Orientalism in the European Court of Human Rights

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> 'The power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images is the only attainable one in which a sane person would want to live.' [1]

1. Introduction

Law is constitutive of the world we live in. Feminists and postcolonial theorists, in particular, highlight the inbuilt bias of law in a number of areas; through substantive legal rules; the form through which law disciplines its subjects; and also in its pretension to neutrality.[2] Critiques by Darien-Smith[3] and Costas Douzinis [4] amongst others challenge the presumption of the neutrality of human rights law and argue that human rights discourse, alongside discourse on race, has been influenced if not completely shaped by the historical religious context in which 'Western' ideas about "minorities" and "rights" were originally formulated.' [5] Despite this critical attention Eve Darian-Smith argues that the premise of neutrality persists, and '... the narrative of law's neutrality [is] still so compelling, perhaps even necessary for contemporary Western nations.'[6] For this reason it is important to

[1] Gordon cited by Teemu Ruskola in, 'Legal Orientalism' 101 Mich .L. Rev. (2002-2003) 179, p.200.
[2] For example Carol Smart, *Feminism and the Power of Law* (Abingdon, Routledge, 1989); Peter Fitzpatrick and E Darien-Smith, *Laws of the Postcolonial* (Michigan, University of Michigan Press, 1999) Ratna Kapur, *Erotic Justice: Law and The New Politics of Postcolonialism* (Abingdon, Routledge-Cavendish 2005); Upendra Baxi, *The Future of Human Rights* (Oxford, Indian Paperbacks, 2008); EP Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York, Pantheon, 1975). Anti-instrumentalists and Law and Development theorists have been equally critical.
[3] Eve Darien Smith, *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law* (Oxford, Hart, 2010)
[4] Costas Douzinis, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Abingdon, Routledge-Cavendish, 2007)
[5] Nomi May Stolzenberg, 'Righting the Relationship Between Race and Religion in Law' 31 (3), OJLS (2011) 583, p. 593.
[6] Darien–Smith, *supra* note 3, Preface.

deconstruct and challenge the normative basis of legal discourses, as well as the rules, or application of the rules themselves. Anti-Orientalist critique is a form of postcolonial critique,[7] typified by Edward Said's seminal work, *Orientalism.*[8] Like other postcolonial and critical theories including feminist theory, an anti-Orientalist critique challenges the processes, production and content of 'knowledge:'[9] in this case a 'knowledge' that constructs both the 'Orient' and its notional subjects as 'Other' and inferior.

A rich literature on Orientalism has developed within cultural studies, art, literature, sociology and there is an emerging application to political science,[10] less literature exists on Orientalism and law[11] This article addresses this gap by providing a critique of the normative basis of European human rights law through the identification of Orientalist discourse in adjudication under the European Convention of Human Rights and Fundamental Freedoms (ECHR).[12] Some of the cases used here have already been subject to academic critique but this article is distinctive in subjecting them to a methodology which facilitates an anti-Orientalist textual analysis. The analysis here illustrates the significance of gender in the

[7] Alpana Roy 'PostColonial Theory and Law: A Critical Introduction' 29 *Adelaide Law Review* (2008) 320; Margaret Davies, *Asking the Law Questi*on, (3rd Edition) (Sydney, Lawbook Co, 2008)
[8] Edward Said, *Orientalism* (London, Penguin, 2003).
[9] Carol Smart, 'Law's Power, The Sexed Body, and Feminist Discourse.'17:2 Journal of Law and Society, (1990) 194
[10] Ocumene: Citizenship after Orientalism, Symposium, Open University 6-7 February 2012.
[11] Alpana Roy noted in 2008 that conversations between law and postcolonialism in general have been infrequent, Roy, *supra* note 7. Teemu Ruskola notes the absence of studies on `specifically *legal* forms of Orientalism' *supra* note 1. Yet excellent examples of the application of Orientalism to legal studies do exist. Darien-Smith and Fitzpatrick, *supra* note 2, charts many of these . Work ranges from examinations of the production of knowledge about indigenous law during the colonial period, to the identification of Orientalism in international law in the current period post 9- 11.For example, Carol Tan (ed) *Law and Orientalism Special Issue of the Journal of Comparative Law*, VII:2 (2012); John Strawson 'Islamic Law and English Texts' in Eve Darien-Smith and Peter Fitzpatrick (eds), *supra* note 2; Veena Oldenburg, *Dowry Murder: The Imperial Origins of a Cultural Crime,* (Oxford, OUP, 2002); Kunal Parker, 'Interpreting Oriental Cases: The Law of Alterity in the Colonial Court Room' 107:7 *Harvard Law Review*, 1711 – 1728; Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge, CUP, 2003); Richard Falk, 'Orientalism and International Law: A Matter of Contemporary Urgency' 7 (1-2) *The Arab World Geographer* (2004) 103; Allain, J, 'Orientalism and International Law: The Middle East as the Underclass of the international Order' 17 *Leiden Journal of International Law* 391-404.

[12] Rome,4. X1. 1950

Orientalist constructions of both the claimant and the state. It argues that the European Court of Human Rights (ECt.HR) not only fails to properly address rights claims by visibly-Muslim women, but also contributes to discrimination against visibly-Muslim women through its validation of discriminatory practice in law, legal adjudication, policy, and in social settings across Europe.[13] It is not suggested that the Court intends to contribute to this worsening discrimination,[14] still the need for change within the ECt.HR is pressing and the article suggests ways that this change could be focussed.

In section 2 this article examines Orientalism as a concept, identifies Orientalist tropes and analyses the role that gender plays in this construction of Orientalist discourse. Section 3 applies these tropes to identify and deconstruct Orientalist discourses in adjudication under the European Convention of Fundamental Rights and Freedoms. In subsections (i) – (iv) textual examples are used to examine and illustrate the negative construction of Muslim claimants through an Orientalist lens. In part (v) the focus turns to the construction of the respondent state. This last sub-section builds on Marie Dembour's work[15] which looks at how colonial constructions of the State affect the way the margin of appreciation is applied under the ECHR. It develops Dembour's analysis by analysing the impact of gender in the construction of the respondent state as either 'Oriental' or 'modern.' Section 4 suggests ways

[13] Charlotte Skeet 'Globalisation of Women's Rights Norms: The Right to Manifest Religion, and "Orientalism" in the Council of Europe' 4:3 *Public Space: The Journal of Law and Social Justice* (2009); Amnesty International, *Choice and Prejudice: Discrimination Against Muslims in Europe*, Amnesty International (2012); Ayesha Salma Kariapper, *Walking a Tightrope: Women and Veiling in the United Kingdom*, (London, Women Living Under Muslim Laws, 2009)

[14] European Network Against Racism, *Racist Crime in Europe: ENAR Shadow Report 2013- 2014* (Brussels, ENAR 2014) http://enar-eu.org/IMG/pdf/shadowreport_2013-14_en_final_lowres-2.pdf accessed May 2015; European Network Against Racism, *Racism and Discrimination in Employment in Europe 2013- 2017: ENAR Shadow Report (* Brussels, ENAR, 2017) http://www.enar-eu.org/IMG/pdf/shadowreport_2016x2017_long_final_lowres.pdf.

[15] Marie-Benedicte Dembour, 'Postcolonial Denial: Why the European Court Finds it so Difficult to Acknowledge Racism' in Mark Goodale, and K Clarke (eds.) *Mirrors of Justice: Law and Power in the Post-Cold War Period* (Cambridge, CUP, 2010).

that these negative discourses within the European Court of Human Rights might be countered and changed. In conclusion, 5, the article stresses the importance of deconstructing Orientalist discourse under the ECHR for the integrity of the rights system in Europe.

2. Orientalist Discourses and the Role of Gender in their Construction

2.1. Orientalism Defined.

Edward Said,[16] ascribes several understandings to the term Orientalism. He accepts the term can be given a neutral definition which just describes the bodies of writing, research and teaching about the Orient across a range of disciplines.[17] Any author or academic, by this description, who engages in this nature of enquiry or production of knowledge about the Orient would be an Orientalist. Yet Said also uses the term Orientalism to define a 'style of thought' that seeks to distinguish the 'Orient' and 'Occident,' basing its epistemology on the distinctions it creates between the two.[18] Further he presents this thought system of Orientalism as a 'corporate institution for dealing with the Orient' a 'Western style for dominating, restructuring, and having authority over the orient ' through ' making statements about it , authorizing views of it , describing it, by teaching it, settling it and ruling over it'.[19]

2.2 Role of Gender in Orientalist Constructions

In *Orientalism,*[20] Said recognised the essentialist and inherently masculinist approach of Orientalism both in relation to constructions of the Orient and of 'male' and 'female'. Like

[16] Said, *supra* note 8.
[17] *Ibid*., p. 3.
[18] *ibid*.
[19] *ibid*.
[20] *ibid*.

other colonial and post-colonial discourses Orientalism uses a binary notion of gender and a concept of acceptable masculinism to distinguish that which is deemed 'civilized and acceptable' from that which is 'uncivilized' and unacceptable. For instance Orientalist discourse 'Orientalises' non-Western men by defining and portraying them as feminised, 'lamentably alien,'[21] and aligned with women in Western societies.[22] Historically even the conception of the Orient itself was made analogous to 'Woman' in Western society: viewed as '…outsider and incorporated weak partner …'[23] Women who are Orientalised are presented as a contrast to 'modern' or 'Western' women, lacking in agency and caricatured as 'creatures of a male power fantasy ...',[24] showing 'unlimited sensuality, '[25]and 'unbounded sexuality,'[26] and in this way also presented as carnal temptresses[27] posing a 'threat' to Western men and culture.[28]

