Birkbeck
UNIVERSITY OF LONDON

ORBIT - Online Repository of Birkbeck Institutional Theses

Enabling Open Access to Birkbeck's Research Degree output

What the veil reveals: a critique of religious and secular debate over the headscarf

https://eprints.bbk.ac.uk/id/eprint/40270/

Version: Full Version

Citation: Baldi, Giorgia (2017) What the veil reveals: a critique of religious and secular debate over the headscarf. [Thesis] (Unpublished)

© 2020 The Author(s)

All material available through ORBIT is protected by intellectual property law, including copyright law.
Any use made of the contents should comply with the relevant law.

Deposit Guide
Contact: email

What the veil reveals: a critique of religious and secular debate over the headscarf

Giorgia Baldi

School of Law,

Birkbeck, University of London

Submitted for the Degree of

Doctor of Philosophy of the University of London

February 2017

Declaration

I hereby declare that the work presented in this thesis is my own, except where explicit reference is made to the work of others.

Abstract

The debate over the female headscarf has become an arena of fervent discussion in the West as well as in Muslim majority societies and it is often framed through the lens of a 'clash of civilizations' between western/'secular' and 'religious'/traditional values. This thesis attempts to contribute critically to the recent debate and 'obsession' over the legal regulation of the *hijab* shared by westerns and Islamists. Trough anthropological, semiotic, political and legal theories, it proposes to give a different reading of the legal decisions over the practice of veiling in order to unwrap the way in which the tension between 'secular' and 'religious' is understood as an absolute polarization.

A closer analysis of recent western legal decisions over women's veiling reveals a disturbing symmetry with a positivized modern view of *Sharia* law by Islamists as binding women's bodies to a fixed, transparent and singular 'universal' identity that is, I claim, analogous to a universal-ist subjectivity of Human Rights law. Thus, the veil emerges as the metaphor of a clash between two imperialist universalist modern discourses: the secular discourse of a westernised world that is re-humanised through Human Rights and the reactive Islamist discourse. Both aim at creating a fixed and monolithic subject of law through the control of the visible (veiling/unveiling) in the public sphere. The claim of an incompatible dichotomy between liberal/secular and 'Islamic' religious values obscures this symmetry.

Moreover, I argue that this polarization is the result of a specifically Occidental (Christian/secular) semiotic understanding of religion and religious practices which is nowadays embedded in western law, but also in Islamist discourse. This dichotomy becomes a useful tool to sustain the fiction of a monolithic subject and to operate a re-configuration of religious sentiments and practices in the public sphere to benefit state sovereignty. This re-conceptualization emerges as a necessary sovereign act to preserve the unity and homogeneity of a people.

Acknowledgements

I am greatly indebted to my supervisor, Dr Marinos Diamantides. Without his encouragement and kindness, I would never have completed this thesis. His work has been a continuous source of inspiration for me and his precious philosophical insights have deeply influenced not only my research but also my understanding of life, law and politics. Marinos has been an exemplary supervisor: despite his heavy workload he has always been available to discuss and guide my work, and he has given me the independence to develop my own lines of enquiry. I cannot thank him enough for what he has done for me in the last few years: he has been a mentor, a teacher and a friend. More than that, he has taught me what it means to be a rigorous academic, showing at all times a unique and extraordinary sensitivity. It has been a great privilege for me to work with a scholar of such intellectual rigour whose academic excellence is internationally-recognised. Birkbeck law school has been greatly supportive: I would like to thank Shabna Begum for her help with teaching allocations and Dr Elena Loizidou for her kindness and genuine engagement, and for telling me everything I know about teaching. I am immensely grateful to them. And I am also grateful to Dr Anton Schütz and Dr Piyel Haldar, whose advice during my upgrade was especially valuable for my research. My sincere thanks go to my friends Shirin Shahidi, Walid Salem, George Andrews, Severino Gergolet, Nicoletta Lambrtucci, Daniele D'Alvia and Marisa Fassi who gave me support and encouragement, and to Silvana Der Kureghian, who was with me in the darkest moments with her sparkling mind and kindness. Special thanks go to my friends Rashida al-Mughrabi and Raed Debiye for being more than a family and for helping me to understand the complex political and legal context of the Middle East. My parents, Baldi Giorgio and Cantoni Liviana, have offered their support throughout the whole project. I am grateful to my mother for her encouragement and to my father for his endless curiosity and helpful insights about Middle Eastern politics. My gratitude goes also to my sister, Cristina Baldi, whose warmth, happiness, and benevolence have made a real difference in my life. I am also grateful to all those feminists who have guided my political and intellectual life in the last twenty years and strongly supported this research project. The endless discussions I had in recent years with Cecilia Luzzi, Sandra Schiassi, and others pushed me to write about Muslim women. I am also greatly indebted to my grandmother, Gemma Regina, and to my aunt, Baldi Chiarina, for the example they gave me during their lives. This work would not have been possible without the material and emotional support and encouragement of all these people.

Table of Contents

Introduction

My research began to take shape while I was involved with women's activism in the Middle East at the beginning of the twenty-first century. It was a period of political turmoil: the 9/11 attacks, the 7/7 bomb in London, the Palestinian uprising and western wars in Iraq and Afghanistan have deeply changed East/West relations. Increasingly those changing relations have been played out around the image of women. In Iraq and Afghanistan, western wars have been justified as a struggle in the name of democratic principles and women's freedom: for years, western mass media have repeatedly broadcast images, documentaries and news of oppressed women under the shroud of a *burqa*. But women's body has also become prominent in discourses around the ways European societies deal with integration, multiculturalism and the place of religion in western, liberal, secular space. Veiled Muslim women in Europe started to be perceived as a threat to European values and a challenge to the western concept of women's freedom, to the point that many European countries felt the need to legislate over the wearing of the headscarf: as a result, the veil has been banned -from educational institutions, work places and public offices- in the name of secular values and gender equality. In 2004, France enacted a law to ban the headscarf from public schools, and in 2010 the French government banned the *burqa* from the public sphere. Belgium and Switzerland passed similar laws forbidding the wearing of the veil in schools and public offices, and the concealment of the face in public spaces.[1] At the same time, in Germany, eight *Landers* forbade the use of the veil in public institutions, while allowing the display of Christian symbols. Although in many other European countries there is no specific law banning the female headscarf, veiled Muslim women have felt their possibility of agency to be limited in the work place, in educational institutions, and even in courtrooms.

The female veil is not only an obsession for westerners: some Muslim countries have banned or rendered the veil compulsory. In Turkey, for instance, the veil was banned from public offices and educational institutions until 2013; in Iran the veil was made compulsory after the 1979 Iranian revolution. In Saudi Arabia women are obliged to

[1] 'Burka Ban for Muslims Enforced in Switzerland with Fines of as Much as £8,000' (*The Telegraph*, 2016) <http://www.telegraph.co.uk/news/2016/07/07/burka-ban-for-muslims-enforced-in-switzerland-with-fines-of-up-t/> accessed 22 October 2016.

wear the veil and in certain parts of Afghanistan controlled by the Taliban, the *burqa* has been rendered compulsory. This reveals that the power of the veil lies exactly in the symbology conferred on one item of female clothing: for some, the veil is a symbol of a backward tradition, while for others it is a symbol of modesty and Islamic values.

It is well known that ever since antiquity, the female body, with more or less clothing, has been a useful tool for establishing a specific gendered social order and, as part of the process of nation building, creating and representing the borders of an 'imagined community'.[2] But the 'modern' obsession over women's attire seems to signify something different, intertwined with a new reality which has deeply changed the relation between East and West.

The re-presentation of a fixed image of veiled Muslim women has always struck me as it has contrasted with my experience in the field, where I have seen a plurality of subjectivities and women's normative choices that escapes the singularity attached to their performative acts (such as wearing a veil). It is exactly the inexplicable obsession over Muslim women's garments, along with my experience in the field with Arab and Muslim women, that encouraged me to write about the female headscarf: I started to think that there was something more than a defence of specific societal values behind the obsession over the veil. The discrepancy between the reality that I was living and the one that was presented made me think that, rather than being a crusade to help Muslim women or to advance specific societal values, the discourse around the veil focuses on Muslim women's performativity in a particular way: as a fixed singular image, a construction that hides profound dis-similarities and unveils something about the East as well as about the West. What, then, does the discourse around the veil disclose?

This research attempts to give an answer to this question and to contribute to the recent debate over the legal regulation of the Muslim headscarf. As veiling emerges as an extremely multifaceted practice, I have developed my argument by using different approaches. Through an anthropological investigation of the plurality of uses and meanings of veiling, and a comparative political and legal study of sovereignty formation in the 'West' as well as in Muslim majority societies before and after westernization, the research aims to show that both western and Islamist modern legal thinking fail to

[2] Nira Yuval-Davis, *Gender & Nation*, (vol 24, Cambridge Univ Press, 1997).

understand and respect the plurality of performativity and normative choices expressed in the different uses of the veil. These two dis-similar legal and political systems aim at creating a singular and monolithic subject of secular and religious law through the control and juridical regulation of images and symbols in the public sphere. By attaching to the practice of veiling a fixed and unchangeable meaning, the sovereign state aim to define not only subjectivity, but also the 'proper' place of religion and religious sentiments/practices in public space. This re-conceptualization of religious practice emerges as a necessary act to maintain the unity and homogeneity of an 'imagined community'. In this regard modern Islamist 'mirror' the occidental in ways that medieval Muslims never did, I further show.

The first Chapter focuses on the analysis of veiling through different approaches: normative, cultural, praxiological and anthropological. The normative approach focuses on legal practices in a specific social/historical context, by adding a normative dimension to the analysis of the discourse: it is based on the investigation of existing juridical procedures, various legal interpretations, and subsequent lines of action; in essence, it analyses the "set of guidelines that state how things ought to be done" based on a normative theory that is "theoretically derived through a process of logical thinking".[3] As norms outline human behaviour and influence the recognition of a normative order within a society, the Chapter will include an analysis of the main legal Islamic texts in relation to the women's headscarf: as I shall argue, veiling is not compulsory in Islam; rather, it is a variant result of the historical accommodation of Islam in different cultures. For this reason, it is also essential to analyse the phenomenon using a cultural and anthropological approach. The first approach is based on the idea that culture, such as social customs, beliefs and language, frames the popular identity, way of life, and understanding of reality.[4] The second focuses on the study of human beings in relation to fluid socio-cultural and historical contexts. But the headscarf should also be understood through a praxiological approach which focuses on "how people, in their many settings, orient themselves to something they call 'Islamic law' and how they refer personal-status questions to the Islamic law model […]. [This] suggest[s] [the need to]

[3] Edmund Heery and Mike Noon, *A Dictionary of Human Resource Management* (1st ed, Oxford University Press, 2001) 238-9.

[4] Culture, however, is not a fixed "set of permanent pre-existing assumptions but something that is permanently produced, reproduced, negotiated and oriented to by members of various social settings". Baudouin Dupret, 'What Is Islamic Law? A Praxiological Answer and an Egyptian Case Study' (2007) 24 Theory, Culture & Society 79, 79–80.

focus on the methods people use locally to produce the truth and intelligibility that allow them to cooperate and interact in a more or less ordered way".[5] In essence, there is a difference between classical Islamic doctrine (from the 6th to the 12th century) and how law is administrated on a daily basis by local courts which use different methods of interpretation and different books of *Shari'a* law in deciding over a single case.[6] The first Chapter, then, aims at framing the headscarf within different and ever-changing cultural, normative, social and historical contexts.

My analysis attests not only that the donning of the veil is not compulsory in Islam (since, on this matter, Islamic legal sources are variably interpretable because Muslim scholars have not reached consensus), but also that veiling is an immanent, ever-changing, practice which acquires different meanings based on the wearer's personal intentions within pluralist non-liberal discursive traditions. Although my anthropological, legal and cultural survey of the uses of the female veil reveals a multiplicity of meanings and interpretations, I note how it is since the formation of nation-states and nationalist movements that the veil started to acquire a specific meaning and to be legally regulated by the state. But while, in western history, clothing (including the female veil) has always been regulated by a supreme authority (be it the church or the state),[7] in Muslim-majority societies, such top-down regulation of clothing did not start until the nineteenth century, with the birth of western-style nation-states. In fact, as historically the construction of nationhood passed through the definition of 'womanhood' and 'manhood', women's body became the biological, cultural and symbolic reproducer of the new nations and/or nationalist movements. Clothing, then, and the veil in particular, has been constructed through its symbolic meaning as image, metaphor, of a *specific* order of things:[8] like every image, clothing has the potential to include and exclude and to delineate gendered territorial borders of an 'imagined community'[9] as it expresses uniformity, hierarchy and regularity.[10] In this context, the

[5] *ibid,* 82.
[6] Noel J Coulson, *A History of Islamic Law* (Pbk ed, University Press, 1978); See also Dupret (n 4).
[7] Alan Hunt, *Governance of the Consuming Passions : A History of Sumptuary Law* (Macmillan Press, 1996).
[8] Peter Goodrich, 'Visive Powers: Colours, Trees and Genres of Jurisdiction' (2008) 2 Law and Humanities 213; See also Peter Goodrich, 'Signs Taken for Wonders: Community, Identity, and A History of Sumptuary Law' (1998) 23 Law & Social Inquiry 707.
[9] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991).
[10] Gary Watt, *Dress, Law and Naked Truth: A Cultural Study of Fashion and Form* (Bloomsbury Publishing Plc, 2013).

female dressed body emerged as the symbol of an imaginary static and monolithic national culture within specific territorial borders. More recently, it has also been a useful tool to create an (imaginary) 'clash of civilizations' between a 'tolerant' and 'secular' 'West' and a 'backward' and 'chauvinist' 'East'. It's exactly the reading of women's body as a symbol of an intrinsic 'clash of civilizations' that I will address in Chapter Two.

Alluding to Diamantides' approach,[11] who sees the so called 'clash of civilizations' as the progeny of similarity rather than complete difference, my argument is that the passionate debate over the *Hijab* is a fake one; the veil emerges as a visible symbol, a mirror, of a clash between two legal-political systems, 'similar and contingently dis-similar'.[12] My examination takes into consideration the medieval origins of the Islamic legal system in relation to the occidental canon legal system, along with Nancy's theory of the 'monotheist model of social organization'.[13] This framework allows the comparative analysis of two legal systems of religious origins. While the comparison reveals that in both cases the power to make law acts as a substitute for God's supreme power, only in the Occident was this fully articulated with the development of the triumphant doctrine of sovereignty. The difference concerns mostly the 'deficient sovereignty', as Diamantides calls it in another context,[14] and legal authority of pre-modern Muslim government and how this was 'corrected' by colonialism and, ironically, by Islamist nationalists. The result of this analysis is that, on the one hand, the Occident conceives of a universal, abstract, identity valid for everyone which is historically tied to Christianity and that was exported to Muslim-majority societies during the colonial period, while on the other, Islamists respond by trying to change the content but maintain -unknowingly- the same Christian/liberal/secular form of one universal law, imposed by the appropriate authority. In this connection, the current obsession with the

[11] Marinos Diamantides, 'Toward a Western-Islamic Conception of Legalism', in Peter Goodrich, Lior Barshack and Anton Schutz (eds) *Law, Text, Terror: Essays for Pierre Legendre* (Glass House Press, 2006); See also Marinos Diamantides, 'Shari'a, Faith and Critical Legal Theory'', in Marinos Diamantides and Adam Geary (eds) *Islam, Law and Identity* (Routledge, 2012); Marinos Diamantides, 'Constitutional Theory and Its Limits – Reflections on Comparative Political Theologies' (2015) 11 Law, Culture and the Humanities 109.

[12] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11), 97. In his work, Diamantides uses also the term 'structurally similar and contingently dissimilar', or 'di-similar' legal and political systems.

[13] Jean-Luc Nancy, 'Deconstruction of Monotheism' (2003) 6 Postcolonial Studies: Culture, Politics, Economy 37.

[14] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11), 95.

Muslim veil, shared by western human rights activists and Islamists, as revealed in many polemical debates, acts to hide the anxiety produced by the imposition of one way of secularized monotheism over another. This anxiety derives from the condition of incompleteness between two dogmatic (desired) legal systems and their own internal shortcoming: this, in turn, developed on both parts a mechanism of defence and attachment to their respective laws. In this context, the veil emerges as a symbol of the contest between *two versions of sovereignty*, the European imperialist and the Islamist nationalist; in fact, both the compulsory veiling promoted by contemporary power-hungry Islamist groups and the compulsory un-veiling proposed in many western and westernised countries are attempts to symbolically forge a common, fixed and monolithic (national) identity through the female national body.

Chapter Three focuses on the analysis of the so called *'hijab* cases' decided in various national European courts as well as at the European Court of Human Rights (ECHR). My analysis draws, *inter alia*, on Esmeir's work on the emergence of 'juridical humanity'.[15] Her analysis discloses how the imposition of modern positive law by British colonizers was a project of colonization which presupposed the inclusion of the human within the pale of (positive) law as an instrument of subjugation, able to eliminate the past in the name of an eternal present, and thereby to deliver humanity. As Esmeir argues, Human Rights law, a combination of positive and natural law, has replaced the legal positivism exported during the colonial period and took over its global power to deliver humanity through the inclusion of the individual within the pale of the law. Human Rights law protects a *mask*, a 'human-yet-to-become' that forever needs state law in order to be human. In this way law's power allows a double movement: 'de-humanizing' and 're-humanizing'.[16] This is shown in the analysis of the '*hijab* cases' where, in the name of women's rights, Muslim women have been forced to shed the Muslim veil in order to be re-veiled with another *mask*, first worn by the Christian/secular citizen. In this context, the juridical regulation of the practice of veiling is the *emblem* of the intrinsic contradiction of liberalism and Human Rights discourse in general and of the particular violence this contradiction entails for non-western traditions of law. These decisions reveal the paradoxes of liberal thought, which on the one hand claims a separation between the spiritual and the temporal, while on the other it legally defines the private

[15] Samera Esmeir, *Juridical Humanity: A Colonial History* (Stanford University Press, 2012), 3.
[16] Samera Esmeir, 'On Making Dehumanization Possible' (2006) Pmla- Publications of the Modern Language Association of America, 1544.

life of the individual. The result is the emergence of secular law's subject who is (in the abstract) the holder of rights and the bearer of duties and, at the same time, free and compelled. Thus, the veil cases show that the twenty century project of universal emancipation, through the combination of legal positivism and human rights, in reality works to assimilate difference into a Christian/secular understanding of law and politics and to control and forge private sentiments in the public sphere; failing to be re-born in the image of modern law's subject can literally results in the removal of the individual from the public sphere. As I show, the removal of many Muslim women from the public sphere has been made possible normatively through the distinction made by article 9 ('freedom of thought, conscience and religion') of the ECHR between faith and its manifestation. This distinction allows states great discretion in deciding which symbols should be considered 'religious'. Thus, what is at stake is the plurality of different normative choices represented in the many symbolic uses of the veil in contrast with the 'mask' of the abstractly equal legal subject. In this sense, what the analysis of the '*hijab* cases' reveals is that the forced unveiling of Muslim women works to veil them with the mask of the liberal individual. *Ipso facto*, the universality of liberal thought has precluded the possibility to imagine different forms of humanity, beyond the scope of the juridical humanity that the combination of positive and natural law enable.

The last Chapter returns to European legal decisions over the practice of veiling and attempts to give a different reading of the obsession over the female headscarf: through an anthropological analysis of Islam and Islamic performative practices, coupled with a study of images in the secular public space, I challenge the legal reasoning which understands the Muslim veil as a *symbol* 'incompatible with the principle of gender equality and with western democratic values'.[17] My discussion is informed by Mahmood's analysis of the concept of freedom and agency within non-liberal traditions,[18] Goodrich's study on clothing regulation[19], Asad's critique of the secular,[20]

[17] *Sahin v. Turkey*, Application no. 44774/98, (ECHR, 2005), *Dahlav V Switzerland*, Application no. 42393/98 (ECHR, 2001); *S.A.S v. France* Application no. 43835/11 (ECHR, 2014).

[18] Saba Mahmood, *Politics of Piety : The Islamic Revival and the Feminist Subject* (Princeton University Press, 2005).

[19] Peter Goodrich, *Oedipus Lex : Psychoanalysis, History, Law* (University of California Press, 1995); See also Goodrich, 'Signs Taken for Wonders' (n 8).

[20] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003).

and Mancini's reading of European legal decisions over the practice of veiling.[21] I point out that the definition of veiling as a 'religious' symbol not only reiterates previous attempts by nation-states to regulate women's body through dress, but it is also a desperate way of bolstering waning sovereignty in both western and Islamist states. I challenge the western category of understanding of freedom and agency through the anthropological analysis of veiling in different pluralistic non-liberal contexts, and propose a different understanding of these concepts. Mahmood's analysis of the 'piety movement' in Egypt serves to point out that it is possible to conceive an understanding of norms different from the liberal one, by assuming that different contexts produce different subjectivities. Her analysis reveals that the western/liberal concept of freedom, based on the mere formulation of choices as a measurement of freedom, is inadequate when studying non-liberal traditions, as the individual, her desires, and her choices are rendered possible only within specific discourses. By defining veiling as a symbol of Muslim women's oppression, the European court's decisions reveal the inadequacy of western universal(ist) discourse to understand women's freedom and agency within non-liberal pluralistic contexts. The price of this inadequacy, however, is paid by women whose veiled bodies are re-inscribed as a 'symbol' of a chauvinist religion and not as subjects of changing culture and contingent history.

Therefore, it is not through the analysis of women's freedom, but through the symbology conferred on the practice of veiling that the gender dimension of the problem may be unfolded. By defining veiling as a 'sign', a fixed symbol of a monolithic non-modern culture unable to absorb 'democratic' values, European courts have applied a specific western semiotic understanding of signs and symbols and, by so doing, have 'naturalized' women's desires as something 'neutral' to be defined by the state through an 'exercise of a centralized sovereign power': in fact, it is the sovereign that assumes the duty of defining which symbols are to be regarded as 'religious' and brings religious practice into the civil domain. This *exercise of sovereignty* has been rendered necessary in order to preserve the homogeneity of a people. Sadly, as Schmitt argued, even liberal, plural democracy is based on a presupposition of substantial 'homogeneity' which is artificially constructed through a fundamental distinction

[21] Susanna Mancini, 'The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism' in Susanna Mancini and Michel Rosenfeld (eds) *Constitutional Secularism in an Age of Religious Revival* (Oxford University Press, 2014).

between 'self' and 'other', and the consequent exclusion of the 'other' from the public sphere in order to maintain an artificial unity and homogeneity. As Mancini points out, this 'imaginary' enemy is today symbolized by veiled Muslim women. In fact, the fundamental dichotomy between a 'tolerant' Christian/secular thought, presented as a central value in western civilization, and a 'un-democratic' Islamic thought, presented as a threat to western democracy and human rights, deeply informs the legal reasoning over the '*hijab* cases'.[22] This contraposition is instrumental in creating the fiction of a unified community in which Christianity and post-Christianity emerge as a useful tools to strengthen social cohesion and build a unified European identity in contrast with the 'stranger', the 'other', the 'uncivilized'.

[22] Susanna Mancini, 'Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2008) 30 Cardozo L. Rev. 2629.

Chapter 1: Law, power and the Muslim female dressed body

In 2009, during the so called 'Iranian Green Revolution', I travelled from Beirut to Tehran. At that time, the political situation was particularly tense and Mahmoud Ahmadinejad's government was quite suspicious of 'western people' entering the country. As I did not want to experience any problems, and I knew about the restrictive rules applied to women, including the compulsory practice of veiling, I decided to buy a traditional headscarf which would anyway reveal my hair. At my arrival in Tehran I was relieved to see that most of the women walking in the street were wearing a loose headscarf which reveals most of the hair and covers only the back of the head: as I was wearing a 'more modest'/'more covering' *hijab*, I was sure that I would not have problems regarding my attire. Surprisingly, after few days, I discovered that I was wrong: men harassed me continually while I was walking in the city. I asked my Iranian friend why, unlike other women who wore a loose scarf revealing part of the head, I caused such reactions with my 'all-covering' *hijab*. Her answer was clear and straightforward: my *hijab* was definitely different from theirs. It was not a matter related to more or less 'covering' as 'measurement' of modesty, as implied by many Muslim scholars, but of form, shape and colour. One only needs to travel from one area to another to discover that different veiling practices within the Muslim world do not only depend on the interpretation of the *Qur'an* but also, more importantly, the meaning attributed to the practice is often related to particular geographical, historical, political, economic and cultural factors as well as to personal/psychological attitudes. This reveals that veiling, like every performative human practice, should be studied within its wider cultural, historical and political context. While recognizing the impossibility of grasping the many meanings and uses of the veil, this Chapter is an attempt to show the plurality of the practice of veiling. In doing that, I contend that the equation between veiling, modesty, shame and seclusion is a western ethnocentric point of view that denies the very plurality and differences of the practice within Arabo-Islamic culture.[23]

I will briefly introduce the practice of veiling in the Islamic religion to point out that although many people think that the veil is a phenomenon related to Islam, a more

[23] Fadwa El Guindi, *Veil : Modesty, Privacy, and Resistance* (Berg, 1999) 83.

accurate analysis of the main Islamic texts, namely the *Qur'an* and the *Hadith*, reveals that veiling is not a compulsory practice in Islam in the way baptism is in Christianity. Rather, it is a pre-Islamic custom of many societies such as the Mesopotamian, Hellenic, Byzantine, Sassanian, Persian and Greek as well as in the Christian Middle East and Mediterranean regions.[24] In fact, based on different studies, the practice of veiling was not in common use during Muhammad's life, when only his wives and women of the elite used to veil.[25] As I will argue, in the course of Islamic history, the veil has assumed different meanings and emerges as one of the most visible symbols of the accommodation of Islam with heterogeneous local cultures and traditions of the conquered population. In fact, as El-Guindi argues,

"In ordinary life people integrate a multiplicity of dimensions. Devout Muslims live according to rhythmic patterns alternating between sacred and secular space and time in daily life and throughout the life cycle. Islamic texts, far from remaining frozen in Islamic scholars' specialized teachings and writings, spread to ordinary folk through forums of collective worship and public media, and are transmitted through socialization and by oral tradition. They enter the cultural constructions that shape thinking and influence ordinary lives."[26]

In fact, as Asad points out, since Islam is a 'discursive tradition' based on the interpretation of the past for a reformulation of practices in the present, it should not be studied as a fixed or unchanged religion: veiling, like many other Islamic practices, is an ever-changing phenomenon which is lived and experienced differently by believers.[27] This multiplicity of understandings of Islam and Islamic practices has important implications for the construction of specific gender roles and implies a multiplicity of ways to practice and understand veiling.

However, the practice is not only related to different ways to live and experience Islam: the veil, like many other articles of clothing, has been a useful tool to define and express not only class, gender, caste, marital status and kinship/community belonging, but also

[24] Leila Ahmed, *Women and Gender in Islam : Historical Roots of a Modern Debate* (Yale University Press, 1992) 18–29.
[25] Fatima Mernissi, *The Veil and the Male Elite : A Feminist Interpretation of Women's Rights in Islam* (Perseus, 1991); Theodore Gabriel and Rabiha Hannan (eds), *Islam and the Veil: Theoretical and Regional Contexts* (Bloomsbury Academic, 2013).
[26] El Guindi (n 23) xv.
[27] Talal Asad, 'The Idea of an Anthropology of Islam' (2009) Qui Parle 1, 14–5.

political agency and national identity. In Tunisia, for instance, veiling can be a way to participate in community life, but it might also signify a specific community's belonging as well as a rejection of western 'corrupt' values and cultural influence. [28] On the other hand, in Turkey or Iran, the veil (along with the 'un-veil') has assumed a political meaning and has been legally regulated, while in Syria, Egypt, Palestine and other countries of the near Middle East and North Africa the use of the veil has been strictly connected to geographical/socio/economic and political circumstances. The particularity and situationality of the practice of veiling is particularly clear when thinking about the different shapes, colours and uses of the headscarf: in India, women wear the *sari* or the *burqa*, in Iran they wear the *chador*, in east Africa women wear traditional fabric wrapped around their head, while in Morocco both women and men are accustomed to wearing a head-cover.

Despite the wide plurality of meanings attributed to the practice of veiling visible in its colours, shapes and forms, many of the current debates have largely ignored the particularity and the differences of the practice within the Muslim world: consequently, the multi-meanings and variegated practice of veiling has been reduced to a politico-religious 'clash of civilizations' without taking into consideration the complexity of gender identity formation. As a result, (Muslim) women emerge as a homogeneous entity with similar thoughts and behavioural paths: this approach, as I shall argue, not only denies the heterogeneity of Muslim women's practices, but it also leads to the imaginary construction of a fixed, a-historical and monolithic 'other'.[29] It is out of the violence of western colonialism, imperialism and the newly created nation-state in Muslim majority societies, that the veil starts to assume a fixed 'political' meaning and becomes the symbol of national belonging: in fact, on the one hand, the veil was banned by British and French colonizers, while on the other, it was elevated by nationalist as well as by Islamist/nationalist movements as a symbol of anti-imperialist/anti-western struggle. Interestingly, although in Arabic culture the headscarf is worn by men and women, within newly created nation-states only the (female) veil becomes the centre of an 'ever-ending' passionate debate and comes to be legally regulated. In fact, within nationalist thought, women's body represents the nation's

[28] Mounira Charrad, 'Cultural Diversity within Islam: Veils and Laws in Tunisia', in Herbert L. Bodman, Nayyirah Tawhīdī, (eds) *Women in Muslim societies : diversity within unity* (Lynne Rienner Publishers, 1998) 67.
[29] Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 61 Feminist Review, 333–58.

honour, the 'mother of the nation', whereas the "prevention of foreign penetration of the motherland – and women's bodies as symbols of it– is at the very heart of national-state security."[30] As Yuval-Davis argues, women's body in the nation-state emerges as the biological reproducer of ethical/national/cultural group boundaries:[31] "[they are seen] as reproducer of a community's culture and tradition insomuch as women serve as placeholders for broader claims about culture, identity, and territoriality […] women might be the objects of such narratives (to be saved or repudiated) but they are seldom its subjects or agents."[32] The centrality of discourse over the veil in the colonial and post-colonial periods indicates that the practice (whether banned or imposed), has been a useful tool to strengthen national unity and to create a homogeneous law's subject through the creation of a dichotomy between the 'citizen' and the 'other'.[33] If, as Anderson argues,[34] the 'nation-state' is the result of the 'imagination' of citizens which is constructed through the repetition of symbols, mythology and narratives in the public sphere, then the regulation of women's body within nationalist thought "is obviously not a simple case of men versus women but instead a recognition of the pressure and divisions which arise from employing gender to fashion a national community in somebody's, but not everybody's imagine."[35]

The passionate debate about women's body, exemplified in the struggle over the veil, shows the power of clothes in shaping the public sphere: this is evident when studying the history of sumptuary laws,[36] promulgated in periods of socio-political change in order to 'differentiate' between 'citizens' but also to 'homologate' as a means to strengthen a sense of national identity. As I shall argue, since, historically, clothes have been conceived as images and images have the power to rhetorically construct (visible) forms of knowledge, the regulation of clothes emerges as an act of sovereignty useful to fashion not only the public sphere but also, more importantly, its subjects. In fact, it is

[30] Joanne P Sharpe, 'Gendering Nationhood' in Nancy Duncan (ed) *Bodyspace: destabilizing geographies of gender and sexuality*, (Routledge, 1996) 100.
[31] Floya Anthias and Nira Yuval-Davis (eds), *Woman-Nation-State* (Macmillan, 1989).
[32] Saba Mahmood, 'Sectarian Conflict and Family Law in Contemporary Egypt' (2012) 39 American Ethnologist 54, 56.
[33] Joanne Sharp 'Gendering Nationhood' (n 30) 97.
[34] Anderson (n 9).
[35] Cynthia Enloe, *The Morning after: Sexual Politics at the End of the Cold War* (University of California Press, 1993) 250.
[36] "Sumptuary laws are attempts to regulate any kind of consumption, especially conspicuous consumption". Kim M Phillips, 'Masculinities and the Medieval English Sumptuary Laws' (2007) 19 Gender & History 22, 23.

exactly through the fashioning of images, including clothes, in the public sphere, that a specific subjectivity obedient to a 'specific order of things' and faithful to an absolute and transcendent power comes to be constituted. The 'politic of dress', then, which, as I shall argue, is not limited to the promulgation of sumptuary law between the thirteenth and fifteenth centuries but is an integral part of European and non-European history, not only reveals a certain anxiety in relation to clothes regulation, but also, more importantly, it emerges one example of the increasing intrusion of the state in the private life of its citizens.

1.1 The veil and Islamic law

The web site 'Ummah- the Online Muslim Community'[37] offers a virtual forum of discussion for a wide Muslim community scattered in the western world. Searching the word *'hijab'* directs the reader to a page in which a 'guest' asks:

"Is the *hijab* compulsory in Islam? [...] The *Qur'an* just says to draw the clothes over the bosoms (breast/chest). This is not the hair. I just want to know what the Arabic of these words really mean. I want to know if the wives and female believers had to have the hijab on or if they were able to walk without it. I wish it was compulsory but I don't think it is."

Another 'guest' answers: 'if you want to wear it then wear it *inshallah*. don't go confusing yourself", while another, called 'beardedbrother', explains that

"you need to see what the *tafseer* [exegeses/interpretation of the *Qur'an*] is behind that *ayaah* [*Qur'anic* verse] and you need to understand that the english translation of the arabic does not do justice and that the arabic words have deeper meanings [...] you need to see what the scholars of the *sunnah* [Muslim tradition based on the study of Muhammad life and actions] say about this ayah and the *mufasireen* (scholars of *tasfeer*) […] we cant just interpret *ayaahs* from *Qur'an* to our own understanding because this would lead to great problems within the Muslim *ummah* [Muslim community], we need to understand the ayah as the Prophet and his Companions understood the ayah sis."

Uthman Ibn Affan, a member of the forum who chooses to call himself one of Muhammad's Companions, has the privilege of having the 'last word' in the forum: through the reading of few (interpretable) *Qur'anic* verses (*ayah*), and an accurate choice of specific scholars' interpretations and translations, he tries to demonstrate that the veil is compulsory for Muslim women and that it is legally required by the holy *Qur'an.* This debate does not mirror a general confusion of Muslims over God's

[37] 'Is the HIJAB Really COMPULSORY?' (*Ummah, The Online Muslim Community*) <http://www.ummah.com/forum/showthread.php?261950-Is-the-HIJAB-really-COMPULSORY> accessed 4 December 2015 *(Italics added).*

commandments; rather, it highlights the plurality intrinsic in the very structure of classical Islamic law, based on a continuous interpretation of the past for a reformulation of practices in the present. As I shall argue, the *hijab* is one issue that has assumed different meanings based on different interpretations of the sacred Islamic texts.

Before embarking on an analysis of the *hijab* within Islamic religion, it is worth briefly introducing a few key concepts concerning Islamic legal sources, which I will come back to in the next Chapter. For Muslims, the revelation is entrusted in the *Qur'an*, the holy text of Islam, which is not the outcome of a divinely-inspired human such as the Gospel for Christians, but the word of God that was received *verbatim* by the Prophet Muhammad: for this reason, it is the most important religious text and the primary religious and legal source for Muslims in every aspect of their lives. The *Qur'an,* however, gives only general exhortations, mostly of an ethical nature, and commandments on worship, fasting, pilgrimage, marriage and divorce, restrictions of polygamy, regulation of slavery, etc.[38] For this reason, as many scholars point out, as a legislative book, the *Qur'an* raises several problems: "It by no means provides a simple and straightforward code of law. On the contrary, the specific content of the laws derivable from the *Qur'an* depend greatly on the interpretation that legists chose to bring to it and the elements of its complex utterances that they chose to give weight to".[39] Another important legal source for Muslims is the *Sunna*, 'the trodden path', which is translated in the body of Islamic practices based on Muhammad's words and life. The *Sunna* is documented in the *Hadith* (the verb derives from the Arabic *haddatha*, 'to recount' or 'to tell'): a collection of testimonies and stories of the Prophet gathered by his Companions or those who followed his Companions.[40] Generations of Muslim scholars have collected *hadith* from direct or indirect testimonies: to evaluate the validity of each *hadith* those scholars have to establish the legitimacy of *Isnad*, the chain of people who transmitted the source.[41] The function of the *Hadith*, which form the *Sunna*, is to clarify and detail how a good Muslim should behave in order to follow the path of the Prophet Muhammad, who acted completely in conformity with the demands

[38] Abdullah Saeed, *Islamic Thought : An Introduction* (Routledge, 2006) 16, 17, 24.
[39] Ahmed (n 24) 88.
[40] Mernissi (n 25) 35.
[41] Fatima Mernissi, *Women and Islam : An Historical and Theological Enquiry* (Blackwell, 1991); See also John Burton, *An Introduction to the Hadīth* (Edinburgh University Press, 1994).

of the *Qur'an*.[42] In other words, for devout Muslims, "the example of the Prophet Mohammad and of the community he established is to be followed as much as possible"[43] because his actions cannot be in conflict with what is written in the sacred book, as they derive from the same source. Islamic law(s) derive from scholars' different interpretations of the *Qur'an* and *Hadith*: *Sharia* law (which, nowadays, comprises six different books of law) is divided into six categories: *wajib* (obligatory) *halal* (allowed), *haram* (forbidden), *mustahabb* (recommended), *makkruh* (discouraged) or *mubah* (permissible or indifferent). Moreover, for believers, Islam is not simply a religion but a way of life: this, as I shall argue, is in contrast with western/secular/protestant who relates religion only to conceptual meanings and, for this reason, it is seen as a 'private matter'. The way in which Muslim live and inhabit Islam should be studied by taking into consideration also performative and emotional meaning.[44] Indeed, as *Sharia* law does not cover all aspects of Muslims' lives, *Ulama* (the body of clergy) can issue *fatwa*, a (localized) "authoritative statement on a point of law."[45] The veil, as every other Islamic practice, should be understood within a wide plurality of Islamic sources and interpretations.

In Arabic, the veil is known as the *hijab*: the verb indicates the act of covering or hiding something (*yahjib* or *hajaba*) for the purpose of protection. The word is found seven times in the *Qur'an*[46] and it has different meanings such as 'barrier', 'separation', 'messenger', 'veil' and 'darkness'.[47] However, the term does not always indicate women's dress code: its various meanings, coupled with different readings of God's commands, have rendered the matter of the veil interpretable: in fact, there is not unanimous consensus about the matter of the *hijab* by local *Ulema* and Islamic legal

---

[42] Mark J Sedgwick, *Islam & Muslims: A Guide to Diverse Experience in a Modern World* (Nicholas Brealey Pub, 2006) 9.
[43] *ibid*.
[44] Roy A Rappaport, *Ritual and Religion in the Making of Humanity*, (vol 110, Cambridge University Press, 1999).
[45] Aisha Abdurrahman Bewley, *A Glossary of Islamic Terms* (Ta-Ha Publishers, 1998) 7.
[46] *Surah* 7, *Al- A'raf*, verse 46; *Surah* 17, verse 45-46; *Surah* 24, verse 30 and 31; *Surah* 38, *Sad*, verse 32; *Surah* 41, *Fussilat*, verse 5 (in this *Surah* the word *hijab* indicates a cover in the heart of the unbelievers towards Muhammad's call from Islam), *Surah* 42, *Ash-Shura*, verse 51; *Surah* 19, *Maryam*, verse 1; *Surah* 33, *Al-Ahzab*, verse 53-59. See Abdullah Yusuf Ali, *The Holy Qur'an* (Wordsworth Editions, 2000).
[47] It is worth remembering that Muslim *Sufi* have developed a different interpretation of the word *hijab*. "In Sufism, one calls *mahjub* (veiled) the person whose consciousness is determined by sensual or mental passion and who as a result does not perceive the divine light in his soul. In this usage it is man who is covered by a veil, or a curtain, and not God". Asqalani, *Isaba*, vol. 7, cited in Mernissi (n 41) 95.

scholars/experts. Analysis of the controversial verses of the *Qur'an* that mention the *hijab* reveals different interpretations which have been developed by Muslim scholars during the centuries.[48]

In the *Surah* 24, 'An Nur' verse 30 and 31, the *Qur'an* introduces the concept of *hijab* with a commandment to lower the gaze in order to protect chastity:

"30: Tell the believing men to lower their gaze and be modest. That is purer for them. Allah is aware of what they do. 31: And tell the believing women to lower their gaze and be modest, and to display of their adornment only that which is apparent, and to draw their veils over their chests, and not to reveal their adornment except to their own husbands or fathers or husbands' fathers, or their brothers or their brothers' sons or sisters' sons, or their women, or their slaves, or male attendants who lack vigor, or children who know nothing of women's nakedness. And let them not stamp their feet so as to reveal what they hide of their adornment. And turn to Allah together. Oh believers, in that you may succeed."[49]

The verse, which concerns both men and women, is an exhortation to lower the gaze and to cover the *awra* (private parts) as well as 'beauty and ornaments' (in relation to women). This *ayah* is understood differently by Muslim scholars: in fact, the word *zinah* (adornments, ornaments) can signify either *zahirah* (apparent adornment) or *batinah* (hidden adornment). Based on Imam Tabari's[50] interpretation, for instance, this verse means that a woman must cover herself in public, apart from her face and hands. Women are permitted to use make-up and jewellery since they constitute the *zinah zahirah* (apparent adornment) which are ordinarily visible in public.[51] Furthermore, as he points out, the command, 'they should draw their veils over their bosoms', means that women should cover the rest of their bodies and their hair, necks and earrings.[52] To

[48] Barbara Freyer Stowasser, *Women in the Qur'an, Traditions, and Interpretation* (Oxford University Press, 1994).
[49] Ali (n 46) *Surah* 24.
[50] Abu Ja'far Muhammad ibn Jarir al-Tabari (224 – 310 AH; 838–923 CE) was a prominent and influential Kharji scholar, historian and exegete of the *Qur'an* from Persia/Iran (Jariri school).
[51] Other authorities such as Ibn Abbas, Ata b. Abi Rabah, Sa'id b. Jubayr, Qatadah, Amir b. Shurahil, Ibn Zayd, Dahhak and Al-Awza'I quoted the same idea as al Tabari concerning the women's dress code.
[52] Al-Tabari, *Tafsir* (Dar al Kutub al-Ilmiyya Beirut, 1412/1992, vol 9) 303-7. cited in Usama Hasan, 'The Veil: Between Tradition and Reason, Culture and Context', in Theodore Gabriel and Rabiha Hannan (eds) *Islam and the Veil: Theoretical and Regional Contexts* (Bloomsbury Academic, 2013)67.

this interpretation, Qurtubi[53] adds that it is unlawful to reveal women's hidden adornments to any man except for the husband, father, sons, or to those with specific conditions, such as men who have no sexual appetite (the impotent, the insane, the slaves etc…).[54]

But it is in the *Surah* 33*, Al-Ahzab, ayah 53* that many Islamic scholars found the command of the *hijab* intended as the headscarf worn by Muslim women*:*

"53: Oh You who believe! Enter not the dwellings of the Prophet for a meal without waiting for the proper time, unless permission be granted you. But if you are invited, enter, and, when your meal is ended, then disperse. Linger not for conversation. That would cause annoyance to the Prophet, and he would be shy of (asking) you (to go); but Allah is not shy of the truth. And when you ask of them (the wives of the Prophet) anything, ask it of them from behind a curtain *(hijab).* That is purer for your hearts and for their hearts. And it is not for you to cause annoyance to the messenger of Allah nor that you should ever marry his wives after him. That in Allah's sight would be an enormity".[55]

The context of this verse is related to the wedding of Mohammad to Zainab bint Jahsh. After the wedding ceremony, three discourteous guests remained in the house: this annoyed the Prophet. The disciple Anas recounted that Muhammad recited the verse when the guests departed from the Prophet's house. As the *ayah* was pronounced during a special occasion, scholars and jurists disagree whether the verse relates just to the Prophet's wives, conferring them a special status, or to all Muslim women. For al-Tabari, the true meaning of the verse has to be found in the division of the space between two men: the Prophet and Anas, the witness of the event. The interpretation of the word *hijab* as a delimitation of space (a 'curtain' that separates the space) is supported by many other scholars[56] as "the Prophet loosened while standing on the threshold to Zainab's chamber, with one foot in the room and the other outside, in order to bar his servant Anas Ibn Malik…from entering".[57] Thus, a "relatively minor

[53] Imam Abu 'Abdullah Al-Qurtubi was a famous *muhaddith* and *faqih* scholar from Cordoba of Maliki origin. He is most famous for his commentary of the *Qur'an*, *Tafsir* al-Qurtubi.
[54] Al-Qurtubi, *al-jimi' li Akkam al-Qur'an* (Dar Ihya al-Turath al-Arabi, Beirut, 1965) cited in Usama Hasan (n 52) 67.
[55] Ali (n 46), *Surah* 33.
[56] Mernissi (n 41) 100.
[57] Ibn Sa'ad, *Nisa',*cited in Stowasser, (n 48) 90.

incident – after an evening meal some guests delay their departure longer than they should – provokes a response so fundamental as the splitting of Muslim space into two universes – the interior universe (the household) and the exterior universe (public space)".[58] For Ibn Sa'ad,[59] however, the *hijab* command was issued after Muhammad saw some men outside Zainab's house the day after the wedding, while other traditions attributed to Umar Ibn al-Khattab[60] the advice to seclude Muhammad's wives as "both the righteous and the wicked enter into your house".[61]

The *ayah* 59-60 (*Surah* 33) seems, however, to extend the command not only to the Prophet's wives, but to all Muslim women:

"59: Oh Prophet! Tell your wives and your daughters and the women of the believers to draw their cloaks close around them (when they go out). That will be better, so that they may be recognized and not annoyed. Allah is ever Forgiving, Merciful. 60: If the hypocrites, and those in whose hearts is a disease, and the alarmists in the city do not cease, We verily shall urge you on against them, then they will be your neighbours in it but a little while".[62]

This *ayah* clearly refers to women's appearance when outside the home: it is not, therefore, related to seclusion *within* the household. The verse is divided into two parts: the first is an exhortation for women to cover themselves, while the second highlights the reasons for the commandment. Traditional commentators such as al-Tabari, Qurtubi and Ibn Abbas[63] agree that this *ayah* was pronounced in order to protect Muslim women of Medina from sexual harassment. In fact, at that time, the men of Medina used to harass women walking in the street, thinking they were slaves or prostitutes: women, then, used to wear a veil in order to distinguish themselves from the slaves and as a means of protection from male harassment.[64] However, as Ibn al-Arabi argues, the *ayah* do not require excessive covering, but clothing that can be a visible sign of the

[58] Mernissi (n 41) 100.
[59] Ibn Sa'ad (784 CE- 845 CE) was a prominent Sunni scholar of the Arabian Peninsula.
[60] Umar Al-Khattab (583- 644 CE) was an influential Muslim scholars and one of the most important and powerful Muslim caliphs in Islamic history.
[61] Al-Tabari, *Tasfir*, cited in Stowasser (n 54) 90. It is worth to point out that Umar's advices on women's seclusion have found a great opposition from Muhammad's wives.
[62] Ali (n 46) *Surah* 33.
[63] Abd Allah ibn Abbas was a paternal cousin of the Islamic prophet Muhammad. He is revered by Muslims for his knowledge and was an expert in *Tafsir* (exegesis of the *Qur'an*).
[64] Ibn Arabī (1165 –1240) was an Arab Andalusian Sufi mystic and philosopher. See Hasan (n 52) 69.

difference between the 'free' and the 'slave'.[65] It can be argued, though, as some modern interpreters do, that the question of being distinguished as a free woman can be inconsistent after the abolition of slavery throughout the world.[66] As Ahmed points out,[67] the veil was a practice in use before the advent of Islam by Greeks, Roman, Jews and Assyrian women who wore it to indicate high social status:[68] based on this interpretation, it seems that Muhammad was trying to create "in non-architectural terms the forms of segregation –the gynoecium, the harem quarters – already firmly established in such neighbouring patriarchal societies as Byzantium and Iran, and perhaps he was even borrowing from those architectural and social practices."[69] Thus, it can be argued that the question of identity could have a particular significance in a world where Islam was a new emerging religion and needed to be distinguished and recognized by the whole society. In the same vein, Ibn Kathir[70] notes that one of the purposes of the verse was to distinguish the free woman from women of the era of ignorance (*jihiliyyah*) and, thus, to show her Muslim identity: as, at the time of the pronouncement of the *ayah*, living conditions in Mecca were particularly harsh due to repeated military defeats, the command seems to indicate the privileged elitist *status* of Muslim women, as confirmed in medieval *hadith*.[71] It remains, though, unclear whether the veil was prescribed only for the Prophet's wives or for all Muslim women.[72] Qurtubi, for instance, suggests that the command to cover should be extended to all women, whether free or slaves, because all their body is *awra,* private. However, he admits that some Prophet's Companions recount that the *jilbab* covered just the upper body and not a woman's whole body.[73]

More contemporary interpretations suggest that the *hijab*, and the shapes it takes, is still a matter of dispute between Islamic scholars. Sayyid Abul A 'la Maududi (1903-79), an influential Indian scholar, is one of the main 'defenders' of the *purdah* (the veil)

[65] *ibid*.
[66] Javed Ahmad Ghamidi, 'Norms of Gender Interaction', in Gabriel T and Hannan R (eds) Theoretical and Regional Contexts (Bloomsbury Academic, 2013) 119.
[67] Ahmed (n 24) 55.
[68] Suad Joseph (ed) *Encyclopedia of Women & Islamic Cultures*, (Vol. 2, Brill, 2005).
[69] Ahmed (n 24) 55.
[70] Ismail ibn Kathir (1301–1373) was a Muslim *muhaddith, faqīh, mufassir,* historian, and commentator of *Shaaf'I* school. See 'Quran Tafsir Ibn Kathir - Surah / Chapter Index Page' <http://www.qtafsir.com/index.php?option=com_content&task=view&id=3000&Itemid=731> accessed 5 January 2016; Ibn Khatir *Tafsir Ibn Kathir* (Brother Noha Publishing, 2015).
[71] Ibn Sa's, *Nisa',* cited in Stowasser (n 48) 91.
[72] Ahmed (n 24) 55.
[73] Qurtubi, cited in Usama Hasan (n 52) 68.

intended as both women's seclusion and the headscarf worn by Muslim women.[74] In contrast with many scholars, who see the practice of veiling emerging after Muhammad's death, Maududi claims that, in reality, veiling was a practice established by the Prophet as a specific Islamic norm.[75] By taking into consideration different *hadith* in which women were active in the battlefield and in the mosques, Sultan Muhammad Shah (also called Aga Khan III),[76] argues, however, that the *purdah* was not in use during the Prophet's life.[77] During a visit in Zanzibar in 1905, the *Imam* pointed out that the veil "is not for you, but [better] for you is a veil of the heart [*dhill*], have modesty [*aya*: shyness, modesty] in your heart, fill your heart with modesty all the time. You [women] should not cast your eye on other men except your husbands; do not have any thoughts for other men. If in your mind there is desire for other men, you will not gain from your prayers."[78] Although the *Imam* was considered one of the most authoritative interpreters of the sacred text by his followers, the Imami Shi'I Nizari Isma'ili community applied his reformist view differently in different geographical contexts; if, for instance, in east Africa his interpretation of the *purdah*, female marriage, and female work was perceived successfully, in Pakistan the implementation of reforms was more gradual and of a lesser degree.[79]

Other contemporary scholars analyse the *Qur'an* precepts by taking into consideration social, political and historical factors of Muhammad's age. Fatima Mernissi, for instance, argues that the concept attributed to the word *hijab* is three-dimensional, and these three dimensions often blend into one another:

"The first dimension is a visual one: to hide something from sight. In fact, the root of the verb hajaba means 'to hide'. The second dimension is spatial: to separate, to mark a border, to establish a threshold while the third dimension is ethical because it belongs to the realm of the forbidden. So we have not just tangible categories that exist in the

[74] Maulana Maududi and Ismail Sloan and Asl-Ash'ari (eds), *Purdah and the Status of Woman in Islam* (Islamic Publications, 1992).
[75] *ibid*. it is worth noting however, that Maududi discourse on *purdah* was part of a wider campaign against western corruption. See Simonetta Calderini, 'Female Seclusion and the Veil. Two Issues in Political and Social Discourse', in Theodore Gabriel and Rabiha Hannan (eds), *Islam and the Veil: Theoretical and Regional Contexts* (Bloomsbury Academic, 2013) 55.
[76] Aga Khan was the 48th *imam* of the Imami Shi'I Nizari Isma'ilis, a Muslim community settled in India, Pakistan, Syria, Lebanon and East Africa.
[77] Khursheed Kamal Aziz (ed) *Aga Khan III: Selected Speeches and Writings of Sir Sultan Muhammad Shah* (Kegan Paul International, 1998) 2111; Simonetta Calderini (n 72) 60
[78] Sultan Muhammad Shah, cited in Simonetta Calderini (n 75) 56.
[79] *ibid*.

reality of the sense- the visual, the spatial- but also an abstract reality in the realm of ideas; a space hidden by a hijab is a forbidden space."[80]

Mernissi's analysis in relation to the veil takes into consideration not only various interpretations of *Quranic* verses, but also the historical period when the Prophet pronounced them. At that time, year five of the *Hejira*, the Islamic calendar, the Prophet's armies suffered numerous military defeats; it was a particularly disastrous year from a military point of view and, consequently, a year of political stagnation. In fact, the *Surah* describes, among others issues, the siege of Medina. This epoch of doubt and political uncertainty eroded the morality and manners of Medina's population. It seems therefore that "the Prophet, during a troubled period at the beginning of Islam, pronounced a verse that was so exceptional and determining for the Muslim religion that it introduced a breach in space that can be understood to be a separation of the public from the private, or indeed the profane from the sacred, but which was to turn into a segregation of the sexes".[81] In this context, it is important to point out that many Muslim interpreters have noted that the Prophet's wives used to participate actively in the communal affairs of Medina until the revelation of the '*ayah of hijab'*. However, their gradual exclusion from the public sphere was determined by several factors: the protection of Muslim women during a period of political tension and the need for privacy of Muhammad's wives.

In fact, at that time, Medina was a crowded city, especially the Mosque, which was the centre of public affairs: the female room of the Mosque was an extension of the Prophet's wives' apartment and it seems that one of the reasons for the *hijab* revelation was the intention to give privacy to the female elite of Islam.[82] It is worth mentioning that the Arabic concept of privacy differs from that of the west as it "is based on a specific cultural construction of space and time central to the functioning of Islamic society in general […]. Space in this construction is relational, active, charged and fluid".[83] Ardener observes that space, in Muslim culture, is related to social life whereas "behaviours and space are mutually dependent":[84] thus, in Arab culture, space and time

[80] Mernissi (n 41) 93.
[81] Mernissi (n 25) 101.
[82] Stowasser (n 48) 90–2.
[83] El Guindi (n 23) 77.
[84] Shirley Ardener, *Women and Space: Ground Rules and Social Maps* (Bloomsbury Academic, 1981) 2.

are fluid concepts within which people manoeuvre their agency. As El-Guindi argues, the western idea of privacy, which is based on a binary opposition between private and public and its corollary honour/shame, has been used to create a link between space and gender which has been universalized by western feminists and translated into the polarity domestic/public life:[85] this concept, in turn, has been imposed over Muslim culture. The Arabic notion of 'privacy' should be understood "in its transformational fluid form, [which] embraces the Arab cultural construction of space that connects space to time and gender".[86]

Not only the *Qur'an*, but also the *Hadith* are considered an important legal source for Muslims. The '*hadith of Asma'* is the most commonly quoted by scholars to indicate the importance of modest clothes for Muslim women. Durayk reported that Aisha, one of the Prophet's wives, recounted that Asma, her sister, visited Muhammad wearing transparent clothes. In this occasion the Prophet lowered his gaze and pointed out that an adult woman should be covered in public. However, even Abu Dawud, the main transmitter of this fact, doubts about the authenticity of this *hadith* because Asma was known as a woman of piety and she would not introduce herself to the Prophet with transparent garments. Moreover, as Abu Dawud argues, it seems that Khalis b. Durayk, the narrator, has never met Aisha.[87]

Besides, there is a wide body of literature about the 'mothers of the believers', the Prophet's wives, in the *Hadith*: they are considered a model of piety and devotion for their role as protectors of Islamic norms and values. Hence, as Stowasser argues, their behaviour, their dress and their conduct in general must be read as a "(para)legal texts in that their intended meaning is normative, not descriptive. […] This process involved a dynamic spiral of mutual reinforcement of its two constituent components, that is, the principle of these women's righteousness on the one hand, and their function as categorical norm-setters on the other".[88] There are many *Hadith*s describing how the Prophet's wives used to hide themselves in the presence of male strangers. Aisha, for instance, used to veil even in front of the Prophet's grandchildren as well as during the prayer and the circumambulation of the *Ka'ba*.[89] Historically, however, Muhammad's

[85] El Guindi (n 23) 79.
[86] *ibid*, 81.
[87] Hasan (n 52) 70.
[88] Stowasser (n 48) 115.
[89] *ibid,* 92.

wives used to participate actively in the public life of Medina: there are *hadith* recounting how the Prophet's wives used to take care of the injured during war time, for example, or Aisha, who used to pull up her garments to carry water for Muslim warriors on the battlefield.[90]

Interestingly, in the *Hadith*, it is also possible to find many references to men's garments, especially to the male veil. Historical ethnography reveals that men, in pre-Islamic societies, were also accustomed to wear the veil: it seems that even the Prophet wore the veil on certain occasions.[91] For instance, in the *hadith* Sahih al-Bukhari 5360, the Prophet introduced himself to Abu Bakr face-veiled. In the same *hadith*, as Abu Bakr, the witness of the event, testified, Muhammad entered Aisha's room and covered his face with garments because two slaves were dancing and playing drums in front of him.[92]

This indicates that a fixed and monolithic interpretation of Islamic legal sources on the command of *hijab* does not exist. As I briefly pointed out, the *hijab* had a precise function of identity formation, especially in the emergent phase of Islamic religion within an extremely heterogenic society such as Medina. Dozens of legal schools were created throughout Islamic history and about six remain (Sunni and *Shi'a*).[93] Simplifying the complex issue of the *hijab* by reducing the interpretations to the main four Islamic legal Sunni schools, we can say that for the Saafiites and Hanbalites the entire body, including the face and hands is *awra*, while for Malikites and Hanafites the face and hands are not *awra*. During the centuries, Muslim scholars have developed a myriad of interpretations regarding the veil.[94] Nowadays, conditions for the interpretation of the *Qur'an* and *Sunna* are extremely limited compared to the first period of Islam. However, as I shall argue in the next Chapter, Islamic law remains open to interpretations and is based on 'consensus': in order for a rule to be normatively suitable there has to be a constant production of Islamic interpretations followed by the consent of the scholarly community. As the veil is one of the matters that do not find unanimous consent among Muslim scholars, it cannot be considered compulsory in Islam. It is worth noting that in

[90] Nabia Abbott, 'Women and the State on the Eve of Islam' (1941) The American Journal of Semitic Languages and Literatures 259, 273.
[91] El Guindi (n 23) 117.
[92] *ibid,* 119.
[93] Gabriel and Hannan (n 25).
[94] Stowasser (n 48) 93.

Islamic history, *Ulama* have released diverse *fatwa* in relation to the female veil which assume a 'legal value' not for the whole Muslim community, but for the local community that follows a particular scholar. In 2013, an influential Saudi Cleric, Sheikh Ahmed Bin Qassim al-Ghamdi, issued a *fatwa* on the veil: based on his interpretation, women do not need to veil and they can travel alone.[95] On the other hand another important Saudi scholar, Sheikh Abdullah Daoud, issued a *fatwa* calling for female babies to wear the *burqa* as a mean of protection from sexual harassment.[96] In Deoband-Darul-Uloom in India, an influential Islamic scholar issued a *fatwa* prohibiting women from working without the veil: the religious edict aroused various reactions from other clerics, including Maulana Khalid Rashid Firangi Mahali, a leading Sunni scholar of the area, who condemned the *fatwa* as 'unfortunate' and 'useless' since, in Islam, women and men are encouraged to be educated and to have a career.[97] *Fatwa* can be issued publicly or privately: believers are accustomed to asking precise questions of scholars or *Ulama* who then release specific religious edicts (*fatwa)*. This is the case of Aishah Azmi, a British teacher who refused to remove her *hijab* at school because she was obeying a *fatwa* issued personally to her by an Islamic cleric.[98]

In recent years, many Muslim scholars have also started to issue online *fatwas*: believers are able to ask questions related to their daily lives and a scholar, based on his personal interpretation of Islamic legal sources, will answer. Searching online *fatwas* concerning the veil, reveals variegated and differentiated interpretations of the practice. The web site 'Islamweb' has delivered a high number of *fatwas* in recent years and it is particularly used by Muslims living in western countries. When a woman, confused by different *fatwas* found in the website, asks if the *jilbab* is compulsory in Islam, the scholar answers that

---

[95] 'Freedom Fatwa? Saudi Cleric Says Women Don't Need to Veil, Can Travel Alone' (*Al Arabya News,* 2013) <http://english.alarabiya.net/articles/2013/02/27/268730.html> accessed 19 January 2016.

[96] Sara C Nelson, 'Sheikh Abdullah Daoud, Saudi Arabian Cleric Issues Fatwa Calling For Female Babies To Wear Burkas' (*The Huffington Post*, 2013). <http://www.huffingtonpost.co.uk/2013/02/04/sheikh-abdullah-daoud-saudi-arabian-cleric-fatwa-babies-burkas_n_2613803.html> accessed 19 January 2016.

[97] 'Fatwa Forbids Women to Work without Veil ' (*India Today*, 2010) <http://indiatoday.intoday.in/story/Fatwa+forbids+women+to+work+without+veil/1/97058.html > accessed 19 January 2016.

[98] Abul Taher, 'Veil Teacher Was Obeying a Fatwa (*The Sunday Times*, 2010) <http://www.thesundaytimes.co.uk/sto/news/uk_news/article164886.ece> accessed 19 January 2016.

"[Islamic law] does not enjoy a fixed style of dress that the Muslim woman must wear. Rather, there are conditions that should be met for a given clothing to be approved by the sharee'ah. The Muslim woman is not obliged to wear an outer garment if the clothes that she is wearing duly conceal her body (and meet the conditions of the Islamic hijaab) and there is no harm on her for wearing such modest clothing outdoors, even if she wears no outer garment over it. If the conditions of the Islamic hijaab are met in the skirt and the traditional Pakistani dress (salwar kameez), then there is no religious impediment for the Muslim woman to wear such clothes in public places before non-mahram (marriageable) men."[99]

In another online '*fatwa* website', a Muslim (female) university teacher asks if it is possible for her to remove the *hijab* as she experiences harassment by students. In the case, by referring to *Surah* 24 as well as to the *hadith* of Asma, a scholar answers that "it is impermissible for a woman to take off the hijab and uncover the body parts it covers before a non-mahram (a person with whom marriage is permissible) except when there is a necessity or a need that reaches the degree of a necessity".[100] However, based on the *Ulama*'s interpretation, the unpleasant circumstances experienced by a Muslim teacher in a non-Muslim country cannot be considered a 'case of necessity'. The differences among interpretations of God's commands have rendered the matter of veiling extremely heterogeneous: not only have scholars issued very different *fatwas* concerning the veil, but also, more importantly, when locating the practice within Islamic texts and exegesis, what comes out is a plurality of different interpretations which do not find consensus within the Muslim community: for this reason, it is possible to state that the veil is not compulsory in Islam and that its use and shape depends on different interpretations developed over the centuries.

[99] 'Jilbaab Is Not Obligatory If the Womans Clothes Meet the Conditions of the Hijaab' (*Islam Web,* 2016).
<http://www.islamweb.net/emainpage/index.php?page=showfatwa&Option=FatwaId&Id=308041> accessed 19 January 2016.
[100] 'Fatawa - Wearing Hijab Causes Me Work Troubles, Can I Take It Off?' (*Dar al-Ifta al Misriyyah*) <http://www.dar-alifta.org/Foreign/ViewFatwa.aspx?ID=7504> accessed 19 January 2016.

1.2 The Veil and Muslim cultures

Lithma is a "brightly coloured thin material or muslin draped around the head in such a way as to cover the hair and the forehead, while the lower part of it can be pulled down to uncover or pulled up to cover the whole face except the eyes".[101] In Yemen, this specific kind of veil is associated with the concept of femininity while among Bedouins and Berbers, it is considered as a 'sign of' masculinity and virility.[102] This plurality of meanings in relation to veiling expresses the intrinsic variety of the practice: in fact, as any other article of cloth, the veil has been a useful tool to communicate instances of gender, kinship/group belonging, social status etc.: as Rugh argues, clothes "provide a code which can decipher the complexities of social structure and the values on which they are based".[103]

In Nubian society, for instance, the veil is seen as a sign of modesty and respectability: the (ever-changing) veil worn by Nubian women is understood as a tool to communicate a woman's life's phases as well as marital status. In the case, not only does the veil, along with its different uses, emerge as a "mark [of] gender but [it also] becomes a vehicle through which adulthood is distinguished from youth and socially recognized maturation is expressed. Nubian dress, therefore, communicates both a woman's public persona and her social transition."[104] Among the Tuareg, veiling does not communicate gender difference, but it formalizes "the group status of the individual, the identity of the group and the sacredness of privacy."[105] The veil does not conceal identity; rather it is worn by men and women (men wear a 'face veil' which reveals only the eyes while women have a decorated scarf over their heads) as a symbol of maturity, honour and social class.[106] Historically, the veil has also been a useful tool to indicate an individual's social status: among the Rashayda, (female) dress serves not only to separate the individual's life into phases, but also to indicate a woman's identity, her 'reputation' and social status which is acquired through the material artistic achievements of both men

[101] Carla Makhlouf and Carla Makhlouf Obermeyer, *Changing Veils: Women and Modernisation in North Yemen* (Croom Helm, 1979) 30.
[102] El Guindi (n 23).
[103] Andrea B Rugh, *Reveal and Conceal: Dress in Contemporary Egypt* (American University in Cairo Press, 1987) 5.
[104] El Guindi (n 23) 60.
[105] *ibid,* 126.
[106] Robert F Murphy, 'Social Distance and the Veil1' (1964) 66 American Anthropologist 1257, 1257–74.

and women.[107] Similarly, in Yemen, where the practice dates back to the pre-Islamic period and a wide range of different headscarves is worn by men and women,[108] the use of different veils indicates a specific social status. Outdoors, women wear the *sitara* or the *sharshaf:* the *sitara* is "a large piece of cotton material printed in red, blue and green and covering the head and the body. To this is added a piece of black batik ornamented […] covering the face and transparent enough to let the women see through",[109] while the *sharshaf* "consists of three parts: a long pleated skirt worn over the dress and a waist-length cape covering the head and shoulders".[110] Upper-class women tend to wear the *sharshaf*, while women of lower socio-economic status wear the *sitara*, and non-Yemenis and servants do not veil: "this use of women's veiling is consistent with the use of the veil as a status symbol reported in stratified urban societies"[111] of the area. In this context, the veil emerges as "the most distinctive expression in a material form of the various grades of social life [whereas] the biological period…becomes a social period of existence and the individual is merged in a functional section of the community".[112] Among Egyptian peasants, though, the veil is worn to indicate a specific regional, socio/economic and religious identity, while in Palestine, the veil used to indicate a (pre-1948) regional/kinship belonging. Similarly, Ghanyari peasants, a community settled in the Himalayas, wear the veil to indicate kinship relationship and social restrictions;[113] "veiling distinguishes consanguinity from affinity, men from women and caste from caste […] it is a community that is highly stratified and differentiated by caste, affines versus consanguines, men versus women etc."[114] As, historically and contextually, the veil has been a useful tool to communicate and demarcate matters of gender, class and territory, it also expresses power relations within the society. El-Guindi reveals that "among the Rashayda prize money is given to the woman who dances best in public at a wedding, and it is pinned to her *milayah.* In the past in Muslim India women ritually beat their husbands with their veils. In Bahrain,

[107] William Charles Young, *The Rashaayda Bedouin: Arab Pastoralists of Eastern Sudan* (Harcourt Brace College Publishers, 1996) 45.
[108] Makhlouf and Obermeyer (n 101) 32.
[109] *Ibid,* 30–1.
[110] *Ibid*, 31.
[111] El Guindi (n 23) 105.
[112] Alfred Ernest Crawley, *Dress, Drinks, and Drums: Further Studies of Savages and Sex* (Methuen & co ltd, 1931) 117.
[113] Ursula M Sharma, 'Women and Their Affines: The Veil as a Symbol of Separation' (1978) Man 218, 218–33.
[114] El Guindi (n 23) 111.

village women attach the key to the lock of the house to their headveil or hair".[115] The many meanings and uses of the veil reveal the impossibility of fully understanding this pluralistic and ever-changing practice: "the absence of a single, monolithic term in the language(s) of the people who at present most visibly practice 'veiling' suggests significance to this diversity that cannot be captured in one term."[116] Thus, the veil is more than the interpretation of *Shari'a* law; it is a complex phenomenon that embarks on a wide analysis of ethno/cultural/local customs as well as socio/political/historical and economic factors and it comes out as the most visible symbol of the accommodation operated by Islam with different and heterogeneous populations.

With the expansion of Islam, the 'Medina Community' comes face to face with the conquered local population, especially the Byzantine and the Sassanian Empire, where the seclusion of urban upper-middle class women was a common practice.[117] After the death of the Prophet, Islamic jurisprudence was a still-developing apparatus, and the first Caliphs kept the local traditions and cultural norms of the conquered populations: judges were appointed to administrate local affairs by applying local customs based on their own understanding of the *Qur'an*. The practice of veiling, as Ahmed observes, has not been introduced by Muhammad;[118] rather, it was a custom of many pre-Islamic societies such as the Mesopotamian, Hellenic, Byzantine, Sassanian, Persian, and Greek Empires as well as in the Christian Middle East and Mediterranean regions.[119] Thus, what today is considered the 'Muslim veil' is in reality the visible symbol of the accommodation that Islam operated in its history with various heterogeneous populations. In fact, the uses, shapes and meanings of veiling have changed during the course of history and have been interconnected with several political and social factors; in pre-Islamic societies, the veil was worn by women for many reasons such as honour, protection, and to indicate a specific social status: it was "adopted by upper-class urban women who lived in great places and courts and enjoyed considerable mobility and opportunity to participate in the activities within their community. [Differently], village and rural women were slower to adopt these practices, as they interfered with their

[115] *Ibid*, 126.
[116] *Ibid*, 7.
[117] Stowasser (n 48) 115–6; El Guindi (n 23) 19–20.
[118] Ahmed (n 24) 55. It is worth to remind, however, that pre-Islamic Arabia was essentially a matriarchal/matrilineal society which was slowly becoming a patriarchal/patrilineal society at the time of Muhammad's birth: during his life, only his wives used to veil.
[119] *Ibid*, 18–29.

ability to work in the field."[120] Within the borders of the Assyrian Empire, for instance, the veil was a visible symbol of the stratified social system based on class, moral, marital status and respectability: as a matter of fact, Assyrian law stated that women of nobility had to veil in order to distinguish themselves from servants and concubines.[121] In contrast, in classical Greece, the rigid patriarchal structure of the society determined a strict division between private and public space with a consequent increase in women's seclusion practices, including veiling.

