "one of the key principles underlying the Convention" and "a goal to be achieved by member states of the Council of Europe".[115] To some extent, it is understandable that the Court was concerned about the principle of gender equality in the Turkish context. Such concern derives from the presumption 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.[116]

This passage represents the Court's position with regard to gender equality and the Islamic headscarf in the Turkish context. In such a context, wearing the Islamic headscarf was considered in contradiction to the principle of equality between man and woman. According to the Court, then, the headscarf is seen as a serious obstacle to the liberation of women in Turkey. The prohibition on wearing the headscarf is considered as providing equality between women and men. Thus, the ECtHR seems to have accepted Turkey's assertion that the headscarf ban advances gender equality.

However, no argument has been put forward as to how prohibiting students to wear the Islamic headscarf is a necessary condition for gender equality in Turkey. According to Vakulenko, in both cases "the headscarf was attributed a highly abstract and essentialised meaning of a religious item extremely detrimental to gender equality".[117] Ratna Kapur points out that *Şahin* and *Dahlab* cases are "an example of how equality remains its own stumbling block to the realisation of equality".[118] Therefore, it can be said that the principle of gender equality, without adequate analysis, does not provide a legal basis for restricting a woman from following a freely adopted religious practice.[119]

the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and "extremists" who seek to impose the headscarf as they do other religious symbols". *Leyla Şahin v Turkey* (n 2), dissenting opinion of Judge Tulkens, para 10. See also Baljit Kooner, 'The Veil of Ignorance: A Critical Analysis of the French Ban on Religious Symbol in the Context of the Application of Article 9 of the ECHR' (2008) 12 *Mountbatten Journal of Legal Studies* 23, at 40.

115 *Leyla Şahin v Turkey* (n 2) para 115.

116 ibid para 115.

117 Anastasia Vakulenko, ''Islamic Headscarves' and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 *Social and Legal Studies* 183, at 192.

118 Ratna Kapur, 'Un-Veiling Equality: Disciplining the 'Other' Woman Through Human Rights Discourse' in Anver M Emon, Mark Ellis and Benjamin Glahn (eds), *Islamic law and International Human Rights Law* (Oxford University Press, 2015) 288.

119 Jill Marshall 'Freedom of Religious Expression and Gender Equality: Sahin v Turkey' (2006) 69 *Modern Law Review* 452, at 459 and 460.

As mentioned above, religious freedom can be justified on two main grounds such as instrumental and deontological justifications. One of the main deontological justifications put forward by Dworkin for freedom of religion centre on the concepts of human dignity and personal responsibility which can only be ensured by the recognition of personal autonomy.[120] In this regard, religious freedom can be understood as protecting individuals' ethical independence. Dworkin explains:

> Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.[121]

On this view, the basis for the right to religious freedom is respect for the individual's conception of the good life.

It may be true to say that in the context of religious symbols and clothing in the public sphere, the choice to follow a specific religious practice and manifest it through clothing reflects the autonomous decision of the individual.[122] Marshall summarises this point:

> Each person is recognised as unique and ought to be able to live his or her life. Self-respect in this context – viewing oneself as worthy of the same status and entitlements as every other person regardless of what you choose to wear - should surely be foundational in any liberal democracy.[123]

This means that the woman claiming the right to wear the Islamic headscarf is exercising her personal autonomy in religion.[124]

On this account, women's autonomy can be legally recognised when the concepts of human dignity and personal responsibility are considered as "empowering and self-determining rather than constraining and paternalistic".[125] As both *Dahlab* and *Şahin* demonstrate, the prohibitions on religious symbols in state-school were justified in the name of gender equality. However, the personal autonomy of individual women has been considered as the missing

120 ibid 402.

121 Dworkin, *Taking Rights Seriously* (n 8) 272.

122 Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (n 13) 402.

123 Jill Marshall, 'The legal recognition of personality: full-face veils and permissible choices' (2014) 10 *International Journal of Law in Context* 75.

