

The Principle of Gender Equality 'Unveiled'

How does European law treat veiling and pornography and what does this reveal about European gender equality and multiculturalism?

Meya Lee

The Principle of Gender Equality 'Unveiled'

How does European law treat veiling and pornography and what does this reveal about European gender equality and multiculturalism?

Diversity Governance Papers

ISSN 2975-2175

DiGoP 01/2025

Recommended Citation

Meya Lee, The Principle of Gender Equality 'Unveiled'. How does European law treat veiling and pornography and what does this reveal about European gender equality and multiculturalism?, Diversity Governance Papers DiGoP 01/2025, Eurac Research, Bolzano/Bozen, Italy, 2025, <https://doi.org/10.57749/frp6-6269>

Eurac Research

Institute for Comparative Federalism and Institute for Minority Rights

Viale Druso/Drususallee 1

39100 Bolzano/Bozen

Italy

digop@eurac.edu

www.eurac.edu/digop

Editorial Team: Elisabeth Alber, Sergiu Constantin, Georg Grote, Karl Kössler, Petra Malfertheiner, Francisco Javier Romero Caro

Author: Meya Lee

© Meya Lee, 2025



This publication is under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

DiGoP Advisory Board

The advisory board of the Diversity Governance Paper series is composed of the members of the Research Group on [Constitutionalism and Societal Pluralism: Diversity Governance Compared](#) within the International Association of Constitutional Law IACL.

Elisabeth Alber, *Institute for Comparative Federalism, Eurac Research, Bolzano/Bozen*

Nicholas Aroney, *The University of Queensland*

Tracy Beck Fenwick, *Australian National University, Canberra*

Eva Maria Belsler, *Institute of Federalism, University of Fribourg*

Paul Blokker, *University of Bologna*

Ilze Brands Kehris, *Assistant Secretary-General for Human Rights, UN, New York*

Michael Breen, *School of Social and Political Sciences, The University of Melbourne*

Joshua Castellino, *Minority Rights Group International and Middlesex University*

Sergiu Constantin, *Institute for Minority Rights, Eurac Research, Bolzano/Bozen*

Yonatan Fesha, *University of the Western Cape, Dullah Omar Institute for Constitutional Law, Governance and Human Rights, Cape Town*

Anna Gamper, *University of Innsbruck*

James Gardner, *University at Buffalo School of Law*

Georg Grote, *Institute for Minority Rights, Eurac Research, Bolzano/Bozen*

Andrew Harding, *National University of Singapore*

Rainer Hofmann, *Goethe University Frankfurt*

Soeren Keil, *Institute of Federalism, University of Fribourg*

Karl Kössler, *Institute for Comparative Federalism, Eurac Research, Bolzano/Bozen*

Joseph Marko, *University of Graz and Institute for Minority Rights, Eurac Research, Bolzano/Bozen*

Roberta Medda-Windischer, *Institute for Minority Rights, Eurac Research, Bolzano/Bozen*

Sean Müller, *Institute of Political Science, University of Lausanne*

Jaclyn Neo, *Faculty of Law, National University of Singapore*

Francesco Palermo, *Faculty of Law, University of Verona and Institute for Comparative Federalism, Eurac Research, Bolzano/Bozen*

Johanne Poirier, *Faculty of Law, McGill University, Montreal*

Patricia Popelier, *Law Faculty, University of Antwerp*

Günther Rautz, *Institute for Minority Rights, Eurac Research, Bolzano/Bozen*

Petra Roter, *Faculty of Social Sciences, University of Ljubljana*

Asha Sarangi, *Centre for Political Studies, Jawaharlal Nehru University, New Delhi*

José María Serna de la Garza, *Instituto de Investigaciones Jurídicas, National University of Mexico*

Ayelet Shachar, *Max Planck Institute for the Study of Religious and Ethnic Diversity*

Sia Spiliopoulou Åkermark, *Åland Islands Peace Institute*

Nico Steytler, *University of the Western Cape, Dullah Omar Institute for Constitutional Law, Governance and Human Rights, Cape Town*

Nenad Stojanović, *University of Geneva*

Markku Suksi, *Department of Law, Åbo Akademi University*

Alexandra Tomaselli, *Institute for Minority Rights, Eurac Research, Bolzano/Bozen*

Alice Valdesalici, *Institute for Comparative Federalism, Eurac Research, Bolzano/Bozen*

Asanga Welikala, *Edinburgh Centre for Constitutional Law, Edinburgh Law School, University of Edinburgh*

Jens Woelk, *University of Trento and Institute for Comparative Federalism, Eurac Research, Bolzano/Bozen*

Stefan Wolff, *Department of Political Science and International Studies, University of Birmingham*

Abstract

Some European countries have implemented so-called burqa bans, purportedly grounded in security, secularism, and gender equality. This paper critically examines the gender equality argument underlying these bans, comparing it with attitudes towards female sexuality in pornography, to reveal underlying societal norms and perceptions. The paper provides context for the practice of veiling and its diverse interpretations, juxtaposed with the discussion on pornography and gender equality. Despite apparent differences, both practices intersect at the nexus of female sexuality.

Drawing from feminist discourse and supported by evidence from four European Court of Human Rights cases, the paper delves into how particular conceptions of protocols of gendered interactions and female sexuality inform the law. This research highlights the discrepancies in Europe's approach to gender equality and multiculturalism, which, despite intentions for neutrality, are skewed by biases in public opinion and legal frameworks. This highlights the intersecting dynamics of sex, race, and culture in shaping European laws and policies. By deconstructing the gender equality argument in veiling bans, the paper underscores the need for a nuanced understanding of female agency and autonomy within the context of a European liberal democracy.

Author

Meya Lee holds a master's degree in international relations at the Johns Hopkins School of Advanced International Studies (SAIS) in Bologna, Italy. Her research interests focus on language policy, minority and linguistic rights, and the intersection of private and public law. She holds a bachelor's degree in Linguistics and Italian Literature from the University of Oxford, which continues to inform her interdisciplinary approach to issues of identity, governance, and legal frameworks.

Keywords

Feminism, Veiling, Minority Rights, European Law, Gender Equality, Pornography

The Principle of Gender Equality 'Unveiled'

How does European law treat veiling and pornography and what does this reveal about Europe's commitment toward gender equality and multiculturalism?

Introduction

On April 11th, 2011, under Nicolas Sarkozy's administration, France became the first European country to introduce a full ban on "le voile," a French term that is often used in reference to full-face Islamic veils (niqābs and burqas). Shortly afterwards, many other European countries followed suit: Belgium (2011), Switzerland (2016, only in Ticino), Bulgaria (2016), Austria (2017), Denmark (2018), and the Netherlands (2019). These countries implemented either partial or full bans (sometimes progressing from a partial to a full ban). These bans have sparked controversy and constitute a controversial discussion in the general public.