In ancient Sumer, gender roles were seen as complementary; whereas men worked on the sea, women worked on the land: this complementarity and autonomy is visible today in *Shi'a* villages in Bahrain where "each home is locked with a padlock […] [and] each woman carried the key to her house tied to her head cloth or to one of her braids".[122] In ancient Egypt, where men and women enjoyed a form of legal equality, the practice of veiling was not associated with women's seclusion; rather, the veil was worn solely to communicate geographical belonging.[123] This indicates that the practice of veiling has been adopted in Islam as a consequence of the encounter with other populations of the area where the practice was already in use: "the influx of wealth, the resultant raised status of Arabs, and Muhammad's wives being taken as models…combined to bring about […] [its] general adoption."[124] Hence, it is possible to say that "Islam selectively sanctioned customs already found among some Arabian tribal societies while prohibiting others."[125] Thus, the uses of the veil in the area, which carried different meanings, emerge as the expression of different cultures, and not as a strict symbol of women's seclusion or Islamic religion: in certain areas, the veil was used to indicate a high social status. In others, it distinguished the 'pious' women from the 'prostitute', while in the ancient Middle East, veiling indicated a specific tribal/geographical belonging.[126]

---

[120] John L Esposito, *Islam : The Straight Path* (Rev 3rd ed, updated with new epilogue, Oxford University Press, 2005) 99.
[121] Ahmed (n 24) 13, 16.
[122] Henry Harald Hansen, *Investigations in a Shi'a Village in Bahrain*, (The national museum of Denmark, 1967) 40.
[123] Ahmed (n 24) 29.
[124] *Ibid*, 55.
[125] *Ibid*, 45.
[126] *Ibid*, 26.

During the Abbasid period, when the Muslim Empire was at the apex of its expansion, women's veiling and seclusion became a common practice: their household role was important while men were abroad maintaining governmental structures in the emergent Islamic civilization. The Abbasid adopted the practice of women's seclusion from the Persian and Byzantine Empires and operated a broad Arabization and Islamization of the conquered population by reducing the myriad interpretations of Islamic law into four main (Sunni) legal schools. Thus, the texts produced during the Abbasid period mirror general assumptions of the chauvinist society of the time: the "weight Abbasid society gave to the androcentric teachings over the ethical teachings in Islam in matters concerning relations between sexes was the outcome of collective interpretative acts reflecting the mores and attitude of society".[127] Despite the Abbasid's attempt to create a united and homogeneous Muslim community, minorities such as the Sufi and Qarmatians managed to keep their own interpretation of Islamic law. Unlike many women living under Abbasid rules, Qarmantian women were not secluded and did not wear the veil: this is why, as Ahmed argues, the texts of the time portrayed those women as 'obscene' and 'degraded'.[128]

Nevertheless, Ahmed's analysis attests that from the fifteenth to the nineteenth century, during the Mamluk and Ottoman Empires, women were quite active and present in the public sphere: they inherited property, as Islam permits it, worked in many business and textile activities, though with a modest income, and studied in different *madrasas* (school). Moreover, most '*Ulama* class' women seem to have reached a high level of education: Ahmed recounts the story of Hajar (b. 1388), who was educated by her father and participated actively in scholarly discussions. She became one of the leading Muslim scholars of her time: as she did not wear the veil, many scholars chose not to attend her lessons, but she taught other influential scholars of the time such as al-Aswalani and al-Suyuti.[129] The story of Hajar, as well as of other women scholars analysed by Ahmed in her study, demonstrates that women had a continuous interaction with other male Muslim scholars and that they were taught by both sexes.[130]

---

[127] *Ibid*, 87.
[128] *Ibid*, 64–100.
[129] As Ahmed argues, al-Sakhawi, in his writings, speaks about a woman who is 'hear' from behind a 'partition'. This indicates that, probably, the term *hijab* was intended as 'partition' and not 'women's veil'. She also points out that old women did not use the veil; it might be therefore that only young women used to veil. *ibid*, 110–14.
[130] Sufi women used also to be *sheik* and to perform religious chant. *Ibid*, 116.

It is worth noting, however, that women also experienced short periods of seclusion: in 1437, for instance, the plague was spreading in the Muslim Empire. At that time, the Sultan held a meeting with judges and jurists in order to find a way to resolve the problem.[131] It was decided that the plague was God's punishment for people's sin, especially 'adultery'. If, before the plague, women used to walk outside day and night, while the disease was spreading women were secluded and forbidden to leave their houses. These kinds of extreme limitations, however, lasted for very short periods.[132] It is during the colonization period, to which I will return in this Chapter, that the veil comes to be understood (by westerners) as a symbol of universal women's oppression and seclusion and (by the colonized) as a symbol of resistance. Before that period, as I have pointed out, veiling was not necessarily associated with women's seclusion and it has taken different meanings, shapes, and colours in different geographical areas in which Islam took a foothold.

Thus, veiling, in its broader cultural context, is the result of an accommodation between conquerors and local populations. In fact, in the whole history of Islam, in the past as well as nowadays, the veil assumes very different meanings within Muslim majority societies and emerges as the most visible symbol of the accommodation between Islam and various, heterogenic, populations. Some examples can be useful to understand how the expression of Islam in society has changed with time, cross-cultural interaction, gender, ethnicity and class. Local populations have adopted Islamic rules selectively in accordance with individual or group interests and the current realities of each geographic area. As Geertz argues, the universality of Islam comes exactly from its "ability to engage a widening set of individual, even idiosyncratic, conceptions of life and yet somehow sustain and elaborate them all".[133]

The experience of women in central Asia is of particular interest when taking into consideration the complex and variegated socio-ethnic realm of the region and the strong influence of socialist regimes over religions, which developed a different assimilation of Islamic precepts.[134] The construction of gender roles in Kazakhstan

[131] Leila Ahmed (n 24) 67.
[132] *Ibid*, 110–20.
[133] Clifford Geertz, *Islam Observed : Religious Development in Morocco and Indonesia* (University of Chicago Press, 1971) 14.
[134] Nayereh Tohidi, 'Guardians of the Nation', in Herbert L Bodman and Nayyirah Tawhīdī, (eds) *Women in Muslim Societies: Diversity within Unity* (Lynne Rienner Publishers, 1998).

presents some differences from other central Asian Muslim communities due its nomadic heritage. Islam gained a foothold only in the nineteen century, and was introduced by the Tartar merchants and missionaries who started to build Islamic schools and mosques. Prior to the arrival of Islam, Kazaks believed in one or two forms of syncretic religions and considered the *shaman* their spiritual leader who was able to mediate between the spiritual and earthly realms. The nomadic lifestyle of the local population prevented the establishment of Islamic religious institutions such as schools and charities as centres of people's lives. In Kazakhstan, Islam operated a great accommodation not only with pre-syncretic religions already practiced in the area, but also with the nomadic lifestyle of the local population. Examples of this accommodation can be found in many Kazak practices: when a *Mullah* (Islamic religious leader) is not present, for instance, it is the oldest men of the community that performs his tasks; the pilgrimage to Mecca, one of the five pillars of Islam, can be replaced with five visits to the grave of Hoja Akhmed Yassawi, an important poet and Islamic mystic. As their nomadic heritage is incompatible with the practice of female seclusion, Kazak women have never embraced this practice, nor the use of the veil, and they mingle freely with men: the practice of veiling, however, has been adopted by sedentary Kazak women in recent years.[135] Thus, Kazaks simply "accepted Islamic practices that fit well with their way of life and rejected customs seen as incompatible with a nomadic lifestyle": in their daily lives, it is customary law, and not *Sharia* law, that is the accepted social regulation.[136]

Another interesting example of the accommodation of Islam with different cultures is that of Minangkabau people; an ethnic/indigenous group situated in the highlands of West Sumatra, Indonesia, and in Malaysia (which is considered one of the most Islamized areas of the region). For centuries prior to the arrival of Islam, the Minangkabau have regulated their lives based on the *adat*, a complex social system which mirrors their culture and customs.[137] Within Minangkabau society, magic and syncretic traditions are bound with Islamic traditions and the *adat* matrilineal system: the lives of the Minangkabau are thus regulated by Islamic precepts as well as by

[135] Paula A Michaels, 'Kazak Women: Living the Heritage of a Unique Past', in Herbert L Bodman and Nayyirah Tawhīdī *Women in Muslim Societies Diversity within Unity* (Lynne Rienner Publishers, 1998) 191.
[136] *Ibid.*
[137] Taufik Abdullah, 'Adat and Islam: An Examination of Conflict in Minangkabau' (1966) Indonesia 1.

cultural norms.[138] This is mirrored in their ceremonials which emerge as a mix of Islamic rituals, syncretism, animist and magic ceremonies. Ellen suggests the existence of two complementary traditions in relation to gender: "in the first, 'masculine' *adat* reflects the influences of the Shari'a and jurisdictions of the patrilineal royal family over the entire society, while 'feminine' *adat* reflects matrilineal and local customs".[139] The complementary relation between *adat* and Islam is mirrored also in a famous aphorism which states that "Minangkabau customary laws are based on the Holy Book, the Qur'an. For religious law, orders, *adat* applies. Nature is the teacher of humankind".[140] The Islamic faith of Minangkabau women strongly coexists with local ethnic traditions based on the *adat*, which derives from animist beliefs. The way in which Islam is tied to the matriarchal system is particularly interesting when taking into consideration western stereotypes of Muslim women as subjugated to a chauvinist religion; even if religious and political affairs are mainly led by men, property and land are inherited from mother to daughter. The matrilineal Minangkabau kinship system assures that children become part of the mother's family and the responsibility of the maternal uncle rather than the father. Although Muslim leaders in Minangkabau believe that women should be covered with Islamic dress except for their face and hands to save their chastity and morality, many women simply wear modest dresses because Minangkabau perception of morality is based on both *adat* and Islam. In contrast with Minangkabau women from Indonesia, those from Malaysia have assimilated Islam differently and Islamic law has supplanted the *adat*: most Minangkabau/Malaysian women wear the typical middle eastern *hijab* or a *jilbab* (a triangular fabric secured under the chin that covers the body from the head to below the shoulders) along with the traditional Muslim dress style, which comprises a loose tunic, called *sarogon*, and a filmy headscarf.[141]

Africa presents a further differentiation in the assimilation of Islamic practices: Niger/Nigeria could be a good example. In 1808, 'dan Fodio, a prominent Fulani Muslim scholar, launched a *jihad* (holy war) against the Hausa-speaking aristocracy based in

[138] Peggy Reeves Sanday, *Women at the Center: Life in a Modern Matriarchy* (Cornell University Press, 2003) 239–40.
[139] Roy F. Ellen, 'Practical Islam in South East Asia', in Michael Barry Hooker (ed), *Islam in South-East Asia* (Brill, 1983) 67.
[140] 'Encyclopedia of Women & Islamic Cultures (n 68) 234.
[141] RJ Chadwick, 'Matrilineal Inheritance and Migration in a Minangkabau Community' (1991) Indonesia 47.

Gobir,[142] which continued for almost half a century and culminated in the victory of the Fulani and the establishment of two caliphates. Before this, the region comprehended a wide and syncretic variety of Islam(s): although during the fourteenth and fifteenth centuries Islam was considered the most practiced religion in the area, few people observed the five pillars of Islam, including the pilgrimage to the Mecca. During that period, people of the area drew their practices from both Islamic and animist traditions: "the two could be reconciliated because much of the Islamic world recognizes the existence of spirits, or genies."[143] Thus, spirit cults, leaded by aristocratic urban women, continued to be performed in conjunction with Islamic practices at least until the Fulani era. In the pre-Fulani period, women fully participated in the life of the community, working in the fields side by side with men and by leading religious rituals. Only upper-class women were veiled, and seclusion was not contemplated. With the victory of Fulani, a less plural and more monolithic interpretation of Islam was introduced and established.

However, in the Maradi Valley, where many emigrated during the Fulani *jihad*, women continued to integrate Islamic precepts with their own way of life: they worked side by side with men on the farm while veiling and seclusion remained a custom of aristocratic women, as during the pre-Fulani period.[144] Yet, Nigerian women continue to use different kind of veils as a result of the accommodation of Islam with the local culture and traditions. Hausa wear the *Kallabi* (a one square metre of cloth tied to the forehead which covers only the head, sometimes partially), or the *Gyale* (a two metre cloth which covers only partially the head), while Kanuri wear the *Mandil* (similar to the *Gyale*) or the *Lefaya* (similar to the Indian *Sari,* it is wrapped around the body to cover the shoulders from the back to the front).[145] From the mid-1970s, as Mahdi observes, the trend in relation to the veil in Nigeria changed: women in institutions of higher education started to wear the *hijab,* while by the late 1980s the veil had spread to other classes of urban women. But it was only in the 1990s that the practice of women's

[142] The advent of Islam within the Hausa population is dated from at least the fifteenth century, or even prior to that. See Barbara M. Cooper, 'Gender and Religion in Hausaland: Variations in Islamic Practice in Niger and Nigeria', in Herbert L. Bodman and Nayereh Esfahlani Tawhīdī *Women in Muslim societies : diversity within unity* (Lynne Rienner Publishers, 1998) 23.
[143] *Ibid*, 25.
[144] *Ibid*, 29.
[145] Hauwa Mahdi, 'The Hijab in Nigeria, the Woman's Body and the Feminist Private/Public Discourse' (2009) Institute for the Study of Islamic Thought in Africa (ISITA) Working Paper 2–3 <http://buffett.northwestern.edu/documents/working-papers/ISITA_09-003_Mahdi.pdf> accessed 31 January 2016.

veiling in Nigeria began to challenge public schools' official uniforms: in fact, since the expansion of Islamic law at the end on the 1990s, the compulsory *hijab* has been introduced as a school uniform.[146] Based on Mahdi, the increasing uses of the veil in Nigeria can be understood as the expression of the increasing presence of women in the public space, however, it is also important to point out that "recent studies highlight gender issues in the encounter between colonial rule and the elite of the caliphate demonstrate that although a thread from the past could be discerned in the present, adorning hijab can be linked more with the politic of colonial encounter than with the heritage of the Sokoto Caliphate".[147]

These studies indicate not only that Muslim people live and experience Islam differently, but also that the veil can take on different meanings and interpretations based on historical, cultural and geographical contexts. This is attested by the many studies of the veil in recent years which take into consideration an integrated approach and locate the practice within its wider and different cultural, historical, geographical and political context.[148] The veil, as any other item of clothing, should be studied as a tool to understand social, cultural, and normative implications within a specific society: as Simmel observes in relation to clothes, "through their capacity to symbolize a social order, what is and what should be, [they] are related to social action and communication in a dynamic way."[149] Since clothes have the power to establish a 'social identity',[150] they emerge as a part of a society's normative system. As the uses and the meaning of clothes changes in different historical and cultural contexts, dressing comes out as a 'situated body practice' which embodies and incorporates fluctuating power relationships:[151] if 'dressing' is a 'situated practice', then the 'dressed body' emerges as a performance of embodied practices.[152] Likewise, veiling, as every other item of clothing, should be studied as a 'situated practice' which takes different shapes, colours

[146] *Ibid*, 2.
[147] *ibid*, 4.
[148] Ahmed (n 24); El Guindi (n 23).
[149] Justine M Cordwell, Ronald A Schwarz and others, *The Fabrics of Culture: The Anthropology of Clothing and Adornment* (Walter de Gruyter, 1979) 29.
[150] Georg Simmel, 'Fashion' (1957) American journal of sociology 541;See also Roland Barthes, *The Language of Fashion* (English ed, Berg, 2006) .
[151] Joanne Entwistle, *The Fashioned Body : Fashion, Dress, and Modern Social Theory* (Polity Press, 2000); See also Sophie Woodward, *Why Women Wear What They Wear* (Berg 2007) 3–20.
[152] See Kaori O'Connor, 'Lycra, Girdles and Leggings: The Immaterial Culture of Social Change' and Sophie Woodward, 'Looking Good: Feeling Right–aesthetics of the Self' in Susanne Küchler and Daniel Miller, *Clothing as Material Culture* (Berg, 2005).

and meanings based on specific cultural, historical and political contexts. Historically, the veil has emerged as an act of communication materialized by the reiteration of regulatory performative norms and has assumed a multitude of meanings: it might indicate an individual's place within society; identity; geographical provenance; kinship; race; rank; class, territoriality, ethnicity, gender, etc.[153]

The many meanings of, and differences over, the practice of veiling, this 'diversity within unity',[154] indicates that, in order to understand why and how women wear the veil in Muslim majority societies, it is essential to take into consideration many factors, including, but not exclusively, Islamic precepts.

Thus, "treating Islamic culture as frozen in place obscures the processes by which gender is historically, socially and politically constructed. It fails to locate Islamic societies within their proper historical and geographic context, and it ignores the particularities of time and place central to the making of culture. As do other world cultures, Islam provides a general framework with a range of options for action. Within that framework, groups and individuals negotiate practices and symbols while engaging in social action and ongoing struggles".[155]

[153] Ruth P Rubinstein, 'Color, Circumcision, Tatoos, and Scars', in Michael R. Solomon (ed) *Psychology of Fashion* (Lexington Books, 1986) 254–53; See also Mary Whisner, 'Gender-Specific Clothing Regulation: A Study in Patriarchy' (1982) 5 Harvard Women's Law Journal 73.
[154] Herbert L Bodman and Nayereh Esfahlani Tawhīdī, *Women in Muslim Societies: Diversity Within Unity* (Lynne Rienner Publishers, 1998).
[155] Mounira Charrad (n 28) 63.

1.3 Imagining nations, imagining women: the regulation of female clothes in the era of nations

Until the colonial period both men and women wore the veil or other kinds of headscarf/face covering for many reasons and to many effects. The violent western economic/political/cultural imperialist colonization, along with the creation of the 'nation-state' in many other Muslim majority countries in the nineteenth century has completely changed the meaning of the practice of veiling. From a plurality of meanings and performative outcomes, the (female) veil becomes a monolithic and static symbol of state/national identity: as I shall argue, on the one hand, the veil has been elevated as a 'sign of' anti-western/anti-colonial/anti-imperialist struggles by Islamist and nationalist movements, while on the other, colonizers have seen in the practice of veiling a symbol of the backwardness of conquered populations needing to be 'saved' by colonizing forces. The fact that only the female scarf has been elevated as a symbol of cultural belonging is an important feature of nationalism; it reveals that in nationalist thought, women's body becomes the terrain upon which territoriality, ethnicity and culture are established and reproduced.

"Nationalism is an ideological movement for attaining and maintaining autonomy, unity and identity on behalf of a population deemed by some of its members to constitute an actual or potential 'nation'."[156] As Anderson argues, 'nation' is a socially constructed cultural 'artifact' that "has to be understood by aligning it not with self-consciously held political ideologies, but with the large cultural systems that preceded it, out of which – as well as against which- it came into being."[157] For him, 'nation' is primarily an 'imagined community' as "regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship. Ultimately it is this fraternity that makes it possible, over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings."[158] An 'imagined community', then, implies a process of imaginistic individuals' identity formation whereas people recognize themselves as belonging to a particular group/community: this sense of belonging is negatively constructed through

[156] Robert E Miller and Rick Wilford (eds.), *Women, Ethnicity and Nationalism: The Politics of Transition* (Taylor & Francis, 2004) 10.
[157] Anderson (n 9) 19.
[158] *Ibid*, 7.

the differentiation and contraposition between the 'self' and the 'other', 'insider' and 'outsider',[159] whereas symbols come out as a clear cut-dividing line between different 'imagined communities', a useful tool to create unity and homogeneity through the figurative construction of an 'imagined' 'national' history, culture, and tradition.[160] In fact, as Smith argues, "attitude and perceptions are expressed and codified in myth, memories, values and symbols."[161] Henceforth, the 'nation-state' aims to build a mythical and symbolic idea that the 'national collective identity' is ethnical, a-historical, and pre-existing. If, as I have argued, individuals' perceptions are codified through symbols because they work on an individual's pre-symbolic level, then nationalism appropriates images, metaphors and symbols in the public sphere to create a specific paradigmatic and binary opposition between the self, citizen of the territorial 'nation-state', and the 'other', the 'outsider'.[162] By metaphorically constructing the 'image of the nation' through women's body, the state creates new gendered/national subjectivities which mirror and reproduce specific (national) cultural values: as Massad observes: "metaphors of nationalist movements are not only metaphors. They also reflect the fundamental assumptions of nationalist thought, which establishes the future gender constitution and gender roles of nationalist agents."[163] In other words, men and women's roles and responsibilities toward the nation became the focal point of the nation building process.[164]

Specifically, in nationalist thought, women's body emerges as the biological reproducer of ethnic/national group boundaries, the transmitter of ideology and culture, and as signifier of ethnic/national differences.[165] In essence, while women within nationalist

---

[159] Based on Woodard, identity is the product of the society in which we live and our relationship with others. Symbols and representations mark the ways in which we share identities with some people and distinguish ourselves as different from others. Kath Woodward, *Questioning Identity: Gender, Class, Nation* (Routledge, 2004).

[160] As Fanon argues, "it is the white man who created the Negro. But it is the Negro who creates negritude." Frantz Fanon, 'Algeria Unveiled' (2004) Decolonization: perspectives from now and then 5, 171; See also Kenneth Burke, *A Rhetoric of Motives*, vol 111 (University of California Press, 1969); Iver B Neumann, *Uses of the Other: 'The East' in European Identity Formation* (University of Minnesota, Press); Anthony Paul Cohen, *The Symbolic Construction of Community* (Routledge, 1985).

[161] Anthony D Smith, *The Ethnic Origins of Nations* (Wiley, 1991) 15.

[162] Joan B Landes, *Visualizing the Nation: Gender, Representation, and Revolution in Eighteenth-Century France* (Cornell University Press, 2003).

[163] Joseph Massad, 'Conceiving the Masculine: Gender and Palestinian Nationalism' (1995) 49 Middle East Journal 467, 469.

[164] Cynthia Enloe, *Bananas, Beaches and Bases* (Pandora Press, 1989) 45.

[165] Anthias and Yuval-Davis (n 31).

thought symbolize the nation (the heart, the soil, the home, social customs and traditions), men assume the role of creating, building, and protecting the nation.[166] Thus, women's role within nationalist discourse lies in the symbolic meaning attributed by nationalist thought to their bodies: since they symbolize the biological/ethnic/cultural reproducer of the community, they represent 'national boundaries', the signifier of ethical/cultural differences, the image of the 'Other'.[167] One needs only to reflect on the many myths of women's abduction, such as Troy or Ram and Sita, which indicates "how gender and sexuality serve as the ground over which epic struggles about territoriality and morality have been historically waged. That women's bodies figure prominently in almost all nationalist and communitarian struggles (whether ethnic, racial, or religious) in the modern period only serves to strengthen this claim."[168] As Yuval-Davis points out, it is not the exchange or the abduction of women, but their control which is the base of social order and identity formation.[169]

As gender, nation and ethnicity are intertwined with nationalist and colonialist discourses, the racialized, gendered and fixed image of Muslim women's body has been a useful tool to justify imperialist struggles in the west as well as in the east;[170] it is through the visual rhetorical construction of women's body that the nation-state produces a visible differentiation, a contraposition, a 'clash' between the 'self' and the 'other' in order to create an homogeneous and fixed identity for the citizen of the nation-state. In this context, it is the 'image of the (female) veil', and not the veil itself, that becomes the symbol of the 'clash of civilizations'.[171] It is exactly through the understanding of veiling as a fixed symbol of the incompatibility of 'East' and 'West', whether through its rejection or its compulsory adoption, that a simple piece of cloth assumes important implications in the process of gender construction of Muslim women.

---

[166] Jackie Hogan, *Gender, Race and National Identity: Nations of Flesh and Blood* (Taylor & Francis, 2008) 7–9.
[167] Floya Anthias, *Racialized Boundaries: Race, Nation, Gender, Colour and Class and the Anti-Racist Struggle* (Routledge, 1992) 7–8.
[168] Mahmood, 'Sectarian Conflict and Family Law in Contemporary Egypt' (n 32) 56.
[169] Nira Yuval-Davis, 'The Bearers of the Collective: Women and Religious Legislation in Israel' (1980) Feminist Review 15.
[170] Yuval-Davis (n 2); Anne McClintock and others, *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives*, (vol 11, University of Minnesota Press, 1997); See also Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?', in Cary Nelson and Lawrence Grossberg (eds) *Marxism and the Interpretation of Culture* (University of Illinois Press, 1988) 271-314.
[171] Dana L Cloud, 'To Veil the Threat of Terror: Afghan Women and The 'Clash of Civilizations' in the Imagery of the US War on Terrorism' (2004) 90 Quarterly Journal of Speech 285, 289.

Thus, in the colonial period, not only does the veil emerge as a 'political symbol' but also, more importantly, it comes to be one of the best examples of the 'politics of clothes' in the nineteenth and twentieth centuries in the 'West' as well as in the 'East'.[172] If, as Fanon argues, "it is by their apparel that types of society first become known, […] [then their] belonging to a given cultural group is usually revealed by clothing traditions":[173] in other words, it is through clothes, the most immediate and perceptible images in the public sphere, that a society constitutes its sense of uniqueness and belonging.

With the 'politics of clothes', exemplified in the struggle over the veil, colonial power created a "fusion between the issues of women, their oppression, and the cultures of other men. The idea that other men, men in colonized societies or societies beyond the borders of the civilized west, oppressed women was to be used, in the rhetoric of colonialism, to render morally justifiable its project of undermining or eradicating the culture of colonized peoples."[174] The 'politics of clothes', a 'politic of differentiation', has placed the veil as the most powerful symbol of the 'clash' between two dis-similar political systems: on the one hand, colonizers have seen in the veil the symbol of the backwardness of Muslim culture, while on the other, "standing in the relation of antithesis to thesis […] [colonized] reversed –but thereby also accepted – the terms set in the first place by the colonizers" by elevating the veil as the symbol of their nationalist struggles. Thus, it is western discourse that in the first place determined the new meanings of the veil and gave rise to its emergence as a symbol of resistance."[175] In both cases, women's body emerges as an objectified symbol of the newly created nation-state: in other words, it becomes a field of struggle. Some examples can help us to understand how nationalism has appropriated and shaped women's body, specifically the (performative) practice of veiling, into a symbol of 'national difference': Palestine, Algeria, and Iran. In Palestine and Algeria, the meaning of the veil arose from the colonial context, while in Iran, invasive western influences, coupled with the creation of a 'modern' western style-nation-state by the Shah, have transformed the veil into the Iranian national symbol. In Chapter three, I will also take into consideration the

[172] Mounira Charrad (n 28).
[173] Frantz Fanon, *Studies in a Dying Colonialism* (Earthscan Ltd, 1989) 35.
[174] Ahmed (n 24) 151.
[175] *Ibid*, 164.

regulation of the veil in the post-colonial period through the analysis of legal cases in the west as well as in Turkey.

The identity of Palestinian women has been deeply shaped by the complex political context: the Israeli occupation, the strong impact of foreign policies in the country, and the growth of anti-western nationalist movements have deeply impacted women's lives. In the case of Palestine, anti-colonial nationalist movements, "in adapting European nationalist thought to local conditions, […] were faced with the task of defining not only the roles of men and women in the nationalist project, but also what a non-European nationalist masculinity would look like, and what kind of performances would guarantee it."[176] In fact, as Butler argues, nationalism, as well as sexual and gender identities, are performatively produced and re-produced by the regulatory practice of nationalist agency.[177]

Before the first intifada, or 'Palestinian uprising', only peasants wore the veil, as a symbol of geographical/kinship belonging, while urban women were accustomed to wearing modest western-style garments. But the outbreak of the Intifada, in employing European nationalist practices, changed the pluralistic uses of the veil typical of the area: on the one hand, religious/nationalist parties, such as Hamas, started to call for a strict female 'Muslim attire' by linking Islamic faith with the national liberation struggle, while on the other, secular/nationalist parties, such as Fatah, 'ab-used' the character of the (veiled) peasant as a 'sign of' a past un-touched by western powers. By 1988, the streets of Gaza, where Hamas gained a wide support, were filled with graffiti stating "Daughter of Islam, abide by *Shari'a* dress!" and "women who don't wear the *Hijab* are not patriotic", while 'un-veiled' women were repeatedly harassed. To the contrary, in the West Bank, where national/secular parties were particularly strong, it was the image of the peasants that distinguished Palestinian national identity from other Arab identities in the area;[178] in both cases, however, women's body became the symbol of Palestinian national, cultural and traditional values. Women who did not conform with nationalist values were accused of being 'disloyal' to their community and their

[176] Mounira Charrad (n 28) 477.
[177] Judith Butler, *Gender Trouble : Feminism and the Subversion of Identity* (Routledge, 1990).
[178] Ted Swedenburg, 'The Palestinian Peasant as National Signifier' (1990) Anthropological quarterly 18.

common national liberation struggle.[179] As Parker argues, in "the same way that 'man' and 'woman' define themselves reciprocally (though never symmetrically), national identity is determined not on the basis of its own intrinsic properties but as a function of what it (presumably) is not".[180]

Palestinian women became the symbol of the 'nation', the 'soil', the 'home', while men were the defenders of the 'nation'.[181] Women's body, thus, emerges as a matter of national honour whereas the defence of their bodies becomes the defence of the 'nation' itself.[182] As a matter of fact, in the introduction of the Palestinian Nationalist Charter, as well as in Yasser Arafat's speech at the UN in 1974, the Israeli conquest of Palestine is pictured as a 'rape' of their land, while Palestinians are portrayed as the children of an 'abused' mother:[183] "the metaphor of the nation as a mother- or fatherland, the practice of defending and administering it with homosocial institutions like the military and the bureaucracy, and the gendered strategies of reproducing not only the nation and its nationalist agents but also the very national culture defining it, were all constitutive of nationalist discourse".[184] Similarly, as Said argues, Zionists have seen Palestine both as the 'mother land' to which to return, and the 'virgin-land' ready to be fecundated by the newly created 'Jewish state'.[185] Interestingly, during the 2014 Israeli-Gaza war, the City Council of Or Yehuda displayed a ban stating '"Israeli soldiers, the residents of Or Yehuda are with you! Pound their mother and come back home safely to your mother": in Hebrew, the term 'kansu' means 'beat', but it also has a colloquial connotation of 'sexual penetration'. The banner appeared after a sexualized image of an Arab woman was shared in Israeli social networks: the image portrays a "woman labeled 'Gaza', [who] wears conservative Muslim dress from the waist up and nearly nothing from the waist down, while striking an alluring pose and giving the viewer a come-hither glance. The accompanying Hebrew text reads: 'Bibi, finish inside

[179] Joane Nagel, 'Masculinity and Nationalism: Gender and Sexuality in the Making of Nations' (1998) 21 Ethnic and racial studies 242, 255. It should be added that the emergence of the peasant as a national signifier is related to the Zionism's refusal to recognize a specific Palestinian identity and 'land'. Swedenburg, (n 178) 24.
[180] Andrew Parker, *Nationalisms & Sexualities* (Routledge, 1991) 5.
[181] As Pettman argues, in nationalism, the 'nation' is gendered female, while men, the main agent of the nation, represent the 'state'. Jan Pettman, *Worlding Women : A Feminist International Politics* (Routledge, 1996).
[182] Nagel (n 179) 254.
[183] Massad (n 163) 470.
[184] *Ibid,* 468.
[185] Edward W Said, 'Orientalism Reconsidered' (1985) Cultural Critique 89, 103.

this time! Signed, citizens in favor of a ground assault'" whereas, in Hebrew language, the term 'finish' has a colloquial meaning of 'ejaculate'.[186] Thus, as Mosse points out,

"nationalism and respectability assigned everyone his place in life, man and woman […] Alongside the idealization of masculinity as the foundation of the nation and society, woman […] was at the same time idealized as the guardian of morality and of public and private order. The roles assigned to her were conceived of as passive rather than active […] guardian, protector and mother […] woman as a national symbol was the guardian of the continuity and immutability of the nation, the embodiment of its respectability."[187]

The veil, then, within religious/nationalist or secular/nationalist movements, has lost its intrinsic plurality of meanings and come to signify the fixed image of the nation and its honour. Though the veil has never been legally regulated in the country, the influence of nationalist thought has deeply influenced the public image of Palestinian women. It is worth noting, however, that in 2013 the board of trustees of Al Aqsa University in Gaza voted to impose a 'dress code' for female students which renders the *hijab* compulsory and the *jilbab* (a long loose jacket-like cover that extends to the feet) strongly recommended.[188] While, in recent years, Hamas have operated Islamization policies in Gaza, including encouraging women to wear the veil, the government in the West Bank, due to the strong western presence and influence, coupled with the heterogenic religiosity of the area, decided to keep the matter of veiling at grassroots level: peasants still use the traditional veil, while in the city women wear the traditional Muslim headscarf. Christian women, as well as many Muslims, do not veil: however, during important ceremonies, they wear traditional Palestinian clothes.

Similarly, in Algeria, the practice of veiling has situationally and historically assumed different meanings: before the colonial period, the *hijab* was worn by women to indicate tribal belonging. During the colonial period, however, the veil was portrayed by colonizers as a symbol of Algerian backwardness and at the same time elevated as a

[186] David Sheen, 'Israel's War Against Gaza's Women & Their Bodies' (*Muftah*, 2014) <http://muftah.org/israels-war-gazas-women-bodies/> accessed 29 January 2016.
[187] George Lachmann Mosse, *Nationalism and Sexuality : Middle-Class Morality and Sexual Norms in Modern Europe* (University of Wisconsin Press, 1985) 16.
[188] Daoud Kuttab, 'Does Dress Code Signal "Hamasization" of Gaza?' (*Al-Monitor,* 2013) <http://www.al-monitor.com/pulse/originals/2013/01/hamsization-gaza-dress-code-al-aqsa-university.html> accessed 21 November 2015.

symbol of anti-colonial struggle by colonized people. In 1830, France colonized Algeria and assumed control over the country's political and economic sectors. Most importantly, French colonizers, supported by the massive Christian proselytising mission operated by the Church, imposed French law over the governing *Shari'a* law, destroying, in this way, the normative system that have governed the local population for centuries: education in the Arabic language was forbidden and even the academic curriculum was designed to mimic the French one. This indicates that colonization was primarily a cultural battle aimed at transforming Algerians into 'French citizens'. Along with amending the legal and educational system, the French concentrated their efforts on changing the cultural heritage of the country. The veil became the benchmark for a France's cultural and civilizing battle and emerged as the visual and symbolic form of colonization.[189] In fact, in appropriating the visibility of Algerian women's body, French colonizers charged Algerian women with transforming Algerian men and the whole of Algerian society'. Their political doctrine was simple: "if we want to destroy the structure of Algerian society, its capacity for resistance, we must first of all conquer the women; we must go and find them behind the veil where they hide themselves and in the houses where the men keep them out of sight".[190]

As in nationalist thought, the visible works as a form of rhetoric; whereas the 'truth' is rhetorically produced by the discourse, the metaphoric use of the practice of veiling by colonizers and colonized reveals that symbols are rhetorically constructed through competing national images and identities through which imaginary boundaries of nationalism, citizenship and geography are established.[191] In Algerian colonial discourse, the veil was "invested with a two-fold visibility of desires: a libidinal desire to pierce the veil – a desire to see beneath it – as well as an imperial desire to civilize or modernize Muslim society by removing the veil."[192] This is particularly clear in the postcard produced and sold by French colonizers at that time: images that portrayed sexualized veiled women revealing only the breast, or un-veiled/liberated Algerian upper-class women, to indicate the victory of France's 'mission of civilization'. The aim of the colonizers was to transform Algerian people into French citizens and the veil was the visible 'sign of' difference between France's 'civilization' and its colonies: in fact, "for

[189] Ahmed (n 24) 149.
[190] Fanon, 'Algeria Unveiled' (n 160) 163–4.
[191] Bradford Vivian , 'The Veil and the Visible' (1999) 63 Western Journal of Communication 115, 131.
[192] *Ibid*, 123.

male nationalists, women serve as the visible markers of national homogeneity, they become subjected to especially vigilant and violent discipline. Hence, the intense emotive politics of dress".[193] In colonial Algeria, "every veil that fell, everybody that became liberated from the traditional embrace of the *haik* [the typical Algerian headscarf], every face that offered itself to the bold and impatient glance of the occupier, was a negative expression of the fact that Algeria was beginning to deny herself and was accepting the rape of the colonizer."[194]

As a result of the passionate battle against the veil implemented by French colonizers, the *hijab* also assumed a new meaning for Algerians: "to the colonialist offensive against the veil, the colonized opposes the cult of the veil. What was an undifferentiated element in a homogeneous whole acquires a taboo character, and the attitude of a given Algerian woman with respect to the veil will be constantly related to her over-all attitude with respect to the foreign occupation."[195] The harsh conditions of colonized Algeria and the consequent feeling of injustice and dispossession had reinforced traditional behaviour and social norms and rendered the veil the symbol of Algerians' anti-colonization struggle.[196] But the participation of Algerian women in the national liberation struggles was not only limited to the practice of veiling; they wore European dress in the heart of France, carrying messages or military equipment without attracting suspicion, and they wore the veil in their country as a symbol of resistance against the occupation. The visible transformation of women's body was a key factor during de-colonization struggles in the country. Once women's role in the Algerian liberation movement had been revealed, the French launched a tremendous offensive against them. El-Guindi reports French troops raping and torturing Algerian women:[197] by violating women's body, French colonizers also violated Algerian men's honour, so consent by the local population for the anti-colonial movement increased, until the withdrawal from the country of French troops in 1962. After Algeria's liberation, the country witnessed a long period of economic and political stagnation and Islamist groups rooted in the territory started to obtain a growing consent from the local population, especially in the poorest areas of the country. Despite the active role of

[193] Anne Mcclintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest* (1St Edition, Routledge, 1995) 358.
[194] Fanon, 'Algeria Unveiled' (n 160) 167–8.
[195] *Ibid*, 171.
[196] *Ibid*, 173.
[197] El Guindi (n 23) 160–172.

women in the national liberation struggle, in 1981, due to the pressure of conservative Islamist movements, the government introduced a new family code which revived many of the traditional features of the patrilineal family, relegating women to a minor legal status.[198]

In Iran, the veil has assumed different political meanings in different historical and cultural moments while women's body has been fashioned by different state ideologies:[199] "in the nineteenth century, European and Iranian/Islamic women emerged as 'terrain[s] of political and cultural contestations' [which] resulted in the valorization of the veil (hijab) as a visible marker of the self and the other."[200] In the Iranian case, women's opposition to veiling or un-veiling emerges as a resistance to an assigned state/nationalist identity which passes through the juridical regulation of their bodies.

Sedghi identifies three distinct economic and political phases of nineteenth century Iran: the Qajar dynasty, the Pahlavi dynasty, and the Islamic Republic of Iran. In each of these phases, Iranian policies of veiling, un-veiling and re-veiling have been a key element of the changing state national image:[201] in every moment of political transition "the depiction of women's bodies as uncovered or masked, exposed or concealed and their designation as 'western' or 'Islamic' contribute to a specific form of national identity".[202] It is worth pointing out that veiling was a common practice in pre-Islamic Persia; during the Achaemenid Empire women observed seclusion and wore the traditional *chador*, a long veil that covers the body from head to toe. They were referred to as *zai'feh*, the weak sex, and *moti'eh*, obedient to men's will; their lives were strictly controlled by men and they were "primarily confined to the household and reproduction".[203] This situation lasted until the end of the Qajar dynasty. When Reza Shah took power, the country was passing through a period of economic and political stagnation. The Shah, encouraged also by the 1906 constitutional revolution, which saw a great and active participation of women claiming their constitutional and educational rights, gradually started

[198] Peter R Knauss, *The Persistence of Patriarchy: Class, Gender, and Ideology in Twentieth Century Algeria* (Greenwood Publishing Group, 1987).
[199] Jennifer Heath (ed.), *The Veil: Women Writers on Its History, Lore and Politics* (University of California Press, 2008).
[200] Afsaneh Najmabadi, *Women with Mustaches and Men without Beards : Gender and Sexual Anxieties of Iranian Modernity* (University of California Press, 2005) 133.
[201] Hamideh Sedghi, *Women and Politics in Iran: Veiling, Unveiling, and Reveiling* (Cambridge University Press, 2007).
[202] *Ibid,* 277.
[203] *Ibid,* 26.

implementing several reforms for the modernization of the country. Inspired by Ataturk, in 1936 the Shah decided to ban the veil as a symbol of Iranian westernization and modernization.[204] The ban was so strict that if women did not comply with it, they would incur a fine, or even detention in some circumstances. The ban was particularly enforced in the main cities of the country, centres of capitalist development, while in villages women continued to wear the traditional rural *chador*. If, on the one hand, women protested against the ban, then on the other the promise of equal access to public space was underscored by the forced imposition of this law which, in the name of women's rights, denied them the freedom to choose what to wear. As Spivak argues, "it is in terms of this profound ideology of the displaced place of the female subject that the paradox of free choice comes into play".[205] In essence, Iranian women at that time were placed in the position of choosing to accept the modernizing policies of the Shah or being targeted as 'obstacles' to the nation's renovation and modernization.[206]

As the ban attracted criticism from the clergy as well as from many women who felt uncomfortable walking in the street without the veil, in 1941 the Shah decided to repeal the ban. But the Shah's 'secular' government did not mean it to last for long; the general climate of dissatisfaction with western political and economic influence, coupled with the westernization policies operated by the Shah, created strong anti-Shah/anti-western feelings. In fact, the Shah allowed western powers to directly control the country's oil, sugar and tobacco industries in order to pay its debts to foreign powers: the population, then, started to see the newly established secular-national government as a puppet in the hands of the US. In the eyes of Iranians, the US was not only responsible for 'stealing' the country's natural resources, but also for imposing western cultures and values over the Iranian population. In this climate of dissatisfaction, the *chador* becomes the symbol of Iranian culture and tradition in contraposition to a corrupt and imperialist west.[207] In fact, the rejection of western values spurred the demand for a 'return' to an authentic and 'un-touched' 'imagined' past and the *hijab* became the most powerful symbol of the 1979 Iranian revolution broadcast in western media: while western

[204] In Turkey, Ataturk introduced many modernizing and westernizing reforms in the country. One of his main reforms was the banning of the veil as a symbol of modernization. See Ahmed (n 24) 164.
[205] Spivak (n 170) 300.
[206] Nima Naghibi, 'Bad Feminist or Bad-Hejabi? Moving Outside the Hejab Debate' (1999) 1 Interventions: international journal of postcolonial studies 555, 560–1.
[207] Bahar Davary, 'Miss Elsa and the Veil: Honor, Shame, and Identity Negotiations' (2009) 25 Journal of Feminist Studies in Religion 47, 52.

women at the time were struggling for the 'mini-skirt', in Iran, women decided to re-veil and publicly show their support for the Islamic state by enforcing the revolutionary demands. Thus, "while the Constitutional revolution aimed to achieve economic and political independence through the emulation of secular European models of modernity, progress and strength, the emphasis of the Revolution of 1977-79 was in achieving cultural independence through the construction of an indigenous and authentic Islamic model of modernity and progress in Iran."[208]

If, during the revolution, the veil acquired the symbolic meaning of public anti-western and anti-monarch feelings, after 1979, the newly established Islamic Republic of Iran adopted the veil as a symbol of national identity and passed a law to render the practice compulsory;[209] the safeguard of women's appearance become the safeguard of the state. From a religious/cultural symbol, the *hijab* becomes a national symbol and women who do not wear the veil could incur serious consequences. The juridical regulation of women's bodies was part of a wider Islamization policy operated by Khomeini after the revolution.[210] As Sedghi argues, the new image of Iranian women mirrors anti-western positions and the *Shi'a* roots of Persian society whereas women's body continues to serve patriarchal powers, whether secular/nationalist or religious/nationalist.[211] Notable in the Iranian case is how the significance and visibility of the veil have been translated into a concept of nationhood, citizenship and cultural borders.

In contemporary Iran, the debate over the veil is rapidly spreading in the media and many *Ulama* have started to doubt that the veil should be imposed by the state. In 2012, referring to the polemic regarding women wearing an 'improper' Islamic veil, Ayatollah Ali Khamenei declared, "What should we do with them? Is it advisable to reject them? Is it right to reject them? No, their hearts are attached to this camp and

[208] Sedghi (n 201) 202–10.
[209] Nayereh Tohidi, 'Modernity, Islamization and Women in Iran', in Valentine M Moghadam (ed) *Gender and National Identity* (Zed Books, 1994) 141. Similarly, as I shall argue in Chapter three, if the compulsory veil in Iran has been elevated as a national icon, in French the myth of unveiling become the benchmark of the incompatibility between 'secular' and 'religious'.
[210] The Islamization policies of the Republic of Iran consisted mainly in three areas: first, the *Ulema*'s (the clergy body) monopoly of the power in the political system, second, the introduction of the penal Islamic code and third, the Islamization of social norms and morality. *Ibid.*
[211] Sedghi (n 201) 25–7.

their souls are attached to our goals and values."[212] However, although the debate over the veil has been revived, the government does not seem to be willing to repeal the law.[213]

The cases I have taken into consideration reveal the gendered and misogynist practices and assumptions of nationalism.[214] In fact, in nationalism the necessity for unity and homogeneity based on cultural/ethnic territorial differences is at the heart of the tension between women's own identity and their assigned 'state identity': since women within nationalist thought represent the biological and cultural reproducers of an 'imagined community', their plurality of performative practices has been reduced to a singular, national, fixed subjectivity.[215] To the extent that veiling becomes a legal obligation, the veil, far from preserving Islamic values, hides an occidental obsession in the centralized law shared by both 'eastern' and 'western' nationalism. It is exactly the fixed and monolithic (visual) identity of Muslim women's body that the practice of veiling addresses during the colonial and, as I shall argue in Chapter three, in the post-colonial period. In fact, not only have racialized images of veiled women as victims of a chauvinist culture justified imperialist wars, but also, more importantly, they have produced a visual rhetoric of abjection toward the 'other': in the colonial period, the veil emerges as the cut-dividing line between the 'self' and the 'other', 'citizen' and 'alien', 'friend' and 'enemy'. If the overarching strategy of nationalists' 'politics of clothes' is to construct a binary opposition between the 'self' and the 'enemy 'other', then the veil becomes the visual representation of an 'imaginary' 'clash of civilizations' between good and evil;[216] as identity is constructed in terms of its negation, the regulation of women's clothes in the public sphere becomes a useful tool to create cohesion in contraposition with the 'other'. In essence, as Willford and Miller argue, "the compulsory veiling of women by nationalist movements in Sudan, Iran or Afghanistan, whether they are

[212] Mahmoud Pargoo, 'More Veils Lift as Topic Loses Political Punch in Iran' (*Al-Monitor,* 2015) <http://www.al-monitor.com/pulse/originals/2015/12/iran-mandatory-veil-change-views.html> accessed 9 January 2016.
[213] Arash Karami, 'Khomeini's Grandson Says There Is More to Islam than Hijab' (*Al-Monitor,* 2016) <http://www.al-monitor.com/pulse/originals/2016/06/hassan-khomieni-khatami-hijab-islami-grandson.html?utm_source=English+List+-+052616&utm_campaign=67d5b9fcd5-June_03_2016&utm_medium=email&utm_term=0_7ec6b191fc-67d5b9fcd5-102657949> accessed 3 June 2016.
[214] Enloe *Banana, Beaches* (n 164); Mcclintock (n 193); Anthias and Yuval-Davis (n 31).
[215] Frances S Hasso, 'THE "WOMEN"S FRONT' Nationalism, Feminism, and Modernity in Palestine' (1998) 12 Gender & Society 441.
[216] Cloud (n 171) 291.

seeking to shore-up existing regimes or fashion new ones, is but a graphic representation of women's subordination that elsewhere may assume more subtle forms but which are, nevertheless, integral to the processes of defining a national identity."[217] In this case, the veil, a simple multi-meaning piece of cloth worn by women and men, becomes the 'Muslim veil', a fixed symbol of the fluctuating Muslim culture. In particular, the genealogy and the history of the practice of veiling indicates firstly that it was western discourse that created a link between the (backward) 'culture of the 'other' and women's body and, secondly, that that 'eastern' anti-colonial struggle adopted the same nationalist narrative as the colonizers.[218] Ultimately, "they are mirror images of each 'other'. The resistance narrative contested the colonial thesis by inverting it – thereby also, ironically, grounding itself in the premises of the colonial thesis."[219] What colonial powers did first and then nationalist/religious/secular movements in Muslim majority societies, was to apply a secularized form of privatization of "religion that, in turn, helped secure the foundational distinction between the public and the private. The privatization of this aspect of social life did not mean, of course, that they feel outside the purview of the state; rather, they came to be increasingly regulated by the centralized state and its various political rationalities (no longer administrated by local muftis, qadis, customary norms, and parochial moral knowledge)."[220] In this sense, as Mahmood points out, "the gendered and sexualized dimensions […] are best understood as a product of the unique paradoxes produced by the simultaneous privatization of sexuality and religion under the modern post-colonial state. Even through this intertwining of religion and sexuality exhibits a normative structure that cuts across the West and non-West divide."[221] Therefore the veil can be seen as the regulation of private sentiments operated by a newly created centralized sovereign state, be it 'Islamist' or 'secular'. Thus, "because of this history of struggle around it, the veil itself is now pregnant with meanings, as item of clothing, however, the veil itself and whether it is worn are about as relevant to substantive matters of women's rights

[217] Miller and Wilford (n 156) 6.
[218] Partha Chatterjee, *Nationalist Thought and the Colonial World : A Derivative Discourse?* (Zed for the United Nations University, 1986); Interestingly, Said emphasizes the link between colonial power and the 'feminization' or 'fetishization' of the Muslim colonized lands. Edward W Said, *Orientalism* (25th Anniversary Ed with 1995 Afterword Edition, Penguin Books, 2003).
[219] Ahmed (n 24) 165–6.
[220] Mahmood, 'Sectarian Conflict and Family Law in Contemporary Egypt' (n 32) 58. Interestingly, the distinction between private and public, absent in classical sharia law, is typical of the modern 'secularized nation-state'.
[221] *Ibid*, 56.

as the social prescription of one or another item of clothing is to western women's struggles over substantive issues."[222]

[222] Ahmed (n 24) 166.

1.4 Regulating clothes, regulating subjectivities

In 2011, the conservative Canadian government banned the *niqab* (a veil that covers part of the face, revealing only the eyes) at public citizenship oath ceremonies; the *niqab*, as stated by Harper, the Canadian Prime Minister, is "offensive and not how we do things here".[223] A few years later, in 2013, a young Pakistani woman, Zunera Ishaq, challenged the ban by refusing to remove the *niqab* during her oath ceremony: as a result, Zunera could not take Canadian citizenship, but the government allowed her to live in the country with a resident permit. She decided to sue the government, claiming the infringement of her charter rights: the Federal Court of Appeal ruled in her favour and quashed the imposed ban.[224] The case is of particular interest for two reasons: firstly, the ban was imposed in a public oath ceremony where the *niqab* emerges as a cut-dividing line between the 'citizen' and the 'stranger', and secondly, the simple wearing of a specific article of clothing can be considered 'provocative' by civil authorities and so becomes legally regulated.

Why do clothes have such an important place in both western and non-western societies? Why can a simple article of clothing be understood as 'threatening' to civil life in a context in which citizenship comes to be cast in term of the law's subject's visibility? As Hansen argues, "because [clothing] both touches the body and faces outward others, dress has a dual quality […] this two-sided quality invites us to explore both the individual and collective identities that the dressed body enables."[225] In fact, as I shall point out, since "forms of dress, as with forms of architecture, are not [only] mere metaphors for the power and authority of the political state [but] they instantiate the power and authority of the political state,"[226] the sovereign power has always had a particular interest in regulating clothes in the public sphere. After all, from Charles the Great until today, rulers have always tried to regulate dress in order to fashion similarity

---

[223] Adam Gopnik, 'Freedom and the Veil' (*The New Yorker,* 2015) <http://www.newyorker.com/news/daily-comment/freedom-and-the-veil?mbid=social_facebook> accessed 8 December 2015.
[224] 'Just 2 Women Decided against Citizenship Oath because of Niqab Ban' (*CBC News,* 2015) <http://www.cbc.ca/news/politics/niqab-ban-zunera-ishaq-1.3249495> accessed 8 December 2015.
[225] Karen Tranberg Hansen, 'The World in Dress: Anthropological Perspectives on Clothing, Fashion, and Culture' (2004) Annual Review of Anthropology, 372.
[226] Watt (n 10) xv.

and differences in the public sphere:[227] in the Roman Empire, for instance, citizens sentenced to exile were forbidden to wear the toga which was used to distinguish between the 'citizen' and the 'barbarian'. Similarly, the so called 'sumptuary laws', promulgated throughout European history to restrict luxury and extravagance, emerge as an "intrinsic element in the formation of the modern legal [and social] order….[based on the] identification of the 'imagined communities' […] [as well as] moods of nation, class, […] gender", and visible social hierarchies.[228] In this sense, the regulation of clothes becomes one of the "instruments of political, social, and economic regulation,"[229] especially in periods of political and social change.[230] In fact, as I shall argue, since clothes are perceived as 'images', and 'images' have the power to fashion the public sphere, the legal regulation of clothes emerges as "the law's cultural commitment to the fabrication of a certain idea of the civil face and the force with which it seeks to fashion that face for itself and to enforce it on (and perform it for) society at large."[231] In fact, in western and non-western history, the appropriation by the authorities of images and icons in the public sphere has been compounded with the implementation of rules related to clothes which, in the past and present, represent cultural boundaries, accepted or rejected images of an (imaginary) community.[232] Thus, by regulating clothes, law also regulates subjectivities; it places a mask on the real subject in the name of a fixed and monolithic law's subject.

In the course of history, rulers have spent considerable time and efforts to promulgate laws related to the individual's apparel in the public sphere. In teleological terms, as Goodrich remind us, clothes have been conceived through their symbolic meaning, as images, metaphors, of a specific order of things.[233] Tertullian's interest in apparel, for instance, reveals how the regulation of the proper clothes to be exposed in the public

[227] Donald Quataert, 'Clothing Laws, State, and Society in the Ottoman Empire, 1720–1829' (1997) 29 International Journal of Middle East Studies 403, 404; See also John Brewer and Roy Porter, *Consumption and the World of Goods* (Routledge, 2013).
[228] Goodrich, 'Signs Taken for Wonders' (n 8) 708–9.
[229] Philippe Perrot, *Fashioning the Bourgeoisie: A History of Clothing in the Nineteenth Century* (Princeton University Press, 1994) 15.
[230] Frances Elizabeth Baldwin, *Sumptuary Legislation and Personal Regulation in England*, vol 44 (The Johns Hopkins Press, 1923); See also Wilfred Mark Webb, *The Heritage of Dress* (Times Book Club, 1912); Claire Sponsler, 'Narrating the Social Order: Medieval Clothing Laws' (1992) 21 Clio 265.
[231] Watt (n 10) 144-5.
[232] Anderson (n 9).
[233] Goodrich, 'Signs Taken for Wonders' (n 8) 714; Henry Hammond, *Of Idolatry* (Printer to the Universitie, Henry Hall, 1646).

sphere should mirror a divine transcendental order.[234] In his treatise, clothes emerge as a powerful image of an 'ordered society' through which the individual reads and interprets the external world, which, in turn, shapes her/his internal soul:[235] in other words, the external world should mirror the individual's internal 'being'. In fact, not only do clothes "make the human body visible"[236] as they are located at the border between the internal self and the external world, but also, more importantly, their symbolic meaning is understood as a semiotic code which shapes our and others perception of the world.[237] Based on Barthes, garments are "the particular signifier of a general signified that is exterior to it (epoch, country and, social class) consequently, the relations between vestimentary signifier and signified can never be determined in a simple and linear fashion."[238] In essence, garments are strictly related to the formal and normative system which is "defined by normative links which justify, oblige, prohibit, tolerate, in a word, control the arrangement of garments on a concrete wearer who is identified in their social and historical place."[239] Thus, for Barthes, clothes are not simply a cultural phenomenon which defines a personal identity in a specific group, location and time, but they are a vehicle of meanings: they signify structures behind what is represented. As with every image, clothes have the potentiality to include and exclude and to delineate gendered territorial borders of an 'imagined community';[240] as clothes express uniformity, hierarchy and regularity, they are concerned with the imaginistic order of a community.[241]

In Medieval Europe clothes were conceived as a mark of difference; dress was understood as a visible symbol of belonging, social status, religion and gender. In mid-late thirteenth century Europe, sumptuary laws aimed at restricting certain apparel to

---

[234] Geoffrey D Dunn, 'Tertullian', in Roger S Bagnall and others (eds) *The Encyclopedia of Ancient History* (Wiley & Sons Inc, 2012).
[235] Goodrich, 'Signs Taken for Wonders' (n 8) 721.
[236] Amy De la Haye and Elizabeth Wilson, *Defining Dress: Dress as Object, Meaning, and Identity* (Manchester University Press, 1999) 1–2.
[237] Umberto Eco and others, *Travels in Hyperreality, Trans* (Mariner book, 1990).
[238] Barthes (n 150) 5–6.
[239] *Ibid*, 7. It is worth pointing out that, in western history, clothes have always been understood as a 'sign of' an individual's interiority. Drawing from Saussure's system of language, Barthes argues that fashion is a form of language which, as Saussure's semiotic system, is composed by signifier and signified. See Barthes (n 150). Differently, as I will argue in Chapter four, clothes are not only a 'sign of', but they can also be used as 'means to' acquire specific values.
[240] John Alexander Armstrong, *Nations before Nationalism* (University of North Carolina Press, 1982) 6–8.
[241] C Fred Blake, 'Foot-Binding in Neo-Confucian China and the Appropriation of Female Labor' (1994) Signs 676; Watt (n 10) 82.

the elites (as in Tertullian's treatise) or distinguishing Christian from non-Christian communities settled in the area. In 1215, for instance, the Fourth Lateran Council adopted different measures to separate Christians from non-Christians and ruled that Jews and Saracens should wear different clothes in order to avoid confusion between them and the Christian majority. With the promulgation of sumptuary laws, the synod aimed at preventing the mingling of different religious groups: "it happens occasionally that through error Christians have sexual relations with the women of Jews or Saracens, and Jews or Saracens with the women of Christians."[242] Soon, Lateran IV shifted the legal regulation of clothes with the imposition of diverse 'signs' by introducing round badges of different colours: Jews were ordered to wear a red circular patch over their breast, Muslims and unbaptized people a yellow patch, while Christians who broke or challenged 'sumptuary laws' were forbidden to enter any church of the reign.[243] Similarly, in thirteenth century Hungary, clothes were used to designate the 'other', the 'outsider', the 'stranger', an element of difference from the Christian majority settled in the country.[244] Interestingly, however, while the Church in Hungary felt the need to distinguish Jews and Muslims from Christians through the introduction of sumptuary laws related to clothes, it tried at the same time to integrate and assimilate Cumans; as their attire was considered a 'sign of evil', they were ordered to conform with Christian dress and forms of behaviour. After a long negotiation with the Cuman community, the Church allowed them to keep their braids in exchange for baptism and permanent settlement in the area.[245] However, the regulation of clothes to distinguish between different religions is not only a feature of European countries: in the near Middle East, the Umayyad Caliphs, to which I will come back in the next Chapter, introduced diverse types of belt and headgear to distinguish Muslims from non-Muslims.[246]

But sumptuary laws were not only aimed at distinguishing between religions: in the Ottoman Empire, during the reigns of Sultan Osman III (1754-57) and Mustafa III (1757-74), both of which periods were characterized by internal conflicts and political

[242] Antonio García and others, *Constitutiones Concilii Quarti Lateranensis Una Cum Commentariis Glossatorum*, (vol 2, Biblioteca Apostolica Vaticano, 1981) 107.
[243] Nora Berend, 'Medieval Patterns of Social Exclusion and Integration: The Regulation of Non-Christian Clothing in Thirteenth-Century Hungary' (1997) 8 Revue Mabillon 155, 164.
[244] RI Moore, *The Formation of a Persecuting Society: Authority and Deviance in Western Europe 950-1250* (John Wiley & Sons, 2008); See also Ruth Mellinkoff, *Outcasts: Signs of Otherness in Northern European Art of the Late Middle Ages*, (Vol 32, University of California Press, 1993).
[245] Berend (n 243) 169–173.
[246] *Ibid,* 163.

stagnation, the regulation of clothes was used as a disciplinary tool. In fact, during this period, sumptuary laws addressed order, social discipline, honour and austerity:[247] through the legal regulation of different headgear, clothes were used to indicate a specific individual's place within the society and to give people a sense of identity and belonging to a specific group in a 'well-ordered society'. The Ottoman Empire, which at that time was facing many military defeats, needed to "assure ottoman subjects and elites that the world was still an orderly place in which all retained their respective political and social positions".[248] Thus, sumptuary laws were implemented to strengthen power relationships and the superiority of one group over another (men over women, Muslim over non-Muslim etc.). Similarly, Sultan Suleyman, called the 'Lawgiver', promulgated a code (*Kanun-I-Reaya*) to regulate clothes and specific forms of behaviour within different ranks and social hierarchies as a means to create a strong and unified 'nation-state' through the control and interference of the state in the private life of the citizen. In this sense, as Goodrich argues, "a person's place in the imaginary order of nation or class was also a question of the order of images […], the regulation of dress, ornament, and food was linked to a theological and moral concern with the proper signs of identity and community. The legislation of the licit image of a person was linked indissolubly to the order of images and the role of symbols, of […] the 'visible world' in public and private life." [249]

Sumptuary laws served also to demarcate and secure sex and gender identities. In fact, as Hunt argues, sumptuary law related to women's clothes "manifests itself as a concern to establish some natural and stable connection between sex, gender and social role".[250] Meaningfully, during the Middle Ages, a great number of edicts and statutes relating to women's clothes were imposed: as women were excluded from the social public life, their position was related to that of men as the head of family.[251] But, as Hunt argues,[252] if on the one hand, 'social anxieties' about dress have fluctuated in relation to women, on the other, what remains stable is the persistent obsession with women's modesty and morality through the centuries. This, in turn, has been associated with a certain

[247] Quataert (n 227).
[248] *Ibid*, 407.
[249] Goodrich, 'Signs Taken for Wonders' (n 8) 711–2.
[250] Hunt (n 7) 217.
[251] *Ibid*, 217–9.
[252] *Ibid*.

anxiety in relation to the controllability of women: Hunt suggests that sumptuary laws related to gender emerge as a central part of the 'political economy of marriage' which is exemplified in the links between the dowry system and the promulgation of specific sumptuary laws.[253] If for men the regulation of clothes expressed a specific social and economic class, for women sumptuary laws aimed at showing their respectability.[254] In Siena, for instance, sumptuary law prescribed a specific length of women's skirts (whereas only matrons and not unmarried women could wear long trains)[255] while in Florence, in 1464, sumptuary laws were more concerned with women's décolletage (women were allowed to wear a décolletage three centimetres below the collarbone).[256] Another feature of women's clothes regulation concerned cross-dressing. In 1443 Venice, men who dressed as women were subjected to heavy fines while in fifteenth century France Louis XI imposed harsh punishments for prostitutes who wore male clothes. It is worth noting that cross-gender anxieties are not only a feature of European countries: as Ahmed reveals, a decree "issued in Cairo in 1263 forbade women to wear 'imamahs (male headgear) and other masculine clothing".[257] As, at that time, conservative religious authorities disliked gender-crossing clothes, they intimated families and husbands to put an end to this practice. Hunt's study on sumptuary laws reveals that the focus on women's body in Middle Ages Europe was particularly emphasized during the period of the struggle between religious and secular authority.[258] Though there was a general consensus over the inferiority of women, secular and religious power constructed different discourses in relation to the 'woman question': for the Church, women's identity should be related to morality because signs of luxury were seen as a sin, while within secular discourse, women's luxury was associated with the

[253] *Ibid*, 395.
[254] *Ibid,* 218–9.
[255] It is worth noting that in 2015 a French female student was banned from school because her skirt was considered 'too long' and so a 'provocation'. See 'French Muslim Student Banned from School for Wearing Long Black Skirt' (*The Guardian, 2*015) <http://www.theguardian.com/world/2015/apr/28/french-muslim-student-banned-from-school-for-wearing-long-skirt> accessed 30 January 2016.
[256] It is worth noting, however, that the rise of Christianity has particularly influenced the development of sumptuary laws related to women's clothes. As Hunt argues, the particular interests of the Church toward the body "stems from the notion that God's incarnation in the body of man was also his humiliation." The 'original sin', which was manifested in the opposition between knowledge and faith, was transformed into 'sexual sin', "a sin that revolved around and was encapsulated in the body of women […] the most important site of these struggles over conspicuous consumption, vicarious display and women's bodies has been fought for centuries over décolletage […] in puritan new England 'naked arms' were penalized." Hunt (n 7) 222–3.
[257] Ahmed (n 24) 118.
[258] Hunt (n 7).

'economic wrong of extravagance.'[259] The tension between secular and religious power is particularly exemplified by (European) women's veiling; whereas, on the one hand, the veil was seen by the Church as a sign of religious piety and sexual modesty, on the other, the veil facilitated the concealment of identity. Thus, on the one hand, the Church favoured women's head covering while on the other, secular authorities expressed anxieties over the anonymity of women.[260] As a matter of fact, in Siena, officials were obliged to ask veiled women the name of their father or husband: therefore, "what was at stake was the degree of freedom veils allowed for assignations that breached patriarchal control and exhibited some degree of personal and sexual licence. This is borne out by the fact that prostitutes were frequently forbidden to wear the veil."[261] Besides, there was always a strict cooperation between secular and religious authorities: "in Italy, in particular, there is evidence that the targeting of women points to the presence of the ecclesiastical hand behind sumptuary law during the Middle Ages. The morality of women was a central preoccupation and dress and ornamentation was the readily visible sign of immorality; the immoral character could be read from the immodest clothing."[262] The distinction between the 'respectable' and the 'depraved' woman mirrored the legislation of the time: in 1351, the London Dress Ordinance imposed a strict dress code for prostitutes but highlighted that all the restrictions applied to prostitutes had no value if the prostitute was of noble birth.[263] All in all, what is significant in the attention toward women's apparel is that it continues to be an obsession even nowadays: "appearance continues to be 'read' in much the same way as physiognomy was in the eighteenth century as a means of access to some underlying social essence […] appearance is still read as a means of discerning the boundary between insiders and outsider".[264]

Clothes regulations, however, were not only implemented to 'differentiate' between citizens, but also to create unity and homogeneity: in 1337 Edward III of England

[259] Hunt (n 7) 238–9.
[260] It is worth notice that the veil was worn by European women until last century: in France, in the late nineteenth century, veiling was a symbol of fashion and elegance. It was worn for protection from the dust during a great architectural reordering of Paris but also to indicate a 'bourgeois respectability'. In eighteenth century London, women used to wear a full face velvet mask when walking in public parks . See Watt (n 10) 137–141.
[261] Hunt (n 7) 223.
[262] *Ibid*, 239–40.
[263] *Ibid,* 241–44.
[264] *Ibid*, 397.

forbade the exportation and the wearing of foreign clothes except by the royal family.[265] The law stated that anyone acting or dressing as an 'Egyptian', a gypsy or a stranger was to be declared outlaw. The fact that, in sixteenth century England, over twenty enactments on apparel were promulgated indicates the power of clothes to shape the public sphere and to create not only differentiation, but also homologation: in other words if, on the one hand, clothes were regulated to establish class/group differentiation, then on the other the 'English man' was to be recognized exactly by his clothes.[266] As, traditionally, external signs were considered the mark of internal states, "legal concern with dress was a concern both with the indigenous, with a vernacular civility free of the stranger […] and with all other cults that were suggestive of traditions and forces extrinsic to the native soil."[267]

Therefore, not only do clothes provide a sense of belonging but also, more importantly, they delineate the border between 'citizen' and 'foreigner': the first is included within the pale of the law, while the latter comes to be excluded by the law.[268] As identity is built through the negation of the 'image of the other', the rejection of 'foreign' clothes (with their specific shapes, cuts, and colours) was a precise political strategy to avoid 'foreign vices' and to create a sense of national belonging. As Goodrich argues, "doctrine depends upon an antiportait or negative image, it proves doctrine by denouncing heresy, affirms jurisdiction by exclusion of illegitimate speech or by the power of excommunication. It conjures identity by showing the face, the plurality or void, of evil."[269] Clothes, then, have been legally regulated not only to create the image of an 'ordered society', but also, more importantly, to build a unified image of a territorial unified (imagined) community.

During a period of internal instability consequent to the political challenge represented by Greek rebels to the centralized Ottoman Empire (1821-1832), Mahmud II (1808-1839) imposed a fixed attire for different religious/cultural groups in order to shape a monolithic national identity and to create a sense of unity and identity in the fractured

[265] Ruthann Robson, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes* (Cambridge University Press, 2013) 8; See also Goodrich, *Oedipus Lex* (n 19) 12.
[266] Goodrich, *Oedipus Lex* (n 19).
[267] *Ibid*, 88.
[268] Goodrich, 'Signs Taken for Wonders' (n 8) 710–1.
[269] Goodrich, *Oedipus Lex* (n 19) 49.

