
UNVEILING MUSLIM WOMEN: THE CONSTITUTIONALITY OF HIJAB RESTRICTIONS IN TURKEY, TUNISIA AND KOSOVO

Theresa Perkins*

I. INTRODUCTION	530
II. THE HIJAB AS A NON-OPPRESSIVE SYMBOL	533
III. INTERNATIONAL LAW	536
IV. TUNISIA	543
A. <i>Rights & Religion under the Tunisian Constitution</i>	543
B. <i>History of the Hijab</i>	544
C. <i>Administrative Court Decision</i>	545
D. <i>Future of the Hijab in Tunisia</i>	547
V. TURKEY	548
A. <i>Rights and Religion Under the Turkish Constitution</i> ..	549
B. <i>History of the Hijab</i>	550
C. <i>Constitutional Court Decision</i>	552
D. <i>Future of the Hijab in Turkey</i>	556
VI. KOSOVO	557
A. <i>Rights and Religion under the Kosovo Constitution</i>	558
B. <i>District Court Decision</i>	559
C. <i>Future of the Hijab in Kosovo</i>	561
VII. IMPLICATIONS	562

ABSTRACT

This Note will analyze how and why political, social and international pressures affect the way predominately Muslim countries address the issue of religious veiling. Specifically, this piece will examine recent court cases in Tunisia, Turkey and Kosovo regarding the constitutionality of hijab bans in each respective state. Courts in Tunisia, Turkey and Kosovo have come to varied conclusions on the constitutionality of such bans despite having very similar religious freedom protections and guarantees. This Note will examine the historical treatment of the hijab in each state, the constitutional law

* J.D. Candidate, Boston University School of Law, 2012. B.S., Truman State University, 2009. The author would like to thank Professor Jay Wexler for providing invaluable guidance and comments during the drafting of this note. The author would also like to thank Naz Yucel and Vedia Biton for their assistance in translating the 2008 Constitutional Court decision from Turkish into English.

regarding religious expression and freedom in each state, the government's policies towards veiling, and the underlying cultural pressures and prejudices, politics and power struggles that shape the hijab debate in predominately Muslim countries. It will address the merits of enacting and enforcing hijab bans, and discuss the strengths and weaknesses of each court's international law and domestic constitutional law analysis and application. Specifically, this Note will address how states adhere to or manipulate the language of these laws and declarations to fit the social and political goals of each respective state. Finally, this Note will address the future implications of the court rulings in each respective state.

I. INTRODUCTION

The hijab, traditionally a simple piece of cloth, has become a contentious and divisive religious and political symbol throughout the world. Given the long history of women wearing veils,¹ “has become” seems an appropriate characterization for a modern debate over the rights and responsibilities of Muslim women who wear the hijab in public.² This debate has hit a crescendo in western media in the form of a very public struggle to prohibit wearing the hijab in French schools and public buildings.³ While France attracts media coverage, numerous other states have operated under similar laws for many years. A key distinction separates many ban-imposing states from France. In France, Muslims only comprise 5-10% of the population, while, for example, Muslims comprise 99.8% of Turkey's population and 98% of Tunisia's population.⁴ Majority factions have political representation in democratic states and are diffi-

¹ Mohja Kahf, *From Her Royal Body the Robe Was Removed: The Blessing of the Veil and the Trauma of Forced Unveilings in the Middle East*, in *THE VEIL: WOMEN WRITERS ON ITS HISTORY, LORE, AND POLITICS* 27 (Jennifer Heath ed., 2008).

² Due to the differing terms and definitions attached to words associated with Muslim head coverings, for the purposes of this paper, the term “hijab” refers to a veil covering only the hair and shoulders. Limiting the meaning of this term to the least controversial form of veil affects the analysis. While analysis of states prohibiting the burqa might weigh legal protections, prohibitions and rights discussed herein differently, that falls outside the scope of this paper.

³ See, e.g., Magali Faure & Philip Gouge, *Headscarf Row Erupts in France*, BBC NEWS, Apr. 25, 2003, <http://news.bbc.co.uk/2/hi/europe/2975689.stm>; Carla Power, *The Politics of Women's Head Coverings*, TIME, July 13, 2009, <http://www.time.com/time/magazine /Article/0,9171,1908306,00.html>; *Women in Face Veils Detained as France Enforces Ban*, BBC NEWS, Apr. 11, 2011, <http://www.bbc.co.uk/news/world-europe-13031397>.

⁴ The World Factbook, Tunisia, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate_ts.html (last updated Mar. 6, 2012); The World Factbook, Turkey, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate_ts.html (last updated Mar. 22, 2012).

cult to ignore when they choose to vocally support a shared ideal even in undemocratic states.⁵ In other words, although discrimination against Muslim minorities is often cited as a reason for veil restrictions,⁶ such discrimination does not play a role in Muslim-majority states. The abridgement of religious freedom, however, is not exclusively dependent on the existence of minority discrimination, and the notion of religious freedom merits discussion on its own right. Removing the aspect of minority discrimination, the question becomes how can states enact and continue to legally justify such bans?

In the last ten years, women in numerous states publicly challenged veiling bans, forcing courts to address the clash of varying rights allegedly protected under domestic and international law. Three predominately Muslim states that have ruled on the constitutionality of hijab prohibitions in the last four years are Tunisia, Turkey and Kosovo. All three states are relatively new or young, when compared to states like France. Using dates of constitutional enactment as a frame of reference for state formation, Tunisia has the oldest state with a Constitution ratified in 1959, although the new regime is currently working on drafting a new Constitution, and Kosovo has the newest with ratification in 2008.⁷ While courts in these three states recently ruled on the veil ban, the courts reached different conclusions. The Constitutional Court of Turkey upheld the hijab restriction by overturning multiple pieces of legislation that tried to remove the ban. By contrast, lower courts in Tunisia and Kosovo have found similar bans unconstitutional. This paper will examine both the court rulings and the constitutional backdrop for each ruling, taking into account the international nature of this debate and

⁵ See *Unrest in the Middle East and Africa*, CNN, Mar. 6, 2011, http://Articles.cnn.com/2011-03-06/world/middle.east.africa.unrest_1_opposition-forces-gadhafi-forces-libyan-government?_s=PM:WORLD (documenting the protests and revolutionary movements in the Middle East and North Africa).

⁶ See Claire L. Adida, David D. Laitin, and Marie-Anne Valfort, Identifying barriers to Muslim integration in France, *PROC. OF THE NAT'L ACAD. OF SCI.* (October 20, 2010), available at <http://www.pnas.org/content/early/2010/11/17/1015550107.full.pdf+html> (explaining a recent study that found a female Muslim candidate had nearly two and a half times fewer interview callbacks than a similar Catholic candidate); see also Kristine J. Ajrouch, *Global Contexts and the Veil: Muslim Integration in the United States and France*, 68 *SOC. OF RELIGION* 3, 322 (2007) (noting the discrimination against Muslims living in France, which is demonstrated by the percentage of Muslims in public housing and the unemployment rate for Muslims).

⁷ The World Factbook, Tunisia, *supra* note 4; The World Factbook, Turkey, *supra* note 4; The World Factbook, Kosovo, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate_kv.html (last visited Apr. 15, 2012). Note that after the overthrow of President Zine al-Abidine's government on Jan. 14, 2011, the Constituent Assembly of Tunisia was formed to draft a new constitution for Tunisia.

future implications of these actions in both the states concerned and other predominately Muslim states.

Principally, this Note is a critical examination of the manipulability of universal human rights. I contend that the interpretation of constitutional language by key political and judicial figures in Tunisia, Turkey and Kosovo has undermined the notion of universal human rights under the guise of internationally accepted societal protectionism. Specifically, the states rely on three arguments in support of a hijab ban, including that women who wear the hijab do so because they are forced to do so, that permitting women to wear the veil is a threat to the state and that permitting some women to wear the veil will pressure others to do the same. I will suggest that these arguments, while potentially meritorious in certain circumstances, lack support in Tunisia, Turkey and Kosovo. Therefore, the lower courts in Tunisia and Kosovo properly held that veiling bans are unconstitutional restrictions of religious freedom, while the Turkish Constitutional Court's decision to uphold a similar ban was to the detriment of its citizens' religious freedom and supported the continuation of an inappropriate restriction on religious freedom.

The paper will be outlined as follows. Section I discusses the use and wear of the hijab, including the varying reasons women choose to wear it. Specifically, I will argue that the varied use of the hijab does not mean that it universally symbolizes female oppression. Section II discusses international law and conventions that shape the rights discussion surrounding the hijab controversy. I will analyze the text of international law and conventions, asking whether rights recognized at the international level constitute universal rights, and to what extent these rights are incorporated and enforced by ratifying states. Furthermore, I will explore how regional conventions and courts have addressed religious freedom. I will argue that the frequent use of "escape clauses" and reservations undermines the notion of "fundamental rights" and permits states to deny the realization of basic rights, including religious freedom, to hijab-wearing women.

Sections III through V address the constitutional and legal constructs impacting the right to wear the hijab in Tunisia, Turkey and Kosovo respectively. These sections explore how courts recently addressed and applied those constructs with differing outcomes. This Note examines the language and structure of each state's Constitution, explores the history of the hijab in each state, including relevant laws and decrees prohibiting veiling, and recent court rulings in each state that addresses the constitutionality of hijab bans. Specifically, I will argue that the courts in Tunisia and Kosovo have correctly applied constitutional law to protect hijab-wearers, but the judiciary in Turkey continues to apply an archaic constitutional formula to the detriment of its citizen's rights. Additionally, sections III through V address the implications of these court rulings for the respective states given the political climate.

II. THE HIJAB AS A NON-OPPRESSIVE SYMBOL

Before turning to the relevant law and state prohibitions on the hijab, it is important to understand why some Muslim women wear the hijab. To say that women who wear the hijab only do so because they are forced to by religious leaders and relatives is an oversimplification and a fundamental falsehood.⁸ The reasons why women wear the hijab vary widely. While it is true that political and religious leaders in Saudi Arabia and Iran, for example, require women to wear veils in public,⁹ which many view as a form of female oppression,¹⁰ women in other parts of the world are not coerced by similar mandates. There are three popular uses of the hijab unrelated to oppressive symbolism, including the hijab as a sales mechanism, the hijab as a community identifier and the hijab as a personal identifier.

Many who live in the West and who do not wear a veil only view the hijab within the first context. Outside of news media and popular culture representations of the hijab, often focusing attention on the negative images of the hijab,¹¹ non-veil wearers are exposed to representations of

⁸ Kahf, *supra* note 1, at 29 (commenting that there is a “ubiquitous assumption that a Muslim woman is made to [wear the] veil by her husband” in the West); Pamela K. Taylor, *I Just Want to Be Me: Issues in Identity for One American Muslim Woman*, in *THE VEIL: WOMEN WRITERS ON ITS HISTORY, LORE AND POLITICS*, *supra* note 1, at 120 (discussing her experiences lecturing at Harvard, the author said “I had not even begun to express my thoughts . . . and already they had pigeonholed me, inaccurately, as an oppressed, downtrodden woman who had no independence, no intellectual life . . . despite the fact that such assumptions were patently false.”).

⁹ *Headgear in Muslim Lands: Beyond the Burqa*, *THE ECONOMIST*, May 13, 2010, at 67, available at <http://www.economist.com/node/16113081>; Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women’s Equality Under International Law*, 45 *COLUM. J. TRANSNAT’L L.* 367, 390 (2006).