Feminist writers Reina Lewis,[29] Meyda Yeğenoğlu,[30] Ratna Kapur[31] and Rana Kabbani [32] have given greater attention to other gendered elements of Orientalism, in particular the way in which discourses have impacted on women historically. Kabbani notes that, 'Europe's feelings about Oriental women were always ambivalent ones. They fluctuated between

[21] *Ibid*., p. 207.
[22] Although do note that Amar Shalakany, 'On a Certain Queer Discomfort with Orientalism,' Proceedings of the Annual Meeting, ASIL, Vol 101 march 2007 125-129 who argues that we might need to ' ... take a break from Orientalism,' (in the style of Janet Halley's arguments re taking a break from feminism) in order to embrace the 'Universalisation of US gay identity discourse.' In fact his discussion on the manner of discrimination against gay men in Egypt suggests that even here his critique does find Orientalism theory to be useful.
[23] Said *supra* note 8 p. 208.
[24] *Ibid*., p.207.
[25] *ibid*.
[26] *ibid*.
[27] *Ibid*., p.186-188.
[28] i*bid*.
[29] Reina Lewis, *Gendering Orientalism: Race, Femininity and Representation (*Abingdon, Routledge, 1996).
[30] Meyda Yeğenoğlu, *Colonial Fantasies: Towards a Feminist Reading of Orientalism*, (Cambridge, CUP, 1998).
[31] Kapur, *supra* note 2.
[32]Rana Kabbani, *Imperial Fictions: Europe's Myths of Orient* (London, McMillian 2008).
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desire, pity, contempt and outrage. Oriental women were painted both as erotic victims and scheming witches.'[33]

These historic dual portrayals viewed women on one hand as 'victims' trapped within monolithic cultural structures which were hostile to the West and oppressive towards women and on the hand as dangerously erotic: presenting an "exteriority. " This duality can still be identified in current discourses around visibly-Islamic women. Theses often focus on a vision of women as veiled – their veiling interpreted through Orientalist discourses both as symbols of seclusion, oppression, and at the same time as visual carriers of a culture which is 'Other' and dangerous. Said and Yeğenoğlu both argue that in Orientalist discourse the 'veiled' women becomes synonymous with the Orient and the control of 'veiling' becomes entwined with control of the very Orient itself.[34] For example the French in Algeria[35] and the Soviets in Central Asia,[36] used the project of 'modernising' women by suppressing the veil as the lynchpin of their imperial policies. A rhetoric of women's rights was used as justification for colonial policies and the process of forced public unveilings was crucial to their strategies for integration and hegemonic control of the territories they targeted. Franz Fanon writing about the occupation of Algeria, observed that, '[e]very new Algerian woman unveiled announced to the occupier an Algerian society whose systems of defence were in the process of dislocation, open and breached'[37] Laura Nadar maintains that in this current period, it is still a lack of veiling which symbolizes modernity, and is seen by the 'West' as the crucial indicator of women's rights, and as an indicator of commonality.[38] These visual indicators allow a society to be judged as a whole, and become metaphors for the 'modernity' or

[33] *Ibid*., p.53.
[34] Said, *Supra* note 8; Yeğenoğlu, *supra* note 30.
[35] Franz Fanon, *Studies in a Dying Colonialism* (London , Earthscan,1989) see Chapter 1 – Algeria Unveiled
[36] Geoffrey Massell, 'Law As an Instrument of Revolutionary Change In A Traditional Milieu: The Case of Soviet Central Asia' 2 Law and Society Review (1967-68) 179.
[37] Fanon, *supra* note 35, p. 42.
[38] Laura Nadar, 'Orientalism, Occidentalism and the Control of Women'2 *Cultural Dynamics* (1989) p. 323.

'backwardness' of a society.[39] For instance Sherene Razack argues that in the post 9/11 period Muslim womens' bodies have become hyper-visible.[40] Women who are Muslim report experiencing very different treatment if they choose to appear in public wearing visible indicators of their religion or culture like a headscarf.[41] The treatment of visible cultural dress particularly in relation to women is used at a meta-national level to constitute notions of European identity and at national levels as constitutive of the conception of the modern state.

2.3 Orientalist Tropes

The key to deconstructing the Orientalist discourses in these cases is first to understand how they are created. Said's work analyses several ways that Orientalist discourses are constructed and operate to create a relationship of hegemonic control between the Orient and Occident.

First Orientalist discourse presents the Orient and Islam as a religion of the Orient as essentialized and homogenized, [42] nuanced interpretations are lost unless the nuance is to emphasis difference. Second Said's work finds that these essentializng presentations of the Orient are often incorporated into a binary model with the 'Oriental' characteristic presented as exterior and inferior in each case to a European author's own society, religion, character etc. This allows for differing and paradoxical presentations of the Orient or Oriental subject so that on one hand the Orient might be presented as monolithic and unchanging or unchangeable perhaps in relation to 'its' thought processes [43] and yet also presented as

[39] *ibid*.
[40] Sherene Razack, "Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: legal and Social Responses to Forced Marriages" 12 Feminist Legal Studies, (2004) 129- 174, p.130.
[41]See Kariapper *supra* note 13; Amnesty *Choice and Prejudice supra* note 13*; E NAR supra* note 14.
[42] Edward Said, *Covering Islam: How the Media and Experts Determine How we see the Rest of the World* (London, Vintage, 1997), Edward Said *Culture and Imperialism* (London, *Vintage 1994)*; Kabbani, *supra* note 32.

[43] Said, *supra* note 8, p. 208.

unstable. Said argues that, '… in quite a constant way, Orientalism depends for its strategy on the flexible *positional* superiority, which puts the Westerner in a whole series of possible relationships with the Orient without ever losing him the relative upper hand.'[44] Orientalism is in this sense is a style of thought or knowledge '… based on an ontological and epistemological distinction made between the Orient and (most of the time) the Occident.' [45] Thirdly Orientalism operates through methodology which is cumulative and accumulative[46] and which reconstructs and repeats statements about the Orient and presents these as 'knowledge.'[47] Said notes this referentialism in 19th century Orientalism: partial observations when reiterated in later literatures become 'truths' which become strengthened and reinforced each time the reference is given. In this way a supposed impartial or academic approach is constructed and the reality of unsubstantiated opinion is masked. This process is something that Lewis also refers to as a 'politics of citation.'[48] Orientalising views of the Orient are supported by reference to previous Orientalist works and then presented as 'scientific' fact rather than just opinion, myth or speculation.[49] In this way Orientalist discourse becomes '… a created body of theory and practice … ' not just '… an airy European fantasy about the Orient…'[50]

3.1 Orientalist Tropes and Discourse within the Jurisprudence on the European Convention on Human Rights and Fundamental Freedoms

This section examines selected cases from the Commission and ECt.HR providing a textual analysis which reveal the three tropes which typify Orientalist discourse. Each is addressed in

[44] *Ibid*., p. 7.
[45] *Ibid*., p. 2.
[46] *Ibid*., p.122.
[47] *Ibid*., p. 122- 123.
[48] Lewis, *supra* note 29, p. 18
[49] Said, *supra* note 8, p. 122.
[50] *Ibid*., *p.* 6. See also Yeğenoğlu, *supra* note 30, who discusses the variations between different types of representation and discourse.

turn; essentialism, the adoption of a binary approach with Christianity, and circularity or self-referentialism. The section argues for the significance of gender in Orientalised constructions of both claimant and state within ECt.HR case law. These sections take a case by case approach and the cases are grouped together as examples of the tropes they illustrate. This is in order to evidence the presence of each trope in the specific discourse within each case. The cases are also addressed chronologically where possible. In relation to the 'politics of citation'[51] discussed below, it is important to see the linear process of referentialism and this becomes evident where the cases are addressed in the order they were heard.

3.*2* ***Essentialism***

The textual analysis of the following shows the essentialising nature of ECt.HR discourses. Islam is presented as 'monolithic,' as 'external' to Europe, formed of ideologies which are contrary to democratic principles and incompatible with women's rights. The gendered discourses and duality in the construction of visibly-Muslim women is very apparent in relation to cases which involve claims on the right to wear a headscarf. In these cases visibly-Muslim women are constructed as both lacking in agency and as threatening the rights and freedoms of others.

Karaduman v Turkey[52] was the first case in which the, now defunct, European Commission on Human Rights, considered the admissibility of a claim for freedom of religion under

[51] Lewis, *supra* note 29, p. 18
[52] *Karaduman v Turkey* Application16278/90 3 May1993 and also *Bulut v Turkey* (Application No. 18783/91, 3 May 1993)

Article 9(1) and Article 14 by a visibly- Muslim woman.[53] In *Karaduman*, the applicant was refused her pharmacology degree certificate because she would not supply a photograph without her head covered. The Commission did not consider in detail whether the requirement to have her head uncovered was actually 'prescribed by law' but found that the regulations of a secular University ' ... *could* [my italics] require that certificates did not reflect in any way the identity of a movement owing allegiance to a particular religion in which these students take part.'[54] In this context the Commission characterized Karaduman's Islamic beliefs as dangerous to other students and her desire to wear a headscarf as 'fundamentalist' in its nature. The Commission found that '... wearing a Muslim headscarf *may* [my italics] constitute a challenge towards those who do not wear one,' [55] and that a secular University was entitled to ensure '... that certain fundamentalist religious movements do not disturb public order in higher education or impinge on the beliefs of others.'[56] The Commission's analysis and finding that the claim was inadmissible was incomplete since there was no investigation of whether the restriction was 'prescribed by law' and no evidence was sought to show how the Turkish state's restriction was justified 'in a democratic society' or whether indeed it was needed 'to protect the rights and freedoms of others.'