Ottoman Empire. The law, as Quataert argues, "anticipated by a full decade the tanzimat (1839-76) commitment to the formal equality of all before the law and the entry of non-Muslims into the military and bureaucracy on the same legal basis as Muslims." [270] The 1934 Turkish Dress Act, which banned the wearing of religious symbols and attire (except in places of worship), mirrors the attempt to create a strong and unified western style nation-state.[271] Dis-similarly, in 1720s Turkey, where Muslim women were accused of dressing as Christians, a law on modest dress was promulgated; the streets of Istanbul should have 'the face' of a Muslim country.[272] In both cases, the regulation and control of images in the public sphere emerges as a tool to create a specific legal subject by demarcating the boundaries of social thought and social reproduction through the regulation of women's body: in fact, the power of images lies exactly in the opposition between orders of imagination. In essence, the legal regulation of specific clothes comes out as a precise political strategy which aims at institutionalizing a mode of thinking based on the control of images, clothes, desires, and human emotions by a centralized sovereignty,[273] which "institute[s] subjectivity through and across the imagery of law and rhetoricity of its texts."[274] As a matter of fact, as images has been instituted to transmit social power and to establish a specific political order, they have the power to constitute a specific kind of law's subject who is bound to a specific order of power and imagination represented and protected by the rules of law: thus,

"whichever form the image took, either licit or illicit, iconic or idolatrous, its function was structural, it established the order of meaning and of law, it governed the soul by dictating what the heart could see or the mind portray of itself […] the definition of an order of true reference, a doctrine or creed, required the designation of an order of signs through which the […] subjects of law, could be ordered to imagine, perceive, understand, or know the invisible truth."[275]

Therefore, the control of clothes and images in the public sphere is aimed at instituting a 'particular form of governance' and, along with it, a particular form of 'regulated'

[270] Quataert (n 227) 413.
[271] Elisabeth Johnson, *The Headscarf Ban in Turkish Universities Is a Safeguard Or Violation?: Analysis of the ECHR Judgment in Leyla Sahin V. Turkey* (MA thesis, ProQuest, 2008) 66.
[272] Quataert (n 227) 407-9.
[273] Goodrich, *Oedipus Lex* (n 19) 14 and 64.
[274] *Ibid*, 14–5.
[275] *Ibid*, 42.

behaviour whereas the law's subject emerges as emotionally attached to an 'imagined community'. In this sense, law allows a double movement: on the one hand, it excludes difference in the name of 'homogeneity' by excluding the 'stranger', the veneration of other gods and the possibilities of other form of rhetoric, while on the other, by imposing a differentiation of clothes within different economic and social/gendered classes, it highlights differences between citizens.

It is exactly in this sense that the new legal subject, with his/her new clothes, emerges as the image, the mirror, of a precise legal order, of law's appearance in the social realm: "the social body, the icon and mode of civility, included and annexed the subject […] it was the logic of the mirror, of mimetic duplication, of the mask or image, which is to say, of the father in the son."[276] In other words, the regulation of images and clothes in the public sphere was a regulation of the 'licit' form of visibility and its proper reference in order to forge and create a specific law's subject: "the discourse against rhetoric, against images, and against women […] are discourses of the foundation of law in the definition and capture of subjectivity".[277]

In fact, as Foucault reveals,[278] knowledge embraces both the 'visible' and the 'sayable' whereas each historical moment comes out as the combination of these two elements: the 'visible', in contrast with the 'sayable', is a form of knowledge able to create multiple networks of power relations and subjectivities.[279] The place assigned to the visible "demonstrate[s] that rhetoric functions epistemologically not only by virtue of the sayable […] but also […] through ways of seeing. The visible, as a means of knowledge-production, is rhetorical because such knowledge, rendered through complex networks of seeing and being seen that define entire fields of the visible." [280] Images, then, as well as clothes, create meanings: through their symbolic power, they 'move the mind' and they create a link between 'internal' and 'external', 'form' and 'substance'. "The symbolic is therefore no more than the medium that evokes or refers to the imaginary, the perfect community or model of relation, of which the symbol

[276] *Ibid*, 89–90.
[277] *Ibid*, x.
[278] Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Psychology Press, 2002).
[279] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage, 1977).
[280] Vivian (n 191) 132.

(image or word) is a distant replica".[281] Thus, as images are central in the construction of meanings, they are functional to create a link between rhetoric and ideology in nation building process.[282] As I have pointed out, clothes are not only to be intended as mere 'appearance' but they should be analysed through their symbolic meaning through which it is possible to conceptualize nationality, geography and gender as a rhetorical form of the visible which "make the world known to different individuals, who thereby engage, on the basis of such knowledge, in the ongoing refashioning of life in the public spaces."[283] Thus, the visible, unlike the 'visual' which is a simple 'representation', depends upon a symbolic order which emerges as "a rhetorical form that produces effects merely through what is rendered as 'self-evident' or 'natural'".[284] It is therefore clear that the aim of the law is not to 'cover' or 'un-cover', but to 'order' and control the public sphere in order to rhetorically construct meanings and subjectivities.

The idea that clothes can cause 'disruption', or that they can be intended as 'a threat to the values of a society', as in the never-ending legal debate over the veil, shows that it is not the simple article of clothing, but its symbology that can threaten the status quo. As I have argued, the power of clothes lies exactly in their location: since they are at the margin of the body, they symbolize the boundary between the self and the external world.[285] It is therefore clear why, for centuries, rulers have promulgated laws related to clothes: the law intervenes to re-order what escapes from the control of a singular and fixed state sovereignty. As Goodrich argues, "understood as a crucial part of the law of images, and equally as a dimension of the legal construction of the symbolic order, the regulation of appearance can be reinterpreted as a key component in the identity of those 'imagined communities'."[286]

It is exactly through the fashion of images and its repetition in the public sphere that a community identity comes to be constituted and an absolute sovereignty established: thus, the regulation of clothes mirrors the increasing penetration of the state in the individual's private life. If, in Medieval Europe as well as in the Middle East, clothes were

[281] Goodrich, *Oedipus Lex* (n 19) 101.
[282] Janis L Edwards and Carol K Winkler, 'Representative Form and the Visual Ideograph: The Iwo Jima Image in Editorial Cartoons' (1997) 83 Quarterly Journal of Speech 289, 297.
[283] Vivian (n 191) 120.
[284] *Ibid*, 133.
[285] Robson (n 265); See also Joanne Entwistle, 'The Dressed Body', in Joanne Entwistle and Elizabeth Wilson (eds) *Body Dressing* (Berg, 2001); Elizabeth Wilson, *Adorned in Dreams: Fashion and Modernity* (I B Tauris, 2013).
[286] Goodrich, 'Signs Taken for Wonders' (n 8) 724.

used as a means of differentiation, in the newly created nation-states, the regulation of clothes aimed at creating new categories of dress as 'distinctive' of a specific national belonging. In 1920s Turkey, for instance, the newly created secular state banned the veil, intended as a symbol of a 'backward' 'religious' tradition: in the passage from a supposedly (multi) religious Ottoman Empire to a singular 'secular' state sovereignty, women's clothes come to symbolize the identity and the territorial border of the state.[287] Being a means of differentiation or homologation, the appropriation and control of images in the public sphere becomes a useful tool to establish a collective national identity within 'nation building' processes through the visible negation of the 'other'.[288] In this sense, the juridical regulation of clothes emerges as the expression of the state's power and control over the private life of its subjects: in other words, clothing regulation emerges as the symbol of the expansion of *regia potestas* over the subject's soul.

The history of sumptuary laws, as well as the recent cases related to the regulation of the female Muslim headscarf in the west and in the east, reveals that "law demonstrates anxiety when individuals attempt to perform their own public face, through personal modes of dress and undress, in the liminal space of dress that the law takes to be a locus of its own dominion [...]. When we choose to dress ourselves publicly in a particular way, we are exercising a form of self-government. We are taking control of our little state."[289] Thus, the law's anxiety over the legal regulation of clothes can be analysed as a means to control and regulate the subject's boundaries:[290] by wearing (or removing) a veil, the law's subject is appropriating her right to regulate her own relation between her private life and the civil/public sphere. If law comes out as the defender of the licit image in the public sphere, then the secular claim of the separation between private and public is an illusion: as I have argued, the regulation of the individual's private sphere has been a useful tool to shape not only the external world, but also, more importantly, the internal world of the law's subject.[291] Thus, what is at stake in the regulation of clothes is the relation between the individual and the state: this relation,

[287] Alev Çinar, *Modernity, Islam, and Secularism in Turkey: Bodies, Places, And Time* (University of Minnesota Press, 2005) 59–60.
[288] Robson (n 265) 17.
[289] Watt (n 10) 123.
[290] Dani Cavallaro and Alexandra Warwick (eds), *Fashioning the Frame: Boundaries, Dress and the Body* (Berg Publishers, 1998) xxi.
[291] Watt (n 10) 135–6.

as Agamben argues, "concerns the routine inscription and registration of the most private and most incommunicable element of subjectivity –the biopolitical life of the body."[292] In fact, the regulation of clothes reveals that "public reason defines a private being which only has a legitimate existence within the public sphere of its representation."[293] Therefore, the legal subject emerges as a fixed and abstract mask created and subjugated *by* and *through* a specific form of visibility. As Deleuze points out, "the mask is the true subject of repetition. Such is the case because the nature of repetition differs from that of representation, because the repeated cannot be represented, but must always be signified, while masking at the same time that it signifies."[294] In fact, as Goodrich reminds us, the subject is said to have a 'legal personality': the word derives from the Latin *persona* which indicated the actor's mask.[295]

[292] Giorgio Agamben, (trans. Stuart J Murray, 'No to Biopolitical Tattooing' (2008) 5 Communication and critical/cultural studies, 201–2.
[293] Goodrich, *Oedipus Lex* (n 19) 92.
[294] Gilles Deleuze, *Différence et Répétition* (Presses Universitaires de France - PUF, 2000) 29.
[295] Goodrich, 'Signs Taken for Wonders' (n 8).

Chapter 2: Setting the scene: Unveiling 'political Islam'

In February 2016, the US Air Force Research Laboratory released a report entitled 'Countering Violent Extremism: Scientific Methods & Strategies'.[296] The report, which was first published in 2011 following President Obama's announcement of a national counter-terrorism strategy, was drafted by academics and researchers and provides a detailed analysis of terrorism and the possibility of its prevention. In particular, the second part of the report includes a Chapter written by Dr Tawfik Hamid, a former Islamic extremist and fellow at the 'Potomac Institute for Policy Studies': the Chapter, entitled 'A Strategic Plan to Defeat Radical Islam', refers to the wearing of the veil as 'passive terrorism'. He states that "[extremism occurs when] increasing numbers of women begin to wear the *hijab*, which is both a symptom of Salafi proliferation and a catalyst for Islamism […] the proliferation of militant Salafism and the *hijab* contribute to the idea of passive terrorism, which occurs when moderate segments of the population decline to speak against or actively resist terrorism".[297] This reveals that the veil, a simple piece of cloth worn by women for many reasons and to many effects, emerges nowadays as the symbol of the 'clash of civilizations'[298] between a 'secularized' West and a 'religious' and 'extremist' Islamic world and is widely misconstrued, abstractly and without reference to the extreme heterogeneity of Muslim majority societies: in this struggle, religious freedom and gender equality confront the fear of extremism and a desire to exclude religion from the public sphere. It is exactly the so called 'clash of civilizations' and the intrinsic link drawn by western commentators between the veil and the 'backward/violent' culture of the 'other' that I address in this Chapter. Drawing from Diamantides' approach, which sees the so called 'clash of civilizations' as the progeny of similarity rather than complete differences, my argument is that the veil emerges as a symbol, a metaphor, of a profound dis-similarity between

[296] Laurie Fenstermacher, 'Countering Violent Extremism Scientific Methods & Strategies' (*Topical Strategic multi-layer Assessment and Air Force Research Laboratory multi-disciplinary white paper in support of counter-terrorism and counter Terrorism*, 2015) ,<https://info.publicintelligence.net/ARL-CounteringViolentExtremism.pdf> accessed 5 April 2016.

[297] *Ibid.*

[298] Interestingly, Williams has observed that the word 'civilization' is nowadays used to indicate a single and universal development of humanity which is strictly related to the culture of a particular population compared to others. As I shall argue in the next Chapter, this description seems to recall the essence of 'European civilization' which aspires to create a universal humanity through the inclusion of the individual within the pale of positive law. See Raymond Williams, *Keywords : A Vocabulary of Culture and Society* (Fourth impression 1990, Fontana Press, 1990).

the 'east' and the 'west'. Its metaphorical power lies in its capacity to symbolize, through women's body, a specific law's subject that is bound to a fixed and universal law. In fact, as Diamantides argues, although the 'eastern' and the 'western' world passed through the assimilation of Graeco-Roman consciousness, only in the west, this has signified a fusion between legal and political power. Differently, in the east, although the Abbasid's effort to institute a unique, fixed *Sharia* law valid for everyone, the resistance of Islamic scholars never allows the creation of a 'canonic form of *Sunna*'. Hence, while the west has managed to create a unique, universal, fixed law able to bound the subject to a fixed identity, in Muslim majority societies, only the Abbasid, and nowadays Islamists, have tried to demystify Islamic religion in the name of a superior *raison d'État*. In this context, the veil emerges as the symbol, the metaphor, of the anxiety produced by the encounter of two forms of universal(ist) legal systems: one triumphant, and the other aspiring. In fact, both western liberals and Islamists, aim at instituting through the force of the rules of law a fixed law's subject bound to a positive unique and universal(ist) law. Both western liberals and Islamists are concerned with the legal regulation of the female headscarf: but while Islamists advocate the compulsory veiling referring to a westernized and secularized version of *Sharia* law, western liberals call for the un-veiling of women as a means to include them within the pale of western/Christian/secular law. Both aim at creating, through the enforcement of a fixed positivised law, a specific legal subject. Thus the veil is not only a metaphor, but a reality lived and experienced by many women who have seen their personal freedoms limited.

My analysis takes into consideration the medieval origins of the Islamic legal system in relation to the western, canon legal system. I consider both systems to be part of what Nancy calls the 'monotheist model of social organization.'[299] He argues that in all monotheistic societies religious law gradually expands to cover more 'secular' concerns, to the point where the process of production of legal meaning is secularized, with little or no connection to core religious beliefs. In this way, by authorizing a system of law that deals with the temporal, religion itself is 'demystified': this process, as Martel argues, leads to a fetishization of law as a substitute for the withdrawn God.[300] Nancy identifies three 'auto-deconstructionist characteristics' typical of all 'monotheistic model[s] of social organization' which lead to a 'demystification of religion'. Firstly,

[299] Nancy (n 13).
[300] James Martel, *The One and Only Law: Walter Benjamin and the Second Commandment* (University of Michigan Press, 2014).

monotheism 'is in truth atheism'. In fact, the presence of many gods in the 'pre-monotheist' societies corresponded to an effective plurality in nature which is organized by religion through myths; in this sense, "the unicity of God […] signif[ies] the withdrawal of God from presence and thus also from the power thereby understood."[301] Secondly, 'monotheistic religion' manifests itself historically as a composition of narratives and myths and emerges as the elaborations of Greek philosophical consciousness and Roman/statist juridical legacy. The third characteristic follows the former: the 'demythologization/demystification of religion', which found its expression in the construction of mythical narratives, was gradually substituted by narratives concerning human affairs, such as concepts of human rights and democracy in the West, and liberation/decolonization theories in the near East and elsewhere; ultimately, these 'secular' western concepts produced a legalism which is nothing more than the substitute for God's supreme power.

The above framework allows the comparative analysis of two "structurally similar and contingently dissimilar",[302] legal systems of religious origins. While the comparison reveals that in both cases the power to make law act as a substitute for God's supreme power, only in the West was this fully articulated with the development of the doctrine of sovereignty. By contrast, Islamic law's precise relationship with political power is much less linearly developed and the different periods of its cross-fertilization with Greek philosophy and Roman law, before and after colonialism, should be analysed.

After the death of the Prophet (632), the early Caliphs ruled the conquered provinces far from the capital, and left legal and administrative matters to local *qadis* (early judges), wise people respected by the conquered population.[303] They were accustomed to adjudicating legal cases based on the principle of *ra'y*, discretionary opinion, while the *Qur'an* and the *Sunna* were presented as modifications of the existing customary law. The first period of Islam was marked by interpretative freedom and casuistry; therefore the production of jurisprudence was case driven and sensitive to local customs. One immediate result of this was the safeguarding of the conquered population's customary law and pre-Islamic practices.

[301] Nancy (n 13) 42.
[302] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11) 97.
[303] Wael B Hallaq, *The Origins and Evolution of Islamic Law*, vol 1 (Cambridge University Press, 2005).

However, the centralization policies of the Umayyad dynasty initiated a profound struggle between legal and political powers: on the one hand, *qadis* and *Ulama* increasingly depended on the financial favours of the political elite, while on the other, the political elite needed the legitimization of the law to reign and to ensure absolute control over the conquered population. This dynamic and troubled symbiosis characterized the relationship between these two powers. An attempt at western style centralization and sovereignty under a self-proclaimed 'God's Caliph' was further pursued by the Abbasid dynasty. This 'would-be centralized Islamic theocracy' tried to concentrate political, religious and legal power on the Caliphs who financed the translation of classical Greek work into Arabic in an attempt to promote a singular canon law to be interpreted and applied using Aristotelian logic and dialectic disputation. What the Abbasids sought to create was a monolithic, united and universal Muslim juridical community. Notably, however, this effort was not successful: as a matter of fact, the attempt by the Abbasids to create a 'superior *raison d'etat*' was damaged by Muslim scholars who maintained a relatively pluralist system by alleging respect for different schools of legal interpretation. As I shall argue, the matter of the *hijab* should be 'positioned' within this struggle of power and the attempt to create, through the women's body, a singular, fixed, and monolithic national identity.[304]

If, in the West, centralization and sovereignty eventually helped to produce the 'nation-state', in Muslim majority societies the relative freedom of judges and jurists and the *de facto* and *de jure* plurality of schools, which reflected local cultures, meant less state legitimacy and a "deficient sovereignty model"[305] (that arguably rendered the Muslim world more vulnerable to western expansionism). While in the West Christian scholars textualized a canon law embodied first by the Pope and then by the Emperor, in Islam the law's textualization was constantly in need of negotiation with the local legal authority. The situation did not change until the 19th century, when the Ottoman Sultans modelled their new 'Muslim Empire' on the European sovereign 'nation state' by rendering the Hanafi book of law valid only in the hands of the Sultan and created a centralized appointment system for *qadis* while adopting elements of the French Legal system. With the Ottoman Empire the process of 'secularization of Islam' began to be

[304] As a matter of fact, as I have pointed out in the previous Chapter, it was during the Abbasid period that the female veil was first legally regulated in Muslim majority societies. Ahmed (n 24).
[305] Diamantides, 'Constitutional Theory and Its Limits – Reflections on Comparative Political Theologies' (n 11).

westernized. The subsequent colonization period (from the16th to the mid-20th century) marked even more profound changes with the imposition of law codification, the adoption of legal positivism by newly created law faculties, the parallel decline of the *Ulama* system of education and the loss of communication of ideas among different Muslim schools of thought, each of which was isolated in the confines of the new 'nation-state' in the only jurisdiction remaining – namely 'family law'. The codification of Islamic law signifies a reduction of legal and cultural plurality typical of the Muslim world: consequently, the individual becomes gradually bound to a singular, monolithic, binding law emanating from a 'sovereign' of the 'new nation-state'.

Thus, the demythologization and secularization of the Islamic and the western Christian religions happened differently. The differences concern mostly the 'deficient sovereignty'' and legal authority of Medieval Muslim governments which have never succeeded to create a unique *Sharia* law valid for everybody. The Abbasid's attempt to 'proselytize' religion is nowadays re-claimed by Islamists. In fact, what Islamists are seeking is not the 'true', 'pure' Islam, typical of Medina, where the law was made locally and reflected the plurality of cultures of the *Umma*, but the legal edifice sought in the Abbasid period which reinforces central political power by binding the community to a singular all-encompassing legal code as well as a 'national' 'Muslim' identity'.

In this connection, the veil emerges as a symbol of the contrast between two versions of sovereignty, that of the European colonizer and that of the Islamist nationalist who aims to create a singular Muslim identity by reducing Islamic law to a monolithic codified legal system. In fact, as I have argued in the first Chapter, the veil is not an Islamic symbol but was borrowed from earlier non-Islamic cultures. The compulsory veil promoted by the Abbasid through a misogynist interpretation of Islamic texts,[306] as well as by contemporary power-hungry Islamist groups is an attempt to symbolically forge a common identity; indeed the female figure and/or dress code are common collective group and also nationalist symbols.

[306] The Abbasid promoted a misogynist interpretation of Islamic texts and tried to enforce veiling and seclusion throughout the reign: veiling becomes a common practice in the main cities but many peasants in remote rural areas did not wear it. Ahmed (n 24) 66–9; See also Shirley Guthrie, *Arab Women in the Middle Ages: Private Lives and Public Roles* (Saqi, 2013) 124–5; Ziba Mir-Hosseini, 'The Politics and Hermeneutics of Hijab in Iran: From Confinement to Choice' (2007) 4 Muslim World Journal of Human Rights 3.

Therefore, the current obsession with the Muslim veil, shared by western liberals and Islamists, acts to hide the anxiety produced by the imposition of one way of secularized monotheism over another.[307] Recalling Nancy,[308] if in the West the process of 'demystification of religion' founds its final expression in the substitution of religious values with 'human rights and democracy', in post-colonial Islam this 'demystification' founds its westernized expression in the nationalist decolonization struggle. Henceforth, the new 'nation-state', in the West as well as in the East, produced a legalism which is nothing more than a substitute for religion.

As Diamantides argues, when the western and eastern worlds meet, their internal incompleteness becomes apparent: this develops a mechanism of defence and attachment to their respective legal systems. In essence, the so called 'clash of civilizations' is nothing more than the anxiety of two dogmatic legal systems over the condition of incompleteness and their own internal shortcomings:[309] on both sides a mechanism of defence and attachment to their respective laws develops which is nowadays mirrored in the struggle over the veil. In fact, both western liberals and Islamists are prompted by the desire for a positive law that can guarantee social order and facilitate centralized state control. In this context, the passionate debate over the *hijab* is a fake one: the veil is a visible symbol, a mirror, of a clash between two legal systems, structurally similar and contingently dissimilar. As a matter of fact, both liberals and Islamists agree that the dress code of Muslim women cannot be a personal women's choice; where the two sides disagree is on how many centimetres of skin a woman should reveal. While, as I shall argue in the next two Chapters, western law implements a specific model of womanhood through the banning of the veil, the static *Sharia* law proposed firstly by the Abbasid and then by Islamist movements nowadays, proposes a fixed model of womanhood by rendering the veil compulsory.

[307] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11).
[308] Nancy (n 13).
[309] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11).

2.1 *Shari'a* Law and Islamic legal sources

The hierarchy of legal sources for Muslims is highly complex and is the result of a gradual process of accommodation between traditional local customary laws and the hermeneutic interpretations that have been developed in different historical periods and geographic areas; therefore, its specificity has to be found in the interaction of many cultural and normative systems that are inscribed in the very essence of Islamic law.[310] In essence, *Shari'a* is a comprehensive juridical system which emerges as the result of the accommodation operated by Islam with the customary law of the conquered populations as well as of authority and power relationships which were continuously negotiated in the history of Islam. As I have briefly outlined in the previous Chapter, *Shari'a* law is not a fixed, monolithic 'substantive', 'traditional'[311] legal system, as is positive law in the West; rather, it is a 'pluralistic' legal system, a 'polyglot discourse', based on the consensus of the *Ummah*. There was no single Islamic law in the past, nor is there today; on the contrary, there exist many books of Islamic law which allow a certain flexibility in the regulation of Muslims' daily lives.

For Muslims, revelation is entrusted in the *Qur'an* which is not the outcome of a divinely-inspired human, such as the Gospel for Christians; rather, it is the word of God that was received *verbatim* by the Prophet Muhammad and, for this reason, is the most important religious text and the primary source for Muslims in every aspect of their lives. The text emphasises that the Prophet was asked to receive the sacred words in his original tongue, Arabic, and to protect humans from mistakes, inaccuracy, and misapprehensions.[312] The sacred text also highlights that Muhammad was a mere human chosen by God to be the intermediary of the Revelation and to address mankind so they would have no doubt about the "right path" to take and would, therefore, be

[310] Clifford Geertz, *Local Knowledge : Further Essays in Interpretive Anthropology* (3rd ed, BasicBooks, 2000) 185.
[311] In Weber's theory, 'traditional' refers to the legitimacy of traditional norms and it is translated in the acceptance of the legitimacy of what has 'always' existed. In this case "the rightness of a law is judged in terms of its 'legality', its formal appropriateness in terms of existing legal principles, i.e., its procedural correctness". While the principle of 'substantive' is based on the recognition of norms as legitimate "by virtue of a rational belief in its absolute value […]: in this case, rightness of the law is judged in terms of its implementation of a specific extra-legal value, e.g., equality, freedom, or conceptions of morality, patriotism, honor, etc." Martin E Spencer, 'Weber on Legitimate Norms and Authority' (1970) 21 The British journal of sociology 123, 127–28.
[312] Saeed (n 38) 15.

unable to live in ignorance.[313] The sacred text deals with many themes and includes commands about worship, fasting, pilgrimage, marriage and divorce, restriction of polygamy, regulation of slavery, relation between the sexes, children and custody, punishment for crimes etc…[314] The *Qur'an*, however, only occasionally gives explicit guidance; rather, it usually contains general exhortations. In fact, the number of 'legal' verses in the *Qur'an* (between 200 and 500) represents a small portion of the 6300 verses present in the holy book. Since the *Qur'an* is the most important legal source for Muslims, Koranic exegesis (*Tafsir*) has emerged as one of the most important disciplines in Islam.[315]

The second source of Islamic law is the *Sunna*: literally, it means 'the trodden path', and for today's Muslims it is translated into the daily actions and behaviour of the Prophet Mohammad during his life. *Sunna* is a pre-Islamic practice; it was a custom of the earlier Arabian society to follow the *Sunnan* (normative practices to be emulated) of every charismatic and distinguished person in a family/clan. As I shall argue, in the first period of Islam, Caliphs and *proto-qadis* (early judges) referred to *Sunnan* (note the plural) as actions and norms accepted and recognized as ethically correct by the community.[316] The process that led to the singular, codified, Prophetic *sunna* as substitute for the *Sunnan* passed through diverse stages before becoming the second source of law after the *Qur'an.* For this reason, Islamic *Sunna* maintained many pre-Islamic customs, including the practice of veiling.[317]

The *Sunna* is documented in the *Hadith*, testimonies and stories of the Prophet's life transmitted by his companions or those who followed his companions.[318] In the centuries after the death of the Prophet, writing down the *Hadith* was not considered an important practice; it is during the Umayyad Caliphs that Islam witnessed a systematic reorganization and collection of *Hadith*.[319] For many Muslims, the *Hadith* are as important as the *Qur'an*, although the Sacred Book has a divine authorship because it was dictated directly by God. The function of the *Hadith*, which form the *Sunna*, is to

[313] Burton (n 41) 17.
[314] Saeed (n 38) 16, 17, 24.
[315] *Ibid,* 24.
[316] Irfan Shahîd, *Byzantium and the Arabs in the Fifth Century* (Dumbarton Oaks, 1989) 180.
[317] Hallaq, *The Origins and Evolution of Islamic Law* (n 303) 49.
[318] Mernissi (n 25) 35.
[319] Ali, Muhammad, 'Collection and Preservation of Hadith', in P K Koya Kuala Lumpur (ed) *Hadith and Sunnah: Ideals and Realities* (Islamic Book Trust, 1996) 33.

clarify how a good Muslim should behave to follow the path of the Prophet Muhammad, who acted completely in conformity with the demands of the *Qur'an*.[320] For devout Muslims "the example of the Prophet Mohammad and of the community he established is to be followed as much as possible"[321] and it has the same normative value as the *Qur'an* because it cannot be in any case in conflict with it. In order to establish the validity and authenticity of a *Hadith*, Muslim scholars have established the *isnad* system which consists of re-tracing the chain of transmitters of a specific event. While some scholars argue that the *isnad* (the chain of transmission) was a common practice of Muhammad's companions,[322] others locate the beginning of the *isnad* system in the seventh/eighth century.[323] All in all, historically, Muslim scholars have developed specific principles to establish if the *isnad* is valid:[324] the chain must be traced back to its original transmitter and scholars should question whether the original reporter had high moral qualities. Once the *isnad* is established, scholars can accept (*maqbul*) the *Hadith* as authentic (*sahih*), or 'agreeable' (*hasan*), or it is simply rejected (*mardud*). In contrast with Sunni, *Shi'a* believe that, in order for a *Hadith* to be authentic, it should have been transmitted by a member of the Prophet's family or by his descendant *imams*.[325] The importance of the *Hadith* reveals that for Muslim believers, Islam is not simply a religion but a way to inhabit, live, and experience life: their love for the Prophet is mirrored in their wish to imitate his behaviour and way of life, "not as a commandment but as virtues where one wants to ingest, as it were, the Prophet's personal into oneself". Thus, Muslim performative practices lay "not so much upon a communicative or representational model as on an assimilative one".[326]

In the evolution of Islamic law, the study of the *Qur'an* and *Sunna* produced the *Usul al fiqh*, the body of knowledge. *Usul al fiqh* is the "legal theory that laid down the principles of linguistic-legal interpretation, theory of abrogation, consensus and juristic reasoning, among others."[327] Since *Usul al fiqh* arose from the synthesis between two

[320] Sedgwick (n 42) 29.
[321] *Ibid*, 9.
[322] Muhammad Mustafa Azami, *Studies in Early Hadith Literature* (American Trust Publications, 1978) 61.
[323] Saeed (n 38) 38.
[324] Muhammad Zubai Siddiqi, 'The Sciences and Critique of Hadith', in P K Koya Kuala Lumpur (ed) *Hadith and Sunnah: Ideals and Realities* (Islamic Book Trust, 1996) 94.
[325] Saeed (n 38) 38.
[326] Saba Mahmood, 'Religious Reason and Secular Affect: An Incommensurable Divide?' (2009) 35 Critical Inquiry 836, 75–6.
[327] Hallaq, *The Origins and Evolution of Islamic Law* (n 303) 210.

juristic theories, rationalism and traditionalism,[328] it is both descriptive and prescriptive. At the very beginning, before the creation of the main schools of Islamic thought, which developed pluralistic and differentiated interpretations of the main legal sources, the legal theory exposed the *modus operandi* of the law: "the theory culled out what was seen as the best methods of actual legal practice and made them the prescribed methods of 'discovering' law: for, after all, the declared purpose of this theory was, in essence, to lay down the methodology by which new legal cases might be solved."[329] When the earlier jurists started the process of sacred texts' interpretation, *Shari'a* indicated the entirety of the commands and prohibitions found in the *Qur'an* (divine source), while *fiqh* indicated specific rulings that had arisen from the interpretation of *Shari'a* (human source). It is exactly this initial distinction that reveals the existing tension between divine revelation and human legal reasoning within the Islamic system of law: this tension, however, is obscured in so far as (many) believers see the *Sunna* as having 'equal status' with the *Qur'an.*[330]

Shari'a law is based on five main categories: 'forbidden' (*haram*), 'allowed' (*mubaha*), 'recommended' (*mustahabb* or *Sunna*), 'discouraged' (*makruh*), and 'obligatory' (*Wajib*). The establishment of these categories has given a certain flexibility of interpretation of what is right or wrong and has allowed Islam to accommodate itself to the custom/culture/traditions of the conquered populations.[331]

Islamic legal analysis is based on two main principles: *Ijma* (consensus) and *Qyas* (analogy). The *ijma* is the unanimous agreement of the congregation of Muslims about a precise matter: it is a pre-Islamic customary practice of the Arabian peninsula, where it was common to legislate based on the consensus of the whole community. Nowadays, there is a consensus only about the fundamentals of Islam, such as the five daily prayers, the *Qur'an* as the word of God, the unity of God, Mohammad's prophethood,

[328] "Rationalism, in Islamic jurisprudence merely signifies a perception of an attitude toward legal issues that is dictated by rational, pragmatic and practical considerations.…rationalism is substantive legal reasoning that, for the most part, does not directly ground itself in what came later to be recognized as the valid textual sources (namely, the Qur'an and Prophetic hadith/Sunna) [while] traditionalists were those who held that law must rest squarely on Prophetic hadith, the Qur'an being taken for granted by both rationalist and traditionalists." *Ibid,* 74.
[329] *Ibid*, 148.
[330] Noel James Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago Press, 1969) 3.
[331] Sedgwick (n 42) 9.

fasting, and pilgrimage to Mecca.[332] Islamic law is also based on the recognition of *urf* (local custom): if a population follows customary practices that do not conflict with the *Qur'an* or the *Sunna*, then those practices have to be recognized under Islamic law.[333] One of the most important principles of Islamic jurisprudence is the *ijtihad* (interpretation of the sacred texts) by jurists and scholars. The maximum development of *fiqh* through *ijtihad* occurred during the first four centuries of Islam when the interpretation of the God's word was at its maximum development. As I shall argue, with the Abbasid policy and their (unsuccessful) attempt to create an Islamic nation-state under a fixed *Sharia* law, the door of *ijtihad* closed. Although the Abbasid deeply limited the principle of *ijtihad*, different schools (*madhhab,* literally, 'way of proceeding') of Islamic thought still exist associated with different centres of the vast Islamic empire.[334] The Hanafi School of law, founded by Abu Hanifa (d. 150-767) based in Iraq gives particular emphasis to reason and today is followed by Muslim believers mainly on the Indian continent, in central Asia and in Turkey. In contrast, the Maliki school, founded by Malik ibn Anas of Medina (d. 179-795), privileged text over reason and considered the practices of Medina's people at the time of the Prophet as authoritative: this school is actually followed in north and west Africa. The Hanbali School, founded by the traditionalist Ahmad ibn Hanbal (d. 240-855) who collected around fifty thousand *Hadith*,[335] relies deeply on the main texts while confining the *qiyas* (analogy) and the *ijma* (consensus) to insignificant historical categories. Similarly, the *Shafi's* Islamic law school is mainly based on a literal interpretation of the *Qur'an* and the *Sunna*.[336] The main *Shi'a* school of Thought (*Ja'fari*) differs from the Sunni schools in their method of authentication of the *Hadith*: for them, only the *Hadith* recounted by the Prophet's family members or his descendants can be considered valid sources for authentication.[337] As Reinhart observes, the different approaches to Islamic law developed over the centuries by Islamic scholars have important outcomes: firstly, due to the pluralism expressed in Islamic jurisprudence, the doctrine is based on 'juristic probability' more than 'certainty' as is (supposedly) the case in western law. Secondly,

[332] Saeed (n 38) 50–1.
[333] *Ibid*, 50.
[334] Kevin Reinhart, 'Law', in Jamal J Elias, *Key Themes for the Study of Islam* (Oneworld Publications, 2010) 229.
[335] Muhammad Zubair Siddiqi, *The Hadith for Beginners: An Introduction to Major Hadith Works and Their Compilers* (Goodword, 2001) 105.
[336] The (Sunni schools) tend to agree on the most important points but they disagree on details. See Sedgwick, (n 42).
[337] Saeed (n 38) 51–2.

"in their mutually acceptable differences they occasionally provided a resource that could be exploited creatively to effect change or reform":[338] praxiologically, scholars and believers rely on different schools of Islamic thought and combine different aspects in order to deal with different situations.[339]

Islamic law does not only include the codified interpretations of Islamic jurists and scholars within the main Islamic schools of thought which survived until today, but also the understanding of local *Ulama* who issue *fatwas*. The *fatwa,* as I have argued, represents the 'practical' aspect of Islamic law and it is promulgated in response to a precise need of a particular Muslim community: in the past as well as nowadays, *fatwa* is a tool of accommodation to bring tribal societies into the orbit of normative Islam.[340] This suggests a multiplicity of ways for Muslims to comply with obligations and to practice their rights under *Shari'a* law. In the evolution of Islamic law, the *Ulema*, the clerical body, and the Muslim legal scholars are engaged in the study of Islamic law; they are better known as judges of *Shari'a* law because of their role in interpreting 'God's word' for the local community. The translation of '*Ulama*' as an Islamic clerical body should be read with caution in view of the absence of a *corporate* body of Muslim clerics. In fact, in contrast with Christianity, in which the clergy body has a specific hierarchical structure, "the *Ulama* do not possess or monopolize a unique mediating role between the believer and God; they cannot promise or refuse salvation or grace […] there is no mechanism of confession or penitence that they operate, and they are not God's substitute on earth. They are different, therefore, to a church hierarchy through which the believer must go to approach the Divinity."[341] They are the interpreters of 'God's word' by virtue of their knowledge and their position in the local community: for this reason they are seen as the representatives of the *ijma* 'consensus' of the *Ummah* or the representatives of scholarly or learned consensus. The *Ulama* lack, today as well as in the past, a clear hierarchical structure and leadership which makes it "possible for every Muslim to have a voice in religious debates on issues about which they are

[338] *Ibid*, 52.
[339] Reinhart (n 334) 230.
[340] Aharon Layish, 'The Fatwa as an Instrument of Accommodation' in Muhammad Khalid Masud and others (eds) *Islamic Legal Interpretation, muftis and their fatwas* (Harvard University Press, 1996) 270–77.
[341] Michael Gilsenan, *Recognizing Islam : An Anthropologist's Introduction* (Croom Helm, 1982) 31.

knowledgeable."[342] This is an important feature of the analysis of Islamic law because it allows a myriad of interpretations by local religious clerics that vary from place to place based on specific socio/political/economic contexts. Hence, there is no obvious singular response to the question: 'how should a Muslim behave? What interpretation(s) of Islam is normative and applicable?'

In fact, although Sunni Islam includes four main books of Islamic law, local *Ulama* follow diverse legal schools based on their own reasoning: the principle of *ijma* provides an umbrella for the accommodation of various and different interpretations of Islamic law. It is possible to say, therefore, that when Muslim jurists don't agree 'they agree to disagree': as a matter of fact, in order to reduce the tension between different schools of thought, Muslim scholars have set up the principle that each Muslim is free to follow the school of his/her choice and to change his/her school of law on particular legal issues.[343] This pluralistic concept of law emerges from the lack of authoritative hierarchical structure within scholarly and Islamic schools of thought and it is based on the idea that no human interpretation can be the unique and final legal authority. This notion is clarified by a famous saying of the Prophet that "difference of opinion within my community is a sign of the bounty of Allah".[344] This quote amply justifies the pluralistic vision of Islamic law and differences between doctrines. To express the unity and diversity within Islamic law, Coulson refers to an old Arab proverb which assumes that "the person who does not understand divergence in doctrine […] has not caught the true scent of jurisprudence (*Man la ya'raf al-ikhtilaf lam yashumma ra-ihata 'l-fiqh*)".[345]

[342] Michael Winter, 'Ulama' between the State and the Society in Pre-Modern Sunni Islam', in Meir Hatina (ed) *Guardians of faith in modern times: Ulama in the Middle East* (Brill, 2009) 21.
[343] Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (n 330) 34.
[344] The supporting Quranic verse states "Let there be no compulsion in religion" (2:257). See also, Sir Thomas Walker Arnold, *The Caliphate* (Clarendon Press, 1924) 184.
[345] Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (n 330) 20–1.

2.2 Islamic law and the assimilation of the monotheistic frame of mind

Based on Nancy, one of the auto-deconstruction characteristics of monotheism is the assimilation of Greek philosophical consciousness and Roman/statistical juridical legacy. For him, Christianity, in its auto-interpretative history, presents itself not simply as a mythology but as a composition of Greek and Roman philosophy which involves the idea of sovereignty in the name of God. This, in turn, had profound consequences in the development of legal and political power in the West.[346] In contrast, as I shall argue, although Islam historically assimilated Greek philosophical concepts and the Roman juridical legacy, it never developed a western like form of sovereignty. Nevertheless, the assimilation of western concepts during the Abbasid period profoundly changed the essence of Islamic law and, along with it, bolstered a new concept of sovereignty.

The history of Islam is marked by three important periods: the first is characterized by a clear separation between political and legal power in which local judges enjoyed great freedom in their legal adjudications; the second is marked by a partially successful assimilation of Graeco-Roman-Christian elements, which was fundamental for the creation of an 'expansionist nation-state'; while the third is signed by the 'westernization' of Islamic law, which found its expression in concepts such as nationalism, liberation/decolonization and self-determination theology, typical of the 'new modern secular ideology'.

In the first period of Islam, law was marked by unconditional freedom for judges in the administration of legal affairs. Political and legal powers were completely separated and the legal interpretation of 'God's word' was at its most prevalent. After the death of the Prophet (632), the policy of the central Muslim government during the period of the conquest (632- 661) was clear: the conquered populations regulated themselves exactly as they had before the arrival of Islam.[347] The Caliphs employed *proto-qadis* (earlier judges) to administrate, locally, the garrison towns: despite their lack of legal training, they were wise people recognized and respected by the local community, expert in adjudication. The *proto-quadis* were accustomed to adjudicating legal cases based on the principle of *ra'y*, discretionary opinion, which was based on *Sunna Madiya* (past exemplary actions including the life of the Prophet and the earlier Caliphs) and common

[346] Nancy (n 13).
[347] Hallaq, *The Origins and Evolution of Islamic Law* (n 303) 36.

sense, while "rules of law as the *Qur'an* and the *Sunna* established were regarded simply as ad hoc modifications of the existing customary law."[348] Thus, the first period of Islam was characterized by a lack of centralization policies; the *qadis* were appointed by the central government and used to adjudicate legal cases locally, far from the central capital, Medina. The legislative role of the Caliph was purely occasional and only enforced when special need arose. In fact, the so called 'pious Caliphs' (632-661) considered themselves equally subject to the dominant religious and *sunnaic* values. As I pointed out, the early Caliphs and their companions were acting within the Arabian tribal culture and society where 'consensus' and the observance of an 'exemplary path' (*Sunna* and *Sunnan*) was a normative practice. It was this 'freedom of interpretation', combined with the general culture of the area, that had favoured a growing interest in the Prophetic *sunna*; the values that guided the *qadis* at that time mirrored the general culture of the Near East and the *Qur'an's* precepts were only partially altering pre-existing customs.

With this premise, it is not difficult to understand how the Prophetic *sunna* slowly started to be part of the *Sunnan* of the conquered populations. Although the legal administration of the garrison towns was the main duty of the *qadis*, in the beginning they performed many other functions; they were secretaries of treasury, tax-collectors and 'story tellers': they recounted stories about the life of the Prophet or gathered people to discuss the hermeneutical interpretation of the sacred text and the *Hadith*. This fundamental duty provides evidence of the gradual development of *qadis*' religious character, their specialization in 'legal affairs' and the formation of the scholarly circle in Islam. The isolation of Prophetic *sunna* to pre-Islamic customary *Sunnan* is fundamental in understanding the transformation of the *qadis*' function and character and the assimilation of Prophet's model as expression of religious and legal authority.[349] As Hallaq argues, this transformation was the result of an epistemic and pedagogical development:

"epistemic, because the need to know what the Prophet says or did became increasingly crucial for determining what the law was. And pedagogical, because, in order to maintain a record of what the Prophet said or did, approved or disapproved, certain

[348] Coulson, *A History of Islamic Law* (n 6) 4.
[349] Wael B Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge University Press, 2001).

sources had to be mined and this information, once collected, needed in turn to be imparted to others as part of the age-old oral tradition of the Arabs that is now imbued with a religious element."[350]

The seventh century marked a profound change in the function of the *qadis*: they were no longer wise people recognized by the local population but experts in law, appointed solely for judicial functions. The development of a class of legal specialists characterized a new stage in the evolution of Islamic law; "the increasing specialization of the judge's office manifested itself in the growing dependence of the *qadi* upon legal specialists who made their concern to study the laws and all emerging disciplines with which it was associated".[351] The domain of legal procedures was in the hands of the new 'specialized' class while the study of legal discipline was in the hands of the *mufti*, or *Ulama,* who served as legal consultants for the *qadi* and on the issue of *fatwas* when it was needed. The activities of the *Muftis* are often underrated by many western scholars, who see their role as less institutionalised than that of the *qadi*. The growing legal power of the *Ulama*, however, caused a serious entanglement in the relationship between political power and legal authority.[352] If the source of law was the *Qur'an* and the *Sunna*, only jurists, those able to interpret the word of God, had the authority to promulgate the law: "those men in possession of a greater store of knowledge grew more influential than others less learned; gaining in the process […] an authority that began to challenge the legal (but not political) authority of the Caliphs".[353]

This historical moment of Islamic law's evolution marked not only the professionalization of the *qadis* and the development of specialized legal scholars (*Ulama*), but also the pluralistic textualization of the law and the development of many Islamic juridical schools.[354] The study of the *Hadith* and religious texts brought about a specialized circle of learning, or *halaqa*, which organized public discussion about *Qur'anic* interpretation. During the first three decades of Islam *halaqa* was usually held in mosques, which offered a space to discuss and interpret *Sunna* and *Hadith.* As jurists developed many different interpretations of the sacred texts, *mufti*, *qadis* and scholars

[350] Hallaq, *The Origins and Evolution of Islamic Law* (n 303) 50.
[351] *Ibid*, 62.
[352] Muhammad Khalid Masud and David S Powers (eds) *Islamic Legal Interpretation: Muftis and their fatwas* (Oxford University Press, 2005).
[353] Hallaq, *The Origins and Evolution of Islamic Law* (n 303) 77.
[354] It is worth nothing that, despite the proliferation of *Hadith*, the legal jurisprudence continued to be based also on *ra'y,* discretionary opinion, until the eight century.

started to follow different legal doctrines. Jurists generated *fiqh*, the body of legal knowledge, in the main Islamic centres scattered throughout the vast Muslim Empire and elaborated a heterogeneous system of law, differing from place to place and from school to school (or *madhhab*). The scholars of each *madhhab* followed the legal doctrine of a particular *Ulama* who, in turn, followed the positive doctrine of his predecessors. Interestingly, "the personal schools afforded the first step toward providing an axis of legal authority, since the application (in courts and *fatwa*) and the teaching of a single, unified doctrine- that is, the doctrine of the leading jurist around whom a personal school had formed- permitted a *measure* of doctrinal unity".[355] However, the schools, which were open to anyone who possessed intellectual and moral qualifications, were far from being formal educational institutions, nor were they considered an 'official law-making body'. This is an exceptional situation that differentiates Islamic law from other legal systems: while in early Roman law, for instance, the main legal sources were endorsed by an official law-making body and in the canon law first the Pope and then the Emperor were the source of legal rules, the alleged-divine character of Islamic law helped to reinforce its authority. As a matter of fact, 'God's law' was applied equally to the rulers and to the population. In short, the first period of Islam was characterized by a pluralist interpretation of Islamic law and by the gradual development of a professional, but not hierarchically organized, judiciary body. The Caliph performed the role of mediator only in exceptional cases, mostly when the *qadis* asked for his advice, and the *Umma* observed the law established by their local knowledgeable men; "this could be why sovereignty was stillborn in Muslim empires and, also, why the highly complex and elaborate systems of Islamic law incorporate in legal practice diverse understanding of key concepts to the point that a litigant can rely on different *madhahib* ('school of interpretation') in relation to different aspects of the same legal case."[356] The legal and cultural accommodation operated by the firsts Caliphs assured the safeguarding of the conquered population's customary law and pre-Islamic practices. The established law included all the subjectivity of the heterogeneous society of the time (including Christians and Jews, considered part of the *Umma,* the Muslim community, in the *Qur'an*).

[355] Hallaq, *The Origins and Evolution of Islamic Law* (n 303) 166.
[356] Diamantides, 'Shari'a, Faith and Critical Legal Theory'' (n 11) 55.

This "version of law-bound-universality"[357] represented a challenge for a new generation of Caliphs, the Umayyad, who attempted to create a centralized state: "the advent of Umayyad rule set in motion a process of continued expansion and centralization of authority that would transform the Islamic community from an Arab shaykhdom into an Islamic empire whose rulers were dependent on religion for legitimacy and the military for power and stability […] This permanent shift […] symbolized the new imperial age".[358] The Umayyad period (661-750) witnessed the gradual separation of the ruling elite from the people and the egalitarian form of governance of the firsts Caliphs. Scholars, story tellers and *qadis* started to identify political power with dishonesty, corruption and depravity in contraposition to the pious jurists. By the eighth century, anti-Umayyad sentiment had spread and tension between political and legal powers increased when many jurists began to defend the population in preference to the ruling class. This tension between the ruling elite and the religious-legal class is not only the result of the Umayyad's centralized policy but also the outcome of a new historical environment in which religious sentiment was growing within the population. The literature is full of stories of jurists who rejected appointment by the Caliph, or preferred to be imprisoned rather than accept. That was the destiny of many Muslim scholars such as Abu Hanifa or Ali b. Abd Allah Al Muzani, who alleged to be ignorant when they refused to assume the post assigned by the Caliph.[359] This phase of Islamic law's evolution is marked by the separation between the ruling elite and the religious-legal class, where the *Ulama* used the hermeneutic system of interpretation of the *Hadith* as a tool to struggle against the central political power. The development of a sharpened technique of Prophetic *Hadith*'s authentication by the *Ulama* "was precisely a means to control the process of legitimation of state power by association with (invented) good practice."[360] In essence, it was a clash between local and centralized concepts of power, where the *Ulama* played a radical 'politic role' in defending their legal authority from the appropriation of legal affairs by the central political power. Clearly, the ruling elite needed control of the law in order to govern the population and jurists represented the link between the ruling political elite and the masses; in other words, they were the only ones that could give legitimacy to the political authority. This had diverse political implications in the history of Islamic law: "a

[357] Diamantides 'Toward a Western-Islamic Conception of Legalism' (n 11) 100.
[358] Esposito (n 120) 40.
[359] Hallaq, *The Origins and Evolution of Islamic Law* (n 303).
[360] Diamantides 'Shari'a, Faith and Critical Legal Theory' (n 11) 58.

ruler who has no say at all in the definition of the law by which his subjects have chosen to live cannot rule those subjects in any but a purely military sense […] rulers were obeyed as outsider to the community, not as representatives of it […] The state was thus something which sat on top of society, not something which was rooted in it".[361] It is also worth remembering that the two powers were reciprocal; *qadis* and *Ulama* depended on the financial favours of the political elite, while the ruling elite needed the legitimisation of the law to reign and to assure absolute control over the conquered population. The struggle between legal and political power came to an end in the middle of the fourteenth century, when the political power, lacking the support of the local population, recognized that only the *Ulama* could interpret the law of God. Although the Umayyad dynasty never succeeded in creating a canonical version of the *Sunna*, they marked the 'Arabization' and 'Islamization' of the Muslim Empire through a process of conversion and assimilation of 'non-Muslims': with the Umayyad, Islam witnessed the first (unsuccessful) attempt of 'secularization' in the name of a new 'Islamic identity'.[362]

The process of centralization under a unique Caliph was further pursued by the Abbasid dynasty and it coincided with the moving of the capital from Damascus, in the Mediterranean, to Bagdad. The new 'centralized Islamic theocracy' (750-1258), which witnessed an important cultural and economic development thanks to the so called 'pax islamica' (unified 'Islamic world'), tried to concentrate political and legal power in the figure of the Caliph to gain absolute power over the vast Muslim Empire;[363] what the Abbasid dynasty sought to create was a form of law similar to the Roman one, a canon law, where the Caliph (or the sovereign, using Nancy's term) is the ultimate interpreter of the 'God's word'.

The first Caliph of the Abbasid dynasty, Mansur (754-775), tried to create a comprehensive body of law valid for all the conquered population. He offered the founder of the Maliki school of thought an endorsement of his book of law as the unique law valid for the whole Empire: surprisingly, however, Maliki refused, alleging his respect for the other schools of Thought. The successor of Mansur, Al Mahdi, continued to develop the policy of his predecessor: if, on the one hand, Al Mahdi knew that he

[361] Patricia Crone, *God's Caliph : Religious Authority in the First Centuries of Islam* (Cambridge University Press, 1986) 109.
[362] Esposito (n 120).
[363] *Ibid,* 51.

could not gain political legitimacy by coercion and/or oppression of the ruled masses, then on the other, a total conformity to the law would signify a decline of his political power and legitimacy. It is exactly this symbiosis and precarious balance that determined, in the history of Islam, a continuous negotiation between legal and political authority. In order to gain legitimacy, the Caliph decided to surround himself with competent scholars and jurists, loyal to the central government, to assist him in 'legal affairs' when it was needed. If the earlier Caliphs could acquire legitimacy based on their knowledge of the law, he needed to supplement the caliphal office with jurists due to the long and difficult process of law's textualization and the use of reasoning and hermeneutics. Like his predecessor, Al Mahdi needed to fashion the new and vast 'Islamic empire': he engaged Christian intellectuals escaping from the theocratic Byzantine Empire to translate classical Greek work into Arabic and a new form of dialectic argumentation started to be part of Islamic doctrine.[364] This marked not only the introduction of 'western' concepts of logic and dialectic disputation in legal interpretation, but also the attempt to promote a monotheistic frame of mind within the Empire. For the first time in the history of Islam, legal scholars employed by and loyal to the Caliphs started to use dialectic concepts in the hermeneutic interpretation of the *Sunna*; "the Abbasid dynasty needed to fashion an imperial ideology with universalist claims in the basis that the new state was pre-ordained, by the starts and by God, to be the successor of all preceding empires both governing over and employing in its ranks all its subjects, including Jews and Christians."[365]

However, that was just the beginning of the slow closure of the door of interpretation in Islamic law. Al Mamuun (813-833) was a fervent reader of Aristotle. The legend recounts that Aristotle used to appear in Al Mamuun's dreams and to give him advice on justice and sovereignty. He adopted the title 'God's Caliph' by alleging direct descent from the Prophet and imposed the *Mihna*, or inquisition, on those who refused to obey the sovereign and its law.[366] His imperialist and expansionist dreams were mirrored in the war against the Byzantines, who were considered infidels and culturally inferior. Al-Maamun strongly supported the use of logic and dialectic argumentation by intellectuals loyal to the dynasty, and he created institutions to contain political and religious opposition, while asking Islamic scholars to compose books based on logic and

[364] Hallaq, *The Origins and Evolution of Islamic Law* (n 303).
[365] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11) 102–3.
[366] Hallaq, *The Origins and Evolution of Islamic Law* (n 303).

dialectic argumentation to oppose the 'heretics'.[367] If, previously, Islamic law was a comprehensive narrative which covered common interests and religious practices, with the Abbasid, the four main Sunni Islamic schools of Thought were officially formed and the book of *fiqh* was produced: Islamic law started to cover systematic legal principles.

During the Abbasid period (750- 1517) there was a complementary relation between legal and political powers. On the one hand, Caliphs needed to comply with the law to gain political legitimacy, while on the other, jurists employed by the royal court became accustomed to asking Caliphs for legal advice. The Caliphs' participation in the resolution of legal disputes gave them an authority similar to that held by the *Ulama*, although they were subject to the same 'God's Law', while the advantage and honour the jurists received gave them easy access to the circle of the political elite and the royal court: jurists became influential also in governmental policies. By the middle of the Abbasid era (750-1258), judicial appointments were made upon the recommendation of the chief of justice at the royal court. In other words, in spite of the great change in relations between legal and political power,

"Islamic law did not emerge out of the machinery of the body politic, but rather arose as a private enterprise initiated and developed by pious men who embarked on the study and elaboration of law as a religious activity. Never could the Islamic ruling elite, the body politic, determine what the law was. This significant fact clearly means that, whereas in other legal cultures the body politic was the source of legal authority and power, in Islam this body was largely, if not totally, absent from the legal scene."[368]

Although the Abbasid period witnessed the closing of the door of legal interpretation, the Caliphs never succeeded in creating a unique canon law similar to the 'western model'. The reason for this failure in establishing an absolute power similar to the 'European style political theology of sovereign'[369] can be found in the resistance/rebellion of the *Ulama*. As Diamantides points out,

"what is thought-provoking in the narratives around medieval Muslim jurists is that even as, for reasons of state, the doors of interpretation of Islamic law were declared to be closed […] their founding jurists' faith-driven rebellion constitutes an exemplary act

[367] *Ibid.*
[368] *Ibid,* 204.
[369] Diamantides 'Shari'a, Faith and Critical Legal Theory' (n 11) 58.

of powerless resistance as well as an assertion that the *Umma* (the Islamic community) may retain its integrity despite- perhaps because of- lacking in representable doctrinal and political unity be it of the Kelsenian (normative) or the Schmittian (substantive) sort".[370]

In essence, although the Abbasid tried to transform Islam into a proselytising state religion, through a process of assimilation of Greek philosophical consciousness and Roman/statistic/juridical legacy, they never succeeded: their project of creating a centralized theocracy where the Caliph (sovereign or Pope in Nancy's terms) is the ultimate legislator, at the end, failed due to the rebellion of many Muslim scholars who never accepted the outcome of a unique canon law, by referring to a famous *dictum* of the Prophet; 'my community will never err'.[371] As a matter of fact, in the past as well as nowadays, jurists frame *fatwa* based on two or more recognized schools of thought when they face difficult legal cases.

Toward the end of the Abbasid period the practice of *Mihna* was slowly dismissed and the Caliphs became even less a challenge to the legal power.[372] In the following period, Caliphs and *Ulama* kept a careful balance between those two powers. On the one hand, Caliphs managed to preserve this balance through compliance with the religious law, while on the other, jurists didn't compromise their law: "on balance, if there was any pre-modern legal and political culture that maintained the principle of the rule of law so well, it was the culture of Islam."[373] However, this historical period has signed a profound change in the history of Islam and Islamic law: in fact, the war between political and legal power has developed the extra-textualization of Islamic law. By transforming Islamic religion into refined legal rules, the process of 'secularization of religion', using Nancy's terms, was almost complete.

While in the West as well as in the East, the process of 'secularization' was facilitated by the assimilation of a new monotheist frame of mind and Greek dialectic concepts, only in Islam this assimilation signified a shift from a relative freedom of judges and jurists to a more structured legal system. Hence, despite both the Christian and Islamic worlds' passing through a process of symbiosis with Greco-Roman consciousness and the

[370] *Ibid*, 60.
[371] Annemarie Schimmel, *Islam: An Introduction* (SUNY Press, 1992) 61.
[372] Hallaq, *The Origins and Evolution of Islamic Law* (n 303).
[373] *Ibid*, 192–3.

monotheistic frame of mind, what differentiates the two legal systems is the work of Muslim scholars; in the West, the codification of Roman law by theological experts marked the embodiment of 'God's will' with the political power, while in the Islamic world the struggle between legal and political powers, between scholars and Caliphs, prevented the process of law codification. Henceforth, if in the West the symbiosis with Greco-Roman concepts and the logico-techno-juridical universality served the European 'nation-state', in the Islamic world, this symbiosis reduced the freedom of legal interpretation but never succeed in creating a 'canonic form of *Sunna'*. In fact, despite the remaining tensions between legal and political powers, the *Ulama* never accepted the centralized policy of the Caliphs.

And yet, Islamic law's appropriation by political power did happen. The disintegration of central power and the gradual development of 'garrisons' commanded by the army, along with the conquest of the capital by the Mongols, determined the end of caliphal period and the beginning of the era of the Sultans (1299-1922).[374] The Ottoman Empire was the new 'defender of Islam' and conducted a holy war (*jihad*) in the name of the new worldwide religion. The new Sultans assumed the title of 'defender of the *Sharia'* and the Ottoman Empire became the greater force of Islam.[375]

The Sultans set up a new form of centralized administration in which *Ulama* and jurists were incorporated within the state's bureaucracy. The *Ulama* became part of a rich and aristocratic political apparatus; their role was to assist the sultan in his effort to control the educational, legal and social system of the newly centralized 'Islamic nation-state'. The *Shayk al Islam* (the head of Muslim clergy), appointed directly by the sultan, became the head of the new state's religious bureaucracy.[376] The political and administrative reorganization operated by the Ottomans marked the formation of an

[374] After the Abbasid's defeat, three main Muslim empires arose: the Ottoman Turkish Empire (which included North Africa, the Arab world and Eastern Europe), the Persian Safavid Empire, and the Mogul Empire (which included the modern Pakistan, India and Bangladesh). See Esposito (n 120) 60.
[375] *ibid*.
[376] It is worth noting that the new Muslim nation-state established after the defeat of Abbasid, shared the same ideological outlook and approach to state organization and nation-state building where the Sultan concentrated in its person all the powers. As a matter of fact, in the Persian Empire the *shah* was a temporal and spiritual leader. The Safavid rulers, Sultans of the vast Persian Empire, assumed the title 'shadow of God on Earth', and suppressed other interpretation of Islam (Sunni and Sufi). Similarly, the Mughal dynasty, established the so called 'infallibility Decree' of 1579 which recognized the Emperor (not anymore the *Ulama*) as the final authority in religious matter. *Ibid*, 62–4.

'Islamic nation-state', similar to the 'western model of state organization' but unfamiliar with the heterogeneous local cultures of the area. As Hallaq interestingly points out,

"The creation of the nation-state meant, indeed required, a decisive transfer of power – largely devoid of authority- from the hands of the traditional legal elites into those of the new state. The traditional legal profession stood at the heart of the old institutions that were the target of modernization, while the nation-state could not have become a reality without appropriating these institutions."[377]

The aspiration of the Ottomans, as well as other 'Islamic Sultanate nation-states' formed in this historical period, was to fashion a comprehensive 'Muslim identity' by absorbing Islamic institutions within the state:[378] "Islam becomes an identity defined by external differences from 'others' and law frames the points of distinction."[379] In the attempt to develop a structure similar to the 'European sovereign nation-state', Ottomans declared the Hanafi school of Thought the only 'state law book' and *qadis* appointed by the sultan started a (partial) process of law's codification. With the Ottoman, the attempt to concentrate legal authority in the hands of the political power was almost completed: the world started to be divided into 'the house of Islam' (*dar al islam*) and 'the house of war' (*dar al harb*) and the sultan became the guardian of a new Islamic order; law, education, citizenship, defence and welfare were based on a fixed and monolithic Islamic religion. As Hallaq argues,

"the transfer of control over law from the hands of the traditional legal profession to those of the state represented the most important phenomenon of the so called modern legal reform, one that signified simultaneously the eternal loss of epistemic authority and the dawning of the much-abhorred authority and, indeed, oppression, of the nation-state. The emergence of the state as the source of legal power (in opposition to authority) is seen as doubly repugnant because the state not only appropriated law from the religious lawyers (whose roots were in the community) but it also showed itself […] to be an entity severely lacking in religiosity".[380]

The beginning of the eighteenth century marked the gradual decline of the Ottoman Empire: this coincided with the industrial revolution and modernization in the West. The

[377] Wael B Hallaq, 'Muslim Rage and Islamic Law' (2002) 54 Hastings LJ 1705, 1712.
[378] Esposito (n 120).
[379] Diamantides 'Toward a Western-Islamic Conception of Legalism (n 11) 116.
[380] Hallaq, 'Muslim Rage and Islamic Law' (n 377) 1719.

rise of Europe as a new major military and political power challenged the Ottoman Empire by embarking on a policy of colonization. With the colonial period came not only an exceptional wave of military and economic violence but also a 'modernizing' and 'westernizing' process; "this move ushered in a new era during which the traditional legal profession gradually lost control over its own sources of power, making its members heavily dependent on state allocations which in turn diminished in a steady and systematic manner."[381] The powerlessness of the religious elite was exacerbated by the creation of an 'alternative' legal system; by the middle of the nineteenth century, legal scholars were people educated in the West or by 'western style institutions'. With the ratification of the new 'western-legal-system' the new legal elite was assimilated in the emergent legal structure while religious scholars were marginalized as they were considered unable to deal with the new reality. As Hallaq argues, "the ruin of the traditional law college […] was the ruin of Islamic law, for the college's compass of activities epitomized all that had made Islamic law what it was."[382] To guarantee the subordination to the law, colonial power imposed the law codification, which became the standard mode of legislation; "codification is not an inherently neutral form of law-making, nor is it an innocent tool of legal practice, devoid of political or other goals. It is in fact a deliberate choice in the exercise of political and legal power, a means by which a conscious restriction is placed upon the interpretative freedom of jurists, judges and lawyers."[383] If the hermeneutical method was the backbone of Islamic scholars' understanding of the law, the new codified legal system created a link between divine texts and positive legal stipulations. By the 1970s the 'Islamic legal system' was deeply westernized:

"Having codified the law on the basis of western legal models, and having virtually decimated the infrastructure of the traditional legal profession, the nation-state jettisoned Islamic law altogether and reigned supreme as the unchallenged center of legal and political power.[…] This effort at pushing traditional Islamic law aside and rendering it inoperable if not defunct should have alerted many to the fact that not only

[381] *Ibid*, 1712.
[382] *Ibid*, 1712–3.
[383] *Ibid.*

had the rule of law come to an end but that a major gap, a virtual black hole, had fairly suddenly been created without any real substitution or replacement".[384]

The mechanisms of interpretation, which linked divine texts and human reasoning, was substituted by a new 'western law' inherited from the French or the English legal system: the only area that remained untouched was that of 'family law'. The collapse of the traditional Islamic legal system opened the door for a new political order, no longer in the hands of the legal authority of the *Ulama*; legal and political authority was embodied by a new 'sovereign' who, from the Ottoman Empire, was not anymore subjected to the law but started to embody 'God's law'. Despite the legal authority of the *Ulama*, who were pushed aside by the new 'nation-state' but continued to issue *fatwa* and to be influential in local legal affairs, there was no longer an independent legal system that could limit the power of the new autocracies: "to make things far worse, these autocracies harnessed the best of technology and tools of modernity to enhance their dictatorial regimes, with brutal and tragic consequences."[385] As a matter of fact, nowadays, the majority of Muslim countries are led by dictators or, as I shall argue, after the so called 'Arab Spring' by the emerging Islamist movements/parties which seek a unique and fixed *Sharia* law. Where Islamists won, the secularization of Islam, initiated by the Abbasid, can be considered completed.

[384] *Ibid*, 1713–4.
[385] *Ibid*, 1714.

2.3 From Imperial Islam to Islamist movements: towards a 'secularization of Islam'

Many western scholars, journalists and columnists see in the veil the symbol of a 'clash of civilizations'.[386] Perhaps, this (orientalist) understanding is the result of a colonial discourse which has constructed the veil as the most powerful symbol of the backwardness of Muslim culture. As I have argued in the previous Chapter, the veil has been used by both western colonizers and Islamists as a useful tool to create a singular and abstract identity. Although the veil is worn for many reasons and carries different meanings, Islamists advocate the use of the veil as a fixed symbol of compliance with Islamic precepts. Before them, another Muslim Empire tried to impose women's veiling through a misogynist interpretation of Islamic texts: the Abbasid.[387] For this reason, my argument distances itself from the prevalent discourse, which sees Islamic fundamentalists as a creation of the violent western colonization of the Muslim world during the nineteenth century and the veil as a visible symbol of a 'clash' between two different worlds.[388] This argument is, in fact, disclaimed by Islamic history and its encounter with Roman law and dialectic Aristotelian concepts during the Abbasid period. It is exactly the encounter with western forms of power during the Abbasid era, along with the positivization of *Sharia* law and the introduction of western legal rules by the Ottomans, that have given rise to Islamist movements.[389] As Diamantides argues,

"In the light of this history […] the terrific intensity of today's fundamentalist desire for the rule of Islamic law appears far more complex than a case of 'Muslims' reacting to the modern, colonial and neo-colonial secular western globality. In its own modernity imperial Islam had already produced a relatively short-lived version of God's Caliph' as a principal secular fiction, which figures truth over the conflicting claims of different identities".[390]

---

[386] Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (Touchstone, 1998).
[387] Ahmed (n 24) 66–9; Guthrie (n 306); Mir-Hosseini (n 306) 3.
[388] See Abdul Hadi Palazzi, 'The Islamists Have It Wrong' (2001) Middle East Quarterly, 3; Zachary Lockman, *Contending Visions of the Middle East : The History and Politics of Orientalism* (2nd ed, Cambridge University Press, 2010); See also Jochen Hippler and others (eds), *The Next Threat: Western Perceptions of Islam* (Pluto Press, 1995).
[389] Charles Tripp, 'Islam and the Secular Logic of the Sate in the Middle East', in Abdel Salam Sidahmed and Anoushiravan Ehteshami (eds) *Islamic Fundamentalism* (Westview Press, 1996) 51–2.
[390] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11) 106.

In fact, the body of Islamic law that fundamentalists are fighting for reflects the Manichean division operated by the Abbasid and then by the Ottoman between *dar al islam* and *dar al harb*, Muslim and non-Muslim, good and bad: specifically, the idea of a state committed to the enforcement of a unique and monolithic *Sharia* law, as called by important Islamist scholars such as Al Rashid Rida, Syed Qutb, Maududi, and Qaradawi, founds a parallel in the Hanafi notion of "*dar-al-islam* (the abode of Islam) which refers to a territory that is ruled by the *Sharia* even if the majority of its inhabitants happen to be non-Muslims".[391] Similarly to the Abbasid and the Ottomans, Islamist movements call for the establishment of a 'positivized' (*Sharia*) law able to bind subjects to a fixed unique national identity: in this sense, Islamists try to finish what a previous expansionistic Muslim Empire tried, unsuccessfully, to achieve and, using Nancy's terms, to operate a 'secularization of Islam'. In fact, if the 'demystification process' operated by monotheistic religions ultimately means the creation of a legalism as substitute for God's supreme power, then in the West, the 'secularization of religion' founds its political expression in principles such as democracy and human rights, while in the Islamic world it founds its political expression in ideas such as nationalism, liberation theology and self-determination; thus the 'post-colonial instrumentalization' of Islamic law operated by Islamists corresponds to an unconscious return of western elements where law is uniform and centrally produced.[392] As a matter of fact, Islamic fundamentalists, a phenomenon that occurred in the nineteenth century and it is often associated with the political, social and legal development of Muslim majority societies during and after the colonial era,[393] call for an immutable, all-encompassing guide to human life. [394] Although many scholars have read the rise of Islamism as the failure of Muslim majority societies to embrace secularism, Islamists adopt a secular political system within a religious ideology drawn on the western model of territorial 'nation-state': in this way, they 'secularize' religious principles in the name of fetishized rules of a centrally interpreted law able to homogenize subjects in a unique, fixed identity and

[391] Mohammad Hashim Kamali, 'The Islamic State: Origins, Definition and Salient Attributes', in K S Nathan and Mohammad Hashim Kamali (eds) *Islam in Southeast Asia'* (Institute of Sopuntheast Asian Studies, 2005) 281.
[392] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11) 96.
[393] See Nazih NM Ayubi, *Political Islam : Religion and Politics in the Arab World* (Routledge, 1993); See also Samir Amin, 'Political Islam. Exploding Samuel Huntington's 'clash of Cultures' thesis' (2001) Covert Action Quarterly 3; Bassam Tibi, *The Challenge of Fundamentalism : Political Islam and the New World Disorder* (University of California Press, 1998).
[394] David George, 'An Alternative New World Order?' in Abdel Salam Sidahmed and Anoushiravan Ehteshami (eds) *Islamic Fundamentalism* (Westview Press, 1996) 71.

to safeguard the interests and power of the elite. In other words, Islamists try to complete the process started with the Abbasid. In this sense, Islamic political extremism emerges "not [as] a case of fervor by subject embodying a monotheistic religion that never separated itself from the political but, on the contrary, of attachment to a state-indebted science of legal interpretation that is embodied by a revered interpreter. Fundamentalists love is not for Allah but the legitimate and great leader who, much as Legendre's analysis of the western juridico-political culture, act as a 'feigned divinity' or 'theatrical ploy' standing in the place of the holy text".[395]

Although the *Qur'an* does not justify bonds, whether nationalist, racial, linguistic or territorial, Islamists call for a 'Muslim state' within specific territorial borders and stress that the only 'salvation' is the creation of an 'Islamic state' where subjects are bound by a unique and just (*Sharia*) law able to fashion a national identity. Al-Banna and Sayyd Qutb, founders and ideologues of the Muslim Brotherhood in Egypt, an Islamist party founded in 1928, integrated the western concept of nation-state with Islamic political discourse in order to lay down the theory of an 'Islamic nation-state' modelled on the Abbasid's *pax islamica*, considered the 'golden age of Islam': in fact, Islamists see in the destruction of the Abbasid Empire a turning point in the history of Islam.[396] While they reject democracy, considered a direct violation of God's sovereignty because the 'law of people' is positioned as a higher authority than that of God, as well as Arab nationalism, secularism, and socialism, understood as the expression of an imported western decadence, they paradoxically model their ideal of Islamic state on western concepts such as the rule of law and political participation. Qutb equates freedom to *ubudiyya* (a term absent in the *Qur'an* and interpreted by Islamists as the 'equal submission to God'), a term that recalls that of western natural rights.[397] Kepel and Lawrence[398] see in Qutb's political theory a preoccupation with the post-Enlightenment loss of values and,

[395] Diamantides 'Toward a Western-Islamic Conception of Legalism' (n 11) 110.