¹⁰ Olivier Guitta, *Why France is Right About the Burqa*, *GLOBALPOST*, Feb. 26, 2010, <http://www.globalpost.com/dispatch/worldview/100225/france-burqa-ban-human-rights> (quoting Fadela Amara, the French Secretary of State for Urban Policies, who said “the burqa confiscates a woman’s existence . . . I favor banning this coffin for women’s basic liberties.”); Maj. David J. Western, *Islamic Purse Strings: The Key to the Amelioration of Women’s Legal Rights in the Middle East*, 61 *A.F. L. REV.* 79, 140-41 (2008) (addressing the social problems created by forcing women to wear a hijab in Saudi Arabia).

¹¹ See Frances Harrison, *Crackdown in Iran Over Dress Codes*, *BBC NEWS*, Apr. 27, 2007, <http://news.bbc.co.uk/2/hi/6596933.stm>; Western, *supra* note 10; Taylor, *supra* note 8, at 121 (noting the western media’s excessive use of images showing angry women wearing veils); West Wing, *CJ Slams Saudi Arabia*, *YOUTUBE* (Feb. 14, 2012) <http://www.youtube.com/watch?v=k30MOebDSww> (referencing a clip from the *The West Wing: Enemies Foreign and Domestic* (NBC television broadcast May 1, 2002), where a character denounces Saudi Arabia to the press for its veiling requirement and general treatment of women); Stephen J. Lyons, *‘Lolita in Tehran’ Lifts a Veil on Oppression*, *USA TODAY*, May 7, 2003, <http://www.usatoday.com/life/books/reviews/>

the veil in advertising. Typically the head covering is used as a symbol of exotic locations or authentic ethnic cuisine,¹² whether the portrayal is accurate or not.¹³ These representations are stereotypes, but the advertisements also are not using the veil as a symbol of oppression. In different scenarios, the veil is presented to or by westerners as an element of fashion or beauty. Fashion shows and fashion products are a means of garnering business while simultaneously portraying the veil as an element of fashionable wear.¹⁴

In addition to the corporate use of the veil as a symbol, some people adopt the veil as a symbol of community identification and pride in a common heritage or culture. The veil is a symbol of solidarity and unification against perceived oppression or hate based on misconceptions of Muslims and Islam.¹⁵ These expressions of community may be restricted to an individual or small group, or they may be part of a larger movement. For example, on some college campuses, student groups host fashion shows featuring the veil as part of a stylish and modern ensemble to “correct some misconceptions” about the hijab.¹⁶ After September 11, Qama, a New York teenager, began wearing a veil after her family and friends felt pressured to cease wearing clothing identifying them as Muslim.¹⁷ Her decision was motivated by the “anti-Muslim sentiment.”¹⁸ She used it as a means to assert her identity as part of a community and demonstrate that she was not bound by the opinions of her peers and neighbors.¹⁹ There are numerous small-scale demonstrations of commu-

2003-05-07-lolita_x.htm (reviewing the popular book “Reading Lolita in Tehran” and discussing the prominent role female oppression plays in the book).

¹² FAEGHEH SHIRAZI, *THE VEIL UNVEILED: THE HIJAB IN MODERN CULTURE* 20 (2001).

¹³ *Id.* at 21.

¹⁴ Asra Q. Nomani, *Hijab Chic*, SLATE, Oct. 27, 2005, <http://www.slate.com/id/2128906/> (describing a Nordstrom fashion show in Virginia that was directed to conservative Muslim women); Shaimaa Khalil, *Muslim Designers Mix the Hijab with Latest Fashions*, BBC, May 14, 2010, <http://www.bbc.co.uk/news/10105062>; *A Tribute to Arabian Beauty*, SILVIKRIN (2009), available at http://adsoftheworld.com/media/print/silvikrin_veil (shampoo advertisement depicting a woman whose hair covers her face as a veil would; the advertisement was meant for Saudi Arabian audiences, but it was created by a British company).

¹⁵ See ABDULAZIZ SACHEDINA, *ISLAM AND THE CHALLENGE OF HUMAN RIGHTS* 159 (2009) (stating that young Muslim women “have embraced the headscarf as a protest against marginalized sources of native cultural institutions and consumerist homogenization of culture and lifestyle represented by Western ideas and values”).

¹⁶ Univ. Coll. Dublin Islamic Soc’y, *Hijab Fashion Show 2010*, WORDPRESS (Feb. 13, 2010), <http://hijabfashionshow.wordpress.com/>.

¹⁷ MARNIA LAZREG, *QUESTIONING THE VEIL: OPEN LETTERS TO MUSLIM WOMEN* 54-55 (2009).

¹⁸ *Id.* at 55.

¹⁹ *Id.*

nal solidarity like Qama's that go unnoticed, but the 2011 uprisings in the Middle East widely televised the use and non-use of the hijab as a symbol of choice and community. The media captured pictures of women protesting and cheering side by side with men, and, importantly, some wore various styles of the veil while others donned less conservative and western style fashions.²⁰ These were pictures of a unified movement where women played a visible and vocal role, but the clothing of the female participants in the movement varied considerably. In other words, these were not the pictures of an oppressed community of women forced to veil or demanding a new government that might force them to veil.

Finally, a significant concern is that women are pressured by their families and social groups to wear a veil, and that this amounts to oppression. Familial pressure is a means of socialization and cultural engineering. Many families raise their children to share their belief system and encourage them to participate in religious observances or conform to religious practices. In some religions, this means children wear religious garments and symbols like the yarmulke, kirpan or a pendent of St. Joseph of Cupertino.²¹ Muslims are no different. Although legal issues sometimes arise when parents impose their religious beliefs on their children,²² parental socialization is not traditionally viewed as oppressive or improper.²³

In many cases, young women freely choose to wear the veil. Many of these women are college educated, and others are successful professionals.²⁴ They see the veil as part of their identity and feel uncomfortable without it, even though they may acknowledge that others consider it out-

²⁰ Uzma Mariam Ahmed, *Middle East Uprisings: The Feminism Makeover*, WASH. POST BLOG, (Mar. 28, 2011, 10:45 AM), http://www.washingtonpost.com/blogs/altmuslimah/post/middle-east-uprisings-the-feminism-makeover/2011/03/28/AFdbwYoB_blog.html.

²¹ St. Joseph of Cupertino is the patron saint of test-takers. The author presumes that St. Joseph pendants are quite popular with Catholic students on test days.

²² See Jennifer Stanfield, *Faith Healing and Religious Treatment Exemptions to Child-Endangerment Laws: Should Parents be Allowed to Refuse Necessary Medical Treatment for Their Children Based On Their Religious Beliefs*, 22 *HAMLIN J. PUB. L. & POL'Y* 45, 85 (2000) (discussing parental rights to deny their children healthcare based on religious beliefs); Janna C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American Healthcare System*, 29 *AM. J. L. & MED.* 269, 297 (2003) (arguing that U.S. courts cannot permit parents to deny their children medical care based on religious beliefs).

²³ See Bennoune, *supra* note 9, at 406-07 (suggesting school girls may need state protection from "coercive family members" who force their children to wear hijabs); Carolyn Evans, *The 'Islamic Scarf' in the European Court of Human Rights*, 7 *MELB. J. INT'L L.* 52, 65 (2006) (arguing that "most religious obligations are 'imposed' . . . and the Court does not normally refer to the obligations in such negative terms.").

²⁴ F. Brinley Briton, *Headscarves Slam Brakes on Women's Careers*, MSNBC, Apr. 20, 2011, http://www.msnbc.msn.com/id/42226074/ns/world_news-europe/.

dated.²⁵ In some cases, younger students choose to wear the veil, although their family members do not wear one.²⁶ This indicates that not all children wear religious symbols because they are pressured to do so by their families, which supports the argument that the hijab can be a symbol of personal identity.

III. INTERNATIONAL LAW

The United Nations and other intergovernmental organizations have recognized and codified the universality of certain human rights. Those very same bodies, however, have simultaneously rejected the true universality of those rights by imposing restrictions and allowing states to exempt their citizens from realizing certain rights. A product of compromise and diverse viewpoints meeting on an international stage, “escape clauses” in these conventions allow states to sign and ratify a document without fully recognizing or granting the rights included in the document. The use of “escape clauses” permits a state to claim that it recognizes basic human rights without really recognizing or protecting those rights.²⁷ Proponents and opponents of hijab restrictions frequently invoke the right of equality, freedom of religion and conscience and the right to education to support their position. Among the international and regional documents protecting the aforementioned rights are the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Political Rights (ICESPR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of

²⁵ Vivienne Sm. Angeles, *Philippine Muslim Women*, in ISLAM, GENDER & SOCIAL CHANGE 228 (Yvonne Yazbeck Haddad & John L. Esposito eds., 1998) (recounting the personal story of one woman who wore the veil even though others saw it as a symbol of “backwardness”).

²⁶ *Student's Headscarf Sparks Debate over Kosovo Identity*, HURRIYET DAILY NEWS, May 18, 2010, <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=students-headscarf-sparks-debate-over-kosovo-identity-2010-05-18> (noting teenager Arjeta Halimi's choice to wear the veil although none of her siblings wears one).

²⁷ See Bruce P. Frohnen, *Multicultural Rights? Natural Law and the Reconciliation of Universal Norms with Particular Cultures*, 52 CATH. U. L. REV. 39, 41 (2002) (suggesting “there is no universal agreement on the existence, let alone the content, of universal human rights equally applicable to all persons.”); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1988, 2005-06 (2002) (finding that states that ratified a human rights treaty are no more likely than states that did not ratify the treaty to abide by the treaty provisions, and states may receive “expressive benefits” merely for ratifying a human rights treaty even if the state does not comply with the provisions therein). *But see* Anne F. Bayefsky, *The Legacy of the Universal Declaration of Human Rights*, 5 ILSA J. INT'L & COMP L. 261, 261 (1999) (arguing the UDHR is an action platform and the adoption of six major human rights treaties by most states suggests there are universal human rights).

Discrimination Against Women (CEDAW) and the European Convention on Human Rights (ECHR).

The first of many international agreements addressing human rights, the UDHR binds no states, and, therefore, has almost no authoritative weight. The UDHR, however, recognizes numerous “inalienable” individual rights, including equality under the law, the “freedom of thought, conscience and religion,” the right to manifest one’s religious belief, and the right to education that strengthens “respect for human rights.”²⁸ Perhaps most important, the UDHR was the first attempt by the international community to recognize universal human rights. This fact suggests that there is a general consensus that some rights, while perhaps not natural or inherent, are socially accepted worldwide, and that the international community felt those rights needed a vehicle for international recognition.

Similar to the UDHR, and adopted shortly thereafter, the dual ICCPR and ICESCR also define “human rights,” but the ICCPR and ICESCR, unlike the UDHR, are ratified conventions. The difference between a convention and a declaration is that a convention is part of international law and legally binding.²⁹ Article 18 of the ICCPR guarantees everyone “the right to freedom of thought, conscience and religion” and guarantees the right to manifest one’s religion in observance and practice.³⁰ The ICCPR allows states to limit the “manifestation” of religion, however, when “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”³¹ This “escape clause” appears frequently in international and domestic statutes and conventions recognizing the freedom of religion. Its inclusion or omission has significant implications for modes of religious expression like the hijab. The vague language in the ICCPR “escape clause” leaves a great deal of discretion for states to restrict religious practices. Furthermore, the ICCPR mandates “respect” for parental liberty to “ensure the religious and moral education of their children in conformity with their own convictions.”³² Interestingly enough, the ICCPR does not give states the same discretion to limit this parental liberty. Finally, the ICCPR ensures “equal protection of the law” regardless of religion.³³ Both Turkey and Tunisia ratified the ICCPR, but Turkey added a reservation prohibiting

²⁸ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmb., arts. 7, 18, 26, U.N. Doc. A/RES/217(III), (Dec. 10, 1948) [hereinafter UDHR].

²⁹ *Press Kit: Human Rights at Your Fingertips*, UN.ORG, (Apr. 12, 2012) <http://www.un.org/rights/50/game.htm#28>.

