

GENDER AND RELIGIOUS DRESS AT THE EUROPEAN COURT OF HUMAN RIGHTS: A COMPARISON OF *ŞAHİN V. TURKEY* AND *ARSLAN V. TURKEY*

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INTRODUCTION

The regulation of religious dress in public spaces, long a fraught question in Europe, has come to the fore with startling force in the past decade. In 2010, the French Parliament approved a law banning any veils that cover the face (the so-called “burqa ban”) by a vote of 246 in favor and 1 opposed with 100 abstentions.¹ In 2011, Belgium banned the wearing of the full-face veil.² Bans on veils or other face coverings have been proposed, with varying degrees of success, in Germany, Austria, the Netherlands, Italy, Spain, Britain, Turkey, Denmark, Russia, Switzerland, and Bulgaria.³ For Council of Europe member states—which includes all the countries of Western Europe, Russia, Turkey, and most former Soviet republics—these national laws are subject to challenge in the European Court of Human Rights (the Court).⁴ Since 2005, the Court has several times considered whether certain restrictions on religious dress were consistent with the freedom of religion protected by Article 9 of the European Convention of Human Rights (the Convention).⁵

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1. Loi 2010-1192 du 11 octobre 2010 d’interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of 11 October 2010 on Prohibiting Concealment of the Face in Public Spaces], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18,344.

2. CODE PÉNAL/STRAFWETBOEK [C.PÉN./SW.] art. 563(b) (Belg.). Covering the face in such a way as to not be identifiable can be punished by a fine of up to €200 or seven days’ imprisonment. The law was upheld by the European Court of Human Rights in 2017. *See Belcacemi et Oussar c. Belgique*, App. No. 37798/13, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-175141> [<https://perma.cc/N6KQ-58QC>].

3. *The Islamic Veil Across Europe*, BBC NEWS (May 31, 2018), <https://www.bbc.com/news/world-europe-13038095> [<https://perma.cc/BEM9-GS8W>].

4. *See* EUROPEAN HUMAN RIGHTS LAW: TEXTS AND MATERIALS 70–71 (Mark W. Janis, Richard S. Kay & Anthony W. Bradley eds., 3d ed. 2008).

5. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention]. The most common restrictions on religious dress taken up by the Court involve restrictions on the Muslim headscarf. *See, e.g., Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447; *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R.

This paper examines two recent decisions of the European Court concerning the regulation of religious dress in Turkey: the 2005 case *Şahin v. Turkey*,⁶ in which the Court upheld a restriction against women wearing a headscarf while attending lectures at a public university, and the 2010 case *Arslan v. Turkey*,⁷ in which the Court struck down the convictions of 127 men, members of the Muslim sect *Tarikat Aczmendi*, for wearing religious dress while parading en masse in the streets of Ankara. Reading these decisions together reveals puzzling inconsistencies in the Court's approach to restrictions on religious dress in Turkey. The Court is willing to endorse onerous restrictions on women's clothing absent evidence that such restrictions are necessary to protect public order, while it is hesitant to endorse such restrictions on men's dress, despite strong evidence that the men's dress is an outward display of politically subversive ambition.⁸ Curiously, the Court characterizes this differential treatment as necessary to promote gender equality and freedom: a woman's choice to wear religious clothing must be interpreted as a symbol of patriarchal domination while a man's decision to wear religious clothing may be interpreted as an exercise of religious freedom. I argue that this assertion masks two troubling differences in the treatment of male and female applicants: first, the Court ignores women's own stated intentions in wearing religious clothing while accepting those of men; and second, that the Court accepts without question Turkey's claim that a woman in religious dress threatens public safety, yet ignores substantial evidence that male members of a politically subversive group wearing religious dress do the same. I conclude that the Court's account of gender equality is at best confused, and at worst reinforces the oppression of women.