Three years after France's official implementation of the 'burqa ban,' the ECtHR ruled in favour of the state in its controversial judgment on *S.A.S. v France*, upholding the ban on the grounds of "living together"—a justification that drew widespread criticism. Indeed, the case was named the "worst ECtHR judgment of 2014" by the Strasbourg Observers.¹ While the Court ultimately sided with France, it explicitly rejected the government's claim that the burqa violates the Principle of Gender Equality. Instead, the ruling emphasised the importance of preserving conditions for social cohesion and democratic interaction. This specific case marks an exception rather than the rule: historically, the ECtHR has upheld burqa bans by accepting arguments that they promote gender equality and reinforce secularism, both seen as foundational pillars of European liberal democracy.

This essay will closely examine and deconstruct the gender equality argument by comparing discussions around the practice of veiling to those around pornography. Despite the apparent polarity between the two—one covering and symbolically desexualizing women, the other unclothing and hypersexualizing them—female sexuality lies at the heart of both matters. By deconstructing the gender equality argument in this way, this essay exposes how Western liberal-democratic countries consider veiling to be an unacceptable form of female sexuality while simultaneously considering pornography as a socially acceptable, albeit publically distasteful, form of female sexuality. The core argument of this paper is that this double standard is not simply a product of patriarchy but is instead sustained by racialised and cultural hierarchies in which Muslim women's expressions of sexuality and piety are constructed as inherently alien and incompatible with 'mainstream' values. In doing so, this essay will bridge discussions on veiling and pornography—subjects that are often treated separately—highlighting that, at least in Europe, they exist within the same hegemonic system of the Judeo-Christian and liberal-democratic patriarchy.

The first part of this essay contains a broad background on veiling, the meanings accorded to veiling, gender equality as justification for veiling bans, pornography and human rights, and gender inequality issues associated with pornography. This paper will also lay out the vast landscape of feminist thought

¹ Weichie, 'The Results Are In: Poll on Best and Worst ECtHR Judgment of 2014' (*Strasbourg Observers*, 12 February 2015)

<https://strasbourgobservers.com/2015/02/12/the-results-are-in-poll-on-best-and-worst-ecthr-judgment-of-2014/> accessed 23 November 2024.

on both issues in order to set out the grounds upon which veiling and pornography can be compared and to illustrate how the feminist discourse around both topics is analogous, falling along similar lines of harm and autonomy.

Ronan McCrea describes the European Court of Human Rights (ECtHR) as adhering to the principle of "militant democracy," meaning that they "[permit] Member States to take illiberal measures such as suppression of political parties committed to overthrowing democracy, in order to protect liberal democracy."² For this reason, the second part of this essay will look specifically at legal cases regarding veiling and pornography brought before the ECtHR and also examine what these legal judgements reveal about Europe's commitment toward gender equality and multiculturalism.

In the analysis of these legal cases, this essay will conclude in an analysis of how European law facilitates and reproduces the normative view of European identity (i.e., what it means to be a European). This paper will illustrate how both topics lie at the intersection of sex, race and culture. The fact that the veil but not pornography is banned on the grounds of gender equality is ultimately reflective of self-contradictory cultural biases inherent to a 'state neutrality' approach. This essay further contends that, although *S.A.S. v France* marked the first instance in which the Court explicitly rejected the discursive conflation of Islamic veiling with misogyny, its reasoning and outcome ultimately remained consistent with prior rulings. This essay ultimately would like to highlight the persistent inconsistency shown by the ECtHR in upholding the Principle of Gender Equality and call into question ECtHR's implementation and realisation of the Principle of Gender Equality. As a cornerstone of European normative values, the ECtHR has a long way to go in terms of multiculturalism and the human rights of women.

Part I: Background

Women's Bodies As "Symbolic-Cultural" Battlegrounds

To understand why headscarves have become the heart of debates around culture, one must understand the meaning imbued in women's bodies within societies. Remaining sensitive to the separation between sex and gender identity, only biologically female humans are able to bear and birth a child. Thus, women often perform gender roles typically associated with these biological capabilities. In many societies, and certainly in the West, women are still considered responsible for taking care of the children (and family). Womanness, arguably until recently, is characterised by belonging to the private, domestic sphere. There, their role extends beyond the physical act of generating more members of the culture; they also serve as the carriers of cultural reproduction itself. Women are therefore seen as guardians of the home and vehicles of 'culture.'³ As Susan Moller Okin points out in *Is Multiculturalism Bad for Women?*, "Home is, after all, where much of culture is practiced, preserved, and transmitted to the young."⁴

It is this double form of reproductive duty tied to the female body that makes "the sphere of personal, sexual, and reproductive life [...] a central focus of most cultures, a dominant theme in cultural practices and rules."⁵ Without women, a population *and* its culture dies. Therefore, to control women is to control the fate of a culture. Hence, female bodies lie at the heart of cultural conflicts, and how a

² R McCrea, 'The Ban on the Veil and European Law' (2013) 13 Human Rights Law Review 57, 62.

³ Susan Moller Okin, 'Is Multiculturalism Bad For Women?' [1997] *Boston Review* <<https://www.bostonreview.net/forum/susan-moller-okin-multiculturalism-bad-women/>> accessed 13 February 2025.

⁴ *ibid.*

⁵ *ibid.*

woman behaves, thinks and dresses becomes the subject of value judgements. Consider the veiling bans across Europe: By instrumentalizing the headscarf, Islam is portrayed as fundamentally incompatible with a cryptic Western ideal. This constructed dichotomy between Islam and the West nests within itself other dichotomies, such as tradition and conservatism versus modernity and progressivism, religion versus secularism, and 'dangerous' versus 'safe.' One only needs to look at Yasmin Alibhai-Brown's claim that "[t]he hijab, jilbab, burqa and niqab are visible signs of this retreat from progressive values."⁶ Indeed, these terms have morphed into a singular "icon representing the perceived intolerable difference of Muslims."⁷ Of particular interest is the conspicuous fact that only the Islamic veil has been banned despite other ways of dressing (e.g., beards, thawbs) and behaviours (e.g., salah prayers, keeping a halal diet) that set Muslims apart. Only the veil has been reconstructed as an assault on secularism and liberal values, and only the veil has been targeted legally. Only the veil invites special attention because, as Seyla Benhabib puts it, "[w]omen and their bodies are the symbolic-cultural site upon which human societies inscript their moral order."⁸

Feminism and Veiling

Within feminist circles, diverse perspectives exist regarding the issue of veiling bans. Some feminists assert that such prohibitions are necessary to ensure social cohesion and challenge perceived symbols of patriarchal oppression and promote gender equality. Others, however, dispute the underlying assumption that veiling is inherently oppressive and instead emphasise the importance of individual autonomy and the right to self-expression.

