

The 'humanity' of the secular legal subject': Reading the European Court of Human Rights' decisions over the practice of veiling

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Abstract:

The debate over the Muslim headscarf has become an arena of fervent discussion in Europe. Much of the debate reveals an attempt to explain the issue in binary terms, between modern, 'secular', universal and 'religious', traditional, local values. In this context, the *hijab* has become the symbol and mirror of the so called 'clash of civilisations'. Through the analysis of two cases sentenced by the European Court of Human Rights (ECHR), my argument is that the passionate debate over the veil is a false one as the *hijab* emerges as a visible symbol of a clash between two legal-political systems, similar but contingently dissimilar: in fact, both Islamists and liberals aim at establishing a singular, universal (positivized) law within the same territory through women's body. Thus, what the analysis of the 'hijab cases' reveals, is not only the emergence of a specific fixed and monolithic Christian/secular/liberal law's subject, but also that the universality of western thought has precluded the possibility of imagining different forms of humanities and, along with it, a legal pluralism able to deal with a new multi-religious Europe.

Keywords: Headscarf debate, secular/religious, religious freedom, sovereignty

Introduction

The female headscarf has been a focal point for many polemical debates both in the West and in societies with Muslim majorities and it is often understood as the symbol of an intrinsic 'clash of civilizations' between a 'secular' and 'tolerant' West and a 'religious' and 'backward' East. From Strasbourg to Kandahar and Paris to Ankara, Muslim clerics and western/liberal jurists share a certain obsession with the juridical regulation of women's body. On the largely Christian or secular European continent the veil features in prominent decisions of the European Court of Human Rights (ECHR) and remains at the centre of passionate, almost daily, debate.

At the heart of this debate is whether a piece of cloth traditionally worn by women of various cultures for many reasons and to many effects (Ahmed 1992; El Guindi 1999), should be allowed, regulated or prohibited. Given that this apparent consensus between secularised Christians and radicalised Islamists suggests the matter is important, I draw on Diamantides' analysis (2008; 2006; 2012), who interpret the so called 'clash of civilizations' as the progeny of similarity rather than complete differences. If anything, in relation to the common concern with Muslim female attire, those two modern political and legal systems –secularised Christianity and fundamentalist political Islam – should be examined in terms of their sameness and not in terms of difference. In fact, as I shall argue, liberals and Islamists agree that the dress sense and sartorial modesty of Muslim women cannot be a question of personal choice within the ordinary and changeable confines of current fashion and public decency rules; where the two sides disagree is on whether to enforce the so called religious dress code or its opposite, one that reveals more than conceals. While some Muslim voices such as British Baroness Sayeed Warsi warn that “banning the veil is like a ban on miniskirts” (Bingham 2013) a much larger section of the population and the media are susceptible to the idea that banning the veil is a necessary means to 'liberate' Muslim women and to 'save secular and democratic values'. For some this means forcing them to be re-born as subjects of occidental Christian/secular¹ 'universal' natural or human rights law. For their opponents it is precisely this rebirth from which Muslim women must be protected – the rebirth of man and woman as a rootless holder of natural rights who, since s/he possesses them, s/he can also agree to alienate them, sell them, commoditize them. In essence, my analysis reveals a symmetry between the use of western positive law, human rights law, and 'positivized' *Shari'a* law – such as that proposed by Islamists – not so much to physically dress or undress Muslim women but to bind their bodies to a fixed, transparent and singular identity. More or less clothed, more or less naked, women's bodies, associated with male pleasure and social reproduction, must emit desirable information. Thus, the female body, clothed or exposed, Muslim or Christian-cum-secular, emerges as an 'objectified' field of struggle, a still quite patriarchal modernity – secular or Islamist; as women are seen as the reproducers of ideologies and transmitters of tradition and culture (Yuval-Davis 1993; Landes 2003), they have to be able to reproduce a specific law's subject.

As a matter of fact, the two leading cases decided at the ECHR that this paper takes into consideration (*Sahin v Turkey*, 2005 and *Dahlab v Switzerland*, 2001) reveal a 'clash' between two legal-political systems, similar but contingently dissimilar. Both systems aspire to create a fixed law's subject through enforcing the rules of law.

¹ I have chosen to use this term because I see a continuation between Christianity and the secular (Kantorowicz 1957; Diamantides 2012).