173; *S.A.S. v. France*, 2014-III Eur. Ct. H.R. 341; *Belcacemi et Oussar*, Eur. Ct. H.R. (2017). The Court has also considered restrictions on visible religious jewelry, *see Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. 215, 218-19 (finding that restrictions on wearing visible Christian crosses at work constituted a violation of Article 9 for one applicant who worked behind the counter for British Airways, but not for a second applicant who worked as a nurse), and requirements that persons be bareheaded in identity photographs, *see Singh v. France*, App. No.24479/0, Eur. Ct. H.R. (2008) (finding that a requirement that persons appear bareheaded in identity photographs for use on driving licenses did not impermissibly infringe on the rights of a Sikh man).

6. *See Şahin*, 2005-XI Eur. Ct. H.R. 173.

7. *Arslan v. Turkey*, App. No. 41135/98, Eur. Ct. H.R. (2009), <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22%22AFFAIRE%20AHMET%20ARSLAN%20c.%20TURQUIE%22%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22001-94065%22%5D%7D> [<https://perma.cc/DZA9-DQVE>]. All translations from the original French are my own.

8. In a recent decision involving Belgium, the Court adopted a slightly more nuanced approach, upholding for the first time the right of a Muslim woman to wear a headscarf in a public forum. *Lachiri v. Belgium*, App. No. 3413/09, Eur. Ct. H.R. (2018), <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Lachiri%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22001-186245%22%5D%7D> [<https://perma.cc/QA9A-CMTF>]. The decision is carefully circumscribed, however, notably declining to consider whether the ban could have been upheld on the grounds of maintaining the neutrality of the public arena. *Id.* § 46.

The Essay proceeds as follows: Section I discusses the Court and its protection of religious freedom. Section II briefly characterizes the Turkish understanding of *laik*, focusing on how this understanding influences the state's approach to restrictions on religious dress. Section III takes up the two cases under discussion, *Şahin* and *Arslan*, paying particular attention to the Court's analysis of both the applicants' intent and the state's evidence—or lack thereof—that the clothing in question threatened public order. Finally, Section IV concludes that the different treatment the Court extends to men and women in cases involving restrictions on religious dress reveals serious deficiencies in the Court's understanding of the value of gender equality.

I. ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Established in 1950 by the European Convention on Human Rights, the European Court of Human Rights is a supra-national court that provides legal recourse of last resort.⁹ Article 9 protects freedom of thought, conscience, and religion:

9(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.¹⁰

This protection, however, is subject to certain limitations:

9(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.¹¹

As a manifestation of religion, religious dress may be subject to limitation, provided that three conditions are met: (1) the limitation must be prescribed by law; (2) it must pursue a legitimate aim; and (3) it must be necessary in a democratic society.¹² Taking each condition in turn, the first, prescribed by law, guards against arbitrary limitations on the manifestation of religion, requiring that any such laws be accessible and foreseeable in its effects.¹³ Second, a law restricting manifestations of thought, conscience, or belief must have a legitimate aim, which, under Article 9(2), means that the restriction must be adopted in the interest of public safety, the protection of public health and morals, or the protection of the rights and freedoms of

9. See EUROPEAN HUMAN RIGHTS LAW, *supra* note 4, at 74–75.

10. Convention, *supra* note 5.

11. *Id.*

12. *Id.*

13. See JEAN-FRANÇOIS RENUCCI, ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION 45 (2005) (“The law must therefore be formulated with sufficient precision to enable the individual to regulate his conduct—if need be with appropriate advice.”).

others.¹⁴ Finally, the limitation must be necessary in a democratic society. The Court has fleshed out this last rather vague requirement, identifying pluralism, tolerance, and broadmindedness as traits necessary in a democratic society.¹⁵

In both *Şahin*¹⁶ and *Arslan*,¹⁷ Turkey argued that the limitations are prescribed by law, were adopted in the interest of protecting public safety and public order, and are necessary in a democratic society. Before turning to the Court's decisions in the two cases, however, it is first necessary to briefly describe the principle of *laik* in Turkey.