[396] Ibn Taymiyya, for instance, who dedicated his life to ending the Mongol occupation, declared the *jihad* is one of the pillar of Islam and even more important than the pilgrimage. Sherko Kirmanj, 'The Relationship between Traditional and Contemporary Islamist Political Thought' (2008) 12 Middle East Review of International Affairs 69, 70.

[397] Marinos Diamantides, 'Islamic Fundamentalism and Western Horror: Fear of the Other or of Oneself?' in Petrus C. van Duyne and others (eds) *Threats and Phantoms* (Wolf Legal Publishers, 2004).

[398] See Gilles Kepel, *The Revenge of God : The Resurgence of Islam, Christianity and Judaism in the Modern World* (Polity, 1994); Bruce B Lawrence, *Shattering the Myth: Islam beyond Violence* (Princeton University Press, 2000).

at the same time, it "reveals the extent to which a modernity originally defined in terms of western experience is no longer a western experience alone".[399] In this sense, "the appropriation of alien forms and norms, albeit justified in terms of Islamic discourse, reflects both the influence of the culturally dominant west (if only unconsciously) and the extent of the authors' pragmatism in accommodating existing realities and maintaining a certain openness to these".[400]

Al-Nabhani, a prominent Islamist thinker and founder of the *Hizb al-Tahrir* (Islamic Liberation Party) in Jerusalem, calls for the restoration of a 'pure' Islamic state and the elimination of the secular order established by western legal and political imperialism in the Middle East after the First World War. However, his theory of an Islamic state is drawn on the forms and norms of the modern 'nation-state', inherited firstly from the Abbasid and then the Ottoman Sultans and colonizing forces. He attempted to rehabilitate the Ottoman Empire in its Islamic dimension, and advocated for a complete return to the medieval caliphate in contrast with democracy and, ironically, the western model of 'nation-state'. Paradoxically, however, "in exhuming the perceived paradigm of authentic Islamic government, al-Nabhani drew heavily on medieval Sunni juristic theories of the Caliphate (such as Abu-l-Hassan al-Mawardi and Taqi al-Din Ibn Taymiyya) undeterred by the fact that these were typically formulated as an apologia for the historical *status quo* and constituted an endeavour to harmonize existing political realities with the *Sharia*".[401] Similarly, Ayatollah Mutahhari, an important *Shi'a* scholar, clearly states that Islam is "a religion that sees its duty and commitment to form an Islamic state. Islam came to reform society and to form a nation and government. Its mandate is the reform of the whole world".[402] As Zubaida argues, although the policy of various *Shia* scholars draws on traditional sources, they reach novel conclusions which can be possible only if we assume the existence of a modern nation-state.[403] Therefore,

---

[399] Roxanne Leslie Euben, *Enemy in the Mirror: Islamic Fundamentalism and the Limits of Modern Rationalism : A Work of Comparative Political Theory* (Princeton University Press, 1999) 161.
[400] Suha Taji-Farouki, 'Islamic State Theories and Contemporary Realities', in Abdel Salam Sidahmed and Anoushiravan Ehteshami (eds) *Islamic Fundamentalism* (Westview Press, 1996) 46–7.
[401] *Ibid*, 42–3.
[402] Ayatullah Murtaza Mutahhari 'Jihad: The Holy War of Islam and Its Legitimacy in The Quran' (*The Islamic Propagation Organization*) <http://www.alseraj.net/maktaba/kotob/english/Fiqh/Jihad/short/jihad/index.html> accessed 23 May 2016.
[403] Sami Zubaida, *Islam, the People and the State: [Essays on] Political Ideas and Movements in the Middle East* (Tauris & Co, 1993) 3. In fact, as Zubaida points out, Khomeini's concept of

by seeking to play the 'politic game' within the framework of an existing nation-state, both *Shi'a* and Sunni fundamentalists succumb to secularizing logic associated with economic development and the territorial state. In other words, Islamists respond to the same secularizing logic that they ostensibly combat.[404]

This 'secularizing' logic is not inherited from western colonizers (which strengthened the creation of a western style nation-state) but from the Abbasid's *pax islamica*. In fact, it is during the Abbasid that, in Islam, there was an attempt to westernizes/secularizes Islamic law. However, as Diamantides reminds us, although the Abbasid's effort, Muslim theo-politics is characterized "by a gap between god and political power rather than fusion,"[405] like in the west. In fact, central to Islamic law is the concept of *umma* which is not an 'imagined (national) community' waiting to be (re) unified by an absolute sovereign, "but a theologically defined space enabling Muslims to practice the disciplines of *din* [religion] in the world:"[406] as Diamantides argues, "the *umma* […] may retain its integrity despite […] lacking in representable doctrinal and political unity be it of Kelsian (normative) or Schmittian (substantive) sort."[407] In contrast with the western concept of nation as an 'imagined community' in which people come to be united thanks to the construction of a particular imagination, "the Islamic *Umma* presupposes individuals who are self-governing but not autonomous. The *Sharia*, a system of practical reason morally binding on each faithful individual, exists independently of him or her. At the same time every Muslim has the psychological ability to discover its rules and to conform to them."[408] Therefore, when Islamists refer to the *Umma 'arabiyya'* (Arab community), they do not refer to the universalist theological concepts expressed in the term, but to an 'imagined community' which founds it expressions in a specific (secular) politic and legal system: a sovereign territorial nation-state like the Ottoman one.

---

people in term of 'nation' is typically modern e related to a specific territory within the border of the nation-state.

[404] Tripp (n 389).

[405] Diamantides, 'Constitutional Theory and Its Limits – Reflections on Comparative Political Theologies' (n 11) 144.

[406] Asad, *Formations of the Secular* (n 20) 197.

[407] Diamantides, 'Shari'a, Faith and Critical Legal Theory'' (n 11) 60.

[408] Asad, *Formations of the Secular* (n 20) 197.

Clearly, medieval scholars represent the main political, legal and theological reference of Islamist movements today: in fact, they often refer to Ibn Taymiyya (1263-1328), who stated that "Islam is both religion and government,"[409] and they rely more on the body of *fiqh,* textualized under the Abbasid, than the *Qur'an* or *Sunnah*, which are the main legal sources for Muslims. Al-Nahbani, for instance, grounds his concept of a 'unified Muslim state' on the principles that *Sharia* law -and not 'people's law' – is sovereign, and that the *Umma* should appoint a unique Caliph who has the right to adopt legal rules and to ratify the constitution of other legal principles.

Likewise, Abu al-Hasan Al-Muwardi (972-1058), loyal scholar of Abbasid dynasty, paid more attention to the political realities of the Abbasid rather than the foundation of *Qur'an* and *Sunna*. In his 'Ordinances of Government',[410] Al-Muwardi legitimized the legal and political authority of the Caliph within a delimited territory and claimed the loyalty of the governed people: he stated that "God […] ordained the caliphate of the Prophet through whom He protected the people; and He entrusted government to him, so that the management of affairs should proceed [on the basis of] right religion […] and affairs of common interest were made stable".[411] Similarly, Abu Hamid al-Ghazali (1058-1111) argued that the establishment of the caliphate is "demanded by the *ijma* (consensus) of the community",[412] and it is more important than the burial of Muhammad's body or the notion of God's unity.[413] Also Ibn Khaldun (1332-1406) affirmed that the caliphate is important because Muhammad saw it as a necessity for the Muslim community,[414] while for Ibn Taymiyya (1263- 1328) a Caliph appointed to govern the affairs of the Muslim community is a religious requirement as, based on his point of view, religion cannot survive without the control of the government.[415] Therefore, based on medieval Muslim scholars, the Caliph should be appointed to protect Islam, to be the judge of *Sharia* law, to implement *Sharia*, to guard the borders

[409] Richard Paul Mitchell, *The Society of the Muslim Brothers* (Oxford University Press, 1993) 16–21.
[410] Àli ibn Muhammad Mawardi, *The Ordinances of Government - Al-Ahkam Al-Sultaniyya W'al-Wilayat Al-Diniyya* (Garnet, 1996).
[411] Ann KS Lambton, *State and Government in Medieval Islam : An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford University Press, 1981) 85.
[412] Erwin IJ Rosenthal, *Political Thought in Medieval Islam : An Introductory Outline* (Cambridge University Press, 1958) 39.
[413] Lambton (n 411) 109.
[414] Ibn Khaldūn, *The Muqaddimah : An Introduction to History* (Princeton university press, 1967) 156.
[415] Rosenthal (n 412) 53–4.

of the 'Islamic territorial nation-state', and to undertake *jihad* against the infidel.[416] It is worth noting that this concept of sovereignty is not restricted to Sunni Muslims, but it is an integral part also of *Shia* Islamists: as a matter of fact, the Iranian Constitution recites that the "absolute sovereignty over the world and man belongs to God".[417]

The recognition of the ruler's legal, political and religious authority, which occurred first during the Abbasid, represented the first attempt of legal authority's appropriation by political institution in Islamic history; this legitimacy was further pursued through an alliance between the Ottoman Sultans and the *Ulama* and it is nowadays recalled by Islamist groups.[418] This reveals that the idea of an absolute form of sovereignty in which legal and political power merge does not come from the colonial period, which strengthened the western model of a centralized nation-state, but from the introduction of Greek dialectic concepts and the Roman-statist-juridico legacy during the Abbasid dynasty. As a matter of fact, the writings of many important Islamists such as Qutb, al-Mawdudu and Khomeinei are a clear result of the elaboration of Greek philosophy on Islamic theology: if, for Aristotle, man is a political animal by nature, contemporary Islamist movements appropriate this notion and merge it with Islamic theology by claiming that man is essentially a religious creature. However, the idea that a 'Muslim state' needs an absolute sovereignty represented in the figure of the Caliph has important consequences in the Muslim world: accepting the arbitrariness of the rulers' discretionary legal power and closing the gate of *ijtihad* without the consensus of scholars on the precise point of law has resulted in a 'deficient' solution for the unity of Islam. Moreover, the emphasis on the obedience of medieval traditional theory and the absolute political order, recalled nowadays by Islamist movements/parties, has created

[416] See Lambton (n 411) 91–2; Rosenthal (n 412) 29. The Christian concept of 'just war', which has taken many meanings from the Crusades until today, can be found in the interpretations Islamists give to the term '*jihad*'. Although the term bears many shades and meanings, in classical Islamic jurisprudence it can express a struggle against one's evil inclinations or an exertion for the sake of Islam and the *Ummah* (Islamic community). For Islamists, as well as for liberals, war is a necessary mean to achieve a universalist free world.

[417] 'Iranian Goverment Constitution, English Text' article 56 <http://www.iranonline.com/iran/iran-info/Government/constitution-5.html> accessed 23 May 2016.

[418] Mansoor Moaddel, *Islamic Modernism, Nationalism, and Fundamentalism: Episode and Discourse* (1 edition, University of Chicago Press, 2005) 35.

a situation in which, from the eighteenth century on, the importance of the monarch is connected to the defence of the land of Islam and Islamic identity.[419]

In the second Gulf War, for instance, Saddam Hussein called all Muslims to be united against 'infidels' in order to gain consensus over his expansionist claim. He ordered to write on the Iraqi flag the slogan '*Allah w Akhbar*' (God is Great) and he convinced his people that it was a war between believers and infidels; as during the most expansionist phase of the Abbasid dynasty, the world was divided into diametrically opposed spheres (*dar al harb* and *dar al islam*). In fact, concepts such as *jahiliya* (pre-Islamic ignorance), and *jihad* (the holy war, against infidels), amply used by Saddam but absent in the *Qur'an*, appear for the first time during the Abbasid period. Saddam's calls attracted many Islamist groups which joined the Baghdad cause at the point where the Islamic Liberation Party (*Hizb al-Tahrir al-Islami*) called on Saddam to declare him the new Caliph of the whole Muslim world.[420]

Moreover, in contrast with traditional Muslim scholars who recognize different books of *Sharia* law, for Islamists, *Sharia* is not a flexible legal system able to adapt to ever changing circumstances; rather, what should be applied are Islamic law's unlimited rules, developed by medieval Islamic scholars.[421] In fact it was firstly with the Abbasid and then with the Ottomans that the door of *ijtihad* was officially closed in the name of a 'secularized' Islamic nation-state which adopted regulations from the French legal system and propounded a fixed, unique, and 'secularized' form of a positivized *Sharia* law. For Ibn Taymiyya the implementation of a unique and monolithic *Sharia* law is the final project of Islam: he stated that "people are in need of a book to guide them, and a victorious sword represents force, and human life depends on both of them".[422] Likewise, contemporary Islamists such as Yusuf al-Qaradawi (1926-) argue that individuals cannot interpret the Koran as they prefer,[423] while Qutb points out that as long as *Sharia* law is not fully implemented people will live in *jahiliyya* (ignorance).[424]

---

[419] Ann KS Lambton, 'Justice in the Medieval Persian Theory of Kingship' (1962) Studia Islamica 91.
[420] Abdel Salam Sidahmed and Anoushiravan Ehteshami (eds), *Islamic Fundamentalism* (Westview Press, 1996) 19.
[421] Palazzi (n 388).
[422] Antony Black, *The History of Islamic Political Thought : From the Prophet to the Present* (Edinburgh University, 2001) 155.
[423] Kirmanj (n 396) 71.
[424] It is worth to point out that Qutb has been deeply influenced by Ibn Taymiyya when he refers to the tartar as 'infidels'. See Sayyid Qutb, *Milestones* (American Trust Publications, 1990).

The claim of Islamists to adopt one fixed and monolithic version of all-encompassing *Shari'a* indicates more similarity with the Abbasid/Ottoman as well as western model of sovereignty, than with the pluralistic and localized Islam of the first 150 years after the death of the Prophet. If Islamist groups express the ideal of a return to a 'pure Islam', they should rely on, and refer to, the period of the 'pious Caliphs', when the interpretation of 'God's word' was in its maximum development and not to the Abbasid, when the door of legal interpretation in Islam (partially) closed in the attempt to create a unified 'Muslim nation-state' through the enforcement of a unique (*Sharia*) law.[425] Moreover, by transforming Islamic law into systematized (positive) universal rules and regulations, Islamic fundamentalists deny the Islamic principle of *ijma*, namely scholarly localized consensus, in the name of a papal *autoritas interpretativa*. In fact, Islamists aim at creating a law "in which all disputes over meaning are subject to state arbitration 'because' law made by formally trained 'experts' sets forth religious truth without the need for contemporary moral re-evaluation even in the light of the general principles contained in Islam's primary source […] without the need to demonstrate that it serves the public interests".[426] In other words, Islamist fundamentalists re-interpret legal principles developed in a specific historical moment of the Muslim Empire in a modern and more secularized way. Diamantides points out that Weber's criteria that give rise to the legitimacy of law are met by *fiqh*: "its norms were developed by professional jurists, they are generally applicable and abstract and the judiciary and state to apply them without need for discussion of their morality in relation to faith and/or the secular *telos* of public interest."[427] Diamantides' thesis reveals that Islamist fundamentalists anticipate post-enlightenment western positivism by creating a law able to control the subject's life: in other words, for Islamists as well as for western liberals, the rules of law are what bind a people, and not shared moral values.

By recalling medieval Islamic scholars, who started to depart from the initial conception of politics as the given consensus of the *Umma* in order to create a fixed and unique Islamic identity in the vast Muslim Empire, Islamists desire a form of sovereignty where

---

Moreover, the term *Jahiliyya* (which refers to the state of human ignorance) has been reinterpreted by Islamists as a normative standard to the extent that one Muslim can declare another (including its ruler) an 'infidel' and s/he is therefore legitimate to start a *jihad*. See Diamantides 'Islamic fundamentalism' (n 397) 169.

[425] As' ad AbuKhalil, 'The Incoherence of Islamic Fundamentalism: Arab Islamic Thought at the End of the 20th Century' (1994) The Middle East Journal 677.

[426] Diamantides 'Toward a Western-Islamic Conception of Legalism'(n 11) 116.

[427] Diamantides, 'Islamic Fundamentalism and Western Horror' (n 397) 175.

differences are bound into a monolithic 'state identity'; a state with a social order assured by unconditional rule of law able to facilitate centralized state control. As Qutb points out, "Arabs did not succeed in conquering kingdoms and destroying thrones until they had become oblivious, for the first time in the history, of their Arab identity".[428] In this sense, Islamists' anxiety with state power is not only related to the adoption of specific nationalist ideas, but to the constitution of a specific social identity. The veil, which becomes a strong symbol of identity and belonging in nationalist thought, is promoted by today's Islamist groups as an attempt to create a common identity through the use of symbols and myths typical of nationalist regimes. As Esposito argues,

"Muslim family offered a clear and easily identifiable starting point for implanting a strong sense of faith, identity, values. […] as wives and mothers, women have been regarded as the culture bearers, exemplars, and teachers of family value. Contemporary Islamic revivalism has fostered new changes and concerns that Islam will be used to justify a forced return to the veil, separation of the sexes, and the restriction of women's role in public life. […] As a result, any attempt to change these customs is simply dismissed as an attack on the Islamic ideal under the influence of the west".[429]

As a matter of fact, before Islamists started to call for the re-veiling of Muslim women, the Abbasid tried to render the veil compulsory.[430] This indicates that Islamist ideologues are moved by the desire for "a stable and predictable social order guaranteed by the absolute rule of positive law that is, law authoritatively distinguished as law, as a means to no end other than its own operation."[431] Therefore, what Islamist movements are seeking is the law of the Abbasid period which, as for the 'western Emperor' or 'Pope', reinforces central political power by binding the community to a unique national and homogeneous 'Muslim identity' protected by a new version of 'God's Caliph' who is able to create unity irrespective of cultural differences.

The Islamist system, however, faces many challenges. In Saudi Arabia, for instance, where an absolute theocracy applies an austere, anti-intellectual and inflexible version of Salafi Islam, known as Wahhabism, groups of youth started to call for a re-examination of Islamic precepts by conforming to the 'pure Islam', that of the 'pious

[428] Youssef M Choueiri, 'Theoretical Paradigms of Islamic Movements' (1993) 41 Political Studies 108, 111.
[429] Esposito (n 120) 236–7.
[430] Ahmed (n 24) 66–9; Guthrie (n 306) 124–5; Mir-Hosseini (n 306) 3.
[431] Diamantides 'Toward a Western-Islamic Conception of Legalism' (n 11) 114.

Caliphs'. They assert that "no one can claim monopoly of truth or righteousness in the name of Islamic law (*Sharia*) […] We are young citizens who seek to create a community that follows the example of the Prophet, peace be upon him, under pluralism of thought […] [and] we reject this patriarchal guardianship which forbids us from practicing our God-given right to think and explore for ourselves, as we can listen and judge."[432] Clearly, Saudi Arabian theocracy has been drawn from that of the Abbasid dynasty where the community was bound by a unique sovereign who promotes a singular and monolithic *Sharia* law.

Similarly, in Iran, where a theocracy was established after the 1979 revolution, the powerful clergy is now divided over the right interpretation of *Sharia* law. The Grand Ayatollah Hossein Ali Montazeri, one of the most influential clerics in the country and a *marja' taghlid* (source of emulation) in Shiite Islam, has often attacked the government for not applying the principle of the Shiite book of law.[433] He has also issued a *fatwa* accusing the Supreme Leader of working for the government and against religion and called people to take action against injustice.[434] Montazeri played an important role against the government of Ahmadinejad, which has deeply divided the clergy body, and opened the door for a (slightly) more moderate Islam in the country.

This indicates that both *Shia* and Sunni Islamists serve European and western ideals of nationalism, patriotism and freedom: their theories are generally characterized by a political structure with an acute statism, legalism and bureaucracy such as the colonial and post-colonial regimes that they vehemently oppose. However, a fundamental distinction should be made between the Caliphal-Ayatollah and the Taliban system of governance: the first is a quasi-pontifical system where debate is allowed but the final knowledge of the law is in the hands of a Caliph/Ayatollah who decides what is legally acceptable, while in the latter the debate about legal interpretation is kept at a local

[432] Caryle Murphy, 'Saudi Youth Question Traditional Approach to Islam' (*Al-Monitor,* 2012) <http://www.al-monitor.com/pulse/originals/2013/02/saudi-youth-question-mohammed-al-ari-tom-cruise-of-wahhabism.html?utm_source=&utm_medium=email&utm_campaign=6053%20,%204%20Feb.%202013> accessed 5 March 2016.

[433] Michael Slackman, 'Cleric Wields Religion to Challenge Iran's Theocracy' (*The New York Times,* 2009) <http://www.nytimes.com/2009/11/22/world/middleeast/22ayatollah.html> accessed 23 May 2016.

[434] Muhammad Sahimi, 'Grand Ayatollah Montazeri's Fatwa' (*Frontline - Tehran Bureau,* 2009) <http://www.pbs.org/wgbh/pages/frontline/tehranbureau/2009/07/grand-ayatollah-montazeris-fatwa.html> accessed 23 May 2016.

level, consequently, the social bounds of citizens remain extremely precarious.[435] In essence, while the Iran of Khomeini, for instance, looks like the reign of al-Maamun, who established intellectual circles for the interpretation of Islamic law and created his image as the absolute legal and political ruler, the Taliban system is characterized by a weak central authority and it mainly focuses in the administration of *hudud* (punishments). Hence, on one hand, the 'quasi-pontifical' system of the Ayatollah in Iran mirrors the power of the Abbasid Caliphs where the space of legal argumentation is limited to the central authority, while on the other, the 'Taliban system' is based on the mere application of fixed legal concept as developed in Medieval Islam. Only in the first case it is not the text but the 'interpreter' that is 'fetishized' as a unique authority.

Nevertheless, both *Shia* and Sunni Islamist movements are facing a problem: it becomes difficult to face the ideological dilemma of the formation of a 'pure' Islamic state without relying on modern forms of secular power such as 'nation-state', patrimonialism and authoritarian rules of law developed by medieval scholars loyal to the Abbasid. If Islamists are advocating a 'pure' Islamic state, as they claim, they should refer to the first period of Islam after the death of the Prophet, when the law was made locally from revered jurists far from the political *entourage*. As during the Abbasid, Islamists try to justify their absolute legal and political power with reference to something 'external' to the 'pure' Islamic precepts. In this way, however, they forget that the Abbasid effort to transform Islam into a proselytizing religion through dialectic Greek concepts and the Roman-statist-juridical legacy for their own legal and political legitimation, in the end failed. In other words, although the introduction of western concepts restricted the freedom of legal interpretation in the name of a superior *raison d'état*, it never succeeded in creating a 'Canonic form of Sunna' valid for all its subjects irrespective of cultural and religious difference: where Islamists won, the secularization of Islam can be considered completed. In fact, if, as Nancy argues, law emerges as the primary expression of all monotheistic religions, in Islam the first step of this transformation was the assimilation of Greek dialectic and juridical concepts during the 'centralized theocracy' of the Abbasid. This process continued with the Ottoman Empire, which adopted part of the French legal system and recognized the validity of only one book of Islamic law. The 'collapse' of classical legal authority was pushed further by western colonizers who imposed the codification of part of Islamic law in an

[435] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11) 112.

attempt to re-create a western-style power structure. Therefore, the rise of Islamism can be understood as the final link in a long chain that aimed to secularize Islam and to transform it into a proselyting religion.

As a matter of fact, the aftermath of the colonial period has witnessed a continuous attempt by 'secular' as well as Islamist powers to appropriate the law. In post-colonial Egypt, for instance, both 'secular' and 'Islamist' governments have "virtually incorporated al-Azhar [the most influential centre of Islamic studies] as an arm of the state through purges and control over Azhar finances, and by gaining the power to appoint al-Azhar's key leadership […] [and] by securing fatwas legitimating their policies."[436] The process of incorporation and cooperation between al-Azhar and the state started with Nasser's project to create a unified nation-state. In order to control the most important Islamic centre, he established alliances with *Imam*s and *Sheikhs* willing to reform the institution: through the incorporation of al-Azhar within the state institution, Nasser not only limited the influence of the Muslim Brotherhood but he also assured the legitimacy of his regime. With Nasser and the later Presidents, al-Azhar came formally under the jurisdiction of the Ministry of Endowments who finances and appoints the *Shayk al-Azhar*: "the forced expansion of al-Azhar into secular fields of study ensured that an increasing number of deans representing non-religious fields would be represented in the Azhar High Council. The impact of this reorganization was profound. Al-Azhar was transformed from an institution with a high degree of independence to one with very little autonomy from government interference."[437] Despite that, the process of inclusion of al-Azhar within the state has never been fully completed. A further attempt to appropriate legal power was made by President Morsi, the representative of the Muslim Brotherhood elected after the 2011 Egyptian uprising, who tried to build an 'Islamic nation-state' and to unify different and heterogeneous identities in a unique 'state identity' under the political and legal authority of a 'God's Caliph'. The political programme of the Muslim Brotherhood and Islamist forces in the country reveals a desire for power typical of the Abbasid period; they asserted that the 'only truth' resides in the supreme guide of the Brotherhood or in the hands of the

[436] Tamir Moustafa, 'Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt' (2000) 32 International Journal Middle East Studies 3, 3.
[437] *Ibid*, 5.

Salafist *Sheikh*.[438] In September 2012, the members of the Senior *Ulama* Council, under attack from the new 'centralized Islamic state', emphasised the need for the full independence of religious scholars from the government. They stressed the importance of protecting the second article of the 1971 Egyptian Constitution, which asserts the total independence of the scholars on issues related to Islamic law. They point out that "the principles of Islamic law cover all necessary issues, along with jurisprudential and fundamental rules adopted by Sunni doctrine" and that "Christian and Jewish Egyptians should apply the principles of their religions regarding personal affairs and religious rites, and choose their spiritual leaders"[439] as the *Qur'an*, the primary source of Islamic law, quotes. The referendum to reform the constitution, strongly desired by the new Islamist government, created a profound crisis in the country as the president granted himself immunity from the judicial body. If the former dictator, Hosni Mubarak, "was astute enough to co-opt and accommodate judges in a way that neutralized, if not spoiled, them in the political arena",[440] the new Islamist president expelled judges and military officials from the political arena: the attack on the constitution determined the end of Morsi's presidency and the beginning of a new era for the country.

With the emergence of Islamist movements/parties and their political victory in many countries, it is possible to argue that the westernization of Islam has been completed. The analysis of Islamic law's evolution and its relationship with political power leads us to reconsider the so called 'clash of civilization' between the West and the East. While in the West, religion and politics are (supposedly) separate spheres but in reality they merge, in the Islamic world, it seems that religion and politics combine but in reality the political power never succeeded in creating a canon law. Thus, as Diamantides argues,[441] the difficulties between the Islamic and western world are not related to a 'clash of civilizations' as much of the media echoes, rather they express the tensions between

[438] Alaa Al-Aswany, 'In Egypt, How to Lie And Remain Pure ' (*Al-Monitor,* 2012) <http://www.al-monitor.com/pulse/politics/2012/12/how-to-lie-and-remain-pure.html?utm_source=&utm_medium=email&utm_campaign=5685> accessed 5 March 2016.
[439] Ahmad al-Buyairi, 'Scholars Seek Autonomy As Arbiters of Islamic Law' (*Al-Monitor,* 2012) <http://www.al-monitor.com/pulse/politics/2012/09/islamic-scholars-maintain-azhars-role-in-egypt.html?utm_source=&utm_medium=email&utm_campaign=4429> accessed 5 March 2016.
[440] Khalil al-Anani 'Morsi's Unsustainable Autocracy' (Al-Monitor 2012) <http://www.al-monitor.com/pulse/originals/2012/al-monitor/morsi-unsustainable-autocracy.html?utm_source=&utm_medium=email&utm_campaign=5465> accessed 5 March 2016.
[441] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11).

two universal-ist monotheisms: when these monotheisms face each other, they are confronted with their own internal incompleteness. Therefore,

"[we should] move the debate on fundamentalism away from unhelpful and historically inaccurate frameworks of analysis (e.g. clash of civilizations) by recognizing that the logic of fundamentalists Islam poses the problem of informed choice between two distinct models of subjectification through attachment to the rule of man-made law of which the currently predominant, western, one faces problems of implosion rather than external hostility, while the Islamic one is faced with the pragmatic problem of its accelerating marginalization, if not outright destruction, in a globalized context".[442]

Despite differences between western and Islamic monotheisms in their historical trajectories and the relationship between the state and religious authority, the expansion of territorial rules remains a significant feature in both the Christian and Islamic world. The operation of western Christian scholars, who reinterpreted Roman law to found the canon law, is similar to the operation requested of Islamic scholars by the Abbasid Caliphs, which substantially consisted in the (unsuccessful) attempt to create an 'Islamic canon law': recalling Nancy's thesis of 'monotheist model of social organization', law becomes central in the sense that all monotheistic religions seek to be materialized in a collective conscience.[443] The process of 'desacralization', or 'secularization', of Islamic law, performed firstly (unsuccessfully) by the Abbasid and then by Islamists is similar to the one operated by Christianity, in which the law becomes the primary expression of religion. In fact, Islamist fundamentalists rely more on the body of *fiqh*, which they invest with an absolute political power, than on the Islamic legal primary sources (*Qur'an* and *Sunna*). This fetishization of law has occurred at the expense of religious moral values to the point that "the reduction of the worldview of Islam into [a totalitarian] ideology is a form of secularism".[444]

Therefore, the Islamists' desire for the rule of law is not related to a simple rejection of 'western values', but it is intrinsically linked to their version of 'God's Caliph' who embodies an absolute power and authority in a 'new' expansionist Muslim Empire. This indicates that the reaction of Islamists towards the 'secular state' is not the result of a

[442] *Ibid*, 107.
[443] Nancy (n 13).
[444] Sohail Inayatullah and Gail Boxwell, *Islam, Postmodernism and Other Futures: A Ziauddin Sardar Reader* (Pluto Press, 2003) 170–1.

cultural difference; rather, it is the same process of 'demystification' that Christian scholars operated in the West. In this light, the assault of Islamists on the secular forces of a 'decadent' western colonizer can be theorized not in terms of difference but, rather, in terms of sameness.[445]

But while Christian modernity managed to create a legal system able to bind the individual to a text which was incorporated first by the Emperor and then by the Pope as absolute and final interpreter of the law, in Islamic history, despite the Abbasid's efforts, the resistance of many Muslim scholars prevented the creation of a unique canon law. Therefore, unlike the development of Christian law, the question over legitimacy remained unresolved in Muslim majority societies, as did the split between the *Ulama* and the government.[446] Hence, Islamic monotheism cannot be seen as part of the western tradition of totalitarianism, as many scholars and Islamic modernists argue. Rather, the development of Islamic monotheism started during the '*pax islamica'* when the Abbasid imposed the use of Aristotelian concepts and Roman law in order to frame Islam as an identity defined by external difference where law marks the point of distinction. In this sense, the Islamist political system emerges as a secularized form of Islamic religion, exactly as secular contemporary western governments are a secularized form of the Christian religion in the name of an absolute, binding, power. As in the West, the political transformations in which Islamists believe are to happen through law's enforcement: in this sense, both secular constitutional order and Islamist theocracies are the result of the creation of a centralized state in which the doors of legal interpretation are closed in the name of a unique sovereign legislator: "in both cases law produces the subject and that is why it carries an absolute value".[447]

In short, while liberals, as well as 'humanists' are simply reiterating the Christian 'monotheistic model of social organization'; a 'monotheist provenience' that they denied, in the same way, Islamists are reiterating a 'secularized' and 'westernized' form of state that they formally reject. However, the history of Islamic legal scholars teaches that it can be a form of resistance to prevent the assimilation of law into political authority. The 'pluralist', 'local' legal system based on the consensus of the community clashed, in the whole history of Islam, with the 'absolute sovereign' in love with power.

[445] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11) 106.
[446] Kamali (n 391) 279.
[447] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11) 113.

2.4 The dis-similar mirror of the West

The secularization paradigm is based on the premise that "the shift of social, political, and economic power from church to state, advances in modern science and technology led to the gradual disenchantment of the world and experience in it. From this point of view, as modernity waxes, religion seems to wane".[448] In other words, western modernity is understood through the (apparent) division between secular and religious in which the latter is supposedly withdrawn from the public sphere to relegate itself into a private matter between God and believers. However, as Asad argues, "there cannot be a universal definition of religion, not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive processes."[449] In this case, as I shall argue, western discourse has produced a legalism which is nothing more than the substitute for God's supreme power in the 'city of men': this, in turn, does not entail a separation of spiritual and temporal powers, but a reconfiguration of religion within the secular. Recalling Nancy,[450] in the West the sacralisation of power had made possible the gradual substitution of God's supreme power to make law with the Pope/King and, nowadays, with 'secular' values such as democracy, human rights, individual rights, separation of power between the church and the state etc.[451] As Diamantides points out,

"the evolution of modern western government, from absolute to popular sovereignty through to governmentality, is nothing if not part of a theo-politics modelled on the 'division of labour', which followed the theological consensus on the triadic nature of

[448] Mark C. Taylor, 'Introduction', in Mark C Taylor (ed) *Critical terms for religious studies* (Chicago University Press, 1998) 2.
[449] Talal Asad, *Genealogies of Religion : Discipline and Reasons of Power in Christianity and Islam* (Johns Hopkins University Press, 1993) 29.
[450] Nancy (n 13).
[451] It is now well accepted by many scholars that the concept of secularism comes from the medieval west. See Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992); Peter Fitzpatrick, 'The Triumph of a Departed World: Law, Modernity, and the Sacred', in Austin Sarat, Lawrence Douglas (eds) *Law and the Sacred* (Stanford University Press, 2007); Ernst Hartwig Kantorowicz, *The King's Two Bodies : A Study in Mediaeval Political Theology* (Princeton University Press, 1957); Leonard V Kaplan, *Theology and the Soul of the Liberal State* (Rowman & Littlefield, 2010).

God, between a glorious God who reigns without consequence to this world and His Son who governs".[452]

The metaphysical shift operated by medieval Christian jurists and theologians made possible the development of a specific notion of Christian/secular/political and legal structure. In fact, the codification of Roman law in the name of the 'public good guided by God' had developed a power that expressed itself through legislation. The result of this operation is twofold: on the one hand, law acquires a universal value supposedly suitable outside European borders, while on the other, tribunals act in the place of God. In fact, in the West, natural law (humanism) and positive law essentially agree that there is a stability of legal process (positivist) or legal values (humanist); this specific notion of law could not exist without the western concept of 'universal' sovereignty.

In the case of the 'Judaeo-Christian' world it was the symbiosis between Greco-Roman consciousness and the 'monotheistic frame of mind' developed during the Hellenic era that strengthened the idea of universality of the logico-techno-juridical system and its splits from the realm of salvation. In fact, medieval western theologians created the concept of an absolute transcendental sovereignty by essentially remodelling Roman law in the name of a new bound community: this, in turn, implied a break with the historical and the mythological occidental narrative which led to the substitution of God with immanent politic.[453] In other words, while in the past, a king was simply substituted with another, the operation of medieval theologians, who re-elaborated the Roman law of heritage and translated it in favour of a unique sovereign, be it the King or the Pope, represented a 'political' re-elaboration of Christian mythologies in the name of a common identity. What the medieval theologians brought about was a domestication of the divine omnipresence by "rendering transcendence immanent in the form of unlimited power, without *telos* and inherent in natural, including biological matter:"[454] in this way, they established a system that could assure an '*infinite* and absolute power'. In essence, by sacralising the institutional body, they managed to establish a continuity of power and to create the concept of 'institution'. In fact, for medieval Christian philosophers and theologians, the Incarnation represented a break between "the ruler

[452] Diamantides, 'Constitutional Theory and Its Limits' (n 11) 13.
[453] Nancy (n 13) 39.
[454] Diamantides, 'Constitutional Theory and Its Limits' (n 11) 11–2.

of the chosen people and God and left the king of this world only a much reduced power, shared with the Church and sacralized through the intermediary of the clergy."[455] In other words, western medieval theologians managed to create a new concept of absolute 'sacred sovereignty' (absent in the Muslim world) through the sacralisation of the institutional body, in which the royal power emerges as the 'rightful power' to rule both the relationship between humans and that between God and humankind:[456] this, in turn, took the form of a new modernity.

In contrast, the symbiosis between spiritual and temporal powers was difficult to achieve in the Eastern Roman and Muslim Empires: as a matter of fact, the Byzantine effort to fill this gap through the notion of priestly government and the Abbasid attempt to sacralize the Emperor through neo-Platonic concepts, created what Diamantides calls a 'deficient sovereignty model'.[457] In the Christian Byzantine Empire the king/priest tried to match political and spiritual power through a slow and ritualized coronation. However, the result of this process was an ineffective and illegitimate endorsement of power: as a matter of fact, the king/priest was often seen by the people as a usurper of the biblical title of 'just king'. This developed, in Byzantine history, into conflicts and conspiracies. By contrast, in the feudal West, where the Pope/Emperor was sanctified through a series of rituals,[458] the perception of the feudal lords as usurper was absent.

In other words, while the Christian Byzantine Empire and the Islamic world presented a constitutive weakness, in the West, this gap was filled by medieval constitutional theories which have made possible the idea of an absolute sovereignty through an integrated political theology. While, in the West, the temporal has merged the spiritual to express the modern notion of sovereignty, the Christian Byzantine and the Muslim politics are characterized by a gap between temporal and spiritual power.[459] As Diamantides argues, "the collapsed dialectic immanence-transcendence of natural theology is absent in medieval Arab-Muslim empires; absent, consequently, is the

[455] *Ibid*, 136.
[456] Marc Léopold Benjamin Bloch, *The Royal Touch: Sacred Monarchy and Scrofula in England and France* (McGill-Queen's University Press, 1973).
[457] Diamantides, 'Constitutional Theory and Its Limits' (n 11).
[458] Kantorowicz (n 451).
[459] Diamantides, 'Constitutional Theory and Its Limits' (n 11) 144.

spectacular product of an integrated political philosophy, which could conceive an absolute sovereignty that, however, is to be exercised pragmatically."[460]

In contrast, western theologians created the concept of an unlimited power without *telos* through an operation of philosophical and theoretical synthesis between temporal and spiritual power in order to develop a coherent notion of political authority and to overcome the 'deficient genealogy' of power. The assumption of an absolute power without *telos* is mirrored in the western self-construction of collectiveness in which people are subjected to an infinite and transcendent normative power. Modern regimes, as Nancy argues, are 'theistic' in the sense that they passed through the idolatry of a single will of the collective. This (modern) theory of a 'pure' law able to bind citizens more than any sovereign, has facilitated the spread of constitutional positivism outside occidental borders and has strengthened the claim that liberal/secular western law is the only just universal form of social organization.

"This theological shift made possible the notion that the king's divine right to 'bind and loose' through legislation and, in principle, irrespectively of results, was to be used ever increasingly so that it matched changes on the ground. Centuries later, the presupposition of the sovereign decision are respectively the normative and material secularized versions of this *potentia absoluta*, which is at once presupposed by and requiring the *potentia ordinata*, or ordinary legislation".[461]

Occidental constitutional theories, based on the distinction between constituted and constitutive power, correspond to a purely political and normative understanding of the state. If it is true that all modern western concepts of the state are secularized theological concepts and that the secular itself is a form of deistic theology where the state becomes a creature of law, then in western understanding of the state the constituent collapses into constituted power, the political into law. As a matter of fact, political and normative positivism employ a 'superpower' derived from natural theology and in the service of social unity without reference to domestic or external 'others'. In this sense, western metaphysical understanding of a universal, centered, absolute power as substitute of a withdrawn God has created a situation in which the

[460] *Ibid,* 138.
[461] *Ibid*, 112.

colonization of the 'others' is seen as an 'expansion' of the corresponding form of legal and political organization (translated, nowadays, into the 'exportation of democracy' through war).[462] In the western tradition, normative constitutionalism presupposes that the 'unity' of the people can be achieved only through the rules of (secular) law, understood as morally neutral; since liberal theories assume that conflicts between individuals would arise naturally, the most civilized framework for the operation of private law, based on the 'social contract', is the state-enforcement of positive law.[463] It is precisely through this mythology that the concept of 'state of nature' justifies the contractarianism.

In essence, while the philosophical and legal history of western modernity made possible the development of an integrated political theology which becomes the foundation of the modern, 'secular', western political and legal systems, in the Muslim world, until the Ottoman Empire and the subsequent colonization period, political and legal powers were continuously in need of negotiation, resulting in a 'deficient sovereignty' model'.[464] If western constitutional philosophers were obsessed with the unity of the people represented by a singular authority through law, in the Muslim world, previous to the Ottoman Empire and the colonization period, this problem did not exist: collective representation was never totally embodied by a (unique) sovereign authority. In fact, unlike Christian ecclesiastical law and positive law, in Islamic law the concept of *Umma* is central. The *Umma*, which includes a plurality of heterogeneous religions, suggests that not all human associations need an absolute sovereign that separates 'us' from 'them': "the *Umma* retains its integrity despite lacking in a corresponding theory of doctrinal and political unity- be it of the Kelsian (normative) or the Schmittian (substantive) sort. The famous distinction *dar al harb/dar al islam* would belong to the latter but for the fact that the decision lies not with the Muslims but their others who can choose to unilaterally convert any time".[465] In fact, as I have argued, Muslim *Ulama* had developed a rational and coherent jurisprudence without relying on Hartian theories and Islamic law was not dictated by the state but, rather, by local wise

[462] As I shall argue in the next Chapter, western colonizers have deeply changed the political and legal structure of many Muslim majority societies. Along, with it, a new concept of humanity strictly related to the Christian concept of redemption emerged.
[463] Thomas Hobbes, *Leviathan* (first published 1651, Cambridge University Press, 1991).
[464] Diamantides, 'Constitutional Theory and Its Limits' (n 11) 110.
[465] *Ibid,* 137.

men recognized by the whole community. The reasons for the stillborn sovereignty in the Muslim world can be found in the absence of a hierarchical structure within the clergy body; the disinterest of jurists in gaining power out of their local *Umma*; the scholars' rebellion against centralized political power; and the understanding of Islam as a universal religion. Therefore, the difference between western and Islamic legal systems can be found in a different assimilation of Greek dialectic and Roman-juridical legacies. While in the West as well as in the East the political authority tried to be 'sanctified' through a process of legal authority's appropriation through the assimilation of Roman statist/juridical legacy and Greek dialectic argumentation, only in the West did this process develop a form of sovereignty where initially the Pope, and then the Emperor, had the absolute/divine right to legislate. In contrast, in Islam this process was never completed. As a matter of fact, although the Abbasid tried to institute a unique positivized form of *Sharia* law, they failed to create a state able to control the production of a singular, codified body of law. This attempt reveals that the 'God's Caliph' was (unsuccessfully) 'Islamized' just as the 'western Emperor' was 'christianized'. As Diamantides argues,

"In the west we went from Jesus 'rendering unto Caesar' […], to Popes and Emperors, in the person of whom the temporal and the spiritual merged as expressed by the notion of sovereignty […]. In Islam, by contrast, the similar early endemic attempts to invest exclusive interpretative authority in the image of a ruler, as both just and sovereign, was undermined by the same jurists that created the sophisticated body of Islamic laws because that image was reserved exclusively for Mohammad, the Prophet and first ruler of Islamic state."[466]

Thus, while in the West, the spiritual and temporal powers were separated "in order to create, outside modern states, not so much a spiritual power as impotent and unenviable theocracies,"[467] in the Muslim world spiritual and temporal powers were in continuous need of negotiation. The 'deficient sovereignty' of the Byzantine and Muslim Empires was resolved, in the West, through the construction of a theo-political notion of sovereignty and, in time, a sacralized nationalism able to bind people to a (territorial) sovereign state. Western legal and political development made possible the *transition* from landed nobility to a Divine King and then to the right of people to use property for

[466] Diamantides 'Shari'a, Faith and Critical Legal Theory' (n 11) 54.
[467] Dagron cited in Diamantides, 'Constitutional Theory and Its Limits' (n 11) 140.

profit. “In their secular polities belief in salvation through obedience to the omnipotent God’s will on earth is not eliminated but transformed; ‘God’, originally a mysterious maker (as He still is in Judaism, eastern Christianity and Islam), became something terrestrial if equally abstract: the Nation, the Market or the Revolutionary Mass”.[468] Similarly, Carl Schmitt argues that

“all significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver- but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle theology”.[469]

Recalling Nancy, if all monotheist models of social organization have an ‘auto-deconstructive’ element as they are based on a blind faith in a withdrawn God, the auto-deconstruction of Christianity culminated in the establishment of the modern ‘Christian/secular/liberal’ state. In contrast, in the classical Islamic states the problem of the ‘deficient authority model’ was left as it was until the Ottoman Empire and the post-colonial nation-states which emulated the western model of social organization. Hence, the self-deconstruction of Islamic monotheism was kept apart until the creation of a westernized (exported) model of ‘nation-state’. However, in the West, the withdrawal of God from human affairs has been replaced by a growing dependence “on various ‘deficiently immanent’ models of omnipotence and omniscience”.[470] This is mirrored in western political and philosophical theories of ‘sovereignty’ in which law gradually acquires an ‘unlimited’ power, as a carrier of universal values.

Therefore, compared to the West which managed to fill the gap through philosophical and political speculation, the Byzantine as well as the classic Muslim empires ran a significant ‘deficit of authority’. In contrast to the West, where the rules of law are understood as central to European civilization, Islamic culture, in its historical development, comes to know the difference between ruling *by* and ruling *of* law.

[468] *Ibid*, 143.
[469] Carl Schmitt, *Political Theology : Four Chapters on the Concept of Sovereignty* (MIT Press, 1985) 36.
[470] Diamantides, ‘Constitutional Theory and Its Limits’ (n 11) 145.

Muslim scholars have developed a rational jurisprudence far from the western positivist Hartian model. The *Ulama*, who were the representative of the consensus of the *Umma*, exercised practical freedom in the interpretation of the holy texts: "in practice the message was to obey the law neither because authoritatively dictated by a state official nor because it passes some philosopher's test but as pronounced by your local wise man whose authority depended on popularity and oscillated according to local political dynamics."[471] In the West the claim for a universalist law ruled by an absolute authority was justified with reference to a 'divine right' to rule: therefore, what was a gap in Islamic history emerges as a 'legitimacy deficit' in the West. Hence, although western legal tradition is considered a secular-rational model marked by a rejection of what goes beyond secular rationality, in reality it has profound roots in religious narratives and it is the expression of a specific monotheistic model of social organization. As a matter of fact, the distinction between secular and sacred/religious is typical of western countries and it is inherited by Christian tradition (Render to Caesar the things that are Caesar's, and to God the things that are God's); this distinction is absent in Islamic or Jewish law.[472]

The comparison between the Muslim and the western world helps to unfold the so called 'clash of civilizations'. Similar to the West, the systematization of Islamic law into a body of extremely particularistic regulations responds to a desire for a sovereignty which possesses a universal-ist law as a substitute of a withdrawn God. In essence, Islamic law "acquired the same universalizing tension that we attribute to secularly dressed Christianity today, namely between the spreading of a civilization and its inability to dialectize its domination via its ideals and norms".[473] But while in Islam, due to the failure to create a Canonic form of law, "the problem of universality was not successfully side-lined by the thought of cultural pluralism grounded in a global consciousness", [474] the western system demands that the citizen live according to fixed rules of positive law that, often, in the name of an abstract equality, simply highlight differences. Therefore, the so called 'clash of civilizations' is false: "since monotheistic 'religion' has been irrevocably imploded under the impact of globalizing tendencies,

[471] *Ibid,* 130.
[472] As I will argue in the last Chapter, this distinction has also determined a very specific way to understand religious symbols in the Christian/secular public sphere.
[473] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11) 116.
[474] *Ibid*, 116–7.

spirituality has been pushed to the level of the esoteric and conflicts of legitimacy are managed through the cult of legalism, the 'priests' of which are, respectively, the morally 'neutral' Western lawyers and the morally 'perfect' Muslim mullahs."[475]

In this regard, the veil, which emerges as the symbol of the incompatibility between two different worlds, in reality is revealed as the emblem of both eastern and western anxieties over their own internal legal shortcomings and incompleteness which develops on both parts a mechanism of defence and attachment to their respective law. The comparison between western and Islamic models of sovereignty unfolds exactly this tension:

"In the west, the fact that secularism is incomplete (possibly inevitably) means that universality is still a source of anxiety even as the prevailing logic of 'management' channels most energy into efforts to 'deal with' cultural difference in the 'global village' (multiculturalism versus integration etc.) […] In Islamic context, likewise, the secularization of the faith through its transformation into a body of extremely particularistic, sophisticated legal rules and principles of interpretation covering ever more aspect of collective life by 'revered jurists' barely hides the impossibility of constructing a 'purely' Islamic identity."[476]

When the western and eastern worlds meet, their internal incompleteness becomes apparent: this develops a mechanism of defence and attachment to their respective legal systems. In sum, the so called 'clash of civilizations' is nothing more than anxiety over the condition of incompleteness between two dogmatic (desired) legal systems. In fact, both Christian and Muslim legal scholars are prompted by the desire for a universal-ist positive law that can guarantee a social order "that is, law authoritatively distinguished as law, as a means to no end other than its own operation, which both presupposed and facilitates centralized state control."[477] Therefore the veil emerges as the expression and the mirror of two dis-similar (desired) legal systems: that of European imperialism and that of Islamist nationalism. Both aspire to create a universalist legal system able to bind the community into a precise identity through the control of women's body.

---

[475] *Ibid*, 117.
[476] *Ibid*, 97.
[477] *Ibid*, 114.

It is exactly the troubled universality of western law that emerges from the analysis of the so called '*hijab* cases' decided at the European Court of Human Rights (ECHR) as well as in different European national courts, which I will take into consideration in the next Chapter. The law's development in the West indicates that the universality of 'modern' 'secular' values, translated nowadays into blind belief in human rights as a global formula, is inherited from the work of medieval jurists who translated the Christian concept of natural law into a secular device which becomes the expression of the secularization of Christianity. As Jacob observes through the analysis of the intrinsic relation between secular rituals and modern political values, the development of new secular sentiments (associated with eighteenth century Europe) has become a new form of religion which contributes to the formation of liberal society and the sacralisation of concepts such as 'reason', 'civil society', 'democracy' etc.[478] This indicates that western/secular modern concepts, which carry a religious essence, are not neutral positions, rather, liberal thought expresses a specific form of governmentality in which religion and national politics are re-defined.[479] In other words, the emergence of a new secular (social) space facilitated the re-definition of religion and religious sentiments/practices into the modern secular world. In this sense, secular is not intended as the gradual withdrawal of religion from the polity, but as the regulation of religion and religious sentiments in the modern Christian/liberal/secular world.[480] As Asad argues, "secularism doesn't simply insist that religious practice and belief be confined to a space where they cannot threaten political stability or the liberties of 'free-thinking' citizens. Secularism builds on a particular conception of the world ('natural' and 'social') and of the problems generated by that world."[481]

As the analysis of the legal decisions concerning the practice of veiling will reveal, the universality attached to modern Christian/secular values in reality acts to absorb the plurality of different laws, traditions, and customs into the universality of western law. This, in turn, has facilitated the creation of the modern law's subject (the 'autonomous' individual) along with a specific form of universalist sovereignty which has been

[478] Margaret C Jacob, *Living the Enlightenment : Freemasonry and Politics in Eighteenth-Century Europe* (Oxford University Press, 1991); See also Margaret C Jacob, 'Private Beliefs in Public Temples: The New Religiosity of the Eighteenth Century' (1992) Social Research 59.
[479] Asad, *Formations of the Secular* (n 20) 190.
[480] John Milbank, *Theology and Social Theory : Beyond Secular Reason* (Blackwell, 1993).
[481] Asad, *Formations of the Secular* (n 20) 191–2.

'exported' (and sometimes imposed) as the only valid model of social organization. However, as I shall argue, the break that the 'secular' West operated with its own Christian mythologies in the name of a common, unique and fixed identity, contradicts its own claim to be the most suitable form of social organization, through the exportation of democracy and human rights permeated by the same Christian narratives in which all the 'other' political and legal organizations appear incompatible from a western point of view. As Diamantides argues, "late-modern contract theories and legal positivism operate as master signifiers not 'anywhere' and not 'just because' but specifically in the context of the European nation-state and only as always already justified i.e. as the equivalent of what, in the earlier times, was seen as justified with reference to now abandoned, albeit still operative, substantive theological structures and beliefs".[482]

In this regard, as I shall argue, human rights activists and the ECHR essentially agree with the monolithic vision of Islamists on Islamic law. In fact, western constitutional theories tend to see *Shari'a* law as shaped by a dichotomy between traditionalists and modernizers. Based on this dichotomy, the emphasis of western discourse on the *hijab* and Islamic law in general is related to the 'clash' between traditionalists and modernizers over the constitutional structure of the state and whether this structure can be legitimated by *Sharia*, which is imagined as a fixed body of law.[483] This passionate debate between Islamophobes and Islamists mirrors "their animosity […] [to] jointly essentialize the 'civilizational' differences between, on the one hand, a 'European' culture that is presented as classical Greek, early Roman and western Christian (downplaying its Jewish, Byzantine/eastern Christian and Islamic influences) and an 'Islamic' one, which is presented as essentially 'other' which could never have absorbed the influences of classical Greece and Christianity but emulates the Jewish theocratic model or, at best, the 'deficiently Christianized' Caesaropapist model of mixed power in

[482] Diamantides, 'Constitutional Theory and Its Limits' (n 11) 123.

[483] In the next Chapter I will also argue that this logic has been imposed in Muslim majority societies along with the creation of nation-state which, in turn, determined the decline of Islamic scholars. In fact, on the one hand, we find literature about Muslim sovereignty based on the concept of a sole lawmaker who is unconsciously coping the Western/Christian/secular concept of sovereignty and law, typical of Islamist discourse while, on the other, liberal Muslim scholars such as An-Naim, who think that the western Christian/secular model is universally valid. Both sides are results of the colonization process. See Abdullahi Ahmed An-Na'im Na, *Islam and the Secular State* (Harvard University Press, 2009).

the Eastern Roman Empire with which it first came to contact".[484] Furthermore, as I argued, "the essentialism of this modernist-legalist position- jointly held by liberal [neo-colonial defense] and [post-colonial] Islamists orientalists- further consists in conceiving the *Shari'a* as the primary expression of the religion of Islam".[485] The new (secularized) law, which becomes central in both western and Islamist thought, was thus able to construct a universal metaphysic which is supposed to be suitable for every society.

[484] Diamantides, 'Constitutional Theory and Its Limits' (n 11) 120.
[485] *Ibid*, 116.

Chapter 3: The 'humanity' of the Secular Subject

In recent years, the female headscarf has been at the centre of many polemical debates in the West. Politicians, judges, journalists and columnists have even 'over-debated' the practice of veiling in the secular European public space, filling pages of journals and social media with stories of Muslim women who have been forbidden to work, to walk in a public place, to have appropriate education, and even to stand in a court room, because they are veiled. Sirine Ben Yahiaten, a 17-year-old French Muslim girl, was obliged to change schools as her attire was considered an 'ostentatious religious sign'.[486] Sirine was wearing a long skirt complete with sweatpants underneath and a hair band that cover her hair. One day the school principal called her in to inquire about her attire. While waiting to speak with the principal, the school's secretary told her that she should not wear sweatpants under her skirt because of the French law banning 'religious symbols'*: "*she told me that my skirt was too long and students walking behind me could fall because of its length, so she said that I was posing a threat to the security of the students. As for the headband, she said it prevents me from hearing well during the class."[487] As Sirine was forbidden to wear what she wanted, she was obliged by the head of the school to attend study period class every day: "Every time I entered the school, someone was waiting for me to accompany me to the study period class since I was no longer allowed to have any contact with other students. I was not allowed to go out during class breaks. I was given exercises to do but I was never given makeup material for the courses that I had been missing."[488] As she could not reach an agreement with the school over her attire, she was obliged to find another school which did not consider a 'long skirt' as an 'ostentatious religious symbol'. Rabha Chatar, a 40-year-old French woman and mother of three, was forbidden to accompany her children to school because she was wearing a veil. Although she tried to challenge the ban at the national French Court, her claim was dismissed because of the new French law on

[486] Nabila Ramdani, 'Veil Row Reignites in France after 15-Year-Old Girl Expelled from School for Wearing a Headband and Long Skirt Which Were Considered 'too Religious'' (*Daily Mail Onlin,e* 2013) <http://www.dailymail.co.uk/news/article-2305314/Veil-row-reignites-France-15-year-old-girl-expelled-school-wearing-headband-long-skirt-considered-religious.html> accessed 30 November 2016.
[487] Hajer Naili, '5 Veiled Frenchwomen Tell 5 Stories of Harassment' (*Women's eNews,* 2014) <http://womensenews.org/2014/11/5-veiled-frenchwomen-tell-5-stories-of-harassment/> accessed 30 November 2016.
[488] *Ibid.*

secularism and the wearing of ostentatious religious symbols.[489] Hanane Karimi, a 36-year-old teacher at the University of Strasbourg, had been obliged to leave her school when she was young because she wore a veil. It was not until 2004 that she decided to resume her education: she gained a Master's and a PhD and started work at the University of Strasbourg.[490] As students in the university focused on her veil, she decided to wear a turban*: "*I feel more comfortable than with a traditional veil, which is often rejected. Yet, even with the turban I stay who I am and I am identified as a Muslim."[491] Leila Glovert, a 33-year-old British citizen who converted to Islam more than 10 years before, lost her job because she was wearing a veil: "I became jobless. I applied to jobs and got called for interviews. Once I showed up at the interviews, I was being told 'we will call you back' or simply 'we don't want the Islamic veil.' I sent hundreds of resumes and each interview ended up that way."[492] As she could not find a job in her city, she decided to move to London and to separate from her children in order to have a job.

These and many other Muslim women in Europe have seen their personal freedoms limited in the name of defending secular values and gender equality. In recent years, tensions over the veil have reached many European national courts, as well as the European Court of Human Rights (ECHR), all of which have legislated over the possibility for Muslim women to wear a veil in the western/secular public space. In this Chapter I will analyse some cases decided at the ECHR in order to highlight the controversial points of these decisions. As I shall argue, what emerges from the analysis of the legal cases related to the practice of veiling is that, by essentializing religion and *Sharia* law, western law protects a specific liberal/Christian/secular law's subject and, by so doing, it excludes different subjectivities.

My analysis, outlined in the previous Chapter, reveals a symmetry between the use of western positive law and Human Rights law *and* 'positivized' *Sharia* law –such as the one proposed by Islamists- not so much to physically dress or undress Muslim women,

---

[489] *Ibid.*
[490] 'Féminisme et Islam : Hanane Karimi, L'orthodoxie et La Révolte' (*Jeune Afrique,* 2016) <http://www.jeuneafrique.com/mag/325356/societe/feminisme-islam-hanane-karimi-lorthodoxie-revolte/> accessed 30 November 2016.
[491] Naili (n 487).
[492] *Ibid.*

but to bind their bodies to a fixed, transparent and singular identity. The *Sahin* case,[493] for instance, to which I will return, reveals a common view among Islamists and liberals that the matter falls under *Sharia* law, which is misrepresented as a comprehensive and transparent code of unalterable revealed law. By referring to the *Refah Partisi* case,[494] the judges stated that *Sharia* law would oblige people to obey static rules imposed by religious concerns. However, the pluralist legal system proposed by the *Refah* Party was quite different from the unique *Sharia* law proposed by Islamist movements. Interestingly, in the case, the rejection of a plurality of legal systems was compounded by a rejection of the pluralistic practice of veiling: the blindness of the ECHR to this pluralism of intentions and of performative outcomes of the act of wearing a veil, reveals that, instead of a clash of civilizations, what we really have is a clash of two imperialistic-universalistic discourses: the triumphant secular discourse of a world that is re-humanized through human rights and the reactive Islamist discourse. Both systems aspire towards establishing a universal-ist law able to bind the subject to a monolithic and static identity. While Islamists aspire to bind the entire world to a universal singular and fixed *Sharia* law, in the West, Human Rights law aspires to redeem the whole of humanity through the inclusion of the human within the pale of the law.

To understand how the universalist claim of Human Rights law has created an intrinsic relationship between positive law, Human Rights law and the 'human', I will recall Esmeir's work[495] on the emergence of juridical humanity. Through examining the history of the British protectorate in Egypt, she reveals that the imposition of a new positive law by British colonizers aimed to deliver humanity to a people (supposedly) 'de-humanized' by earlier barbarian and 'backward' political and legal systems. As humanity is delivered through the inscription of the individual within the pale of positive law, the human becomes the *telos* and the *theological end* of the law. Consequently, the human becomes nothing more than a 'juridical person'. Esmeir's articulation and theoretical analysis allows us to re-think the current debate on human rights as a means of effective development; if 'humanity' is delivered only within the pale of the law, then becoming the subject of human rights can ensure both a temporal humanity and its possible suspension. Hence, Human Rights law protects an already-given-human and it

[493] S*ahin v. Turkey* (n 17).
[494] *Refah Partisi (The Welfare Party) and others v. Turkey,* Application nos. 41340/98, 42342/98 and 41344/98 (ECHR 31st July 2001).
[495] Esmeir (n 15).

claims jurisdiction over the declaration of its status. Therefore, what transpires from Human Rights law is the imposition of a new universal law that in principle 'saves' the part of humanity that has yet to be allowed to enter into the arrangements of liberal law but, in reality, it reinforces its own absolute power and, as a transcendent Christian God did before, it controls and guides the individual by creating a specific secular subject who enjoys the abstract equality of a (supposedly) neutral secular state within the jurisdiction of the law. In this sense, the cases I will analyse can be understood as instances of modern law constructing a 'de-humanized' female, victim of chauvinistic religious law, who must be re-humanized as an abstract individual, at once legislator and subject of law. If the law's subject fails to be reborn and rejects being included in the modern law's project of 'juridical humanity', it immediately returns to a condition that is 'pre-human'.

In fact, as I shall argue, western and Human Rights law protects a specific Christian/secular/liberal individual whose secular practices and/or sensitivity "is one that depends on, one that cannot be abstracted from, the secularist narrative of the progressive replacement of religious error by secular reason – what Asad calls the 'triumphalist narrative of secularism'. A secular sensibility is one considered from the standpoint of its contribution to that progressive narrative."[496] By introducing a secularized concept of religion and religious practices, those decisions reveal that western law protects a specific Christian/secular/liberal citizen whose speech and behaviour incorporates western/liberal categories of religious and secular.

Therefore, although Human Rights law claims to redeem humanity through the force of the law, it actually acts to eradicate cultural differences in the name of a fixed and monolithic Christian/secular/liberal law's subject. This emerges as a paradox of liberalism; if, on the one hand, the citizen is free, then on the other, in order for these freedoms to be guaranteed, the individual has to surrender to the police state. Likewise, on the one hand liberalism justifies itself by claiming a separation between the spiritual and the temporal, the private and the public, while on the other, the private life of the individual has become extremely regulated. In the case, in order to 'save' western secular values, some personal rights of Muslim women and their possibility of agency have to be limited.

[496] Charles Hirschkind, 'Is There a Secular Body?' (2011) 26 Cultural Anthropology 633, 641–2.

In this sense, European legal decisions over the practice of veiling reveal that secularism articulates and defines specific forms of knowledge and emerges not as the mere separation between the private and the public, but as the re-configuration of religious sensitivities and religious practices in the public secular space.[497]

[497] Saba Mahmood, 'Religious Reason and Secular Affect: An Incommensurable Divide?', in Talal Asad, Wendy Brown, Judith Butler, Saba Mahmood (eds) *Critique Secular? Blasphemy, Injury, and Free Speech* (University of California Press, 2009).

3.1 The western/Christian/secular subject of law

In mid-August 2016, Rania El-Alloul was attending the hearing of her son who had been caught driving with a suspended licence in Montreal, Canada. During the hearing, Judge Eliana Marengo asked Rania to remove her headscarf, stating "the courtroom is a secular place and you are not suitably dressed."[498] When Rania refused, alleging her right to wear the veil based on the fact that no ban existed on wearing religious items in the courtroom, the judge refused to hear the case of her 21-year-old son. In the name of secular principles, supposedly violated by a person who was not even the claimant or the accused, Rania's son could not have his hearing.[499] Rania is not the only woman to have seen her possibility of agency limited by legal decisions in the name of secular values: many Muslim women in Europe are still struggling for their right to wear the veil. Before analysing the so called '*hijab* cases' decided at the ECHR, it is necessary to explain how the concept of secularism has developed in western/liberal thought in order to comprehend the main concept to which the ECHR referred in deciding whether Muslim women could wear a veil.

Secularism as a political ideology was born and developed in western history: it is based on the concept that religious and secular powers are two separate spheres of life.[500] The notion at the centre of secular ideology is that political public institutions should be free from religious/ethnic influences and allegiances.[501] For secularists, the strict division between Church and state, private and public, is essential for the formation of modern democracy in liberal societies. Public space comes to be considered neutral and egalitarian once it is free from personal sentiments.[502] In other words, the secular modern state is conceived primarily as the separation between Church and state: this, in turn, is associated with the rise of democracy, human rights, the rule of law and constitutionalism. However, as I shall argue, 'secularism' should not be understood as the mere separation between Church and state, but as a specific western ideology

[498] Simone Osborne, 'Not in My Courtroom - Judge Throws out Case after Woman Refuses to Remove Headscarf' (*Express*, 2016) <http://www.express.co.uk/news/world/699607/burka-hijab-court-ban-judge-montreal-quebec-canada> accessed 3 October 2016.
[499] *Ibid.*
[500] José Casanova, *Public Religions in the Modern World* (University of Chicago Press, 1994).
[501] Charles Taylor, 'Modes of Secularism', in Rajeev Bhargava (ed) *Secularism and its critics* (Oxford University Press, 1998).
[502] As Cavanaugh observes, the belief that the state should be secular is one of the 'foundational legitimating myths' of liberal/western societies. See William T Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP, 2009) 3–4.

which defines particular forms of knowledge and behaviour.[503] In this sense, western/liberal/secular ideology presupposes and creates a specific Christian/secular/liberal law's subject (an abstract, autonomous individual who obeys rational/universalist rules of law) which emerges as the result of the law's intervention in shaping the subject: in fact, law, a cultural product which forms and is formed by a structure of meanings, has the power to define its subject through its bodies. The law's subject portrayed by western/secular/liberal thought is a secular, self-conscious, autonomous individual whose actions correspond to its thought.[504] This specific concept of subjectivity is today embedded in western/positive/universalist law; it is mirrored in the legal decisions over the practice of veiling, and derives from western historical, political and legal developments.