In *Dahlab v Switzerland*[57] almost 10 years later the European Commission on Human Rights one again found a claim by a teacher sacked for wearing a headscarf inadmissible. In this case the essentialising or homogenising language used by the Commission is even clearer, and as with *Karaduman* [58] the evidential basis for this decision is absent. The State claimed

[53] Article 14 was raised in relation to nationality discrimination not gender. It was argued that different requirements for dress existed for Turkish and overseas female students.
[54] *Karaduman v Turkey*, *supra* note 52, p. 108.
[55] *Ibid*., fourth paragraph, p.108.
[56] *Ibid*., third paragraph, p.108.
[57] *Dahlab v Switzerland* application no. 42393/98, European Commission on Human Rights 15 January 2001.
[58] *Karaduman v Turkey*, *supra* note 52.

Tina Dahlab had breached the duty incumbent on education authorities of 'denominational neutrality, under section 6 on the Geneva Cantonal Public Education Act and that her dress conveyed a 'religious message' beyond her 'purely personal sphere....'[59]

The application of Orientalist discourse and construction goes beyond a focus on a construction of 'oriental' ethnicity. Though the binary approach to Islam has created a 'colour line' in some societies[60] The 'headscarf' itself is a visual indicator which is constructed through orientalist discourse as a signal of cultural modern / Western and pre-modern/ Oriental divide.[61] Tina Dahlab was a white Swiss woman who underwent a religious conversion from Catholicism to Islam when she married. She adopted a custom of wearing a headscarf as a personal symbol of her new religion and in doing so became 'Orientalised' in the eyes of the Commission. In the Commission's determination of whether her headscarf was a symbol which extended beyond the 'personal sphere,' the Commission, like the Swiss domestic court, said that they considered that the 'headscarf' could never be a purely 'personal' symbol. The judgement focussed on the fact that her headscarf was linked to a religion that was 'Other'. No evidence of any classroom impact was shown, and no parents had complained, and if they asked her, Dahlab told the children she wore it because she was cold. Despite this the Commission stated that it was 'difficult to assess the impact that a *powerful external symbol* [my italics] such as the wearing of a headscarf *may* [my italics] have on the freedom of conscience and religion of very young children.'[62] The Commission then linked the 'externality' to a fear of conversion to Islam and then linked Islam to the oppression of women, stating '... it cannot be denied outright that the wearing of a headscarf

[59] *Dahlab v Switzerland, supra* note 57, p. 7.
[60] Sherene Razack, 'The Sharia Law Debate in Ontario: The Modernity / Premodernity Distinction in Legal Efforts to Protect Women from Culture,' 15:3 *Feminist Legal Studies*, p.6.
[61] Sherene Razack *Casting Out: The eviction of Muslims from Western Law and Politics* (Toronto, U of T Press, 2008)
[62] *Dahlab v Switzerland, supra* note 57, p.15.

might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which as the Swiss Federal Court noted, is hard to square with the principle of gender equality.' [63] These discourses present Dahlab as a woman lacking agency – the Commission suggests she wears the headscarf because it is 'imposed' on her. They also present her as a danger and a 'threat' to others.[64] By constructing her in this way and removing her agency as a woman claiming discriminiation, the Commission can dismiss the claim of gender discrimination under Article 14 on the basis that the prohibition was not '… directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of State primary-education …'.[65]

The next case, *Leyla Sahin v Turkey* [66] was the first case concerning the headscarf found to be admissible and given a full hearing in the European Court of Human Rights. Sahin claimed her Article 9 right to religion, Article 10 right to Freedom of Expression and her Protocol 1 Article 3 right to education and Article 14 right on the basis of religious (not gender) discrimination were breached by a prohibition on wearing the headscarf at University. Sahin had worn her headscarf for 5 years but following a clampdown on regulations she had been refused entry to her exams and expelled from the University of Bursa for wearing her headscarf. [67] On appeal the Grand Chamber supported the earlier Chamber decision, finding that the Islamic headscarf was incompatible with equality and the rights and freedoms of others. Though Turkey presented no tangible evidence, the Grand Chamber accepted that at a University where '… the values of pluralism, respect for the rights of others and, in

[63] *ibid.*
[64] *Ibid*., p. 15.
[65] *Ibid*., p. 17. Yet the ECHR has long recognized that actions might be discriminatory even when ' presented' as pursuing a legitimate aim See the discussion of this in the Grand Chamber decision of *DH v Czech Republic* (2008) 47 EHRR 3, para 175.
[66] *Leyla Sahin* v *Turkey* (Chamber) (2004) application no. (4474/ 98.
[67] *ibid*.

particular, equality before the law of men and women are being taught and applied in practice, it was understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.'[68] They followed the Chamber decision by suggesting that the decision to ban the headscarf was on the basis of adherence to the principle of gender equality,[69] finding the 'Islamic headscarf,' and Islam itself, incompatible with gender equality and democracy.[70] Once again the claimant is presented as both as lacking in agency, justifying the principle of gender equality to override her rights, and seen as threatening. Her insistence on wearing the headscarf is deemed to threaten democracy itself.

Nadar has observed that Orientalists base their ranking of an area's humanity based on how they '*... perceive' that area's* '… treatment of their women-folk.' [71] The next two cases illustrate the centrality and use of gender in the essentialist constructions of Islam even in cases where women's rights are not being claimed. In *Refah Partisi v Turkey* [72] the *Welfare Party*, a Turkish political opposition party claimed that their proscription by the Turkish government breached the Protocol 1 Art 3 right to free elections. In assessing their claim the ECt.HR went beyond any evidential evaluation of the risk posed by their actual political manifesto and any actions they had previously undertaken. Instead the Grand Chamber presented some 'generalized assumptions' in relation to the incompatibility of Islamic beliefs with democracy.[73] Characterising Islam as unchanging and incapable of change, the Grand

[68] *Leyla Sahin* v *Turkey* (Grand Chamber) (2005) 44 EHRR 5, para. 116.
[69] *Ibid*., para. 115.
[70] *ibid*.
[71] Nadar, *supra* note 37, p. 333.
[72] *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 EHRR 1.
[73] Neilson, Jorgen, 'Shari'a Between Renewal and Tradition' in Neilson and Lisbet Christoffersen (eds.) *Shari's as Discourse: Legal Traditions and the Encounter with Europe*,(London, Ashgate, 2010), pp. 1-2.

Chamber first states, 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 public freedoms have no place in it'.[74] Great emphasis was laid on the characterization of Islam as anti-equality as defined by Islamic rules which the Court found discriminated against women.[75]

In the second case *Gunduz v Turkey* [76] the Court supported Gunduz rights to free speech under Article 10, yet in the course of their decision repeated this essentialist language about the nature of Islam. Early on in the judgement the court recognizes that the very reason that Gunduz was invited to speak on Turkish television was to present the non-conformist (in the context of Islam) beliefs of the Aczmendis and in particular their beliefs that Islam is incompatible with Turkish democratic values. [77] Yet by the end of the judgment the Court adopts a homogenous and totalising view of Islam. Gunduz views are presented as reflective of all belief in Islam.[78] The words from *Refah Partisi* are repeated, 'It [is] difficult to declare ones support for democracy and human rights while at the same time supporting a regime based on sharia. … sharia which faithfully reflected the dogmas and divine rules laid down by religion, was stable and invariable and clearly diverged from Convention values, particularly with regard to … its rules on the legal status of women and the way it intervened in all spheres of private and public life in accordance with religious precepts. …'[79]

3.3 Positional Superiority

[74] *Refah Partisi (The welfare Party) and Others v Turkey supra* note 72, para. 123. See also Kevin Boyle in 'Human Rights, Religion and Democracy: The Refah Party Case', 1 *Essex Human Rights Review* , 1, who argues that the Grand Chamber failed to see the ban in the wider history of numerous bans on opposition parties.
[75] *Refah Partisi*, *supra* note 72, para. 123.
[76] *Gunduz v Turkey* (2005) 41 EHRR 59.
[77] *Ibid*., para. 43.
[78] *Ibid*., para. 51.
[79] *ibid*.