II. LAİK

Though *laik* is translated as secularism in English, it is a distinct concept. Before elaborating what *laik* is, it is important to establish what it is not: *laik* is not analogous to the notion of secularism that developed in the nineteenth century in the United Kingdom and Germany. There, "secularism" had relatively modest goals, seeking not to exclude religious actors or religious arguments from politics entirely, but rather only to eliminate the most egregious form of religious interference in politics.¹⁸ By contrast, the Turkish notion of *laik* is much closer to the French concept of *laïcité*. As elaborated in the French 1905 Law of Separation,¹⁹ *laïcité* draws a sharp, bi-directional distinction between religion and the state, implying that the radical separation of religion from politics was not only possible, but also

14. See Convention, *supra* note 5.

15. See *Handyside v. United Kingdom*, App. No. 5493/72, Eur. Ct. H.R. § 34 (1976), <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22handyside%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-57499%22%5D%7D> [<https://perma.cc/P8HC-37LY>]; see also RENUCCI, *supra* note 13, at 47. Democratic necessity is a complex principle that includes three criteria: "the need for the measure taken, the connection and proportionality between the measure and the legitimate aim cited and, lastly, the measure's consistency with the democratic spirit." *Id.*

16. See *infra* notes and 30–42 accompanying text.

17. See *infra* notes 43–52 and accompanying text.

18. The word secularism, as opposed to secularization, was introduced into the English language in the Victorian period by the British free-thinker and political activist George Holyoake. Excluded from political office because of the religious tests for office that were common at the time, the secularists were preoccupied with politics and saw their movement as much a political, as an intellectual, agitation. See EDWARD ROYLE, VICTORIAN INFIDELS: THE ORIGINS OF THE BRITISH SECULARIST MOVEMENT, 1791–1866, at 4 (1974). Several decades after Holyoake's movement took hold, reformers in Weimar Germany abolished religious tests for office. See generally PETER C. CALDWELL, POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM (1997).

19. Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat [Law of 9 December 1905 concerning the Separation of Church and State], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 12, 1905.

desirable.²⁰ Like *laïcité*, *laik* envisions a regime in which “religion is shielded from a political role.”²¹

Indeed, since its founding in 1923, the Turkish Republic has understood *laik* to be intimately intertwined with democracy.²² In 1937, *laik* was formalized as one of three constitutional principles, the other two being social equality and equality before the law.²³ These three principles are seen as foundational and mutually reinforcing: a threat to any of the three is a threat to democracy. Per the Constitutional Court, *laik* is a principle that protects the individual and his or her identity as an individual: “[*Laik*] is the principle which offers the individual the possibility to affirm his or her own personality through freedom of thought.”²⁴ By protecting freedom of thought, *laik* promotes religious freedom.²⁵ Further, because *laik* makes possible an individual identity apart from religious affiliation, manifestations of religion—which inevitably signal membership in a religious group—may conflict with *laik*. Freed from the tyranny of a religious hegemon that requires visible markers of religious affiliation, individuals can freely choose—or decline—to practice their religion.

Laik has thus been understood as requiring regulations on religious dress since the early days of the Turkish Republic, with the Dress (Regulations) Act of 3 December 1934 prohibiting imams from wearing religious clothing in the streets.²⁶ Religious dress was seen not as an individual choice, but rather as an imposition mandated by a religion “perceived and presented as a set of values that were incompatible with those of contemporary society.”²⁷ The Islamic headscarf has proven particularly controversial, with the Supreme Administrative Court writing that “[b]eyond being a mere innocent practice, wearing the headscarf is in the process of becoming the symbol of

20. See generally David Saunders, *France on the Knife-Edge of Religion: Commemorating the Centenary of the Law of 9 December 1905 on the Separation of Church and State*, in *SECULARISM, RELIGION AND MULTICULTURAL CITIZENSHIP* 56 (Geoffrey Brahm Levey & Tariq Modood, eds., 2009).

21. See Judgment of 7 March 1989, E: 1989/1, K: 1989/12, Anayasa Mahkemesi [Constitutional Court] (Turkey).

22. Article 2 of the Turkish Constitution provides that:

The Republic of Turkey is a democratic, secular and social State governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.