In the Middle Ages, western societies witnessed a combination of local, customary law and universal canon law based on Roman law. The various religious wars in Europe, culminating in the so called 'papal revolution' and the consequent fragmentation of the authority and unity of the Catholic Church, favoured the creation of important notions which have persisted to this day, and are the foundation of modern western law.[505] Firstly, the aftermath of the papal revolution witnessed a separation between spiritual and temporal power, whereas religion was relegated to the private sphere.[506] Secondly, the separation between secular and religious power favoured the emergence of a new form of governmentality[507] that culminated in the shift from government (in which the state intervenes in specific areas), to governance (in which the state sets standards).[508] Along with a new form of governmentality, this period has witnessed the emergence of

[503] Talal Asad, 'Reading a Modern Classic: WC Smith's "The Meaning and End of Religion"' (2001) 40 History of Religions 205, 206.
[504] Marinos Diamantides, 'On and Out of Revolution: Between Public Law and Religion' (2014) 10 Law, Culture and the Humanities 336, 350.
[505] David Kennedy, 'Images of Religion in International Legal Theory', in Mark W Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff Publishers, 1999) 146–149.
[506] Mr William T Cavanaugh, '"A Fire Strong Enough to Consume the House:" the Wars of Religion and the Rise of the State' (1995) 11 Modern Theology 397, 404.
[507] In Foucauldian terms, 'governmentality' refers to the way governments produce citizens. Michel Foucault, Michel Foucault, *The Foucault effect: studies in governmentality: with two lectures by and an interview with Michel Foucault*, (Harvester Wheatsheaf, 1991).
[508] Alain Supiot, *Homo Juridicus: On the Anthropological Function of the Law* (Verso, 2007); See also Diamantides, 'On and Out of Revolution' (n 504) 350.

a new concept of 'Man': driven by rational judgments and individual reason, the new man is now independent from his Father and in the place of the Holy Spirit.[509]

The various religious conflicts in Europe pushed the idea of the necessity to subordinate the religious domain to institutional political power in the modern nation-state. As Locke argued,[510] a delimitation of the political and religious realm was necessary, as conflicts between political and religious powers were incapable of being resolved by rational means: the division between secular and religious power, then, has been seen as a useful tool to establish the lowest common denominator between different Christian sects and to link the individual to the power of the state.[511] The religious/secular distinction, at the foundation of modern western law, accompanies the idea of the creation of a fundamental dichotomy between private/public, state/church, religious/secular.[512] This is attested by the obsession of the Enlightenment philosophers with the proper definition of religion:[513] while the term comes to be understood as a trans-historical and transcultural phenomenon, an illogical and un-real belief, a myth, human life has started to be conceptualized as divisible into different spheres of human action.[514] As Cavanaugh argues, "what is at issue behind these wars of religion is the creation of 'religion' as a set of beliefs which is defined as personal conviction and which can exist separately from one's public loyalties to the State."[515]

Herbert, a prominent Victorian English philosopher, defined 'religion' in terms of belief, practices and ethics: a religious individual is a person who believes in a supreme transcendental power and follows certain practices based on a set of conducts and recommendations which will have, as a result, reward or punishment after life. For Herbert, this definition of religion is valid in every society and confirms the thesis of the necessity to relegate religion and religious sentiments to a private sphere.[516] However, the universalization of the concept of religion as a private belief neglects the particularities of different faith communities. Cavanaugh observes that the descriptive

[509] Diamantides, 'On and Out of Revolution' (n 504) 357 and 351.
[510] John Locke, *Two treatises of government : a critical edition,* (Cambridge University Press, 1960).
[511] Taylor (n 501) 33–4.
[512] Joan Wallach Scott, *The Politics of the Veil* (Princeton University Press, 2007) 91–2.
[513] Asad, *Formations of the Secular* (n 20) 29.
[514] Cavanaugh, *The Myth of Religious Violence* (n 502) 3.
[515] Cavanaugh, 'Fire Strong Enough' (n 506) 403.
[516] Talal Asad, 'Where Are the Margins of the State?' in Veena Das and Deborah Poole (eds) *Anthropology in the Margins of the State* (School of America Research Press, 2004) 286.

definition of religion has not only facilitated a new form of governmentality but it has also created a fundamental problem: by defining religion as a mere private/un-real/mythological belief, religion itself becomes a normative concept which acquires a specific meaning based on particular power relations. In other words, the definition of religion depends on who has the power to define it in different cultural and historical contexts.[517]

The idea that religion is a personal, irrational, transcendent, and mythological belief was accompanied by the creation of a new rational knowledge, now 'desensualized' from human invisible experiences. For Kantian and neo-Kantian philosophers, it is essential to limit the sensible in order to secure the purity of the moral will. This can be achieved only by creating two distinct worlds which can assure the autonomy of moral will to the domain of the 'supersensible' while passions and emotions are relegated to the sphere of sensible private life. Practices of self-cultivation (which form the religious subject) have a positive function of disciplining the self, but they cannot contribute to the subject's moral reasoning.[518]

However, as I have pointed out, the Enlightenment did not produce a separation between Church and state power, or a decline in religiosity in the name of human reason. Rather, it simply transferred religious devotion from the realm of the Church to that of the world: this new religiosity, which in western history has been expressed in concepts such as secularization, modernization, nationalism, etc.,[519] becomes the foundation of modern/positive/western law.[520] In fact, in western history, elements of the state's apparatus come to be secularized according to new sacred narratives. Hobbes describes the state as 'a mortal God' whose life is 'eternal' because the duty to protect the worldly life of the individual is given to the state.[521] The state is transcendent in part for its sacredness,[522] due to its claim to protect the life of its citizens, and in part because it acquires the power to shape the individual's life and to

[517] Cavanaugh, *The Myth of Religious Violence* (n 502) 59.
[518] Hirschkind (n 496) 637.
[519] Inayatullah and Boxwell (n 444) 163.
[520] For Sardar, western imperialist wars to dominate are a form of religious zeal but disjointed from the initial ethical values. *ibid*.
[521] Hobbes (n 463).
[522] For Emile Durkheim the state's sacredness is what defines society. See Émile Durkheim, *Selected Writings* (Cambridge University Press, 1972).

create an obedient 'citizen' through the force of the law.[523] Although the state is not a living human, the state is accorded the same sacrality of human life. The modern secular/liberal state is thus founded on a political myth, an original mythical narrative which provides the infrastructure of its political values (freedom, equality and tolerance) within a framework of private and public morality.[524] In this sense, as Cavanaugh observes, the modern concept of religion, as well as that of the nation-state, undergo a process of naturalization: "the secular nation-state […] appears as natural, corresponding to a universal and timeless truth about the inherent dangers of religion."[525] Since the state (or the Leviathan) claims eternal life, it is also entitled to defend itself by any means. As the Leviathan is authorized to do whatever is necessary to maintain the commonwealth, including the use of violence, secular violence becomes legitimated over religious violence. The founding of western law and mode of sovereignty, then, is intrinsically linked to a discourse of self-legitimation which also justifies acts of violence to enforce the law and to defend the state. However, as Salecl argues, this is one of the paradoxes of the modern/secular/liberal concept of politics: "just as the violent act of enforcing law establishes conventions which then guarantee the validity of this performative act itself, so a state, by means of its funding gesture, sets up conventions which then retroactively give legitimacy to its creation."[526] The state, like the Kantian subject, is creator and created, it produces and imposes law on itself.[527] The subject of modern/western/liberal law acts by reference to transcendent rules which each citizen has to obey. By assigning to religious practices and religious beliefs a proper place, the 'secular' state has created the conceptual conditions to secure the loyalty of its citizens, irrespective of different religious allegiances.

This new form of governmentality was accompanied by positivization of the law, as articulated by Hart.[528] He locates the foundation of universalist positive law in the practice of officials who recognize the law as the primary rules to which citizens must obey: not anymore natural law or 'community based legal systems' but law processes and procedures have become the ultimate expression of the law itself. Law's

[523] Hobbes (n 463).
[524] Asad, *Formations of the Secular* (n 20) 56.
[525] Cavanaugh, *The Myth of Religious Violence* (n 402) 3.
[526] Renata Salecl, *The Spoils of Freedom : Psychoanalysis and Feminism after the Fall of Socialism* (Routledge, 1994) 91.
[527] *ibid*, 81.
[528] H L Hart, *The Concept of Law* (2nd ed, Oxford University Press, 1997).

codification has led to the abandonment of a substantive legal concept of justice in the name of proceduralist rules of law.[529] As the state was run by the rules of law, positive law acquired a universal power which was a substitution of God's supreme power: "grounding the study of the law in codification, while restricting it to such forms of legal ordering, generated […] the effect of universality, abstraction, and coherence."[530] In fact, the rules of positive law were general, fixed, and established a unique system which everybody had to obey within the borders of western nation-states.[531] As positive law presupposes an individual able to turn desires into rights, the individual acquires his/her natural identity by having rights. Thus, western law's development has transformed the individual into a *homo juridicus.*[532]

Positive law conceives the individual as 'abstractly equal' to others. For Hobbes, "if nature…has made men equal, that equality is to be acknowledged: or if nature has made men unequal; yet because men that think themselves equal, will not enter into conditions of peace, but upon equal terms, such equality must be admitted".[533] In other words, although egalitarianism may not be supported by nature, abstract equality is a precondition for political life.[534] The concept of abstract equality, which is at the foundation of positive law, rests on the idea that every individual is equal before the law. As the individual is conceived in abstract terms, the legal subject inevitably emerges as a mask, a theatrical artifice, a product of mere institutional performances. This *persona*, or mask, comes to life as law's progenitor, but, at the same time, it also comes *before* the law and maintains its maker. Schlag points out that the abstract (juridical) subject is a "metaphysical or calculating, self-interested being, conceived in an asocial way in a world whose socially was no more than the coming together of individuals in a social contract…the law knew no real individuals, only their mystical abstraction".[535] The western development of contractualism has boosted the liberal/secular concept of autonomy whereas, from mercantile society, contract (including the later concept of 'social contract') was understood as composed of isolated juridical subjects within specific power relations. In this sense, the relevance of the Kantian philosophy and its

[529] Supiot (n 508).
[530] Esmeir (n 15) 58.
[531] Hart (n 528) 164–5.
[532] Supiot (n 508) ix.
[533] Hobbes (n 463) 120.
[534] Marvin Zetterbaum, 'Equality and Human Need' (1977) 71 American Political Science Review 983, 985.
[535] Pierre Schlag, *The Enchantment of Reason* (Duke University Press, 1998) 31.

notion of a rational/self-master/abstract individual remains at the foundation of western and Human Rights law. Therefore, Western/liberal democracies could not exist without the abstract and empty concept of the individual and nor could western and Human Rights law exist without the concept of an abstract subject of law, the *cogito*.[536]

For Supiot, the idea of abstract equality is associated with the concept of contract which, in turn, is profoundly linked to Christianity: as a matter of fact, the concept of *pacta sunt servanda* ('the agreement must be kept') was developed by western Christian theologians and imposed on all Christians as a duty.[537] He states that the *imago dei* rests essentially in three fundamental western concepts: Man as individual, subject, and person. Man is an individual because he is unique and, at the same time, identical; in other words, Man is conceived as a 'whole' and, at the same time, as a separate individual. Meanwhile, each man is also considered to be identical to the other because part of a shared humanity: as they are created in the image of God, they are 'brothers', identical. For Supiot, these Christian concepts define the modern subject of law.[538]

Marcel Gauchet also links the emergence of secular modernity to Christianity's historical development.[539] For him, it is Christianity that created a dynamic which culminated in the emergence of the abstract autonomous individual of modern democracy and it is Christianity that allowed the emergence of an earthly absolute power as substitute for a withdrawn God. The separation between 'the divine' and 'the human' has opened a space for human action and the rise of the modern notion of sovereignty. Christianity's attention to the concept of conscience has encouraged individual interpretation and evaluation of sacred authority, furthering, in this way, the western/liberal concept of autonomy. This process, in turn, has led to 'Christianity's own overcoming' which has resulted in the modern Christian/secular/liberal political order and the relegation of

[536] Salecl (n 526) 119.
[537] As Supiot argues, although the contract form is supposedly an horizontal relationship between equals, it is in reality a vertical relation of power: "what all these versions of contract have in common is that they place a person- whether real, or legal, private or public- within the sphere of power of another person, but without thereby infringing, at least in formal terms, the principles of freedom and equality." For this reason, the abstract category of contract erodes, giving space to the emergence of a new type of contract which aims to legitimate the exercise of power. Supiot (n 508) 104.
[538] *ibid*.
[539] Marcel Gauchet, *The Disenchantment of the World : A Political History of Religion* (Princeton University Press, 1997).

religion as a private belief.[540] Thus, the genealogy of the secular comes, in western history, to be fused with the genealogy of the 'modern': for Locke, western modernity is founded in the distinction between secular and religious power, public and private, state and Church. As I shall argue, one way in which judges, journalists and politicians frame the issue of veiling is by reducing it to a pre-modern or anti-modern practice;[541] as the secular has become synonymous with 'modernity', that which is in contrast with western/secular/liberal values is considered 'backward' or 'pre/anti-modern'. In other words, as Muslims are supposedly unable to distinguish between religion and the state, they are seen as 'backward' people in need of a positive law to 'rescue' them from their backwardness.

Thus, Christianity persists and it is inseparable from the modern western world.[542] Although God seems to have disappeared, He remains in the western legal human being, conceived in His image:[543] "the unity of the divinity – the uniqueness of the one God, and the correlative singularity of the sovereign –was mirrored by the unitary identity of the subjects of law".[544] Since the secular is in reality theological, the legal subject is also a theological construction.

Supiot finds that Christianity is the only religion in which God is perceived as law giver (as creator of the law of nature) but is, at the same time, bound by it: similarly, the modern/Christian/secular subject is creator and, at the same time, is subject to state law.[545] This is the paradox of the Christian/secular/liberal subject of law: that its intrinsic nature is both obedient and free and self-governing. In other words, while on the one hand the Christian/secular/liberal subject of law enjoys a freedom guaranteed by the state, then on the other s/he must to be subject to state power in order for her/his freedom to be protected. The liberal/Christian/secular subject of modern western law is the *citizen*, the *individual*, bearer of rights and duties: an individual who has the freedoms that the state allows and guarantees while, at the same time, for the sake of these freedoms, s/he must to obey the static rules of law. As Diamantides points out,

---

[540] *ibid*.
[541] Nilüfer Göle, *The Forbidden Modern: Civilization and Veiling* (University of Michigan Press, 1996).
[542] Jean-Luc Nancy, 'The Deconstruction of Christianity', in Hent de Vries and Samuel Weber (eds) *Religion and Media* (Stanford University Press, 2001) 115.
[543] Supiot (n 508) 12; Nancy (n 13).
[544] Peter Goodrich, *'Review: Social Science and the Displacement of Law' by W. T. Murphy*, (1998) Law and Society Review, 32.2, 476.
[545] Supiot (n 508).

the paradox of the western law's subject "lies in the fact that modern man conceives himself ironically: he acts as 'natural', pre-fall, Adam but he thinks himself as Crusoe. The modern subject, that is, possesses the ideological means to act as if justifiably, whereas it privately thinks itself solely as desiring machine and intelligent exploiter of opportunities without a 'history' and therefore without responsibility."[546]

[546] Diamantides, 'On and Out of Revolution' (n 504) 358.

3.2 The 'humane' subject of law

In March 2016, the French minister for women's rights, Ms. Laurence Rossignol, compared women who wear the veil to 'Negroes who supported slavery'.[547] In the interview, Ms. Rossignol criticized western fashion companies for selling items such as the *burqini* and new, fashionable and 'modern' *hijabs*. For Ms. Rossignol, a legal regulation over the practice of veiling was necessary to 'save' Muslim women from a backward anti-secular religion that oppressed them. Similarly, Amin Qasim, considered one of the main thinkers of Egyptian liberal feminism, condemned veiling and women's seclusion and advocated a more 'humane' and positive law able to deliver humanity to women.[548] Strongly influenced by British colonial 'humane' rules and a western life style brought to Egypt by the English mandate, he stated that women should be considered 'humane', exactly like men.[549]

Much has been written about the concept of humanity: however, most scholarly work tends to read the term as carrier of an all-embracing category with a single essence. Esmeir's analysis, however,[550] reveals how the concept of humanity has profound roots in the work of colonial jurists and is nowadays embedded in Human Rights law. Through a compelling analysis of the concept of humanity by important thinkers such as Agamben, Arendt, Foucault, and Fanon,[551] she reveals a new relationship between law and the 'human' within the colonial project. Esmeir explains how the imposition of the new, modern, positive law during the British occupation of Egypt (1882-1956) was a precise project of colonization which presupposed the inclusion of the human in the law as an instrument of subjugation, able to eliminate the past in the name of an eternal

---

[547] Peter Allen, 'Minister Compares Veiled Women to 'Negroes Who Supported Slavery'' (*Mail Online*, 2016) <http://www.dailymail.co.uk/news/article-3516233/French-minister-compares-veiled-women-negroes-supported-slavery-Politician-sparks-outrage-questioning-rise-fashion-lines-cater-Muslims.html> accessed 12 April 2016.

[548] Qasim Amin, *The Liberation of Women* (Cairo American University Press, 2000).

[549] However, as Ahmed have argued, "in calling for women's liberation the thoroughly patriarchal Amin was in fact calling for the transformation of Muslim society along the lines of the western model and for the substitution of the garb of Islamic-style male dominance by that of western-style male dominance. Under the guise of a plea for a liberation of woman, then, he conducted an attack that in its fundamentals reproduced the colonizer's attack in native culture and society." Ahmed (n 24) 161.

[550] Esmeir (n 15).

[551] See Giorgio Agamben, *State of Exception* (University of Chicago Press, 2005); Giorgio Agamben, *Homo Sacer : Sovereign Power and Bare Life* (Stanford University Press, 1998); Hannah Arendt, *The Origins of Totalitarianism* (3rd ed, Allen & Unwin, 1967); Frantz Fanon, *The Wretched of the Earth* (Penguin, 1967); Foucault, *The Order of Things* (n 278).

present, and thereby to deliver humanity.[552] Her work shows how the new legal reforms, alongside the adoption of positive law, claimed to deliver Egyptians from their 'inhuman' existence under a 'despotic', 'lawless' and 'inhumane' pre-colonial past. In order to deliver humanity, the new law confined the past to a place unrelated to the present: this 'absolute now' created not only the 'human' but also the 'inhumane' backwardness of what preceded it. As Esmeir points out,

"the binding of positive law operates through presentist practices; in colonial Egypt, historicization of the past turned the past into an era that preceded the present but no longer claimed it. This new temporality, itself a modern power, secured the authority of positive law by citing its own present and repeatedly writing down its foundational texts. This authority no longer bore any relation to the meanings of authority in Islamic law."[553]

The rejection of the past and the repetition of textbooks *in* and *for* the present were necessary to create a rupture with the former legal tradition. Consequently, Egypt witnessed a loss of traditional authority and the rise of a new authority embedded in the obedience to a universal, positive, fixed legal order. The law becomes strictly bound to state power and the human has become chained to the universal power of law because law itself delivered humanity.

For Esmeir law incorporates the 'human' in three ways: firstly, by claiming authorship and source to be human; secondly, by rendering the human the theological end of the law, and finally by defining the human according to the law.[554] Consequently, "the new men are either the governed or the orderly governors; one becomes a new man by learning the art of being governed or of governing."[555] With the colonial project humanity is no longer a category of birth,[556] but a juridical category that defines the

[552] As Festa argues, the encounter between colonizers and colonized produced emotions that could threat the integrity of the colonizers. One way in which the colonizers' integrity could be reasserted was to define the colonizer/colonized relations in term of the asymmetry of sympathy: this, in turn, has articulated a relations between the colonizers' sympathy and the colonized suffering. Lynn M Festa, *Sentimental Figures of Empire in Eighteenth-Century Britain and France* (Johns Hopkins University Press, 2006) 7.
[553] Esmeir (n 15) 24.
[554] *ibid*, 73.
[555] *ibid*, 69.
[556] Conversely, Fanon argues that humanity is not something delivered by the colonizer but a category of birth. Fanon, *The Wretched of the Earth* (n 551).

legal subject itself as human/inhuman. As 'man is not born but made',[557] humanity has become the *telos* of the new, modern, positive law which is the prerequisite for a new, universal humanity.

Thus, positive law emerges as a tool for the education of a new man and, along with it, a new 'woman'.[558] For Qasim, the inferior status of women was the main evidence of the backwardness of Egypt; he argues that British people were able to occupy Egypt because of the perfection of their species and because, thanks to the power of positive law, western European countries were able to move from despotic to democratic law, from chaos to order.[559] He proposed extending the concept of humanity to women, although colonial officials argued that humanity has been delivered to all Egyptians, irrespective of their gender: in fact, for the British, the humanity given to women was the result of a broader 'humanity project' in which the introduction of new legal reforms acted to elevate women from their animal status.[560] For colonizers, what distinguished the humans from the animals was that the former, unlike the latter, had awareness that punishment is attached to the infringement of moral/legal rules: hence, only a subject who has awareness of its rights and duties can be defined as 'human'. One of the first legal reforms of British colonizers was the banning of the veil, understood as a symbol of an uncivilized and backward society. Yegenoglu observes that the obsession over the practice of veiling was "characterized by a desire to master, control, and reshape the body of the subjects by making them visible".[561] This, in turn, has signified an imposition of western modernity, which privileges the visible as a primary route of knowledge:[562] interestingly, what Amin and the colonial officials shared was not only a specific concept of 'womanhood', but also the idea that humanity is a status that may be delivered or taken away. In declaring Egyptian men and women as 'human', British colonizers combined coloniality, judiciality and humanity.

---

[557] Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge University Press, 1986) chap. 1-2-3-4.
[558] As Miner points out "our task…included something more than new principles and new methods. It ultimately involved new men". Alfred Milner, *England in Egypt* (Edward Arnold Publisher, 1892) 28.
[559] Amin (n 548) 59–60.
[560] In Esmeir's work, animality means 'absence of humanity', as defined by British officials. Esmeir (n 15) 81–2.
[561] Meyda Yegenoglu, *Colonial Fantasies : Towards a Feminist Reading of Orientalism* (Cambridge University Press, 1998) 12.
[562] Myra Macdonald, 'Muslim Women and the Veil: Problems of Image and Voice in Media Representations' (2006) 6 Feminist Media Studies 7, 8.

The principle advocating a government of laws and not of men was central to the operations of the colonial state in Egypt. However, by defining and delivering humanity through law, the British never succeeded in determining the transition from pre-human to human or from violence to non-violence; since the law delivers humanity, it continues to contain the inhuman.

In contrast with Arendt's work,[563] in which the juridical person and the human overlap and so the subject's dehumanization corresponds to the collapse of its juridical status, for Esmeir the juridical subject coincides with the human because law locates the human as a product of the law itself. Moreover, contrary to Agamben,[564] for Esmeir, colonization did not suspend the law; rather, through colonization, law was expanded and it contained multiple legalities. Law has become "a technology of colonial rule and modern relationship of bondage;"[565] it has not only delivered humanity, but it has also assured total domination through functional, utilitarian violence. "The principle of utility recognizes […] and promotes happiness and felicity through the law reason […] because the principle of utility is the property of every object, pleasure is always objectively produced and pain avoided."[566]

British officials focused on reforming five main state practices: banning the veil, banning the use of the whip by state officials against peasants, establishing a taxation system to which the *fellahin* (peasants) had to contribute, monitoring the rural administration and abolishing forced labour (also called *corvee* labour).

"By identifying these reforms as humane, colonial law also named the human protected by them. Humane reforms were not only legal means to teach Egyptians how to be human through the cultivation of a sensibility of humaneness; they were also practices aimed at establishing the human status of the receiving subjects."[567]

Esmeir saw the inclusion of the individual within the pale of the law not as an instrument aiming to protect, but as the vehicle of a 'functional', 'repressive' violence and domination.[568] She unfolds the double face of the colonial project; if, on the one hand, the British aimed to eliminate the arbitrary, non-instrumental khedival legal

[563] Arendt (n 551).
[564] Agamben, *State of Exception* (n 551).
[565] Esmeir (n 15) 285.
[566] *ibid*, 120.
[567] *ibid*, 119.
[568] *ibid*, 8.

system,[569] then on the other, they established an arbitrary distinction between 'humane', utilitarian, colonial violence and 'inhumane' pre-colonial violence. In fact, through a systematic reconstruction of historical and legal documents, Esmeir unmasks the true face of the colonial project: *corvee* labour was not abolished, but regulated. Similarly, harsh punishments such as the use of the whip, no longer used in the Ottoman Empire, were not prohibited but allowed for "hard-labor convicts refusing to work, disobeying orders, encouraging disobedience, intentionally destroying clothes or property belonging to prison authority etc."[570] In colonial Egypt the use of violence against rebels and criminals was regulated according to the offence committed: for serious offences the use of the whip was limited to twelve to twenty-four lashes, followed by minor offences punished with solitary confinement, leg irons, a diet of bread and water, etc.[571]

"Crucially, the idealized stance enabled the British to turn law's ideals of humanity into violent weapons aimed at protecting their very purified ideals. The resort to exceptional measures enabled, in turn, purified ideals of humanity."[572]

As Lord Cromer, the British controller-general of Egypt, famously stated, "civilization must, unfortunately, have its victims".[573] In other words, the process of becoming human required certain sacrifices: in this way, British colonizers established a distinction between necessary suffering and wasteful pain. In this regard, the local customs that European colonizers outlawed were not concerned with indigenous suffering but with "the desire to impose what they considered civilized standards of justice and humanity on a subject population - that is, the desire to create new human subjects".[574]

Interestingly, colonizers' legal language not only legitimized oppressive practices, but it also had the power to transform those practices into humane ones. The combination of the concept of 'benevolence' and 'cruelty' should not surprise western eyes. In fact, as Asad argues, although the meaning of the term 'humanity' has been linked since

[569] The Khedival-legal system was the Ottoman pluralist legal order grounded in the tradition of Islamic law. For an overview of Ottoman legal system, see F Robert Hunter, *Egypt under the Khedives* (Cambridge Univ Press, 1984).
[570] Esmeir (n 15) 142.
[571] *ibid*, 141.
[572] *ibid*, 243.
[573] Evelyn Baring, 'Political and Literary Essays, 1908–1913' (Cambridge University Press, 2010) 44.
[574] Asad, *Formations of the Secular* (n 20) 110.

antiquity to the notion of 'threatening others kindly', medieval Christian theologians, in an attempt to justify the Crusades, stated that love was not incompatible with violence (asserting, *inter alia*, that the Crusades were conducted 'with love') by referring to St. Augustine, for whom punishment (if inflicted with love) was a method to redeem sinners. Therefore, in Christianity, sin and salvation are part of the human being, while the process of salvation requires penitence.[575] The European Enlightenment, with its insistence on the power of reason, did not eliminate this paradox: violence (in the form of an 'utilitarian' or 'necessary' violence) and benevolence remain inextricably linked. Likewise, the concept of humanity, inherited from the western/Christian/secular past, embraces both benevolence and cruelty.

In colonial Egypt, as Esmeir argues, "humanity is truly universalized when in the colonies pain is properly measured, administrated, and instrumentalized… pain marks the distinction between human and inhuman [...]. Only pain that serves an end is admitted. Useless, non-instrumental pain is rejected".[576] Henceforth, juridical humanity aims to eliminate 'unproductive' pain. In this regard, Esmeir does not see any distinction between 'arbitrary cruelty' and 'productive cruelty'; the impossibility of that distinction reveals all of the law's violence as arbitrary and signals a collapse of ends into means.

"Significantly, it was the colonial iteration, more than their khedival history of sovereign power, that corresponded to the particular meanings and operations of sovereign power that the rule of law claimed to have overcome"[577] through the consolidation of a regime of private property. In fact, within these newly established estates, peasants cultivated cotton for the world market and lived under legalities constituted and executed by the estates' private owners who acted as absolute monarchs. The hallmark of the abolition of forced labour was in reality the creation of a labour free from the state (and so not subjected to its power operation) in the hands of private landlords: "progress triumphed. Left behind were free peasants to be managed by the technology of private property."[578] These new estates established a system of supervision and coercion in which the state intervened only when asked by the management of the estates.

---

[575] *ibid*.
[576] Esmeir (n 15) 14.
[577] *ibid*, 202.
[578] *ibid*, 161.

Thus, with the colonial project, 'absolute khedival rights' were substituted for 'absolute private property rights' which became the new technology of management[579] while law had become nothing more than a set of rules which acted towards 'normalizing' and 'modernizing' Egypt.[580] Foucault argues that modernity can be conceptualized as a "triangle of sovereignty-discipline-government, which has as its primary target the population and as its essential mechanism the apparatus of security".[581] In his analysis, law emerges as "a permanent vehicle for relations of domination, and for polymorphous techniques of subjugation";[582] since society contains multiple subjugations, modern law, and not any more the sovereign, emerges as a vehicle for relations of domination. In the Egyptian case, the absolute sovereign power, which constituted a continuity between his land and his principality, was fragmented into pieces of land owned by private landlords. Henceforth, plurality of estates signified, in colonial Egypt, a plurality of law.[583] The legal reforms established a new relationship with the 'non-human' and a new subjugation to law and violence.[584] As Esmeir points out,

"modern law and colonialism occupy the same space of humanity/nonhumanity, humanization/dehumanization: colonialism negates humanity and the modern rule of law, both of which stand united in their idealized form against colonial forces: colonialism dehumanizes; modern law recovers the human. The result of these accounts is to reinforce both the necessity and the superiority of the modern rule of law."[585]

Esmeir's work reveals all the paradoxes of positive law. If, on the one hand, the British instituted 'humane' legal reforms such as the abolishment of the use of the whip and *corvee* labour, then on the other, they established a number of exceptional legalities used to suppress and punish political activism and banditry. In other words, in the colonial period, positive legal order emerged as productive of a specific relationship between "law's idealized humanity and factualized violent measures. The splitting of the law was parallel to a corresponding split between the British normative legal gaze and

[579] *ibid*, 162.
[580] François Ewald, 'Norms, Discipline, and the Law' (1990) 30 Representations 138.
[581] Foucault *The Foucault Effect* (n 507) 102–4.
[582] Michel Foucault, *Society Must Be Defended : Lectures at the Collège de France, 1975-76* (1st Picador pbk ed, Picador, 2003) 27.
[583] Lauren Benton, *Law and Colonial Cultures* (Cambridge University Press, 2002) 253.
[584] Importantly, this transfer of power from the monarch to private landlords has been a useful tool to establish the liberal distinction between public and private, which was unknown in colonial Egypt prior to the English mandate.
[585] Esmeir (n 15) 2.

Egyptian factual operation of law […] Crucially, the idealized stance (a technique of purification) enabled the British to turn law's ideals of humanity into violent weapons aimed at protecting their purified ideals (a new technique of hybridization)."[586] Positive law, therefore, emerged as embracing a split between the ideal of humanity and the factuality of its own violence.

The universalist claim of positive law can now be understood as a constitutive part of Human Rights discourse.[587] Human Rights law has replaced the 'metaphysical conceptions of natural law' and the universalistic claim of positive law. Paraphrasing Nancy, in the West, the supreme and absolute law passed from God to the Pope/King and then to the 'mass':[588] today, this universalist law, based on legal process and procedures, is embodied in Human Rights discourse. In the modern world, though universal categories have been challenged, Human Rights remains something sacred, universally just, and unquestionable. As Human Rights law emerges from the secularization of the Christian idea of natural law[589] which enabled a wider notion of humanity that extends its scope to non-Christians,[590] the history of human rights is not much concerned with the creation of a universal humanity (its object), but it is intrinsically linked to the interpretations that nineteenth- century European scholars gave to medieval Christian literature and how the medieval concept of natural law as divinely inscribed ethics was translated into a secular device which inscribed the plurality of the world's culture into the transcendentality of western universal law.[591] As per positive and natural law, Human Rights law is based on the idea of an original sense

[586] *ibid,* 243.
[587] In the West, natural law (humanism) and positive law essentially agree that there is a stability of legal process (positivist) or legal value (humanist).
[588] Nancy (n 13).
[589] Schmitt (n 469); Friedrich Engels, 'Lawyers' Socialism', in Karl Marx and Friedrich Engels *On Religion* (Foreign Languages Publishing House, 1957).
[590] John M Headley, *The Europeanization of the World: On the Origins of Human Rights and Democracy* (Princeton University Press, 2008) 115.
[591] As Breckman argues, the concept of humanity carries the Christian idea of 'redemption' (through His sacrifice, Christ has redeemed humanity). This, however, should not be understood as a rewording of ancient European narratives but as a profound transformation in western thought in which temporal and spiritual power have been fused in order to embrace a distinctive political and legal system carrier of a specific secular/liberal morality. Warren Breckman, 'Politics in a Symbolic Key: Pierre Leroux, Romantic Socialism, and the Schelling Affair' (2005) 2 Modern Intellectual History 61.

of the rights, which inevitably rely on the notion of an authority, a transcendental order, the *imago dei.*[592]

'Juridical humanity' allows to re-think Human Rights and international law today; in fact, the association between the human and the law has profound roots in the work of colonial jurists.[593] Contemporary human rights discourse, derived from a combination between natural and positive law, is based on some principal assumptions which echo the assumption of positive law exported during the last century: firstly, despite the difficulties in organizing pluralistic societies, the liberal democratic positivized order is considered the only just able to produce the most equitable outcomes. Hence, Human Rights law as well as positive law were exported by the West as a universally valid global formula.[594] The Universal Declaration of Human Rights aimed to announce an 'internationalization' of human rights and pave the way for a new international jurisdiction which would exist outside the borders of national countries while presupposing an individual within the pale of a new universal law. Secondly, gender equality can be defined in global terms: "in other words women around the world can be considered one indivisible group, historically silenced and oppressed by men. Thus, the solution offered by international Human Rights discourse must be global (universal)."[595]

It is important to point out that long before Human Rights discourse was concerned with the idea of gender equality, positive law was concerned with the idea of abstract equality. Feminist legal theory has found the concept of abstract equality extremely problematic. For many feminist scholars, Human rights carry a patriarchal character exactly because it presupposes an abstract notion of the subject of law which is deeply informed by individualism.[596] For Olsen, the discourse of human rights does not resolve social conflicts, rather, it reformulates them: as human rights discourse defines a very specific Christian/secular/liberal subject, along with a specific idea of womanhood, they act to use sexuality as a matter of social control, allowing new forms of sexual

[592] Emmanuel Lévinas, *Outside the Subject* (Athlone, 1993) 116–7.
[593] Asad, *Formations of the Secular* (n 20).
[594] Esmeir (n 16).
[595] Mark van Hoecke, 'Islamic Jurisprudence and Western Legal History', in Jorgen S Nielsen and Lisbet Christoffersen (eds) *Shari'a As Discourse: Legal Traditions and the Encounter with Europe* (Routledge 2016) 49.
[596] Salecl (n 526) 113.

violence.[597] Similarly, Gilligan argues that Human Rights law presupposes an individual to be detached from society and, by so doing, it hides relations of power and domination.[598] For Foucault the notion of human rights is nothing more than the sacralization of law which emerges as a useful tool for relations of power and domination, whereas the subject needs to articulate its relation to power in a clearly apparent neutral and abstract legal discourse.[599]

With the concept of abstract equality, the individual becomes bound to the state and its central law maker and not any more to her/his own community. Likewise, the abstract concept of human rights allows political and legal authorities to determine who is 'human' and who is not, or who can rightly be threatened 'inhumanly': "precisely because it is an inclusive category, 'the human' belongs to an exclusive universe that does not contain mere life".[600] The liberal/secular idea that we need more 'humane legal reforms' is in reality a further attempt to include the individual within the pale of a universalist law that defines which behaviours have to be considered 'humane' or 'inhumane'. As Asad points out,

"the abstract concept of *humanity* can serve as a mediator between the timeless universality of international law and the particular incidents of lethal force because of its double sense of biological species and compassionate behavior. Humanity is able to play this role, passive and active, because of the metaphysical conception of life that underpins it."[601]

The secular/liberal/abstract subject of human rights is the autonomous, rational, individual, citizen of the modern nation-state, who must be subjected to the law in order to become a law's subject: its humanity, theorized by Human Rights law only tautologically, is given through the inclusion within the pale of a universalist law which aims to maximize the pleasure and minimize the pain. Taylor traces the sensibility of the

---

[597] Frances Olsen, 'Statutory Rape: A Feminist Critique of Rights Analysis'in Khatarine T Bartlett and Rosanne Kennedy (eds) *Feminist Legal Theory: Reading in Law and Gender* (Westview Press, 1992).
[598] Carol Gilligan, *In a Different Voice : Psychological Theory and Women's Development* (Harvard University Press, 1982).
[599] Michel Foucault, *The History of Sexuality* (Penguin Books, 1981).
[600] Asad, *Formations of the Secular* (n 20) 157.
[601] Talal Asad, 'Reflections on Violence, Law, and Humanitarianism' (2015) 41 Critical Inquiry 390, 411.

secular/modern world as profoundly inherited from Christianity: prominent to secular sensibilities is the concept of universal benevolence, of redeeming the human through the elimination of violence, seen as a "moral imperative to reduce suffering,"[602] which, as I have argued, is intrinsically linked to the idea of 'inevitable' or 'necessary' violence.

The concept of (necessary) suffering is a common feature of positive and Human Rights law: in both, pain is a necessary means to progressively replace suffering by pleasure.[603] Western liberal seculars believe that, unlike those of barbarians, their own violent acts are justified by a moral/legal framework: since barbarians act outside a western moral/legal framework, they are considered not fully 'human'.[604] What is interesting in the secular concept of cruelty, then, is that "in a secular system like human rights, responsibility is assigned for it."[605] In fact, as Asad argues, for Human Rights law the human essence of a person is not violated if s/he is victim of military action or market manipulation permitted by international law.[606] This leads to a paradox: although the universality of human rights, the identification and application of Human Rights law does not exist independently from the legal institutions of the nation-state, and nor does it exist independently from the individual's civil/political status. In fact, the liberal approach presupposes that, in order to ensure the survival of the liberal/Christian/secular model, rights cannot be conceivable outside a strong authority that punishes any violation of the law: therefore, the minimal state called for by libertarians is paradoxical, as liberal rights are intrinsically linked to a strong state apparatus.

Therefore, Human Rights law protects an already-given human and it claims jurisdiction over the declaration of its status: "Human Rights law, like modern law more generally, aspires to name, define, call into being, redeem the human".[607] Since the legal subject is a human and, at the same time, a human-yet-to-become, becoming the subject of human rights can ensure both a temporal humanity and its possible suspension. In fact, positive and Human Rights law aspire to constitute a 'human' who would otherwise remain non-human. Both, positive and Human Rights law, aspire to name, to define a

[602] Charles Taylor, *Sources of the Self : The Making of the Modern Identity* (Cambridge University Press, 1989) 394.
[603] Asad, *Formations of the Secular* (n 20) 68.
[604] Asad, 'Reflections on Violence, Law, and Humanitarianism' (n 601).
[605] Asad, *Formations of the Secular* (n 20) 129.
[606] Asad, 'Reflections on Violence, Law, and Humanitarianism' (n 601).
[607] Esmeir (n 16) 1544.

law's subject who would not exist outside of the law: in fact, if it is true that there is no legal system without a legal subject, it is also true that there cannot be human rights without the 'human'. By defining the human through its inscription within the pale of the law, Human Rights law defines also the pre-human or non-human that preceded it. Hence, as Esmeir points out,

"becoming subjects of human rights ensures recognition of their (temporary) humanity and its (possible) suspension. A person is, therefore, at once a human and yet-to-be-human, a member of universal human kind and its de-humanized figure. This contradiction does not constitute a failure in logic but is related to the law's aspiration to call into existence, and by so doing to constitute a human who would otherwise remain non-human."[608]

However, the problem in conceptualizing the human as a legal status allows for a double movement: dehumanizing and re-humanizing. Moreover, because any government can violate one's legal status as a human, there is always the risk of being de-humanized: consequently, the concept of human as inscribed in the law is extremely fragile.

As I shall argue in the analysis of the '*hijab* cases', the subject of Human Rights law is a Christian/secular/liberal subject waiting to be rescued, 're-humanized', through its inscription in the law. Muslim women who have rejected removing their veils and being included within the pale of Human Rights law have been seen by western judges as 'de-humanized' subjects, victims of a chauvinist religion and in need of 'salvation'. The call to humanize de-humanized individuals responds to a desire to establish secular reason as the only true, universal form of humanity. As Esmeir points out,

"The problem is that the law's power of constituting humanity carries the risk of erasing all other humanities, not only in imposing its particular vision of humanity but also, and more crucially, in erasing their past existence before the law's intervention."[609]

Thus the key questions are: first, are we really sure that the inclusion of de-humanized people within the pale of Human Rights law does not reproduce a colonial logic? Second, what political possibility do those subjects have, other than being victims awaiting (humanitarian) intervention?

---

[608] *ibid,* 1546.
[609] *ibid,* 1547.

3.3 Revealing paradoxes: Sahin, Dahlab, Shabina and the others

In 2011, few days before the '*burqa* ban' came into force in France, Kenza Drider, a 32 year-old French citizen who wore a *niqab,* declared that neither the state nor any mosque could order her how to dress. Oddly, a full-face veiled woman has become the face (or the symbol) of the 'country's *burqa* brigade' who claim that their personal rights to freedom of religion and gender equality have been severely limited by the new law.[610] Perhaps those women did not realize that although western/Christian/secular law is founded on the freedoms of the individual, it actually imposes many boundaries on those freedoms.

This is what emerges from European legal decisions over the practice of veiling which rely on the assumption that Islam (and the veil, which supposedly represents it) is incompatible with western secular democratic values and conflicts with the principle of gender equality. Many cases concerning Muslim women's veil have been decided in national courts in different European countries and it would be difficult to analyse all of them in this context. I have chosen therefore to analyse some prominent cases decided at the ECHR: *Dahlab v Switzerland (2001), Sahin v Turkey (2005) and SAS v France (2014)*.[611] Through these cases, I will try to analyse not only the ECHR's legal reasoning but also that of the national courts. I will also analyse the *Begum* case (2007) which,[612] although it was decided in a UK national court, is based on the analysis of art. 9 of the European Convention on Human Rights.[613] Although diverse European national courts have disclosed different concepts of secularism, subject's autonomy and women's

[610] Kim Willsher, ''Burqa Ban' in France: Housewife Vows to Face Jail rather than Submit' (*The Guardian,* 2011) <https://www.theguardian.com/world/2011/apr/10/france-burqa-law-kenza-drider> accessed 25 September 2016`.

[611] S*ahin v. Turkey*, (n 17); *Dahlav V Switzerland*, (n 17) ; *S.A.S v. France* (n 17).

[612] *R (Begum) v. Headteacher and Governors of Denbigh High School*, [2004] EWHR 1389, [2006] UKHL 15, [2007] 1 AC 100.

[613] Art. 9. (1) states that "everyone has the right to freedom of thought, conscience and religion; this right includes the freedom either alone or in community with others and in public or in private, to manifest his religion or belief in worship, teaching, practice and observance". Art. 9. (2): "Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". 'European Convention on Human Rights', art 9.

freedom in dealing with the matter,[614] I consider these cases particularly exemplificative of secular/liberal paradoxes concerning women and religious freedom. All the applicants claimed an infringement of their rights under art. 8, 9, 10 and 14 of the Convention.[615] However, through a considerable emphasis on state neutrality and secular values, along with the distinction in art. 9 between faith and its manifestation, the ECHR widened the 'margin of appreciation',[616] leaving considerable discretion to states to define what kind of religious manifestations are allowed in the secular public space; in this way, the ECHR remained unbiased when imposing a limitation on individual's personal freedoms. Thus, the regulation of women's bodies and the limitation of their personal freedoms becomes the *emblem* of the intrinsic contradiction of human rights discourse in general and liberalism in particular. In fact, if, on the one hand, liberalism operates a separation between spiritual and temporal, private and public, then on the other, the private life of the individual becomes extremely regulated. In this sense, secularism and western positive law act to eradicate differences and to protect a 'secular citizen' through the control of women's body. This, in turn, reveals western incapacity to think juridical plurality: as I have argued, this incapacity is inherited from western medieval legal

[614] In France, for instance, the banning of the veil has been framed in the name of state neutrality and public order (as wearing the headscarf has been considered a practice that challenges French social cohesion as well as secular principles). Eva Brems, 'Above Children's Heads: The Headscarf Controversy in European Schools from the Perspective of Children's Rights' (2006) 14 International Journal of Childrens Rights 119. In Germany, eight *Länder* have passed a law prohibiting the wearing of the veil in public institutions in the name of 'religious pluralism' and for the 'protection of the Christian traditions' of the country. W. Schiffauer, 'Enemies within the Gates. The Debate about the Citizenship of Muslims in Germany', in Tariq Modood and others *Multiculturalism, Muslims and Citizenship* (Routledge, 2006) : thus, "while in France the notion of secularity has been interpreted in terms of a rupture from the Christian past, in Germany it has been regarded as implying a continuity of the Christian tradition" Schirin Amir-Moazami, 'Muslim Challenges to the Secular Consensus: A German Case Study' (2005) 13 Journal of Contemporary European Studies 267, 271. In the United Kingdom, where the government has taken a more flexible approach to cultural diversity, recent legal controversies such as the *Begum* case in relation to the wearing of the veil at work and within educational institutions have re-opened the discussion about multiculturalism.

[615] Article 8 –Right to respect for private and family life, Article 9-Freedom of thought, conscience and religion, Article 10 – Freedom of expression. Article 14-The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 'European Convention on Human Rights', art 8, 9, 10, 14.

[616] The margin of appreciation plays an important role in remitting certain kinds of judgements to democratically elected officials who are said to know the particular context of their country better. It is usually employed by the ECHR when there is not a formal European consensus on particular topics or where the issue is particularly controversial. Yutaka Arai and Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia nv, 2002).

origins and the consequent strength of the territorial 'nation-state'. Therefore, although secular thought is accepted unconditionally, it limits Muslim women's personal freedoms while expressing a specific form of power. As Gunn argues,

"Despite the popular beliefs that *laïcité* and religious freedom are founding principles that unite the citizens of their respective countries, they actually operate in ways that are more akin to founding myths […] in current controversies involving religion and the state, where the doctrines are cited for the ostensible purpose of resolving conflicts, they continue to be applied in ways that divide citizens on the basis of their beliefs and that belittle those whose beliefs do not conform to popular preferences."[617]

This is well shown in *Dahlab v Switzerland*.[618] Ms. Dahlab was a teacher in a primary school in Switzerland. After a period of deep spiritual searching she converted to Islam and started to wear the *hijab.* She wore the veil for four years; during that time there was no complaint from her young students or their families. When students asked her why she was wearing long clothing and covering her head, she used to answer that it was to keep her ears warm.[619] After four years, an inspector visited the school and reported that Ms Dahlab was wearing 'Muslim' garments. The Director General of Public Education asked her to remove the veil: when Dahlab refused, alleging her right to wear the headscarf, she was dismissed. She appealed the decision in the Swiss Court which, while upholding the decision of the School, found odd the request of Ms Dahlab against the norm of a Christian country and prohibited the wearing of the headscarf based on a law on states' neutrality. The domestic court pointed out that it was impossible for the law to cover all state school teachers' behaviour and that some margin was allowed in circumstances where the conduct would be regarded by the average citizen as being of minor importance. Ms Dahlab appealed at the ECHR which, in line with the Swiss Court, pointed out that Switzerland was pursuing a legitimate aim to ban the *hijab* in public schools in the name of gender equality (as the veil has been seen by the judges as a chauvinist practice imposed by the Koran) and state neutrality, considered an expression of state's secularism.

[617] T Jeremy Gunn, 'Religious Freedom and Laïcité: A Comparison of the United States and France' [2004] BYU L. Rev. 419, 422.
[618] *Dahlab v Switzerland* (n. 17).
[619] *Ibid*, 456.

In the case, the ECHR found that the principle of *laïcité* could be interpreted in such a way as to allow states to restrict personal freedoms and it emphasized the importance of weighting "the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused":[620] suddenly, the right-holder woman has become the accused. In fact, instead of weighting the rights of Ms Dahlab to wear the *hijab* with the rights and freedoms of others, the ECHR presented an (imaginary) undefined 'other' in need of protection from the 'wrongdoing' of Ms. Dahlab. The Court presupposed that, because Ms. Dahlab was working with young children and the student-teacher relationship is a powerful one, her *hijab* could have 'proselytizing effects'. However, the Court did not find any coercive or proselytizing action carried out by the applicant to induce students to behave or believe in the same way she did. It is not clear what kind of 'bad influence' or 'proselytizing effects' Ms Dahlab was exercising on 'vulnerable children' since she did not even tell them that she had converted to Islam. Moreover, in four years, it should have been possible to produce further evidence from students who had suffered as a result of her wearing the *hijab.* Many of those children were probably exposed to religious rituals by parents, relatives and other figures of authority; consequently, it is difficult to understand how Ms Dahlab would defy the authority figures of a child's life. Indeed, what kind of message is sent to 'young and vulnerable children' when their teacher is dismissed for the clothing she wears? Many Muslim children attended the school and they might have asked why a teacher who dressed like them had been dismissed. Those children, who probably suffered from mistrust or discrimination, may have received the message that stereotypes about Muslims are valid.[621] Moreover, if it is true that we live in a pluralistic society, how can we justify the fact that, when the individual works in public places she has to comply with 'liberal' values?[622] If wearing a *hijab* creates tensions and conflicts, as stated in the Strasbourg decision, then the parties should take measures to reconcile and not to prohibit group manifestations.

[620] *Ibid,* 449.
[621] Caitlin Killian, 'The Other Side of the Veil North African Women in France Respond to the Headscarf Affair' (2003) 17 Gender & Society 567, 577.
[622] In *Kokkinakis v Greece,* Application 14307/88 (ECHR 25 May 1993), para 31and in the *Manoussakis and Others v. Greece,* Application No. 18748/91 (ECHR 26 Sept. 1996), IV RJD, para. 44, the ECHR clearly stated that pluralism is an important feature in a democratic society.

The weakness of the accusation of proselytism moved against Ms Dahlab is evident when comparing the case with *Kokkinakis v Greece*,[623] decided at the ECHR. The case involved two Jehovah's Witnesses who were charged with the criminal offence of proselytizing after knocking on the door of diverse Greek Orthodox priests in order to try to convince them of the truth of their religion in a country where it is illegal.[624] Hence, on the one hand, a woman, by wearing certain clothes, wants to hide her body and her religion from her students, while on the other a man knocks at the door of an orthodox priest trying to convince him of his truth. Oddly, for the ECHR, Ms Dahlab's clothing represented a greater threat to liberty than Mr Kokkinakis's attempt to proselytize: in fact, the former was considered by the ECHR as a form of proselytism whiles the latter was not.[625] Hence, although the Court has taken into consideration the principle of proportionality and necessity, it has applied them inconsistently. While, for the Court, it was not necessary to regulate proselytizing actions such as that committed by Kokkinakis in a country where this action was considered illegal by the domestic court, in Switzerland, removing a woman from the public space because she has started to wear the veil has been presented by the ECHR as a necessity to save the principle of 'state neutrality'. Thus, the principles of proportionality and necessity, as applied by the ECHR, do not restrain western/liberal paradoxes; rather, they allow them to be perpetrated. In fact, if the rule of law is ultimately a promise of predictability, the very idea that one has to wait and see *how* the Court will in each case employ the tests of proportionality and necessity is paradoxical. What transpires from this decision is that, in general, in order for the 'sovereign nation-state' to remain strong and unified, certain performances of some rights have to be limited. In the event, a Muslim woman's dress choice is more threatening than a Christian man's speech.

Moreover, the fact that a woman who never tried to proselytize was *removed* from the public space just because her image did not conform to the 'western conception of liberated woman' is a significant feature: not only does it reveal that in liberalism the individual emerges as an abstract entity who, while enjoying the *allowed* freedoms, is

---

[623] *Ibid*.

[624] In Greece proselytism is forbidden by constitution. For this reason, Mr Kokkinakis was judged guilty by the Greek Court. See Art. 13. 2 of the Greek constitution 'Constitution of Greece' <http://www.hri.org/docs/syntagma/artcl25.html> accessed 4 May 2016.

[625] The Court held that the conviction of the Greek national court against Mr. Kokkinakis was a breach of article 9 of the ECHR because the simple attempt to convince others of a religious belief cannot be considered a breach of freedom of religion. *Kokkinakis v Greece* (n 610) 414.

also subjected to the state's rules, but it also unmasks the intrinsic paradoxes of positive and Human Rights law. In fact, if the individual has 'equal rights' those rights can be regulated more or less depending on how abstractly or concretely the individual is perceived to be using these rights. The protection afforded to the individual by the rule of law –certainty, predictability – follows this pattern. If Kokkinakis's proselytizing is protected, it is because 'he did nothing but speak' with the intention to convert another who is free to accept or not; if Ms Dahlab was removed from sight it was because she demonstrated, performed, acted out her right to be different, which carries illocutionary force. In other words, Kokkinakis' proselytizing speech befits the model of the Christian/secular/'human' protected as an abstract equal citizen from the state; by contrast Dahlab, whose body already assigned her to the order of an asset for concrete societal reproduction, engaged in a performative speech-act that has to be regulated by the state. Otherwise she should be removed from the public space; she should disappear. In essence, by presenting her with the alternative 'unveil or lose your teaching job' the law hid Dahlab much more efficiently than any veil could ever do. For the veil, as all clothes do, does not hide but *presents* humans to each other, whereas the *persona juridica*, in modern law, isolates people from each other and connects them to the state.

Another controversial case decided at the ECHR is *Sahin v Turkey*.[626] In 1998, Istanbul University released a circular prohibiting students from wearing the headscarf (along with 'long beards') during lectures and examinations. A few months later Sahin, in her fifth year of medical school at Istanbul University, was denied access to a written examination because she was veiled and disciplinary measures were imposed as a result of her failure to comply with the circular. One year after that, she was also suspended for six months by the Dean of the Cerrahpa Faculty of Medicine for taking part in a demonstration concerning the right to wear the headscarf in Turkey. As no university in the country allowed the wearing of the veil, Sahin was forced to move to Vienna University in order to complete her studies. She applied to the Istanbul Administrative Court, claiming her right to wear the *hijab* in the university; the Court, however, dismissed her application. In 1998, she lodged a complaint against the Turkish government, claiming that the ban on wearing the headscarf in higher education violated her rights under Articles 8, 9, 10 and 14 of the Convention and article 2 of

[626] *Sahin v Turkey* (n 17).

Protocol No.1.[627] The case reached the ECHR and in 2005 the Grand Chamber decided that the university's refusal to allow her to wear a headscarf did not violate Article 9 of the European Convention of Human Rights on freedom of thought and religion and confirmed the decision of the Fourth Section of the Court of June 2004.

The ECHR found that the ban on wearing the veil applied by the university was sought to 'preserve the secular nature of the institution concerned'[628] and so was considered admissible. The decision was based on two main problematic assumptions: *Sharia* is a substantively static and unchangeable revealed legal system, and the values of *Sharia* law are illiberal and incompatible with western secular democratic principles. Rather than trying to understand whether wearing a headscarf in the university violates Article 9 of the Convention, the judges focused on the question of how to incorporate/accommodate Islam within 'secular' western values. In the case, the Strasbourg Court felt the need to retell the master narrative of the rise of the secular state in Turkey[629] and the supposed difficulties in convincing Muslim religious groups to accept the privatisation of their religion.[630] With the defeat of the Ottoman Empire, the Kemalist 'secular' revolution (1924) started a western-style modernization process in the attempt to establish a strong nation-state. Kemalists wanted to 'civilize' Turkish society, understood as backward for its inability to embrace western secular modernity.[631] The new secular/republican[632] project put a great emphasis on women's emancipation and on their un-veiling as a necessary condition for the modernization of the nation.[633] Although Kemal never legally banned it, he strongly discouraged the practice of veiling: in this way, Turkish women's hair became the symbol of a new nation, an (apparently) de-Islamised, westernized, and modernized nation-state. In the 1980s, as a result of the secularization process operated by subsequent governments,

[627] *Ibid*.
[628] *Ibid*, para. 116.
[629] *Ibid,* paras. 30-35.
[630] Wael B Hallaq, *Authority, Continuity and Change in Islamic Law* (n 349).
[631] Göle (n 541) 13–15.
[632] It is important to point out that Turkish model of secularism, even if based on western concepts of *laïcité'*, has created a sort of hybrid in which a particular kind of Islam has been accommodated within the state's institutions and subjected to state regulations. The Presidency of Religious Affairs, for instance, is a state institution whose duty consists of dealing with the affairs of Sunni and appointing *imams*. See Andrew Davison, 'Turkey, A" secular" state?: The Challenge of Description' (2003) 102 The South Atlantic Quarterly 333, 337.
[633] Zehra F Arat, 'Turkish Women and the Republican Reconstruction of Tradition', in Fatma Muge Gocek and Shiva Balaghi (eds) *Reconstructing gender in the middle east: tradition, identity and power* (Columbia University Press, 2013) 61.

the veil started to be legally banned in public offices. For women who were wearing the veil, this represented a denial of their presence in the public sphere. After years of passionate debate, the ban was lifted in 2013, but at the time of the ECHR's decision over Sahin's case, the ban was still in force. According to the ECHR, since the formation of the secular (nation) state in Turkey, the country has been constantly struggling with political and religious forces that try to overthrow the secular, liberal, state. In fact, the abolition of the caliphate and the formation of the Turkish Republic were described by the Court as if they were actual ones: "the constitutional court underlined that the principle of secularism is the major force of shifting Turkey from *umma*- based country toward a nation-based republic."[634] Thus, it seems that instead of judging Sahin's claim, the Court was preoccupied with judging the challenge of political Islam for the Turkish 'secular' Republic. The Court stated that

"in a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practice that religion or on those who belong to another religion may be justified under article 9 (2) of the Convention […] the Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception […] The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university".[635]

It seems that the approach of the ECHR sets forth a general rule for Turkey which implies that, because in the country the majority of the population is Muslim, it is essential to ban the *hijab* in order to protect the freedom of others, public order, and the principle of secularism and gender equality. However, by focusing on the history of Turkey and the (supposed) existence of extremist religious movements attempting to overthrow the secular state, the ECHR made a mistake: it "substituted Turkey for the University of Istanbul and Islam for the headscarf".[636] In the case, the Court defined the

[634] Ali Ulusoy, 'The Islamic Headscarf Problem before Secular Legal Systems: Factual and Legal Developments in Turkish, French and European Human Rights Laws' (2007) 9 European Journal of Migration and Law 419, 422.
[635] *Sahin v Turkey* (n 17) para. 115.
[636] Kerem Altiparmak and Onur Karahanogullari, 'European Court of Human Rights: After Sahin: The Debate on Headscarves Is Not Over, Leyla Sahin v. Turkey, Grand Chamber Judgment of 10

wearing of the veil as a symbol of affiliation with religious/political movements. However, the Court failed to prove the existence of extremist Islamist groups in the university and to explain the relation between the claimant and those groups. It also failed to give evidence that wearing a headscarf in a higher educational institution can "pressure students who are not wearing the *hijab".*[637] As Sahin was a university student, and not a teacher in a primary school like Dahlab, the argument that veiling can be seen as a tool for proselytism is extremely weak.

To emphasize the impossibility of reconciling the Turkish Republic's secular, liberal and democratic values with 'extremist' (Islamist) religious movements in Turkey, the Court referred to the *Refah* Party, which was subsequently banned. *Refah Partisi*,[638] an Islamic political party founded in 1983, participated in the first national election in 1991, gaining growing consent until 1998, when the Constitutional Court of Turkey officially banned the party for violating the constitutional secular principle of the separation between religion and the state: in 2003, the ban was upheld by the ECHR based on the premise of a general incompatibility of an Islamic-based-politico-legal system with secular western democracy. In fact, for the ECHR, Refah was allegedly attempting to introduce *Sharia* law which "would oblige individuals to obey […] static rules of law imposed by the religion concerned".[639] In the case, the Strasbourg Court concluded that:

"*Sharia*, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable[…]. Principles such as pluralism in the political sphere or the constant evolution of the public freedoms have no place in it. The Court notes that it is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on *Sharia*, which clearly diverges from Convention values, particularly with regard to […] its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts […]. Refah's policy was to apply some *Sharia* private law rule to a large part of the population in Turkey [namely Muslim], within the framework of a plurality of legal systems. Such a policy goes beyond the freedom of individuals to observe the precepts of their religion […]. This Refah policy falls outside the private sphere to which Turkish

November 2005, Application No. 44774/98' (2006) 2 European Constitutional Law Review 268, 279.

[637] *Sahin v Turkey* (n 17) para. 111.

[638] *Refah and Others v Turkey* (n 494).

[639] *Ibid*, para. 70.

law confines religion and suffers from the same contradictions with the Convention system as the introduction of *Sharia*".[640]

Through the reference to the *Refah* case, the ECHR accepted the understanding of the Turkish Court which conceived *Sharia* law as a non-negotiable code whose authority lies outside the human horizon and, certainly, outside the authority of a modern (nation) state. In the *Refah* case, the Court also observed that "there was already an Islamic theocratic regime under Ottoman law"[641] and that this system was dismantled with the introduction of the republican regime in Turkey.

The Ottoman Empire applied a legal system (namely the 'Millet system') based on religious identity where every religious group responded to different laws in relation to family law.[642] The Court's ignorance of the Millet system is astonishing: it confused *Refah* neo-Ottomanism, which called for a plurality of legal systems, with Islamic fundamentalism, which calls for the establishment of a unique, fixed, territorial *Sharia* law. Oddly, in the Court's view, a political party whose actions seem to be aimed at introducing *Sharia* along with other religious legal systems in relation to family law, as is the case of modern Israel, is seen as an association which hardly comply with the democratic ideals that motivates the Convention.

The reference to the *Refah* case, at the centre of the ECHR's decision in the *Sahin* case, is particularly striking as it seems that the Court's ignorance of the plurality of Islamic traditions regarding the veil was compounded by its rejection of a plurality of legal systems within the same territory qua political unit. It is clear, therefore, that in seeking to forcibly expose Turkish women's bodies to their natural rights the ECHR was also seeking to subjugate them under the logic of singular state sovereignty. In this regard, liberals and Islamists are on the same side, as both aim to create a universal(ist) law that will bind the individual to a fixed and monolithic identity.[643] What is not on their side is the historically documented legal pluralism of Muslim-majority societies: in fact, as I have argued, in Islamic history, political and legal powers were always separated and in

[640] *Ibid*, para. 72 and 19.
[641] *Ibid*, para. 125.
[642] Ido Shahar, 'Legal Pluralism Incarnate: An Institutional Perspective on Courts of Law in Colonial and Postcolonial Settings' (2012) 44 The Journal of Legal Pluralism and Unofficial Law 133.
[643] Diamantides, 'Shari'a, Faith and Critical Legal Theory'' (n 11).

continuous need of negotiation.[644] But while, in the West, law was in the hands of the Pope/king/sovereign state, in Muslim medieval societies *Sharia* was in the hands of scholars who were accustomed to adjudicating legal cases within the limits of the four main (Sunni) schools. In this context, Diamantides' examination[645] is particularly revealing. The result of his comparative study of 'two structurally similar and contingently dissimilar' legal systems of religious origins, is that on the one hand, the West conceives a universal, abstract identity valid for everyone which is historically tied to Christianity and was exported to Muslim-majority societies during the colonization period, while on the other, Islamists respond by trying to change the content but maintain the same Christian/liberal/secular western structure of one universal law imposed by the appropriate authority. In fact, what Islamists are seeking is not the 'true', 'pure' Islam where the law was made locally and reflected the plurality of cultures of the *Umma*, but a law that reinforces the central political power by binding the community in a singular all-encompassing legal code as well as a 'national' 'Muslim' identity'. In this sense, the veil emerges as a symbol of the contrast between two versions of sovereignty, that of European imperialism and that of Islamist nationalists who aim to create a singular Muslim identity by reducing Islamic law into a monolithic codified legal system. Although the veil is not an Islamic symbol but rather a pre-Islamic custom,[646] the compulsory veiling promoted by contemporary power-hungry Islamist groups, as well as the compulsory un-veiling proposed by many western and non-western countries, appears to be an attempt to symbolically forge a common fixed and monolithic (national) identity through women's body: both (patriarchal) regimes aim at legally regulating and controlling women's attire by inscribing women's bodies as monolithic symbols of cultural belonging and not as subject of culture and history. In fact, the female figure and/or dress code are common collective group and also nationalist symbols.

In the *Sahin* case, through a crusade in the name of western/secular/liberal values, the ECHR shows a confused reasoning: although the Court stated that there was no interference with article 9 (1), the commission considered whether the interference was

[644] See Hallaq, *The Origins and Evolution of Islamic Law* (n 303); *Authority, Continuity and Change in Islamic Law* (n 349).
[645] Diamantides, 'Shari'a, Faith and Critical Legal Theory'' (n 11).
[646] Ahmed (n 24); El Guindi (n 23).

justified under article 9 (2).[647] According to the ECHR, the decision of Istanbul University to ban the *hijab* was motivated by the need to protect the rights of others and public order,[648] in accordance with article 9 (2), which justifies restrictions on freedom of religion. However, based on article 13 (para. 29) of the Turkish Constitution, fundamental freedoms and rights can be restricted only by a parliamentary act and not by an institution such as a university. Despite the absence of statutory bases to ban the headscarf in universities, the Court accepted as a legal basis the transitional section 17 of law No. 2547 which states that "choice of dress shall be free in institutions of higher education, provided that it does not contravene the laws in force".[649] Through this choice, it was not difficult for the Grand Chamber to understand the restriction on wearing Islamic headscarves merely as an internal rule of Istanbul University, rather than a limitation of personal freedoms.[650] In the case, the ECHR particularly emphasized the role of state neutrality and its responsibility to interpret domestic law in the respect and harmony between different ethnic/religious groups,[651] relegating its role to examining whether the domestic law is in line with the European Convention of Human Rights.[652] By widening the margin of appreciation, the ECHR stated that "it is the principle of secularism, as elucidated by the Constitutional Court, which is the paramount consideration underlying the ban on the wearing of religious symbols in universities".[653] Even if Sahin declared that she embraced the principle of secularism, the Court, without any analysis of the actual circumstances or of whether the headscarf was a danger for social order, discharged Sahin's claim, obliging her to change country in order to obtain a university degree.[654] In other words, by stressing on the principle of secularism, the Court not only limited Sahin's individual rights of freedom of religion, but it also "assumed the religious task of describing which Islamic duties are suitable to be performed at secular universities; practising Muslim students in Turkish universities are free 'to manifest their religion in accordance with habitual forms of Muslim observance' (para 118 and 159). The Court did not explain which religious duties were

[647] Howard Gilbert, 'Redefining Manifestation of Belief in Leyla Sahin v Turkey'(2006)' 3 European Human Rights Law Review 308, 308.
[648] *Sahin v Turkey* (n 17) para. 99.
[649] *Ibid*, para. 88.
[650] Altiparmak and Karahanogullari (n 636).
[651] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights*, (Vol 1, Oxford University Press, 2001) 308. See also *Sahin v Turkey* (n 17) para. 106.
[652] Altiparmak and Karahanogullari (n 636) 277.
[653] *Sahin v Turkey* (n 17) para. 116.
[654] Evans (n 651) 306.

being carried out in Turkish universities. Since no example was presented, this argument was not only futile, but also misleading."[655]

Clearly, the ECHR has identified 'religion' as a force that aspires to regulate human life and to subordinate secular to religious values: it relies on the assumption that religion should be relegated to a small private sphere in order to safeguard a wider secular public sphere. However, by defining religion as a simple private belief, not only has the Court circumscribed the role and place assigned to religion and religious practices but it has also imposed a narrow definition of religion on other cultures.[656]

This is particularly evident in France, where the matter of the veil has been particularly troubling. In 1989, after the expulsion from school of young Muslim girls because they were veiled, *the Conseil D'Etat* ruled that wearing religious symbols in public schools is permissible as long as they do not "constitute an act of intimidation, provocation, proselytizing, or propaganda"[657] or threaten the dignity and freedom of the other: this allowed schools to 'interpret' which religious symbols could be shown in educational public institutions. The decision sparked a passionate debate and in 2003 the former President Chirac commissioned an inquiry on French secularism:[658] the commission found that a ban was necessary to implement the secular values of the country.[659] Immediately after, in 2004, a law was passed forbidding religious symbols in public schools.[660] Although, in the last decade, many young Muslim girls have tried to legally challenge the French ban, the ECHR has always upheld the irremovable decisions of French national courts. In 2010, the French government decided to ban the concealment of the face in public places (also known as the '*burqa* ban').[661] This latest

[655] Altiparmak and Karahanogullari (n 636) 273.
[656] Jørgen Nielsen, *Towards a European Islam* (Palgrave Macmillan UK, 1999) 88.
[657] Joan W Scott, 'Symptomatic Politics: The Banning of Islamic Head Scarves in French Public Schools' (2005) 23 French Politics, Culture & Society 106, 107.
[658] *Commission De Reflexion sur l'application du principle de laicite dans la Republique, Rapport au President de La Republique* (2003).
[659] Gunn (n 617) 462. It is worth pointing out that in France public schools adopt the Catholic religious calendar and the state supports Jewish and Catholic schools; however, this is not considered harmful to the secular principle of the state. See Talal Asad, 'Trying to Understand French Secularism', in Hent de Vries and others (eds) *Political Theologies: Public Religions in a Post-secular World* (Fordham Univ Press, 2006) 505-6.
[660] L*oi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* (FR).
[661] *LOI No. 2010-1192 du 11 Octobre 2010 interdisant la dissimulation du visage dans l'espace public, Journal Officiel (JORF) (*FR).

ban has been challenged by a young girl in the case *SAS v France* decided at the ECHR.[662] The case is of particular interest as the ECHR's judges have justified the ban differently than in previous cases, further widening the application of the 'margin of appreciation'.

The case concerns a young French girl who wears the *burqa* or *niqab* based on her personal convictions. The claimant stressed that no one from her family had exerted any pressure to wear specific garments; that she does not wear it 'systematically' (adding that she might not wear it when she goes to the doctor or when she meets friends and she wants to socialize); that, by wearing the veil, she did not want to annoy anyone but to "feel at inner peace with herself";[663] and that she did not have any problem taking off her *niqab* for security reasons (in banks, airports etc.) and showing her face if required by a public officer.[664] Her request was not to wear the *niqab/burqa* always, but when she needed to, based on her spiritual inclinations. She claimed that the ban interfered with her fundamental rights as it could not be proved that it was a legitimate aim to protect 'public safety' or to 'ensure respect for the minimum requirements of life in society'. For her, the ban was based on a purely visual form of communication which does not consider the rights of minorities, and it is based on chauvinist and paternalistic stereotypes of Muslim women.[665] In the case, the Human Rights Centre of the University of Ghent presented an empirical study on the uses of the veil. The research points out that women who wear a face veil in Belgium understand it as "part of a life project that considers Islam as 'a lifestyle'" and that the *burqa* does not limit communication between people: indeed, the report adds that the "profile that emerges from the studies of women who wear the face veil in Europe, is not one of 'submissive' women."[666]

The French government reiterated that the ban was within the limitations established by art. 9 (2) of the Convention and that it was justified as it pursued a legitimate aim within a democratic society. For the government, the ban was necessary to ensure identification; to protect the rights and freedoms of others; and to prevent fraud. Moreover, the government reiterated the importance of the face in human interaction,

---

[662] *S.A.S v France* (n 17).

[663] *Ibid*, para. 10-12.

[664] *Ibid,* para. 10-12.

[665] *Ibid*, para. 79-80.