124 Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (n 13) 402.

125 See Kai Moller, 'Dworkin's Theory of Rights in the Age of Proportionality' (2018) 12 *Law and Ethics of Human Rights* 281

element in the Court's decisions.[126] It is fair to say that the paternalistic goal of restricting people from living ethically worthless lives does not constitute as legitimate under the principle of personal responsibility.[127] Therefore, banning the Islamic headscarf because of paternalistic disapproval would widely be considered as simply unacceptable and an unjustifiable intrusion in the personal life of the right-holder.[128]

This approach, moreover, can be seen as violating the principle of human dignity by denying women's individual autonomy. As Dworkin notes, a restriction or a policy may violate dignity "by usurping an individual's responsibility for his [or for her] own ethical values".[129] For instance, forcing people to wear seatbelts does not violate people's ethical independence simply because such policy is not motivated by a belief in the superiority of some view.[130] According to Dworkin, as Steven Guest emphasised, there is no violation of ethical independence "where the matter is not foundational, or the government does not assume any 'ethical' justification".[131] The Court's approach in *Dahlab* and *Şahin* ignores the many different reasons why Muslim women choose to wear headscarves or veils, so that it denies an essential feature of responsibility for their own life in the name of gender equality. Such paternalistic justification should not be accepted as a legitimate reason since it violates the principle of human dignity. Thus, denying one's personal responsibility and ability to adopt a freely chosen religion to practice can be considered as violating his or her human dignity.

3.1. Denying Women's Autonomy in the name of Protecting Gender Equality

According to Dworkin, the concept of human dignity consists of two principles: the principle of intrinsic value and the principle of personal responsibility. The upshot is that the state's role should not be that of superimposing a specific conception of the good life, rather that of providing the ethical independence of all individuals and the chance for people to define and pursue their own ideal of well-being. Religious freedom, as Dworkin argues, should be understood as protecting individuals' ethical independence. This argument derives from the principle of personal responsibility which can only

126 See Levy, 'Women's Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights' (n 102). See also Marshall, 'The legal recognition of personality: full-face veils and permissible choices' (n 124).
127 See Moller, 'Dworkin's Theory of Rights in the Age of Proportionality' (n 126) 281.
128 ibid.
129 Dworkin, *Is Democracy Possible Here?* (n 10) 71.
130 See Kyritsis and Tsakyrakis, 'Neutrality in the classroom' (n 6) 210.
131 Stephen Guest, *Ronald Dworkin* (Stanford University Press, 2013) 176.

be properly achieved through recognising everyone's personal responsibility in defining and pursing the value of his or her life.

It can be argued that Dworkin's account of dignity blocks paternalistic policies which may restrict the autonomy and liberty of individuals without their consent. In this context, gender equality is invoked to restrict individual choices by, for instance, claiming that the wearing of the headscarf is incompatible with the ideals of equality. However, it is difficult to find concrete evidence in either *Şahin* or *Dahlab* that the wearing of the Islamic headscarf was anything other than the choice of those women. In each, the Court found an artificial conflict between the Islamic faith and women's right to equality which had not been adequately examined. Therefore, in *Şahin* and *Dahlab* the Court paternalistically denied the applicant's right to personal autonomy.[132]

As Ivana Radacic argues, the principles of equality and secularism have been interpreted in a paternalistic manner.[133] Such a paternalistic approach, however, can be seen as violating the principle of personal responsibility by denying the individual the ability to define and pursue her own judgement about the value of wearing the Islamic headscarf. In *Dahlab* and *Şahin*, the decisions of the Court relied on two stereotypes of Muslim women as the main grounds for the decisions. The Court, in both cases, made the assumption that the wearing of a headscarf by itself is incompatible with the principle of gender equality. The Court reasoned that it seems to be "imposed on women by a precept which is laid down in the Koran".[134] Evan draws attention to the wording used by the Court in *Dahlab*. She notes that the way in which the word 'imposed' is used here is unnecessary.[135] In the words of Carolyn Evans:

> Most religious obligations are 'imposed' on adherents to some extent and the Court does not normally refer to the obligations in such negative terms. It is not clear why wearing headscarves is any more imposed on women by the *Qur'an,* than abstinence from pork or alcohol is imposed on all Muslims, or than obeying the Ten Commandments is imposed on Jews and Christians.[136]

It has to be born in mind that there is an explicit disagreement among Islamic scholars as to whether the wearing of the Islamic headscarf is a mandatory religious duty.[137] However, the concept of gender equality in Islam, and its

132 Anastasia Vakulenko, *Islamic Veiling in Legal Discourse* (Routledge, 2013).
133 Ivana Radacic, 'The Ban on Veils in Education Institutions: Jurisprudence of the European Court of Human Rights' (2008) 4 *Croatian Yearbook of European Law and Policy* 267, at 281.
134 *Dahlab v Switzerland* (n 17).
135 Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 18) 65.
136 ibid 65.
137 See Ellen Wiles, 'Headscarves, Human Rights, and Harmonious Multicultural Society:

relationship with the Islamic headscarf did not receive serious consideration by the Court in either case. In both cases, according to Evans, the Court relied on the Western understanding of Islam: "…the *Qur'an* and Islam are oppressive to women and there is no need to be more specific or to go into any detail about this because it is a self-evident, shared understanding of Islam".[138] Sharon Todd notes that: "the point is that this connection between lack of equality and the wearing of religious symbols is only ever made in the light Muslim practices. The argument is never marshalled to defend Jewish or Sikh boy's equality".[139] This means that the Islamic headscarf is perceived by the ECtHR as a 'powerful' symbol of gender inequality.

It is difficult to understand why the Islamic headscarf has to necessarily symbolise gender inequality. In both cases, the Court did not provide a plausible reason as to why the wearing of the headscarf cannot be compatible with gender equality. Rather, the Court simply said that it was "…difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and…equality and non-discrimination."[140]An immediate question arises as to why it is difficult or where such difficulty lies. Or as Ellen Wiles notes: "is the headscarf solely or invariably a symbol of female submission and inferiority in Islam, or is its meaning more complex and divergent, particularly in contemporary European societies?"[141] It seems that the Court, without engaging with the complexity of the issue, took a simplistic assumption about Muslim women.

In fact, the Court in *Şahin* relied only on the decision in *Dahlab* with respect to the Islamic headscarf and gender equality. In *Dahlab*, the headscarf was interpreted as a 'powerful religious symbol' in a way that "appeared to be imposed on women by a precept which is laid down in the Koran and which…was hard to square with the principle of gender equality". This does not mean more than that merely wearing the Islamic headscarf is an obstacle to the realisation of the gender equality. The Court's reasoning for this approach seems to be that the Islamic headscarf is inherently oppressive and inimical to gender equality, and therefore it should be banned. What has been missing until now is the voice of Muslim women who wear the headscarf as an autonomous choice.

Implications of the French Ban for Interpretations of Equality' (2007) 41 *Law and Society Review* 699.

138 Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 18) 65.

139 Sharon Todd, *Toward an Imperfect Education* (Routledge, 2016) 92.

140 *Dahlab v Switzerland* (n 17); *Leyla Şahin v Turkey* (n 2).

141 Wiles, 'Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality' (n 138) 719.

It should be pointed out that the Court's assumption ignores the many different reasons why women wear headscarves. As Judge Tulkens pointed out in her powerful dissenting opinion:

> What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to…In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. "Paternalism" of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of Article 8.[142]

The first impression given by the case law of the Court is that the Islamic headscarf has been recognised as being associated with the subordination of women. In other words, in both cases, the restrictions on wearing the Islamic headscarf were justified in the name of gender equality. Such presumption ignores the fact that a woman may wear the Islamic headscarf in accordance with her religious faith, culture or personal convictions. What emerges strongly from *Şahin and Dahlab* is that wearing the headscarf as a personal choice was simply absent from the Court's rulings. Thus, the Court justified its decisions based on preconceived opinions about Muslim women.