Veiling: a practice rooted in gender inequality and gender discrimination

Feminists advocating for a ban on veiling consider the practice to be rooted in the patriarchal structure of Islam. Yasmin Alibhai-Brown, for example, interprets the veil as a way to keep women "sequestered or contained lest they raise male lust and cause public disorder" because conservative Islam "casts[s] women as sinners and temptresses."⁹ Indeed, for many people, the veil conjures up images of oppressive and militantly misogynistic regimes like the Taliban's Afghanistan. Élisabeth Badinter, a French feminist philosopher, in an address to the ad hoc French national commission on "the wearing of the full-face veil on national territory" says:

"Je commencerai par rappeler un souvenir qui nous est sans doute commun: le choc ressenti la première fois que nous avons vu à la télévision, il y a à peine dix ans, les femmes fantômes d'Afghanistan. [...] Qui pouvait penser alors que des femmes oseraient revendiquer de se promener dans cette tenue dans les villes françaises ou que des hommes pourraient contraindre des femmes à la porter? Franchement, personne."¹⁰

Badinter conflates Afghanistan with Islam with all types of veiling with male oppression. Similarly, in the Netherlands, Cisca Dresselhuys, the ex-editor-in-chief of *Opzij* (a Dutch feminist paper), stated that there was no space in *Opzij* for women practising Islamic veiling:

⁶ Yasmin Alibhai-Brown, 'As a Muslim Woman, I See the Veil as a Rejection of Progressive Values' *The Guardian* (20 March 2015) <<https://www.theguardian.com/commentisfree/2015/mar/20/muslim-woman-veil-hijab>> accessed 13 February 2025.

⁷ Joan Wallach Scott, *The Politics of the Veil* (8. printing and 1. paperback printing, Princeton Univ Press 2010).

⁸ Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002) 84.

⁹ Alibhai-Brown (n 7).

¹⁰ 'Assemblée Nationale ~ Compte Rendu de Réunion de La Mission d'information Sur La Pratique Du Port Du Voile Intégral Sur Le Territoire National' <<https://www.assemblee-nationale.fr/13/cr-miburqa/08-09/c0809004.asp>> accessed 24 February 2025.

“vrouwenbesnijdenis is bij mij taboe en redactrices met een hoofddoek komen er bij Opzij niet in”¹¹¹²

Both writers, as well as others such as Susan Moller Okin,¹³ further conflate forms of Islamic veiling with practises such as polygamy and female genital mutilation, depicting headscarves as a gateway to other extreme taboo practices.

Closely tied to the gender inequality argument is the argument of maintaining the social order of Western countries. Within this argument, lies the narrative of the Islam/West dichotomy. Anti-veil feminists often rely on this oversimplistic portrayal of Islam as the antithesis of the West in their narratives, imposing a value judgment that reinforces this binary division. Again, Élisabeth Badinter's opinion is revealing:

“Quel que soit le nombre de femmes – 300 ou 3 000 – qui dissimulent leur visage en France, force est de constater qu’il n’y en avait pas une seule il y a quelques années, et le nombre ne fait rien à l’affaire. N’y en aurait-il qu’une qu’il faudrait se poser la question des principes ainsi remis en cause. Or, il s’agit précisément des idéaux du triptyque républicain: le port du voile intégral piétine littéralement les principes de liberté, d’égalité et de fraternité.”¹⁴

The veil is perceived as inherently at odds with Western liberal democracy. Indeed, for Badinter, to wear the full-face veil is to pervert the principles of equality and liberty bestowed upon French (and arguably more broadly Western) citizens and betray all women suffering under male oppression. In doing so, she deprives Muslim women of the genuine choice to wear the *hijab* on their own terms and to further develop the meaning attached to the practice.

Veiling: a practice of empowerment and reappropriation

Feminists advocating for a woman's right to choose whether to veil view it as an issue of personal agency, decoupling it from its representation as a symbol of oppression. These scholars argue that a woman's decision to wear a veil must be respected as a valid expression of her identity and beliefs, challenging the notion that veiling is inherently oppressive.

Despite veiling becoming a symbol of oppression in Western discourse, those who practice veiling in Europe often refer to it as a vehicle of agency. For example, Berrin Koyuncu Lorasdaği's 2009 study on Turkish girls in the Netherlands involved interviews with 30 self-identified headscarf-wearing Turkish students from various schools in Amsterdam. She found that all of the girls interviewed rejected the notion of the hijab as inherently oppressive and, by extension, an obstacle to their liberation. To the contrary, all but 2 girls indicated that they felt emancipated by the headscarf. Participant Tülay A. indicated that she felt protected from unwanted hypersexualisation and said that the headscarf allowed her to be appreciated for her “character and success.”¹⁵ Another participant, Gül Y., expressed that without the headscarf, she “would not have the opportunity to exercise [her] social and economic emancipation in the labour market.”¹⁶ This highlights the significance autonomy within a specific culturo-religious context. Banning the headscarf would prevent women from expressing their identity within their own specific context and, for those wearing it under familial pressure, deprive them of a vehicle for emancipation.

¹¹ Trouw, 'Bij Opzij geen hoofddoek' (Trouw, 26 August 2016) <<https://www.trouw.nl/voorpagina/bij-opzij-geen-hoofddoek~bbb8c9bb/>> accessed 18 February 2025.

¹² ('female genital mutilation is a taboo for me and editors wearing the headscarf are not allowed at Opzij').

¹³ Okin (n 4).

¹⁴ 'Assemblée Nationale ~ Compte Rendu de Réunion de La Mission d'information Sur La Pratique Du Port Du Voile Intégral Sur Le Territoire National' (n 12).

¹⁵ Berrin Koyuncu Lorasdaği, 'The Headscarf and Emancipation in the Netherlands' (2009) 19 *Feminism & Psychology* 328.

¹⁶ *ibid.*

However, it is also important to be aware of the power dynamics that are in play here. Hirschmann critically looks at the claim that veiling can provide full and true autonomy.¹⁷ Firstly, religion is difficult to divorce from culture and context, and the context of a lot of societies is a patriarchal one. While the veil can empower Muslim women by facilitating educational access and fostering financial independence, its use ultimately reinforces patriarchal structures. Hirschmann and Diffendal argue that the underlying message of veiling is that these spaces are inherently male-dominated, positioning women merely as guests to the public domain rather than equal participants.¹⁸ As Hirschmann puts it: "Autonomy operates within particular structures and parameters set by community, but men have historically set and defined these cultural norms."¹⁹ Keeping this in mind, it is important to recognise that hetero-patriarchal norms can be found in the Western world too. To conclude this section on feminism and veiling, this paper refers to a poignant question posed by participant Fadik A. in Lorasdađi's study: "the headscarf cannot be a symbol of oppression. Are women who do not wear headscarves not oppressed, not beaten by their husbands?"²⁰ Islam is not the common denominator of their frustration, it is the patriarchal systems that exist in *both* Muslim societies and Western societies.

Feminism and Pornography

Pornography: a practice of sex-based inequality and sex discrimination

Recalling Fadik A's comment in Lorasdađi's study, this section will look at pornography, a practice some feminists condemn as a means of gender oppression through hypersexualisation. I have chosen to contrast pornography with veiling for a specific reason. In her analysis of the French head-scarf controversy, Wallach Scott explains that:

*"Until their confrontation with Islam, many French feminists saw the sexual exhibitionism of their society as demeaning to women because it reduced them to a sexed body. But in the heat of the headscarf controversy, those concerns were set aside and equality became synonymous with sexual emancipation, which in turn was equated with the visibility of the female body."*²¹

By placing sex and female sexuality at centre stage, pornography can be analysed as "sexual exhibitionism" which reduces the pornographic performer (almost always a woman) to a "sexed body." Feminist discourse on pornography, like on veiling, is broad and heterogeneous, and this section will explore how such portrayals can be considered just as much a vehicle for reproducing female oppression and hetero-patriarchal values as veiling.