In particular, the *Sahin* case (2005), in which a young student was forbidden to enter a Turkish university because she was veiled, reveals a common view among Islamists that the matter falls under *Sharia* law, which is moreover misrepresented as a comprehensive and transparent code of unalterable revealed law. By referring to the *Refah Partisi* case (*Refah Partisi v Turkey*, 2003), the judges stated that *Shari'a* law would oblige people to obey static rules imposed for religious reasons. However, the pluralist legal system called for by the *Refah* Party was quite different from the unique *Sharia* law proposed by Islamist groups/parties. In the case, the rejection of a pluralist legal system 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, as with any codified human action, reveals that, instead of a clash of civilisations, what we really have is a clash of two imperialistic-universalistic discourses: the triumphant secular discourse of a world that is re-humanised through human rights (not too far from the Christian version in which a particular man is re-born as a universal human through baptism) and the reactive Islamist discourse. Both systems aspire towards establishing a universalist 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 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 (2012) 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 colonisers aimed to deliver humanity to a people (supposedly) 'de-humanized' by previous 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 become 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 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' part of humanity which 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 context, the ECHR's decision over the practice of veiling, which appears as a necessity in a globalised world, emerges as one of the main contradictions of the human rights discourse which claims to safeguard dignity for all. This mirrors a more general contradiction 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. In the case, in order to 'save' western values, some personal rights of Muslim women and their possibility of agency have to be limited. 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 secular law's subject. In this sense, secularism emerges not as the separation between private and public, but as the re-conceptualization of religious sensitivities and religious practices in the public sphere.

Revealing paradoxes

The Universal Declaration of Human Rights (UDHR), which arose from the atrocities of the Second World War, represented the first expression of what many people consider to be the legal rights of every human being. With the Universal Declaration, the Council of Europe and the European Convention on Human Rights (which established the European Court of Human Rights in order to enforce individual rights and freedoms) aimed to announce an 'internationalization' of human rights and pave the way for a new jurisdiction which would exist outside national borders in order to protect individuals from the actions of their states. However, the latest ECHR decisions concerning regulation of the female headscarf seem to contradict the underlying values of the convention.

Leyla Sahin v Turkey (2005) is one of the most controversial cases decided at the ECHR. 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 wearing the veil and disciplinary measures were imposed as 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. On the 21st of July 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 Protocol No.1.² The case reached the European Court of Human Rights and in November 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's decision was based on two main problematic assumptions: *Sharia* is a substantively static and unchangeable revealed law system, and the values of *Sharia* law are illiberal and incompatible with western secular democratic principles. In fact, in the case, the Strasbourg Court felt the need to retell the master narrative of the rise of the secular state in Turkey as has been told by the official state since Atatürk, complete with references to the supposed difficulties in convincing Muslim religious groups to accept the privatisation of their religion (Hallaq 2001) –as if the previous Ottoman ruler had been some kind of divine anointed king, as was the case in Europe before modernity. It appeared, therefore, that the problem in Turkey was the existence of religious extremist groups which demanded, *inter alia*, the freedom for women to wear the Islamic headscarf in public places, the amendment of the anti-polygamy law, and the establishment of a plurality of legal systems based on religious belonging: for this reason, based on the ECHR's reasoning, the measures adopted by the university were in line with the convention. It is not clear, however, whether there were extremist Islamic groups operating in the University; how these groups affected public order; and if the applicant had a relationship with those groups. None of these points were answered by the Court. Rather, it seemed that the general approach of the Court 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, the 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 which attempt to overthrow the secular state, the Court has made a mistake: it “substituted Turkey for the University of Istanbul and Islam for the headscarf” (Altıparmak and Karahanogullari 2006, 279).

To emphasise 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*, an Islamic political party founded in 1983, participated in the first national election in 1991 gaining, in coalition with two other parties, 16.9%

² Article 8 – Right to respect for private and family life, Article 9, Freedom of thought, conscience and religion “Article 10 – “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 - Convention_ 2016)

of the vote. In the following years, *Refah* gained 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 European Court of Human Rights. The ECHR's decision to ban the party was based on the premise of a general incompatibility of an Islamic-based-politico-legal system with secular western democracy. In fact, based on the Court's reasoning, *Refah* was allegedly attempting to introduce *Sharia* law which "would oblige individuals to obey...static rules of law imposed by the religion concerned" (*Refah v Turkey*, 2003 para 70). 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 *Shari'a*, which clearly diverges from convention values, particularly with regard to its criminal law and criminal procedure, 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 law confines religion and suffers from the same contradictions with the convention system as the introduction of *sharia*" (para 72 and 19).