The second trope, 'positional superiority,' relies on a binary presentation of Islam with mainstream Christianity, the 'West' or Europe. Other studies suggest that rights adjudication in Europe treats the established Christian church very differently to other Christian sects and non-Christian religions.[80] Discourse in the cases discussed above show implicit binary division but in the Grand Chamber decision on *Lautsi* v *Italy*[81] it is illustrated much more clearly. In *Lautsi,* the Grand Chamber reversed the decision of the Chamber[82] which drawing on the earlier cases of *Dahlab*[83] and *Sahin*[84] had found that the mandatory placement of any crucifixes in school classrooms breached the claimant's right to freedom of religion under Article 9. In contrast the Grand Chamber found that the visibility of religious symbols in classrooms is not always problematic. In Christian Jopkke's view the Court's recognition that secularism is not the only way to secure democracy and human rights is a positive development in ECt.HR jurisprudence. [85] I agree with his analysis and support the outcome of the case. Yet the case itself is not free from the taint of Orientalism as Jopkke suggests.[86]

In coming to their conclusion the Chamber followed the finding of *Dahlab*[87] and *Sahin*[88] on religious symbols in educational contexts. In those cases no evidence of actual harm had been provided by the State required, so in *Lautsi* the Chamber did not look for evidence of 'actual harm.' When the Grand Chamber reversed this decision they justified their different approach

[80] Paul .Marshall, 'Religious Freedom' in Liam Gearon (ed.) *Human Rights and Religion: A Reader* Sussex Academic Press 2002; Marie-Benedicte Dembour, The Cases that Were Not to Be: Religious Freedom and the European Court of Human Rights' in Italo Pardo (ed) *Morals of Legitimacy: Between Agency and System* (New York, Berghanan Books, 2000), Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, Oxford University Press, 2001)
[81] *Lautsi v Italy* Grand Chamber Application no. 30814/06 [2011] 54 EHRR 60.
[82] *Lautsi v Italy* Chamber [2009] 50 EHRR 1051.
[83] *Dahlab v Switzerland, supra* note 57.
[84] *Leyla Sahin* v *Turkey supra* note 68.
[85] Christian Jopkke *European Identity in the Face of Islam,* Paper presented at SEI Conference, *The Future of Europe: Progress or Decline?* University of Sussex, September 27th 2012.
[86] *ibid*.
[87] *Dahlab v Switzerland , supra* note 57.
[88] *Sahin v Turkey, supra* note 68.

to the earlier jurisprudence by emphasising a binary distinction between Christian and Islamic symbols. Citing *Sahin* as an example of the state's responsibility to maintain'… public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. ...'[89] the Grand Chamber implicitly draws an inference that it is not religious symbols per se but Islamic symbols which are problematic. A distinction is made between a crucifix on a wall as an 'essentially a passive symbol… ' and not an 'external symbol' [90] as the headscarf in *Dahlab* had been described. *Lautsi* justifies the different interpretation of these religious symbols by emphasising the 'threat' that the Islamic headscarf posed to the religious beliefs of the children and parents ,[91] in contrast to the lack of a threat posed by a crucifix.[92]

3.4 A 'Politics of Citation'[93]

We can trace a 'self-referentialism' in these ECt.HR cases. Law itself is of course a self-referential system to some extent,[94] though determinations by the former Commission and the ECt.HR do not create binding precedent, the ECt.HR rightly refers to previous determinations to ensure consistency and develop the body of jurisprudence. Yet the case-law is not repeating legal principles, instead it repeats opinions, which are not supported by evidence, on both the nature of Islam and the agency of women who are visibly-Muslim. These then becomes 'facts' which gain weight and credence each time they are replicated. This suggests

[89] *Lautsi v Italy, supra note 81, para.* 60.
[90] *Ibid*., para. 72.
[91] *Ibid*., para. 73.
[92] It should be noted that the Ontario Court of Appeal in Canada found that even without any directly coercive or aggressive element, it is the normalisation of a particular religion in the classroom and the embarrassment of non-conformity that acts as barrier to a child seeking exemption from religious exercises. In this view an individual's religious symbol of any type would pose no problem but the states installation of crucifixes in the classroom would form an additional pressure against non-conformism in relation to Christian practices and optional prayers *Zylberberg v Sudbury Board of Education* (1988) 65 O.R. (2d) 641 (CA) and *Canadian Civil Liberties Assocation v Ontario* (1990) 71 O.R. (2d) 341 (CA)
[93] Lewis, *supra* note 29, p. 18.
[94] Gunther Teubner 'Autopoiesis in Law and Society: A rejoinder to Blankenburg' 2 , *Law and Society Review* (1984).

that this modern jurisprudence is self-referential in the way described by Said and Lewis as prevalent of Orientalist discourse.

This self-affirming approach prevents the recognition of error by the Court and is used to justify clearly irreconcilable case law in relation to different religions. This has been repeated in a line of cases. For example in *Refah Partisi*[95] the court reiterates the finding in *Dahlab* on the nature of Islam, [96]and this is repeated in *Sahin v Turkey*.[97] Opinion on the headscarf and its nature originally presented in *Dahlab* are treated as 'facts.'[98] The Court does not require evidence of a threat to democracy or of the impact on women's equality other than the Commission's opinion in *Dahlab and Karaduman*. *Dahlab* and *Sahin* were similarly cited in *Dogru* v *France* [99] by the Court which once again did not require evidence but merely acquiesced to the French state's position that a headscarf ban in sports classes was necessary for health and safety reasons.[100] As discussed earlier i*n Lautsi* both *Sahin and Dahlab* are cited to justify the differential treatment by the Grand Chamber of the Christian religion.[101]

In relation to this well cited 'difficulty' of reconciling 'wearing of the headscarf with the principle of gender equality' all references go back to just one text reference to *Musulmans en Terre Europeenne*, by Sami Aldeeb which was originally cited by the Swiss Constitutional Court in their determination of Dahlab's claim and was adopted by the ECt.HR judgement in

[95] *Refah Partisi v Turkey, supra* note 72.
[96] *ibid*.
[97] *Sahin v Turkey, supra* note 68, para. 111.
[98] *ibid*.
[99] *Dogru v France* application number 27058/05 (2009)49 EHRR 8, paras, 73 – 76.
[100] No similar ban was imposed in relation to sport at the Olympic level see Mafoud Amara 'Veiled Women Athletes in 2008 Beijing Olympics: Media Accounts' (2012) *International Journal of the History of Sport* 29:4 638: FIFA have also now lifted their ban after a two year trial which found no safety problems. BBC Sports News March 1st 2014. http://www.bbc.co.uk/sport/0/football/26398297
[101] *Lautsi v Italy, supra* note 81.

that case.[102] This single citation, taken without its context from this prolific Swiss author forms the basis of presumptions which are used over and over again.

3.5 Impact on the Construction of the Claimant

Previous sections have shown how the three tropes, identified by Edward Said,[103] have been used in the adjudication of the European Convention on Fundamental Rights and Freedoms, in particular how these Orientalist discourses were used to frame the claim and claimant. Orientalist discourses distinguish women who are visibly-Muslim from women who are not visibly-Muslim. While the latter are deemed 'modern,' and hold agency and have rights against the state the former are deemed pre-modern and subject to the paternalism of the state. The analysis in these sections support Sherene Razack's argument that the headscarf has become a focus for European fears about Islam in the context of debates about a "culture clash" in Europe**.**[104] In this context the headscarf itself acts as a visual indicator that can become a cue for differential legal treatment.

The difficulty that the ECt.HR has in constructing visibly-Muslim women as rights holders is evident not only through discussion of the headscarf in the case law but also through the absence of discussion of the headscarf as illustrated by the next example. In *Kavakci v Turkey*[105] the ECt.HR's absence of reference to the headscarf reveals their difficulty in reconciling a woman wearing a headscarf as a rights holder. Kavakci was elected as an MP to the Turkish Grand National Assembly but was prevented from taking her oath and thrown out

[102] *Dahlab* v Switzerland, *supra* note 57, para. 7.
[103] Said, *supra* note 8.
[104] Sherene Razack *Casting Out: The eviction of Muslims from Western Law and Politics* (Toronto, U of T Press, 2008) p.125.
[105] *Kavakci v Turkey* ECHR (Application no 71907/01) 2007.

of the Turkish Grand National Assembly because she turned up to the ceremony wearing a headscarf. There was no law in place forbidding women to wear the headscarf in the Assembly but nevertheless the Prime Minister demanded that Kavakci be 'put in her place,'[106] and she was removed from the Assembly. Subsequently Kavakci's Turkish citizenship was removed and finally her political party – the Virtue Party - was banned. The Inter-Parliamentary Union investigation examined her case and found that the victimisation Kavackci experienced flowed from the initial denial of her right to wear a headscarf in the Assembly [107] Yet when her case was heard by the ECt.HR they declined the opportunity to examine how Kavakci's right to religion under Art 9 intersected with her claim under Protocol 1, Art 3. The ECt.HR did find that Kavackci's rights under Protocol 1, Art 3 had been breached but by failing to acknowledge why this had happened the Court avoided the conclusion that the Turkish government's refusal to allow the headscarf in the Assembly was incompatible with rights to democracy under the ECHR. Reaching this latter conclusion would have created a paradox for the ECt.HR in relation to their earlier decisions and discourses on the headscarf as an anti-democractic symbol.

A claimant's success or failure in the ECt.HR does not only depend on their construction but also on whether the respondent state is construed as 'modern' and allowed a wide margin of appreciation, or is itself Orientalized and in need of tighter supervision**.** The next section analyses how Orientalist discourse constructs the respondent state.

3.6. Role of Gender in the Construction of the Respondent State

[106] See Richard Peres, The Day Turkey Stood Still: Merve Kavacki's walk Into the Turkish Parliament (Reading, Ithica, 2012) Preface; Merve Kavackci, Headscarf Politics in Turkey: A Postcolonial Reading (Basingstoke, Palgrave, 2010) p.75- 76.

[107] Contrast the court findings with the report by the Inter-Parliamentary Union Report of the Committee on the Human Rights of Parliamentarians case No. TK/66- Merve Safa Kavakci – Turkey CL/177/11(a)-R.1 / Part 1 Geneva, 19th October 2005.