From the cases mentioned above, it can be concluded that the Court took a paternalistic approach toward Muslim women.[143] Such approach derives from the idea that "the person interfered with will be better off or protected from harm".[144] In this context, "banning [the headscarf] means imposing one set of standards and denies these women freedom as autonomous persons in their own right: seemingly in the name of gender equality".[145] The Court took the view that these adult women do not know what is good for them, so that they should be forced not to wear the Islamic headscarf. This sort of paternalistic approach, as Judge Tulkens emphasised, is contrary to the case law of the ECtHR which has developed a real right to personal autonomy. Such approach, therefore, can be seen as a denial of the woman's right to personal autonomy in the context of the ECHR. Dworkin writes:

142 *Leyla Şahin v Turkey* (n 2); *Dahlab v Switzerland* (n 17).

143 See Maleiha Malik, 'The Return of a Persecuting Society? Criminalizing facial veils Europe' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press, 2014) 232-250; See also Howard, 'Banning Islamic Veils: is gender equality a valid argument?' (n 32).

144 Gerald Dworkin, 'Paternalism' in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Stanford University, Winter 2017 Edition).

145 Marshall, 'Freedom of Religious Expression and Gender Equality: Sahin v Turkey' (n 120) 460.

> Some laws can be justified only on deep paternalistic assumptions the majority knows better than some individuals where value in their lives is to be found and that it is entitled to force those individuals to find it there… These laws are offensive to liberty and must be condemned as affronts to people's personal responsibility for their own lives'.[146]

According to Dworkin's account of human dignity and liberty, the Court's paternalistic approach violates the woman's right to liberty by deciding for her something that she has the right to decide for herself. In this context, the notion of dignity should be understood as a claim for independence from state in matters of ethical choice.[147] It is a fundamental aspect of Dworkin's theory that a good life is understood as defining success according to one's independently defined and chosen values. This approach has been suggested as the basis for human dignity, hence it can be seen as a philosophical underpinning for the right to religious freedom. For Dworkin, therefore, the concept of human dignity provides the legitimate ground for religious freedom.[148] Since the basis for the right to religious freedom is respect for the individual autonomy, paternalism is unacceptable under the principle of personal responsibility. However, the Court in *Şahin* and *Dahlab* failed to recognise women's personal responsibility for realising the value of their life, hence violated the dignity of women.

Conclusion

The issue of religious dresses has been the subject of deep controversy in Europe over the years.[149] This article analysed the case-law of the Court as it relates to the restrictions on the wearing of religious clothing and symbols in public spheres. It first provided a legal framework in which religion is guaranteed under Article 9 ECHR. The article then critically engaged with the ECtHR's case-law on Article 9 ECHR, with a specific emphasis on displaying religious symbols in public spheres.

This article has showed that the ECtHR had consistently held that the restrictions on the Islamic headscarf were compatible with the Convention.[150] In *Dahlab* and *Sahin,* gender equality was invoked in order to restrict individual choices by, for example, arguing that the wearing of the headscarf is an obstacle to the liberation of women. This is highly important in this context, because

146 Dworkin, *Is Democracy Possible Here?* (n 10) 73.

147 Domingo, 'Religion for Hedgehogs? An Argument against the Dworkinian Approach to Religious Freedom' (n 11) 373.

148 Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 376.

149 Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (n 13).

150 *Karaduman v Turkey*, Application no 16278/90, Commission decision of May 3, 1993, DR 74; *Dahlab v Switzerland* (n 17); *Leyla Şahin v Turkey* (n 2).

the conflict between the right to freedom of religion and women's rights to equality is considered as a controversial issue under the Convention.[151] This article has critically examined the treatment of gender equality by the Court in the Islamic clothing cases through the lens of Dworkin.