³⁰ Covenant on Civil and Political Rights, art. 18, para. 1, *opened for signature* Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S 171 [hereinafter ICCPR] (ratified by Tunisia in 1969; ratified by Turkey in 2003).

³¹ *Id.* art. 18, para. 3.

³² *Id.* art. 18, para. 4.

³³ *Id.* art. 26.

application of the ICCPR with regard to minority religious expression where upholding the ICCPR conflicts with the Turkish Constitution.³⁴ Kosovo, due to its recent creation and controversial status as a state, is not a member of the United Nations nor any of the conventions discussed.³⁵

The ICESCR, while not guaranteeing religious freedom, does guarantee the right to an education that promotes understanding and tolerance among ethnic and religious groups.³⁶ Like the ICCPR, the ICESCR also mandates “respect” for parental liberty to “ensure the religious and moral education of their children in conformity with their own convictions.”³⁷ This mandate is important because ban-imposing states sometimes claim to protect the individuality of children from parental or peer proselytizing. Like the ICCPR, Turkey and Tunisia ratified the ICESCR. However, Turkey submitted a reservation that makes a parent’s choice of education dependent on Article 14 of the Turkish Constitution.³⁸ Article 14 protects the “secular order” of Turkey,³⁹ which allows the state to severely curtail the rights of parents in the area of religious education without breaching its obligation under the ICESCR.

Unlike the ICCPR and ICESCR, which focus on universal individual rights, the CRC and the CEDAW are directed to specific, historically-underrepresented populations and populations ripe for exploitation. The CRC recognizes the rights of a child to a life free from discrimination. Specifically, the CRC mandates respect for a child’s “freedom of thought, conscience and religion,” but includes an “escape clause” for issues of “public safety, order, health or morals, or the fundamental rights and freedoms of others.”⁴⁰ It also recognizes the right of a child to receive an education, but it does so with two potentially conflicting and vague clauses. The first recognizes a child’s right to an education “directed to”

³⁴ ICCPR, *supra* note 30, Declarations and Reservations: Turkey.

³⁵ The UN has had a presence in Kosovo since 1999 to assist with state building and security. Likely due to this relationship, the Kosovo Constitution includes Article 22, which recognizes the force and superiority of provisions in the UDHR, European Convention for the Protection of Human Rights, ICCPR, CEDAW, and CRC. See U.N. Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. Doc. S/1999/779 (July 12, 1999); CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 22.

³⁶ International Covenant on Economic, Social and Cultural Rights, art. 13, ¶ 1, *opened for signature* Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3. [hereinafter ICESCR] (ratified by Tunisia in 1969; ratified by Turkey in 2003).

³⁷ *Id.* art. 13, para. 3.

³⁸ ICESCR, *supra* note 36, Declarations and Reservations: Turkey.

³⁹ TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 14 (Turk.).

⁴⁰ Convention on the Rights of the Child, art. 14, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (ratified by Tunisia in 1992; ratified by Turkey in 1995).

the “development of . . . his or her own cultural identity, language and values.”⁴¹ The second suggests education should prepare a child to interact with and respect others “in the spirit of understanding . . . [and] tolerance.”⁴² The former implies that a child can receive an education narrowly tailored to his or her family’s values and beliefs, but the latter suggests a proper education should expose a child to differing viewpoints, morals, values and customs. While these two concepts do not appear mutually exclusive, states may not consider both of equal value or may not create policy reflecting an equal balance of these rights. The ambiguous language gives states a great deal of discretion. Tunisia and Turkey both signed and ratified the CRC, but Turkey attached a reservation stating that it would interpret the CRC according to the letter and spirit of its Constitution.⁴³ Turkey used the reservation tool to reassert its sovereign authority, thus allowing it to insulate the secular provisions in its Constitution from international challenge where any of the constitutional provisions conflicted with Turkey’s international agreements.

The CEDAW focuses exclusively on the rights of women, and it fails to mention rights of religion or belief. However, the document guarantees women freedoms and rights that promote their equality with men, and it explicitly calls for equality in educational opportunities.⁴⁴ Perhaps due to the lack of a religious freedom clause, Turkey neglected to attach any reservations to the CEDAW. Tunisia, on the other hand, attached a reservation stating Tunisia only recognizes the authority of the CEDAW to the extent that it does not conflict with Article 1 of the Tunisian Constitution.⁴⁵ Among other provisions, Article 1 and Article 5 establishes Tunisia’s religion as Islam and guarantees “the free practice of religious belief” that “does not disturb public order.”⁴⁶ Tunisia’s reservation does not mean Tunisian women are subjected to the same human right restrictions faced by women in countries like Saudi Arabia.⁴⁷ Saudi Arabia also ratified the CEDAW but attached a restriction specifying that Islamic law (Shari’ah law) supersedes any of the CEDAW provisions in the event of conflict.⁴⁸ Therefore, identifying the state’s religion as Islam does not

⁴¹ *Id.* art. 29, ¶ 1.

⁴² *Id.*

⁴³ CRC, *supra* note 40, Declarations and Reservations: Turkey.

⁴⁴ Convention on the Elimination of all Forms of Discrimination against Women, art. 3, 10, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (ratified by Tunisia in 1985; ratified by Turkey in 1985).

⁴⁵ *Id.* at Declarations and Reservations: Tunisia.

⁴⁶ سنوئل ائیرومجل روتسد [CONSTITUTION] Dec. 29, 1955, art. 1, 5 (Tunis.).

⁴⁷ See Adrien Katherine Wing & Hisham Kassim, *The Future of Palestinian Women’s Rights: Lessons from a Half-Century of Tunisian Progress*, 64 WASH. & LEE L. REV. 1551, 1557 (2007) (finding Tunisia’s constitutional revision in 1997 prohibited discrimination based on gender in key areas like policy development and political office).

⁴⁸ CEDAW, *supra* note 44, Declarations and Reservations: Saudi Arabia.

mean Tunisia adopts, incorporates or enforces Islamic law the way Saudi Arabia, for example, incorporates Islamic law.⁴⁹

In addition to international law, regional conventions also address human rights. In many ways, regional bodies can address ongoing human rights concerns through institutional mechanisms in ways the United Nations cannot due to its size and diversity. The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) is one such convention. The European Convention ensures religious freedom and the right to publicly “manifest” or express one’s religion, but it also includes an “escape clause” permitting limitations on such religious manifestations as required by “democratic society.”⁵⁰ The language suggests that abridging such rights should only occur under conditions promoting the principles and values enshrined in the law of a democratic society. Importantly, the European Convention also creates the European Court of Human Rights (ECHR), which handles issues between states and cases brought by individuals.⁵¹ Unlike the special tribunals established to handle human rights atrocities under the U.N. system, the ECHR has a wider and more diverse mandate.

Due to the ECHR’s broad mandate and authority to hear cases, the ECHR has handled numerous cases regarding the manifestation of religion and the extent to which the “escape clause” provision allows a state to limit that manifestation. First, limitations on religious expression must be considered in context, and an institution may limit such expressions if the expression imposes on the beliefs of others or disrupts public order.⁵² For example, in *Leyla Şahin v. Turkey (Leyla Şahin)*, the ECHR held that a university in Turkey could prohibit students from wearing the hijab in class under an “if the end justifies the means” balancing approach.⁵³ The ECHR cited several reasons why the university’s actions were justified, including the potential proselytizing effect of the hijab on other students, the state’s secularist values and an alleged incompatibility between the hijab and the principles of tolerance and gender equality.⁵⁴

⁴⁹ See Wing & Kassim, *supra* note 47, at 1552 (finding Tunisia “has taken the most secularized approach to women’s rights in majority-Muslim countries.”).

⁵⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. 5 [hereinafter ECPHRFF].

⁵¹ *Id.* art. 19.

⁵² *Leyla Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 98, ¶¶ 109, 111 (2005).

⁵³ *Id.* ¶ 122 (finding the university could enforce its ban because the “issue was justified in principle and proportionate to the aim pursued”).

⁵⁴ *Id.* ¶ 115 (stating “there 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”); *Id.* ¶ 111 (stating that the hijab “appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality [and] . . . tolerance”) (citing *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 449).

What the ECHR discussed and failed to discuss in *Leyla Şahin* suggests a great deal about the struggle facing hijab-wearing women. Several principles and criticisms emerge from these cases. First, the mechanisms for protecting human rights available outside the state, like the ECHR, may not have the power to overturn, or may refuse to use such powers to overturn, a state's decision to restrict rights under a "margin of appreciation" approach.⁵⁵ This approach undermines religious freedom because state-imposed limitations on religious expression are precisely where the court should play the largest role due to the manipulability of "escape clause" language. On one hand, this approach respects state sovereignty. On the other hand, the states in question willingly entered into the European Convention, thereby giving up some autonomy. If a state voluntarily participated in the codification of fundamental rights and agreed to be bound by a regional judicial mechanism, the courts mandated to protect the *fundamental* nature of those rights must act as final arbiters at the expense of state sovereignty. If the states did not intend the regional court to decide human rights cases based upon the European Convention, the states could have chosen not to create a corresponding court to enforce the provisions of the European Convention.⁵⁶ European Convention members created a court capable of issuing binding rulings, which suggests that the members recognized the need for a higher authority to intercede in cases where a state acted contrary to the agreement. If the parties did not want to give the ECHR power, the members could simply have acknowledged that there are fundamental rights without creating the ECHR, leaving the states to decide whether to protect these rights.

Second, the hijab is a mode of religious expression fraught with negative connotations derived from inaccurate media portrayals, ignorance and selective symbolism.⁵⁷ While some view the hijab as an object of oppression,⁵⁸ others view a woman's choice to wear the veil as a means of

⁵⁵ Bennoune, *supra* note 9, at 381. *But see* Kokkinakis v. Greece, App. No. 14307/88, 17 Eur. H.R. Rep. 397, ¶ 47 (1993) (qualifying the margin of appreciation doctrine by making it "subject to European supervision").

⁵⁶ ECPHRFF, *supra* note 50, art. 43.

⁵⁷ *See generally* Katherine H. Bullock & Gul Joya Jafri, *Media (Mis)Representations: Muslim Women in the Canadian Nation*, 20 CAN. WOMEN STUD., 35, 35-40; Rachel Saloom, *Arab Stereotyping: A Multi-Disciplinary Perspective*, 2 AM. U. MODERN AM. 24, 27 (2006); Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 COLUM. J. GENDER & L. 199, 221 (2007) (discussing how the French media typically portrayed images of the hijab as an oppressive garment women were forced to wear by regimes like the Taliban in Afghanistan, which "resonated in the popular French consciousness").

⁵⁸ Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49, 81 (2005) (stating that French women who wear the hijab are classified into "gendered image" groups

individual expression.⁵⁹ In *Leyla Şahin*, the ECHR accepted the argument that women who wear the hijab are forced to do so against their will, or that they might coerce others into doing so.⁶⁰ The European Court effectively presumed that a woman who wears a veil lacks the capability to make decisions regarding her religious expression or the fortitude to resist proselytism.⁶¹

Despite the recognized right of states to abridge the rights of religious freedom and religious expression, some codified recognition of fundamental religious freedom exists. Signing parties have diverse reasons for ratifying these covenants, and state practice may not reflect the commitments made under a covenant; however, the number of conventions citing religious freedom suggests that states generally agree that some level of religious freedom exists for all people. Means of religious expression, and how religious freedom balances with other rights and social values, are more contentious. State governments and judicial actors balance social, political and international commitments differently with regards to hijab bans, which creates a seemingly disparate treatment of the hijab in predominately Muslim states like Tunisia, Turkey and Kosovo. There are two important questions that arise from this balancing effort: (1) whether, and to what extent, “fundamental freedoms” like freedom of religion and religious expression, female equality, and the right to an education contribute to the government and court’s rationale to permit or prohibit veiling, and (2) whether, and to what extent, the freedom to manifest one’s religion through the hijab is entirely dependent upon political pressures, regional perceptions, state-specific culture and social values. The analysis in the following sections will explore the inconsistent balancing of the rights, pressures and values in Tunisia, Turkey and Kosovo and demonstrate how courts in Tunisia and Kosovo properly deferred to the protection of religious expression when confronted with the conflict between a woman’s right to wear the hijab and her right not to wear the hijab.

including the “victims of violence and subjugation by male members of their community”).