In her piece titled 'Post-Colonial Denial' Marie Benedicte` Dembour[108] argues that whether or not the ECt.HR finds that the state's behaviour falls with the margin of appreciation depends in part on its construction of the 'nature' of that state. Dembour's article challenges the general failure to recognize state racism in the jurisprudence of the ECt.HR and she argues that this in itself is a form of 'postcolonial denial.[109] Whilst noting that it is only recently and rarely that the ECt.HR has made any findings of racial discrimination,[110] Dembour explains that the preponderance of recent findings of state racism lie against the former Eastern European states. Her suggestion is that the ECt.HR is more comfortable in finding racism in these situations because it has Orientalised these states, and in doing so then accords them a lesser margin of appreciation. By separating these states out from 'modern' European states the court distances modern Europe from the taint of racism.[111]

Dembour analyses claims in relation to racial discrimination. It is argued here that the key to the differential treatment of cases in relation to religious clothing under the ECHR, depends on how the Turkish state is construed in each instance. Whether the Court recognises the claimants rights and whether they perceive the need for state supervision varies according to the way that both the claimant, and the respondent state are construed by the Court. If the claimant is 'Orientalised' and the state can position itself as 'modern', the state will be accorded a wide margin of appreciation. Where both claimant and state are 'Orientalised' the state will be deemed to require supervision to a higher standard and the margin of appreciation accorded will be much less, so the claimant even if Orientalised may be successful.

[108] Dembour, *supra* note 15.
[109] *Ibid*., pp. 53 and 54.
[110] *Ibid*., p. 45.
[111] *Ibid*., p. 53.

The cases discussed in this subsection show the role of gender in the construction of Orientalist and 'modern' narratives of state behaviour. Discourses applied externally to 'Orientalise' states may also be internalised and reproduced through domestic 'modernisation' policies. For instance Ataturk's Turkey in the 1920's ,[112] and Reza Shah in Iran in the 1950's[113] viewed clothing and particularly women's clothing as central to the presentation of the state as a 'modern' state. Government policies forced or encouraged women to 'unveil.' Yeğenoğlu, describes how 1920's Turkey, constituted itself as the modern Turkish state by positioning Islam as an 'outside Other.'[114] Women were charged, though not bound by law, to visually present themselves as 'modern Western' women and in this way to represent the new Turkish state while at the same retaining 'modest feminine virtue.'[115] There are echoes of Atatürk's push for modernity, in the way that Turkey positioned itself for entry to EU 1990's and 2000's, [116] As noted in the case of *Sahin[117] itself,* the revival of the 1981 regulations prohibiting the headscarf coincide with Turkish positioning for entry to the European Union entry. The regulations themselves in addition to prohibiting the headscarf refer to modernity by requiring students to wear '... ordinary, sober, *modern* dress.'[118]

[112] Yeğenoğlu, *supra* note 30, pp.126-138.
[113] Haideh Moghissi, *Populism and Feminism: Women's Struggle in a Male Defined Revolutionary Movement in Iran* (London, MacMillan, 1994).
[114] Yeğenoğlu, *supra* note 30, pp.134-5.
[115] *ibid*.
[116] There are echoes of Atatürk's push for modernity in the 1990's and 2000's as Turkey positioned itself for entry to EU. The Turkish government adopted a clamp down on forms of dress that were associated with Islam or 'unmodernity.' The 1981 regulations drawn up by the military government in 1981 required female students and personnel in Universities to '… wear ordinary, sober modern dress,' and not veils as is noted in *Sahin v Turkey, supra* note 66, para. 33 - which had been relaxed over the years were reissued in 1998 in a circular to Universities.
Hilal Elver 'Gender Equality from a Constitutional Perspective: The Case of Turkey', in Beverley Baines and Ruth Rubio- Marin, *The Gender of Constitutional Jurisprudence* (Cambridge, CUP, 2005), notes that this pressure to appear 'modern' intensifies after 9/11 when the Turkish state seeks to distance itself still further from Islam.

[117] *Sahin v Turkey (Grand Chamber), supra* note 68.
[118] *Sahin v Turkey, supra* note 68, p.33.

The ECtHR 's treatment of the cases from Turkey would seem to suggest that the Turkish state is constructed as 'modern' where it places itself in opposition to 'veiling'. The treatment of visibly-Islamic women and the prohibition of the headscarf acts to construct the state as 'modern' in the eyes of the ECtHR and worthy of a greater margin of appreciation and lesser supervision. In those cases which involve visibly-Muslim women, as in *Sahin*, the state is allowed a wide margin of appreciation. In contrast where the claimants are male as with *Arslan v Turkey*[119] and *Gunduz*,[120] or where the applicant is female but where religion is not an issue as in *Opuz v Turkey*,[121] the Turkish state cannot position itself in this way and itself becomes subject to an Orientalist construction, deemed pre-modern, and in need of greater European supervision. The next section compares and contrasts the cases against the Turkish state showing in each case how the characterisation of the state explains the treatment of the claims.

For example in the *Sahin* decisions both the Grand Chamber and Chamber reference the centrality of women's equality in the Turkish constitution and state exercise of duty to uphold equality. 'The Court ... notes the emphasis placed in the Turkish constitutional system on the protection of the rights of women.[122] In contextualising the decision the Chamber even refers to the 1922 Turkish constitutional settlement under Atatürk and is favourable approach to women's rights and equality.[123] There is no reference to the fact that the Turkish Constitution under question is a later constitution developed under military rule. Neither the Chamber, nor Grand Chamber requires the state to show how this ban is necessary to

[119] *Arslan v Turkey*, (2010) ECHR 41135/98

[120] *Gunduz* v *Turkey*, *supra* note 76.

[121] *Opuz v Turkey (*2010) 50 EHRR 28 concerned a claim that the Turkish state had failed to protect the applicant and her mother from the domestic violence carried out by the applicant's husband.

[122] *Sahin v Turkey*, *supra* note 68, para, 115, quoting para, 107 of the Chamber judgement, *supra* note 66.

[123] *Sahin v Turkey* – Chamber, *supra* note 66, paras, 27-28.

protection of the rights and freedoms of others: specifically women's equality. Neither do either the Chamber or Grand Chamber take into account the wider evidence of harm to women's education caused by these widespread exclusions from University. For instance Human Rights Watch among others had produced a briefing which highlighted the negative impact on the education of girls and women caused by the ban and the CEDAW Committee had raised concerns[124] Yet the ECHRs positioning of the Turkish state, as modern and as protector of women's rights, seems to provide the court with sufficient reason to assume that the ban is justified.

Francoise Tulkens' dissent in *Sahin*[125] notes the absence of the evidential base for the decision. She wonders how the court was able to accept in the case of *Sahin* but not in *Gunduz* that the claimant's behaviour was a threat to the rights of others.[126] Tulken's concern is as a feminist to treat Sahin's right to freedom of religion in an equal manner to claim's brought by men. She does not accept the majority view in relation to meaning assigned to sahin's ' headscarf' and does not consider that Sahin's adoption of the headscarf either removes her agency or makes her more of a threat to the rights and freedoms of others. In Gunduz despite Orientalist discourses on Islam the Court looks for evidence to justify Gunduz' prosecution and is concerned to recognize the balance between fighting 'extremism' and individual freedom.[127] The Court emphasises the importance of upholding freedom of expression for a society 'to progress'[128], and the Court stresses the need for Turkey to evidence its actions, and show that they are both 'relevant and sufficient' and 'proportionate

[124] Human Rights Watch**,** *Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf (Human Rights Watch Briefing Paper June 29, 2004)* http://www.hrw.org/legacy/backgrounder/eca/turkey/2004/index.htm;
[125]*Sahin* v Turkey Grand Chamber, *supra* note 68, Dissenting Opinion of Judge Tulkens p. 3.
[126] *Ibid*., p. 9.
[127] *Gunduz v Turkey*, *supra* note 76.
[128] *Ibid*., para, 37.

to the legitimate aim pursued.'[129] Ultimately in Gunduz the Court finds the action taken by Turkey disproportionate and its reasoning unconvincing and irrational.[130]

The discussion above argues that the Courts difference of approach lies in the use of gender to construct both the agency of the claimants, and the motivations of the Turkish State differently. What other explanation might there be for the Court's different treatment of *Sahin* and *Gunduz*? The difference in *Gunduz* and *Sahin* might be viewed as a difference in treatment between Article 10 Freedom of Expression rights and Article 9 rights to Freedom of Religion. While Article 10 rights are better protected than Article 9 within the European system[131] the differences between the cases cannot be purely understood on this basis.[132] *Arslan* [133] shows us that it is not just where Article 10 is argued rather than Art 9 that Muslim men may be successful where visibly-Muslim women cannot. In *Arslan* the Court found that the restriction was also found to be 'according to law' and also that it was also that it was for a legitimate purpose - the protection of secularism and the rights and freedoms of others.[134] Unlike *Sahin*[135] in *Arslan*[136] the Court goes on to evaluate the evidence and consider whether the men arrested under this law had actually constituted any threat which justified the infringement of their rights under Article 9.[137] The Court concludes that merely wearing this tradition garb in itself could not constitute a threat and its prohibition under the law could not

[129] *Ibid*., para, 42.
[130] *Ibid*., para, 51-52.
[131] Marie Benedicte Dembour, 'The cases that were not to be: Religious Freedom and the European Court of Human Rights' in Italo Pardo, (ed.) *Morals of Legitimacy: Between Agency and System* (2000) Berghahn Books, Oxford, 208 Paul Marshall, 'Religious Freedom' in Liam Gearon (ed.) *Human Rights and Religion: A Reader* (Brighton, Sussex Academic Press, 2002)
[132] Leyla Sahin, also argued her case under Article 10 but, despite the Grand Chamber recognising that the headscarf had become politicised they declined to consider her situation under that right. *Sahin v Turkey, supra* note 68, paras, 35 and 163-164.
[133] *Arslan v Turkey*, *supra* note 119.
[134] *Ibid*., para, 43.
[135] *Sahin* v Turkey, *supra* note 68.
[136] *Arslan v Turkey supra* note 119.
[137] *Ibid*., para 45.

be justified in a democratic society.[138] In coming to this decision the Court focuses on the quality of the law. Its age is emphasized suggesting that it is outmoded and pre-modern.[139] The Court is initially troubled by the apparent contradiction between its findings and those in *Sahin*, but draws a distinction between restrictions imposed in public places and those in public institution or public schools.[140] They do not explain how this difference provides evidence of 'proportionality' rather than merely adding to the issue of legitimate aim.