Türkiye Cumhuriyeti Anayasası [CONSTITUTION] Nov. 7, 1982 art. 2 (Turk.).

23. See Mustafa Erdodan, *Religious Freedom in the Turkish Constitution*, 89 *MUSLIM WORLD* 377, 378 (1999).

24. Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173, 187 (quoting the Turkey Constitutional Court’s judgment of 7 March 1989).

25. See *id.* (noting that “the distinction [*laik*] makes between politics and religious belief, renders freedom of conscience and religion effective” (quoting the Turkey Constitutional Court’s judgment of 7 March 1989)).

26. T. Jeremy Gunn, *Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights in Şahin v. Turkey*, 3 *DROITS ET RELIGIONS*, 339, 345 n.18 (2008). Dr. Gunn notes that Atatürk imposed restrictions on secular as well as religious dress in an effort to modernize and westernize Turkey, famously outlawing the fez in 1925. See *id.*

27. Şahin, 2005-XI Eur. Ct. H.R. at 187.

a vision that is contrary to the freedoms of women and the fundamental principles of the Republic.”²⁸ With this brief account of *laik* in place, I turn now to two recent cases in which the European Court considered Turkish restrictions on religious dress, *Şahin* and *Arslan*.

III. ŞAHİN V. TURKEY & ARSLAN V. TURKEY

The perceived relationship between religious dress and anti-democratic principles is at the heart of Turkey’s argument in both *Şahin* and *Arslan*. Turkey contends that the headscarf at issue in *Şahin* and the traditional dress at issue in *Arslan* communicate the wearers’ support for politically subversive and anti-democratic Islamic groups, and as such, the state has the right and the obligation to prohibit persons from publicly appearing in the garments.²⁹

A. Şahin v. Turkey

Şahin v. Turkey centers on Leyla Şahin, then a 24-year-old student in the Faculty of Medicine at Istanbul University, who was refused access to lectures and exams because she was wearing an Islamic headscarf. In accordance with a judgment of the Turkish Constitutional Court, the University had banned women from wearing the headscarf on university premises.³⁰ Şahin asserted that this policy constituted an interference with her right under Article 9(2) to manifest her religion, while the state countered that the restriction was necessary to protect public safety and order. The headscarf, the state claimed, had become a symbol of subversive political Islamic movements that sought to undermine the Republic and thereby threatened democracy itself.³¹ Regardless of whether the applicant herself meant to communicate support for such groups, by wearing the headscarf, the Court contended that she signaled such support to the university community. Indeed, the applicant maintained that she wore the headscarf purely from religious conviction, because she was raised “in a traditional family of practicing Muslims and considers it her religious duty to wear the Islamic headscarf.”³² Şahin contended that she had never sought to influence the beliefs of her fellow students by wearing the headscarf.³³ The state provided no evidence to the contrary.³⁴ In a 16 to 1 decision, the Court found

28. *Id.* (quoting the Supreme Administrative Court of Turkey).

29. *See Şahin*, 2005-XI Eur. Ct. H.R. at 187; *Arslan v. Turkey*, App. No. 41135/98, Eur. Ct. H.R. § 27 (2009), <https://hudoc.echr.coe.int/eng#{%22fulltext%22:%22AFFAIRE%20AHMET%20ARSLAN%20c.%20TURQUIE%22%22},%22documentcollectionid%22:2;%22GRANDCHAMBER%22,%22CHAMBER%22,%22itemid%22:%22001-94065%22}> [<https://perma.cc/DZA9-DQVE>].

30. *See Şahin*, 2005-XI Eur. Ct. H.R. at 187–88 (“[S]tudents had to be permitted to work and pursue their education together in a calm, tolerant and mutually supportive atmosphere without being deflected from that goal by signs of religious affiliation.”).

31. *See supra* note 28 and accompanying text.

32. *Şahin*, 2005-XI Eur. Ct. H.R. at 181.

33. *See id.* at 201.