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. Even though groups of people living within the European borders are resolving their civil law problems on *sharia*-derived solutions, the ECHR seems to find Islamic law totally outside the scope of the European legal system. In the *Refah Partisi* case (2003), the Court also observed that "there was already an Islamic theocratic regime under Ottoman law" (para 125) and that this system was dismantled with the introduction of the republican regime in Turkey.

The Ottoman Empire applied a legal system (the 'Millet system') based on religious identity where every religious group responded to different laws in relation to family law (Shahar 2012). The Court's ignorance of the Millet system is astonishing as well as the confounding of *Refah* neo-Ottomanism with Islamist fundamentalism and indeed, only those parts of Islamist ideology that contrast with western law –namely its claim that the entirety of *Sharia* is revealed/positivized law—and not those

which evoke their similarity –namely that, unlike the Millet system, Islamists call for the establishment of an Islamic empire where jurisdiction is territorial. In other words, the Court confused *Refah*, which called for a plurality of legal systems, with Islamic fundamentalism, which call for the establishment of a unique, fixed, territorial *Sharia* law. Oddly enough, in the Court’s view, a political party whose actions seem to be aimed at introducing different religious legal systems in relation to family law, as is the case of modern Israel, is seen as an association which hardly complies with the democratic ideal that motivates the convention. Moreover, with regard to the true 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 grounds that the party was planning to set up a plurality of legal systems.

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. As ever in liberalism, individual liberty is assured only together with state law supremacy. In this regard, liberals and Islamists are on the same side as both aim at creating a universal(ist) law able to bind the individual to a fixed and monolithic identity (Diamantides 2012). What is not on their side is the historically documented legal pluralism of Muslim-majority societies: in fact, in Islamic history, political and legal powers were always separated and in continuous need of negotiation (Hallaq 2001; 2002; 2005). But while, in the West, law was in the hands of the Pope/king/sovereign state, in Muslim medieval majority societies *Sharia* was in the hands of scholars who were accustomed to adjudicating legal cases within the limit of the four main (Sunni) schools (Elias 2010; Hallaq 2001; Diamantides 2012).

In this context, Diamantides’ examination (2012), which takes into consideration the medieval origins of the Islamic legal system in relation to the western, canon legal system, along with Nancy’s theory of a ‘monotheist model of social organization’(2003), is particularly revealing. In fact, this framework allows the comparative analysis of two structurally similar, but contingently dissimilar, 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. If in the West centralisation 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” (Diamantides 2012, 12) which arguably rendered the Muslim world more vulnerable to western expansionism. Thus, the difference concerns mostly the ‘deficient sovereignty’ and legal authority of traditional Muslim government and how this was ‘corrected’ by colonialism and, ironically, Islamist nationalists. The result of this analysis 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 colonisation 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, typical of Medina, where the law was made locally and reflected the plurality of cultures of the *Umma*, namely an Islamic community, 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’.

Therefore, 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 (Ahmed 1992; El Guindi 1999; Gabriel and Hannan 2013; Bomeman 2014; Mernissi 1991), 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 subjects of history. In fact, the female figure and/or dress code are common collective group and also nationalist symbols.

“The Muslim family offered a clear and easily identifiable starting point for implanting a strong sense of faith, identity, values [...] Women and the family have traditionally been regarded as the culture bearer. Contemporary Islamic revivalism has fostered new changes and concerns that Islam will be used to justify a forced return to the veil [...] As a result, any attempt to change these customs is simply dismissed as an attack of the Islamic idea under the influence of the west” (Esposito 2005, 236–7).

In this connection, the current obsession with the 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 whereas the veil emerges as a

symbol of the contest between two versions of sovereignty, that of the European imperialist and that of the Islamist nationalists.