Catherine MacKinnon and Andrea Dworkin, two members of the radical feminist anti-pornography movement, provide a definition of harmful pornography in their work *Pornography and Civil Rights - A new day for women's equality*. They define pornography to be the depiction of women as sexual objects, in which women are dehumanized and portrayed as enjoying pain or humiliation. Such scenarios often include sexual violence, physical harm, sexual submission, penetration by objects or animals, and scenes of degradation or injury.²²

Employing this definition, MacKinnon and Dworkin argue that pornography fitting the provided definition harms *all* women through depictions of androcentric constructions of heterosexual sex, degradation and sexual objectification of women, and the implicit prescription of a 'sexy' body. These mechanisms reinforce the asymmetrical gender relations between men and women, and for this reason

¹⁷ Nancy J Hirschmann, 'Eastern Veiling, Western Freedom?' (1997) 59 *The Review of Politics* 461.

¹⁸ *ibid*; Chelsea Diffendal, 'The Modern Hijab: Tool of Agency, Tool of Oppression' (2006) 5 *Chrestomathy* 129.

¹⁹ Hirschmann (n 19) 474.

²⁰ Koyuncu Lorasdađi (n 17).

²¹ Wallach Scott (n 8).

²² Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (2. printing, Organizing Against Pornography 1989).

MacKinnon in *Toward a Feminist Theory of the State* (1991) believes it impossible for pornography to be considered a legitimate profession. The consent required to practise a profession like pornography is impossible in a society where women are unequal in every way - politically, financially, socially, and more. Indeed, MacKinnon points out that “[w]omen are known to be brutally coerced into pornographic performances.”²³

Following this framework, sex, pornography, prostitution and rape are inextricable from each other because hetero-patriarchal sexual relations are inherently violent and demeaning to women. “Compare victims’ reports of rape with women’s reports of sex. They look a lot alike. Compare victims’ reports of rape with what pornography says is sex. They look a lot alike.”²⁴ Hence, pornography is considered to harm all women because it constructs female humiliation and pain as a key element in sexual arousal and sexual relations. In her book *Female Sexual Slavery*, Kathleen Barry, points out that “[t]he male fantasy insists that beatings, rape, humiliation, and pain turn women on.”²⁵ In other words, gender inequality, being part and parcel of pornography, becomes an inherent component of sexual reality constructed by pornography.

This argument of gender inequality as an essential part of pornography is tied to the argument that individuals learn from pornography, especially when it is ubiquitous, and that society has been desensitised to the violence it depicts. Prada portrays pornography as a ‘theory’ that people learn from and which manifests through aggressions against women.²⁶ To explain this relationship between pornography and social reality, MacKinnon applies the speech act theory; pornography not only depicts but also reinforces the socio-political inequality between men and women. It is not just a simple obscenity or a private indiscretion, but rather an active political practice of male domination that violates women’s civil rights.

Finally, pornography harms *all* women as an apparatus of quotidian sexual objectification of women and their bodies. “Being surrounded by pornography-which is not only socially ubiquitous but often directly used as part of sex”²⁷ is part of the lived experience of every female. The more pornography that exists in the world, the more the connection between sexuality and violence is legitimized, “and the more honestly women can be defined in terms of their fuckability.”²⁸

Pornography: a practice of empowerment and reappropriation

‘Pro-pornography’ feminism, on the other hand, asserts that pornography, when produced ethically and consensually, can be viewed through a lens of empowerment and sexual agency for all individuals, challenging traditional narratives that frame pornography solely as a vehicle of heterosexual oppression. These feminists acknowledge the perpetual sexualisation of women and their lived experience as a consequence of it but consider the institution of pornography as a possible “site of cultural reappropriation.”²⁹

The emergence of pornography genres such as ‘feminist porn’ and ‘post-porn’ has attempted to pivot away from obligatorily heterosexual and cisgender frameworks that other and relegate women to inferiority in society. Such genres of new pornography also address the issue of aesthetics. One of the consequences of non-feminist pornography is that, through the sexualisation of women, female sexuality is prescribed and female bodies are constructed as only being acceptable in certain ways. Feminist porn and post-porn, on the other hand, tries to sexually liberate and facilitate sexual expression by redefining the ‘acceptable’ body, be it female, male, non-binary, trans, disabled, etc, and redefining the ‘acceptable’ type of sexuality beyond heterosexuality. This genre of pornography also

²³ Catharine A MacKinnon, *Toward a Feminist Theory of the State* (1. paperback ed., 5. [print.], Harvard Univ Pr 1991) 208.

²⁴ *ibid* 146.

²⁵ Kathleen Barry, *Female Sexual Slavery* (Univ Pr 1984) 209.

²⁶ Nancy Prada Prada, ‘¿Qué Decimos Las Feministas Sobre La Pornografía? Los Orígenes de Un Debate’ (2016) 5 *La Manzana de la Discordia* 7.

²⁷ MacKinnon (n 25) 149.

²⁸ *ibid* 183.

²⁹ Rachael Liberman, “It’s a Really Great Tool”: Feminist Pornography and the Promotion of Sexual Subjectivity’ (2015) 2 *Porn Studies* 174, 186.

aims to depict safe sexual practices (such as including dialogue on consent) and adhere to ethical production standards. In this way, pornography provides spaces for feminine and queer individuals to reclaim their agency and renegotiate their sexuality. Judith Butler's "performativity" is sometimes used in the context of pornography to describe the idea that the power of feminist porn lies in the performance and reiteration of the body to 'sex' a previously 'un-sexed' ('unsexy') body.³⁰ The value of pornography lies therefore in its capacity for reappropriation and being a vehicle of agency.

Comparison of gender equality in both practices through the lens of feminism

In many ways, the feminist discourse around gender equality in pornography mirrors feminist discourse around headscarves or veils. Compare these two statements:

"While for the former pornography is nothing more than the visual embodiment of patriarchy and violence against women, the latter see it as a potential vehicle for channeling the erotic expression of women and sexual minorities, and thus as a mechanism for their sexual liberation."³¹

"The veil is both a marker of autonomy, individuality and identity, and a marker of inequality and oppression."³²

The parallelism of these two statements demonstrates that both veiling and pornography are practices that have developed within a highly sexualised and patriarchal backdrop and have gender inequality baked into their very existence. Both can be reappropriated by women as a tool of agency and autonomy, partially redefining what is acceptable for women. Neither, removed from their context, are inherently harmful or helpful because practices are given power and salience by the social meanings imbued in them.

In light of this comparison, Yasmin Alibhai-Brown touches on an intriguing point in her 2015 opinion piece in the Guardian. "Like a half-naked woman, a veiled female to me represents an affront to female dignity, autonomy and potential. Both are marionettes and have internalised messages about femaleness."³³ The internalised message of acceptable female sexuality is reflected in the European Court of Human Rights rulings that will be analysed in the following sections.