34. *See id.* at 201–02.

in favor of the state, in effect endorsing Turkey's argument that the intentions of the wearer are not decisive.³⁵ The headscarf, the Court determined, was a political symbol whose meaning and significance were determined not by the women who wear it, but by the state.

The Court's decision was not, however, unanimous. In a careful dissent, Judge Françoise Tulkens observed that secularism is "an essential principle . . . undoubtedly necessary for the protection of the democratic system in Turkey."³⁶ Yet, said Tulkens, while the Court is fiercely protective—indeed perhaps overprotective—of an individual's right to hold certain beliefs, it is less willing to intervene to protect manifestations of religion.³⁷ The Court's refusal to consider Şahin's explicit intention in wearing the headscarf is deeply problematic: the Court ignored not only Şahin's statements that she had "no intention of calling the principle of secularism, a principle with which she agreed, into question," but also the lack of any evidence to show that she "through her attitude, conduct or acts, contravened [the] principle [of secularism]."³⁸ Turkey did not argue that the headscarf was "ostentatious or aggressive or was used to exert pressure, to provoke a reaction, to proselytize or to spread propaganda and undermined—or was liable to undermine—the convictions of others."³⁹ Further, there was no evidence that Şahin's wearing of the scarf disrupted the life of the university in any way.⁴⁰ Most troublingly, while Turkey argued that fundamentalist religious groups pressured women to wear the headscarf, both Turkey and the Court's majority failed to consider that the woman at the center of the case was an adult and a university student who "might reasonably be expected to have a heightened capacity to resist [such] pressure."⁴¹ It is difficult to see, then, how the Court's decision amounts to anything other than paternalism in violation of the principles of equality, non-discrimination, and the right to personal autonomy strictly upheld by the Court in other settings.⁴² The Court's decision is problematic not only because it represents a misapplication of the limitations clause in Article 9(2), but also because it does so at the expense of the values of gender equality to which the Court is otherwise so deeply committed. A case that came before the court five years later, also involving Turkey's efforts to prohibit religious dress, but this time the dress of men, affirms that Judge Tulkens's concerns about gender equality were well-placed. It is to that case that we now turn.

B. Arslan v. Turkey

The applicants in *Arslan* were 127 members of a small Muslim sect, *Tarikat Aczmendi*, who had gathered together from across the country in

35. *See id.* at 208.

36. *See id.* at 222 (Tulkens, J., dissenting).

37. *See id.* at 222–23.

38. *Id.* at 223.

39. *Id.* at 223–24.

40. *See id.*

41. *Id.* at 224–25.

42. *See id.* at 225.

Ankara, on October 20, 1996, for a religious ceremony at a local mosque.⁴³ The sect teaches that it is a religious duty to wear particular clothing, namely a turban, baggy trousers and black tunic, and to carry a stick.⁴⁴ Before the ceremony, the group walked en masse through the streets of Ankara wearing this distinctive dress.⁴⁵ The men were arrested by local police and charged with violating two laws regulating the wearing of religious dress.⁴⁶

The applicants wore the same distinctive dress to the preliminary hearing on January 8, 1997, despite a warning from the trial judge that the clothing would be interpreted as a sign of disrespect for the court.⁴⁷ At trial, the applicants were found guilty and were sentenced to two months in prison, commuted to a fine of \$4.⁴⁸ At the appeal before the Court, Turkey argued that their insistence on wearing their religious dress in the courtroom, even after being instructed that such behavior would be considered hostile to the state, was “characteristic of their sect, which envisioned the installation of a system of laws based on sharia as a replacement of the democratic regime and was guided not by their convictions but in order to defy justice.”⁴⁹

Regardless of the applicants’ intent, wearing distinctive clothing while in a large group and in a public space, Turkey argued, amounted to provocation, proselytism, and propaganda.⁵⁰ The limitations on the men’s religious dress was “intended to uphold secular democratic principles” and protect public order and safety.⁵¹ The applicants asserted that they did not intend to communicate a political message through their dress, declaring that their clothing was “dictated by their faith and had no political significance.”⁵²