The difference in the rhetoric around the nature of the Turkish state and women's equality is most striking when we compare *Sahin*[141] and *Opuz v Turkey*[142]. *Opuz* involved a claim that the Turkish state had failed to properly investigate and take action against domestic violence. In this case, in the absence of the claimant's visible –Muslim identity, the Court gives a much more detailed investigation of women's equality under the law in Turkey. It is significant that this reveals a marked difference in the way that the Court characterizes the nature of the Turkish state. In *Opuz* the Turkish state is no longer characterized as the 'protector of women' acting for their rights and freedoms as it was presented in *Sahin*[143] instead it must justify its actions and be subject to ECt.HR supervision. In relation to the finding of a breach of Article 14. In *Opuz* the Court emphasises the need to 'modernise' observing that 'Turkish law.... needs to be brought in line with international standards in respect of the status of women in a democratic and pluralistic society.'[144]

[138] *Ibid*., paras, 50 – 52.
[139] *Ibid*., paras, 20, 21,34, 41, 52.
[140] *Ibid*., para 49.
[141] *Sahin v Turkey*, *supra* note 68.
[142] *Opuz v Turkey*, *supra* note 121.
[143] *Sahin v Turkey*, *supra* note 68.
[144] *Opuz v Turkey*, *supra* note 121, para, 192.

In *Gunduz*, *Arslan* and *Opuz*[145] the Court makes it clear that the state is found wanting when measured against the standards of other 'modern' states and the Court emphasizes that to act as a 'modern' state is to protect the rights of those individual claimants. Yet where the Turkish state takes a supervisory position in relation to visibly-Muslim women as in *Sahin*, it can resist the construction of itself as 'Oriental' and 'Other'.

This analysis views the ECt.HR as perpetuating intersectional discrimination. Historically discriminatory discourses were applied to construct women with an Islamic religious affiliation in a way that distinguished them from Islamic men, and from 'Western' women who were not assigned an apparent religion or ethnicity. These historic constructions appear to be informing the Courts treatment of the claimants' so that they are unable to claim rights to freedom of expression and religion in the same way that their male counterparts can, and they are treated differently to rights claims by women who are not visibly-Muslim. The argument here is that these constructions render not only the religious affiliation but also the gender of the claimants very visible.

In contrast to the perspective expressed here, Anastasia Vakulenko argues that in Sahin the ECt.HR is 'moving towards' a recognition of the intersectional discrimination experienced by the claimant.[146] She believes that they failed to develop their analysis fully and that Sahin's gender was therefore 'eclipsed' by her religion, the ' … interaction of gender and religion in her identity was also rendered invisible .'[147]

[145] *Gunduz v Turkey*, *supra* note 76; *Arslan v Turkey*, *supra* note 119; *Opuz v Turkey*, *supra* note 121.

[146] Anastasia Vakulenko, `Islamic Headscarves' and the European Convention On Human Rights: An Intersectional Perspective'16(2), *Social & Legal Studies*, (2007), 183–199.

[147] *Ibid*., p.190.

This section has shown how the discourses within the case law that are used to justify the Court's decisions correspond, both in terms of content and nature, to the tropes that Said identified. In particular the way that gender is used to both construct the claimants and the respondent states suggest a continuum between historic discriminatory discourses and the discourse of the Court. The next section examines way that these discriminatory discourses can be countered and addressed.

4.1 Addressing Orientalism

> '… human rights theory needs a way of challenging both explicit political power and the power associated with defining what constitutes an acceptable argument.'[148]

4.1.2 Reinforcing as well as Failing to Address Discrimination

In relation to the headscarf cases in the Council of Europe system arguably the Commission and Court did not just fail to recognize the intersectional discrimination against women who are visibly-Muslim but rather the institutions discriminated against the claimants themselves on an intersectional basis, using Orientalist discourses to justify the failure to allow a remedy. The influence of these earlier decisions is tangible. The 1998 Circular in Turkey which re-invokes the headscarf ban in Universities and was used against Sahin invokes *Karaduman* and the other headscarf cases that were found inadmissible by the European Commission. It states specifically that it is 'By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights ...'[149]

[148] Brooke Ackerly, *Universal Human Rights in a World of Difference* (Cambridge, CUP, 2008).
[149] *Sahin v Turkey, supra note 68, para 12.*

How can we address these problematized discourses within the E.Ct.H.R? Brian Turner[150] suggests a number of ways that Sociology as a discipline can rid itself of Orientalist discourses and I believe these are also relevant for legal discourse. First he argues that it is crucial to abandon all 'reified notions of "Islam" as a universal essence ...' so that the 'complexity and difference ...' of 'Islams' can be appreciated.[151] Second we should look at Islam from a global perspective to avoid 'the limitations of dichotomous views of East and West, or North and South …'.[152] Third he suggests that we turn the 'anthropological gaze' onto Western culture itself to see its 'Otherness' in order 'to dislodge the usual privileged position of dominant Western cultures.'[153] Applying these principles to the determinations of the ECt.HR would mean more than just sanitation of the language used by the court in its judgements but would require a difference in approach.

Particularly the material impact of these current discourses on women's position need to be recognized and addressed.

Two particular interrelated problems for the female claimants are revealed through this case law. Firstly it seems that the dominant discourses blind and deafen the court which then fails to 'hear' the claimants properly and treats them as having no adult agency. Secondly the acceptance of certain presumptions about Islam and the applicants position mean the court feels it does not need to look for evidence to support its position so proper procedural standards are not applied. While Orientalist discourses themselves suggest the court might experience ontological difficulties in determining what might be seen as good evidence or not

[150] Brian Turner 'From Orientalism to Global Sociology' in Brain Turner (ed.) *Orientalism, Postmodernism and Globalisation* (Abingdon, Routledge, 1994)
[151] *Ibid*., p.104.
[152] *ibid*.
[153] *ibid*.

it need not be the case. The judgments of Gunduz[154] and Arslan[155] both display Orientalist discourses but ultimately the court did not depart from correct procedures in each. As discussed earlier the Court is currently influenced by certain assumptions both about the nature of Islam and of Christianity. It is telling that in *Lautsi* the Italian Constitutional Court itself had explicitly rejected the analysis of the Christian crucifix as a 'passive symbol,' yet the ECt.HR accepted this contention by the state. Whilst the E Ct. HR used presumptions about the nature of Islam, supported by a 'politics of citation' in all the cases I have discussed, it only required evidence of the State's 'necessity' for restriction of the right in *Gunduz* and *Arslan* [156]but did not do this in relation to *Karaduman*, *Dahlab* and *Sahin.* [157] My argument here is that in the cases involving visibly-Muslim women the requirement for evidence is missing.[158] Applying correct procedures can't guarantee a just outcome but failing to apply the procedures at all does not allow a just outcome.

4.2 Challenging Orientalist Discourses

How can the discourses and procedures of the court be challenged? First, alternative discourses have been generated by the court itself. These alternative internal discourses provide support for future courts wishing to take a different approach and may be drawn on by national courts when interpreting the scope of rights.[159] In *Refah Partisi, Sahin and Lautsi* dissenting or separate judgements also challenge the dominant discourses within the cases. In

[154] *Gunduz v Turkey, supra* note 76.
[155] *Arslan v Turkey, supra* note 119.
[156] *Gunduz v Turkey, supra* note 76; *Arslan v Turkey, supra* note 119.
[157] *Karaduman v Turkey, supra* note 52; *Dalab v Turkey, supra* note 57; *Sahin v Turkey, supra* note 68.
[158] As Tulkens noted in her dissent in *Sahin v Turkey, supra* note 68 , Dissent p.3.
[159] For example the logic and clarity of Tulkens' approach in her dissenting judgment in *Sahin* has been adopted by Brenda Hale in a United Kingdom House of Lords (now Supreme Court UK) case *R (on the application of Begum (by her litigation next friend, Rahman)) (Respondent)* v. *Headteacher and Governor of Denbigh High School* (Appellants) [2006] UKHL 15

Refah Partisi (The Welfare Party) and Others v *Turkey*[160] Judge Kovler concurred with the Grand Chamber's decision that banning the Welfare Party did not breach protocol 1 Art 1 on the basis of his evaluation of the evidence. Nevertheless he felt compelled to provide a separate opinion in which he challenges the essentialism and homogenisation explicit in the majority judgement of the Grand Chamber. He explained, 'What bothers me about some of the Courts findings is that in places they are unmodulated, especially as regards the extremely sensitive issues raised by religion and its values. I would prefer an international court to avoid terms borrowed from politico-ideological discourse, such as "Islamic fundamentalism" … "totalitarian movements" … " threat to the democratic regime" ... ' [161] He was also critical of the E Ct.HR elision of legal pluralism with anti-democracy and discrimination.[162] Noting the Grand Chamber's reference to gender equality to dismiss the significance of Islamic thought, he regretted the failure to analyze the concept of legal pluralism and the Grand Chamber's reductionist presentation of 'Sharia – a legal tradition going back thousands of years' merely as 'permitting discrimination based on the gender of the parties concerned'.[163]

Judge Tulkens' dissent in *Sahin* also provides a robust analysis of the facts and law which admonishes the majority for failing to exercise proper supervision over the Turkish state.[164] She reminds the majority of the court that there are proper procedures to be followed in assessing claims. She also challenges the reductionism of the Court in the way it characterizes the headscarf and appeals to formal equality between men and women in relation to the treatment of the Grand Chamber

[160] *Refah Partisi v Turkey, supra* note 72.
[161] *Ibid.*, Concurring Opinion of Judge Kovlar p.2.
[162] *Ibid*., p3.
[163] *Ibid* ., p. 5.
[164] *Ibid.*, p. 3.