[666] 'European Court of Human Rights. S.A.S v France, Application No. 43835/11Written Submission by the Human Rights Centre of Ghent University' <http://www.hrc.ugent.be/wp-content/uploads/2015/11/SAS.pdf> accessed 16 September 2016.

as its concealment would break 'the social tie' and manifest a refusal of the principle of 'living together'[667] and gender equality (as the concealment of women's face has been understood as a denial of women's existence).[668]

The ECHR declared inadmissible the applicant's claim under art. 3, 11, and 14, and did not find any violation by the government of art. 8 and 9 of the Convention.[669] Although, for the first time, the ECHR dismissed the idea that the veil limits the principle of gender equality, it approved France's '*burqa* ban' based on the principle of 'living together', as expressed by the French government: for the majority "the respect for the minimum requirements of life in society […] [can be associated with the legitimate aim of the] protection of the rights and freedoms of others".[670] The notion of 'living together', at the basis of the decision, is a principle which is not covered by art. 9 (2) and it encounters many problems when applied in a legal reasoning. Firstly, the idea that an individual needs to be 'available' for contact and communication as an obligation imposed by the state and against the individual's will,[671] contradicts the 'right to private life'.[672] By understanding the veil as a mere communicative barrier,[673] the Court imposes a specific sociability on the individual's public sphere. Secondly, the fact that 'living together' implies that people need eye contact encounters strong empirical and normative objections,[674] taking into consideration that a number of social and sporting activities involve the wearing of clothing that conceals the face (such as motor-cycling, carnivals, folkloristic events etc.). These, however, are considered exceptions of the law. Exactly because the law recognizes these exceptions, it shows that people can also live together with face covering (as in many other societies). Therefore, the '*burqa* ban' did

[667] S.A.S (n 17) para. 81.
[668] *Ibid*, para. 82.
[669] Stephanie Berry, 'SAS v France: Does Anything Remain of the Right to Manifest Religion?' (*EJIL: Talk!*, 2014) <http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/> accessed 17 January 2017. Art. 3-'No one shall be subjected to torture or to inhuman or degrading treatment or punishment', Art. 11- 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests'. European Convention on Human Rights art 3 and 11.
[670] *SAS v France* (n 17) para 121 and 157.
[671] *Ibid*, para. 146.
[672] Art. 8 establish the right to "respect private and family life, his home and his correspondence". 'European Convention on Human Rights' (n 613).
[673] *SAS v France* (n 17) para. 52.
[674] It is worth noting that only the *burqa* conceals the eyes, while other kinds of face-covering, such as the *niqab*, usually show the eyes.

not aim at liberating women or favouring human interaction. Although the ECHR restated that pluralism is the basis of democratic society, it has upheld a law that affects a specific minority in France without any empirical proof that the *burqa* limits people's interaction.[675] As Nußberger and Jäderblom, the dissenting judges, argued, the concept of 'living together' "sacrifices concrete individual rights guaranteed by the Convention to abstract principles."[676] Hence, the '*burqa* ban' could not be legitimate. It seems therefore, that the Court upholds a specific idea of secularism as intended by the French government.

Although the United Kingdom has developed a concept of secularism different from that of France,[677] the issue of Muslim women's veiling has been particularly controversial. *Shabina Begum*[678] is a case that has been decided by UK national courts and it focuses on the analysis of art. 9 of the European Convention. Shabina was a young student at the Denbigh High School, where 75-80% of students are Muslim. The school, in view of its recognition of a multicultural/multi-faith environment, has imposed a uniform code in accordance with parents, pupils and three local *imams* which permits young Muslim girls to wear a *shalwar kameez*.[679] One day Shabina arrived at school with a *jilbab* (a long dress that covers the whole body except for the face), claiming that the *shalwar kameeze* does not comply with the requirement of her faith. The Head of School's Assistant noted that when Shabina entered school with a *jilbab* many young students felt "threatened" as the garment was "associated with extreme views and it would identify them as belonging to extreme Muslim sects".[680] As a compromise was impossible, Shabina was expelled and she sued the school based on religious discrimination: in 2004 the Administrative Court dismissed her claim, while she won in the appeal. Finally, the case reached the House of Lords which ruled in favour of the school.

Various issues were considered by the courts. Firstly, the judges considered whether Shabina has been excluded. In the Administrative Court, Bennett J argued that Shabina

---

[675] *SAS v France* (n. 17) para. B9.
[676] *Ibid*, para. A.2.
[677] The attitude of France in relation to religious freedom has been called 'secular fundamentalism' or 'illiberal secularism'. See Ingvill Thorson Plesner, *Freedom of Religion and Belief- a Quest for State Neutrality?* (University of Oslo, 2008) 409.
[678] *Shabina v. Denbigh High School* (n. 612).
[679] A long tunic wrapped over a pair of trousers.
[680] *Shabina v. Denbigh High School* (n. 612) EWHR [2004] para. 51.

had not been excluded: rather, she had excluded herself by choosing not to wear the school uniform as she was aware of the school uniform policy when she started the school. For this reason, the limitation was justified by art. 9 (2) as the school's decision to allow the *shalwar kameeze* was a means of inclusion.

The Court of Appeal rejected this argument: Brooke LJ noted the existence of various interpretations of Islamic law in relation to female clothing, suggesting that Shabina's freedom to manifest her religion had been limited.[681] By referring to the *Sahin* case,[682] the Court argued that a certain margin of appreciation was allowed when considering section 2 of article 9. Lord Bingham noted that the right to manifest a belief made a distinction between the right to hold a belief and the right to manifest a belief, which can lead on to consideration over the 'rights and freedoms of others'.[683] It is exactly this principle of respecting the 'freedom of others' that has activated the 'margin of appreciation' in previous cases decided at the ECHR. Although the margin of appreciation is a principle of the ECHR and so is not an option for national European courts, the United Kingdom has applied the legal reasoning of art. 9 in the *Shabina* case. Lord Bingham stated that "[i]n applying the principles of *Sahin v Turkey* the justification must be sought at the local level and it is there that an area of judgment, comparable to the margin of appreciation, must be allowed to the school."[684] For Lord Hoffman, the school was "in the best position to weigh and consider […] [its]…wish to avoid clothes which were perceived by some Muslims (rightly or wrongly) as signifying adherence to an extremist vision of the Muslim religion and to protect girls against external pressures".[685] However, as in other cases related to the wearing of the veil in Europe, the Court failed to provide evidence of the pressure on others and it failed to prove that banning the veil could be the best choice to protect other young girls. The Court also took into consideration whether Shabina, at that time 14 years old, has freely chosen to wear the *jilbab*: as Lord Scott pointed out, "the confrontational nature of the peremptory manner in which the *jilbab* issue was raised with the school was very

[681] *Ibid*, [2006] UKHL 15, paras. 28, 31–34, 40–44, 48.
[682] *Ibid*.
[683] *Ibid*, [2007] 44 EHRR 5 para. 99.
[684] *Ibid*, Lord Bingham, para. 64 *italics added.*
[685] *Ibid*, UKHL 15; [2007] 1 AC 100 para. 65 [emphasis added]. Notably, the argument has been dismissed by many scholars. See Gareth Davies, 'United Kingdom: Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in SB v. Denbigh High School. Decision of 2 March 2005.' (2005) 1 European Constitutional Law Review 511.

unlikely to have been chosen by Shabina, not yet 14 years of age".[686] Also Baroness Hale expressed a particular preoccupation with the 'free will' of young Muslim girls in the UK: she stated that "if a Sikh man wears a turban or a Jewish man a yamoulka, we can readily assume that it was his free choice to adopt the dress dictated by the teaching of his religion."[687] The sentence is quite contradictory as it is not clear how a man is free to choose his garments if they are 'dictated' by religious beliefs but a woman is not.[688] By referring to Raday, an ex-member of the UN Committee on the Elimination of Discrimination Against Women, Baroness Hale advocated the necessity for schools' neutrality to enhance the principle of gender equality: for Raday, "'mandatory policy that rejects veiling in state educational institutions may provide a crucial opportunity for girls to *choose the feminist freedom* of state education over the patriarchal dominance of their families".[689] It seems that Baroness Hale operated a separation between gender and culture, implying that they are two concepts in opposition and so needing to be balanced by the state.[690] However, as I will argue in the next Chapter, the liberal paradigm of choices does not help us to understand different religious practices and sensitivities.[691] All in all, the assumption of the Lords was that the law should 'save' a young girl (in the case, Shabina) from Islamic radicalism, otherwise she should pay a price for her choice.[692] As Lord Hoffman pointed out, "people sometimes have to suffer some inconvenience for their beliefs and choices".[693] Lord Bingham stated that the claimant had chosen to study in a secular institution, presupposing a rational abstract self-mastering individual free from any constraints without any reference to whether the applicant could obtain the same education in another school.[694] As Gies argues, "enrolling a child at a particular school is underpinned by informed consent and

---

[686] *Shabina v. Denbigh High School* (n 612) UKHL 15; [2007] 1 AC 100 at para. 80.
[687] *Ibid*, para 94.
[688] Lieve Gies, 'What Not to Wear: Islamic Dress and School Uniforms' (2006) 14 Feminist Legal Studies 377, 382.
[689] Frances Raday, 'Culture, Religion, and Gender' (2003) 1 Int'l J. Const. L. 663, 709. Baroness Hale, quoting Raday, *Shabina v. Denbigh High School* (n 612) UKHL 15; [2007] 1 AC 100, para. 98 *Italics added.*
[690] This view ignores that the very concept of gender equality is the result of a particular (western) culture. Salecl (n 526) 122.
[691] Saba Mahmood, 'Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation' (2006) 18 Public Culture 323, 344.
[692] As Lord Bingham argued, 'It was of course open to the respondent, as she grew older, to modify her beliefs, but she did so against a background of free and informed consent by her and her family', Lord Bingham, *Shabina v. Denbigh High School* (n 612) UKHL 15; [2007] 1 AC 100 para. 25 *(italics added).*
[693] *Ibid*, Lord Hoffmann, para. 50.
[694] *Ibid*, para. 23.

unconstrained choice appears to ignore the difficulties involved in sending a child to a different school".[695] Moreover, the Court did not consider the emotional challenge of a young girl in changing school: "having to change school at the age of 13 in order to manifest one's religion should be *prima facie* seen as a sufficiently serious and disruptive step".[696] Brown found that the rhetoric of choice is often used to hide western chauvinism towards non-liberal cultures: "what makes choices 'freer' when they are constrained by secular and market organizations of femininity and fashion rather than by state or religious law?"[697] For Brown, western clothes are constructed as expressing a freedom of choice while Islamic ones are constructed as expressing a complete lack of choice: "we need fundamentalism, indeed, we project and produce it elsewhere, to represent ourselves as free".[698] Surely, as I shall argue in the next Chapter, the individual's choices are influenced by a number of factors and so it is difficult to think about a completely 'free choice'.

[695] Gies (n 688) 385–6.
[696] Davies (n 685), 11.
[697] Wendy Brown, *Regulating Aversion : Tolerance in the Age of Identity and Empire* (Princeton University Press, 2008) 176.
[698] *Ibid,* 189.

3.4 Reconfiguring religion and religious practices in the secular space

Analysis of some of the many European juridical decisions over the practice of veiling reveals that banning the veil, framed in the defence of secular values and gender equality, in reality works to exclude differences and to limit Muslim women's agency. This limitation has been implemented through the crucial distinction made by art. 9 between faith and its manifestation.

According to the European Convention on Human Rights, religious freedom is not limited to belief but also extends to its manifestations and is "one of the foundations of a democratic society";[699] however, not every act based on religious belief is protected by article 9. In the ECHR's decisions, the term 'practice' in article 9 (1) "does not cover each act which is motivated or influenced by a religion or belief". In fact, the manifestation should be one of the "normal and recognized manifestations" of religion or belief that "actually express the belief concerned".[700] It is therefore unclear why the ECHR's judges could not consider the veil a 'normal manifestation' which expresses a profound religious belief.[701] The distinction between 'belief' and 'manifestation' has received little attention from jurists as it is taken as necessary in the legal reasoning.[702] The idea that religion necessitates a separation between what is observable and what does not fit with the liberal separation between the public and the private. Through the distinction between *forum internum* and *forum externum* the Court presupposes a religious individual whose faith is a simple private matter distinguishable from its manifestations (such as symbols, rituals, etc.).

For Cavanaugh, the separation between faith and its manifestation, at the heart of human rights discourse over the veil, makes room for state action to identify and characterize different social spheres of competence such as 'religious' and 'secular' and to justify limitation of personal freedoms.[703] Many scholars have noted that in recent years the ECHR's attitude has shifted in relation to cases that deal with religious freedom: previously, for the Court "the state has no direct role to play in the religious

[699] *Kokkinakis v Greece* (n 622) para. 31.
[700] *Arrowsmith v the United Kingdom* App. N. 7050/75 (ECHR 1978) 5, 19, 20.
[701] Evans (n 651).
[702] Peter Cumper and Tom Lewis, ''Taking Religion Seriously'? Human Rights and Hijab in Europe—Some Problems of Adjudication' (2008) 24 Journal of Law and Religion 599.
[703] Cavanaugh, *The Myth of Religious Violence* (n 502) 59.

life of believers"[704] which implies that different religious communities should not interfere in the public sphere. However, recently, through a growing emphasis on state neutrality, the Court has given states the power to decide which practices are to be considered 'religious'. In fact, in the Court's reasoning, secularism is "a tangible manifestation of neutrality":[705] this means that only the state can decide how to provide an appropriate space of religious diversity while advancing the principle of secularism. Since secularism is conceived as the only possible system to secure the autonomy of the individual "from others and from state power through its articulation of the autonomy of the state from cultural and religious authority",[706] the state has the power to "either tolerate or ban particular cultural differences without being defined as partial."[707]

Although the ECHR has established the distinction between faith and its manifestation through art. 9, it avoids giving any specific definition of 'religion',[708] leaving this duty to European member states. However, what transpires from different cases is that the Court understands religion as mere individual, voluntary, private, intellectual conviction.[709] The tendency of the Court to essentialize religion, and in particular Islam, is evident in all the analysed cases concerning the wearing of the veil. This essentialization is not surprising, as western and Human Rights law promote abstract reasoning.[710] In fact, the act of categorizing always involves a certain level of abstraction from one context to its application into another which results in a high level of uncertainty.[711] This is evident in the analysed cases which reveal that the modern secular state does not always apply the principles that guide it: as a matter of fact, the principles of necessity, proportionality and state neutrality have been applied differently in different cases, as is particularly evident in the comparison between *Dahlab* and *Kokkinakis*'s case.[712] As Asad argues, the "problem with universal definitions of religion is that by insisting on an essential singularity, they divert us from asking questions about

[704] In *Otto-Preminger-Institut v Austria* 19 EHRR 34 (1995) (ECHR, 1995) (se A) 6, 19; 19 EHRR 34, 57, the Court held that 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society'.
[705] Evans (n 651) 306.
[706] Brown (n 697) 153.
[707] Leti Volpp, 'The Culture of Citizenship' (2007) 8 Theoretical Inquiries in Law 571, 574.
[708] Evans (n 651).
[709] *ibid,* 75–6.
[710] Roger Trigg, *Religion in Public Life: Must Faith Be Privatized?: Must Faith Be Privatized?* (OUP Oxford, 2007) 86.
[711] For Asad, 'uncertainty' is what defines the margins of the state Asad, 'Where Are the Margins of the State?' (n 516) 286–7.
[712] *Dahlab v Switzerland* (n. 17), *Kokkinakis v Greece* (n 622).

what the definition includes and what it excludes – how, by whom, for what purpose, and so on. And in what historical context a particular definition of religion makes good sense."[713] Hence, the concept of religion is discursively constructed "not [as] a neutral descriptor of a reality that is simply out there in the world", but as a category that is inseparable from western history and goes hand in hand with its "Siamese twin secularism".[714] Asad identifies three metaphysical beliefs that are at the heart of secular discourse and that allow the relegation of religion into a private sphere.

"[firstly], that 'the world' is a single epistemic space, occupied by a series of mutually confirming sciences […] that not only employ something called 'the scientific method' but also confirm it as the model for reason […] [secondly] that the knowledges gained from these disciplines together support an enlightened morality, that is to say, rules for how everyone should behave if they are to live humanely; and [thirdly] that in the political realm this requires particular institutional separations and arrangements that are the only guarantee of a tolerant world, because only by compelling religion […] to remain within prescribed limits can the transcendent power of the secular state secure liberty of belief and expression."[715]

The foundational myths of secularism reveal the fact that it is exactly the lack of problematization of secular forms of power that allows the secular state to introduce restrictions to personal freedoms without perceiving them as violence but as a safeguard of the place assigned to religion.[716] The western/secular/liberal understanding of faith presupposes a specific modern liberal perception of society which is at the foundation of western positive and Human Rights law.[717] For Asad, western law is part of a modern project which seeks to institutionalize a specific form of principles and subjectivities in the public secular sphere: in other words, "modernity is not primarily a matter of cognizing the real but of living-in-the-world".[718]

Therefore, western positive and Human Rights law protect an individual who complies with the principle of secularism and with a secular mode of experiencing religion: "the political solution that secularism proffers […] lies not so much in tolerating difference

[713] Asad, 'Reading a Modern Classic' (n 503) 220.
[714] *ibid,* 205 and 221.
[715] *ibid*, 221.
[716] Cavanaugh (n 506) 407.
[717] Plesner (n 677) 378–9.
[718] Asad, *Formations of the Secular* (n 20) 14.

and diversity but in remaking certain kinds of religious subjectivities (even if this requires the use of violence) so as to render them compliant with liberal political rule".[719] In this sense, what transpires from these decisions is the imposition of a new universal law that in principle 'saves' the part of humanity which has yet to be allowed to enter into the arrangement of liberal law but, in reality, it reinforces its own absolute power and, as a metaphysical Christian God did before, it controls and guides individuals in their existence: thus "from identifying the human individual in various ways to demanding that the state take charge of regulating her conduct, the liberationist ideal of human rights discourse has born a state increasingly regulatory and punitive."[720] Although western liberal law is centred upon a liberal concept of the individual, it increasingly aims at state control of human conduct and the individual's physical being, the body, even though it calls for the protection of minorities. Therefore, European decisions over the practice of veiling emerge as the mirror of liberal paradoxes: if, on the one hand, the individual has rights, then on the other those rights can be threatened according to how the society and the nation-state want it to be regulated. Hence, in positive and Human Rights law, the individual is free and, at the same time, compelled. As Diamantides argues,

"If the secular individual of practical reason acts as both a source of value and legislator, what value is there of legally entrenched human rights provisions that are open to deviations imposed by the practicalities of the state? [...] We legally entrench an absolute sense of human dignity just as we reserve the right to judge it as finite, subject to political necessities, which, be they true or false, constitute a determinism as rigourous as that of nature's indifference from which human rights were supposed to deliver us!"[721]

In this sense, secularism, which has become synonymous with 'modernity', defines specific forms of knowledge and practices (religious and non-religious) and it becomes the framework through which to read and understand the religious, political and ethical spheres of the Christian/secular/liberal subject.[722] Secularism, then, is a concept that

[719] Mahmood, 'Secularism, Hermeneutics, and Empire' (n 691) 328.
[720] van Hoecke (n 595) 45.
[721] Diamantides, 'Islamic Fundamentalism and Western Horror' (n 397) 173.
[722] Hirschkind (n 496) 634.

"brings together certain behaviors, knowledge, and sensibilities in modern life."[723] In other words, "a secular person is someone whose affective-gestural repertoires express a negative relation to forms of embodiment historically associated with (but not limited to) theistic religion."[724]

Hence, the separation between private and public, secular and religious, creates not only an understanding of how private and public life should be lived and experienced, but also a specific imagination which mediates people's identity in the 'modern' world.[725] Therefore, secularism is not a neutral position but, rather, it is a "normatively prescriptive model that favours certain forms of modern religion at the expense of others that are equally legitimate."[726] Evans observes that the ECHR has a tendency to protect forms of religion that are compatible with western/secular/liberal sensitivities and that do not challenge the supremacy of the state over the individual's public life. In other words, since in secular thought religion is conceived as a mere private belief, it should not interfere with the individual's public life: in the case, the role of the law is to secure civic loyalty which is challenged by specific manifestations of faith in the public space.[727] In this view, the women's headscarf is seen as a threat to secular sensitivities because it proposes a specific idea of religion that does not conform to western secularity.

In this sense, the essentialization of religion, along with the separation between faith and its manifestation, not only ignores the specific materialities of different religions, but it also excludes different subjectivities. As I will argue in the next Chapter, for many Muslims, religion is not a simple private intellectual conviction, but a relationship created through practices:[728] Asad notes that the Arabic term *Iman* (faith) "is not a singular act that one performs naked before God. It is the virtue of faithfulness toward God, an unquestioning habit of obedience that God requires of those faithful to him, a disposition that has to be cultivated like any other, and which links one through mutual

[723] Asad, *Formations of the Secular* (n 20) 25.
[724] Hirschkind (n 496) 638.
[725] Asad, *Formations of the Secular* (n 20).
[726] Ozlem Denli, 'Between Laicist State Ideology and Modern Public Religion: The Head-Cover Controversy in Contemporary Turkey', in Tore Lindholm and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, 2004) 497–511.
[727] Evans (n 651) 300.
[728] Asad, 'Reading a Modern Classic' (n 503) 208–9.

responsibility and trust to others who are faithful."[729] Hence, if European democracies are founded on the principle of pluralism, as stated in the cases, then they should consider that religion is not always essentially the same and its definition very much depends on different cultures and historical periods.[730]

Thus, what the legal decisions over the headscarf reveal is that, by defining religion as a private belief, secularism tries to define and permanently fix the place of religion in the public sphere. However, by so doing, western law excludes different subjectivities. As Asad points out,

"Muslims, as members of the abstract category 'humans', can be assimilated […] into a global (European) civilization once they have divested themselves of what many of them regard (mistakenly) as essential to themselves. The belief that human beings can be separated from their histories and traditions makes it possible to urge an Europeanization of the Islamic world."[731]

Hence, in the West, the subject of law has the autonomy to express her/his identity only when those identities can be assimilated into liberal secular sensitivities. As a matter of fact, coercive de-veiling in some European countries has led to the exclusion of many women, the 'others', the 'outsiders', from the public space. As positive and Human Rights law conceives the individual abstractly, it excludes subjectivities that do not comply with the Christian/liberal/secular understanding of religion. In this sense, the 'salvation' project of positive and Human Rights law in reality means assimilation into Christian/secular/liberal understandings of law and politics. Failing to assimilate into a new law's subject means the disappearance of the individual from the public space because it represents an embarrassment. The matter of the veil is therefore associated with the European idea of 'assimilation' where prohibitionist laws are justified as mechanisms to ensure that 'outsiders' can be adjusted into secular, democratic western society.

Phillips formulates this asymmetry between 'insider' and 'outsider' (or between a tolerant West and an intolerant East- as presented by the Court) in the following way: "'we' have culture while culture has 'them', or we have culture while they are a culture.

[729] *ibid,* 218–9.
[730] *ibid,* 220.
[731] Asad, *Formations of the Secular* (n 20) 170.

Or, we are a democracy while they are a culture […] this asymmetry turns on an imagined opposition between culture and individual moral autonomy, in which the former vanquishes the latter unless culture is itself subordinated by liberalism".[732]

The (imagined) clash between cultures is well shown in the analysis of the '*hijab* cases' whereas *Sharia* is conceived as a static positivized legal order, as the western positive law. Diamantides' analysis has helped to unfold the 'clash of civilizations' in which the veil emerges as the symbol of a clash between two forms of universalist and absolute historically-conjoined legal systems: the European and the Islamist 'fixed codified *Sharia* law' to be implemented by the appropriate hierarchical authority which is the exact mirror of the West.[733] The desire to create a unique, fixed and binding law, as I have argued, passes through the control and juridical regulation of women's body.

The gender dimension of the matter of veiling is of particular importance as, through a complex and often incoherent reasoning, the Court has linked 'secularism', the 'republic' and women's body. The debate over the veil highlights contradictory views on Muslim women. On the one hand, the Court sees those women as victims of an oppressive and intolerant religion and acts as their rescuer, while on the other, Muslim women are represented by the Court as dangerous religious fundamentalists who seek to overthrow secular western values. This contradictory view reveals, on the one hand, an objectionable mode of autonomy, (as they transgress the limits of their freedom) while on the other, a lack of autonomy, (as they are seen as subjects obedient to fundamentalist male relatives). With the exception of *SAS v France*,[734] in which, for the first time, the Court rejected the idea that the veil is an impediment to gender equality (although the French government still sustains this argument), all the other cases were based on the idea that banning the veil is a necessary means to advance the secular/liberal idea of gender equality. However, it is difficult to understand how gender equality can be advanced through a punitive measure or through a totalizing

[732] Anne Phillips, *Multiculturalism without Culture* (Princeton University Press, 2009) 62–3.
[733] Diamantides, 'Shari'a, Faith and Critical Legal Theory'' (n 11).
[734] *SAS v France* (n 17).

understanding of Islam.[735] In this sense, the European legal decisions over the practice of veiling contrast with the principle of gender equality.[736]

The dissenting opinion of Judge Tulkens in the *Sahin* case well explains this point: "What is the connection between the ban and sexual equality? The judgment [of the majority] does not say. Indeed, what is the signification of wearing the headscarf? As the German Constitutional Court noted in its sentence of 24 September 2003, wearing the headscarf has no single meaning: it is a practise that is engaged in for a variety of reasons. It does not necessarily symbolize the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to do." [737]

Therefore, the regulation of women's bodies emerges as one of the main contradictions in the human rights discourse which claims to safeguard dignity for all.[738] Women's body, as I have argued, is of a fundamental importance for the reproduction of a society's values: "through their clothing and demeanour, women and girls become visible and vulnerable embodiments of cultural symbols and codes. In addition, the primary identification of the woman with the family and home, in a problematic separation of 'public' and 'private' spheres of existence, contributes to her secondary status in the very realm where her future is debated and even decided: the public".[739] Foucault sees in the control of bodily practices by legal/political authority a modern technique of discipline.[740] Through this reading, the regulation of Muslim women's attire can be understood as an essential disciplinary tool of the new form of liberal neo-governmentality. The concept of secularism, widely used to justify the normative control of (Muslim) women's body, becomes one of the technologies of control employed by the state to discipline (different/ non-homogeneous) bodies. In this view,

[735] It is worth remembering that all the claimants were living in societies where there was no compulsory veiling.
[736] Homa Hoodfar, 'The Veil in Their Minds and on Our Heads: Veiling Practices and Muslim Women', in Lisa Lowe and David Lloyd (eds) *The Politics of Culture in the Shadow of Capital* (Duke University Press, 1997) 259–67.
[737] *Sahin v Turkey,* (n 17) (Dissenting opinion of Judge Tulkens).
[738] Lisbet Christoffersen, 'Is Shari'a Law, Religion or Combination? European Legal Discourses on Shari'a', in Jorgeb S Nielsen and Lisbet Christoffersen (eds) *Shari'a As Discourse* (Ashgate Publishing Limited, 2010) 65.
[739] Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (Psychology Press, 1995) 169.
[740] Foucault, *Discipline and Punish* (n 279); Foucault, *The History of Sexuality* (n 599).

secularism is used to keep the body under the control of the state: from a secularist point of view, religious symbols mark differences in bodies that are supposedly neutral, rational and abstract.

Honderich observes that "the problem of classical utilitarism is, in a word, its unfairness".[741] In fact, the idea that an action should provide happiness to the greatest number of people allows some minority rights to be sacrificed in the name of a greatest common welfare.[742] In the context, by overlooking the historical, social and religious meaning symbolized by the veil, western discourse has sacrificed Muslim women's freedom in the name of a defence of the majority's secular sensitivity. However, by so doing, instead of protecting women's rights and pluralities, it excludes them.

[741] Ted Honderich, 'Punishment, the New Retributivism and Political Philosophy', in A Phillips-Griffiths (ed) *Philosophy and Practice* (Cambridge Univ Press, 1985) 145.
[742] Salecl (n 526) 77.

Chapter 4: The veil that reveals

In the last few years, the female headscarf has been a focal point for many polemical debates in the West. In many European countries, the veil has been banned in public schools, public offices and, in certain cases, public spaces. The most recent debate concerns the summer 2016 '*burkini ban*'[743] implemented by several mayors of the French Riviera. The ban came after the July 2016 attack in Nice, when eighty-six people died. The mayors' decision was based on the assumption that the veil is 'a sign of' Salafist proliferation, contrasting with French liberal/secular/democratic values.[744] Clearly, the '*burkini ban'* sparked passionate debates on various social media, especially after the publication of a video in which four male French police asked a Muslim woman to undress on the beach.[745] In order to reduce the social and political tension created by the video, Mr. Christian Estrosi, president of the Regional Council of Provence-Alpes-Côte d'Azur and deputy mayor of Nice, threatened to file a lawsuit against anyone who posted photos or videos of women wearing *burkini* on Facebook or Twitter. Heedless of the rights of a woman who was asked to undress in front of the entire world, he stated that the publication of those photos "provoke[d] defamatory remarks and threats" against police agents. He added that legal complaints had already been filed "to prosecute those who spread the photographs of our municipal police officers and those uttering threats against them on social networks."[746] Although France's highest administrative court overturned the mayors' decision to ban the *burkini,* as it was considered to be in violation of French laws on civil liberties, freedom of movement and religious freedom, many mayors decided to maintain the ban, opening another legal and political battle over women's body.[747]

---

[743] A type of swimwear which covers the whole body except for the face, hands and feet, used by some Muslim women.

[744] Elaine Ganley, 'Why France Thinks the Burkini Is an Attack on Secularism' (*The Independent,* 2016) <http://www.independent.co.uk/news/world/europe/burkini-ban-france-cannes-nice-muslim-islam-beach-french-secularism-a7206971.html> accessed 9 September 2016.

[745] 'France Warns of Muslim Stigmatisation amid Burkini Ban' (*Al-Jazeera,* 2016) <http://www.aljazeera.com/news/2016/08/france-warns-muslim-stigmatisation-burkini-ban-160824191045697.html> accessed 9 September 2016.

[746] Amar Toor, 'French Official Threatens to Sue Social Media Users Who Share Burkini Photos' (*The Verge*, 2016) <http://www.theverge.com/2016/8/25/12637964/france-burkini-ban-photo-nice-social-media> accessed 9 September 2016.

[747] Aurelien Breeden and Lilia Blaise, 'Court Overturns "Burkini" Ban in French Town' (*The New York Times,* 2016) <http://www.nytimes.com/2016/08/27/world/europe/france-burkini-ban.html> accessed 9 September 2016.

The '*burkini* ban' is of particular interest as it focuses on how western/liberal/seculars semiotic understand images, symbols and sign in the public sphere. In fact, from a purely aesthetic point of view, there is no difference between a *burkini* and swimwear worn by divers. Moreover, plenty of people cover up on the beach to protect themselves from the sun or for a variety of other reasons.[748] This indicates that the power of the *burkini* does not lie in the mere image of a covered body, but in the symbology attached to an article of clothing. The '*burkini* affair' in France, which emerges within the framework of an endless obsession over the female headscarf, reveals that attention should be paid to the semiotic of signs and how it works in the modern western/secular/liberal public space.

As I shall argue, western semiotic ideology, which gives to images and signs a fixed meaning arbitrarily defined by social conventions or by law, does not take into consideration the "affective and embodied practices through which a subject comes to relate to a particular sign"[749] and naturalizes and defines the religious subject as an individual who simply submits him/herself to a set of recommendations based on general beliefs: in other words, secularism conceives of religion as a simple belief, and therefore as a matter of personal choice. This understanding is strictly linked to the place of religions within the secular state and to the role of the law in regulating 'visible' religious practices, such as the veil, in the public space. In this sense, secularism is not understood as the mere separation between temporal and spiritual power, but as the re-conceptualization of religious sensitivities and religious practices in the modern world:[750] thus, while secular thought has come to define concepts of state, economy, religion and law, it simultaneously creates a specific law and religious subject through the control of the visible in the public space.

In this concluding Chapter, I will consider this issue through the lens of the passionate debate that has developed in the last few years around European legal decisions concerning the practice of veiling; as I have argued, those juridical decisions rely on the assumption that veiling is a symbol 'irreconcilable with the principle of gender equality'

[748] Soraya Chemaly, 'France's Burkini Ban Exposes How Women Are Still Violently Oppressed in the Name of Nationalism' (*Quartz,* 2016) <http://qz.com/767796/frances-burkini-ban-has-exposed-the-way-women-are-oppressed-in-the-name-of-nationalism/> accessed 16 October 2016.
[749] Mahmood, 'Religious Reason and Secular Affect' (n 326) 841–2.
[750] Talal Asad, *Formations of the Secular* (n 20); Mahmood, 'Religious Reason and Secular Affect' (n 497).

and thus 'incompatible with western democratic values.' Reading Wendy Brown[751] on the necessity to cast doubt on the normative limits of liberal political discourse, I will try to challenge the reasoning of European courts over the practice of veiling.

I will draw on Mahmood's study[752] of 'pious women' to argue that non-liberal traditions have developed different understandings of religion and bodily practices: if, on the one hand, secular rationality defines religion (and religious signs/practices) as a simple matter of personal choice, then on the other 'pietist women' disclose a performative/affective understanding of (religious) bodily practices. Her analysis is of particular interest as it reveals that what is often ignored is the way in which liberal thought defines and universalizes a specific Christian/liberal/secular rationale based on very specific concepts of religion and, along with it, of women's agency and freedom. By challenging western universal(ist) understandings of the category of agency, freedom and desire, she argues that different contexts produce different subjectivities: this, in turn, helps to understand the lives of women, including the practice of veiling, in a non-liberal framework. In fact, the very liberal/fixed and universalist concept of women's freedom and agency overlooks the fact that many Muslim women freely choose to wear the veil and that this is often understood as a mark of agency, or as a tool to acquire a specific subjectivity: thus, "what is seldom problematized in [western] analysis is the universality of the desire – central for liberal and progressive thought – to be free from relations of subordination."[753] Mahmood's work helps not only to understand Muslim women's practice, but also to unfold the western universal(ist) understanding of a specific concept of freedom and agency in order to deconstruct the two fixed and monolithic poles between which women, in the 'East' as well as in the 'West' have been trapped: as Spivak points out, we should now "fix the critical glance not specifically at the putative identity of the two poles in a binary opposition, but at the hidden ethico-political agenda that drives the differentiation between the two."[754] In fact, as my analysis attests, the ambiguity and plurality of the practice of veiling indicates not only different individuals' normative choices, but also that, often, speaking about this

[751] Wendy Brown, *Politics out of History* (Princeton University Press, 2001) 41.
[752] Mahmood, *Politics of Piety* (n 18).
[753] Saba Mahmood, 'Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival' (2001) 16 Cultural anthropology 202, 206.
[754] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press, 1999) 331–2.

practice in western societies becomes quite problematic, "for the universalism such terminology seems to endorse denies these cultural variations and specificity."[755]

Thus, it is not through the analysis of women's freedom, but through the symbology conferred on the practice of veiling that the gender dimension of the problem can be unfolded. This leads to the second argument against the courts' reasoning: the definition of veiling as a '*religious symbol incompatible* with western democratic values'. I argue that it is exactly the act of defining veiling as a 'sign', a 'symbol' of something intrinsically 'other', that allows the marginalization of Islamic culture in the liberal/secular public sphere where Christian symbols can be displayed as carriers of democratic values, while Islamic symbols have been banned as a threat to western/liberal/secular values. Through Goodrich's work of the power of images,[756] Mahmood's analysis of Muslim performative practices,[757] and Asad's analysis of the secular,[758] I will try to understand why the veil has been defined as a *symbol of* values incompatible with democracy. As I shall argue, symbols not only allow people to give meanings free from any context as they come to be understood through the western semiotic distinctions between signifier and signified, but they also have the power to create an emotional attachment to something 'un-representable'. This is why, historically, political power has always tried to control symbols, signs and clothes in the public sphere in order to create a specific political attachment to an absolute power that represents the unity of a people. The necessity to control images and symbols in the public sphere is mirrored in the legal decisions over the practice of veiling. By defining veiling as a 'sign', a fixed symbol of a monolithic culture in contrast to western secular democratic values, European courts 'naturalize' women's desires as something 'neutral' to be defined by the state through an 'exercise of sovereignty': in fact, it is the sovereign that decides which symbols are to be regarded as 'religious' and gives to religious practices their proper place within secularized democracies, in the 'East' as well as in the 'West'.

[755] Nancy J Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom* (Princeton University Press, 2009) 171.
[756] Goodrich, *Oedipus Lex* (n 19).
[757] Mahmood, *Politics of Piety* (n 18); Mahmood, 'Feminist Theory, Embodiment, and the Docile Agent' (n 753).
[758] Talal Asad, 'French Secularism and the "Islamic Veil Affair"' (2006) 8 Hedgehog Review 93.

In this sense, drawing from Mancini's analysis, the regulation of (Muslim) women's attire can only 'defend' a very specific kind of democracy which is based on a substantial homogeneity, such as that described by Schmitt.[759] He argues that democracy is based on a form of 'substantial homogeneity' which, in turn, forms the unity of a people. This unity and homogeneity is artificially constructed through the creation of a fundamental dichotomy between 'self' and 'other', 'friend' and 'enemy', 'insider' and 'outsider' which underlines every democracy. In this regard, in the name of an artificially constructed homogeneity, the 'other', the 'different', the 'outsider' (the presence of other subjectivities) has to be excluded by an exceptional act of sovereign power in order to 'save' the (imagined) unity and homogeneity of western democracies. It is exactly in this context that the *hijab* emerges as symbol, a 'sign', a 'cut-division' between 'insider' and 'outsider', 'friend' and 'enemy' whereas the 'Muslim woman' emerges as the 'enemy', disloyal to a secularized transcendental power that wants only to rescue her by un-veiling her. As Mancini argues, it is through the "removal of the culture of Islam on the unproven assertion that it is undemocratic [that] homogeneity is artificially reinforced at the expense of genuine cultural diversity."[760] As a result, "secularized religion and secularism are used in order to exclude the other and protect the culturally homogeneous character of European societies that is perceived – and even explicitly described – as threatened by pluralism and globalization."[761] Therefore, the definition of veiling as a 'sign', a 'symbol' of something intrinsically 'other', allowed and encouraged the emergence of certain kinds of (homogeneous) subjectivities, namely the (abstract) Christian/secular/liberal autonomous individual, at the expense of other plural subjectivities, namely the 'diversity of the other' represented in the image of a veiled woman: as such, veiled Muslim women have been un-unveiled to be re-veiled with the veil, the mask, of the western 'liberated' and 're-humanised' western/secular/Christian law's subject. In contrast, as Asad argues, it is exactly because the veil raised disagreement between Muslim scholars on whether it is divinely required by God, that its symbology should also be indeterminate for non-Muslims.[762]

Thus, the obsession for 'un-veiling' Muslim women indicates the inadequacy of western (and Islamist) universal(ist) discourse within pluralistic contexts. Through the juridical

[759] Susanna Mancini 'The Tempting of Europe' (n 21).
[760] Mancini 'Power of Symbols' (n 22) 2666.
[761] *ibid*, 2631.
[762] Asad, 'French Secularism and the"Islamic Veil Affair"' (n 758) 96.

regulation of women's attire, western judges tried to regulate specific kinds of sociability and to bring private sentiments into the public sphere. In other words, by defining veiling as a fixed symbol of something intrinsically 'other', not only do European judges exclude different concepts of freedom and agency and different forms of 'humanity',[763] but they also operate a re-configuration of religious practices and sentiments in the 'modern/secular world'. Therefore, "the forms of attire toward which secular-liberal morality claims indifference are indexical precisely of the kind of religiosity that makes such a secular-liberal morality possible in the first place."[764]

[763] Esmeir (n 16); Esmeir (n 15).
[764] Mahmood, *Politics of Piety* (n 18) 74–5.

4.1 On Freedom and Agency: an East/West Perspective

In the 1960s, the feminists' struggle for emancipation rendered a simple piece of clothing such as the miniskirt the symbol of a whole social and cultural change. At that time, the mini skirt represented the possibility for women to make choices over their body, historically controlled by patriarchal social and political powers. 'I wear my skirt as I like' could be a slogan of women struggling for the mini skirt more than forty years ago; rather, it is a campaign created in 2015 after the expulsions from school of young French and Belgian girls because their skirts were considered 'too long' and thus a 'provocation, and potential act of protest'.[765] The decision, made by the Head of School, was taken after the banning of religious symbols from public schools in the context that the 'long-skirt' was considered 'Muslim clothing' and thus a 'religious symbol'. This indicates that the juridical regulation of women's body, along with the fundamental dichotomy between the 'naked-liberated' body and the 'covered-constrained' one, remains at the core of many polemical debates, in the past as well as today: it seems that in the Christian/liberal/secular West, in which the model of 'liberated' woman has been 'naturalized' and 'universalized', the length of women's skirts becomes the *measurement* of women's freedom. As I shall argue, this dichotomy, which is mirrored in western legal decisions over women's clothes where the 'naked body', symbolized in the miniskirt, is considered a 'sign of' women's liberation associated with the possibility of agency while the 'long-skirt' (along with the *hijab*) is regarded as a 'conspicuous religious symbol' incompatible with Christian/secular values of tolerance and gender equality, endorses problematic assumptions, not only about the proper place of religion and religious practice within secularized democracies and the role of the law in regulating religious practices, but also about women's freedom and the possibility of agency.

[765] Ishaan Tahroor 'A French Muslim Girl Was Kicked out of Class Because Her Skirt Was Too Long' (*The Washington Post,* 2015) <https://www.washingtonpost.com/news/worldviews/wp/2015/04/29/a-french-muslim-girl-was-kicked-out-of-class-because-her-skirt-was-too-long/> accessed 11 May 2016; Andy Furniere, 'School in Mechelen Prohibits the Wearing of Long Skirts' (*The Bulletin,* 2015) <http://www.xpats.com/school-mechelen-prohibits-wearing-long-skirts> accessed 11 May 2016; Daily Sabah, 'After France, Muslim Students in Belgium Banned from School' (*Europe News* 2015) <http://en.europenews.dk/After-France-Muslim-students-in-Belgium-banned-from-school-77380.html> accessed 11 May 2016.

While in the West the veiled (or 'too dressed') body has become the monolithic symbol of women's universal oppression and seclusion, in Pakistan a popular new animated television series, 'Burqa Avenger', soon to be broadcast in India, offers a different understanding of veiled Muslim women by challenging the western universal(ist) understanding of women's freedom and the possibility of agency. In the series, Jiya, an unveiled teacher in a female primary school in Pakistan, struggles in defence of women's rights by 'transforming' herself into her alter ego, 'Burka Avenger': a super heroine who wear the *burqa* to conceal her identity while using 'Takht Kanaddi', a special martial art involving books and pens, to struggle against the enemy.[766] Unlike the western stereotype of a subjugated woman victim of a chauvinist society, Jiya is an educated woman and 'books' and 'pens' are the weapons she uses against the enemy. Moreover, interestingly, it is exactly through her *burqa* that the main character acquires the possibility of agency as she can hide her identity and fly. In other words, 'Burqa Avenger' is an interesting character because she escapes from the western monolithic view of Muslim women and offers a different understanding of Muslim women's performativity. While many scholars have revealed that the association between veiling and 'women's oppression' is an overstatement,[767] its centrality in western legal reasoning is exemplified in the comparison between the *Dahlab* and *Kokkinakis* cases, decided at the European Court of Human Rights (ECHR).[768]

On the one hand, a Swiss teacher was dismissed because she started to wear the veil despite never telling her students that she had converted to Islam, while on the other, Mr. Kokkinakis tried to proselytize in a country where this is illegal. The fact that Ms. Dahlab's illocutionary act (or performance) of wearing a veil was considered more threatening than Mr Kokkinakis' proselytizing reveals a clash between a performative body and the logocentrism on which western polity and law is based. If Kokkinakis's proselytizing is protected, it is because the court perceived he did 'nothing but speak' with the intention to convert another who is free to accept or not; if Ms Dahlab was removed from sight it was because she demonstrated, performed, acted out, her right to be different, which carries illocutionary force. Thus, it is exactly the illocutionary force

[766] Zeeshan Mukhtar, 'Pakistan's Burqa-Clad Cartoon Superhero Makes Foray into India | Global Development (*The Guardian,* 2015) <http://www.theguardian.com/global-development/2015/apr/30/pakistan-burka-avenger-cartoon-superhero-india-women> accessed 12 November 2015.
[767] Ahmed (n 24); El Guindi (n 23).
[768] *Dahlav V Switzerland* (n 17), and *Kokkinakis v Greece* (n 622).

of Ms Dahlab's performative act that is at stake. In fact, western scholars and judges tend to see bodily performances as expression, symbol and 'sign' of profound cultural/religious fixed meanings whereas the 'veiled body' emerges as a constraint to women's agency.

In contrast to many western feminists and scholars who have analysed the condition of women in Muslim majority societies in terms of the moral autonomy of the subject resisting external (patriarchal) structures of power,[769] Mahmood's work[770] discloses a different understanding of bodily practices, ethics, freedom and agency from that of the liberal polity. She intends agency as the "capacity for action that historically specific relations of subordination enable and create" by reconsidering "the conceptual relationship between desire and self-making, performance and the constitution of the subject, and moral action and embodiment in feminist debates."[771] Her analysis helps to "move beyond the teleology of emancipation underwriting many accounts of women's agency,"[772] and to analyse the relationship between body and subject formation within non-liberal discourses; through her study of subjects excluded by the liberal trajectory, Mahmood challenges the idea of agency central to the liberal concept of autonomy by 'expanding' the Butlerian concept of 'performativity of the body'.[773]

Butler's analysis is drawn from two central concepts of Foucault's philosophy: firstly, power is conceived as a relation of forces which are productive of new discourses, objects, desires, and relations. Secondly, the subject does not precede power relations but is produced *through* those relations. Thus, the conditions that secure the subject's subordination are the same that produce self-consciousness and agency.[774] This "understanding of power and subject formation encourages us to conceptualize agency not simply as a synonym for resistance to relations of domination, but as capacity for action that specific relations of subordination create and enable."[775] By questioning the works of power, which do not simply dominate but also form the subject, Butler breaks with a long feminist tradition which presumes that all humans are "endowed with a will,

[769] Ahmed (n 24) 236.
[770] Mahmood, *Politics of Piety* (n 18).
[771] Mahmood, 'Feminist Theory, Embodiment, and the Docile Agent' (n 753) 203.
[772] *ibid*, 210.
[773] Butler (n 177); Judith Butler *Bodies That Matter: On the Discursive Limits of Sex* (Taylor & Francis, 2011).
[774] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Harvester Press, 1980) 109–133.
[775] Mahmood, *Politics of Piety* (n 18) 18.

a freedom, and an intentionality" whose workings are "thwarted by relations of power that are considered external to the subject."[776] In her analysis, the subject is located *within* structures of power, which in turn, form the subject. As she argues,

"to claim that discourse is formative is not to claim that it originates, causes, or exhaustively composes that which it concedes: rather, it is to claim that there is no reference to a pure body which is not at the same time a further formation of that body. In this sense, the linguistic capacity to refer to sexed bodies is not denied, but the very meaning of 'referentiality' is altered. In philosophical terms, the constative claim is always to some degree performative."[777]

Drawing from Derrida's interpretation of Austin's concept of the 'performative', Butler formulates the idea of a subject performatively constituted through the repetition of heterosexual norms which retroactively produce the appearance of gender: in other words, norms are the necessary ground in which the subject can enact her agency in terms of repetition and/or subversion of identities and subjectivities.[778] In Butler's thought, while on the one hand the reiteration of structures of norms consolidates particular discourses, then on the other it is the very structure of norms that provides the subject with the means for its destabilization: "the paradox of subjectification is precisely that the subject who would resist such norms is itself enabled, if not produced, by such norms. Although this constitutive constraint does not foreclose the possibility of agency, it does locate agency as a reiterative or rearticulatory practice, immanent to power, and not a relation of external opposition to power."[779] In other words, for Butler, agency emerges as located *within* a productive reiterability and is related to the work of re-signification of norms.

In contrast with Butler, who reduces agency to a binary and antagonistic framework in which norms are reiterated and/or re-signified, Mahmood intends agency "not simply [as] a synonym for resistance to social norms but [as] a modality of action."[780] Drawing from Austin's 'speech-act theory', Butler's theory of performativity, and Derrida's

[776] Seyla Benhabib and others (eds), *Feminist Contentions: A Philosophical Exchange* (Routledge, 1995) 136.
[777] Butler (n 177) 10–1.
[778] Butler calls this process the 'constitutive outside of the subject'. This term is used to mark the realm of what is unspeakable and unintelligible but remains necessary for the subject's self-understanding. *ibid*, 3.
[779] *ibid,* 15.
[780] Mahmood, *Politics of Piety* (n 18) 157.

performative act as 'iterable practice', Mahmood argues that "it is *through* repeated bodily acts that one trains one's memory, desire, and intellect to behave according to established standards of conduct."[781] In other words, it is one's performative practice that determines one's desires and not the opposite: for the pietist women that Mahmood worked with, for instance, "action does not issue forth from natural feelings but creates them."[782] In fact, for women of the piety movement, repeated bodily acts such as praying or wearing the veil become indispensable for specific values considered necessary attributes of the self. The Aristotelian term *habitus,*[783] and the equivalent Arabic *malaka*, can capture this sense of embodiment and inhabitation: *habitus*, or *malaka*, is a quality acquired by doing and repeating certain actions until those actions become an integral part of the subject.[784] In this sense, the body is both a way to express an inner state and a means *through* which certain moral values are acquired through the repetition of specific bodily performances. Imagine, she argues, a pianist who submits herself to a strict disciplinary regime to gain the ability, 'the requisite agency', to play the piano virtuously: in the case, her ability to play the piano is compounded with her ability to be taught. 'Docility', a term associated with the absence of agency, "literally implies the malleability required of someone to be instructed in a particular skill or knowledge – a meaning that carries less a sense of passivity and more that of struggle, effort, exertion, and achievements."[785] Similarly, for women such as those Mahmood worked with, agency is seen as the individual capacity to train the body in order to become willing subjects of a particular discourse. Thus, Mahmood intends agency not as 'resistance to power', but as 'capacity for action': in her analysis, agency is linked with performativity and emerges as "the specific ways in which one performs a certain number of operations on one's thoughts, body conduct, and ways of being, in order to 'attain a certain kind of state of happiness, purity, wisdom, perfection, or immortality in accord with a particular discursive tradition."[786] If agency is seen as the capacity to undertake moral actions, then this capacity "is entailed not only in those acts

[781] *ibid (Italics added).*
[782] Saba Mahmood, 'Agency, Performativity, and the Feminist Subject' in Lene Sjorup and Hilda Christensen (eds) *Pieties and Gender* (Brill, 2009) 35.
[783] Aristotle defines 'habitus' as the ethics formulated through bodily practices. As Mahmood points out, the Aristotelian understanding of 'moral' has influenced many Islamic scholars such as Hamid al-Ghazali (d. 111), Ibn Khaldun (d. 1406) and al-Miskawayh (d. 1030). Mahmood, *Politics of Piety* (n 18) 137; Aristotle, *The Basic Works of Aristotle* (Random House, 1941).
[784] Mahmood, *Politics of Piety* (n 18) 137.
[785] Mahmood, 'Feminist Theory, Embodiment, and the Docile Agent' (n 753) 216.
[786] *ibid,* 210.

that resist norms but also in the multiple ways in which one inhabits norms."[787] For the women of the piety movement, for instance, piety "rises from practice, is perfected by practice, and then governs all actions and practices."[788] By considering the possibility that norms can actually structure the interiority of the subject, Mahmood eludes Butler's antagonistic and dualistic framework: norms can be confirmed or subverted, but they can also be *inhabited*, aspired to and consumed.

"[Norms] are performed, inhabited, and experienced in a variety of ways […]:[they] are not simply a social imposition on the subject but constitute the very substance of her intimate, valorised interiority. I think about the variety of ways in which norms are lived and inhabited, aspired to, reached for, and consummated. This requires that we explore the relationship between the immanent form a normative act takes, the model of subjectivity it presupposes (specific articulations of volition, emotion, reason, and bodily expression) and the kinds of authority upon which such an act relies."[789]

Hence, unlike Butler, for Mahmood agency is understood as the ability to take specific kinds of performative action, just one of which is resistance/reiteration: agency is thus located *within* specific discourses which, in turn, form the subject who, performatively, reiterates/subverts/inhabits norms.[790] This model of performativity "emphasizes the sedimented and cumulative character of reiterated performances, where each performance builds on prior ones, and a carefully calibrated system exists by which differences between reiterations are judged in terms of how successfully (or not) the performance has taken root in the body and mind."[791] However, she argues, this does not mean "to invoke a self-constituting autonomous subject nor subjectivity as a private space of cultivation. Rather, it draws our attention to the specific ways in which one performs a certain number of operations on one's thought, body, conduct, and ways of being"[792] within specific discursive traditions.

Thus, what is important to understand is "the complex relationships between the immanent form of a normative act, the model of subject it presupposes, and the type of

[787] Mahmood, *Politics of Piety* (n 18) 15.
[788] Mahmood, 'Feminist Theory, Embodiment, and the Docile Agent' (n 753) 215–6.
[789] Mahmood, *Politics of Piety* (n 18) 23.
[790] Mahmood, 'Feminist Theory, Embodiment, and the Docile Agent' (n 753) 210.
[791] *ibid*.
[792] *ibid*, 217.

authority on which it is based."[793] By recalling Foucault's relationship between ethics and morals, Mahmood gives another place to bodily practices: a place in which moral virtues are acquired *through* the reiteration of those practices.[794] In fact, borrowing from Aristotle, Foucault conceives ethics not as an abstract concept but as a series of practical performances that are relevant to a specific way of life. For Foucault, ethics refers to a particular set of procedures and techniques through which the subject comes to be formed in a particular (localized) context.[795] Therefore, subjectivity is an effect of the modality of a specific structure of power in which the subject is formed through the re-enactment of practices delimited in advance. However, Foucault also recognizes another kind of subject formation, namely 'moral subjectification', which refers to the available model "for setting up and developing [a] relationship with the self, for self-reflection, self-knowledge, self-examination, for the decipherment of the self by oneself, for the transformations that one seeks to accomplish with oneself as object."[796] Hence, if on the one hand the subject resists or complies with moral codes, then on the other, Foucault recognizes that the subject has many different ways of forming a relationship with a 'moral code' which, in turn, establishes a relationship between the inner self (will, desires, actions etc.) and norms within a particular discourse. Foucault's analysis of ethical formation helps to understand agency firstly as a capacity required to take specific moral action and, secondly, as bounded to cultural and historical discourses through which the subject is formed. Hence, at stake is not what a certain ethic *means* but what it *does*. Women with whom Mahmood worked learned how to analyse body and soul movement in order to acquire a specific selfhood:

"[they] establish coordination between inner states (intention, movements of desires and thought etc.) and outer conduct (gestures, actions, speech etc.). This principle of coordination has implications for how we might analyse the conceptual relationship the body articulates with the self and with others, and by extension, the self's variable relationships to structures of authority and power."[797]

---

[793] Mahmood, *Politics of Piety* (n 18) 23.
[794] *ibid*, 136.
[795] Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress', in Michel Foucault and James D Faubion (eds) *Ethics: Subjectivity and Truth*, (Vol 1, New York Press 1997) 225.
[796] Foucault, *The History of Sexuality* (n 599) 29.
[797] Mahmood, *Politics of Piety* (n 18) 31.

In other words, if "bodily *habitus* constitutes a tacit form of performativity, a citational chain lived and believed at the level of the body,"[798] then it is *through* the shape that specific ethical practices take that it is possible to analyse the ethical subject formation; "the importance of these practices does not reside in the meanings they signify to their practitioners, but in the work they do in constituting individuals: similarly, the body is not a medium of signification but the substance and the necessary tool through which the embodied subject is formed."[799]

The understanding of the body as a 'means to' and not a 'sign of', challenges the western/liberal understanding of norms in terms of subversion and/or destabilization. For the women of the 'piety movement', for instance, "this means that the possibility for disrupting the structural stability of norms depends upon literally re-tutoring the body rather than in destabilizing the referential structure of the sign, or, for that matter, positing an alternative representational logic that challenges masculinists reading of feminine corporeality."[800] Thus, if the signification and citationality of the body is at the centre of Butler's theory, Mahmood is more interested in the work the body performs: in her analysis, the body is a '*medium for, not a sign of.*' "In this view, the specific gestures, styles, and formal expressions that characterize one's relationship to a moral code are not a contingent but a necessary means to understanding the kind of relationship that is established between the self and structures of social authority, and between what one is, what one wants, and what kind of work one performs on oneself in order to realize a particular modality of being and personhood."[801]

For instance, despite a wider consensus between Muslims about the importance of the Islamic virtue of 'modesty', there is no consensus on how this virtue should be lived, performed, and/or experienced and whether it requires the donning of the veil. For most of the piety movement's women, the veil not only expresses the value of modesty, but it is also the means *through* which this value is acquired.[802] Thus, what is at stake is not the capacity of women to subvert or re-enact the norm of modesty, but rather the relationship between the body, the norm, and how the body inhabits norms in different contexts.

---

[798] Judith Butler, *Excitable Speech : A Politics of the Performative* (Routledge, 1997) 155.
[799] Mahmood, *Politics of Piety* (n 18) 29.
[800] *ibid*, 166.
[801] *ibid,* 120.
[802] *ibid*, 23.

Not surprisingly, both Islamists and secular state-fetishists have found in the piety movement a bitter enemy: the authority those women follow is grounded in sources which elude the logic of singular state sovereignty. In fact, although many liberal feminists see those subjects in search of piety as being outside the 'modern-civilized' 'first world' trajectory, what seems to unite women of different social classes of this movement is the open conflict with several structures of (patriarchal) authority such as Islamic orthodoxy, liberal or nationalist discourse, family relations, state institutions, etc.[803] In fact, their activities and their interpretation of Islamic precepts have deeply challenged nationalist as well as Islamist movements because of the role that the body acquires within the nationalist imaginary, be it secular or Islamist/secular. Women of the piety movement are quite critical towards nationalist-identitarian interpretations of religiosity, understood as an abstract system of beliefs without any connection to the way in which those beliefs are lived, performed, and experienced: based on their point of view, this understanding of the body treats performative acts primarily as a 'sign of' the self rather than as a 'means to' its formation.[804]

Mahmood's work discloses how women manoeuvre their agency within different frameworks of power and how specific body performances can be understood in non-liberal terms: agency comes from "within sematic and institutional networks that define and make possible particular ways of relating to people, things, and one self:"[805] in this way, she operates a shift from a centred human subject to its 'condition of possibility' *within* specific discourses which, in turn, determine those conditions.

This notion presupposes that there does not exist a homogeneous idea of personhood, but that different subjectivities cohabit in a specific pluralistic cultural and historical space and that each of those configurations of personhood is the product of different discourses. Mahmood describes how women of the piety movement have a completely different understanding about ritual obligations and the role of the body in forming the 'moral-subject'. These differences within an (apparently) united movement challenge not only the western monolithic idea of individual freedom and agency, but they also help to understand how different discourses can form different subjectivities and that those plural subjectivities often escape from the liberal logic of freedom and agency of

[803] *ibid*, 15.
[804] *ibid*, 166.
[805] Asad, *Formations of the Secular* (n 20) 78.

the (homogeneous) fixed and monolithic Christian/secular law's subject. This is why 'Burqa Avenger' is such an interesting character: in her plurality of performative acts, she escapes the logic of the singular state sovereignty which needs to sustain a fixed and monolithic subject. Jiya wears the *burqa* when she wants and/or when she needs. In this way, she not only embodies a different concept of freedom and agency but also, more importantly, she represents an 'intimacy', what Agamben calls a *use of the body* or as a *use of the self* which is defined as "a relation to an inappropriable and un-representable zone of un-known".[806] By escaping from the western semiotic ideology which presupposes that the primary function of images is to communicate fixed meanings, 'Burqa Avenger' avoids being re-scribed as a monolithic subject of the nation-state and she manoeuvres her agency through the different *use of her body* within a community and a plurality of normative choices. This plurality of normative choices is embedded in the very structure of classical Islamic law, and it is part of the *post-madhab* character of Islam which reveals a certain flexibility, as witnessed by Muslim scholars as well as illiterate Muslims, toward different Islamic schools and Islamic sources.[807] In fact,

"scholarly arguments are not simply frozen bodies of texts, but live through the discursive practices of both lettered and unlettered Muslims whose familiarity with these arguments is grounded in a variety of sources – not all of which are controlled by scholars. Moreover, scholarly arguments are often transformed by the context in which they are evoked, a process that imparts to the arguments new meanings, usages, and violence not intended by the original author."[808]

The essence of classic Islamic jurisprudence, based on the comprehension of the past for a re-formulation of practices in the present, creates a link between the past and the present, practitioners and scholars, and between theory and how, praxiologically, norms are lived, experienced, performed and inhabited.[809] The donning of the veil is a good example of the plurality of sources and discourses in which women manoeuvre their

---

[806] Giorgio Agamben, *L'Uso Dei Corpi* (Neri Pozza, 2014) 128 (*my translation).*
[807] Mahmood, *Politics of Piety* (n 18) 81–9.
[808] *ibid,* 96–7. Similarly, as Rappaport argues, cultural order is not static; rather, it continuously changes through the performative repetition of fixed rituals by individuals who, by giving a different significance to it, render the cultural order 'fluent'. For Rappaport the 'ultimate postulate' is nothing else but signifier without signified. These signifiers are transmitted through 'fixed ritual practices' to which the individual gives different significance based on his/her personal concerns. See Roy A Rappaport (n 44) 27-93.
[809] Asad, 'The Idea of an Anthropology of Islam' (n 27) 14.

agency. In fact, as I showed in the first Chapter, veiling is not a compulsory practice in Islam and many Muslim women do not veil at all. Since in classical Islamic jurisprudence there does not exist a centralized authority that regulates and/or punishes infractions, and due to the lack of consensus over many matters, including the practice of veiling, juridical matters become interpretable by the individual. As Asad argues, the engagement of ordinary Muslims with Islamic founding texts depends on the context through which those texts acquire a specific meaning.[810] In this way, Asad operates a shift from a western understanding of a fixed and unchangeable *sharia* law to an interpretable religious text in which meanings are established based on contextual power relations. In other words, the interpretation of a particular norm depends not only on classical Islamic sources but also, more importantly, on the practical context in which these norms are performed, inhabited, and experienced. In this sense, the veil can also be seen as a 'possibility of action', a tool for women to negotiate certain norms and/or inhabit pluralistic non-liberal patriarchal traditions. The full-face-veil worn by 'Burqa Avenger', for instance, is not only a tool through which she achieves her goals, but it is also an element that empowers her by giving her an exceptional possibility of agency, exactly like the mask worn by 'western super-heroes'. It is exactly her 'plurality' of performative acts that gives her the freedom to perform and manoeuvre her agency within particular discourses.

In some way, the life of Jiya/'Burqa Avenger' is not much different from that of many Muslim women who manoeuvre their agency within non-liberal plural discourses. Abu-Lughod gives the example of a woman who decided not to veil because she considered herself virtuous, or another who, after marrying an older man, decided not to veil for anyone younger and subsequently she stated that everybody is younger.[811] In this sense, "veiling is both voluntary and situational […] an act undertaken by women to express their virtue in encounters with particular categories of men."[812] Many Bedouin women, for instance, cover their faces with a black head cloth in front of older men: this is understood as a voluntary act that expresses a sense of morality and honour towards their family. Thus, by covering their faces in front of certain categories of men, Bedouin women not only decide when and for whom to veil, but they also express their

[810] *Ibid*; Talal Asad, *Genealogies of Religion* (n 449); *Formations of the Secular* (n 20).
[811] Lila Abu-Lughod, *Veiled Sentiments: Updated with a New Preface: Honor and Poetry in a Bedouin Society* (2nd Revised edition, University of California Press, 2000) 164.
[812] *ibid,* 169.

individual ethic as well as a sense of honour towards their families. By contrast, the veil worn by Egyptian women in the mid-1970s can be read both as a mark of piety and as a sign of being an educated and sophisticated urban woman,[813] while Boddy's study of Sudanese women within *zar cult*[814] reveals how women use this cult as a kind of 'subordinate' discourse as well as "a feminine response to hegemonic praxis."[815] As Hirschmann observes, "these discursive challenges to customary practices illustrate women's power to exert some control over the conditions of their lives by redefining those practices and categories of meaning: women reconstruct their material realities through discursive intervention in customary practice."[816] Therefore, the donning of the veil should not be confused with lack of agency, but should be intended within particular discourses which form not only the subject but also its desires.[817]

This may be what is unsettling for western liberal feminists and leftists: that desire is not a universal fixed category and subjectivity is a fragile and ambiguous concept constituted through performativity of a lived and ever changing body of interpretable norms. Those norms are not only subverted or re-enacted but also lived, experienced, and inhabited. This is not to say that all Muslim women wear the veil to create a pious self, nor that they all intend their bodies as a tool to reach specific ethical achievements: as I pointed out, even if a specific group of women wears the veil for a specific reason, it is impossible to generalize because the choice to veil is very personal. Women can decide to veil, or not to veil, in order to gain social esteem or to feel free from harassment. The veil worn by urban women, for instance, has a different meaning from the veil worn by peasants working in the fields in Bukittinggi, Sumatra. Moreover, in certain neighbourhoods of big cities in the Middle East, prostitutes wear the veil to hide their 'illicit' profession: in this sense, the veil is a sign of dishonour. Since the practice of veiling takes different colours, shapes and forms, it also implies different meanings and normative choices within different cultural and historical contexts.[818]

---

[813] Arlene Elowe Macleod, *Accommodating Protest : Working Women, the New Veiling, and Change in Cairo* (Columbia University Press, 1991).
[814] The zar cult is a curative tradition that mixed Islamic idiom and spiritualism, mainly practiced by women. Janice Boddy, *Wombs and Alien Spirits: Women, Men, and the Zar Cult in Northern Sudan* (Univ of Wisconsin Press, 1989).
[815] *ibid*, 7.
[816] Hirschmann *The Subject of Liberty* (n 755) 186.
[817] Lila Abu-Lughod, 'Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others' (2002) 104 American anthropologist 783, 786.
[818] Davary 'Miss Elsa and the Veil' (n 207) 59.

The attempt by western scholars and judges to see the practice of veiling as a fixed and unchangeable religious/cultural symbol, a '*sign of',* not only does not take into consideration the plurality of meanings and practices of veiling and the historical and cultural context within which certain practices, wills and desires develop, but it also imposes a specific semiotic ideology on different cultures.

In 'Christian Moderns', Keane[819] reveals how the western semiotic distinction between signifier and signified, object and subject, form and essence, mirrors Calvinist and Protestant concerns to institute a separation between the transcendent world and the reality of this world. This distinction was imposed on other cultures by western missionaries and has become embedded in the secular idea of what it means to be modern and how images work in the liberal/secular world. As, in western semiotic ideology, clothes are conceived as images,[820] they are intended as a vehicle for meanings: they signify structures behind what is represented, irrespective of the modality of the subject/object relation.[821] It is exactly this fixed reading of clothes that emerges in the European legal decisions where the practice of veiling comes to be defined as a fixed 'religious symbol' incompatible with the principle of secularism and gender equality. Those decisions reveal a very secular understanding of religion and religious practices: one in which the (abstract) individual can choose to separate its personal beliefs from its external being. As I have argued, secularism conceives religion as simple belief and therefore as a matter of personal choice. In contrast, Mahmood's analysis reveals that religious practices can also be an integral part of the individual. In fact, although many western commentators see religion as 'alien' to liberal/secular thought, the semiotic reading that has been applied by western judges in cases related to the Muslim headscarf implies a specific liberal/secular understanding of religion. As Vakulenko points out, the understanding of veiling as a mere 'religious symbol', as expressed in the European legal decisions over the female headscarf, does not only ignore the social, political, psychological and legal dimensions of the phenomenon, it also reinforces a strict division of the private/public spheres.[822] The secular

[819] Webb Keane, *Christian Moderns: Freedom and Fetish in the Mission Encounter* (University of California Press, 2007).
[820] Goodrich, 'Signs Taken for Wonders' (n 8).
[821] Barthes (n 150).
[822] See Anastasia Vakulenko, *Islamic Veiling in Legal Discourse* (Routledge, 2012); Anastasia Vakulenko, 'Islamic Headscarves' and the European Convention On Human Rights: An Intersectional Perspective' (2007) 16 Social & Legal Studies 183; Anastasia Vakulenko, 'Islamic

understanding of religion, then, depends upon a prior normative understanding of what religion is and how the secular law's subject should experience its religious life: this understanding is today embedded in western positive law.

Along with a specific concept of religion, European judges have disclosed a very specific idea of 'womanhood' and what constitutes the (female) body in the modern secular world where hair is visible: in fact, in liberal/secular thought, freedom is intended as the mere possibility of the subject to choose autonomously, based on her own desires. In liberal theory, individual autonomy defines the 'human' and emerges through the distinction between positive and negative freedom which has deeply informed liberal and feminist analyses of women's freedom and women's rights.[823] Negative freedom is defined by the absence of external obstacles, while positive freedom is understood as the capacity to realize an autonomous will: thus, in western-liberal thought, autonomy "is a procedural principle, and not an ontological or substantive feature of the subject, it delimits the necessary condition for the enactment of the ethics of freedom."[824]

Based on Berlin, negative freedom is defined as something external, alien, 'other' to the self; it means "not being interfered with by others. The wider the area of non-interference, the wider my freedom."[825] Negative freedom draws a clear distinction between 'subject' and 'object', the 'self' and what is 'other', 'external' to the subject while, at the same time, it relies on a very strict notion of individual responsibility.[826] Thus, freedom is understood as something 'measurable' because 'the less external

---

Dress in Human Rights Jurisprudence: A Critique of Current Trends' [2007] Human Rights Law Review 24.

[823] From 'natural freedom', associated with the emergence of 'natural rights', to a new concept of freedom linked to a specific concept of humanity, as emerges in human rights law, ideas such as self-determination, autonomous will and (abstract) 'equality' come to define Christian/secular/liberal culture and polity: the social contract, for instance, is based on a specific (individualist) western concept of freedom, choice, and consent. The spread of the western concept of freedom, conceptualized in individualistic terms, and strictly related to the idea of women's rights, was a focal point in the 1995 Beijing UN conference on women, CEDAW, and the 1985 Nairobi Forward-Looking Strategies for the Advancement of women. It is clear that, if on the one hand such language supports a universalistic idea of 'natural freedom' intrinsically related to the concept of 'humanity', then on the other, echoing Esmeir's work on the stop of temporality operated by colonizers, it confirms the hegemonic power of the west. Nancy J Hirschmann, 'Eastern Veiling, Western Freedom?' (1997) 59 The Review of Politics 461, 461–2; John Stuart Mill, *On Liberty : And Other Essays* (Oxford University Press, 1998) 472.

[824] Mahmood, *Politics of Piety* (n 18) 11.

[825] Isaiah Berlin, *Four essays on Liberty* (Oxford University Press, 1971) 123.