While the Court had upheld a similar restriction in *Şahin*, here the Court found in favor of the applicants. In a majority decision penned by the same Judge Tulkens, the Court accepted the applicants’ assertion that they intended their clothing to have only religious and not political significance: “[T]he Court finds nothing in the record to show that the applicants had tried to inflict undue pressure on passersby with the *intent* of promoting their beliefs.”⁵³ Crucially, the Court emphasized the importance of the applicants’ stated intention in wearing the clothing: they claimed to have no political motivations and so the state ought not ascribe such motivations to them. If a

43. Arslan v. Turkey, App. No. 41135/98, Eur. Ct. H.R. §§ 1, 6–7 (2009), <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%5B%22AFFAIRE%20AHMET%20ARSLAN%20c.%20TURQUIE%22%2D%22%22%2C%22documentcollectionid%22%3A%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2D%22%22%2C%22itemid%22%3A%5B%222001-94065%22%5D%7D> [https://perma.cc/DZA9-DQVE].

44. *Id.* § 7.

45. *Id.*

46. *Id.* § 10. The laws in question are Act 671, the so-called “hat law” adopted on November 25, 1925, and Act 2596, which prohibited the wearing of certain religious garments in public spaces.

47. *See id.* § 11.

48. *See id.* § 14.

49. *Id.* § 27.

50. *See id.* § 29.

51. *Id.*

52. *Id.* § 15.

53. *Id.* § 50.

bystander incorrectly attributes a subversive political intention to a member of the group because of the clothes he is wearing, the group member cannot be held accountable for this error.

The Court is thus careful here to distinguish the individual members from the group and refrain from attributing to any individual group member the ideology of the group writ large. That the group holds views antithetical to the democratic and secular state, is, however, undeniable. Speaking to the major daily newspaper *Milliyet* in 1996, the leader of *Tarikat Aczmendi* asserted that:

even if the regime today does not want to go, it will have to go. If the leaders themselves do not choose *Shariat*, the people will bring it. And God forbid, there will be a lot of bloodshed then. . . . If we are forced to, we do not listen to any rules and regulations.⁵⁴

That the Court might be unaware of the subversive political intentions of the group is impossible, given that the same leader appeared as an applicant before the Court in a case decided in 2004, *Gündüz v. Turkey*.⁵⁵ Gündüz appealed to the Court concerning his 1996 conviction on charges of “incit[ing] the people to hatred and hostility on the basis of a distinction founded on religion” as a result of his appearance on a television program in which he argued that democracy was incompatible with Islam.⁵⁶ Among the documents in that case are transcripts of his statements made on the program, including: “Kemalism was born recently. It is a religion—that is, it is the name of a religion that has destroyed Islam and taken its place. Kemalism is a religion and secularism has no religion. Being a democrat also means having no religion.”⁵⁷ This statement and others are a direct indictment of secularism and democracy. Yet the Court found that Turkey’s conviction of Gündüz violated his right to free expression and ordered the state to pay the applicant €5000 in damages.⁵⁸ Though *Tarikat Aczmendi* is precisely the kind of politically subversive Islamist movement that the state invoked in *Şahin*, the Court found in favor of the group on two separate occasions.

Reading the Court’s decisions in *Şahin* and *Arslan* together raises serious questions: can these decisions be reconciled with one another and, if not, what does this tell us about the Court’s approach to limitations on religious dress?

54. Aylene Güney, *The Military, Politics, and Post-Cold War Dilemmas in Turkey*, in *POLITICAL ARMIES: THE MILITARY AND NATION BUILDING IN THE AGE OF DEMOCRACY* 162, 176 n.21 (Kees Koonings & Dirk Kruijt, eds., 2002) (quoting an interview with the leader of the *Tarikat Aczmendi* in a newspaper).

55. *Gündüz v. Turkey*, App. No. 35071/97, Eur. Ct. H.R. (2004), <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22G%C3%BCnd%C3%BCz%22%22%22documentcollectionid2%22:%5B%22GRANDCHAMBER%22%22CHAMBER%22%22%22itemid%22:%5B%22001-61522%22%22%7D%7B%22perma.cc/TH9L-JS72%22%7D%7D>.