When the western and eastern worlds meet, the 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 an anxiety over the condition of incompleteness between the two dogmatic (desired) legal systems and their own internal shortcomings: this developed on both sides a mechanism of defence and attachment to their respective law (Diamantides 2012). In fact, both, fundamentalist Christian and Muslim legal scholars are prompted by the desire for a positive law that can guarantee a social order and facilitate a centralised state control. Henceforth, the rhetoric of tension between *Sharia* law as invoked by Islamists and western human rights discourse is misleading: there is only a clash between two forms of universalist and imperialistic legal system (Diamantides 2006; 2012), one triumphant, the other aspiring: the European one and the Islamist 'fixed codified *Sharia* law' model to be implemented by the appropriate hierarchical authority which is, in turn, the exact mirror of what they formally reject (Tripp 1996; George 1996). Both are temporally conjoined in modernity. Thus, the passionate debate over the *hijab* is a fake one: the veil has become a visible symbol, a mirror, of a clash between two legal systems, similar but contingently dissimilar.

The Sahin case, as well as many other judicial decisions over the practice of veiling, confirms that the historically Christian concept of universal natural law –subject to exceptions under equally universalist concepts of just war– has made a multiplicity of legal systems (that is, law beyond the territorial model) inconceivable'. The western incapacity to think juridical plurality is inherited from western medieval legal origins and the consequent strength of the territorial 'nation-state': western law is generally considered to emanate from political authority (Kantorowicz 1957). This 'ideology of the powerful' has rarely questioned its foundations.

Structurally, the model of a Human Rights Charter, on the authority of which the ECHR can liberate individuals by banning veils and political parties, would not surprise a medieval Pope acting as universal arbiter of a universal law that 'saves' humanity by subjugating particular traditions to European power. The sacrality of the rules of law, based on abstract equality, was exported outside European borders during the colonial era as a universally valid rational system. Then, in the post-colonial period, the universalist secular/Christian positive law was translated into another universalist Christian/secular law called Human Rights. The Muslim female veil embarrasses this universality.

The 'humane' subject of law

The universality of human rights is often conceived as the ethical western project of 'humanizing' the world: this is, at least, the way in which the West often portrays itself in opposition to an incompatible backward and un-democratic Islamic world, as highlighted, for instance, in the *Sahin* case (*Sahin v Turkey*, 2005). However, while delivering humanity, Human Rights law shapes a specific law's subject who is intrinsically bounded to the law.

To understand how Human Rights law as universal system has created a relationship between (secular/western/positive) law and its ('humane'/Christian/secular) subject, it can be useful to recall Samera Esmeir's work (2012) on the emergence of juridical humanity. She recounts the story of the British protectorate in Egypt (1882-1956) and the consequent encounter between two different political, social and legal systems. Esmeir reveals that the imposition of the new, modern, positive law by the British colonizer was a precise project of colonisation 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 present. The new legal reforms, alongside the adoption of western positive law, claimed to deliver Egyptians from their 'inhumane' existence under a 'despotic', 'lawless' and 'barbaric' 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. The rejection of the past and the repetition of textbooks *in* and *for* the present³ were necessary to create a rupture with the past legal tradition: in fact, the repetition of textbooks "of what was circulating in the present... did not engender continuity with the past but rather homogenized the present. The authority of positive law was rearticulated by these acts of repetition on the present and in the present"(Esmeir 2012, 58). 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.

Hence, the introduction of positive law, a historicist practice which engenders the presentist power of 'humanizing' 'de-humanized' people, was a legal temporal force that contributed to the colonial power operation and signified "the abandonment of substantive concepts of justice and their replacement with proceduralist and formal ones"(Douzinas, 2000, 10). Thus, the law becomes strictly bound to state power and the human has become chained to the universal power of the law because law itself has delivered humanity. In Esmeir's analysis, the juridical subject coincides with the human because law locates the human as a *product* of the law itself. For her the law incorporates the 'human' by claiming authorship and source to be human; by rendering the human

³ On repetition of symbols in the nation-state see also (Anderson 1991)

the theological end of the law, and by defining the human according to the law. Thus, with the colonial project humanity is no longer a category of birth,⁴ but a juridical category that defines the legal subject itself as human/inhumane. As 'man is not born but made' (Pagden 1986, 1), humanity has become the *telos* of the new modern positive law which is the prerequisite for a new universal humanity. 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 essence, by making possible humanization through the inscription of the individual within the pale of positive law, British officials determined also its 'dehumanization', namely a subject outside the border of positive law: moreover, as law confers humanity, exclusion from the law results in the practice of dehumanisation.