⁵⁹ BROWYN WINTER, *HIJAB & THE REPUBLIC: UNCOVERING THE FRENCH HEADSCARF DEBATE* 44-45 (2008) (stating that women may choose to wear the veil as an embrace of feminist ideals); Maliha Masood, *One the Road: Travels with My Hijab*, in *THE VEIL: WOMEN WRITERS ON ITS HISTORY, LORE AND POLITICS*, *supra* note 1, at 213, 224 (finding that “women demanding the right to cover their heads” do so as an expression of “free will to dress as they pleas[e]”).

⁶⁰ *Leyla Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, ¶ 111 (2005).

⁶¹ The ECHR failed to explain how a woman wearing the hijab pressures those around her to do so or proselytizes merely by wearing the hijab, but the ECHR effectively signals the hijab does so by deferring to the Turkish government’s judgment on the matter.

IV. TUNISIA

A. *Rights & Religion under the Tunisian Constitution*

The Tunisian government's opposition to the hijab is underscored by an interesting constitutional framework. Specifically, Tunisia's Constitution propagates the value of human rights generally, but it also proclaims that there is a role for Islam in the state. First, with regards to protected rights, the Preamble of the document states that a "republican regime" is the "best guarantee for the respect of human rights . . . [and] equality among citizens" and that Tunisia guarantees "fundamental freedoms and human rights in their universality."⁶² The term "universality" does not mean, however, that the rights are *always* guaranteed. The constitutional language restricts guaranteed rights. Specifically, Article 5 describes the state's role in promoting tolerance and notes that the state "defends the free practice of religious beliefs provided this does not disturb public order."⁶³ The latter half of the provision is similar to the "escape clauses" in several international human rights conventions, but Tunisia's Constitution permits abridgement only to protect "public order."⁶⁴ The state could interpret "public order" very broadly, but language in Article 7 of the Constitution suggests otherwise. Article 7 states that the Tunisian government can limit "all" rights only "to protect the rights of others, the respect of public order, national defense, the development of the economy and social progress."⁶⁵ The inclusion of "public order" in the list of potential reasons to limit "all" rights implies protecting public order is different from protecting the rights of others, taking actions to defend the state and the promotion of development.⁶⁶ The Tunisian government, however, might point to the limitations on "all" rights in Article 7 as additional reasons the state may abridge the religious freedoms granted in Article 5. Interpreting the language to further restrict religious freedom seems strange since Article 5 specifically limits it only when a religious practice disturbs "public order;" but, given that the document in question is the Constitution, the general principles underscoring the language may carry more weight than the construction.

Second, the language of the Constitution suggests that there is a role for religion in Tunisia, but the Constitution fails to explicitly define that role. Article 1 of the Constitution states that Tunisia's "religion is Islam," but it fails to explain what that means for the people and laws of Tun-

⁶² سنوئلا ؤيرومجال روتسد [CONSTITUTION] Dec. 29, 1955, pmb. (Tunis).

⁶³ *Id.*

⁶⁴ *Compare id.*, with ICCPR, *supra* note 30, art. 18, ¶ 3 (noting that a state can limit religious expression to protect "public safety, order, health, or morals or the fundamental rights and freedoms of others").

⁶⁵ سنوئلا ؤيرومجال روتسد [CONSTITUTION] Dec. 29, 1955, pmb., art. 7 (Tunis).

⁶⁶ *Id.*

sia.⁶⁷ Further suggesting there is a role for religion in the state, the Preamble, establishing the purpose and tone of the Constitution, begins “in the name of God, the Merciful, the Compassionate.”⁶⁸ Under Articles 21 and 42 legislators and the President take an oath swearing by God to “respect the Constitution.”⁶⁹ Additionally, under Article 38, the President must be Muslim.⁷⁰ These provisions do not illuminate the place of Islam in the state, but the provisions suggest that Tunisia is not a secular state and that Tunisia does not guarantee a separation between church and state. The only constitutional provision potentially suggesting otherwise is Article 8, which prohibits the creation of a political party with “religion . . . as the foundation for its principles”⁷¹ Article 8, however, prohibits more than religious-based political parties; it also prohibits political parties based on principles on race, language, sex or region.⁷² Furthermore, Article 8 guarantees the “freedom of opinion, expression, the press . . . and association”⁷³ Therefore, the restriction may say less about the role of Islam in the state and more about the effort to protect the rights and equality of all Tunisian citizens, as demonstrated in Articles 5, 7 and 8.

B. *History of the Hijab*

To some, the North African state of Tunisia represents a beacon of gender equality amidst an array of predominately Muslim countries known to abridge women’s rights.⁷⁴ To others, Tunisia represents fifty-five years of dictators who vehemently, and sometimes violently, opposed religious

⁶⁷ *Id.* art. 1.

⁶⁸ *Id.* pmb. l.

⁶⁹ *Id.* arts. 21, 42.

⁷⁰ *Id.* art. 38.

⁷¹ *Id.* art. 8.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Mounira Charrad, *Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation*, 64 WASH. & LEE L. REV. 1513, 1516, 1527 (2007) (finding that legislation reforms “propelled Tunisia to the forefront of gender legislation in the Arab world,” and noting Justice Sandra Day O’Connor’s description of Tunisia as “a model for other countries in the Islamic world regarding gender legislation”) (quoting Justice Sandra Day O’Connor, Remarks at the Symposium: Tunisia: Celebrating Fifty Years of Women’s Emancipation (Nov. 11, 2006) (transcript available at <http://www.loc.gov/today/cyberlc/transcripts/2006/061130ame1200.txt>)); Uzoamaka Okoye, *Women’s Rights Under the Shari’a: A Flawed Application of the Doctrine of Separate But Equal*, 27 WOMEN’S RTS. L. REP. 103, 118 (2006) (finding that women’s rights in Tunisia are advanced by legislation like the 1956 ban of polygamy); Katrin Bennhold, *Women’s Rights a Strongpoint in Tunisia*, N.Y. TIMES, Feb. 22, 2011, <http://www.nytimes.com/2011/02/23/world/middleeast/23iht-letter23.html> (suggesting Tunisian women have “more to lose” in a revolution because Tunisian women have the right to vote, they participate in parliament, and they can consent to marriage).

expression. The hijab ban in Tunisia has a long history. President Habib Bourguiba frequently referred to the hijab as an “odious rag,” and he prohibited women from wearing it in government offices in 1981.⁷⁵ After coming to power, President Zine Abidine Ben Ali further prohibited the hijab in schools and “discourage[d] women from wearing it on public streets and . . . gatherings.”⁷⁶ The hijab ban is enshrined in Circular 102, which prohibits the hijab because it represents “extremism.”⁷⁷ However, Ben Ali frequently cited other reasons for the ban. For example, he referred to the hijab as an “an imported form of sectarian dress” that failed to reflect “Tunisia’s cultural heritage.”⁷⁸ Furthermore, in 2006, he publicly demanded that Tunisians “must fight ethnic clothing.”⁷⁹ Irrespective of the underlying political reasons for these pronouncements, Ben Ali’s language suggests divergent reasons for Tunisia’s ban. His language suggests that the hijab is linked to extremist behavior, that manifestations of religion should not appear in public places and that the hijab is worn by a particular ethnic group not considered part of Tunisia’s cultural make-up. After the promulgation of Circular 102, police and authorities harassed women wearing the hijab in public.⁸⁰

C. Administrative Court Decision

In 2007, Saeeda Adalah, a school teacher, challenged the constitutionality of the hijab ban (Circular 102) with the assistance of prominent human rights attorney Saida Akremi.⁸¹ Although a media blackout prevented much of the court’s ruling from reaching the public, a Tunisian administrative court ruled the ban unconstitutional because it infringed on basic human rights, including the freedom of belief.⁸² Specifically, Circular 102 “interferes in personal freedoms, since such dress expresses distinctively cultural, religious and intellectual belonging and reflects per-

⁷⁵ Daniel Williams, *Tunisia Veil Case Threatens ‘Odious Rag’ Struggle*, BLOOMBERG, Jan. 3, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVnYog.7H.yI&refer=Europe>.

⁷⁶ U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT: TUNISIA 2 (2009).

⁷⁷ Mohammad Ahmad, *Tunisia’s Ban Unconstitutional*, TURKISH WEEKLY, Oct. 11, 2007, <http://www.worldbulletin.net/index.php?aType=haberArchive&ArticleID=11861>.

⁷⁸ Williams, *supra* note 75.

⁷⁹ Tahereh Ghanaati, *The Tunisian Time Bomb*, PRESS TV, Jan. 11, 2011, <http://www.presstv.ir/detail/159714.html>.

⁸⁰ AMNESTY INTERNATIONAL, HUMAN RIGHTS IN REPUBLIC OF TUNISIA (2007), available at <http://www.amnesty.org/en/region/tunisia/report-2007>.

⁸¹ See Williams, *supra* note 75 (citing Adalah’s desire to wear the hijab at her school).

⁸² Ahmad, *supra* note 77 (finding the court premised its ruling on the find that “law no. 102 has violated the Constitution which guarantees people the right to practice their full rights as enshrined by the law”).

sonal inclination.”⁸³ While some government officials pointed to the ruling to demonstrate the fairness of Tunisian courts,⁸⁴ the government publicly decried the court’s ruling and refused to enforce it “on the grounds that it divides rather than unites.”⁸⁵ Therefore, while government officials said veiling was prohibited because of its religious, cultural and ethnic connections, the court ruled that the Constitution protects those very connections. Furthermore, the court addressed public criticism that the hijab is a symbol of oppression forced upon women. By citing the “personal inclination” attached to Adalah’s choice to wear the hijab, the court recognized that at least part of the population wearing the hijab does so without coercion.⁸⁶ Additionally, the language “intellectual belonging” suggests many of the women wearing the hijab are educated, like Adalah, and are part of a larger Islamic community who also choose to wear the veil.⁸⁷

Even though President Ben Ali argued the hijab ban was constitutional, the administrative court was correct in its assessment of Circular 102. On its face, Circular 102 appeared linked to the larger state efforts to liberalize women’s rights in Tunisia, surely to the delight of President Ben Ali, but Circular 102’s implementation and enforcement likely had more to do with Ben Ali’s own insecurities regarding his ability to maintain power.⁸⁸ The Tunisian Constitution permits limitations on religious expression to maintain public order, but, irrespective of whether a shift of government control actually constitutes a threat to public order, the “escape clause” only protects the ban if there is a logical bridge between women wearing the hijab and a disruption of public order. Ben Ali prohibited symbols of more conservative Islamic practices, like the hijab and “Islamic style beards,” and outlawed political parties desiring an Islamic state.⁸⁹ His characterization of the hijab as a “garment of foreign origin

⁸³ Jamar Arfaoui, *Tunisian Court Reinstates Veiled Teacher*, MAGHAREBIA, Oct. 10, 2007, http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2007/10/10/feature-02.

⁸⁴ *Id.* (quoting a legislator as saying “this decision stresses the independence of the Tunisian judiciary, contrary to what is being said by some voices questioning impartiality”).

⁸⁵ See Williams, *supra* note 75 (citing a government official who stated “the decision will make no difference”).