56. *Id.* § 13.

57. *Id.* § 11.

58. *Id.* § 57.

CONCLUSION

The Court reached opposite conclusions in *Şahin* and *Arslan*, finding no violation of Article 9 in the first and a violation of Article 9 in the second. Turkey's justification for the limitation is the same in both cases: the need to protect public order and safety. While a majority of the Court accepted Turkey's argument in *Şahin* that a lone woman wearing a headscarf while attending lectures at a public university constituted a threat to public safety, even though the applicant denied any ties to radical groups or to holding any anti-secularist or anti-democratic beliefs, that same Court found that the right of men to march en masse in the distinctive dress of a politically subversive religious movement outweighed any public safety concerns. In *Arslan*, the Court distinguished *Şahin* by asserting that the former involved public spaces whereas the latter did not. I argue that this distinction is fallacious, and that the different outcomes are more likely attributable to the different standards by which the Court evaluates women's religiously significant dress.

First, the Court distinguished between the public spaces in which the religiously significant dress was worn in *Şahin* and *Arslan*: public educational institutions in the former,⁵⁹ and the public square in the latter.⁶⁰ The distinction is meaningful presumably because the state has a greater interest in enforcing its values in public schools than in public spaces more broadly.⁶¹ Indeed, in its discussion of whether the prohibition on headscarves violated Şahin's right to education under Article 2, Protocol 1 of the Convention,⁶² the Court notes that the right to education can be restricted only where the restrictions are foreseeable, pursue a legitimate aim, and are proportional with the aim to be achieved.⁶³ The Court concluded that each of these requirements was met: preserving the secular character of educational institutions is a legitimate aim, the restriction was foreseeable,⁶⁴

59. See *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173.

60. See *Arslan v. Turkey*, App. No. 41135/98, Eur. Ct. H.R. § 49 (2009), <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22%22AFFAIRE%20AHMET%20ARSLAN%20c.%20TURQUIE%22%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22001-94065%22%5D%7D> [https://perma.cc/DZA9-DQVE].

61. In accordance with the doctrine of the margin of appreciation, individual states are granted significant latitude in their regulation of schools, "although the final decision as to the observance of the Convention's requirements rests with the Court." *Şahin*, 2005-XI Eur. Ct. H.R. at 214–15.

62. Convention, *supra* note 5. "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." *Id.*

63. See *Şahin*, 2005-XI Eur. Ct. H.R. at 214–15.

64. The Court notes that it was "unrealistic" that Şahin would not have known of the restriction before matriculation, and so presumably should have decided to pursue her medical education elsewhere. *Id.* at 216. After losing the case, Şahin did indeed go elsewhere to pursue her medical education, finishing her education at the Faculty of Medicine at Vienna University in Austria. *Id.* at 214–15. Şahin has since become a member of parliament in the AKP. See *Leyla Şahin Usta*, AK PARTI, <http://www.akparti.org.tr/en/ak-kadro/central-decision-making-and-administrative-committee/leyla-sahin-usta> [https://perma.cc/34RC-SUY4] (last visited Mar. 6, 2019).

and the measure was proportionate because banning the headscarf does not interfere with students' ability to perform religious duties and the university took certain measures to "avoid having to turn away students wearing the headscarf."⁶⁵ The Court has upheld state restrictions on religious expression in public primary schools, finding that young students are impressionable and uniquely vulnerable to manipulation.⁶⁶ While such restrictions may be persuasive vis-à-vis primary schools, the argument is less convincing when the students at issue are university students pursuing medical degrees. Even if a certain degree of paternalism towards university students is accepted, doing so at the expense of a student's fundamental right is troubling.