In *Lautsi v Italy*[165] the Court was not unanimous in adopting a binary approach. Judge Malinverni joined by Judge Kalaydjieva gave a separate judgement in which they were clear that they could not reconcile the existing case-law on religious symbols with the majority position in *Lautsi.* Rather Malinverni and Kalaydjieva maintained it was paradoxical for the court to allow a state to insist on the display of religious symbols in the classroom and at the same time uphold case law which prevented an individual from voluntarily doing so. Turning the 'anthropological gaze' onto the history of Christianity whether in Europe or a global context would find the crucifix to be anything but a passive symbol and Malinverni and Kalaydijieva are critical of the Grand Chambers finding the crucifix as neutral. They note that not even the Italian Court of Cassation found that the crucifix 'symbolised values which were independent of a particular religious belief.'[166] Malinverni and Kalaydjieva concluded that 'The presence of crucifixes in schools is capable of infringing religious freedom and schoolchildren's right to education to a greater degree than religious apparel that, for example a teacher might wear, such as the Islamic headscarf. ' Reminding the majority of the correct procedural approach to 'right to religion' claims they note that ' … in the latter example the teacher in question may invoke her own freedom of religion, which must also be taken into account and which the state must also respect. The public authorities cannot, however invoke such a right.'[167]

The strong support for individual wearers of religious symbols, given by Judge Malinverni and Judge Kalaydjieva in their dissents may also influence subsequent courts who may not be prepared to accept a binary distinction between Christianity and Islam.

[165] *Lautsi v Italy*, *supra* note 81.
[166] *Ibid.*, Separate Judgment by Judge Malinverni and Judge Kalaydjieva p.5.
[167] *ibid*.

Second the operation of transjudicialism may also operate to effect change.[168] Often discussed in relation to influence of international norms on domestic law, [169] there is increasing awareness of the cross fertilisation of norms across different rights systems. An analysis of jurisprudence and debate within the UN Human Rights system and other jurisdictions reveal a very clear difference of approach. While in many situations the ECt.HR seeks to locate its decisions in the global context of concern for rights where the ECt.HR deals with minority religious concerns, and particularly in relation to the headscarf cases, it is not evident that the wider approach has been properly considered. Within the UN system Asma Jahangir Special Rapporteur on Freedom of Religion or Belief noted concerns which had been raised recorded by a number of human rights bodies on the effects of 'headscarf' bans on women's employment and education. [170] In a later report she is clear that while the 'Right to Manifest Religion' can be restricted legitimately ' any limitation ... must respond to a pressing public or social need it must pursue a legitimate aim and be proportionate to that aim … .'[171] Hence she notes that the burden of justifying any limitation lies with the state and any prohibition based '…on mere speculation or presumption rather than on demonstrable facts is regarded as a violation of the individual's religious freedom.'[172] The rapporteur follows her comments by approving Francoise Tulkens' dissent in *Sahin* making it clear that it is Tulkens' approach and not that taken by the majority of the Grand Chamber which is

[168] Ruth Rubio-Marin and Martha I Morgan, "Constitutional Domestication of International Gender Norms: Categorisations, Illustrations and Reflections from the Nearside of the Bridge," in Karen Knop (ed.) *Gender and Human Rights*, (Oxford, OUP, 2004*)* p.113.
[169] Reem Bhadi, "Globalisation of Judgement: Transjudicialism and the Five Faces of International Law in Domestic Courts" *George Washington International Law Review* (2002) 555; Karen Knop, "Here And There: International Law in Domestic Courts" 32 *New York University School of Law Journal of International Law and Politics* (2000) p.501.
[170] Report on Civil and Political Rights Including the Question of Religious Intolerance: Report Submitted by Asma Jahangir UN Economic and Social Council E/CN.4/2005/61 20th December 2004, para 64.
[171] Report on Civil and Political Rights Including the Question of Religious Intolerance : Report Submitted by Asma Jahangir UN Economic and Social Council E/CN.4/2006/5 9th January 2006, para 53.
[172] *Ibid*., paras 47 and 60.

preferred.[173] A clear contrast to the approach taken by the E.Ct.H.R can also be seen in the jurisprudence of the Human Rights Committee in the cases of *Hudoyberganova v Uzbekistan* [174] in relation to a prohibition on 'hijab' worn by a civil servant and in *Ranjit Singh v. France*[175] in relation to a Sikhs right not to remove a turban for an official photograph. In each of those cases the committee rejected the state's argument that restriction was necessary 'to protect the rights and freedoms of others' on the basis that the state provided no clear evidence for this.

The CEDAW committee has also raised concerns in relation to headscarf bans. In their questioning of the Turkey and in the final comments noted the ban in Turkey and asked that the Turkish government present statistics on the situation particularly to ensure that the ban did not worsen the already large disparity between numbers of women and men in higher education.[176] The shadow report from 71 NGO's in Turkey in 2010 highlighted the negative impact of the ban on women including discrimination in seeking healthcare, employment, education, [177] and in its concluding comments to Turkey's 2010 report the Committee expressed concern at the lack of data provided by Turkey on the impact of the ban,[178] once again to request that this statistical data be provided.[179]

[173] *ibid*.
[174] *Hudoyberganova v Uzbekistan* (no 931/2000UN Doc. CCPR/C/82/D/931/200,2004)
[175] *Ranjit Singh v. France (*Communication No. 1876/2009,U.N.Doc. CCPR/C/102/D/1876/2009 - 2011),
[176] A complaint to the Committee on the Elimination of All Forms of Discrimination Against Women, from a Turkish teacher who had been dismissed for wearing a headscarf was found inadmissible because she had not 'exhausted the domestic remedies.' *Rahime Kayhan* (2004) Communication 8/2005 CEDAW/ c/34/D/8/2005. It can be argued that the CEDAW Committee is currently considering exhaustion of domestic remedies very narrowly.
[177] http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/CPRER_Turkey46.pdf
[178] Concluding Comments 12- 30th July 2010 46th Session CEDAW/C/TUR/CO/6 **,** s.16
[179] *Ibid.*, s17.

Third, as shown above, civil society and NGO's can also play an important role providing normative direction for understandings of the scope of human rights.[180] This is particularly the case in relation to women's rights.[181] Third party interventions, though subject to some controversy [182]can provide valuable input from civil society and NGO's in relation to raising feminist perspectives on law.[183] In the context of the ECt.HR positive development of understandings of equality and women's rights have come through carefully reasoned third party interventions, drawing on wider global rights discourse and norms.[184]

In relation to religious symbols *Lautsi v Italy* in the Grand Chamber illustrates the success of such interventions. Over thirty interventions on the place of religious symbols in educational institutions, were received from different governments, individuals and groups after the Chamber hearing and before the appeal to the Grand Chamber. Most were supportive of the position of the Italian state. In the Grand chamber hearing the ECt.HR rethought their approach in relation to religious symbols and education, and made it clear that the interventions were influential in their new approach. Though *Lautsi* also illustrates Carol Harlow's criticism of third part interventions, that they tend to be undemocratic because they are dominated by already dominant voices.[185]

[180] T. Risse, S Ropp and K Sikkink, The Power of Human Rights: International Norms and Domestic Change (Cambridge: CUP, 1999)
[181] See I.M.Young, *Inclusion and Democracy* (Oxford: OUP, 2000)
[182] Carol Harlow, "Public Law and Popular Justice," 65:1*Modern Law Review (2002)* 1.
[183] Harriet Samuels, "Feminist Activism, Third Party Interventions and the Courts" 13 *Feminist Legal Studies* (2005) 15.
[184] As a result of interventions in *MC v Bulgaria* Application no 39272/9 (2005) 40 EHRR for the first time the ECtHR found a positive duty on the state to take action in relation to violence against women: in this case to investigate and prosecute rape. Interventions drew on jurisprudence from the Inter-American Commission and Court and on CEDAW to present rape as a women's rights issue. The interventions challenged the 'rape myths' presented by the state and argue for the state had a positive duty to protect. In *Opuz v Turkey, supra* note 121, an intervention by Interrights drew on jurisprudence under CEDAW and from the Inter-American Commission as well as other international women rights norms to establish a state duty in relation to domestic violence against women. This was cited within the case by the ECt.HR. at paras 72-90 and at 125.
[185] Harlow, s*upra* note 182.