⁸⁶ Arfaoui, *supra* note 83.

⁸⁷ *Id.*

⁸⁸ See Charrad, *supra* note 74, at 1526 (finding the 1980s, when Ben Ali mandated and extended the hijab prohibition, was a time when Islamic fundamentalism grew as a political threat).

⁸⁹ U.S. DEP’T OF STATE, HUMAN RIGHTS REPORT: TUNISIA (2004) (finding the Tunisian government prohibits proselytism and that police arrest men “with ‘Islamic’ style beards”); Winter, *supra* note 59, at 38 (discussing how the Ennahdha operates in Europe to promote the creation of a Islamic state in Tunisia because the government outlawed the group).

having a partisan connotation,” and the government’s concern that the administrative court’s ruling would be socially divisive, demonstrates Ben Ali’s wariness of opposition groups and his supposition that garments associated with more conservative religious views are outward demonstrations of support for such groups. However, a redefining of the “Islamic tradition” in many states has led women to wear the hijab for reasons unrelated to extremism or conservative religious values.⁹⁰ This questionable logic justifying the hijab ban may be why the court chose to focus heavily on the religious expression rights abridged by Circular 102, rather than focusing on the concern of proselytism, which the government “viewed as disturbing the public order.”⁹¹ Furthermore, the fact that the Constitution recognizes a role for Islam in the state reduces the effectiveness of the “proselytism” argument because citizens have been forewarned of the importance Islam plays in Tunisian society.

Additionally, given that police harassed and attacked many Tunisian women wearing the hijab, the connection between the hijab ban and other progressive reforms regarding female rights is a weak one.⁹² While the Tunisian government publicly associated the hijab with extremist Islamic groups,⁹³ the government did not similarly connect the hijab to women’s rights. Therefore, these blatant attacks on women by authority figures may have contributed to the court’s decision not to focus on the hijab as a potential symbol of women’s oppression.

D. *Future of the Hijab in Tunisia*

Ben Ali’s suppression of human rights, including religious freedoms and the administrative court’s ruling targeting the regime’s denial of religious expression are not insignificant. In January of 2011, after over a month of civil unrest, protestors succeeded in driving President Ben Ali from the country. The fate of the current Constitution, and the potential for preserving religious and women’s rights under a rewritten Constitution, is under great scrutiny. Tunisia’s regime change may occur through “existing constitutional mechanisms,” but the first test of the current Constitution’s authority will depend upon the Constitutional Council’s ability to successfully hold Presidential elections in a tumultuous environment.⁹⁴ The Constitutional Council is the body with ultimate authority

⁹⁰ Charrad, *supra* note 74, at 1518-19 (finding the Tunisian government’s advances in women rights stems from a fundamental shift in interpretation of “the Islamic tradition”); *see also supra*, at 533-36.

⁹¹ U.S. DEP’T OF STATE, *supra* note 76, at 2.

⁹² Kahf, *supra* note 1, at 35 (discussing the harsh punishments imposed on women wearing the veil and how police frequently rip veils off of women on the streets).

⁹³ Ahmad, *supra* note 77; Ghanaati, *supra* note 79.

⁹⁴ Nathan J. Brown, *Ben Ali May be Gone but His Constitution is Not Yet Forgotten*, FOREIGN POLICY, Jan. 15, 2011, http://mideast.foreignpolicy.com/posts/2011/01/15/ben_ali_may_be_gone_but_his_constitution_is_not_yet_forgotten.

over constitutional interpretations.⁹⁵ Article 57 dictates that the Constitutional Council must meet upon the President's resignation, appoint an interim President, and hold new Presidential elections.⁹⁶ If this process occurs successfully, there is a chance that much of the current language of the Constitution will remain intact even in a revised Constitution.⁹⁷

Potentially, a new ruling party could propose substantive changes to the document, or interpret provisions of the document differently from its predecessors. Women's organizations in Tunisia are actively fighting to maintain the progressive rights enjoyed under the prior regime, and some groups fear the new regime will ignore their call for a separation between mosque and state, leading to more restrictions on women.⁹⁸ The new regime will likely permit women to wear the hijab, upholding the court's ruling, because of the nature of the revolution, but the potential emergence of powerful Islamist groups could lead to a new human rights issue: mandatory religious practice that abridges religious freedoms and undermines the language of the current Constitution. Ennahdha, a formally prohibited Islamic party, has expressed preference that the new ruling party operate with the "tolerance and moderation" of Turkey's governing party.⁹⁹ Therefore, with the survival of current constitutional language highly dependent upon its successful application in the ongoing regime change, the state of religious and expressive freedoms in Tunisia remains uncertain.

V. TURKEY

Ennahdha's expression of admiration for the tolerance in Turkey is ironic considering the ongoing debate surrounding public hijab wear in

⁹⁵ CONSOL. PERIODIC REPORT OF TUNIS. UNDER THE TERMS OF ARTICLE 62 OF THE AFRICAN CHARTER ON HUMAN & PEOPLES RIGHTS 7, 16 (2009), http://www.achpr.org/english/state_reports/Periodic%20Report_Tunisia.pdf; Maureen Cosgrove, *Tunisia Constitutional Council Announces Interim President, New Elections*, JURIST, Jan. 15, 2011, <http://jurist.law.pitt.edu/paperchase/2011/01/tunisia-constitutional-council-announces-interim-president-new-elections.php>.

⁹⁶ سنوتال ائيروممجال اروتسد [CONSTITUTION] Dec. 29, 1955, art. 57 (Tunis.).

⁹⁷ Alaa Shahine and Caroline Alexander, *Tunisia's Mebazaa Calls for Election of Council to Write New Constitution*, BLOOMBERG, Mar. 3, 2011, <http://www.bloomberg.com/news/2011-03-03/tunisia-s-mebazaa-calls-for-election-of-council-to-write-new-constitution.html> (noting the interim President's call for the formation of a council to rewrite the Tunisian constitution); Kareem Fahim, *Tunisia Says Constitution Will Not Cite Islamic Law*, N.Y. TIMES, Mar. 26, 2012, <http://www.nytimes.com/2012/03/27/world/africa/tunisia-says-constitution-will-not-cite-islamic-law.html> (stating that the "drafting committee will preserve language in Tunisia's current constitution that refers to Islam as the state's religion and Arabic as its language" but will "not mention Islamic law as a source of legislation").

⁹⁸ Thomas Fuller, *Next Question for Tunisia: The Role of Islam in Politics*, N.Y. TIMES, Feb. 20, 2011, <http://www.nytimes.com/2011/02/21/world/africa/21tunisia.html>.

⁹⁹ *Id.*

Turkey. Even after the European Court ruled on behalf of the hijab ban in *Leyla Şahin*, the ban remains controversial, and recent government efforts to repeal the ban have led to more litigation on the matter. The role of the judiciary in Turkey, coupled with constitutional provisions protecting secularism in the country, continues to divide the state and raises questions of human rights protection.

A. *Rights and Religion Under the Turkish Constitution*

Turkey's Constitution, amended and ratified in 1982, enshrines and protects the concept of secularism at the expense of certain human rights that could frustrate the viability of secularism in the state.¹⁰⁰ Any restrictions on fundamental rights, however, must conform to Turkey's democratic society and the "principle of proportionality."¹⁰¹ The Constitutional Court has clarified this language and suggested that a "reasonable relation" must exist between the ends and means.¹⁰² Reasonableness is judged by balancing the practicality of the restriction, how urgent it is, and whether the state can impose the restriction in moderation.¹⁰³ Contrasting Tunisia's constitutional provision recognizing Islam, Turkey is a secular state. The Constitution protects secularism through Article 2, which declares that the state is secular, and Article 4, which prohibits amendments or amendment proposals that might undermine the secular nature of the state.¹⁰⁴ The prohibition on amendments to the provisions protecting secularism does not prohibit the government from first amending Article 4 or from ignoring Article 4 in the event that there is a strong desire and ability to amend the Constitution, but it does indicate how important the concept of secularism is in the state.¹⁰⁵ The prohibition also highlights the static nature of Turkey's Constitution, and the prohibition on amendments undermining the secular state does not allow

¹⁰⁰ TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, pmb. (Turk.) (stating that activities not protected under the constitution include those "contrary to . . . Turkish historical and moral values or . . . modernism of Atatürk and that, as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics").

¹⁰¹ Judgment of Oct. 18 2007, E: 2007/81, K: 2007/81, Anayasa Mahkemesi [Constitutional Court] (Turk.), available at <http://www.anayasa.gov.tr/index.php?lang=en&id=148> (citing TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 13 (Turk.)).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, arts. 2, 4 (Turk.).

¹⁰⁵ Mehmet Cengiz Uzun, *The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education*, 28 PENN ST. INT'L L. REV. 383, 400 (2010) (noting the potential to amend Article 4, but suggesting that this format "affords to the principle of laicism a *de facto* functional hierarchy over most other provisions") (*emphasis added*).

the Constitution to change with shifting social, political and cultural demands.¹⁰⁶

Furthermore, under Article 10, the Constitution guarantees the equality of men and women, and it mandates that the state take affirmative steps to ensure this equality.¹⁰⁷ The state recognizes certain inalienable rights under Article 12, and these rights are expanded upon in chapter 2 to include, among other rights, the right to privacy, religion, opinion and association.¹⁰⁸ However, in addition to the state's ability to restrict rights undermining the secular nature of the state, Article 14 prohibits individuals from intentionally exercising their rights with the goal of "endangering the existence of the . . . secular order."¹⁰⁹ This is an odd provision. It simultaneously recognizes inherent human rights and effectively limits individuals from using those freedoms based on their intent.

Article 24 ensures religious freedoms, but it limits the scope of those freedoms. First, "acts of worship" are permitted as long as they do not endanger the secular nature of the state under Article 14, and individuals may not exploit religion to further personal or political influence.¹¹⁰ Furthermore, under Article 136, the state supervises all religious education.¹¹¹ Generally speaking, under Article 42, all children have the right to an education, but the right to education is limited because citizens must remain loyal to the Constitution, and education must align with "the principles and reforms of Atatürk . . ."¹¹² Therefore, the combination of Articles 24, 42 and 136 could either support secularism by ensuring that students receive a neutral perspective on religion, or undermine secularism by comingling religious and state affairs.

B. *History of the Hijab*

Turkey's move towards becoming a secular state began in the 1920's as an effort by the administration to promote modernization in the newly forming state; secularism was later enshrined in the 1937 Constitution.¹¹³

¹⁰⁶ See Judgment of June 5 2008, E: 2008/16, K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turk.) (translated by Naz Yucel and Vedia Biton) (Sait Adali, J., dissenting) (suggesting the Constitution should adapt as society changes).

¹⁰⁷ TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 10 (Turk.) ("The State shall have the obligation to ensure that this equality [between men and women] exists in practice.").

¹⁰⁸ *Id.* art. 12.

¹⁰⁹ *Id.* art. 14.

¹¹⁰ *Id.* art. 24.

¹¹¹ *Id.* art. 136 (mandating that the Department of Religious Affairs act "in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity").

¹¹² *Id.* art. 42.

¹¹³ Nurhan Süral, *Islamic Outfits in the Workplace in Turkey, A Muslim Majority Country*, 30 COMP. LAB. L. & POL'Y J. 569, 570-72 (2009); Uzun, *supra* note 105, at 392.