This article has made explicit that restrictions on the wearing of Islamic headscarves are often thought to be compulsory for the promotion of gender equality. While a headscarf ban has been justified as a solution to gender inequality, the ECtHR, in two cases, failed to give adequate weight to the personal autonomy of the applicants. As discussed above, *Dahlab* and *Şahin* denied the fact that restricting the wearing of headscarves by the state "is just as paternalistic and patriarchal as putting pressure on women to wear these garments".[152] Dworkin's theory of personal responsibility helped us to reveal that the Court ignored individual's responsibility and ability to adopt a freely chosen religious practice. Thus, the Court's paternalistic approach does not qualify as legitimate under the principle of personal responsibility. The findings of this article suggest that such failure, from a Dworkinian approach, can be seen as violating the principle of personal responsibility.

As discussed throughout the article, religious freedom can be based on human dignity and personal responsibility. This understanding of human dignity is important because, as pointed out by Jill Marshall, the main aim and very essence of the Convention "is respect for human dignity and human freedom".[153] In this article, I argued that, understood as an important component of human dignity, the concept of personal autonomy is a missing element in the Court's decisions in this context.

This article has also elaborated to what extent the principle of state neutrality has been respected by the ECtHR. In particular, it has focussed on whether the principle of religious neutrality can be considered as compatible with the compulsory display of crucifixes in classrooms of state-schools. The ECHR jurisprudence on religious dress and symbols, as Ronan McCrea writes,

151 Levy, 'Women's Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights' (n 102); See also Marshall, 'Freedom of Religion Expression and Gender Equality: *Sahin v Turkey*' (n 120).

152 Howard, 'Banning Islamic veils: is gender equality a valid argument?' (n 32) 160.

153 Marshall, 'The legal recognition of personality: full-face veils and permissible choices' (n 124) 64; See *Pretty v UK*, Reports of Judgments and Decisions 2002-III, 29 April 2002, para 65. In fact, in *Goodwin v. the UK*, the Court has already emphasised this point: "the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including their right to establish details of their identity as individual human beings." *Christine Goodwin v the UK* (GC), Application no 28957/95, ECHR 2002-VI, para 90.

has "granted priority to the right of states to define their own relationship to religion, to defend the public sphere and state institutions from religion, or, conversely, to promote certain denominations through state institutions".[154] This means that in relation to the regulation of religious manifestations in the public sphere, the Contracting States have been allowed a wide margin of appreciation.[155] Importantly, exercising such discretion, the Contracting States are subject to limitations. For instance, in *Refah Partisi v. Turkey*, the ECtHR implicitly defined the duty of the state as "the neutral and impartial organiser of the exercise of various religions, faiths and beliefs".[156] In order to perform the state's duty of neutrality and impartiality, the state must abstain from assessing "the legitimacy of religious belief".[157]

In the case of *Lautsi v. Italy*, the main issue was the permissibility of the display of crucifixes in state-school classroom. While the Court held that the display of the crucifix on the classroom walls of the state school is compatible with the Convention, this article has showed that the issue of neutrality and impartiality have been abandoned by the Court. This finding also suggests that such ruling is inconsistent with the Court's previous decisions in *Dahlab* and *Şahin*.

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[154] Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford University Press, 2010) 121.

[155] In sum, the doctrine of margin of appreciation entails that sensitive issues should be handled by the states as the local authorities are better placed to assess such issues than Strasbourg institutions. Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2016). See Steven Greer, *The Exceptions to Articles 8 to 11of the European Convention on Human Rights* (Council of Europe Publishing, 1997). See also Dimitrios Tsarapatsanis, 'The Margin of Appreciation Doctrine: A Low-Level Institutional View' (2015) 35 *Legal Studies* 675.

[156] *Refah Partisi (The Welfare Party) and others v Turkey* (n 115) para 91.

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