[826] Charles Taylor, 'What's Wrong with Negative Liberty?' in A Rayan (ed) *The idea of Freedom: Essay in Honor of Isaiah Berlin* (Oxford University Press, 1979) 176.

constraints we have, the more we are supposed to be free': hence, in liberal thought, freedom is an 'objective', and not a 'subjective' principle. Despite differences between western philosophers on the significance of 'choice' and 'constraint', negative freedom's individualism is revealed in the distinction between the 'self' and the 'other', while constraints "contain an inherently conflictual character, because individuals' desires and interests inevitably collide with them."[827] However, as I shall point out, it is difficult to apply this distinction to analyse how people, in the 'East' as well as in the 'West', live and experience life and to think that this opposition between the individual and the society is universally valid.

On the contrary, positive freedom focuses on the analysis of political and social conditions which emerge as limits to individual freedom, and tries to find positive actions in order to overcome those constraints. In positive liberty theories, the subject is a rational 'self-master' who knows exactly what her own true desires are: thus, positive freedom presupposes an individual as totally detached from the external context (understood as a 'constraint' to the individual's desires).[828] The problem with this approach, however, is that individual 'will' or 'desires' come to be determined by 'others', the state and its law: "since the laws embody the true will, then by forcing me to obey the law the state is only 'forcing me to be free' that is, to follow my true will, whether I know it or not."[829] The western idea of (positive) freedom is embedded in modern western positive law and this is revealed by the fact that many European states feel the need to legislate on women's bodies. In the context of western legal decisions over the veil, the main concern of the judges was to 'rescue' Muslim women from religious fundamentalist groups, whether they wanted it or not: by implying that they knew the true 'will' and 'desire' of (Muslim) women (which, surely, is not 'wearing a veil'), European judges acted as 'rescuers' for those women, supposedly unable to make a choice based on their true interests and desires. The western project of Muslim women's 'salvation' from and/or to something, not only implies a certain violence entailed in the process, but it also reinforces a sense of the superiority of western liberal thought.[830] This indicates that liberal concepts of women's freedom and agency are not

[827] Hirschmann *The Subject of Liberty* (n 755) 5.
[828] Taylor (n 826) 185.
[829] Hirschmann (n 755) 8.
[830] Abu-Lughod (n 817) 789.

just part of a philosophical tradition, but have become a normative feature of the modern liberal/secular state.

The difficulties in the western approach to freedom are revealed in the complexity of drawing a clear line between an internal self, with its own particular desires, and the external world, in which the subject exists: "without such specificity of context, the individual too is unspecified, an abstraction."[831] As I have argued, the ontological idea behind the modern legal subject is the very abstract notion of the individual: Hegel named it the 'hypothetical self of modernity' and pointed out that "as this person, I know myself to be free in myself. I can abstract from everything, since nothing confronts me save pure personality and free ego."[832] This (transcendent) and abstract form of subjectivity is possible only if the individual is free from all cultural and social constraints: to become an 'abstract individual', "we have to completely forget the relationships (e.g. ethical, juridical, love, etc.) we are used to thinking about."[833] Thus, the external world, traditions, sentiments etc. are seen as deformations of a natural individual who is (abstractly) free only once s/he is free from external oppressive structures of power.[834] This western/Christian/secular abstract idea of the subject has been particularly violent when imposed on other (plural) non-liberal cultures: in fact, from the first colonial encounter until today, colonial powers have always tried to 'rescue' Muslim women by un-veiling them.[835] Since the western/Christian/secular individual emerges as a mask, an abstraction, the western approach does not help to understand how will and desires are formed. If, as positive liberty scholars argue, we have conflicting internal desires and interests, then how can we understand our true will?

As argued, in order to understand how desires and interests come to be formed, it is essential to understand them within specific historical and cultural contexts which, in turn, form the subject, her choices, will, and desires: in fact, "in ordinary life the wish to do one thing rather than another is rooted in dominant conventions, in loyalties and habits one has acquired over time, as well as in the anxieties and pleasures experienced

---

[831] Hirschmann (n 755) 10.
[832] Georg Wilhelm Friedrich Hegel, *The Philosophy of History* (Prometheus Books, 1991) 235.
[833] *ibid*.
[834] Reza Rahbari, 'Unveiling Muslim Women: A Trajectory of Post-Colonial Culture' (2000) 25 Dialectical anthropology 321, 328–9.
[835] Fanon, *The Wretched of the Earth* (n 551) 210–1; Frantz Fanon, *A Dying Colonialism* (Grove Press, 1967) 26–28.

in interaction with lovers and friends, with relatives, teachers, and other authority figures."[836] If, echoing Foucault,[837] the subject emerges as the product of a particular form of social formation and as such is not only 'constrained' but also formed by it, then we need to interrogate the liberal assumption of a 'rational-self-master' who knows exactly what his/her true desires are. In fact, if the 'choosing subject' exists within a specific discourse, then "the ideal of the naturalized and unified subject utilized by most freedom theories is thus deeply problematic and simplistically overdrawn"[838] because our desires and interests come to be shaped by what the general discourse renders 'available'.[839]

Abu-Lughod's study of Bedouin women is an interesting example of how the concept of freedom can be understood differently in non-liberal traditions.[840] She argues that for Bedouin women "autonomy or freedom is the standard by which status is measured and social hierarchy determined […] Equality is nothing other than equality of autonomy –that is, equality of freedom from domination by or dependence on others."[841] Hence, freedom is intended as "the strength to stand alone and freedom from domination": this "is won through tough assertiveness, fearlessness, pride [and] through self-control [over] the passions."[842] Thus, negative freedom, as exposed by western philosophers such as Hobbes and Locke, and positive freedom, as defined by Hegel and Rousseau, are an integral part of Bedouin society. However, as Hirschmann and Abu-Lughod reveal, despite an apparent similarity in the understanding of the concept of freedom, there is still a consistent difference. Although individual autonomy is an important feature within Bedouin tribes, the concept of honour remains central in the Bedouin culture.[843] For Bedouin, honour is strictly linked to the status of each tribe; it is associated with the capacity to "stand[s] alone and fear[s] nothing," for "fear of anyone or anything implies it has control over one,"[844] and is measured as both the capacity to secure authority and the free consent to obey. Hence, if on the one hand, the individual must be strong and

[836] Asad, 'French Secularism and the "Islamic Veil Affair"' (n 758) 99.
[837] Foucault, *The History of Sexuality* (n 599).
[838] Hirschmann (n 755) 13.
[839] Elster calls it 'adaptive preference'. See Jon Elster, *Sour Grapes : Studies in the Subversion of Rationality* (Cambridge University Press, 1983).
[840] Abu-Lughod (n 811).
[841] *ibid*, 79.
[842] *ibid*, 87.
[843] *ibid*, 79.
[844] *ibid,* 88.

independent, then on the other, it is linked to tribal hierarchical structures, due the strict link between honour, autonomy and tribal status.

According to Abu-Lughod's study,[845] in Bedouin society, a practice such as veiling, understood as a symbol of women's oppression by western judges, is considered a source of honour; it attests to a certain independence from men because it "serves as a statement that the wearer is intent on preserving herself as separate from others, emotionally and psychologically as well as physically; it is a tangible marker of separateness and independence."[846] If, for many women of the piety movement the veil is a tool to achieve specific abilities and potentialities, for the Bedouin women Abu-Lughod worked with, the veil indicates esteem and autonomy because it 'covers' not only the body but also "the natural needs and passions."[847] For them, challenging familiar hierarchy would be considered a dishonour and, thereby, a mark of un-freedom. Interestingly, although Bedouin women condemn those (men and women) who violate tribal norms, they seem to be delighted by people, especially women, who show a strong will: those women do not always follow tribal/familiar norms but their authority is nevertheless recognized by the community.[848] It is worth noting that the link between honour and modesty drawn by Bedouin society "serves to rationalize social inequality and the control some have over the lives of others […] if honor derives from virtues associated with autonomy, then there are many, most notably women, who because of their physical, social, and economic dependence are handicapped in their efforts to realize these ideals."[849] It can, though, be argued that this is what Foucault calls social control, which is based on the colonization of desires:[850] this kind of colonization "not only coerces individuals, but redefines such coercion as freedom and choice thereby denying individuals the ability to see the control they are subject to, and making them the instruments of their own oppression."[851] If it's true that, in the 'East' as well as in the 'West', the subject, its desires and, consequently, its choices are the outcome of specific discourses, then it would be problematic to state that women's agency upholds values that oppress them as the ability to challenge cultural norms is

[845] *ibid*.
[846] Hirschmann 'Eastern veiling, Western freedom?' (n 823) 474.
[847] Abu-Lughod (n 811) 115.
[848] Hirschmann 'Eastern Veiling, Western Freedom?' (n 823) 473.
[849] Abu-Lughod (n 811) 33.
[850] Foucault, *Discipline and Punish* (n 279).
[851] Hirschmann 'Eastern veiling, Western freedom?' (n 823) 478.

troubling also for men: the difference, in the case, is that it is 'men' (intended as a group), in the 'West' as well as in the 'East', who set the parameters of the general discourse by enforcing cultural norms which give them more possibilities of agency than women.

My analysis reveals that if, on the one hand, women manoeuvre their agency within structures of power, often re-enacting patriarchal norms, then on the other, those norms gave them the framework within which they negotiate their choices: in essence, they manoeuvre their agencies through intervention in customary practices despite those practices being affected by specific power relations. As Hirschmann points out,

"Women who utilize the veil to express agency subvert the practice by turning its norms against itself, but also reinforce its underlying power structure; they may 'negotiate' patriarchal restrictions, but they also feed into and support them. Hence the lines between agency, choice, and resistance on the one hand, and oppression, domination, and coercion on the other, become blurred: what looks like oppression may in fact be resistance, and what looks like free choice and agency may in fact be oppression. Indeed, it is often the case that resistance and agency are simultaneously an expression or illustration of oppression."[852]

Thus, if on the one hand, every human is confronted with choices, then on the other, those choices are formed by the discourse people live in because it is the "general ethical dimension that not only gives sense to the self in relation to others but also forms a notion of freedom that can only unfold itself in a specific cultural narrative. A cultural narrative does not imply a restriction against which a will would have to be formulated; rather, it defines a person and his or her will as a bent toward the world."[853] This reveals how the question of women's freedom emerges as extremely ambiguous in relation to specific discourses which, in turn, form specific subjectivities.

These studies disclose not only the well-known plurality of the Muslim world, as well as different meanings of the practice of veiling, but they also reveal the possibility to think about freedom and agency in ways that are different from liberal/Christian/secular thought. On the one hand, those women share certain western concepts such as control over the self, the absence of external constraints and the importance of the individual,

[852] *ibid*, 486.
[853] Anjum Alvi, 'Concealment and Revealment' (2013) 54 Current Anthropology 177, 182.

while on the other, autonomy is deeply influenced by concepts of honour, membership and obedience to sources of authorit(ies). Understanding the context within which some choices are made possible, helps to understand concepts of freedom and agency as located *within* a community, structures of power, and relationships.[854] For those women, the veil is not the symbol of a chauvinist religious/fundamentalist political movement that obliges them to cover their head, as implied by European judges, but a tool through which they negotiate their preferences: the veil helps them to be located within a community (kinship, family, religious, national) because it is *through* their agency *within* their community that they achieve specific concepts of freedom, agency and ethics.

Those women, unlike the western citizen who is detached from her/his community and so is alone in front of the state, manoeuvre their lives *within* a community in which other values of freedom and autonomy emerge.[855] In fact, as I have pointed out, at the heart of eastern concepts of freedom is not the self-reliant, self-controlled, lonely western citizen, but an individual who is part of a community which, in turn, deeply influences concepts of self, freedom and agency. In other words, when analysing concepts of women's freedom and agency, it is essential to understand the local context in which certain bodily acts are performed and certain desires formed.

Therefore, the analysis of the practice of veiling should take into consideration "not just […] whether the choosing subject can act on her choice but how that subject and her choices are constructed in the first place."[856] In this sense, when studying the practice of veiling, the liberal opposition between those who defend the 'free will' of Muslim women and those who see veiling as a backward cultural imposition is a fake one. *The paradox of liberalism lay exactly in the formulation of choice as measurement of freedom* (the more choices I have, the more I am supposed to be free).[857] In fact, as I have argued, the western universalist model of "human action presupposes […] a natural disjuncture between a 'person's true desire' and those that are socially prescribed…The politics that ensues from this disjuncture aim to identify moment and places where conventional norms impede the realization of an individual's real desires, or at least obfuscate the distinction between what is truly one's own and what is socially

[854] Hirschmann 'Easter veiling, Western freedom?' (n 823) 479.
[855] Hirschmann *The Subject of Liberty* (n 755) 189–90.
[856] *ibid,* 46–7.
[857] Hirschmann 'Eastern veiling, western freedom?' (n 823).

required."[858] In contrast, the studies I have taken into consideration hypothesise a possible separation between self-realization and autonomous will and between agency and discursive infrastructures. In other words, the liberal distinction between a subject's own desires and social conventions cannot be easily presumed in Muslim majority societies since "socially prescribed forms of behaviour constitute the conditions for the emergence of the self as such and are integral to its realization."[859] Clearly, a study of veiling can't be mapped from the western binary distinction between more and fewer choices, as the way in which we experience our daily life is far more complicated.

If the freedom of the western individual is based on her ability to choose, then Muslim women, who choose to wear the veil as autonomous individuals, should be free to dress as they please. However, paradoxically, the same law that is founded on the concept of freedom and individual autonomy is also the one that limits women's agency by normatively regulating their attire. As I have argued, the liberal concept of 'autonomous individual' comes out as an 'imaginary', because individual actions and desires come to be 'universalized', 'naturalized' and properly measured and regulated by the positive action of the law. In fact, European legal decisions over the practice of veiling reveal a specific concept of women's freedom, that of the 'liberated' western woman, and show that the immanent and multi-layered pluralistic practice of veiling escapes western eyes. Thus, what the practice of veiling really unfolds is the blindness of our own practices, including dressing: "social constructivism [should remind] us once again of the inevitable situatedness of meaning in context, and the contractedness of desire, choice, and subjectivity."[860] In fact, the concept of 'situatedness' implies that all practices, including veiling, shall be understood within specific structures of power;[861] in the case, the power of western discourse lay exactly in the homogenised representation of covering practices which allowed the continuation of an epistemic violence against Muslim women.[862] By defining veiling as a 'backward' practice, not only do European judges violate women's own understanding of their own practices, but they also reduce the 'woman question' to a single piece of cloth which takes different forms, lengths,

[858] Mahmood, *Politics of Piety* (n 18) 149.
[859] *ibid*.
[860] Hirschmann *The Subject of Liberty* (n 755) 174.
[861] Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) Feminist studies 575, 575–599.
[862] Mary E Husain and Kevin J Ayotte, 'Securing Afghan Women: Neocolonialism, Epistemic Violence, and the Rhetoric of the Veil' (2005) 17 NWSA journal 112, 112–133.

colours, and meanings in different cultural and historical contexts. In fact, in the legal decisions over the practice of veiling, Muslim women are a unified category whose oppression is simply a variation of a basic theme.[863] However, "to assume that the mere practice of veiling women in a number of Muslim countries indicates the universal oppression of women through sexual segregation not only is analytically reductive, but also proves quite useless when it comes to the elaboration of oppositional political strategy".[864]

Failing to recognize that all humans are 'multiple-layered' and that the practice of veiling represents a plurality of norms, ethics and bodily practices reduces the subject to a singular and fixed identity. It is exactly for this reason that the veil is seen as a 'clash of civilizations': if we reduce the human to a singular and fixed identity, then this identity can be *measurable* only through allegiances to a specific power which, in turn, forms identities, subjectivities and desires. It is in this way that the plural subjectivities and identities of Muslim women have been reduced to a static and monolithic law's subject. This 'reductionism' is not only theoretical, but is part of a wider neo-colonial and paternalistic political context in which the juridical regulation of women's body becomes a useful tool to control the public sphere.[865] But the Muslim women's body has also been a useful tool to justify western imperialist warfare in Afghanistan and Iraq, as well as Islamists' struggles for the establishment of a territorial nation-state under a singular and fixed *sharia* law: "arguably, in neither case do women take part in constructing the framework within which decisions about dress take place, but rather, are forced to respond in conflicting directions to frameworks constructed by men."[866] The mandatory de-veiling operated by the Shah in pre-revolutionary Iran, for instance, was no less oppressive than the compulsory re-veiling ordered by the Islamic revolutionaries in the aftermath of the 1979 Iranian revolution:[867] both (patriarchal) regimes aim at legally regulating and controlling women's attire by inscribing women's bodies as monolithic symbols of cultural belonging and not as subjects of history. In this sense, "the effort to unveil forcefully Muslim women who have chosen Islamic attire would be akin to the

[863] Hirschmann 'Eastern veiling, western freedom?' (n 823) 464.
[864] Mohanty (n 29) 67.
[865] Husain and Ayotte (n 862) 117.
[866] Farida Shaheed, 'Controlled or Autonomous: Identity and the Experience of the Network, Women Living under Muslim Laws' (1994) Signs 997, 1003.
[867] See Houchang E Chehabi, 'Staging the Emperor's New Clothes: Dress Codes and Nation-Building under Reza Shah' (1993) 26 Iranian Studies 209, 209–31; Hoodfar (n 736) 10.

intolerance of those who attempt to mask them by imposing the veil."[868] Therefore, it is not the veil that renders women free or unfree, but the means that patriarchy allocates to a specific article of clothing in order to control and limit women's agency. By un-veiling Muslim women, the law re-veiled them with the veil, the mask, of the unified western citizen and, by so doing, defined not only its subject, but also, more importantly, the image that the subject has of itself: only in this way the power of the law enables the Christian/secular/liberal subject to become part of a 'universal humanity'.

Moreover, are we really sure that, by freeing their heads from a piece of cloth, we can free Muslim women? Can we say that, once freed and included within the pale of positive/universalist/western 'humane' law, those women will want to be like the 'liberated' western women? Or maybe they will want something else?[869]

As Hirschmann argues, "it is less whether western freedom is 'good' or 'bad' than who determines what is 'good' and 'bad' about the West and East."[870] In this sense, "the connections between 'East' and 'West' are profound, not only in the similarity of how their discourses work to express and materialize gendered power, but in how different cultural contexts reveal things about others that are not visible from within."[871] Since veiling challenges "western assumptions about what women should choose, it illustrates how power operates in all contexts."[872] It shows how power operates in Muslim majority societies but also in a western context in which the 'colonization' of our desires and will occlude the possibility to think about other lives and other ways of understanding agency, freedom, autonomy and subject formation. These studies highlight that "discourse, language, and systems of knowledge, [provide] us with the sense of who we are, and hence with our powers and freedoms as much as our limitations and restrictions."[873] Maybe we should recognize that the western/liberal world is not necessarily the best one or the only one, and that the liberal-secular system is not the only solution to multicultural/multi-ethnic societies, as different people might

[868] Bahar Davary, 'A Matter of Veil: An Islamic Response'', in Regina Wentzel Wolfe and Christine E Gudorf (eds) *Ethics and World Religion: Cross-Cultural Case Studies* (Orbis books, 1999) 158.
[869] Wendy Brown, 'Do Humans Want Freedom? Do We Want Humans to Be Free?' in Giorgio Agamben and William McCuaig (eds) *Democracy in what state?* (Columbia University Press, 2010) 56.
[870] Hirschmann, *The Subject of Liberty* (n 755) 181.
[871] *ibid*, 194–5.
[872] *ibid*, 193.
[873] *ibid*, 198.

simply want different things.[874] Paradoxically, it is exactly this category of women, the ones who choose something incomprehensible in the eyes of the 'western liberated woman', who challenge the western universalistic category of understanding of freedom and agency. After all, can we really say that veiling is more or less oppressive than the Wonder Bra or the miniskirt?

Remarkably, while historically many articles of clothing have simply disappeared from the fashion landscape, the veil has persisted over the years and is still an obsession for many: "It may be that since the west triggered the symbolic importance of the veil through its imperialism, it retains a certain dominance over the terms of the discourse."[875] Thus, it is not through the concept of freedom and autonomy that we can understand the gender dimension of the '*hijab* obsession' but through the analysis of its symbology.

[874] Abu-Lughod (n 811) 788.
[875] Hirschmann *The Subject of Liberty* (n 755) 181.

4.2 The Symbology of 'otherness'

In an interview published in an online newspaper in 2015, a journalist asked Talal Asad why, in a previous article, he had written that 'Muslims as Muslims cannot be represented in Europe'.[876] Behind the irony lies a truth. As the relationship with the Muslim world is often understood in terms of a 'clash of civilizations', Muslim women's body and their plurality of performative acts become a static and monolithic symbol of a chauvinist society disclosing, in this way, a problem of representation of the Muslim world's wide plurality.

This is clear when reading the '*hijab* cases' in which the veil has been defined as a monolithic 'religious symbol incompatible with *democratic values*'.[877] As I have shown, European judges see in the veil the disclosure of something intrinsically anti-democratic and anti-feminist, *vis-à-vis* the 'liberated' Christian/secular/western woman. This interpretation allowed the emergence of a fundamental dichotomy between Christian and Islamic symbols in the public sphere: in fact, on the one hand, Christian (religious) symbols are interpreted in cultural terms as a secularized Christianity which carries democratic and pluralistic values, while on the other, Islamic symbols are interpreted as 'religious symbols' or as the expression of a backward culture incompatible with western democracy.[878] Thus, what emerges from the legal decisions over the practice of veiling is not the plurality of different normative choices expressed in the different uses of the veil and typical of the Muslim world, but the symbol of something static, monolithic, which has to be removed from the public sphere in order to 'save' democratic values.

The definition of veiling as a 'symbol' of something intrinsically 'other' is an important feature in the analysis of the '*hijab* cases'. The power of symbols is well-known in critical legal theory; through symbols and images, it is possible to understand what cannot be said directly. As Lacan argues, an idol "gives pleasure to other gods",[879] as images remind us of ancestral myths still unattached to the symbols of institutional prose.[880]

---

[876] Hasan Azad, 'Do Muslims Belong in the West? An Interview with Talal Asad' (*Jadaliyy,a* 2015) <http://www.jadaliyya.com/pages/index/20768/do-muslims-belong-in-the-west-an-interview-with-ta> accessed 5 October 2016.
[877] See *Sahin v Turkey (n 17); Dahlab v Switzerland (n 17); SAS v France (n 17).*
[878] Susanna Mancini 'The Tempting of Europe' (n 21).
[879] Jacques Lacan, *Four Fundamental Concepts of Psychoanalysis* (Pellican, 1978) 113.
[880] Goodrich, *Oedipus Lex* (n 19) 242.

Since symbols have the power to create an illusion of presence and attachment to what is 'un-representable', then images are the point of fracture which defines the boundaries between the inside and outside of the law, as the 'veiled' woman, through her clothes, represents the boundaries of citizenship. In fact, as clothes have been regarded as a 'symbol', a 'visible image' of a different 'other', they have always been normatively regulated by the law through a sovereign act: garments operate a visible differentiation, a boundary, a clear-cut dividing line, between citizens and foreigners and between the different classes of citizens.[881] Thus, it is through symbols and metaphors that it is possible to conceptualize nationality, geography and gender, as it is through the visible that the public sphere comes to be shaped. But images, symbols and metaphors do not only 'differentiate' and shape the public space, they also allow people to give a meaning free from any context: they "invite one to do a reading of them independently of people's stated intentions and commitments. Indeed, the reading becomes a way of retrospectively constituting 'real desires' [and] facilitates the attempt to synthesize the psychological and juridical concepts of the liberal subject."[882] As I have argued, the distinction between object and subject, signifier and signified, form and substance, is in reality an integral part of the Protestant semiotic ideology which is now embedded in the secular idea of what it means to be 'modern'. Drawing from Keane,[883] who finds that Saussure's system of language based on the distinction between signifier and signified mirrors Calvinist and Protestant concerns to institute a distinction between the transcendent world and the reality of this world, Mahmood points out that "to confuse one with the other is to commit a category mistake and fail to realize that signs and symbols are only arbitrarily linked to the abstractions that humans have come to revere and regard as sacred".[884] It is exactly the (western) implied duality between signifier and signified that is at stake in the regulation of veiling, in which 'the veil' has been defined as a fixed 'religious symbol incompatible with secular values of gender equality'. As Asad argues,

---

[881] As Goodrich points out, "Legal concern with dress was a concern both with the indigenous, with a vernacular civility free of the stranger and with all other cults that were suggestive of traditions and forces extrinsic to the native soil. It was also and more specifically a concern with the internal ordering of the realm and specifically the coding of status in dress." *ibid*, 87–8; Hunt (n 7).

[882] Asad, 'French Secularism and the "Islamic Veil Affair"' (n 758) 104.

[883] Keane (n 819).

[884] Saba Mahmood 'Religious Reason and Secular Affect' (n 497) 73.

"The process of signification is both rational and clear. It is assumed that a given sign signifies something that is clearly 'religious'. What is set aside in this assumption, however, is the entire realm of ongoing discourses and practices that provide authoritative meanings. The precision and fixity accorded to the relationship of signification is always an arbitrary act and often a spurious one where embodied language is concerned. What is signified by the headscarf is not some historical reality (the evolving Islamic tradition) but another sign (the eternally fixed 'Islamic religion') which, despite its overflowing character, is used to give the 'Islamic veil' a stable meaning."[885]

In other words, if the power of symbols lies in their capacity to evoke a monolithic and static belonging, then the veil has the power to evoke the 'Islamic veil' so, "more than an image, the veil is an imaginary – a shrouded difference waiting to be unveiled, to be brought into the light of reason, and made indifferent."[886] In essence, in western/Christian/secular imaginary, the veil "can only symbolize the world of authority and tradition that already stands in a false relation to history and requisite progress: its proper meaning is decided by a prior verdict, namely, that this tradition (often glossed as literalist) must be destroyed in order for reason, culture, and the free spirit to grasp the true meaning of religion. Any attempt to resist such a judgement cannot but take in the terms of its own demise."[887] By contrast, although the veil as a cultural/religious symbol has been "constructed by and through various and conflicting discourses surrounding ideas of nation, culture, personhood, and power as well as gender,"[888] what I have tried to show is that the veiled woman, intended as a 'cultural/religious other', should be distinguished from the 'veiled' woman as a subject of culture and history within historical heterogeneous non-liberal discourses.[889] As Mahmood's analysis points out, Muslim women who wear the veil as an act of piety do not want to communicate something, rather, for them, the veil is a tool to achieve a specific selfhood.

In this sense, the construction of a stereotyped veiled woman as a signifier of a dangerous 'other' operated by western judges inevitably eludes the gender dimension

[885] Asad, 'French Secularism and the "Islamic Veil Affair"' (n 758) 97.
[886] *ibid*, 100.
[887] Mahmood, 'Secularism, Hermeneutics, and Empire' (n 691) 343–44.
[888] Hirschmann 'Eastern veiling, western freedom?' (n 823) 177.
[889] Chandra Talpade Mohanty, *Feminism without Borders : Decolonizing Theory, Practicing Solidarity* (Duke University, 2003) 19.

of the problem, so not only does the 'veil' emerge as a 'fantasy', but also the (Muslim) 'woman' becomes an 'imaginary objectified body', a mere carrier of specific cultural values. This is not surprising, as gender plays an important role in the construction of a people's identity. As Benhabib argues, it is exactly through women's body that ideas of the 'self' and the 'other' come to be constructed:[890] in fact, "in the struggle against the veil, sexual difference demarcates the line between the self and the other, between the western, gender-egalitarian self against the oriental and patriarchal other."[891]

As a matter of fact, the regulatory principle implied in the European legal decisions over the practice of veiling is not 'gender neutral,' as it discloses a very specific idea of 'womanhood' and what constitutes the (female) body, where hair is visible. This is exemplified in a passage of the Stasi Commission report[892] which states that "young men force [girls] to wear clothes that are concealing and *asexual*, and to lower their eyes on seeing a man; and if they do not conform with such rules, they are stigmatized as 'whores'."[893] This passage implies that women, in order to be 'free' and 'equal' to men in liberal societies, should underline their sexuality: thus, "the 'power of the secular' seems […] to reside in its capacity to naturalize such a distinctive perspective on the female body, and to represent and grasp the non-veiled body as the natural and 'free' body."[894] In this way, the 'covered body' emerges as un-natural or as a violation of women's autonomy, whereas the 'liberated' and 'sexualized' western woman is seen as the natural condition for women's freedom. As women's body is 'naturalized', their 'desires' also turn into something 'neutral' to be defined by the appropriate authority. In fact, by defining the veil as a 'religious' symbol, the court operated a detachment of the subject from its 'object': desire, in this context, becomes something neutral to be defined by the state, so the object of the desire (the veil) can be defined as 'religious' or 'irreligious' and not any more through a socio-psychological approach.[895]

Thus, what is at stake is the association between the wearing of particular attire and specific 'desires' as it is presumed that "the wearer's act of displaying the sign […]

---

[890] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, 2002).
[891] Susanna Mancini, 'The Tempting of Europe' (n 21) 119.
[892] The Stasi Commission has been set up by the French Government in order to investigate the application of the principle of *laicite* in France.
[893] *Commission De Reflexion* (n 658).
[894] Nadia Fadil, 'Not-/Unveiling as an Ethical Practice' (2011) 98 Feminist Review 83, 96–7.
[895] Asad, 'French Secularism and the "Islamic Veil Affair"' (n 758) 94.

incorporates the actor's will to display it – and therefore becomes part of what the headscarf meant."[896] In the case, the Muslim gendered identity becomes central in the meaning attributed to the headscarf to display 'that' particular identity, namely a fixed and static, backward Muslim tradition. In fact, the symbolic construction of the 'Muslim woman' is intrinsically linked to the one of the Muslim man, who is seen as a terrorist, soaked in a backward chauvinist culture that oppresses women: in this context, Muslim women emerge as the symbol of a (stereotyped) 'monolithic Islamic culture', a static subjectivity disloyal to liberal democracies that want to 'rescue' them. It is through the definition of veiling as a 'symbol', a 'sign of', that the 'covered body' becomes something static, a symbol of a specific cultural belonging, an 'object'. However, as I have pointed out, if a "sign designates not a real status but an imaginary one, [so the veil is] an imaginary transgression."[897] The result of this operation is that Dahlab, Sahin and Shabina, as well as many other Muslim women in Europe, have been removed from the public sphere or un-unveiled, to be re-veiled with the mask of the 'western liberated woman': so it seems that in 'liberal' and democratic Europe, women all look alike. Interestingly, in 2008, a Moroccan woman, mother of three children and married to a French citizen, was denied French citizenship because, based on the *Conseil D'Etat* reasoning, her full-face-veil did not fulfil the 'condition of assimilation', which is considered an essential requirement to gain French citizenship.[898] The fact that the 'secular values' of her (Muslim) husband were not taken into consideration indicates that only women should conform to the principle of secularism and gender equality.[899] In this regard, the situation of Muslim women seems not much different from that of 'liberated' western women: in both cases women are not considered members of a community, but emblems, symbols, of specific discourses. The debate over the *hijab* and the definition of the appropriate garments women can wear in the public sphere, highlights that in western/liberal/secular countries the 'woman question' has been a useful tool to create a dichotomy between two dis-similar imaginaries of womanhood; the 'constructed' western 'liberated' woman, and the 'imaginary' Islam-ist one.

---

[896] *ibid*, 97.
[897] *ibid*.
[898] Angelique Chrisafis, 'France Rejects Muslim Woman over Radical Practice of Islam' (*The Guardian,* 2008) <https://www.theguardian.com/world/2008/jul/12/france.islam> accessed 5 October 2016.
[899] Patrick Weil, 'Headscarf versus Burqa', in Susanna Mancini and Michel Rosenfeld (eds) *Constitutional Secularism in an Age of Religious Revival* (Oxford University Press, 2014) 209.

However, as I have argued, the simple wearing of a specific garment cannot be linked to women's oppression and Islam cannot be seen as incompatible with democracy, as it is a religion open to interpretation and not a political movement that threatens western democracy. Moreover, the limitation of women's rights in the name of women's rights is a paradox: as I have shown in the first Chapter, not only is the veil not always worn as a religious symbol, but the practice and the meaning attributed to the practice changes in different historical and cultural contexts. Thus, reducing the 'veil' to a religious/cultural symbol not only simplifies the complexity of subject formation, but it also betrays the rich history and wide meanings of the practice: "when this conjunction is used to frame contemporary issues of constitutional and legal order, it presents the veil and its regulation as a problem in need of a solution rather than asking how this symbol comes to be regarded as a problem."[900] The question that arises from this reading is who decides if the meaning of a certain symbol, such as the veil, is 'religious' or not? And why are states so concerned in regulating (Muslim) women's attire?

As Asad points out, the banning of the veil can be understood as an *exercise of sovereign power*, as it is the sovereign that decides which symbol is to be regarded as 'religious' and, consequently, it acquires the power to shape the public sphere.[901] Since the definition of 'religious symbols' becomes a juridical matter, the sovereign gains the teleological and transcendental power to impose those definitions on its subjects. The necessity for a sovereign power to decide upon exceptions is made clear in the Stasi Commission's report, which points out that the donning of the veil overloads teachers and public officers who "are often left isolated, in a difficult environment" to define which 'religious symbol' can be legitimate in a public school.[902] Thus, if it is the sovereign power that decides exceptions and defines symbols, then "all modern concepts of the state are secularized theological concepts"[903] as the state assumes the teleological duty of defining images and metaphors in the public sphere. As Hobbes argues, "we are not everyone to make our own private reason or conscience, but the public reason, that is the reason of God's supreme lieutenant, judge; and indeed we have made him judge

[900] Jiohn Borneman, 'Veiling and Women's Intelligibility', in Susanna Mancini and Michel Rosenfeld (eds) *Constitutional Secularism in an Age of Religious Revival* (Oxford University Press, 2014) 216.
[901] Asad, 'French Secularism and the "Islamic Veil Affair"' (n 758) 101.
[902] Commission De Reflexion (n 658) 31.
[903] Duncan Kelly, 'Carl Schmitt's Political Theory of Representation' (2004) 65 Journal of the History of Ideas 113, 128.

already, if we have given him a sovereign power to do all that is necessary for our peace and defence."[904] In this sense, if the sovereign has the absolute power to decide on everything, it also has the authority to decide on religious symbols in the public sphere: therefore, the 'exercise of sovereignty' becomes a necessary act to maintain 'peace and order' whereas "public order refers not merely to security or the absence of material disorder, but also to all the conditions of life in a well ordered society."[905] Therefore, if, on the one hand, the state seems to withdraw from religious matters, then on the other, it intervenes in educating/forming Christian/secular/liberal legal subjects through the control and fashion of symbols in the public sphere:

"[the] secular state today abides in a sense by the *cuius region aius religio* principle (the religion of the ruler is the religion of his subjects), even though it disclaims any religious allegiance and governs a largely irreligious society […] [in fact] it is not the commitment to or interdiction of a particular religion that is most significant in this principle but the installation of a single absolute power – the sovereign state – drawn from a single abstract source and facing a single political task: the worldly care of its population regardless of its beliefs. The state is now transcendent as well as a representative agent."[906]

In other words, the state, the *Leviathan*, which embodies an absolute transcendental and abstract power, is also the one that defines symbols and their place in the public sphere. As religion directs people to other loyalties and other 'worldly-powers', the state has to define its place in the worldly care of its population in order to assure the loyalty of the Christian/secular law's subject to a transcendental absolute power embodied in the sovereign. Thus, what is at stake is the legitimate authority that decides over the definition of symbols and gives a specific shape to the public sphere. In this sense, the separation between spiritual and temporal power is blurred as it is the state that regulates not only the public but also the private lives of its subjects.[907] As Mahmood puts it, "the ongoing regulation of religious life through juridical and legislative means suggests a far more porous relationship than the doctrine of secularism suggests […] [it] shows how a self-avowed secular state has come to define

[904] Hobbes (n 463) Ch. XXXVII.
[905] Michel Troper, 'Sovereignty and Laicite'' in Susanna Mancini and Michel Rosenfeld (eds) *Constitutional Secularism in an Age of Religious Revival* (Oxford University Press, 2014) 151–2.
[906] Asad, 'French Secularism and the "Islamic Veil Affair"' (n 758) 94.
[907] Troper (n 905) 153.

what religious and nonreligious attire is in the public domain (something normatively considered a matter of personal choice within liberalism)."[908] This is clear in the analysis of the '*hijab* cases' whereas, on the one hand, liberal polity tries to operate a separation between private and public, spiritual and temporal, while on the other, the state takes the responsibility of creating 'Christian/secular' citizens by regulating their private life, ethics, and sentiments. Thus, the question is not how to accommodate Islam within Christian/liberal/secular polity but how liberal polity defines the public space and its limitations through the juridical regulation of women's body.[909]

By defining what the appropriate attire is for Muslim women, not only did the sovereign state remove Sahin, Dahlab and Shabina, like many other Muslim women in Europe, from the public sphere, but it also brought private sentiments into the public scrutiny of the secular polity and, by so doing, it operated a re-configuration of religious practices in the public sphere. Therefore, citizenship emerges not as a natural right, but as something constructed by an act of sovereignty through the force of the rules of law, whereas the Christian/secular/liberal citizen becomes "a particular kind of contradictory individual – one who is morally sovereign and yet obedient to the laws of the secular republic, flexible and tolerant yet fiercely principled";[910] a 'citizen' able to take part in the 'game of the signs' and show his/her loyalty to an absolute sovereign power. In fact, it is through the inclusion of the individual *within* the pale of the law that liberalism defines its subjects and forms a specific Christian/secular citizen loyal to a centralized transcendental sovereign power. Through an exercise of sovereignty, the absolute power defines subjectivities by shaping the public space while defining the public limits of religious sentiments: paradoxically, the sovereign state "realizes its universal character through a particular (female Muslim) identity, that is, a particular psychological internality."[911]

But why does the sovereign state need an *exercise of sovereignty* to limit Muslim women's attire? Why was this act 'necessary' to 'save' democratic values? Is it simply to 'rescue' the 'poor Muslim women' from their 'terrible' men?

[908] Mahmood, 'Secularism, Hermeneutics, and Empire' (n 691) 325.
[909] Asad, 'French Secularism and the "Islamic Veil Affair"' (n 758) 95.
[910] *ibid*, 104.
[911] *ibid*, 98.

Based on Schmitt's analysis, what is important in a democracy is the unity of a people, which is based on some sort of 'substantial homogeneity' and is symbolized in the figure of the sovereign.[912] He points out that it is *through* the concept of 'substantial homogeneity' that it is possible to create a particular identity able to clearly distinguish itself from other (foreign) identities: in essence, "democracy in the Schmittian sense ultimately means the unconstrained political expression of a particular people's collective identity."[913] By linking the 'individualistic-humanitarian' feature of liberalism to democracy, understood in terms of homogeneity of a people, Schmitt argues that "the state rests, as a political unity, on the combination of two opposed transformative principles – the principle of identity (namely the presence of a people conscious of itself as a political unity) […] – and the principle of representation, the power of which is constituted as a political Unity."[914]

For Schmitt, the homogeneity and unity of a people is based on a false illusion, a 'fabrication', a 'false consciousness' constructed in order to maintain a homogeneous 'imagined' unity; in fact, communities "are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined."[915] Thus, the unity and homogeneity of a community is established through a certain form of 'affective identity': "in nationality there is an aspect of sentiment; it is at once soul and body."[916] For Renan, in a unified nation, people are bounded by shared memories as well as a present will to live together: on the one hand, the will to live together and the defence of this 'togetherness' enables the principle of 'unity' to become the normative principle of legitimacy expressed in the 'right of belonging', while on the other, 'shared memory' provides for the need of affective source of national consent by binding people together in a unified fashion.[917] In essence, in order to have a unified community, it is necessary to create an 'affective identity' which is translated into the 'affective' attachment to a unity represented by the sovereign. Goodrich's work reveals how this 'affective

[912] Historically, philosophers have given different connotations to the term 'democracy'. I have, however, chosen to adopt Mancini's reading of the 'hijab cases'. She argues that European legal decisions over the practice of veiling defend a specific kind of democracy, as the one described by Carl Schmitt. Susanna Mancini 'The Tempting of Europe' (n 21).
[913] Heiner Bielefeldt, 'Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Countercriticism' (1997) 10 The Canadian Journal of Law and Jurisprudence 65, 69.
[914] Carl Schmitt, *Verfassungslehre* (Berlin, 1920) 214, in Kelly (n 903).
[915] Anderson (n 9) 6.
[916] Henriette Psichari (ed) *'Qu'est-Ce Qu'une Nation?', Oeuvres Completes de Ernest Renan* (Vol 1, Calmann-Levy, 1947) 920.
[917] *ibid*, 903–4.

attachment' is formed through the control and juridical regulation of symbols and metaphors in the public sphere. As a matter of fact, historically, the appropriation of images and icons was compounded with the implementation of rules related to clothes.[918] As I have argued, clothes, in the past and present, represent cultural boundaries, accepted or rejected images of an (imaginary) community. It is through the regulation of images and symbols that the institution creates an emotional attachment to an absolute political power which speaks 'for us' because it 'represents us'. In this sense, the appropriation of images works to create a fixed, gendered and stable identity of the legal subject within specific geographical borders, as the analysis of the '*hijab* cases' reveals.[919] In fact, it is exactly in the name of a European (imagined) homogeneous identity that the 'veiled woman' becomes a threat to democratic values. Unity and identity, which coincide in Schmitt's analysis, become essential pillars to the political: unity is formed by an (imagined) common identity, while identity is shaped through the appropriation and legal regulation of what is visible in the public sphere. It is exactly in this way that the 'veiled woman' becomes the symbol of a fixed (Muslim) world, which looks similar to the dictatorship of the Taliban in Afghanistan.

Based on Schmitt's analysis, in order to create a unified homogeneity, politics needs to create a contrast, a differentiation, between homogeneity and plurality.[920] For Schmitt, pluralism is the enemy of democracy as it threatens the sovereignty of the state and, at the same time, the existence of a (valuable) concept of politics. In his view, pluralism is not synonymous with political freedom, rather it "is the total domination of civil society and thus the elimination of politics in the name of morality, legality and the economy."[921] In fact, in pluralist theories "the state simply transforms itself into an association which competes with other associations; it becomes a society among some other societies which exist within or outside the state."[922] In essence, the autonomy of the social system would not guarantee the unity of the system itself. Plural theories

[918] Goodrich, *Oedipus Lex* (n 19) 87–88.
[919] As Goodrich argues, "jurisdiction is first and foremost a power to allow entry, a threshold condition of access wherein the subject holding the keys can determine who enters and who is excluded from the country, community or court that the gate protects […] on the flip side of this founding moment of imagined identity we find a domain of the excluded, of those abandoned to an outside of law, those deemed exceptional and in the earlier terminology of Christian societas excommunicated or out of community." Goodrich, 'Visive Powers' (n 8) 215–6.
[920] William Rasch, 'Conflict as a Vocation Carl Schmitt and the Possibility of Politics' (2000) 17 Theory, Culture & Society 1.
[921] *ibid*, 3.
[922] Carl Schmitt, *The Concept of the Political* (Rutgers University Press, 1976) 44.

threaten not only the unity and homogeneity of a people, but also the legitimacy and the sovereignty of the state, as the problem of conflicting loyalties arises. In order to maintain a homogeneous character, the sovereign needs consent, it needs citizens loyal to an absolute and transcendental power which acts as the only power able to defend the 'being' of a people against 'intrusions'; only the state, and not particular groups, Schmitt insists, can protect and defend us.

The battle between 'homogeneity' and 'plurality' is particularly clear in the *Sahin* case[923] in which the court repeatedly emphasized the impossibility of reconciling Turkey's secular-liberal and democratic values with extremist (Islamic) religious movements by referring to the Refah Party that, based on the court reasoning, attempts to introduce *sharia* law which 'would oblige individuals to obey static rules of law imposed by religious concerns'. However, the court confused Refah neo-Ottomanism, which calls for a plurality of legal systems based on personal status, with Islamist fundamentalists who call for the establishment of an Islamic empire where jurisdiction is territorial. Indeed, with regard to the distinction between personal/communitarian Islamic law and territorial/individualistic western law, it is clear that the ECHR's decision to dismantle Refah was partly based on the ground that the party was planning to set up a plurality of legal systems. In the case, the court's ignorance of the plurality of Islamic traditions regarding the veil was compounded by its rejection of a plurality of legal systems within the same territory *qua* political unit. It is clear, therefore, that in seeking to forcibly expose Turkish womens' bodies to their natural rights the ECHR was also seeking to subjugate them under the logic of singular state sovereignty. This shows that what really threatens western societies is not a veiled woman, but the pluralism she represents. Islam is not only a pluralistic religion, as it is open to interpretation and is praxiologically lived and experienced differently in different cultural and historical contexts, but also the practice of veiling itself takes different shapes, colours and meanings which mirror different normative choices.

If homogeneity and unity, and not plurality, are the bases of democracy, then how does politics make 'difference' possible? How can the 'right of belonging' be imaginatively constructed through the image, the 'symbol', of the 'other'?

[923] *Sahin v. Turkey* (n 17).

Based on Schmitt's analysis, political communities are bounded by a fundamental distinction between 'friend' and 'enemy', 'insider' and 'outsider': "'friend' and 'enemy', ultimately, have no content in themselves, they are oppositional positions capable of unifying the members of a group."[924] Thus a strong homogeneous and united community needs the identification and elimination or eradication of the 'other', the 'enemy': hence, the very idea of democracy is based on the concept of exclusion, of 'containing'/eliminating/hiding the differences and pluralities that ultimately threaten the monolithic character of liberal democracies by threatening their (imagined) homogeneity and unity.[925] As a matter of fact, the people of a nation are bound by symbolic boundaries represented by the presence (as a negation) of the 'other' in the public sphere which challenges the national homogeneous identity of a people. Only in this way, territorial and personal boundaries are secured by an exercise of sovereignty in defence of democracy. Echoing Hobbes's *Homo Homini lupus*, Schmitt argues that (imagined) 'enemies' threaten our being both from outside and inside: for this reason, "a sheltered and protected life requires not only the apathy, indifference, and self-indulgence of wealth and power, but also, and more crucially, the work of the state that maintains the physical distance, separation, and destruction of the enemy."[926] In this context, the identification and elimination of the 'enemy' by the state is extremely important in order to preserve the unity of a people.[927]

Nowadays, Islam has become the 'other' and the *hijab* the symbol of 'otherness'. In fact, since the 1970s, sociologists have noticed that racist discourses based on biological/ethnic claims have been replaced by different, and more subtle, forms of discrimination based on cultural belonging.[928] As Balibar argues, it is not any more the category of race, but that of 'immigrant', understood as "the result of their belonging to historical cultures,"[929] which enables racist discourses: this, in turn, "entails a superimposition of different dimensions of 'otherness' that exacerbates issues of boundaries, accommodation and incorporation. The immigrant, the religious, the racial,

[924] Susanna Mancini 'The Tempting of Europe' (n 21) 128.
[925] Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008) 9.
[926] Xudong Zhang, 'Multiplicity or Homogeneity? The Cultural-Political Paradox of the Age of Globalization' (2004) 58 Cultural critique 30, 49.
[927] Schmitt, '*The Concept of the Political*' (n 922).
[928] Martin Barker, *The New Racism : Conservatives and the Ideology of the Tribe* (Junction Books, 1981).
[929] Etienne Balibar, 'Is There a Neo-Racism?' in Etienne Balibar and Immanuel Maurice Wallerstein (eds) *Nation, Class, Ambiguous Identities* (Verso, 1991) 22.

and the socio-economic dispriviledged 'other' all tend to coincide. Moreover, all those dimensions of 'otherness' now become superimposed upon Islam, so that Islam become utterly 'other'."[930] If Islam is the 'other', the veiled woman who supposedly represents backward Islamic values incompatible with western democratic principles is the symbol of this 'otherness': in this way, Muslim (veiled) women have been forcibly included in a symbolic and imaginary dichotomy between 'friend' and 'enemy', 'insider' and 'outsider' which underlies every democracy.

This dichotomy is clear in the analysis of the '*hijab* cases'. In the Begum case,[931] for instance, a young British student in the UK was forbidden to attend her school because she had started to wear a *jilbab* and not a *shalwar kameeze*, considered the most appropriate uniform for Muslim women by three local *imams*. As Mancini argues, this is indicative of western binary perceptions of Muslims as the court implied the existence of two kinds of Muslims: the one 'accommodated' in liberal/democratic societies, and Islamic fundamentalists from which western democracy has to be defended:[932] "the court seems to appreciate this trivialized version of Islam, where everybody looks alike, there is no room for diversity, nor is there for minorities within minorities: a watered-down version, an Islam that doesn't look too Islamic."[933] My anthropological study reveals, however, that there are many kinds of Muslims and three local *imams* cannot decide which is the best attire for Muslim women. The dichotomy between a 'tolerant' West and in 'intolerant' East is mirrored also in a passage of the French resolution over the practice of veiling, which stresses the "power and the duty we have to oppose ideologies and ways of thinking [symbolized by the full-face veils] that one can only qualify as 'barbarian', in the sense that they deny the idea of progress, of civilization, of democracy, of sex-based equality […] it's our value system which is at issue […] this is our Republic being tested in this way."[934] In Germany, five German *Landers,* while

[930] José Casanova, 'The Long, Difficult, and Tortuous Journey of Turkey into Europe and the Dilemmas of European Civilization' (2006) 13 Constellations 234, 242.
[931] *Begum v Denbigh High School Governors*, (n 612).
[932] Mancini 'Power of Symbols' (n 22).
[933] *ibid*, 2652.
[934] *Loi no.* 2010-1192 (n 661) 22f. Further regulation in: "Circulaire of Marvh 2011 relative a la mise en oeuvre de la loi no 2010-1192 du 11 oct. 2010 interdisant la dissimulation du visage dans l'espace public" (3 March 2011) JORF (FR). Interestingly, the statistic of the French Interior Ministry indicated that French Muslim women who wear the veil were no more than 1900, and only 25% of them grew up in a non-Muslim family and converted to Islam as adult. Assemblee Nationale, Rapport d'information no. 2262, "Au nom de la mission d'information sur la pratique du voile integral sur le territoire national, 26 janvier 2010", 264.

allowing the display of Christian symbols, adopted a law that banned Islamic symbols in public schools.[935] As the Bavarian Ministry declared, Christian symbols, included 'nuns' habits', are permitted as they are not 'political symbols' while Islamic dressing can be the symbol of an ideology opposed to gender equality.[936]

"With the representation of the cross as the icon of the suffering and Lordship of Jesus Christ […] the plaintiffs who reject such a representation are confronted with a religious worldview in which the formative power of Christian beliefs is affirmed. However, they are not thereby brought into a constitutionally unacceptable religious-philosophical conflict. Representations of the cross confronted in this fashion […] are […] not the expression of a conviction of a belief bound to a specific confession. They are an essential object of the general Christian-occidental tradition and common property of the Christian-occidental cultural circle."[937]

It is exactly the interpretation of the crucifix as a 'cultural symbol' and Islamic (female) dress as a 'religious symbol' that allows the creation of an (imagined) enemy and the need to defend a homogeneous national identity. Similar reasoning was applied by the court in the *Lutsi* case[938] in which Italian judges argued that "the crucifix […] may be legitimately displayed in the public schools because it does not clash with the principle of secularism, but, on the contrary, it actually affirms it."[939] In this way, the court not only implied that secularism had been achieved thanks to Christian values, but also that, as secularism is rooted in Christianity, the crucifix had to be displayed in public schools.

Those legal decisions illustrate how the concept of 'radical otherness' (what Kristeva calls 'the abject')[940] is established through the boundary expressed by the law: as Butler argues, "the 'abject' designates that which has been expelled from the body, discharged

[935] For a collection of the cases see Universitat Trier, 'Institute of european Constitutional Law (IECL)' http://www.uni-trier.de/index.php?id=24373&L=2 accessed 15 July 2015.
[936] 'Discrimination in the Name of Neutrality: Geadscarf Bans for Teachers and Civil Servants in Germany' (*Human Right Watch* 2009), 'Germany_0209_web - germany0209_webwcover.pdf' <https://www.hrw.org/sites/default/files/reports/germany0209_webwcover.pdf> accessed 5 October 2016.
[937] Bauerischer Verwaltunggsgerichtshof [Bay VGH] [Bavarian Higher Administrative Court] (june 3, 1991), 122 Bayerische Verwaltungsblatter [Bay CBI] 751 (751-54) (F.R.G.) reprinted in Neue Zeitschrift fur Verwaltungsrecht [New Journal of Administrative Law] issue 11, 1991, at 109.
[938] *Lutsi v Italy,* Application no 30814/06 (ECHR, 2011) para. 16.1.
[939] *Ibid*.
[940] Julia Kristeva, *Strangers to Ourselves* (Harvester Wheatsheaf, 1991).

as excrement, literally rendered 'other'."[941] Once it has established the division between 'friend' and 'enemy', the 'abject', the 'stranger', must be excluded from civil liberty and civil rights as their plurality of cultures do not belong to liberal democracies. In order to maintain democracy, the boundary between 'insider' and 'outsider' becomes crucial and the identification and expulsion of the 'other' from the public sphere necessary.[942] As Fadil puts it in relation to the banning of the full-face veil in Belgium, "the exclusion of face-veiled women as 'abject other' enables a minimal sense of 'we-ness' in the fractured Belgium but also in other western-European countries where citizenship is increasingly cast in cultural terms."[943] It is exactly through these boundaries, expressed symbolically by the veil, that the (fixed) identity of the 'self' and the 'other' emerges: the necessary exercise of sovereignty operated by the authority to bind Muslim women to a fixed subjectivity can be seen as an effort to maintain differences and, thus, a homogeneous and unified democracy. In fact, European legal decisions on the limitation of civil liberty and religious freedom show how 'defence mechanisms' tend, on the one hand, to belittle the image of the 'other', as 'veiled women' are seen as victims or brainwashed, while on the other, to assert a right of violence and aggressivity in limiting the personal sphere of the legal subject. Thus, the concept of 'radical otherness' is essential to maintain the homogeneity of a people and, consequently, the exclusion of the 'other' is necessary to 'save' western democracies.

As the inscription of women's bodies into the homogeneity of western democracy has been set by the law, Muslim women have been unveiled to be re-veiled with the mask of the unified Christian/secular law's subject: in this sense, "(late) liberalism has become a form of life that decides the very way in which we imagine humanity."[944] In the case, law allows a double movement; on the one hand, it excludes the 'other' by 'de-humanising' them, while on the other, it 're-inscribes' the 'other' into a liberal trajectory by 're- humanising' them.[945] The result of this 'law's double movement' is that "religious freedom as a public, mainly collective, institution has been transformed into fragments of a diffuse 'right to identity' that blurs the line between the public and private domains.

[941] Butler (n 177) 169.
[942] John Cash, 'The Political/Cultural Unconscious and the Process of Reconciliation' (2004) 7 Postcolonial Studies 165, 165–75.
[943] Fadil (n 894) 88.
[944] Michele Spanò, *Saba Mahmood, Politics of Piety: The Islamic Revival and the Feminist Subject* (2013) Foucault Studies, 195.
[945] Esmeir (n 16).

The public dimension of 'civil rights' shrinks and re-emerges as a diffuse 'right to recognition' of the freely chosen identity by public authorities and, finally, by every individual."[946] Hence, on the one hand, by determining forms and languages in advance, the rules of law form a specific Christian/liberal/secular citizen and its being, its desires, while on the other, it takes significant steps in limiting the personal freedom of Muslim women by representing the constructed desires of a majority of European people in search of an abstract, unified, and universal identity. The necessity to regulate women's body in order to create a fixed and abstract legal subject is related to the need to control the public sphere. If metaphors produce the necessary emotional attachment to legal obedience and political love, then the visible has to mirror a specific order of power and imagination and the legal subject should mirror a legitimate order of thought.[947] As democracy is based on the unity of an (imagined) community, then symbols and metaphors, which form and strengthen the unity and identity of a people, have to be regulated in order to save the homogeneity and unity of European democracy.

In fact, as Schmitt argues, to defend democracy, the rules of law are not enough as they are impotent in protecting the homogeneity of the nation, so an act of sovereignty becomes necessary.[948] For Schmitt, the sovereign intervenes normatively exactly where the (procedural) law fails; "if sovereignty as the 'highest legal power' sees itself as the need to exercise reflective judgement, then sovereignty as 'actual power' is concerned with survival and must be defined as the paradoxical self-preservation of the law by extra-legal means, or rather, by the legal suspension of the law."[949] This is clear when analysing the 'inconsistencies' found in the analysis of the '*hijab* cases' as it is not objectively clear whether the veil is a threat to democratic values or a symbol of women's oppression. Those instances become clear if we interpret it as an act of sovereign power embodied in a ruler: this exercise of sovereignty represents a necessary act to preserve the political unity and identity of a people. Performed by a prince and supreme legislator, the sovereign act creates a (necessary) exception, a 'disturbance' symbolized in the veil, which must be rendered invisible by 'exceptional' rules of law. In fact, in the discourse over the veil, Christian (religious) symbols are

[946] Karl-Heinz Ladeur and Ino Augsberg, 'Myth of the Neutral State: The Relationship between State and Religion in the Face of New Challenges' (2007) 8 German LJ 143, 36.
[947] Goodrich, *Oedipus Lex* (n 19) 77.
[948] Schmitt, *Political Theology* (n 469).
[949] Rasch (n 920) 9.

interpreted in cultural terms as a secularized Christianity which carries democratic and pluralistic values, while Islamic symbols are interpreted as 'religious symbols' or as the expression of a backward culture incompatible with western democracy. In this way, the unity and homogeneity of a people "are easily attained when the basic difficulty is emphatically ignored and when, for formal reasons, everything that contradicts the system is excluded as impure."[950] Since democracy depends "upon the 'identity' of rulers and ruled",[951] it is exactly pluralism, which responds to a different logic and loyalties, that threatens the unity of a people and the sovereign, who represents an abstract and imagined homogeneity. For this reason, the sovereign power must react and actively pursue artificial unity and homogeneity in order to maintain unanimity and unity. Thus, what the European legal decisions mirror are the desires and the projections of a large part of the European population which identifies an imaginary Muslim 'enemy' and excludes it, legally, politically, and 'visibly', in order to preserve itself.[952]

Those decisions reveal that symbols are constructed in order to create homogeneity in contraposition with an imaginary 'enemy', which is, at least, the 'plurality of the other': "both the imposition to learn 'under the cross' and that to learn bareheaded indicate the existence of a homogeneous collective identity and of outsiders, who have the choice between accepting to share, even symbolically, the values of the majority, or to be excluded from the public sphere."[953] Thus, more than a crusade against a visible/invisible evil, the juridical decisions over the veil reveal the fragility, vulnerability and paradoxes of implicit assumptions of a liberal universalist thought in search of a universal and abstract identity. However, "to rely on a powerful and yet empty representation of Europe, opens the door to marginalization and the exclusion of those who threaten the unity of the representation, to the homologation of conducts, and to the tyranny of majorities."[954]

[950] Schmitt, *Political Theology* (n 469) 21.
[951] Kelly (n 903) 122.
[952] Susanna Mancini 'The Tempting of Europe' (n 21) 129.
[953] Mancini 'Power of Symbols'(n 22) 2666.
[954] Susanna Mancini 'The Tempting of Europe' (n 21) 134.

Conclusion

Debates on the sartorial practices of Muslim women seem almost inevitably to be reduced to a footnote of the 'clash of civilization' thesis. Thus, the veil become a symbol of 'chauvinist' (Islamic) religion, in which the individual is (supposedly) submitted to 'fixed' and 'un-liberal' rules of conduct. In turn, unveiling symbolises a Christian/secular/liberal west, in which the individual is (apparently) free from submission and thus able to (freely) choose. As I pointed out, this view was crucial to the colonial project. The banning of the veil under colonial rule reinforced the idea of the backwardness of other culture in Muslim-majority societies and equated unveiling with emancipation.[955] The rhetorical dichotomy – backward Islam/progressive west- is nowadays represented by and fabricated over the symbol of the veil, once again, in view of the number of Muslims living in the west. In fact, western European countries that banned the veil "see the unveiling as equivalent to liberating women, just as the rhetoric of colonialism focused on women's oppression in colonized societies, attaining moral justification for eradicating the culture of colonized people."[956] Recent debates concerning the veil show that in western public discourse, the veil is often seen as discharging a singular transparent function: it 'hides' from the public sphere not only the female body, but also makes transparent the symbolism of backward/'anti-modern'/anti-secular values.

In my analysis, by contrast, the veil does not conceal: it reveals. It reveals first that the veil has been seen through the lens of western semiotics as a fixed symbol of a profound 'clash of civilizations', of women's oppression, and of intolerant/undemocratic values. As I discussed in Chapter three, in the *Sahin* case the veil has been understood as a symbol of 'radical Islam'; in the *Dahlab* case the headscarf has been seen as a proselytising symbol in conflict with the principle of gender equality, while in the *Begum* case the *jilbab* has been considered a symbol of Islamic fundamentalism, able to threaten the 'peace' of the school. I have tried, in this regard, to understand how and why a specific fixed and monolithic symbology has been attached to the veil: through a

[955] Leila Ahmed coined the term 'colonial feminism' to describe feminism "used against other cultures in the service of colonialism". In fact, in the western colonial discourse "the domesticated, subjugated, unenlightened Other as opposed to the liberated, independent and enlightened western self was used as a moral prop to legitimize colonial power relations". In this sense, as Said argues, orientalism "is not an airy European fantasy about the orient, but a created body of theory and practice." Ahmed (n 24) 150–2; Said (n 218) 6; Mohanty (n 29) 73.
[956] Davary 'Miss Elsa and the Veil' (n 207) 65.

study of signs, symbols and semiotics in the secular space, I have attempted to unwrap the way in which the (supposed) tension between the 'secular' and the 'religious' is understood as an absolute polarization. This dichotomy, as I have argued, is not neutral, for it discloses a very occidental Christian/secular understanding of 'religion' and the religious subject. In fact, in liberal/secular thought, 'religion' is understood as mere belief, an idea, a matter of personal choice, while the secular subject is conceived as an autonomous, abstract, individual: one who is able to separate its internal from its external being. In my analysis, it is exactly this specific Christian/secular understanding of religion and the religious subject that allows the regulation of private (religious) sentiments in the public sphere. In this view, the regulation of Muslim women's performative practices, applied through the distinction between faith and its manifestation made by article 9.2, indicates that secularism does not emerge as the mere separation between religion and politics, private and public, but as the re-configuration of religious sensitivities and religious practices in the public space. Thus, to think about the 'religious' is also to 're-think' the 'secular': "through a certain double movement secularism and Christianity have become productively fused, in a way that repeats the story of European exceptionality while inscribing the essential otherness of the Muslim populations within its borders."[957] By rhetorically constructing the veil as a fixed symbol of something intrinsically 'other', both liberals and, ironically, Islamists try to create a fixed and static law's subject who is bound to a monolithic positivized and universal-ist law through the control and the juridical regulation of images and symbols in the public sphere. This, in turn, not only reproduces colonial discourses over women's body, but it also imposes a rhetorical truth which shapes a well-defined national identity:[958] be it secular or Islamist. I sum, I argued that the regulation of images and symbols in the public sphere emerges as a necessary act of sovereign power to create a specific fixed and bound legal and religious' subject and to give to religious practices its proper place in order to create unity and homogeneity. However, by so doing, the secular/liberal and democratic law as well as the fixed/positivized *Sharia* law called for by Islamists nowadays, excludes different subjectivities and protects a very specific law's subject through the force of a binding law.

[957] Charles Hirschkind, 'Religious Difference and Democratic Pluralism: Some Recent Debates and Frameworks' (2011) 44 Temenos 125.
[958] Vivian (n 191) 129.

In fact, my analysis discloses a symmetry between western positive and human rights law on the one hand, and the positivized *Sharia* law called for by Islamists on the other. Islamists, in contrast to classical Islamic law, aspire to bind the entire world to a universal singular and fixed *Sharia* law as interpreted by their 'Caliph', Western law aspires to redeem the whole of humanity through the inclusion of the human within the pale of the law. Diamantides' comparative study between sovereignty formation in the East as well as in the West is of particular interest, not only because it unmasks the so called 'clash of civilizations', represented and constructed over the women's headscarf, but also because it places the matter of the veil within a specific form of sovereign power which presupposes a fixed abstract law's subject bound to a monolithic, positive, and universal-ist law.[959] His analysis reveals that while in the West legal and political power merged and were sanctified in the figure of an absolute sovereign, in the pre-modern Muslim world, political and legal authority was always in need of negotiation. In fact, while the assimilation of Graeco-Roman concepts led western legal scholars to develop a Canon law, where first the Pope and then the Emperor had the absolute *auctoritas interpretativa* (the authority to interpret the law), in Islam this assimilation never succeeded in creating a Canonic form of *Sunnah.* In fact, despite the Abbasids' effort to create a unique and monolithic Canon law, valid for all citizens, irrespective of cultural and religious differences, the opposition of the *Ulama* never allowed the creation of a singular body of *Sharia* law.[960] It is exactly this 'gap' or, as Diamantides names it, a 'deficient sovereignty', that modern Islamists want to fill, eager as they are to contest western dominance. In this view, the obsession over the veil shared by both is not only related to the place of women's body as carrier of societal values within nationalist thought, but to the anxiety produced by the encounter of two dis-similar universal-ist and imperialist legal and political systems conjoined in modernity: European 'humane'/positive law and Islamist 'fixed codified *Sharia* law' which mirrors the West.[961] The veil emerges as the visible metaphor of eastern and western anxiety produced by the imposition of one type of secularized monotheism over another. This anxiety is played out over Muslim women's bodies, which become the symbol of an

[959] Diamantides, 'Toward a Western-Islamic Conception of Legalism'; 'Shari'a, Faith and Critical Legal Theory''; 'Constitutional Theory and Its Limits – Reflections on Comparative Political Theologies' (n 11).
[960] Hallaq, *The Origins and Evolution of Islamic Law* (n 303); *Authority, Continuity and Change in Islamic Law* (n 349).
[961] Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11) 107.

'imaginary' dichotomy, of something intrinsically 'other', to be removed from the public sphere.

This is particularly clear when reading the legal decisions over the practice of veiling which rely on a polarization between a tolerant and secular West and an intolerant and religious East: in the *Sahin* case, for instance, the rejection of the plurality of meanings of the veil is compounded by the rejection of the pluralist legal system called by *Refah*, as I have pointed out in Chapter three; in the *Begum* case, the *jilbab* worn by Shabina, seen as a symbol of radical Islam, is understood in contrast with the *Shalwar Kameez*, considered the symbol of a 'tolerant' Islam; while in the *Dahlab* case, the 'illiberal values' of her *hijab* are seen in contraposition with gender equality and women's freedom. This dichotomy, as I have argued, encodes problematic assumptions about religion and religious practices in the public space as well as the role of the law in regulating religious practices/symbols. In fact, the distinction made by art. 9.2 between faith and its manifestation discloses a specific (Christian/secular) definition of religion and religious practices: Cavanaugh observes that "religion in modernity indicates a universal genus of which the various religions are species: each religion comes to be demarcated by a system of propositions; religion is identified with an essentially interior, private impulse; and religion comes to be seen as essentially distinct from secular pursuits such as politics, economics, and the like."[962]

McClure shows how the 'modern'/universalist/liberal/secular definition of 'religion' is linked to statecraft and authority.[963] Through an analysis of Locke's work, grounded in a specific western epistemology which empowers the state, and a study of the concept of religion as developed from secular liberalism in the seventeenth century, she argues that the relegation of religion into a private domain allows the state to be the only rightful power to regulate the civil domain, and so to impose conformity or toleration towards different religious practices in the name of 'public order and security'. In fact, Locke's epistemology focuses on the distinction between 'this-world' (subject to civil regulations) and the 'other' (metaphysical) one: while religion concerns the individual's salvation in the 'other world', 'this-world' is regulated by civil authority.[964] In essence,

[962] Asad, 'Where Are the Margins of the State?' (n 516) 286; Peter Harrison, *'Religion' and the Religions in the English Enlightenment* (Cambridge University Press, 2002).
[963] Kirstie M McClure, 'Difference, Diversity, and the Limits of Toleration' (1990) 18 Political Theory 361.
[964] *ibid*, 366-77.

the seventeenth-century distinction between civil and religious domains, private and public, state and religion, has given to the state the legitimacy of regulating any visible practices in the civil domain in the name of the civil interests of 'this-world'. For McClure, "the factual character of worldly effects […] constitutes a standpoint from which all permitted practices of worship are rendered equal, independent and politically indifferent, a distinctly civil perspective that deploys empiricism as a mechanism for effectively converting religious 'difference' into religious 'diversity'."[965] In other words, the emphasis on 'worldly effects' operated by western philosophers "foreclose[s] the use of coercion in religious matters even in the hands of those legitimately entitled to wield it in the domain of civil interests […] it is precisely the civil criterion of worldly injury that operates to circumscribe the scope and limits of what might be advanced as an appropriate expression of religious belief and practice in the first place."[966]

In this view, the rule of toleration established by western secular tradition is based not on a principle of 'personal conscience', but on the notion of 'worldly harm', as evident in the analysis of the '*hijab* cases' in which the headscarf has been forbidden through the exceptions made by art. 9.2 of the European Convention on Human Rights, which limits the personal right of freedom of religion in specific cases. The article states that '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'. Although the judges have not presented any objective proof of the veil's danger to European democratic societies, they have constructed veiling as an element capable of 'disrupting societies' while defining what is perceived as a 'social harm' in modern western societies. In all the analysed juridical decisions, veiling emerges as an ostentatious, un-necessary, and unacceptable manifestation of a religious belief and comes to be perceived as a 'danger' to the freedom of others or as an element capable of 'disrupting' the 'peace' of the society: in other words, the veil has been perceived as a 'real' 'social harm'. As McClure argues, "in the context […] of contemporary expressions of 'difference', themselves articulated in terms of worldly harm, the neutrality of civil law and state policy, guaranteed epistemologically with

[965] *ibid*, 380.
[966] *ibid,* 378.

respect to religion, is extinguished in both logical and practical terms."[967] In this view, as I have argued, European legal decisions over the practice of veiling indicate that secularism is not a neutral position as, inevitably, any exercise of civil power would favour one definition of 'religion' over others through a specific normative understanding of what a 'social harm' is. In the case, European judges, who have (erroneously) intended secularism as a synonym of state neutrality, have banned the veil based on the 'safety and security' of western/liberal societies while applying a very 'modern' Christian/secular definition of religion: this, in turn, depends upon a prior normative understanding of what religion is and how the secular law's subject should experience its religious life.