The first President of Turkey, Mustafa Kemal Atatürk, promoted secularism until his death in 1946, which was a substantial change from the religious Ottoman Empire that previously controlled the area.¹¹⁴ Turkey's laicism promotes "[s]tate neutrality towards all religions," but, specifically, judicial authorities in Turkey understand that the concept precludes state recognition of any elements of Islamic Shari'ah law.¹¹⁵ The efforts by the government and the Council of Higher Education to remove the veil from classrooms spanned from the late 1960's through the early 1980's when the ratified Constitution of 1982 established a strong foundation to prohibit women from wearing veils.¹¹⁶ Later legislatures responded to the attack on veiling. From 1989 to 1991, the legislature introduced legislation to permit religious clothing in classrooms, but the Constitutional Court put an end to those efforts by stating that the legislation did not conform to the principles of the Constitution.¹¹⁷

The debate surrounding the headscarf was publicly revived in 1999 when Merve Kavakçı, a newly elected Parliamentarian, wore her veil to her swearing in ceremony.¹¹⁸ She was forced to leave the chamber.¹¹⁹ The Turkish Parliament and President continued to lead the way in attempts to reform the prohibition against the hijab. In 2007, Abdullah Gul, whose wife wears a hijab, beat a secular candidate for the presidency, which worried the military because the military is the traditional guardian of the secular status quo.¹²⁰ The military was concerned by the apparent radicalization of the ruling Islamist party.¹²¹ The fear of radicalization is not groundless. Some worry about the ties between Turkish leaders and the leaders of Iran, a pariah state, who are viewed as radical by much of the West.¹²²

This shift away from secular leadership led to the creation of Law 5735, passed by the Turkish legislature, which had the effect of permitting stu-

¹¹⁴ Rachel Rebouche, *The Substance of Substantive Equality: Gender Equality and Turkey's Headscarf Debate*, 24 AM. U. INT'L L. REV. 711, 714-15 (2009).

¹¹⁵ Uzun, *supra* note 105, at 395, 411 (discussing the 1998 Turkish Constitutional Court's ruling requiring the Welfare Party to dissolve because it undermined the secular nature of the state).

¹¹⁶ *Id.* at 406-08.

¹¹⁷ *Id.* at 407-10.

¹¹⁸ Süral, *supra* note 113, at 584-85.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 577-78.

¹²¹ *Id.*

¹²² John R. Thomson, *A Troubling Anti-West Tilt Persists; Islamist Pressure Undermines its Moderate Image*, THE WASH. TIMES, Mar. 3, 2010, at B3 (describing the ties between President Gul and Prime Minister Erdogan of Turkey, and President Mahmoud Ahmadinejad of Iran who is known for his statements and positions against Western governments and culture).

dents in higher education institutions to wear religious clothing.¹²³ Specifically, the law amended Article 10 of the Constitution, which ensures equality before the law, by adding that state and administrative authorities must act to preserve equality in all proceedings *and uses of public services*.¹²⁴ Furthermore, under Article 42, which ensures the right to education, Law 5735 mandates that no one can deny a student access to education unless the law explicitly permits it.¹²⁵ These two provisions had the effect of allowing women to wear the hijab in schools. Secular members of the government moved to “void the legislation,” which led to a 2008 Constitutional Court decision on Law 5735.¹²⁶

C. Constitutional Court Decision

Given this constitutional structure and the language of Law 5735, the Turkish Constitutional Court ruled in 2008 that the legislature’s attempt to lift the hijab ban was unconstitutional.¹²⁷ The Court based its ruling on five constructions of constitutional language and purpose: (1) permitting women to wear the hijab undermines “the concepts of public peace, [and] national solidarity,” (2) the hijab contradicts respect for human rights, (3) the hijab undermines the “nationalism of Atatürk,” (4) the hijab undermines the constitutional purposes expounded in the Preamble, and (5) the democratic, secular government is defined by the rule of law.¹²⁸

Turning to the issue of public order and unity, the Court focused on the oppression of women forced to wear the hijab and the power of hijab as a symbol that influences others.¹²⁹ The Court presumed that permitting public veiling will cause conflicts between those who choose to veil and those who do not, will cause conflicts between Muslims and non-Muslims, and will lead to tension and clashes.¹³⁰ The Court relied almost exclusively on the Foreign Ministry’s statement in *Leyla Şahin* that the hijab is a symbol of female oppression.¹³¹ The Court further contended that religious clothing obstructs collaboration, cooperation and affiliation because those with differing beliefs will refuse to work together.¹³² To

¹²³ Law No. 5735 of Feb. 9, 2008, Resmî Gazete [R.G.] No. 26796 (Feb. 23, 2008) (Turk.).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Judgment of June 5 2008, E: 2008/16, K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turk.).

¹²⁷ *Id.* For the purposes of this paper, I had the 2008 Constitutional Court opinion translated from Turkish to English by Naz Yucel and Vedia Biton. The translation is on file with author and the Boston University International Law Journal.

¹²⁸ Judgment of June 5 2008, E: 2008/16, K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turk.).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

demonstrate this conflict, the Court relied on the social reactions to Law 5735 when the legislature debated enacting the law and the polarization during Law 5735 discussions in the National Assembly.¹³³

However, the Court did not provide sufficient supportive facts to justify such sweeping statements. As previously discussed, while headscarves may be viewed as oppressive, when mandated by the state for example, the relationship between headscarves and oppressive religious practice is weakening.¹³⁴ Additionally, in many ways, the argument that religious clothing prevents desired interaction between people of different religions is contextual. States with a contemporary history of ethnic and religious tensions and divisive social structures may struggle with efforts to integrate different religious groups. States with a contemporary history of integrated educational environments, like Turkey, can rely less on this argument. Also, the Court failed to explain how the outward manifestation of a person's religion will fundamentally alter collaborative efforts between people, given that the person's underlying religious beliefs remain unaltered. The Court seemed to suggest that peers are willing to collaborate with their more conservative or less conservative counterparts as long as no one is wearing a veil. This suggestion relies on the faulty presumption that, absent the wearing of a veil, individuals are otherwise unaware of the religious convictions of their friends and co-workers.

Turning to the Court's reliance on the legislative discussion of Law 5735, this link is tenuous at best. While it is true that the conflict between secular proponents and opponents continues, citing social commentary and the legislative struggle as evidence of the supposed danger in lifting the ban ignores the divisive nature of most political issues and the political arena generally. Danger is not inherent in all other laws passed by the Turkish Parliament without unanimous support, and legislative debate is an element of the democratic state established in the Constitution.¹³⁵ Also, the political debate surrounding legislative enactment should not be confused with the social response to enacted legislation. Just because a proponent of the secularist state fights to keep the hijab ban does not mean that that individual will refuse to associate with women who choose to wear one after the legislative battle has ceased. Furthermore, given the military and judicial pressures to maintain a secular state, by countering the actions of elected officials, the judiciary may be inflaming the social debate and creating more divisiveness.

Second, the Court addressed the topic of human rights. The Court's primary concern was that those choosing to wear the hijab will coerce

¹³³ *Id.*

¹³⁴ *See supra*, at 533-36.

¹³⁵ TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 2 (Turk.).

others to begin wearing them too.¹³⁶ Framing this concern in terms of human rights, the Court suggested the mere possibility that individuals could “behave in an obstructing and damaging manner to each others’ freedom of belief” undermines the freedom of belief enshrined in Article 24 of the Constitution.¹³⁷ Essentially, a hypothetical imposition on the freedom of belief outweighs the realized imposition on the freedom of belief. Rather than focusing on the individuals seeking to wear the hijab, the Court framed the issue in terms of those who do not want to wear the hijab and who may feel pressured or coerced to do so if others are wearing veils.

There are several problems with this argument. Addressing the issue of religious freedom from the perspective of the non-religious or non-practicing religious is a way to maintain the values of secularism while claiming to support religious freedom. The Court’s vision presumes that Muslim women in Turkey will fall victim to the coercive nature of the hijab as a religious symbol and that those who find its presence offensive have an inherent right to not be offended. The latter presumption is absurd in a democratic society where opposing viewpoints are common. The former presumes that Turkish women will be coerced into veiling even though devout Muslims worldwide interact with other Muslims who wear the hijab and still choose not to wear them. Furthermore, the Court’s reliance on the “coercion” argument¹³⁸ undermines the notion that women are independent, free-thinking and capable of logically assessing their own morals, values and beliefs in Turkey. The idea that Muslim women in Turkey, who hold high-level government offices and have achieved great success in a wide variety of fields, need to be rescued from the pressures of the veil by its mere appearance in public life brings the Court’s position into question.

Third, the Court argued that Atatürk “nationalism has replaced the relationship of religion and cults.”¹³⁹ The Court was worried about national polarization and argued that the Turkish identity was a unifier under Atatürk nationalism. However, the Court’s fear seems baseless. The view that permitting veiling will cause a breakdown in national unity presumes that individuals cannot remain loyal both to Turkey and to their religion. While the government has restricted some public expressions of religion, this does not mean that Turkish Muslims do not practice their beliefs or hold strong religious convictions. In actuality, many Turkish

¹³⁶ Judgment of June 5, 2008, E: 2008/16, K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turk.).

¹³⁷ *Id.*; TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 24 (Turk.).

¹³⁸ Judgment of June 5, 2008, E: 2008/16, K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turk.).

¹³⁹ *Id.*

citizens already balance their loyalties to Turkey and their loyalties to their religion.

Fourth, the Court cited the Preamble and the creation of a laic state as a reason Law 5735 is unconstitutional.¹⁴⁰ In support of this argument, the Court suggested that a state founded on religion undermines equality under the law.¹⁴¹ Specifically, “republic and democracy are opposed to the [S]hari’ah system.”¹⁴² This statement implies that permitting women to wear the hijab could lead to a new form of government operating under Shari’ah law. However, the Court’s assertion lacks concrete support. Specifically, the correlation between permitting certain individual behavior and a shift in the foundational system of law in Turkey is a stretch dependent upon a slide down a very long, slippery slope.¹⁴³

Finally, the secular nature of the state plays a significant role in the Court’s reasoning. The Court argued that permitting headscarves will effectively base a public law on religious grounds.¹⁴⁴ Furthermore, the Court reasoned that Article 4 prohibits any amendments to Article 2 of the Constitution, and Law 5735 undermines Article 4 by amending Article 2, so the entire foundation of the Constitution would be in jeopardy if Law 5735 were upheld.¹⁴⁵

Given the construction of the Constitution and the Court’s historical preservation of the secularism of the state,¹⁴⁶ the Court’s view in this case fits with prior judicial rulings but fails to preserve fundamental religious freedoms. Regardless of President Gul’s personal motives for supporting less restrictive veiling laws, effectively, the legislature passed a law to repeal a restriction on religious expression.¹⁴⁷ The government did not affirmatively impose new requirements mandating a specific religious practice. In fact, the constitutional amendments under Law 5735 do not explicitly mention the hijab or religious symbols, and the text focuses on promoting equal treatment generally.¹⁴⁸ The Court views secularism as

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See Süral, *supra* note 113, at 580 (2009) (suggesting the hijab reflects individual religious belief and has nothing to do with state policy).

¹⁴⁴ *Id.*

¹⁴⁵ Judgment of June 5, 2008, E: 2008/16, K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turk.).

¹⁴⁶ Uzun, *supra* note 105, 408-10.

¹⁴⁷ Süral, *supra* note 113, at 577.

¹⁴⁸ Act No. 5735 Amending the Constitution of the Republic of Turkey (Feb.2, 2009), <http://www.anayasa.gov.tr/index.php?l=content&lang=en&id=141> (ensuring equal treatment of individuals who use “all forms of public services” and prohibiting denial of education access for any reason except reasons directly stated by law); Uzun, *supra* note 105, at 418 (suggesting the general language amendments were a response to the Court striking down previous amendments targeted at religious symbols in 1989 and 1991).

the foundation of society, and considers the hijab prohibition to be part of that secularism, but if one shifts the perceptive foundation so that the status quo promotes free religious expression without mandate or restriction, removing the ban simply restores the status quo of human rights. The Turkish Constitution acknowledges the foundational existence of fundamental rights and freedoms, like religious expression, but restricts those rights in favor of secular order.¹⁴⁹ The Court surmises that any amendments that undermine Article 4 will destroy the very foundation of the Constitution¹⁵⁰ but then fails to make a strong case that permitting individuals to wear the hijab would cause such a catastrophic outcome.