Part II: ECtHR - Custodian of European identity and values

ECtHR Rulings on Veiling

Dahlab v. Switzerland (2001)

Switzerland, by law, observes *laïcité* or secularism. Despite the formal separation of the state and religion, the country, as a federal state, allows the various cantons to determine the extent of this separation. In

³⁰ Liberman (n 31).

³¹ Ana Valero Heredia, 'Feminism and Pornography: From Mainstream Pornography (Hetero-Patriarchal) to Post-Porn (Non Binary)' [2022] The Age of Human Rights Journal 221, 222.

³² Hirschmann (n 19) 472.

³³ Alibhai-Brown (n 7).

Geneva, for example, *laïcité* is very much emphasised and practised, in contrast to Valais, where the municipalities are responsible for funding the Catholic Church.³⁴

In *Dahlab v. Switzerland*, Ms. Dahlab was a Swiss convert to Islam who worked as a schoolteacher at a public primary school in Geneva. As an extension of the State, Genevan public schools are subject to the principle of *laïcité*. After her religious conversion in 1991, Ms. Dahlab began wearing an Islamic headscarf to class in observance with what she believed was her religious duty. Four years later, the school inspector of the Vernier district informed Geneva Directorate General for Primary Education about Ms. Dahlab's choice to wear the Islamic headscarf but noted that she had not been the subject of parental complaints. The Geneva Directorate General for Primary Education then requested that she refrain from wearing the headscarf while carrying out her professional duty at school in accordance with the principle of secularism.

When Ms. Dahlab appealed the decision to the Geneva cantonal government, she was dismissed on the grounds that her veil conveyed a religious message in a secular environment. Dahlab then took the case to the Federal Court, alleging that her human rights under Article 9 of the European Convention of Human Rights on the Freedom of Thought, Conscience and Religion had been violated, and arguing that the prohibition infringed on the "inviolable core of her freedom of religion."³⁵ Ultimately the Federal Court upheld the decision. The Court first established the meaning of her headscarf - i.e., whether it was indeed a religious symbol (in the sense that the Crucifix or Star of David is). They noted that "the appellant wears the headscarf and loose-fitting clothes not for aesthetic reasons but in order **to obey a religious precept** which she derives from the following passages of the Koran"³⁶ and they determined that the *hijab* indeed constitutes a "'powerful' religious symbol" which is a "clear indication that the person concerned belongs to a particular religion."³⁷ Furthermore, as a civil servant, Ms Dahlab was "bound by a special relationship of subordination to the public authorities, a relationship which they have freely accepted and from which they benefit; it is therefore justifiable that they should enjoy public freedoms to a limited extent only."³⁸

Finally, and relevantly, the Swiss Federal Court stated that "**it is difficult to reconcile the wearing of a headscarf with the principle of gender equality.**"³⁹ Indeed, the concern for maintaining the principle of gender equality has historically featured very strongly in the Swiss headscarf debate⁴⁰ as it is considered "a fundamental value of our society enshrined in a specific provision of the Federal Constitution (Article 4§2) and must be taken into account by schools."⁴¹ Considering all the factors above, the court ruled that the prohibition of Ms Dahlab's headscarf was in the interest of maintaining 'public order' and 'safety' (despite the fact that, at the time she was first requested to refrain from wearing her headscarf, neither Ms Dahlab nor the school had received any complaints from parents or otherwise).

Eventually, Ms. Dahlab brought the case to the European Court of Human Rights, alleging once again the violation of her freedom to manifest her religion, but this time also the violation of her rights guaranteed by Article 14: the Prohibition of Discrimination. Ms Dahlab claimed that a Muslim man in her position would have been allowed to teach at a public primary school in Geneva without being subject to the same prohibitions.

³⁴ 'Religion' (Eidgenössisches Departement für auswärtige Angelegenheiten EDA)

<<https://www.eda.admin.ch/aboutswitzerland/en/home/gesellschaft/religionen.html>> accessed 1 March 2025.

³⁵ *Dahlab v Switzerland (dec)* [2001] ECHR 42393/98.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ Federica De Rossa and Micol Ferrario, 'Governance or Women's Rights. How Much Room for the Gender Equality Argument In The Swiss Headscarf Debate?' (2021) 48 DPCE Online <<https://doi.org/10.57660/dpceonline.2021.1417>> accessed 7 August 2024.

⁴¹ *Dahlab v. Switzerland (dec.)* (n 37).

⁴² As a side note, it is particularly interesting that the official Geneva Canton brochure on *laïcité* at school includes a section specifically targeting gender inequalities, implying a correlation between religion and gender inequality.

The ECtHR ruled to uphold the Swiss Federal Court's initial decision, accepting that the *hijab* is indeed a "powerful external symbol" which may have a "some kind of proselytising effect."⁴³ Following this line of reasoning, the perceived effect of the *hijab* is considered to promote values that are counter to democratic European values - i.e., gender equality:

*"seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which [...] is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."*⁴⁴

The argument behind the ECtHR ruling is problematic considering its ethnocentric construction of Islam as an inherently misogynistic religion. By equating patriarchal misogyny with Islam, the ECtHR demonstrates a biased assumption about autochthonous cultures, values, and beliefs that influenced their decision.

Regarding the allegation that the Swiss Federal Court violated Article 14, the Court decided 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 the State primary-education system. Such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith."⁴⁵ This reasoning is problematic however, as customs that many Muslim men follow as part of their religion are not uniquely Muslim. For example, beards, which may be sported by Muslim men in observance of their faith,⁴⁶ are not exclusive to nor identificatory of Islam. Hence, Muslim women who believe they need to veil are disproportionately affected.

Leyla Şahin v. Turkey (2005)

Turkey falls under the purview of the ECtHR being a member of the Council of Europe having ratified the European Convention of Human Rights. Additionally, like Switzerland, Turkey separates the state from religion, following Kemalist ideology which considers *laiklik* (secularism) as an essential element of a democracy.⁴⁷ *Leyla Şahin v. Turkey* is pertinent for two reasons. Firstly, unlike *Dahlab v. Switzerland*, Ms. Şahin was not a 'representative of the state' and therefore her actions were not a 'powerful external symbol' that might have a proselytising effect. Secondly, in the 2000s, Turkey pursued reforms to guarantee fundamental freedoms outlined in the Convention, leveraging the ECtHR for legitimacy and modernization during its European Union accession process.

Ms. Şahin, a Turkish national and practising Muslim, wore the Islamic hijab as a religious duty during her medical studies at Bursa Uludağ University. Upon moving to Istanbul for her fifth year, she faced academic restrictions due to her decision to wear the headscarf, including being barred from exams and denied entry to certain lectures. Her refusal to comply with the dress code led to disciplinary actions, including a warning and later a one-semester suspension.