Therefore, in colonial Egypt, law became "a technology of colonial rule and modern relationship of bondage"(Esmeir 2012, 285): it did not only deliver humanity, but it also assured total domination through *functional, utilitarian* violence. In fact, the new legal reforms established a new relationship with the *non-human* and re-established a new subjugation to law and violence. While, on the one hand, the British imposed 'humane' legal reforms such as the abolishment of the use of the whip, the abrogation of *corvée* labour, and (significantly) the banning of the veil, on the other, they established a number of exceptional rules in order to suppress and punish political activism and banditry. Hence, in the colonial period, positive legal order emerges as productive of a specific relationship between law's idealized humanity and factualized violent measures: "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" (Esmeir 2012, 243). Through the consolidation of a regime of private property in which 'absolute khedival rights'⁵ were substituted with 'absolute private property rights', law becomes the new technology of management: in this sense, "it was the colonial iteration between the West and the Muslim world, 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"(Esmeir 2012, 202). Therefore, while the British aimed to eliminate the *arbitrary, non-instrumental* khedival legal system, they established an *arbitrary* distinction between 'human', *utilitarian*, colonial violence and 'inhumane' pre-colonial violence (Esmeir 2012). The impossibility of the distinction between 'arbitrary cruelty' and

⁴ Differently, as Fanon (1967) argues that humanity is not something that can be delivered or taken away.

⁵ The Khedival-legal system was the Ottoman legal order grounded in the tradition of Islamic law. For an overview of the Ottoman legal system (Hunter 1984)

‘productive cruelty’ reveals all of the law’s violence as arbitrary and signals a collapse of ends into means. In colonial Egypt, law did not emerge as an instrument aiming at protecting, but as the vehicle of a ‘functional’ and ‘repressive’ violence and domination.

The universalist claim of positive law can now be understood as a constitutive part of human rights discourse: as a matter of fact, contemporary human rights are based on few main assumptions which echoes the assumption of positive law exported during the last century: firstly, despite the difficulties involved in organizing pluralistic societies, the liberal democratic positivized order is considered able to produce the most equitable outcomes: therefore, positive law and then Human Rights law are conceived as a global formula (Esmeir 2006). Secondly, gender equality is defined in global terms, consequently, the solution offered by human rights must be global, universal: through human rights’ lenses, “women around the world can be considered one indivisible group, historically silenced and oppressed by men”(Mark van Hoecke 2016, 49).⁶ Moreover, as Esmeir (2006) argues, “Human Rights law, like modern law more generally, aspires to name, define, call into being, redeem the human”(1544). 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, Human Rights law, as positive law before, aspires to constitute a ‘human’ who would otherwise remain non-human and protects an already-given human while claiming jurisdiction over the declaration of its status. 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’. In other words, it is not possible to have a concept of human rights without a definition of what is ‘human’ and, along with it, it is difficult to define humanity without defining the ‘pre-human’ or ‘non-human’.

If, during the last century, the subjects of human rights were specific people who had been ‘de-humanized’ by their oppressive and ‘backward’ regimes, and were thus waiting to be ‘re-humanized’ through their inscription within the pale of (positive) law, nowadays, the western-constructed ‘political failure’ of third world countries has defined all those who do not conform to the model of Christian/secular subject as the ‘yet-to-become-fully-human’ of international law. As Esmeir (2006) argues,

“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 dehumanized figure. This contradiction does not constitute a failure in

⁶ 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.

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...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" (1547).

Therefore, conceptualizing the human as a legal status allows 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': in this sense, the specific concept of a human inscribed within the pale of the law emerges as extremely fragile and paradoxical. In fact, although Human Rights 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, as revealed in the current debate over the headscarf. 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"(Mark van Hoecke 2016, 45). This, however, clashes with other models of social organization, where communities organize themselves according to different standards'.

In this sense, the forced un-veiling of 'inhumanely-treated' Muslim women in order to re-veil them with the legal mask of a state-protected human *à l'occidentale* acquires an emblematic status: it reveals that the regulation of Muslim women's bodies is the *symbol* of the intrinsic contradiction in liberalism and human rights discourse in general and the particular violence this contradiction entails for non-western traditions of law and politics in particular. If, on the one hand, liberalism justifies itself by claiming a separation between the spiritual and the temporal, the private and the public, then on the other hand, the private life of the individual has become extremely regulated: hence, the western/abstract citizen is free and, at the same time, compelled.