Second, the Court's treatment of gender in the two cases raises significant questions. The state imposes—and the Court accepts—more stringent restrictions on women's dress, despite its failure to present any "tangible argument or evidence that the headscarves posed a threat to public order, to women's rights, or to the religious freedom and expression of others."⁶⁷ The Court declared in *Şahin* that limitations on the headscarf may be justified in order to promote gender equality because the headscarf was a "powerful external symbol' . . . imposed on women by a religious precept" and, as such, was "hard to reconcile with the principle of gender equality."⁶⁸ The Court declined, however, to elaborate what the principle of gender equality entails. As Judge Tulkens observed: "Wearing the headscarf is considered . . . synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say."⁶⁹ The lack of analysis is particularly surprising given the presence of a countervailing right guaranteed by the Convention. As Cindy Skach observes, the Grand Chamber's analysis of gender equality in *Şahin* is "notably thin and unsatisfying."⁷⁰ Its "conclusory reasoning is simply inadequate to address the fundamental questions here."⁷¹ Simply declaring that prohibitions on the headscarf promote gender equality should not be sufficient for limiting women's freedom of religion. Indeed, as *Arslan* demonstrates, far from promoting gender equality, by upholding the prohibition on the headscarf the Court is re-entrenching gender discrimination with its willingness to accept men's self-ascriptions of their intentions, even when there is significant evidence contradicting their claims, yet rejecting the same self-ascriptions from women. By rejecting women's

65. See *Şahin*, 2005-XI Eur. Ct. H.R. at 216. The Court asserted this rather controversial claim with no discussion.

66. See, e.g., *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447 (noting that a teacher wearing a headscarf may impact the freedom of conscience and religion of children ages four to eight).

67. Cindy Skach, *Religious Freedom—State Neutrality—Public Order—Role of International Standards in Interpreting and Implementing Constitutionally Guaranteed Rights*, 100 AM. J. INT'L L. 186, 192 (2006).

68. See *Şahin*, 2005-XI Eur. Ct. H.R. at 205.

69. *Id.* at 225 (Tulkens, J., dissenting).

70. Skach, *supra* note 67, at 192.

71. *Id.* at 193.

own statements of their intentions, the Court is effectively erasing women's agency, an erasure made even more problematic because it is done in the name of gender equality.

Further, the Court assumed that the headscarf admits of only one political interpretation: namely, support for anti-secularist, revolutionary Islamism. This univocal interpretation of the headscarf has been challenged, noting that the headscarf has become, for many women, a symbol of dissent against colonial or authoritarian regimes that outlawed the headscarf.⁷² Insisting that the religious significance of women's dress cannot be distinguished from its political significance and that such dress admits of only one interpretation, regardless of how the women wearing the clothing actually interpret their own dress, is to place an onerous burden on women seeking to wear religiously significant clothing. That this same burden is not also imposed on men's religious dress, which, to the contrary, are permitted to have multiple and nuanced meanings that are deciphered not by the state or by the Court but by the man wearing the clothes, is striking. Indeed, it is difficult to square this differential treatment with the promotion of gender equality to which the Court is apparently committed.

At the same time that the Court refuses to accept women's stated intentions for wearing religiously-significant clothing, it ascribes tremendous power to women in such clothing. According to the Court, a single woman in a headscarf during a medical school exam exerts more undue pressure on observers than does a group of more than 100 identically-dressed men, easily identifiable as members of a politically subversive group hostile to the state and to secularism, marching through the streets with sticks. Endowing women with such power, and then using that purported power as a basis for curtailing women's agency, is a familiar trope. As more and more states impose or contemplate restrictions on women's religious dress, the relationship between women's agency, gender equality, and religious dress will likely come before the Court again, and a more sustained treatment of these complex issues by the Court will be in order.

72. See Nicholas Gibson, *An Unwelcome Trend: Religious Dress and Human Rights Following Leyla Şahin vs Turkey*, 25 NETH. Q. HUM. RTS 599, 624 (2007). Gibson observes that "it is farcical to suggest that wearing the Islamic headscarf is comparable with advocating violent political upheaval." *Id.* at 530; see also JOHN R. BOWEN, *WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE* 186–87 (2007).