Ms. Şahin first lodged a complaint with the Istanbul Administrative Court, which ruled that her treatment was indeed legal, before turning to the ECtHR. Şahin alleged that her rights and freedoms guaranteed by Articles 8 (Right to respect for private and family life), 10 (Freedom of expression) and 2 of Protocol No. 1 in addition to 9 and 14 of the European Convention on Human Rights had been violated by Turkish university regulations concerning Islamic veiling.

⁴³ *Dahlab v. Switzerland (dec.)* (n 37).

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ For a brief introduction on the practice of growing beards in Islam: Australian National Imam Council, Beard Policy - Islamic Guidance Paper, 1 Sept 2020.

⁴⁷ Note that under the Justice and Development Party (AKP), there has been a significant shift between Kemalist secular ideology to an Islam-centred political ideology in Türkiye.

Like in *Dahlab*, the ECtHR ruled that there was no violation of any of the Articles. Articles 8, 9 and 10 all contain caveats that provided the ECtHR to apply the Margin of Appreciation and rule in favour of Turkey. In its opinion, the Court made three interesting arguments. The first was that in a democratic society, the State is “entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety.”⁴⁸ In this case, pursuing secularism was argued to uphold public order by preventing religious clashes and facilitating peaceful coexistence among students and citizens more generally. Continuing, the Court argued that the Islamic headscarf, “which is presented or perceived as a compulsory religious duty” may have a significant impact “on those who choose not to wear it,” hence infringing on the rights of others. Thirdly, the ECtHR referred to *Dahlab* again to reiterate how the Islamic veil stood at odds with the principle of gender equality and wider democratic values of tolerance. Therefore, the ECtHR considered the banning of the veil was necessary to uphold the values of a democratic society.

ECtHR Rulings over Pornography

Pryanishnikov v. Russia (2019)

Pryanishnikov v. Russia marks the first occasion in which the ECtHR has considered the issue of gender equality and (extreme) pornography.⁴⁹

Mr. Pryanishnikov, a producer of ‘erotic films’ with a distribution certificate from the Ministry of Culture, applied for a film reproduction licence in 2003. The Ministry of the Press denied his request, citing allegations of involvement in illegal production, advertising, and distribution of erotic and pornographic material under Article 242 of the Russian Criminal Code. This article empowers Russian authorities to regulate acceptable depictions of sexuality for their population.

After several attempts to get the refusal overturned, Mr Pryanishnikov turned toward the ECtHR, alleging a violation of Article 10, his right to Freedom of Expression. Russia argued that, although their refusal may have interfered with his right to Freedom of Expression, they were under the obligation to do so under the 1923 Convention for the Suppression of the Circulation of and Traffic in Obscene Publications. They also referred to Recommendation No. R (89) 7 by the Council of Europe Committee of Ministers to further argue that their refusal was in the interest of protecting minors, pursuing “legitimate aims of protecting morals and the rights of others.”⁵⁰

Ultimately, the ECtHR ruled in favour of Mr Pryanishnikov, noting that “[t]he domestic courts therefore failed to recognise that the present case involved a conflict between the right to freedom of expression and the need to protect public morals and the rights of others, and failed to perform a balancing exercise between them.”⁵¹

The most salient aspects discussed in this case can be found in the Concurring Opinion of Judge Pinto De Albuquerque. Pinto de Albuquerque points out that European legal precedents on pornography usually follow three reasonings:

- “1. the protection of children [...] from pornographic material and content;*
- 2. the protection of believers from pornographic material and content with offensive portrayals of God or persons and objects of religious veneration;*

⁴⁸ *Leyla Şahin v Turkey* [2005] ECtHR 44774/98.

⁴⁹ Tara Beattie, ‘Pryanishnikov v Russia (App. No.25047/05), Judgment of 10 September 2019—Setting the Foundations for Human Rights Discourse on Pornography’ (2019) 6 European Human Rights Law Review <<https://durham-repository.worktribe.com/output/1311055/pryanishnikov-v-russia-app-no2504705-judgment-of-10-september-2019-setting-the-foundations-for-human-rights-discourse-on-pornography>> accessed 13 February 2025.

⁵⁰ *Pryanishnikov v Russia* [2019] ECtHR 25047/05.

⁵¹ *ibid.*

3. the protection of the freedom of choice of adults with regard to all other pornographic material and content that do not infringe the rights of the two groups of people mentioned above.⁵²

In other words, when the question of obscenity or pornography has appeared under the ECtHR's purview, the Court's decisions have historically tended to favour the principles of freedom. However, Pinto De Albuquerque concedes that the principle of gender equality is a significant component of the conversation regarding pornography in international law. For example, the UN committee on Elimination of Discrimination against Women General Recommendation No. 19 on Violence against Women connects pornography to gender inequality:

"11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion [...].

*12. These attitudes also **contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals.** This in turn contributes to gender-based violence."*⁵³

Pinto de Albuquerque highlights that aspects of pornography are indeed harmful to women and fly in the face of the principle of gender equality.

*"State responsibility vis-à-vis pornography does not end with the protection of children. Pornography frequently desensitises the consumer to sexual aggression, normalises sexual assault and **promotes a rape culture, which impacts seriously on gender equality.** [...]*

*Since **pornography reinforces stereotypes, discrimination and gender inequality, exploits existing inequality between the sexes and contributes to gender-based violence,** the question arises to what extent the Court should proscribe pornography in the same way that it proscribes male violence against women in general."*⁵⁴

Ultimately, Pinto de Albuquerque recommends a more gender-sensitive interpretation of the European Convention on Human Rights in order to be more conscious and proactive in considering gender inequalities that are ubiquitous in society.

Chocholáč v. Slovakia (2022)

The case of Chocholáč involves a morality argument. It concerns a 33-year-old serving a life sentence in Ilava prison. Upon a routine inspection of his cell, staff found pornographic content, depicting "classic adult heterosexual sex (*klasický sex medzi dospelými ženami a mužmi*)," in his possession. Referring to Article 132§2 and Article 371§1 of the Slovakian Criminal Code that outlaws pornography for prisoners on the grounds of threat to morality (*ohrozenie mravnosti*), Ilava Prison confiscated his material and opened disciplinary proceedings against him.

Chocholáč lodged a complaint before the ECtHR, alleging a violation of Article 8 of the European Convention on Human Rights. He stressed the difficult conditions of his prison sentence (being isolated from social life) and stated that pornography was simply a way for him to cope. Slovakia, however, alleged that pornography could "prompt sexual and violent offences,"⁵⁵ a choice of words that calls to mind the language used by anti-pornography feminists. Indeed, the Government argued that prohibiting pornography in prison was in the interest of "the rights of others, [...], exposing prisoners to

⁵² *ibid.*

⁵³ Committee on the Elimination of Discrimination against Women, 'CEDAW General Recommendation No. 19: Violence against Women' (United Nations 1992) Convention on the Elimination of All Forms of Discrimination Against Women A/47/38.

⁵⁴ *Pryanishnikov v. Russia* (n 52).