Significantly, *some* individuals are interpolated more than others, especially when their behaviour indicates that there are alternative traditions of individuation and subjectification to that of liberal positive law and human rights. This is well shown in the *Dahlab* case (*Dahlab v Switzerland*, 2001), decided at the ECHR. 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 (*Dahlab v Switzerland*, 456). After four years, an inspector visited the school and reported that Ms Dahlab was wearing 'Muslim' garments. At this point, the Director

General of Public Education becomes involved. He tried to mediate with Ms Dahlab and 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 upheld the decision of the School. The Court 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 that explicitly prohibits the wearing of religious symbols in public schools. The domestic court pointed out that it was impossible for the law to cover all the behaviour of state schools' teachers 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 European Court of Human Rights which, in line with the Swiss Court, pointed out 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' (*Dahlab v Switzerland*, 449): suddenly, the right-holder woman becomes the accused. In fact, instead of weighing the rights of Ms Dahlab to wear the *hijab* with the rights and freedom of others, the EHCR presented an (imaginary) undefined 'other' in need of protection from the 'wrongdoing' of Ms. Dahlab.⁷ Moreover, as the applicant was working in a public institution, the Court found that the request of the school was admissible under the principle of 'state neutrality'.

But the most controversial point of the decision is the accusation of proselytism moved against Ms Dahlab. In fact, from the analysis of the case, it is not clear which 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. Many of those children were probably exposed to religious rituals by parents, relatives and other figures of authority. Hence, how can we prove that the behaviour of Ms Dahlab would defy the authority figures of a child's life? 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?⁸ If it is true that wearing a *hijab* creates tensions and conflicts, as stated in the Strasbourg sentences, the parties should take measures to reconcile and not to prohibit group manifestations.

The weakness of the accusation of proselytism moved against Ms Dahlab is evident when comparing the case with *Kokkinakis v Greece* (1993), 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

⁷ It is worth remembering that during the four year period in which Ms Dahlab wore the *hijab*, there was no objection to the quality of her work. Moreover, it clearly appears that the applicant never tried to have any kind of advantage or proselytising action related to her religious belief. For an interesting analysis of the case see (Bahia Tahzib-Lie 2004, 473–83)

⁸ In *Kokkinakis v Greece* (Application 14307/88) ECHR 25 May 1993 A. No. 260, para 31 and *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.

diverse Greek Orthodox priests in order to try to convince them of the truth of their religion.⁹ Oddly enough, for the ECHR, Ms Dahlab's clothing represented a greater threat to liberty than Mr Kokkinakis's attempt to proselytize: 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. The former is considered by the ECHR as a form of proselytism while the latter is not. Hence, although the Strasbourg 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 the one committed by Kokkinakis in a country where this action has been 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'. 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. Therefore, what transpires from those decisions 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 s/he is 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 essence by presenting her with the alternative 'unveil or lose your teaching job' the law hid Dahlab much more efficiently than any veil

⁹ In Greece proselytism is forbidden by constitution. For this reason, Mr Kokkinakis was judged guilty by the Greek Court. In fact, Article 13. 2 of the Greek constitution states: "There shall be freedom to practice any known religion; individuals shall be free to perform their rites of worship without hindrance and under the protection of the law. The performance of rites of worship must not prejudice public order or public morals. Proselytism is prohibited". See ('Constitution of Greece' 2016)

could ever. For the veil, as all clothes do, does not hide but *present* humans to each other, whereas the persona juridical, in modern law, isolates people from each other and connects them to the state.

The veil cases I have taken into consideration show that the western project of universal emancipation, through the combination of legal positivism and human rights, in reality works to assimilate differences into the Christian/secular/liberal understanding of law and politics which remains Eurocentric, phallogocentric and logocentric. Failing to be re-born in the image of modern law's subject results in the removal of the individual from public space because its very presence is embarrassing. Dahlab was embarrassing because she was working happily in the centre of Europe all-dressed-up in the wrong manner. Years ago it would have been a miniskirt. It is now the veil.