What it is missed, then, in the western debate over the women's headscarf is the way in which liberalism understands and defines 'religion' and 'religious practices' in the modern world and how this understanding is encoded in the law. In my analysis, secularism emerges not as the mere separation between the private and the public, religion and the state, but as the re-configuration of religious sensitivities and religious practices in the secular public sphere.[968] In other words, secularism becomes the imposition of a specific form of subjectivity and emerges not only as a "constellation of institutions, ideas, and affective orientations that constitute an important dimension of what we call modernity, [but also as a] concept that brings together certain behaviours, knowledges, and sensibilities in modern life".[969]

In fact, the law's subject that emerges from European juridical decisions over the practice of veiling is a specific Christian/secular/liberal subject, an abstract autonomous individual who is able to separate its internal from its external being, as revealed in the distinction art. 9.2 makes between faith and its manifestation. For Hobbes, the nature of the political individual is split between its juridical, authoring/authorizing essence, and its 'outward appearance', its fictional representation: this notion "establishes an indissoluble relation between the creation of a fictional representation, to which is attributed a Leviathan's power, and the juridical notions of the person in relation to authorship and authority."[970] In modern western law, the law's subject emerges as a

[967] *ibid*, 386.
[968] Mahmood, 'Religious Reason and Secular Affect' (n 326).
[969] Asad, *Formations of the Secular* (n 20) 25.
[970] Connal Parsley, 'Mask and Agamben: The Transitional Juridical Technics of Legal Relation, The' (2010) 14 Law Text Culture vii, 15.

mask, an 'appearance', and acquires its existence only through its inscription within the pale of a binding, fixed and monolithic positivized law. In fact, as Esmeir's analysis points out, in positive and human rights law, the human comes out as a person *in* the law who enjoys specific juridical protection only when re-inscribed within the pale of a positive, 'humane' and universal-ist law.[971] As human rights and state law only protect a *mask*, an abstract secular individual, a 'human-yet-to-become' that needs the state law in order to be human, Muslim women have been un-veiled only to be re-veiled with the mask of an abstractly free law's subject: a liberal/Christian/secular individual who is (in the abstract) the holder of rights and the bearer of duties, but at the same time is free and compelled, creator and created – a subject bound to the force of a positivized law which shapes its 'internal desires' and its external world through the control of symbols and images in the public sphere.

Since the modern (juridical) subject enters into 'universal human nature' by wearing the mask of secular rights holder over any particularity, the exclusion of many veiled Muslim women from European public space becomes the *emblem* of the intrinsic paradox of liberalism and human rights discourse which claim to safeguard minority rights: in fact, if on the one hand secular/liberal thought claims a separation between the spiritual and the temporal, then on the other, the private life of the individual has become extremely regulated. This difficulty in establishing a clear cut-dividing line between the 'secular' and the 'religious' is not a contradiction, but the very condition for the exercise of secular power.[972] As 'secular' power has the authority to regulate symbols and bodily performances in the public sphere for the 'safety' and 'security' of its citizens, it has also the power to operate a re-conceptualization of religious practices in the secular space through a specific semiotic reading of signs and symbols.

In fact, although there is a wide body of literature about the many uses and meanings of the veil, all western legal decisions over the practice of veiling as far have given to the headscarf a fixed and monolithic symbology which is defined through a particular liberal/secular discursive tradition. Following Saussure's distinction between signifier and signified, form and substance,[973] I have argued that the veil appears in law as carrying a single and fixed meaning, arbitrarily defined by law or social conventions.

[971] Esmeir (n 15).
[972] Hirschkind (n 496) 643.
[973] Keane (n 819).

Moreover, in Christian/secular semiotics "there must be something that exists beyond the observed practices, the heard utterances, the written words, and it is the function of religious theory to reach into, and to bring out, that background by giving them meaning".[974] In liberalism, this 'something' is the abstract universalist notion of juridical humanity. The veil is seen as the dispensable cover of this humanity.

In this context, Mahmood's analysis has been particularly helpful in order to understand the relation established between the body and specific practices in non-liberal contexts. She argues that religious practices are not only the mere performance of a (fixed) internal self, but an integral part of the individual.[975] In fact, for Muslim believers, Islam is not simply a religion but a way to inhabit, live, and experience life: their love for the Prophet is mirrored in their wish to imitate his behaviour and way of life, "not as a commandment but as virtues where one wants to ingest, as it were, the Prophet's personal into oneself".[976] Thus, Muslim performative practices lie "not so much upon a communicative or representational model as on an assimilative one".[977] The Aristotelian term *schesis*, which is defined as the way in which something relates to something else, can capture this sense of pluralistic embodiment and inhabitation (or intimacy) which is experienced differently by Muslim believers throughout the world: "such an inhabitation of the model (as the term schesis suggests) is the result of a labor of love in which one is bound to the authorial figure through a sense of intimacy and desire".[978] In this view, symbols (in the form of religious performances) do not carry a specific meaning, but are a set of relations established between the 'object' and the person who performs a particular utterance: an emotional form of relationality that binds a subject to an object.[979] In this view, symbols are not only intrinsically linked to the individual's social life (and, consequently, changing with it) but they are a constitutive part of the individual itself: as Asad argues,

---

[974] Talal Asad, *Genealogies of Religion* (n 449) 123.
[975] Mahmood, *Politics of Piety* (n 18).
[976] Saba Mahmood 'Religious Reasons and Secular Affect' (n 497) 75.
[977] *ibid,* 76.
[978] Mahmood, 'Religious Reason and Secular Affect' (n 326) 848.
[979] Asad, *Genealogies of Religion* (n 449). For Legendre subjectivity is instituted through an affective attachment to a social order such as law: "the function of affective integration of the human qua desiring machine falls to textual institutions such as religion and law…the individuals involved are barred access to the meaning of what is going on, which, however, is happening to and through them." See Diamantides, 'Toward a Western-Islamic Conception of Legalism' (n 11) 99.

"different kinds of practice and discourse are intrinsic to the field in which religious representations (like any representation) acquire their identity and their truthfulness. From this it does not follow that the meanings of religious practices and utterances are to be sought in social phenomenon, but only that their possibility and their authoritative status are to be explained as products of historically distinctive disciplines and forces."[980]

In sum, symbols and images are not to be read necessarily as mere representations of a fixed and monolithic meaning, but as a "cluster of meanings that might suggest a persona, an authoritative presence, or even a shared imagination. In this view, the power of an icon lies in its capacity to allow an individual (or a community) to find him – or herself in a structure that has bearing on how one conducts oneself in this world."[981] Indeed, for the women Mahmood worked with, religion is not a simple idea and so a matter of personal choice, as in western/secular liberalism, but a way to live and inhabit the world bodily and ethically: they use their body as a *means to*, not *a sign of*. Thus, the analogy between words/text and religious practices, as presupposed in secular semiotic ideology and encoded in western/Christian/secular law, overlooks the 'form of life'[982] in which certain bodily practices are performed.[983] The liberal/secular tendency to overlook the political dimension of specific bodily practices "is in part a product of the normative liberal conception of politics, one separate from the domain of ethics and moral conduct, and is in part a reflection of how the field of ethics has been conceptualized in the modern period."[984] Religion, in this context, becomes an 'abstract system of regulatory norms', and is not constitutive of the subject. In this view, the (western/Christian/secular) semiotic reading applied by western judges to the practice of veiling (through the distinction between faith and its manifestation made by art. 9.2), encodes a very specific liberal/Christian/secular understanding of religion and the religious subject which emerges as an (abstract) individual who can choose to separate its personal beliefs from its external being: in other words, by "fail[ing] to attend to the affective and embodied practices through which a subject comes to relate to a particular sign – a relation founded not only on representation but also on…attachment

[980] Asad, *Genealogies of Religion* (n 449) 129.
[981] Mahmood, 'Religious Reason and Secular Affect' (n 326) 845.
[982] Giorgio Agamben, *L'Uso Dei Corpi* (n 806).
[983] Asad, *Genealogies of Religion* (n 449) 128.
[984] Mahmood, *Politics of Piety* (n 18) 119.

and cohabitation"[985] European judges have 'naturalized' a specific notion of religion and the religious subject.

Along with a fixed idea of religious practices and the religious subject, western legal decisions over the practice of veiling disclose a very fixed and monolithic concept of womanhood: in fact, the banning of the veil has been justified not only as a necessary act to defend secular values, but also as a crusade in the name of women's rights where the veil has been read as a fixed symbol of gender inequality, of something that 'hides' women's body (and being) from the public sphere. However, Mahmood's investigation of the 'piety movement', which focuses on how to analyse bodily performances without reducing them to the western/liberal concept of freedom and agency, has shown that different contexts produce different subjectivities while disclosing different ways of subjectification and different understandings of bodily practice, women's freedom and agency.

The fact that European judges have intended the veil as a universal symbol of women's oppression reveals that the universalism of the western liberal concept of freedom and agency has been the main domain through which to read women's oppression and their possibility of agency: it is clear therefore that, by taking into consideration only the western notion of individual freedom, western/positive/universal(ist) law hides other forms of humanity and other concepts of freedom and agency.[986] The imposition of a western idea of freedom not only has the power to exclude differences by creating an imaginary, monolithic, fixed, and homogeneous law's subject, but it also imposes an epistemic violence upon Muslim women through the fetishization of 'un-veiling'. In fact, the idea of freeing women by unveiling them in the name of 'women's rights' has been "used ideologically to isolate and contain adversaries of great powers":[987] the representations of a subjugated Muslim woman needing to be 'rescued' by western law, "have fit particularly well into patriarchal social mythologies whose own devaluation of women has been cloaked in terms of a need to 'protect' women from the harshness of certain jobs or political responsibilities".[988] In the event, by overlooking the ever-

[985] Mahmood, 'Religious Reason and Secular Affect' (n 326) 841–2.
[986] For Zizek, the concept of 'personal choice', at the base of liberal thought, should be found in the western Christian past. Slavoj Žižek, *On Belief* (Routledge, 2001).
[987] Haideh Moghissi, *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* (Zed, 1999) 4.
[988] Husain and Ayotte (n 862) 122.

changing historical, social and religious meanings symbolized by the veil, western/liberal/secular law has only given to Muslim women the 'free' choice to be assimilated into western societies or to disappear from the public sphere. This indicates that, in the liberal West, the subject of law, the citizen, has the autonomy to express her/his identity only when those identities can be assimilated into Christian/secular/liberal understanding of 'secular' and 'religious'. As I have argued, the inscription of women's body into the homogeneity of western societies has been set through an *exercise of a centralized sovereign power* in order to control the public sphere through regulatory mechanisms that 'normalize' and 'naturalize' the private life of its subjects.[989] In fact, by giving a fixed definition of the practice of veiling, the sovereign acts as a prince, a theologian active in the recognition, definition, and exclusion of symbols in the public sphere through the establishment of a fundamental dichotomy between 'friend' and 'enemy', 'insider' and 'outsider', which underlies every democracy. For Schmitt, in order to maintain unity and homogeneity, the sovereign needs to create a dichotomy between 'friend' and 'enemy' and to eliminate the latter.[990] This (imagined) dichotomy, as Mancini argues, is nowadays symbolized by (Muslim) women's bodies, which emerge as mere carriers of a static tradition and not as subjects of heterogeneous cultures with different concepts of freedom and agency:

"[European legal decisions over the female headscarf] reflect the desire of majorities to re-establish clear boundaries between the self and the other, to avoid dialogue and compromise with the other, and to reduce the visibility of the latter, in order to guard the [supposedly] homogeneous character of the public sphere."[991]

In this sense, the western obsession with the veil reveals not only how identity and inequalities are structured and reproduced in western/liberal/secular societies,[992] but also that the veil plays a crucial role in defining both 'western/secular' and 'eastern/Islamist' identity.[993] In fact, "the authoritative status of representations/discourses is dependent on the appropriate production of other

[989] Asad, 'French Secularism and the "Islamic Veil Affair"' (n 758) 101.
[990] Schmitt, *The Concept of the Political* (n 922); *Political Theology* (n 469).
[991] Susanna Mancini 'The Tempting of Europe' (n 21) 129.
[992] Ruth Mandel, 'Turkish Headscarves and The "foreigner Problem": Constructing Difference through Emblems of Identity' (1989) New German Critique 27, 29.
[993] Maryam Khalid, 'Gender, Orientalism and Representations of the "Other"in the War on Terror' (2011) 23 Global Change, Peace & Security 15, 21.

representations/discourses; the two are intrinsically and not just temporally connected."[994] This means that the production of knowledge about the 'other' is simultaneously the production of knowledge about the self: "given that knowing is a way of making, this knowledge-production will always be accompanied by competing epistemologies: […] such an ongoing rhetorical contest is beheld upon the very fabric of the *hijab*."[995] For Bleiker "the inevitable difference between the represented and its representation is the very location of politics":[996] political representation, as well as other visual representations, does not depend upon a prior/pre-given truth, but on who gives meaning to a specific image, symbol or performative act. The symbology attached to the practice of veiling has a precise political meaning and discloses several intertwined issues: the fragility and paradoxes of a liberal and secular polity which claims to safeguard minority rights but at the end is unable to uphold the values it professes; the universalism of western (and Islamist) concepts which hides an inability to accommodate different subjectivities and leads to the exclusion of many women from the public space respectively by veiling/unveiling them; and the tactic of imputing a fixed, monolithic, law-bound subjective identity through the force of a positivized law in order to maintain the unity and homogeneity of a 'people'.

[994] Asad, *Genealogies of Religion* (n 449) 117.
[995] Vivian (n 191) 131.
[996] Roland Bleiker, *Aesthetics and World Politics* (Palgrave Macmillan UK 2009) 511.

Bibliography

Abbott N, 'Women and the State on the Eve of Islam' (1941) The American Journal of Semitic Languages and Literatures 259.

Abdullah T, 'Adat and Islam: An Examination of Conflict in Minangkabau' (1966) Indonesia 1.

Abu-Lughod L, *Veiled Sentiments: Updated with a New Preface: Honor and Poetry in a Bedouin Society* (2nd Revised edition edition, University of California Press, 2000).

--'Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others' (2002) 104 American Anthropologist 783.

AbuKhalil A, 'The Incoherence of Islamic Fundamentalism: Arab Islamic Thought at the End of the 20th Century' (1994) The Middle East Journal 677.

Agamben G, *State of Exception* (University of Chicago Press, 2005).

--*Homo Sacer : Sovereign Power and Bare Life* (Stanford University Press, 1998).

-- *L'Uso Dei Corpi* (Neri Pozza, 2014).

-- and Murray S J, 'No to Biopolitical Tattooing' (2008) 5 Communication and critical/cultural studies 201.

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

Ali A Y, *The Holy Qur'an* (Wordsworth Editions, 2000).

Altiparmak K and Karahanogullari O, 'European Court of Human Rights: After Sahin: The Debate on Headscarves Is Not Over, Leyla Sahin v. Turkey, Grand Chamber Judgment of 10 November 2005, Application No. 44774/98' (2006) 2 European Constitutional Law Review 268.

Alvi A, 'Concealment and Revealment' (2013) 54 Current Anthropology 177.

Amin Q, *The Liberation of Women* (Cairo American University Press, 2000).

Amin S, 'Political Islam. Exploding Samuel Huntington's 'clash of Cultures' thesis' (2001) Covert Action Quarterly, 3.

Amir-Moazami S, 'Muslim Challenges to the Secular Consensus: A German Case Study' (2005) 13 Journal of Contemporary European Studies, 267.

Anderson B, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991).

An-Na'im A A, *Islam and the Secular State* (Harvard University Press, 2009).

Anthias F, and Yuval-Davis N (eds), *Woman-Nation-State* (Macmillan, 1989).

Anthias F, *Racialized Boundaries: Race, Nation, Gender, Colour and Class and the Anti-Racist Struggle* (Routledge, 1992).

Arai Y and Arai-Takahashi Y, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia nv, 2002).

Arat Z F, 'Turkish Women and the Republican Reconstruction of Tradition', in Gocek F M and Balaghi S (eds) *Reconstructing gender in the middle east: tradition, identity and power* (Columbia University Press, 2013).

Arendt H, *The Origins of Totalitarianism* (3rd ed, Allen & Unwin, 1967)

Ardener S, *Women and Space: Ground Rules and Social Maps* (Bloomsbury Academic, 1981).

Aristotle, *The Basic Works of Aristotle* (Random House, 1941).

Armstrong J A, *Nations before Nationalism* (University of North Carolina Press, 1982).

Asad T, *Genealogies of Religion : Discipline and Reasons of Power in Christianity and Islam* (Johns Hopkins University Press, 1993).

--'Reading a Modern Classic: WC Smith's "The Meaning and End of Religion"' (2001) 40 History of Religions 205.

--*Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003).

--'Where Are the Margins of the State?' in V Das and D Poole (eds) *Anthropology in the Margins of the State* (School of America Research Press, 2004).

--'Trying to Understand French Secularism', in Hent de Vries and others (eds) *Political Theologies: Public Religions in a Post-secular World* (Fordham University Press, 2006) 522-539.

-- 'French Secularism and the "Islamic Veil Affair"' (2006) 8 Hedgehog Review 93.

-- 'The Idea of an Anthropology of Islam' (2009) Qui Parle 1.

-- 'Reflections on Violence, Law, and Humanitarianism' (2015) 41 Critical Inquiry 390.

Ayubi N M, *Political Islam : Religion and Politics in the Arab World* (Routledge, 1993).

Azami M M, *Studies in Early Hadith Literature* (American Trust Publications, 1978).

Aziz K K (ed) *Aga Khan III: Selected Speeches and Writings of Sir Sultan Muhammad Shah* (Kegan Paul International ,1998).

Baldwin F E, *Sumptuary Legislation and Personal Regulation in England*, vol 44 (The Johns Hopkins Press, 1923).

Balibar E, 'Is There a Neo-Racism?' in Balibar E and Wallerstein I M (eds) *Nation, Class, Ambiguous Identities* (Verso, 1991) 17-28.

Baring E, 'Political and Literary Essays, 1908–1913' (Cambridge University Press, 2010).

Barker M, *The New Racism : Conservatives and the Ideology of the Tribe* (Junction Books, 1981).

Barthes R, *The Language of Fashion* (English ed, Berg, 2006).

Benhabib S and others (eds), *Feminist Contentions: A Philosophical Exchange* (Routledge, 1995).

--- *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, 2002).

Benton L, *Law and Colonial Cultures* (Cambridge University Press, 2002).

Berend N, 'Medieval Patterns of Social Exclusion and Integration: The Regulation of Non-Christian Clothing in Thirteenth-Century Hungary' (1997) 8 Revue Mabillon 155, 164.

Berlin I, *Four essays on Liberty* (Oxford University Press, 1971).

Bewley A, *A Glossary of Islamic Terms* (Ta-Ha Publishers, 1998).

Bielefeldt H, 'Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Countercriticism' (1997) 10 The Canadian Journal of Law and Jurisprudence 65.

Black A, *The History of Islamic Political Thought : From the Prophet to the Present* (Edinburgh University, 2001).

Blake C F, 'Foot-Binding in Neo-Confucian China and the Appropriation of Female Labor' (1994) Signs 676,

Bleiker R, *Aesthetics and World Politics* (Palgrave Macmillan UK, 2009).

Bloch M L B, *The Royal Touch: Sacred Monarchy and Scrofula in England and France* (McGill-Queen's University Press, 1973).

Boddy J, *Wombs and Alien Spirits: Women, Men, and the Zar Cult in Northern Sudan* (Univ of Wisconsin Press, 1989).

Bodman H L and Tohidi N E, *Women in Muslim Societies: Diversity Within Unity* (Lynne Rienner Publishers, 1998).

Borneman J, 'Veiling and Women's Intelligibility', in Mancini S and Rosenfeld M (eds) *Constitutional Secularism in an Age of Religious Revival* (Oxford University Press, 2014) 2016-228.

Breckman W, 'Politics in a Symbolic Key: Pierre Leroux, Romantic Socialism, and the Schelling Affair' (2005) 2 Modern Intellectual History 61.

Brems E, 'Above Children's Heads: The Headscarf Controversy in European Schools from the Perspective of Children's Rights' (2006) 14 International Journal of Childrens Rights 119.

Brewer J and Porter R, *Consumption and the World of Goods* (Routledge, 2013).

Brown W, *Politics out of History* (Princeton University Press, 2001).

--*Regulating Aversion : Tolerance in the Age of Identity and Empire* (Princeton University Press, 2008).

--'We Are All Democrats Now' in Giorgio Agamben and William McCuaig (eds) *Democracy in what state?* (Columbia University Press 2010).

Burke K, *A Rhetoric of Motives*, vol 111 (University of California Press, 1969).

Burton J, *An Introduction to the Hadīth* (Edinburgh University Press, 1994).

Butler J, *Gender Trouble : Feminism and the Subversion of Identity* (Routledge, 1990).

--*Excitable Speech : A Politics of the Performative* (Routledge, 1997).

-- *Bodies That Matter: On the Discursive Limits of Sex* (Taylor & Francis, 2011).

Calderini S, 'Female Seclusion and the Veil. Two Issues in Political and Social Discourse', Gabriel T and Hannan R (eds), *Islam and the Veil: Theoretical and Regional Contexts* (Bloomsbury Academic, 2013) 48-63.

Casanova J, *Public Religions in the Modern World* (University of Chicago Press, 1994).

-- 'The Long, Difficult, and Tortuous Journey of Turkey into Europe and the Dilemmas of European Civilization' (2006) 13 Constellations 234.

Cash J, 'The Political/Cultural Unconscious and the Process of Reconciliation' (2004) 7 Postcolonial Studies 165.

Cavallaro D and Warwick A (eds), *Fashioning the Frame: Boundaries, Dress and the Body* (Berg Publishers, 1998).

Cavanaugh W T, '"A Fire Strong Enough to Consume the House:" the Wars of Religion and the Rise of the State' (1995) 11 Modern Theology 397.

--*The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP, 2009).

Charrad M, 'Cultural Diversity within Islam: Veils and Laws in Tunisia', in Bodman H L and Tawhīdī, N E (eds) *Women in Muslim societies : diversity within unity* (Lynne Rienner Publishers, 1998) 63-83.

Chatterjee P, *Nationalist Thought and the Colonial World : A Derivative Discourse?* (Zed for the United Nations University, 1986).

Chehabi H E, 'Staging the Emperor's New Clothes: Dress Codes and Nation-Building under Reza Shah' (1993) 26 Iranian Studies 209.

Choueiri Y M, 'Theoretical Paradigms of Islamic Movements' (1993) 41 Political Studies 108.

Christoffersen L, 'Is Shari'a Law, Religion or Combination? European Legal Discourses on Shari'a', in Nielsen J S and Christoffersen L (eds) *Shari'a As Discourse* (Ashgate Publishing Limited, 2010) 57-77.

Çinar A, *Modernity, Islam, and Secularism in Turkey: Bodies, Places, and Time* (University of Minnesota Press, 2005).

Cloud D L, 'To Veil the Threat of Terror: Afghan Women and the 'Clash of Civilizations' in the Imagery of the US War on Terrorism' (2004) 90 Quarterly Journal of Speech 285.

Cohen A P, *The Symbolic Construction of Community* (Routledge, 1985).

Cooper M B, 'Gender and Religion in Hausaland: Variations in Islamic Practice in Niger and Nigeria', in Herbert L. Bodman L and Tohidi N E (eds) *Women in Muslim societies : diversity within unity* (Lynne Rienner Publishers, 1998) 21-39.

Cordwell J M, Schwarz R A and others (eds), *The Fabrics of Culture: The Anthropology of Clothing and Adornment* (Walter de Gruyter, 1979).

Coulson J N, *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago Press, 1969),

--*A History of Islamic Law* (Pbk ed, University Press, 1978).

Crawley A E, *Dress, Drinks, and Drums: Further Studies of Savages and Sex* (Methuen & co ltd, 1931).

Crone P, *God's Caliph : Religious Authority in the First Centuries of Islam* (Cambridge University Press, 1986).

Cumper P and Lewis T, ''Taking Religion Seriously'? Human Rights and Hijab in Europe—Some Problems of Adjudication' (2008) 24 Journal of Law and Religion 599.

Davary B, 'A Matter of Veil: An Islamic Response'', in Regina Wentzel Wolfe and Christine E Gudorf (eds) *Ethics and World Religion: Cross-Cultural Case Studies* (Orbis books, 1999) 154-55.

--'Miss Elsa and the Veil: Honor, Shame, and Identity Negotiations' (2009) 25 Journal of Feminist Studies in Religion 47.

Davies G, 'United Kingdom: Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in SB v. Denbigh High School. Decision of 2 March 2005.' (2005) 1 European Constitutional Law Review 511.

Davison A, 'Turkey, A" secular" state?: The Challenge of Description' (2003) 102 The South Atlantic Quarterly 333.

De la Haye A and Wilson E, *Defining Dress: Dress as Object, Meaning, and Identity* (Manchester University Press, 1999).

Deleuze G, *Différence et Répétition* (Presses Universitaires de France – PUF, 2000).

Denli O, 'Between Laicist State Ideology and Modern Public Religion: The Head-Cover Controversy in Contemporary Turkey', in Lindholm T and others (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, 2004) 397-512.

Diamantides M, 'Islamic Fundamentalism and Western Horror: Fear of the Other or of Oneself?' in Petrus C. van Duyne and others (eds) *Threats and Phantoms* (Wolf Legal Publishers, 2004) 157-186.

--'Toward a Western-Islamic Conception of Legalism', in Goodrich P, Barshack L and Schutz A (eds) *Law, Text, Terror: Essays for Pierre Legendre* (Glass House Press, 2006) 95-117.

--'Shari'a, Faith and Critical Legal Theory'', in Diamantides M and Geary A (eds) *Islam, Law and Identity* (Routledge, 2012) 49-67.

--'On and Out of Revolution: Between Public Law and Religion' (2014) 10 Law, Culture and the Humanities 336.

-- 'Constitutional Theory and Its Limits – Reflections on Comparative Political Theologies' (2015) 11 Law, Culture and the Humanities 109.

Dunn G D, 'Tertullian', in Roger S Bagnall and others *The Encyclopedia of Ancient History* (John Wiley & Sons Inc ,2012).

Dupret B, 'What Is Islamic Law? A Praxiological Answer and an Egyptian Case Study' (2007) 24 Theory, Culture & Society 79.

Durkheim É, *Selected Writings* (Cambridge University Press, 1972).

Eco U and others, *Travels in Hyperreality, Trans* (Mariner book, 1990).

Edwards J L and Winkler C K, 'Representative Form and the Visual Ideograph: The Iwo Jima Image in Editorial Cartoons' (1997) 83 Quarterly Journal of Speech 289.

El Guindi F, *Veil : Modesty, Privacy, and Resistance* (Berg, 1999).

Ellen F R, 'Practical Islam in South East Asia', in Hooker M B(ed), *Islam in South-East Asia* (Brill, 1983) 50-91.

Elster J, *Sour Grapes : Studies in the Subversion of Rationality* (Cambridge University Press, 1983).

Engels, F and Kautsky K, 'Lawyers' Socialism' in *Marx K. and Engels F. Collected Works* 26 (1990) 597-616.

Enloe C, *Bananas, Beaches and Bases* (Pandora Press London, 1989).

-- *The Morning after: Sexual Politics at the End of the Cold War* (University of California Press, 1993).

Entwistle J, *The Fashioned Body : Fashion, Dress, and Modern Social Theory* (Polity Press, 2000).

-- 'The Dressed Body', in Entwistle J and Wilson E (eds) *Body Dressing* (Berg, 2001).

Esmeir S, 'On Making Dehumanization Possible' (2006) Pmla- Publications of the Modern Language Association of America, 1544.

--*Juridical Humanity: A Colonial History* (Stanford University Press, 2012).

Esposito J L, *Islam : The Straight Path* (Rev 3rd ed, updated with new epilogue, Oxford University Press, 2005).

Evans C, *Freedom of Religion under the European Convention on Human Rights*, vol 1 (Oxford University Press, 2001).

Euben R L, *Enemy in the Mirror: Islamic Fundamentalism and the Limits of Modern Rationalism : A Work of Comparative Political Theory* (Princeton University Press, 1999).

Ewald F, 'Norms, Discipline, and the Law' (1990) 30 Representations 138.

Fadil N, 'Not-/Unveiling as an Ethical Practice' (2011) 98 Feminist Review 83.

Fanon F, *The Wretched of the Earth* (Penguin, 1967).

--*A Dying Colonialism* (Grove Press, 1967).

--*Studies in a Dying Colonialism* (Earthscan Ltd, 1989).

--'Algeria Unveiled' (2004) Decolonization: perspectives from now and then 5.

Fenstermacher L, *Countering Violent Extremism Scientific Methods & Strategies* (2015) Topical Strategic multi-layer Assessment and Air Force Research Laboratory multi-disciplinary white paper in support of counter-terrorism and counter-wmd,<https://info.publicintelligence.net/ARL-CounteringViolentExtremism.pdf> accessed 5 April 2016.

Festa L M, *Sentimental Figures of Empire in Eighteenth-Century Britain and France* (Johns Hopkins University Press, 2006).

Fitzpatrick P, *The Mythology of Modern Law* (Routledge, 1992).

--'The Triumph of a Departed World: Law, Modernity, and the Sacred', in Austin Sarat, Lawrence Douglas *(eds) Law and the Sacred* (Stanford University Press, 2007) 155-184.

Foucault M, *Discipline and Punish: The Birth of the Prison* (Vintage, 1977).

--*Power / Knowledge : Selected Interviews and Other Writings, 1972-1977* (Harvester Press, 1980).

-- *The History of Sexuality* (Penguin Books, 1981).

--*The Foucault Effect : Studies in Governmentality* (Harvester Wheatsheaf, 1991).

--'On the Genealogy of Ethics: An Overview of Work in Progress', in Michel Foucault and James D Faubion (eds) *Ethics: Subjectivity and Truth*, vol 1 (New York Press, 1997) 253-280.

--*The Order of Things: An Archaeology of the Human Sciences* (Psychology Press, 2002).

-- *Society Must Be Defended : Lectures at the Collège de France, 1975-76 /* (1st Picador pbk ed, 2003).

Gabriel T and Hannan R (eds), *Islam and the Veil: Theoretical and Regional Contexts* (Bloomsbury Academic, 2013).

García A and others (eds), *Constitutiones Concilii Quarti Lateranensis Una Cum Commentariis Glossatorum*, vol 2 (Biblioteca Apostolica Vaticano, 1981).

Gauchet M, *The Disenchantment of the World : A Political History of Religion* (Princeton University Press, 1997).

Geertz C, *Islam Observed : Religious Development in Morocco and Indonesia* (University of Chicago Press, 1971).

--*Local Knowledge : Further Essays in Interpretive Anthropology* (3rd ed, BasicBooks, 2000).

George D, 'An Alternative New World Order?' in Sidahmed A B and Ehteshami A (eds) *Islamic Fundamentalism* (Westview Press, 1996).

Ghamidi J A, 'Norms of Gender Interaction', in Gabriel T and Hannan R (eds) *Theoretical and Regional Contexts* (Bloomsbury Academic, 2013).

Gies L, 'What Not to Wear: Islamic Dress and School Uniforms' (2006) 14 Feminist Legal Studies 377.

Gilbert H, 'Redefining Manifestation of Belief in Leyla Sahin v Turkey'(2006)' 3 European Human Rights Law Review 308.

Gilligan C, *In a Different Voice : Psychological Theory and Women's Development* (Harvard University Press, 1982).

Gilsenan M, *Recognizing Islam : An Anthropologist's Introduction* (Croom Helm, 1982).

Goodrich P, *Oedipus Lex : Psychoanalysis, History, Law* (University of California Press, 1995).

--'Signs Taken for Wonders: Community, Identity, and A History of Sumptuary Law' (1998) 23 Law & Social Inquiry 707.

-- 'Visive Powers: Colours, Trees and Genres of Jurisdiction' (2008) 2 Law and Humanities 213.

-- *'Review: Social Science and the Displacement of Law' by W. T. Murphy*, (2008) Law and Society Review, 32.2, 476.

Göle N, *The Forbidden Modern: Civilization and Veiling* (University of Michigan Press, 1996).

Gunn T J, 'Religious Freedom and Laïcité: A Comparison of the United States and France' [2004] BYU L. Rev. 419.

Guthrie S, *Arab Women in the Middle Ages: Private Lives and Public Roles* (Saqi, 2013).

Hallaq W B, *Authority, Continuity and Change in Islamic Law* (Cambridge University Press, 2001).

--'Muslim Rage and Islamic Law' (2002) 54 Hastings LJ 1705.
--*The Origins and Evolution of Islamic Law*, vol 1 (Cambridge University Press, 2005).

Hammond H, *Of Idolatry* (Printer to the Universitie Henry Hall, 1646).

Hansen H H, *Investigations in a Shi'a Village in Bahrain*, (The national museum of Denmark, 1967)/

Hansen K T, 'The World in Dress: Anthropological Perspectives on Clothing, Fashion, and Culture' (2004) Annual Review of Anthropology, 372.

Haraway D, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) Feminist studies 575.

Harrison P, *'Religion' and the Religions in the English Enlightenment* (Cambridge University Press, 2002).

Hart H L, *The Concept of Law* (2nd ed, Oxford University Press, 1997).

Hasan U, 'The Veil: Between Tradition and Reason, Culture and Context', in Gabriel T and Hannan R (eds) *Islam and the Veil: Theoretical and Regional Contexts* (Bloomsbury Academic, 2013) 65-80.

Hasso F S, 'THE "WOMEN"S FRONT' Nationalism, Feminism, and Modernity in Palestine' (1998) 12 Gender & Society 441.

Headley J M, *The Europeanization of the World: On the Origins of Human Rights and Democracy* (Princeton University Press, 2008).

Heath J (ed.), *The Veil: Women Writers on Its History, Lore and Politics* (University of California Press, 2008).

Heery E and Noon M, *A Dictionary of Human Resource Management* 1st ed (Oxford University Press, 2001).

Hegel G W F, *The Philosophy of History* (Prometheus Books, 1991).

Hippler J and others (eds) *The Next Threat: Western Perceptions of Islam* (Pluto Press, 1995).

Hirschkind C, 'Is There a Secular Body?' (2011) 26 Cultural Anthropology 633.

--'Religious Difference and Democratic Pluralism: Some Recent Debates and Frameworks' (2011) 44 Temenos 125.

Hirschmann N J, 'Eastern Veiling, Western Freedom?' (1997) 59 The Review of Politics 461

--*The Subject of Liberty: Toward a Feminist Theory of Freedom* (Princeton University Press, 2009).

Hobbes T, *Leviathan* (Cambridge University Press, 1991).

Honderich T, 'Punishment, the New Retributivism and Political Philosophy', in Phillips-Griffiths A (ed) *Philosophy and Practice* (Cambridge Univ Press, 1985).

Hoodfar H, 'The Veil in Their Minds and on Our Heads: Veiling Practices and Muslim Women', in Lowe L and Lloyd D (eds) *The Politics of Culture in the Shadow of Capital* (Duke University Press, 1997) 248-279.

Hogan J, *Gender, Race and National Identity: Nations of Flesh and Blood* (Taylor & Francis, 2008).

Hunt A, *Governance of the Consuming Passions : A History of Sumptuary Law* (Macmillan Press, 1996).

Hunter F R, *Egypt under the Khedives* (Cambridge Univ Press, 1984).

Huntington S P, *The Clash of Civilizations and the Remaking of World Order* (Touchstone, 1998).

Husain M E and Ayotte K J, 'Securing Afghan Women: Neocolonialism, Epistemic Violence, and the Rhetoric of the Veil' (2005) 17 NWSA journal 112.

Ibn Khaldūn, *The Muqaddimah : An Introduction to History* (Princeton university press, 1967).

Ibn Khatir *Tafsir Ibn Kathir* (Brother Noha Publishing, 2015).

Inayatullah S and Boxwell G, *Islam, Postmodernism and Other Futures: A Ziauddin Sardar Reader* (Pluto Press, 2003).

Jacob M C, *Living the Enlightenment : Freemasonry and Politics in Eighteenth-Century Europe* (Oxford University Press, 1991).

-- 'Private Beliefs in Public Temples: The New Religiosity of the Eighteenth Century' (1992) Social Research 59.

Johnson E, *The Headscarf Ban in Turkish Universities Is a Safeguard Or Violation?: Analysis of the ECHR Judgment in Leyla Sahin V. Turkey* (Ma thesis, ProQuest, 2008).

Joseph S (ed) '*Encyclopedia of Women & Islamic Cultures*', Volume 2 (Brill, 2005).

Kamali M H, 'The Islamic State: Origins, Definition and Salient Attributes', in Nathan K S and Kamali M H (eds) *Islam in Southeast Asia'* (Institute of Sopuntheast Asian Studies, 2005).

Kantorowicz E H, *The King's Two Bodies : A Study in Mediaeval Political Theology* (Princeton University Press, 1957).

Kaplan L V, *Theology and the Soul of the Liberal State* (Rowman & Littlefield, 2010).

Keane W, *Christian Moderns: Freedom and Fetish in the Mission Encounter* (University of California Press, 2007).

Kelly D, 'Carl Schmitt's Political Theory of Representation' (2004) 65 Journal of the History of Ideas 113.

Kennedy D, 'Images of Religion in International Legal Theory', in Janis M W and Evans C (eds), *Religion and International Law* (Martinus Nijhoff Publishers, 1999) 145-154.

Kepel G, *The Revenge of God : The Resurgence of Islam, Christianity and Judaism in the Modern World* (Polity, 1994).

Khalid M, 'Gender, Orientalism and Representations of the "Other"in the War on Terror' (2011) 23 Global Change, Peace & Security 15.

Killian C, 'The Other Side of the Veil North African Women in France Respond to the Headscarf Affair' (2003) 17 Gender & Society 567.

Kirmanj S, 'The Relationship between Traditional and Contemporary Islamist Political Thought' (2008) 12 Middle East Review of International Affairs 69.

Knauss P R, *The Persistence of Patriarchy: Class, Gender, and Ideology in Twentieth Century Algeria* (Greenwood Publishing Group, 1987).

Kristeva J, *Strangers to Ourselves* (Harvester Wheatsheaf, 1991).

Lacan J, *Four Fundamental Concepts of Psychoanalysis* (Pellican, 1978).

Ladeur K H and Augsberg I, 'Myth of the Neutral State: The Relationship between State and Religion in the Face of New Challenges' (2007) 8 German LJ 143.

Lambton A, 'Justice in the Medieval Persian Theory of Kingship' (1962) Studia Islamica.

--*State and Government in Medieval Islam : An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford University Press, 1981).

Landes J B, *Visualizing the Nation: Gender, Representation, and Revolution in Eighteenth-Century France* (Cornell University Press, 2003).

Lawrence B, *Shattering the Myth : Islam beyond Violence* (Princeton University Press, 2000).

Layish A, 'The Fatwa as an Instrument of Accommodation' in Masud M K and others (eds) *Islamic Legal Interpretation, muftis and their fatwas* (Harvard University Press 1996) 170-77.

Lévinas E, *Outside the Subject* (Athlone, 1993).

Locke J, *Two treatises of government : a critical edition,* (Cambridge University Press, 1960).

Lockman Z, *Contending Visions of the Middle East : The History and Politics of Orientalism* (2nd ed, Cambridge University Press, 2010).

Macdonald M, 'Muslim Women and the Veil: Problems of Image and Voice in Media Representations' (2006) 6 Feminist Media Studies 7.

Macleod A E, *Accommodating Protest : Working Women, the New Veiling, and Change in Cairo* (Columbia University Press, 1991).

Mahdi H, 'The Hijab in Nigeria, the Woman's Body and the Feminist Private/Public Discourse' (2009) Institute for the Study of Islamic Thought in Africa (ISITA) Working Paper 2–3 <http://buffett.northwestern.edu/documents/working-papers/ISITA_09-003_Mahdi.pdf> accessed 31 January 2016.

Mahmood S, 'Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival' (2001) 16 Cultural anthropology 202.

--*Politics of Piety : The Islamic Revival and the Feminist Subject* (Princeton University Press, 2005).

-- 'Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation' (2006) 18 Public Culture 323.

--'Religious Reason and Secular Affect: An Incommensurable Divide?' (2009) 35 Critical Inquiry 836.

-- Religious Reason and Secular Affect: An Incommensurable Divide?', in Talal Asad, Wendy Brown, Judith Butler, Saba Mahmood (eds) *Is Critique Secular? Blasphemy, Injury, and Free Speech* (University of California Press 2009) 64-100.

-- 'Agency, Performativity, and the Feminist Subject' in Sjorup L and Christensen H (eds) *Pieties and Gender* (Brill, 2009).

-- 'Sectarian Conflict and Family Law in Contemporary Egypt' (2012) 39 American Ethnologist 54.

Makhlouf C and Obermeyer M C (eds), *Changing Veils: Women and Modernisation in North Yemen* (Croom Helm, 1979).

Mancini S, 'Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2008) 30 Cardozo L. Rev. 2629.

--'The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism' in Susanna Mancini and Michel Rosenfeld (eds) *Constitutional Secularism in an Age of Religious Revival* (Oxford University Press, 2014) 111-135.

Mandel R, 'Turkish Headscarves and The "foreigner Problem": Constructing Difference through Emblems of Identity' (1989) New German Critique 27.

Martel J, *The One and Only Law: Walter Benjamin and the Second Commandment* (University of Michigan Press, 2014).

Massad J, 'Conceiving the Masculine: Gender and Palestinian Nationalism' (1995) 49 Middle East Journal 467.

Masud M K and Powers D S (eds) *Islamic Legal Interpretation: Muftis and their fatwas* (Oxford University Press, 2005).

Maulana Maududi M and SloanI I (eds), *Purdah and the Status of Woman in Islam* (Islamic Publications, 1992).

Mawardi M, *The Ordinances of Government - Al-Ahkam Al-Sultaniyya W'al-Wilayat Al-Diniyya* (Garnet, 1996).

Mcclintock A, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest* (1St Edition, Routledge, 1995).

-- and others, *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives*, vol 11 (U of Minnesota Press, 1997).

McClure M K, 'Difference, Diversity, and the Limits of Toleration' (1990) 18 Political Theory 361.

Mellinkoff R, *Outcasts: Signs of Otherness in Northern European Art of the Late Middle Ages*, vol 32 (University of California Press, 1993).

Mernissi F, *The Veil and the Male Elite : A Feminist Interpretation of Women's Rights in Islam* (Perseus, 1991).

-- *Women and Islam : An Historical and Theological Enquiry* (Blackwell, 1991).

Michaels P A, 'Kazak Women: Living the Heritage of a Unique Past', in Bodman L H and Tawhīdī, N E (eds) *Women in Muslim Societies Diversity within Unity* (Lynne Rienner Publishers, 1998) 187-204.

Milbank J, *Theology and Social Theory : Beyond Secular Reason* (Blackwell, 1993).

Mill J S, *On Liberty : And Other Essays* (Oxford University Press, 1998).

Miller E R and Wilford R (eds), *Women, Ethnicity and Nationalism: The Politics of Transition* (Taylor & Francis, 2004).

Milner A, *England in Egypt* (Edward Arnold Publisher, 1892).

Mir-Hosseini Z, 'The Politics and Hermeneutics of Hijab in Iran: From Confinement to Choice' (2007) 4 Muslim World Journal of Human Rights 3.

Mitchell R P, *The Society of the Muslim Brothers* (Oxford University Press, 1993).

Moaddel M, *Islamic Modernism, Nationalism, and Fundamentalism: Episode and Discourse* (1 edition, University Of Chicago Press, 2005).

Mohanty C T, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) Feminist review 61.

--*Feminism without Borders : Decolonizing Theory, Practicing Solidarity* (Duke University, 2003).

Moghissi H, *Feminism and Islamic Fundamentalism : The Limits of Postmodern Analysis* (Zed, 1999).

Moore R, *The Formation of a Persecuting Society: Authority and Deviance in Western Europe 950-1250* (John Wiley & Sons, 2008).

Mosse G L, *Nationalism and Sexuality : Middle-Class Morality and Sexual Norms in Modern Europe* (University of Wisconsin Press, 1985).

Muhammad A, 'Collection and Preservation of Hadith', in Koya Kuala Lumpur (ed) *Hadith and Sunnah: Ideals and Realities* (Islamic Book Trust, 1996) 23-57.

Murphy R F, 'Social Distance and the Veil1' (1964) 66 American Anthropologist 1257.

Nagel J, 'Masculinity and Nationalism: Gender and Sexuality in the Making of Nations' (1998) 21 Ethnic and racial studies 242.

Naghibi N, 'Bad Feminist or Bad-Hejabi? Moving Outside the Hejab Debate' (1999) 1 Interventions: international journal of postcolonial studies 555.

Najmabadi A, *Women with Mustaches and Men without Beards : Gender and Sexual Anxieties of Iranian Modernity* (University of California Press, 2005).

Nancy J L, 'The Deconstruction of Christianity', in Hent de Vries and Samuel Weber (eds) *Religion and Media* (Stanford University Press, 2001).

--'Deconstruction of Monotheism' (2003) 6 Postcolonial Studies: Culture, Politics, Economy 37.

Neumann I B, *Uses of the Other: 'The East' in European Identity Formation* (University of Minnesota Press, 1999).

Nielsen J, *Towards a European Islam* (Palgrave Macmillan UK, 1999).

O'Connor K, 'Lycra, Girdles and Leggings: The Immaterial Culture of Social Change' in Küchler S and Miller D (eds), *Clothing as Material Culture* (Berg, 2005) 41-60.

Olsen F, 'Statutory Rape: A Feminist Critique of Rights Analysis' in Bartlett K T and Kennedy R (eds) *Feminist Legal Theory: Reading in Law and Gender* (Westview Press, 1992).

Pagden A, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge University Press, 1986).

Palazzi A H, 'The Islamists Have It Wrong' (2001) Middle East Quarterly, 3.

Parker A, *Nationalisms & Sexualities* (Routledge, 1991).

Parsley C, 'Mask and Agamben: The Transitional Juridical Technics of Legal Relation, The' (2010) 14 Law Text Culture .

Perrot P, *Fashioning the Bourgeoisie: A History of Clothing in the Nineteenth Century* (Princeton University Press, 1994).

Peters J and Wolper A (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (Psychology Press, 1995).

Pettman J, *Worlding Women : A Feminist International Politics* (Routledge, 1996).

Phillips A, *Multiculturalism without Culture* (Princeton University Press, 2009).

Phillips K M, 'Masculinities and the Medieval English Sumptuary Laws' (2007) 19 Gender & History 22.

Plesner I T, *Freedom of Religion and Belief- a Quest for State Neutrality?* (University of Oslo, 2008).

Psichari H (ed) *'Qu'est-Ce Qu'une Nation?', Oeuvres Completes de Ernest Renan* (Vol 1, Calmann-Levy, 1947).

Quataert D, 'Clothing Laws, State, and Society in the Ottoman Empire, 1720–1829' (1997) 29 International Journal of Middle East Studies 403.

Raday F, 'Culture, Religion, and Gender' (2003) 1 Int'l J. Const. L. 663.

Rahbari R, 'Unveiling Muslim Women: A Trajectory of Post-Colonial Culture' (2000) 25 Dialectical anthropology 321.

Rappaport A R, *Ritual and Religion in the Making of Humanity* (Cambridge University Press, 1999).

Rasch W, 'Conflict as a Vocation Carl Schmitt and the Possibility of Politics' (2000) 17 Theory, Culture & Society 1.

Reinhart K, 'Law', in Elias J (ed), *Key Themes for the Study of Islam* (Oneworld Publications, 2010).

Robson R, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes* (Cambridge University Press, 2013).

Rosenthal E, *Political Thought in Medieval Islam : An Introductory Outline* (Cambridge University Press, 1958).

Rubinstein P R, 'Color, Circumcision, Tatoos, and Scars', in Solomon R M (ed) *Psychology of Fashion* (Lexington Books, 1986).

Rugh A B, *Reveal and Conceal: Dress in Contemporary Egypt* (American University in Cairo Press, 1987).

Saeed A, *Islamic Thought : An Introduction* (Routledge, 2006).

Said E W, 'Orientalism Reconsidered' (1985) Cultural Critique 89.

--*Orientalism* (25th Anniversary Ed with 1995 Afterword Ed edition, Penguin Books, 2003).

Salecl R, *The Spoils of Freedom : Psychoanalysis and Feminism after the Fall of Socialism* (Routledge, 1994).

Sanday P R, *Women at the Center: Life in a Modern Matriarchy* (Cornell University Press, 2003).

Schiffauer W, 'Enemies within the Gates. The Debate about the Citizenship of Muslims in Germany', in Tariq Modood and others *Multiculturalism, Muslims and Citizenship* (Routledge, 2006) 94-116.

Schimmel A, *Islam: An Introduction* (SUNY Press, 1992).

Schlag P, *The Enchantment of Reason* (Duke University Press, 1998).

Schmitt C, *Verfassungslehre* (Berlin, 1920).

--*The Concept of the Political* (Rutgers University Press, 1976).

--*Political Theology : Four Chapters on the Concept of Sovereignty* (MIT Press, 1985).

--*Constitutional Theory* (Duke University Press, 2008).

Scott J W, 'Symptomatic Politics: The Banning of Islamic Head Scarves in French Public Schools' (2005) 23 French Politics, Culture & Society 106.

--*The Politics of the Veil* (Princeton University Press, 2007).

Sedghi H, *Women and Politics in Iran: Veiling, Unveiling, and Reveiling* (Cambridge University Press, 2007).

Sedgwick M J, *Islam & Muslims: A Guide to Diverse Experience in a Modern World* (Nicholas Brealey Pub, 2006).

Shahar I, 'Legal Pluralism Incarnate: An Institutional Perspective on Courts of Law in Colonial and Postcolonial Settings' (2012) 44 The Journal of Legal Pluralism and Unofficial Law 133.

Shaheed F, 'Controlled or Autonomous: Identity and the Experience of the Network, Women Living under Muslim Laws' (1994) Signs 997.

Shahîd I, *Byzantium and the Arabs in the Fifth Century* (Dumbarton Oaks, 1989).

Sharma U M, 'Women and Their Affines: The Veil as a Symbol of Separation' (1978) Man 218.

Sharpe J P, 'Gendering Nationhood' in Nancy Duncan (ed) *Bodyspace: destabilizing geographies of gender and sexuality*, (Routledge, 1996).

Sidahmed A S and Ehteshami A (eds), *Islamic Fundamentalism* (Westview Press, 1996).

Siddiqi M Z, 'The Sciences and Critique of Hadith', in P K Koya Kuala Lumpur (ed) *Hadith and Sunnah: Ideals and Realities* (Islamic Book Trust, 1996).

--*The Hadith for Beginners: An Introduction to Major Hadith Works and Their Compilers* (Goodword, 2001).

Simmel G, 'Fashion' (1957) American journal of sociology 541.

Smith A D, *The Ethnic Origins of Nations* (Wiley, 1991).

Michele Spanò, *Saba Mahmood, Politics of Piety: The Islamic Revival and the Feminist Subject* (2013) Foucault Studies, 195.

Spencer M E, 'Weber on Legitimate Norms and Authority' (1970) 21 The British journal of sociology 123.

Spivak G C, 'Can the Subaltern Speak?', in Cary Nelson and Lawrence Grossberg (eds) *Marxism and the Interpretation of Culture* (University of Illinois Press, 1988).

--*A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press, 1999).

Sponsler C, 'Narrating the Social Order: Medieval Clothing Laws' (1992) 21 Clio 265.

Stowasser B F, *Women in the Qur'an, Traditions, and Interpretation* (Oxford University Press, 1994).

Swedenburg T, 'The Palestinian Peasant as National Signifier' (1990) Anthropological quarterly 18.

Supiot A, *Homo Juridicus: On the Anthropological Function of the Law* (Verso, 2007).

Taji-Farouki S, 'Islamic State Theories and Contemporary Realities', in Sidahmed A S and Ehteshami A (eds) *Islamic Fundamentalism* (Westview Press, 1996).

Tamir M, 'Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt' (2000) 32 International Journal Middle East Studies 3.

Taylor C, 'What's Wrong with Negative Liberty?' in Rayan A (ed) *The idea of Freedom: Essay in Honor of Isaiah Berlin* (Oxford University Press, 1979).

-- *Sources of the Self : The Making of the Modern Identity* (Cambridge University Press, 1989).

-- 'Modes of Secularism', in Rajeev Bhargava (ed) *Secularism and its critics* (Oxford University Press, 1998).

Taylor M C, 'Introduction', in Mark C Taylor (ed) *Critical terms for religious studies* (Chicago University Press, 1998) 1-19.

Tibi B, *The Challenge of Fundamentalism : Political Islam and the New World Disorder* (University of California Press, 1998).

Tohidi N, 'Modernity, Islamization and Women in Iran', in Valentine M Moghadam (ed) *Gender and National Identity* (Zed Books, 1994).

-- 'Guardians of the Nation', in Bodman, Herbert L and Tawhīdī N (eds) *Women in Muslim Societies: Diversity within Unity* (Lynne Rienner Publishers, 1998) 137-162.

Trigg R, *Religion in Public Life: Must Faith Be Privatized?: Must Faith Be Privatized?* (OUP Oxford, 2007).

Tripp C, 'Islam and the Secular Logic of the Sate in the Middle East', in Sidahmed A S and Ehteshami A (eds) *Islamic Fundamentalism* (Westview Press, 1996).

Troper M, 'Sovereignty and Laicite'' in Mancini S and Rosenfeld M (eds) *Constitutional Secularism in an Age of Religious Revival* (Oxford University Press, 2014) 146-159.

Ulusoy A, 'The Islamic Headscarf Problem before Secular Legal Systems: Factual and Legal Developments in Turkish, French and European Human Rights Laws' (2007) 9 European Journal of Migration and Law 419.

van Hoecke M, 'Islamic Jurisprudence and Western Legal History', in Nielsen J S and Christoffersen L (eds) *Shari'a As Discourse: Legal Traditions and the Encounter with Europe* (Routledge, 2016) 45-56.

Vakulenko A, 'Islamic Headscarves' and the European Convention On Human Rights: An Intersectional Perspective' (2007) 16 Social & Legal Studies 183.

-- 'Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends' [2007] Human Rights Law Review 24.

--*Islamic Veiling in Legal Discourse* (Routledge, 2012).

Vivian B, 'The Veil and the Visible' (1999) 63 Western Journal of Communication 115.

Volpp L, 'The Culture of Citizenship' (2007) 8 Theoretical Inquiries in Law 571.

Walker Arnold T, *The Caliphate* (Clarendon Press, 1924).
Watt G, *Dress, Law and Naked Truth: A Cultural Study of Fashion and Form* (Bloomsbury Publishing Plc, 2013).

Webb W M, *The Heritage of Dress* (Times Book Club, 1912).

Weil P, 'Headscarf versus Burqa', in Mancini S and Rosenfeld M (eds) *Constitutional Secularism in an Age of Religious Revival* (Oxford University Press, 2014) 195-215.

Williams R, *Keywords : A Vocabulary of Culture and Society* (Fourth impression 1990, Fontana Press, 1990).

Wilson E, *Adorned in Dreams: Fashion and Modernity* (I B Tauris, 2013).

Winter M, 'Ulama' between the State and the Society in Pre-Modern Sunni Islam', in Meir Hatina (ed) *Guardians of faith in modern times: Ulama in the Middle East* (Brill, 2009) 21-45.

Whisner M, 'Gender-Specific Clothing Regulation: A Study in Patriarchy' (1982) 5 Harvard Women's Law Journal 73.

Woodward K, *Questioning Identity: Gender, Class, Nation* (Routledge, 2004).

Woodward S, *Why Women Wear What They Wear* (Berg, 2007).

Yegenoglu M, *Colonial Fantasies : Towards a Feminist Reading of Orientalism* (Cambridge University Press, 1998).

Young W C, *The Rashaayda Bedouin: Arab Pastoralists of Eastern Sudan* (Harcourt Brace College Publishers, 1996).

Yuval-Davis N, 'The Bearers of the Collective: Women and Religious Legislation in Israel' (1980) Feminist Review 15.

--*Gender & Nation*, vol 24 (Cambridge Univ Press, 1997).

Zetterbaum M, 'Equality and Human Need' (1977) 71 American Political Science Review 983.

Žižek S, *On Belief* (Routledge, 2001).

Zhang X, 'Multiplicity or Homogeneity? The Cultural-Political Paradox of the Age of Globalization' (2004) 58 Cultural critique 30.

Zubaida S, *Islam, the People and the State : [Essays on] Political Ideas and Movements in the Middle East* (Tauris & Co, 1993).

Cases and legal documents

Arrowsmith v the United Kingdom App. no 7050/75 (ECHR, 12 October 1978).

Assemblee Nationale, Rapport d'information no. 2262, "Au nom de la mission d'information sur la pratique du voile integral sur le territoire national, 26 janvier 2010".

Bauerischer Verwaltunggsgerichtshof [Bay VGH] [Bavarian Higher Administrative Court] (june 3, 1991), 122 Bayerische Verwaltungsblatter [Bay VBl] 751 (751-54) (F.R.G.) *reprinted in* Neue Zeitschrift fur Verwaltungsrecht [New Journal od Administrative Law] issue 11, 1991, at 1099.

Circulaire of Marvh 2011 relative a la mise en oeuvre de la loi no 2010-1192 du 11 oct. 2010 interdisant la dissimulation du visage dans l'espace public" (3 March 2011) Journal Officiel *JORF.*

Commission De Reflexion sur l'application du principle de laicite dans la Republique, Rapport au President de La Republique (2003) http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf, accessed 15 October 2014.

'Constitution of Greece' <http://www.hri.org/docs/syntagma/artcl25.html> accessed 4 May 2016.

Dahlav V Switzerland, Application no 42393/98 (ECHR, 15 February 2001).

'Iranian Goverment Constitution, English Text' article 56 <http://www.iranonline.com/iran/iran-info/Government/constitution-5.html> accessed 23 May 2016.

Kokkinakis v Greece, Application no 14307/88 (ECHR, 25 May 1993).

L*oi n^{o} 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (FR).*

LOI No. 2010-1192 du 11 Octobre 2010 interdisant la dissimulation du visage dans l'espace public Journal Officiel (JORF) (FR).

Lutsi v Italy, Application no 30814/06 (ECHR, 18 March 2011).

Manoussakis and Others v. Greece, Application no 18748/91 (ECHR, 26 September 1996).

Otto-Preminger-Institut v Austria (1994) 19 EHRR 34.

R (Begum) v. Headteacher and Governors of Denbigh High School, [2004] EWHR 1389, [2006] UKHL 15, [2007] 1 AC 100.

Refah Partisi (The Welfare Party) and others v. Turkey, Application nos. 41340/98, 42342/98 and 41344/98 (ECHR 31st July 2001).

S*ahin v. Turkey*, Application no. 44774/98 (ECHR, 10 November 2005).

S.A.S v. France Application no. 43835/11 (ECHR, 1 July 2014).

Written Submission by the Human Rights Centre of Ghent University' <http://www.hrc.ugent.be/wp-content/uploads/2015/11/SAS.pdf> accessed 16 September 2016.

Universitat Trier, 'Institute of european Constitutional Law (IECL)' http://www.uni-trier.de/index.php?id=24373&L=2 accessed 15 July 2015.

News Articles & Clips

'Burka Ban for Muslims Enforced in Switzerland with Fines of as Much as £8,000' (*The Telegraph*, 2016) <http://www.telegraph.co.uk/news/2016/07/07/burka-ban-for-muslims-enforced-in-switzerland-with-fines-of-up-t/> accessed 22 October 2016.

'Discrimination in the Name of Neutrality: Geadscarf Bans for Teachers and Civil Servants in Germany' (*Human Rights Watch,* 2009), 'Germany_0209_web - germany0209_webwcover.pdf' <https://www.hrw.org/sites/default/files/reports/germany0209_webwcover.pdf> accessed 5 October 2016.

'Fatawa - Wearing Hijab Causes Me Work Troubles, Can I Take It Off?' (*Dar al-Ifta al Misriyyah*) <http://www.dar-alifta.org/Foreign/ViewFatwa.aspx?ID=7504> accessed 19 January 2016.

'Fatwa Forbids Women to Work without Veil' (*India Today*, 2010) <http://indiatoday.intoday.in/story/Fatwa+forbids+women+to+work+without+veil/1/97058.html> accessed 19 January 2016.

'France Warns of Muslim Stigmatisation amid Burkini Ban' (*Al-Jazeera,*2016) <http://www.aljazeera.com/news/2016/08/france-warns-muslim-stigmatisation-burkini-ban-160824191045697.html> accessed 9 September 2016.

'Féminisme et Islam : Hanane Karimi, L'orthodoxie et La Révolte-- (*Jeune Afrique,* 2016) <http://www.jeuneafrique.com/mag/325356/societe/feminisme-islam-hanane-karimi-lorthodoxie-revolte/> accessed 30 November 2016.

'Freedom Fatwa? Saudi Cleric Says Women Don't Need to Veil, Can Travel Alone'(*Al Arabya News,* 2013) <http://english.alarabiya.net/articles/2013/02/27/268730.html> accessed 19 January 2016.

‘French Muslim Student Banned from School for Wearing Long Black Skirt’ (*The Guardian, 2*015) <http://www.theguardian.com/world/2015/apr/28/french-muslim-student-banned-from-school-for-wearing-long-skirt> accessed 30 January 2016.

‘Is the HIJAB Really COMPULSORY?’(*Ummah- The Online Muslim Community,* 2010) <http://www.ummah.com/forum/showthread.php?261950-Is-the-HIJAB-really-COMPULSORY> accessed 4 December 2015.

‘Jilbaab Is Not Obligatory If the Womans Clothes Meet the Conditions of the Hijaab’ (*Islam Web,* 2016) <http://www.islamweb.net/emainpage/index.php?page=showfatwa&Option=FatwaId&Id=308041> accessed 19 January 2016.

‘Just 2 Women Decided against Citizenship Oath because of Niqab Ban’ (*CBC News,* 2015) <http://www.cbc.ca/news/politics/niqab-ban-zunera-ishaq-1.3249495> accessed 8 December 2015.

al-Buyairi A,‘Scholars Seek Autonomy As Arbiters of Islamic Law' (*Al-Monitor,* 2012) <http://www.al-monitor.com/pulse/politics/2012/09/islamic-scholars-maintain-azhars-role-in-egypt.html?utm_source=&utm_medium=email&utm_campaign=4429> accessed 5 March 2016.

al-Anani K, ‘Morsi’s Unsustainable Autocracy' (*Al-Monitor,* 2012) <http://www.al-monitor.com/pulse/originals/2012/al-monitor/morsi-unsustainable-autocracy.html?utm_source=&utm_medium=email&utm_campaign=5465> accessed 5 March 2016.

Al-Aswany A, ‘In Egypt, How to Lie And Remain Pure ' (*Al-Monitor,* 2012) <http://www.al-monitor.com/pulse/politics/2012/12/how-to-lie-and-remain-pure.html?utm_source=&utm_medium=email&utm_campaign=5685> accessed 5 March 2016.

Allen P, ‘Minister Compares Veiled Women to 'Negroes Who Supported Slavery'’ (*Mail Online*, 2016) <http://www.dailymail.co.uk/news/article-3516233/French-minister-compares-veiled-women-negroes-supported-slavery-Politician-sparks-outrage-questioning-rise-fashion-lines-cater-Muslims.html> accessed 12 April 2016.

Azad H, ‘Do Muslims Belong in the West? An Interview with Talal Asad’ (*Jadaliyya,* 2015) <http://www.jadaliyya.com/pages/index/20768/do-muslims-belong-in-the-west-an-interview-with-ta> accessed 5 October 2016.

Berry S, ‘SAS v France: Does Anything Remain of the Right to Manifest Religion?’ (*EJIL: Talk!*, 2014) <http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/> accessed 17 January 2017.

Breeden A and Blaise L, ‘Court Overturns “Burkini” Ban in French Town’ (*The New York Times,* 2016) <http://www.nytimes.com/2016/08/27/world/europe/france-burkini-ban.html> accessed 9 September 2016.

Chemaly S, ‘France’s Burkini Ban Exposes How Women Are Still Violently Oppressed in the Name of Nationalism’ (*Quartz,* 2016) <http://qz.com/767796/frances-burkini-ban-has-exposed-the-way-women-are-oppressed-in-the-name-of-nationalism/> accessed 16 October 2016.

Chrisafis A, ‘France Rejects Muslim Woman over Radical Practice of Islam’ (*The Guardian,* 2008) <https://www.theguardian.com/world/2008/jul/12/france.islam> accessed 5 October 2016.

Furniere A, ‘School in Mechelen Prohibits the Wearing of Long Skirts' (*The Bulletin,* 2015) <http://www.xpats.com/school-mechelen-prohibits-wearing-long-skirts> accessed 11 May 2016.

Ganley E, ‘Why France Thinks the Burkini Is an Attack on Secularism' (*The Independent,* 2016) <http://www.independent.co.uk/news/world/europe/burkini-ban-france-cannes-nice-muslim-islam-beach-french-secularism-a7206971.html> accessed 9 September 2016.

Gopnik A, ‘Freedom and the Veil’ (*The New Yorker,* 2015) <http://www.newyorker.com/news/daily-comment/freedom-and-the-veil?mbid=social_facebook> accessed 8 December 2015.

Karami A, ‘Khomeini’s Grandson Says There Is More to Islam than Hijab’ (*Al-Monitor,* 2016) <http://www.al-monitor.com/pulse/originals/2016/06/hassan-khomieni-khatami-hijab-islami-grandson.html?utm_source=English+List+-

+052616&utm_campaign=67d5b9fcd5-June_03_2016&utm_medium=email&utm_term=0_7ec6b191fc-67d5b9fcd5-102657949> accessed 3 June 2016.

Kuttab D, 'Does Dress Code Signal "Hamasization" of Gaza?' (*Al-Monitor,* 2013) <http://www.al-monitor.com/pulse/originals/2013/01/hamsization-gaza-dress-code-al-aqsa-university.html> accessed 21 November 2015.

Mukhtar Z, 'Pakistan's Burqa-Clad Cartoon Superhero Makes Foray into India | Global Development (*The Guardian,* 2015) <http://www.theguardian.com/global-development/2015/apr/30/pakistan-burka-avenger-cartoon-superhero-india-women> accessed 12 November 2015.

Murphy C, 'Saudi Youth Question Traditional Approach to Islam' (*Al-Monitor,* 2012) <http://www.al-monitor.com/pulse/originals/2013/02/saudi-youth-question-mohammed-al-ari-tom-cruise-of-wahhabism.html?utm_source=&utm_medium=email&utm_campaign=6053%20,%204%20Feb.%202013> accessed 5 March 2016.

Mutahhari M 'Jihad: The Holy War of Islam and Its Legitimacy in The Quran' (*The Islamic Propagation Organization*)<http://www.alseraj.net/maktaba/kotob/english/Fiqh/Jihad/short/jihad/index.html> accessed 23 May 2016.

Naili H, '5 Veiled Frenchwomen Tell 5 Stories of Harassment' (*Women's eNews,* 2014) <http://womensenews.org/2014/11/5-veiled-frenchwomen-tell-5-stories-of-harassment/> accessed 30 November 2016.

Nelson S C, 'Sheikh Abdullah Daoud, Saudi Arabian Cleric Issues Fatwa Calling For Female Babies To Wear Burkas' (*The Huffington Post*, 2013) <http://www.huffingtonpost.co.uk/2013/02/04/sheikh-abdullah-daoud-saudi-arabian-cleric-fatwa-babies-burkas_n_2613803.html> accessed 19 January 2016.

Osborne S, 'Not in My Courtroom - Judge Throws out Case after Woman Refuses to Remove Headscarf' (*Express*, 2016)

<http://www.express.co.uk/news/world/699607/burka-hijab-court-ban-judge-montreal-quebec-canada> accessed 3 October 2016.

Pargoo M, 'More Veils Lift as Topic Loses Political Punch in Iran' (*Al-Monitor,* 2015) <http://www.al-monitor.com/pulse/originals/2015/12/iran-mandatory-veil-change-views.html> accessed 9 January 2016.

Ramdani N,'Veil Row Reignites in France after 15-Year-Old Girl Expelled from School for Wearing a Headband and Long Skirt Which Were Considered 'too Religious'' (*Daily Mail Online,* 2013) <http://www.dailymail.co.uk/news/article-2305314/Veil-row-reignites-France-15-year-old-girl-expelled-school-wearing-headband-long-skirt-considered-religious.html> accessed 30 November 2016.

Sabah D, 'After France, Muslim Students in Belgium Banned from School' (*Europe News,* 2015) <http://en.europenews.dk/After-France-Muslim-students-in-Belgium-banned-from-school-77380.html> accessed 11 May 2016.

Sahimi M, 'Grand Ayatollah Montazeri's Fatwa' (*Frontline - Tehran Bureau,* 2009) <http://www.pbs.org/wgbh/pages/frontline/tehranbureau/2009/07/grand-ayatollah-montazeris-fatwa.html> accessed 23 May 2016.

Sheen D, 'Israel's War Against Gaza's Women & Their Bodies' (*Muftah*, 2014) <http://muftah.org/israels-war-gazas-women-bodies/> accessed 29 January 2016.

Slackman M, 'Cleric Wields Religion to Challenge Iran's Theocracy' (*The New York Times* 2009) <http://www.nytimes.com/2009/11/22/world/middleeast/22ayatollah.html> accessed 23 May 2016.

Taher A, 'Veil Teacher Was Obeying a Fatwa (*The Sunday Times*, 2010) <http://www.thesundaytimes.co.uk/sto/news/uk_news/article164886.ece> accessed 19 January 2016.

Tahroor I,'A French Muslim Girl Was Kicked out of Class Because Her Skirt Was Too Long' (*The Washington Post,* 2015) <https://www.washingtonpost.com/news/worldviews/wp/2015/04/29/a-french-muslim-girl-was-kicked-out-of-class-because-her-skirt-was-too-long/> accessed 11 May 2016.

Toor A, ‘French Official Threatens to Sue Social Media Users Who Share Burkini Photos’ (*The Verge*, 2016) <http://www.theverge.com/2016/8/25/12637964/france-burkini-ban-photo-nice-social-media> accessed 9 September 2016.

Willsher K, ‘'Burqa Ban' in France: Housewife Vows to Face Jail rather than Submit’ (*The Guardian,* 2011) <https://www.theguardian.com/world/2011/apr/10/france-burqa-law-kenza-drider> accessed 25 September 2016.