Noting the Court's weak reasoning for striking the amendments passed by the legislature, the Court's actual rationale for prohibiting the amendment remains obscure. The Court, supported by the military, has become increasingly political and takes its role as "guardians of secularism" as a mandate to strictly interpret the law in terms of secular values.¹⁵¹ This judicial activism accompanies a great deal of power to shape law and policy as long as the Court retains its legitimacy.¹⁵² The alleged radicalization of the ruling party is disconcerting for some,¹⁵³ but prohibiting women from wearing the hijab in public likely has little impact on the radicalization of political parties. To the contrary, the notion that there is a link between the two is undermined by the fact that the ban is still in place yet the feared radicalization, if it is occurring, has happened in spite of the ban.

D. *Future of the Hijab in Turkey*

The future of the ban in Turkey remains uncertain. While many regional and domestic cases upholding the ban suggest no changes are forthcoming, Turkey's interest in joining the European Union (EU) may change that. Atatürk called for secularism as a way to encourage state modernization and development, so it seems counterintuitive that Turkey may have to relax its secular behavior, as defined by the Court, in order

¹⁴⁹ See TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 14 (Turk.) (stating "none of the rights and freedoms embodied in the Constitution with aim of . . . endangering the existence of the . . . secular order") (emphasis added); Art. 24 (stating "acts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Article 14").

¹⁵⁰ Judgment of June 5, 2008, E: 2008/16, K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turk.).

¹⁵¹ Süral, *supra* note 113, at 576.

¹⁵² See Süral, *supra* note 113, at 594 (finding the elite engage in social engineering contrary to the desires of the masses, but the masses are best defined as "mild-secularists" and not Islamists).

¹⁵³ John Thomson, *A Troubling Anti-West Tilt Persists; Islamist Pressure Undermines its Moderate Image*, WASH. TIMES, Mar. 3, 2010, at B3; Süral, *supra* note 113, at 578.

to gain admission to an organization focused on economic development. In early February, 2011, the European Parliament approved an amendment to comment on the headscarf ban and suggest that Turkey improve religious freedoms.¹⁵⁴ This recommendation was met with some opposition from members who wanted to ensure that women were not being pressured into wearing the veil, and others who suggested the act was outside the scope of the EU's role. The Socialists, however, suggested that Turkey should rewrite its Constitution "in order to be in line with European standards," which suggests that Turkey's secularism may prove to be a hurdle in its effort to gain admission into the EU.¹⁵⁵ While rewriting the Constitution is an unlikely and drastic measure, Turkey may consider whether permitting more religious freedom and expressions of religion will aid its application to join the EU. Even France, the first EU member state to ban some types of veils, has expressed concern that Turkish veiling restrictions are prohibited under EU law.¹⁵⁶ Thus, if a prominent member state has concerns about how the EU will respond to its ban, a non-member state like Turkey certainly must consider the EU's position on bans if it wants to be admitted as a member.

VI. Kosovo

Compared to the young states of Turkey and Tunisia, Kosovo is a veritable infant. On February 17, 2008, Kosovo declared independence from Serbia, and, as of February 17, 2011, seventy-five members of the United Nations have formally recognized it as a state.¹⁵⁷ Although the 1995 Dayton Agreement effectively ended the Bosnian War, tensions continued in Kosovo between the Albanians, who comprise 92% of the current population, and Serbs, who comprise less than 8% of the current population.¹⁵⁸ The ethnic Albanian population resisted Yugoslav and Serb control, leading to numerous indictments of Serb and Yugoslav leaders for crimes against humanity, and the region gained the support of a peacekeeping force led by NATO. Kosovo has the support of numerous

¹⁵⁴ Selcuk Gultasli, *Headscarf Issue Once Again in European Parliament Report*, TODAY'S ZAMAN, Feb. 11, 2011, <http://www.todayszaman.com/news-235239-headscarf-issue-once-again-in-european-parliament-report.html>; Press Release, The European Parliament Foreign Affairs Committee, *Turkey's Uphill Route to the EU*, (Feb. 11, 2011), <http://www.europarl.europa.eu/news/en/pressroom/content/201102071PR13244/html/Turkey%27s-uphill-route-to-the-EU>.

¹⁵⁵ *Id.*

¹⁵⁶ *French Deputies Pass Face Veil Ban*, ALJAZEERA, July 14, 2010, <http://english.aljazeera.net/news/europe/2010/07/2010713144852665644.html>.

¹⁵⁷ *Kosovo's Cold Reality After Three Years of Independence*, BBC NEWS, Feb. 17, 2011, <http://www.bbc.co.uk/news/world-europe-12492187>.

¹⁵⁸ The World Factbook, Kosovo, *supra* note 4.

powerful nations, such as the United States, twenty-two EU states and Japan.¹⁵⁹ Turkey also recognizes it as a state.¹⁶⁰

A. *Rights and Religion under the Kosovo Constitution*

Upon declaring independence, Kosovo ratified a framework Constitution entitled the 2002 Kosovar Constitution.¹⁶¹ This Constitution remained in place from 2002 until 2008 until the state ratified the new Constitution of the Republic of Kosovo in 2008 (2008 Constitution). The 2008 Constitution ensures “equality of all individuals” and, importantly, acknowledges “full respect for internationally recognized fundamental human rights and freedoms”¹⁶² Specifically, the 2008 Constitution mandates that the state ensure equality for men and women in economic, political and social areas.¹⁶³ The 2008 Constitution also includes numerous provisions regarding religious freedom and freedom of expression. First, Article 8 establishes Kosovo as a secular state, but secular means that the state remains neutral in religious matters.¹⁶⁴ This is distinct from the Turkish Constitution, which imposes restrictions on interference of “religious feelings in state affairs and politics.”¹⁶⁵ This commitment to neutrality reveals Kosovo’s general policy of noninterference in religious affairs, whereas Turkey’s policy allows for affirmative attempts to remove all aspects of religion from state governance, debate and public life. Furthermore, Kosovo also strives to protect cultural and religious heritage under the 2008 Constitution, which demonstrates the extent to which the state values its religious tradition.¹⁶⁶

Like Tunisia and Turkey, Kosovo ensures both religious freedom and the freedom to manifest one’s religion, which the state can only restrict to protect safety, order, health or the rights of others.¹⁶⁷ These freedoms affect education because public schools must allow equal education opportunities to all students given their “specific abilities and needs.”¹⁶⁸ Students with specific religious beliefs may require special accommodation so they can manifest or observe those beliefs. Due to the tumultuous history of the region and its ethnic-based tensions, the 2008 Constitution has a unique chapter of rights and principles focused on ethnic and relig-

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ KORNIZE KUSHTETUESE PER VETEQUEVERISJE TE PERKOHSHME NE KOSOVE [FRAMEWORK CONSTITUTION], May 15, 2001, art. 4.4 (c), (f) (Kos.).

¹⁶² CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 3.

¹⁶³ *Id.* art. 7.

¹⁶⁴ *Id.* art. 8.

¹⁶⁵ TÜRKÁYE CUMHURİYETİ ANAYASAI [CONSTITUTION] Nov. 7, 1982, pmb1. (Turk.).

¹⁶⁶ *Id.* art. 9.

¹⁶⁷ *Id.* art. 38.

¹⁶⁸ *Id.* art. 47.

ious communities. This includes permitting communities to develop and express communal identity, and to display communal symbols, as long as the rights of others are not violated and the acts do not violate the law.¹⁶⁹

In addition to the constitutional provisions addressing religious freedom, Kosovo also has a law specific to religious freedom: the 2006 Religious Freedom Law. This law recognizes a tradition of religious life in Kosovo that incorporates multiple religions and requires that the state promote “mutual understanding, tolerance and awareness” between groups.¹⁷⁰ The differences between the 2002 Kosovar Constitution, the 2006 Religious Freedom Law and the 2008 Constitution of the Republic of Kosovo are significant to the hijab issue. The 2002 Constitution permitted communities to display religious symbols and protected individuals from requirements that they declare religious affiliation, but the 2006 Law did not include either of these provisions.¹⁷¹ The absence of these provisions created a legal inconsistency.¹⁷² Perhaps suggesting the importance of these two provisions, the 2008 Constitution reiterates both.

B. District Court Decision

In late 2009, Kosovo’s Ministry of Education prohibited high school students from wearing religious clothing, including the hijab.¹⁷³ The Ministry of Education’s decree occurred after the state Ombudsperson recommended that any restrictions on veiling should apply only to teachers and administrators.¹⁷⁴ The Education Minister cited the state’s secularism as support for the prohibition.¹⁷⁵

Seventeen-year-old Arjeta Halimi challenged this ban with the assistance of CLARD Kosovo, a legal aid NGO, and the office of the Ombudsman.¹⁷⁶ The District Court of Gijlan/Gnjilane ruled that the veil

¹⁶⁹ CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, arts. 57, 59.

¹⁷⁰ Law on Freedom of Religion in Kosovo, Law No. 02/L-31, UNMIK/REG/2006/48 (August 24, 2006).

¹⁷¹ *Id.*; KORNIZE KUSHTETUESE PER VETEQUEVERISJE TE PERKOHSHME NE KOSOVE [CONSTITUTIONAL FRAMEWORK FOR PROVISIONAL SELF-GOVERNMENT IN KOSOVO], May 15, 2001, art. 4.4 (c), (f).

¹⁷² Kyle Woods, *Religious Freedom in Kosovo: Prenatal Care to a New Nation*, 2008 BYU L. REV. 1009, 1023-24 (2008).

¹⁷³ Fatos Bytyci, *Headscarf Ban Upsets Devout Muslims in Kosovo*, REUTERS (June 24, 2010, 7:42 PM), <http://in.reuters.com/Article/2010/06/24/idINIndia-49612120100624>; U.S. DEP’T OF STATE, REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: KOSOVO (2009).

¹⁷⁴ U.S. DEP’T OF STATE, *supra* note 173; Armand Shkullaku, *Scarves, a Rash Decision*, EXPRESS-KOSOVO, June 25, 2010 (citing Article 4 of the Student Code of Conduct, which prohibits religious uniforms).

¹⁷⁵ Bytyci, *supra* note 173.

¹⁷⁶ *Conference with Ombudsperson*, CLARD Kosovo (Mar.17, 2010) http://www.clardkosovo.org/index.php?option=com_content&view=Article&id=111%3Aconference-with-ombudsperson&catid=1%3Alatest-news&lang=en.

was permissible and cited a child's right to both education and religious freedom.¹⁷⁷ Rather than re-admitting Halimi to school, however, the local authorities and the Ministry of Education required her to take her exams at home if she elected to take them.¹⁷⁸ The Minister suggested that the state would not change its mind regarding the hijab prohibition unless the Constitutional Court (Court) considered the issue and ruled otherwise.¹⁷⁹

The unique facts of Halimi's case may have affected the District Court's ruling in this case. First, Halimi is a student, so the Court may not have thought that Halimi's choice to wear the hijab imposed on the rights of her fellow students because she does not have any responsibility to the Ministry of Education or other state agencies defined by the "secular" nature of the state. Second, the outcome of Halimi's case suggests that the District Court of Gijlan's definition of "secularism" does not preclude public displays of religious observance, unlike in Turkey. Kosovo is very young state, and the judiciary and legislature have yet to fully define what "secularism" means for Kosovo.¹⁸⁰ CLARD suggested that Halimi faced discrimination partially due to the lack of "consolidation of the rule of law in the Republic of Kosovo."¹⁸¹ As Kosovo develops, stronger legal and legislative institutions will likely develop to address human rights claims. For example, the Constitutional Court could address the issue to potentially solve the inconsistency in application of the ban throughout the country, but such an appeal may not reach the Constitutional Court in the near future. Kosovo adopted the "secular" Constitutional provision, in part, as a way to address the ethnic tensions between the Albanian population of Kosovo, which is predominately Muslim, and the Serbs, who are predominately Orthodox Christian and Catholic.¹⁸² Promoting religious tolerance and respect between the ethnic groups in Kosovo, the Constitution specifies that the state will remain neutral with regards to

¹⁷⁷ Ismet Hajdari, *Student's Headscarf Sparks Debate on Kosovo Identity*, AGENCE FRANCE PRESSE (May 18, 2010, 12:00 AM) <http://www.france24.com/en/20100517-students-headscarf-sparks-debate-over-kosovo-identity>.