None of the interventions in *Lautsi* directly addressed the problems caused by the earlier case law on headscarves. Neither were interventions presented or accepted on behalf of the applicants in the previous headscarf cases. *SAS v France*,[186] decision given in 2014 illustrates a development in relation to interventions on behalf of visibly- Muslim claimants and it is suggested that these have had some impact on the approach taken by the Court. The *SAS v France* [187] hearing took place in November 2013. Ms S was a French citizen living in France in 2011 at the time the full face veil ban came into force.[188] She moved to the United Kingdom and brought a case arguing that the French Bill interfered with her article 8, 9, 10 and 14 rights under the ECHR.[189] Five interventions were received in the case. The Ghent Human Rights Centre presented empirical evidence on the impact of veil bans, Amnesty International also intervened on her behalf as did the UK NGO Liberty, the international SOROS group, and the NGO Article 19.[190] An intervention was also accepted from the Belgian state in support of the French state. [191] The questioning adopted by the Court suggested a more rigorous approach to supervision of the state than has previously been taken.[192] For example the French government were asked how they believed this ban would actually operate to 'promote equality' when the women in question were to be fined and criminalized for its breach.[193] The interventions on behalf of the applicant focussed on counteracting assumptions made in previous case-law. These were successful to the extent that the respondent state was required and were unable to evidence their contentions both that the ban was necessary for security purposes and that it was necessary to promote equality.[194]

[186] *SAS v France* [2014] ECHR 695.
[187]The webcast of the hearing can be found at http:/www.echr.coe.int/pages/home.aspx?
[188] Act Prohibiting Concealment of the Face in Public Spaces 2010.
[189] Respectively, the right to a private life, right to religion, right to freedom of expression and right to be free from discrimination in the enjoyment of these rights. *SAS v France, supra* note 184, para 74.
[190] *Ibid*., paras 89- 105.
[191] *Ibid*., paras, 86- 88.
[192] Webcast of the hearing can be found at http:/www.echr.coe.int/pages/home.aspx
[193] *ibid*.
[194] *SAS v France, supra* note 186, respectively paras, 139 and 119.

Despite this the European Court of Human Rights found the ban acceptable on the basis that it was necessary to respect the requirements of 'living together.' The Grand Chamber considered that this requirement '… could be linked to the legitimate aim of the "protection of the rights and freedoms of others."'[195] This case shows both the success of interventions in changing elements of a discourse but also the difficulty of anticipating what new grounds might be incorporated or accepted by the Court to support the overall discourse.[196]

This section has highlighted alternative discourses both within and outside the Court. Academic and practice based legal literature also debate the approach and outcomes of both cases involving the headscarf and cases on religious rights of Muslims, religious rights more generally and the Courts approach to gender equality. While neither academic discussion, dissenting judgments, third party interventions, transjudicialism or the influence of the wider rights environment taken on their own is likely to produce a change. Increasing the sites and frequency of these discussion will have an impact. As Margaret Davies recognizes 'In the end, the law (as opposed to individual laws) is not going to be changed by theory, it is not going to be changed by specific reforms or by individual judges, and it is not going to be changed by critique. All of these interventions have an influence, of course. But the only way

[195] *Ibid*., paras 144- 159, though the only evidence that was given was that it was believed that a majority of citizens in France felt shocked seeing a women in a burqua because it '… infringed the principle of gender equality as generally accepted in France' (para, 120), and that covering the face 'placed a barrier' against interpersonal relationships (para, 122) which breached the right of others to live in a space of socialisation' which made 'living together easier'(para, 122).

[196] Though Human Rights NGOs are united, feminists and feminist academics have been split on support for visibly-Muslim women claiming rights to wear headscarves. This shows how visibly-Muslim are subject to 'political intersectionality' and not necessarily represented by the groups that would normally campaign politically for women's rights – see Kimberele Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour' 43:6 *Stanford Law review,* (1990/91*).* In fact much lobbying has actually been against the claimants. For example Francoise Tulkens noted that the night before the Grand Chamber was due to hear the *Sahin* case French feminists were camped out on the grass outside the court lobbying the Grand Chamber not to overturn the Chamber decision. Francoise Tulkens, Public Lecture, University of Sussex, UK, May 2009.

the identity of law—in its ethos, its culture, its fundamental attachments, its boundaries, and its metaphysics—has ever changed, and the only way it ever will change, is through sustained critical-mass practices which bring new meanings, and new directions to legal culture.' [197]

5 Conclusion

'We must hold on to and not seek to deny the contradictions between the possibilities of rights claims and discourse.'[198]

Human rights were founded as universal and overreaching cultural constructs, and it is the very appeal to Universalism and normative authority which makes human rights effective tools against oppression. [199] Yet these same aspects of rights are problematic since they have the power to assert 'reality,' and place rights claims beyond political debate. Ratna Kapur warns that the positive aspects of human rights cannot be taken for granted: rather rights must be recognized as contested, as ' ... an arena where different visions of the world are fought out …' If we only see rights as progressive then we obscure this 'struggle',[200] and lose a sense of the paradoxical nature of rights. This paradox which Stammers argues is a part and parcel of the very nature of human rights. [201]

This article has identified Orientalist discourses within rights adjudication by the European Commission and European Court of Human Rights. It is argued that the creation and replication of this Orientalist jurisprudence within the council of Europe is unjust,

[197] Margaret Davies - The Law Becomes Us: Rediscovering Judgment, Fem Leg Stud (2012) 20:167–181 :178

[198] Elizabeth Schneider, 'The Dialectic of Rights and Politics: Perspectives from the Women's Movement' (1986) 61 N.Y.U. L.Rev. 589, p331.

[199] Ackerly, *supra* note 146; Schneider, *supra* note 196.

[200] Ratna Kapur, 'Human Rights in the Twentieth Century: Take a Walk on the Dark Side' 28:4 Sydney Law Review (2006), 665, p. 671.

[201] Neil Stammers, *Human Rights as Social Movements* (Cambridge, Pluto Press, 2009).

particularly so for the female claimants under the Convention. The intersection of female gender and visibility as a Muslim, generates a 'victimisation rhetoric'[202] which effectively enforces both gender and cultural essentialism,[203] and renders equality claims ineffective. At the same time Orientalised women serve as both a contrast and also a caution to other women. They are presented as providing a danger to equality for all that allows the court to restrict their rights.

This unjust treatment calls the European rights system into question and has wide consequences. ECt.HR jurisprudence provides justification for the passage of law at national levels which allow state control and oppression of visibly-Islamic women.[204] The employment prospects of visibly-Muslim women are becoming increasingly hampered in Europe.[205] This negative jurisprudence also reinforces harmful stereotypes generated in European societies, in turn these lead to an increase of physical attacks on Muslims, and particularly on visibly-Muslim women in Europe.[206] For example in 2014 80% of all anti-Muslim attacks in France were carried against women and many involved the headscarf.[207] Evidence suggests that the frequency and violence of attacks against women in Europe are increasing.[208] Darien Smith argues the importance of understanding linkages between religion and racism and inequality and reminds us that, as in the past, modern Western law is currently informed and shaped by specific historical circumstances. [209] One of those

[202] Kapur, *supra* note 2, p. 127.
[203] *ibid.*
[204] In *Sahin v Turkey*, *supra* note 68, para 12, it was noted that the government said that in a passage of the Circular which reinitiated the headscarf ban, it stated that the Circular was in line with ECt.HR and European Commission on Human Rights decisions.
[205] Amnesty International, *supra* note 14.
[206] Skeet, *supra* note 13.
[207] Nils Muiznieki Commissioner for Human Rights – Following Visit to France 22- 26th September 2014. Council of Europe COMMDH (2015) 1 17 February 2015, https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2015)1&Language=lanEnglish, para16 page 8.
[208] Muiznieki, *supra* note 205; Kariapper *supra* note 13; Amnesty *supra* note 14.
[209] Darien-Smith, *supra* note 3.

historical circumstances is the rise of Orientalism and as Reina Lewis notes an historical understanding of Orientalism can help us to trace the source of contemporary discrimination as well as highlighting ways that these Orientalist discourses and their negative consequences could be addressed.[210]

Despite my critique I do not suggest that the court employs a deliberate policy in relation to women who are visibly–Muslim. In relation to Orientalist discourses Said argues that they are precisely so compelling because they are so ingrained in Western thought and language, 'The Orient is an integral part of European *material* civilisation and culture. Orientalism expresses and represents that part culturally and even ideologically as a mode of discourse with supporting institutions, vocabulary, scholarship, imagery, doctrines, even colonial bureaucracies and colonial styles.'[211] Kimberele Crenshaw has argued that for courts 'the privileging of maleness or whiteness' is automatic so 'implicit, it is generally not perceived at all.'[212] In relation to the differential treatment of visibly-Muslim women Nevertheless there is an urgent need for the ECt.HR to recognize the problems inherent in their current approach and to rethink their understanding of equality, and in particular to uphold the rights of visibly-Muslim women.

[210] Lewis, *supra* note 27.
[211] Said, *supra* note 8, p. 2.
[212] Kimberele Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics' *U.Chi.Legal F.* (1989) 139 , p. 151.

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