As I have argued, human rights and state law only protect an abstract secular individual, a 'human-yet-to-become' that forever needs the state law in order to be human. The modern (juridical) subject enters into the 'universal human nature' by acquiring rights and, consequently, those who do not get these rights are excluded; to have citizens we must have also 'aliens' or, as Kristeva (1991) puts it "never has democracy been more explicit, for it excludes no-one-except foreigners"(149).

The *Dahlab* and *Sahin* cases are instances of modern law constructing a 'dehumanized' female, victim of a (supposedly) chauvinist religious law, who must be re-humanized as abstract individuals at once legislators and subjects to the law. If they fail to be re-born and reject inclusion in modern law's project of 'juridical humanity', they immediately return to a condition of being 'pre-human'. Therefore, are we really sure that the inclusion of de-humanized people within the pale of Human Rights law does not reproduce a colonial logic? Which political possibilities have those subjects outside the pale of the law and awaiting humanitarian intervention?

Conclusion

According to the European Convention on Human Rights, religious freedom is not limited to belief but it extends also to its manifestations¹⁰ and it is 'one of the foundations of a democratic society' (*Kokkinakis v Greece*, 1993, para 31); however, not every act based on religious belief is protected by article 9 of the convention. In the ECHR's decisions, it is the term 'practice' in article 9 (1) which

¹⁰ The key provision in the Convention for the protection of human rights and fundamental freedoms with respect to freedom of religion is art. 9. 9.1 which 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 - Convention_ENG.pdf' 2016)

‘does not cover each act which is motivated or influenced by a religion or belief’ (*Arrowsmith v the United Kingdom* 1978). In fact, the manifestation should be one of the ‘normal and recognized manifestations’ of religion or belief that ‘actually express the belief concerned’ (*Arrowsmith v the United Kingdom* 1978, 20). It is therefore unclear why the ECHR’s judges could not consider the veil a ‘normal manifestation’ which expresses a profound religious belief (Evans 2001).

This instance becomes clear if we assume that article 9 protects the rights of subjects who comply with the principle of secularism and with a secular mode of experiencing religion. In fact, while secularism conceives religion as a set of recommendations based on general beliefs (and so a matter of ‘personal choice’), Mahmood’s work (2005) reveals that for Muslim believers, Islam is not simply a set of commandments based on religious belief as in western secular thought, but a way to live and inhabit the world, bodily and ethically: as their aim is to follow the example of the Prophet, a “Muslim’s relationship to Mohammad is predicated not so much upon a communicative or representational model as an assimilative one” (Mahmood 2009, 847). The western/secular understanding of religion as a ‘private matter’ is strictly linked to the place of religions within the secular state (Keane 2016) and to the role of the law in regulating 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-conceptualisation of religious sensitivities and religious practices in the modern world (Mahmood 2009; Asad 2003): thus, while secular thought has come to define concepts of state, economy, religion and law, it simultaneously creates a specific law and religious subject. As Gursel (2013) argues, “when certain forms of religiosity which are not in compliance with the secular sensibilities of the state step out from the private sphere into the public, this renders the individuals’ acts suspect as if they are not religiously but politically motivated”(10).

This is particularly clear when comparing the *Dahlab* and *Kokkinakis* cases which indicate that the regulation of women’s body is particularly emblematic of the *manner* in which the paradoxes and inherent contradictions of liberalism are reproduced. *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 assigns 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.

Hence, 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 in liberal secular thought. In this sense, the western discourse over the *hijab* not only overlooks the ever-changing historical, social and religious

meaning symbolized by the veil, but it also highlights western incapacity to think the plurality, as revealed in the analysis of the *Sahin* case (*Sahin v Turkey*, 2005).

The ECHR's legal decisions over the practice of veiling indicate that secularism is not a neutral position: rather, it is a "normatively prescriptive model that favours certain forms of modern religion at the expense of others that are equally legitimate"(Denli 2004, 497). In the case, the secular position of the ECHR's judges led the Court to approve a series of repressive and illiberal measures: in the name of national security and gender equality, the ECHR's judges have deeply limited the possibility of agency of many Muslim women in Europe. Therefore, "the political solution that secularism proffers...lies not so much in tolerating difference 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" (Mahmood 2006, 328).

In this sense, the human rights project of humanity's salvation in reality works to assimilate the individual into Christian/secular/liberal understanding of law and politic. Failing to assimilate into a new law's subject means the disappearance of the individual from the public space because it represents an embarrassment.

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