⁵⁵ *Chocholáč v Slovakia* [2022] ECtHR 81292/17.

pornography could lead to offence and interpersonal conflict, and thereby eventually to endangering safety and order in prisons.”⁵⁶

Ultimately, the ECtHR ruled in favour of Chocholáč and judged that there had indeed been a violation of Article 8. The argument used was that the interference with the prisoner’s private life was disproportionate and not “necessary in a democratic society.”⁵⁷ However, the Dissenting Opinion of Judge Wojtyczek contested that the interference was *not* disproportionate considering the element of gender inequality found in pornography. Wojtyczek refers to the Parliamentary Assembly of the Council of Europe Resolutions 1835 (2011) and 2412 (2021), which link the issue of human rights of women to pornography. Wojtyczek points out that legal reports show pornography to be a “significant cause of violence against women. This assessment is shared, in particular, by several streams within the feminist movement.”⁵⁸ Furthermore, he suggested that ‘soft-law’ instruments such as these indicate that “after a period marked by a tendency to decriminalise pornography, there is now a growing international tendency to broaden the scope of criminalisation of pornography.”⁵⁹ With these considerations in mind, Wojtyczek considered Article 8 to not have been violated in this case because “a general ban on pornographic material in prisons pursues several legitimate purposes. It serves the objective of rehabilitation and reintegration of prisoners. It facilitates the preservation of order in prisons. It also promotes the more general aim of eliminating negative gender stereotyping and violence against women.”⁶⁰ Wojtyczek’s dissenting opinion illustrates that there is an awareness of how pornography may oppose gender equality. However, despite this awareness, the ECtHR demonstrates a double standard in its rulings on what measures are appropriate to take.

Analysis: Veiling bans under the premise of gender equality

In 2015, expressing objection to the veil, Sarkozy stated that “dans la République, la femme et l’homme sont à égalité.”⁶¹ But is this actually true - either in France or in the rest of Europe? Consistent reference to the apparent incompatibility between the principle of gender equality and the *hijab* in *Dahlab v. Switzerland* and *Şahin v. Turkey* may give the impression that gender equality is the focal point of Western liberal democratic values, but upon a closer look at *Chocholáč v. Slovakia* and *Pryanishnikov v. Russia*, despite acknowledgement of women’s rights and pornography concerns, it seemingly has not featured in the decision-making of the ECtHR. Indeed, ECtHR decisions in both *Chocholáč* and *Pryanishnikov* have ruled in favour of defending the Right to Private Life and the Freedom of Expression. Further, judge Wojtyczek’s dissenting opinion in *Chocholáč* refers to the discourse around the containment of pornography. Although there have been some steps in the right direction—such as the Parliamentary Assembly of the Council of Europe’s reports and resolutions like *Gender Aspects and Human Rights Implications of Pornography*⁶²—European institutions tend to downplay gender equality when other priorities come into play. Or perhaps, is it that the principle of gender equality is magnified when needed to ensure social cohesion in cases of multicultural conflicts?

The treatment of *Dahlab* and *Şahin* shows the conflation in the Western conscience of Islam and non-European values. It seems that the term ‘secularism’ in both rulings acts as a surrogate for gender equality, democracy, and nationhood.⁶³ This inevitably binds Islam tightly into opposition to the very concepts which are considered to define European values. In turn, this paves the way for the

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ Le Monde, ‘« Nous ne voulons pas de femmes voilées » : Sarkozy parlait « bien évidemment » de la burqa’ (19 February 2015)

<https://www.lemonde.fr/politique/article/2015/02/19/nous-ne-voulons-pas-de-femmes-voilees-sarkozy-parlait-bien-évidemment-de-la-burqa_4579960_823448.html> accessed 13 February 2025.

⁶² Frank Heinrich, ‘Gender Aspects and Human Rights Implications of Pornography’ (Council of Europe Parliamentary Assembly 2021) 15406.

⁶³ Giorgia Baldi, ‘“Burqa Avenger”: Law and Religious Practices in Secular Space’ (2018) 29 Law and Critique 31.

construction of certain practices as incompatible with 'democratic society,' 'public safety and order,' 'morals,' or 'freedom or rights of others.'

Vakulenko, who also looked at these two specific cases, states that in both *Dahlab* and *Şahin* "the headscarf was attributed a highly abstract and essentialized meaning of a religious item extremely detrimental to gender equality."⁶⁴ The ECtHR has shown that, at least in institutions that are representative of public European state institutions, the perceived threat to the principle of gender equality and European liberal democratic values justifies the interference with the freedom of expression, freedom of thought, conscience and religion; and right to private life. Cloaked in the language of human rights, ECtHR cases indicate that, in Mancini's words, patriarchy is considered "as the exclusive domain of the other."⁶⁵

To conclude the analysis, let us briefly return to the case of *S.A.S. v France*. The introduction to this paper described it as "an exception rather than the rule," but this is only true insofar as it is the first time the ECtHR explicitly acknowledged that Islamic veiling is not inherently a misogynistic practice. We have seen that the European Court of Human Rights exhibits a blind spot regarding gender and multiculturalism, rooted in its intention of state neutrality. The Court's decision in *S.A.S.* reflects this. While the Court explicitly dismissed gender equality as a justification for the niqab ban, it failed to acknowledge that the very same reasoning underpinned the ban's adoption (see, for example, Badinter's address to the parliamentary assembly referenced earlier). It also overlooked the disproportionately harmful impact the ban has on Muslim women. Upheld under the French principle of *vivre ensemble* ('living together'), the ban restricts women who wear the niqab from participating equally in public life, restricting their access to employment and further deepening their social marginalization.

Furthermore, the *S.A.S.* ruling, by framing the niqab as incompatible with "*vivre ensemble*," illustrates France's deeper discomfort with Islam. It enforces conformity to majority norms by portraying the niqab as inherently at odds with French community values, obstructing the ability of veiling Muslim women to live together with fellow citizens. As Trispiotis argues, the ban may therefore exacerbate power imbalances within families, perpetuate harmful stereotypes, and undermine their ability to engage equally in public and political life.⁶⁶ Ultimately, the Court's uneven application of gender equality reveals the gap at the intersection between multiculturalism and gender and Europe's ongoing struggle to reconcile its liberal principles with its increasingly diverse societies.

Conclusion

"Concern with gender inequality seems limited to Muslims and does not extend to French or German or Dutch practices that also permit the subordination of women. It is as if patriarchy were a uniquely Islamic phenomenon!"⁶⁷

Analysis of ECtHR decisions in cases such as *Dahlab v. Switzerland* and *Şahin v. Turkey* raises questions about the true emphasis placed on gender equality within Western liberal democratic values. While public discourse often links the Islamic hijab to the perceived conflict with gender equality, cases like

⁶⁴ Anastasia Vakulenko, 'Islamic Headscarves' and the European Convention On Human Rights: An Intersectional Perspective' (2007) 16 *Social & Legal Studies* 183.

⁶⁵ Susanna Mancini, 'Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism' (2012) 10 *International Journal of Constitutional Law* 411.