¹⁷⁸ *Id.*

¹⁷⁹ Bytyci, *supra* note 173.

¹⁸⁰ *Conference with Ombudsperson*, CLARD Kosovo (Mar. 17, 2010) http://www.clardkosovo.org/index.php?option=com_content&view=Article&id=111%3Aconference-with-ombudsperson&catid=1%3Alatest-news&lang=en.

¹⁸¹ *Id.*

¹⁸² Fatmir Sejdiu, Former President of the Republic of Kosovo, Address to the Universal Peace Federation International Leadership Conference (Feb. 3, 2011) (addressing the secularism of Kosovo; Dr. Sejdiu stated that "unfortunately in the last war in Kosovo and in other parts of former Yugoslavia, exponents of the Serbian Orthodox Church have been found as warmongers and supporters of war . . . The independent Kosovo, with the approval of the highest state acts, adopted even the international arrangements for the preservation of cultural and religious minorities . . .").

religion.¹⁸³ Yet, if neutrality means neither opposing nor supporting a specific religious view, permitting individual students to express their religious identity does not equate to the comingling of church or mosque and state.

Third, Halimi's choice to wear the hijab appeared to be free from any parental pressure because she repeatedly said the hijab was part of her identity, and because none of her younger sisters wore veils.¹⁸⁴ The Deputy Foreign Minister of Kosovo suggested that the government ban was partially based upon the "truth" that the hijab is a symbol of female submission.¹⁸⁵ While it is true that most parents and guardians play a role in their child's religious socialization and a child's expression of that faith, Halimi's personal choice to wear the hijab is inconsistent with characterizing her as a victim of religious oppression, unless the state is suggesting her own interpretation of Islam has subsequently oppressed her.

C. *Future of the Hijab in Kosovo*

Due to Kosovo's youth and the possibility that it will one day join the European Union, some suggest the hijab ban is an effort by the government to "westernize" the state.¹⁸⁶ This supposition is surprising given that the European Parliament has once again suggested Turkey reconsider the ban as it contemplates whether to admit Turkey into the EU.¹⁸⁷ "Westernization" may suggest the existence of democratic values, but the concept of "westernization" in Turkey is different. Some argue Turkey has pursued secularism because it strives for "westernization."¹⁸⁸ Without context, the term means very little. If "westernization" means Kosovo desires to have its population dress more like citizens of the United States, for example, then the term makes some sense because, proportionally, there are far fewer Muslims residing in the United States.

¹⁸³ CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 8.

¹⁸⁴ Hajdari, *supra* note 177.

¹⁸⁵ Mark Lowen, *Headscarf Ban Sparks Debate Over Kosovo's Identity*, BBC, Aug. 23, 2010, <http://www.bbc.co.uk/news/world-europe-11065911>.

¹⁸⁶ *Id.*

¹⁸⁷ Selcuk Gultasli, *Headscarf Issue Once Again in European Parliament Report*, TODAY'S ZAMAN, Feb. 11, 2011, <http://www.todayszaman.com/news-235239-headscarf-issue-once-again-in-european-parliament-report.html>; Press Release, The European Parliament Foreign Affairs Committee, *Turkey's Uphill Route to the EU*, (Feb. 11, 2011), <http://www.europarl.europa.eu/news/en/pressroom/content/201102071PR13244/html/Turkey%27s-uphill-route-to-the-EU>.

¹⁸⁸ See Aliah Abdo, Note, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 505 (2008); see also Mustapha Kamal Pasha, *Predatory Globalization and Democracy in the Islamic World*, 581 ANNALS AM. ACAD. POL. & SOC. SCI. 121, 124 (2002) (noting that scholarship suggests Islam and democracy are not compatible, which, in turn, implies that only "westernization" can create a stable democratic society).

However, given that most western states, including the United States, do not prohibit citizens from wearing the hijab, it makes little sense to suggest that abridging the right of religious expression will bring Turkey or Kosovo more in line with western states.¹⁸⁹

Furthermore, the Constitutional Court of Turkey argued laicism is fundamental in Turkish history because it promotes scientific thinking and knowledge, which helps fulfill Atatürk's goal of modernization.¹⁹⁰ As a new state, growth and development are important for Kosovo. However, there is little indication that permitting religious expression will stunt economic development in Kosovo or Turkey. For example, Leyla Şahin was a medical student when she challenged the ban, and an individual's outward expression of a religious belief reflects a belief already held, so it's difficult to see how the religious manifestation itself will discourage scientific thought. Leyla Şahin would probably have continued pursuing a medical degree, likely to the betterment of society, even if the state permitted her to wear the hijab in class. In fact, a woman who cannot wear her veil in class might chose to forego educational opportunities, which could, in turn, deprive society of human capital and expertise. Therefore, the modernization theory is not convincing. Muslim leaders may challenge the ban before the European Court of Human Rights, but, presumably, they will first have to exhaust domestic resources like the Constitutional Court.

VII. IMPLICATIONS

Following general international law, which acknowledges a basic human right to religious belief, Tunisia, Turkey and Kosovo incorporated elements of religious freedom into their Constitutions. However, the three states treat religious expression through veiling in varying ways. While Turkish courts continue to find the hijab ban permissible under the secularist Constitution, courts in Tunisia and Kosovo have ruled similar bans unconstitutional because the ban undermines individual rights to religious belief and expression. The ban is difficult to justify when examining the issue from the perspective of individual human rights. The notion that women who wear the hijab are oppressed or coerced carries more weight in states where political pressures demand that women veil themselves, than it does in most other states where women are not required to wear the hijab.¹⁹¹ The concept of oppression must be based

¹⁸⁹ Some scholars have suggested the United States may soon prohibit the wearing of the hijab, but both the sporadic incidents involving the hijab nationwide and the lack of any such legislative proposals suggest otherwise. See Abdo, *supra* note 188, at 506.

¹⁹⁰ Anayasa Mahkemesi [Constitutional Court] June 5, 2008, E: 2008/16, K: 2008/116 (Turk.).

¹⁹¹ Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*,

on more than parental socialization, peer pressure and media-driven sensationalism, or similar prohibitions could exist for all manifestations of religion, conscience and belief. From a purely historical perspective, none of the three examined countries has such oppressive regimes or practices that suggest the state will begin forcing women to wear the hijab.¹⁹² Somewhere between absolute public prohibition and absolute public compulsion, there lies a realm of free choice where Muslim women should be able to manifest their religious belief.¹⁹³

Without the notion of female inequality or oppression to rely on, states prohibiting the hijab must argue that permitting women to wear the veil seriously threatens either the state or social order. If a state can show that the veil threatens the state, it can restrict veiling under an “escape clause.” Alternatively, the state must argue that the right to wear the veil is outweighed by the impact on the religious rights of others.

In both Tunisia and Turkey, the underlying power struggle of the government leaders who enforce veiling bans cannot qualify as a serious threat to the state or social order. In Tunisia, although Ben Ali’s government cited human rights as a reason for imposing hijab restrictions, the ban really helped to insulate his regime from the political pressures of religious-based groups. When members of the international community formed conventions on human rights, it is unlikely that they envisioned a document that would insulate a leader’s rule from regime turnover or prevent legitimate democratic institutions from responding to the shifting political and social demands of its citizens, to the extent that those demands do not infringe on basic human rights. In fact, Ben Ali’s suppression of basic rights likely contributed to the subsequent destabilization of Tunisia. In Turkey, the military and Constitutional Court have

45 COLUM. J. TRANSNAT’L L. 367, 396 (2007) (suggesting the importance of taking a contextual approach when discussing the hijab, and of determining the impact, potential coercion, motivation, and alternatives of allowing or prohibiting the hijab in a specific location); Arnold S. Rosenberg, *Motivational Law*, 56 CLEV. ST. L. REV. 111, 151 (2008) (noting how the hijab may be a symbol of religious belief in Turkey, but that the hijab may be a symbol of political allegiance in Iran).

¹⁹² While some have expressed fears that Tunisia could become an extremist Islamic state under the new regime, recent reports indicate that the ruling party will not seek to include Islamic law in the new Constitution, which makes veiling requirements less likely – although not outside the realm of possibility. See Kareem Fahim, *Tunisia Says Constitution Will Not Cite Islamic Law*, N.Y. TIMES, Mar. 26, 2012, <http://www.nytimes.com/2012/03/27/world/africa/tunisia-says-constitution-will-not-cite-islamic-law.html> (stating that the “drafting committee will preserve language in Tunisia’s current constitution that refers to Islam as the state’s religion and Arabic as its language” but will “not mention Islamic law as a source of legislation”).

¹⁹³ See Anouar Majid, *The Politics of Feminism*, in GENDER, POLITICS & ISLAM 70 (Therese Saliba, Carolyn Allen & Judith Howard eds., 2002) (suggesting “women’s conditions are determined not by the clothes they wear, but by the degree to which they manage to forge an identity for themselves”).

substantial control over the development of legislation and political participation through their “protectorate of the Constitution” status. The Court and military likely desire to maintain their power, and the unusual nature of the Turkish Constitution, with its prohibition on amendments affecting the secular nature of the state, created an inflexible system protecting the Court’s privileged position. Furthermore, if Kosovo is a secular state, the courts and government have yet to define that secularism, so there is even less reason to suggest that permitting veiling will undermine social order or stability of the “secular” state.

In all three states, the permissibility of the ban depends upon the balance of two elements of religious freedom: the right to hold a religious belief and manifest that belief, and the right to be free from the imposition of another’s religious beliefs. Even if lifting the hijab ban would lead a majority of Muslim women to begin wearing the hijab, there is little to suggest this action would subsequently force other Muslim women, now in the minority, to wear the hijab. In Tunisia, for example, fundamental reinterpretations of the Qur’an have led to the liberalization of numerous laws affecting women, and little suggests those who accept this reinterpretation will suddenly be compelled to adopt a more conservative reading.¹⁹⁴ Furthermore, the imposition argument presupposes that the hijab has some inherent coercive power. The “inherent coercion” supposition relies on the notion that the hijab has a universally understood meaning as a symbol. Given the differing reasons women choose to wear the veil, that supposition lacks merit.¹⁹⁵ As individuals do not have the right to live free from offense, the presence of the hijab in a classroom, for example, is not sufficient reason to prohibit someone from manifesting their religious belief. Without clear evidence that the presence of the hijab in public will impede the religious rights of others, states should defer to protecting individual rights of religious expression rather than suppressing those rights on the theory that some individuals may feel coerced by that expression.

¹⁹⁴ Charrad, *supra* note 74, at 1518.

¹⁹⁵ WINTER, *supra* note 59, at 44-45 (stating that women may choose to wear the veil as an embrace of feminist ideals); Masood, *supra* note 59, at 224 (finding that “women demanding the right to cover their heads” do so as an expression of “free will to dress as they pleas[e]”); *see also supra*, at 533-36.