⁶⁶ Rebecca J Cook and Ilias Trispiotis (eds), 'Chapter 18 Gender Equality and the Scope of Religious Freedom in *S.A.S. v France*', *Frontiers of Gender Equality: Transnational Legal Perspectives* (University of Pennsylvania Press 2023) <https://muse.jhu.edu/pub/56/edited_volume/chapter/4026389> accessed 31 January 2025.

⁶⁷ Wallach Scott (n 8) 4.

Chocholáč v. Slovakia and *Pryanishnikov v. Russia* reveal that the ECtHR prioritises the Right to Private Life and Freedom of Expression, downplaying the narrative of gender equality. The conflation of secularism with concepts like gender equality, democracy and secularism in the Western conscience highlights a tendency to define European values through contrast with the 'Other.' Vakulenko's observation that the headscarf is abstractly attributed a detrimental meaning to gender equality underscores how ECtHR decisions justify interference with fundamental freedoms under the guise of protecting European values. In the realm of human rights, these cases suggest that patriarchy is often considered an issue exclusive to the 'Other.' The comparison of these cases shed light the complex dynamics surrounding multicultural conflicts and the tendency for feminist discourses to be cherry-picked and co-opted to promote certain ideals.

This paper stresses that neither pornography nor veiling are inherently misogynistic nor inherently empowering practices. Instead, through discourse, they are *socially* constructed as one or the other. In both pornography and veiling debates, there are very divisive camps. In anti-pornography discourses, narratives can be so uncompromising that female and queer individuals are denied the opportunity to reclaim their own sexuality within the same cultural battleground. In anti-veiling feminist discourse, the veil is equally demonised: as a pollutant to the achievements for which European feminists have fought so hard, without leaving room for multicultural voices to shine through. This suggests that an understanding that freedom or oppression is not a culturally bound issue is required, as is an acceptance that cultures may be used "to feed into and support overtly political agendas and purposes, which are in turn developed by and for men and serve patriarchal interests, just as Western men have supposedly gender-neutral value systems such as liberalism and Christianity."⁶⁸

⁶⁸ Hirschmann (n 19) 488.

Bibliography

- Abu-Lughod L, 'Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others' (2002) 104 *American Anthropologist* 783.
- Ali A, 'The Experiences of the Face Veil Wearers in Europe and the Law Book Reviews: Law, Gender and Religion' (2016) 25 *Nottingham Law Journal* 119.
- Alibhai-Brown Y, 'Sixteen Reasons Why I Object to This Dangerous Cover-Up' (*The Independent*, 3 April 2011) <<https://www.the-independent.com/voices/commentators/yasmin-alibhai-brown/yasmin-alibhaibrown-sixteen-reasons-why-i-object-to-this-dangerous-coverup-2261444.html>> accessed 13 February 2025.
- , 'As a Muslim Woman, I See the Veil as a Rejection of Progressive Values' *The Guardian* (20 March 2015) <<https://www.theguardian.com/commentisfree/2015/mar/20/muslim-woman-veil-hijab>> accessed 13 February 2025.
- Altman A and Watson L, *Debating Pornography* (Oxford University Press 2018).
- Assemblée Nationale, 'Compte Rendu de Réunion de La Mission d'information Sur La Pratique Du Port Du Voile Intégral Sur Le Territoire National' <<https://www.assemblee-nationale.fr/13/cr-miburqa/08-09/c0809004.asp>> accessed 24 February 2025.
- Australian National Imams Council, 'Beard Policy Islamic Guidance Paper' (*Australian National Imams Council*) <<https://www.anic.org.au/wp-content/uploads/2020/09/Beard-Policy-Islamic-Guidance-Paper.pdf>> accessed 27 February 2025.
- Baldi G, "'Burqa Avenger": Law and Religious Practices in Secular Space' (2018) 29 *Law and Critique* 31.
- , *Un-Veiling Dichotomies: European Secularism and Women's Veiling* (Springer International Publishing 2021) <<https://link.springer.com/10.1007/978-3-030-79297-8>> accessed 13 February 2025
- Barry K, *Female Sexual Slavery* (Univ Pr 1984).
- Beattie T, 'Pryanishnikov v Russia (App. No.25047/05), Judgment of 10 September 2019—Setting the Foundations for Human Rights Discourse on Pornography' (2019) 6 *European Human Rights Law Review* <<https://durham-repository.worktribe.com/output/1311055/pryanishnikov-v-russia-app-no2504705-judgment-of-10-september-2019-setting-the-foundations-for-human-rights-discourse-on-pornography>> accessed 13 February 2025.
- Benhabib S, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002).
- Berger FR and Department of Philosophy, Florida State University, 'Pornography, Sex, and Censorship': (1977) 4 *Social Theory and Practice* 183.
- Brems E, 'Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings' (2014) 22 *Journal of Law and Policy* <<https://brooklynworks.brooklaw.edu/jlp/vol22/iss2/2>>.
- , 'S.A.S v France: A Reality Check' (2016) 25 *Nottingham Law Journal*.
- , 'Head-Covering Bans in Belgian Courtrooms and Beyond: Headscarf Persecution and the Complicity of Supranational Courts' (2017) 39 *Human Rights Quarterly* 882.

Committee on the Elimination of Discrimination against Women, 'CEDAW General Recommendation No. 19: Violence against Women' (United Nations 1992) Convention on the Elimination of All Forms of Discrimination Against Women A/47/38.

Cook RJ (ed), 'Chapter 10 Gender Equality in the European Court of Human Rights', *Frontiers of Gender Equality: Transnational Legal Perspectives* (University of Pennsylvania Press 2023)

<https://muse.jhu.edu/pub/56/edited_volume/chapter/4026377> accessed 31 January 2025.

— (ed), *Frontiers of Gender Equality: Transnational Legal Perspectives* (University of Pennsylvania Press, Inc 2023) <<http://www.jstor.org/stable/10.2307/j.ctv2sck6z6>> accessed 31 January 2025.

Cook RJ and Trispiotis I (eds), 'Chapter 18 Gender Equality and the Scope of Religious Freedom in S.A.S. v. France', *Frontiers of Gender Equality: Transnational Legal Perspectives* (University of Pennsylvania Press 2023) <https://muse.jhu.edu/pub/56/edited_volume/chapter/4026389> accessed 31 January 2025.

Cornell E by D (ed), *Feminism and Pornography* (Oxford University Press 2000).

Costello RÁ and Ahmed S, 'Citizenship, Identity, and Veiling: Interrogating the Limits of Article 8 of the European Convention on Human Rights in Cases Involving the Religious Dress of Muslim Women' (2023) 38 *Journal of Law and Religion* 81.

Cox N, 'Pejorative Assertions, Human Rights Evaluation, and European Veiling Laws' (2022) 70 *The American Journal of Comparative Law* 695.

Crawford B, 'Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure' (2007) 14 *Michigan Journal of Gender & Law* 99.

Cronin S (ed), *Anti-Veiling Campaigns in the Muslim World: Gender, Modernism and the Politics of Dress* (Routledge 2014).

— (ed), 'Introduction: Coercion or Empowerment? Anti-Veiling Campaigns: A Comparative Perspective', *Anti-veiling campaigns in the Muslim world: gender, modernism and the politics of dress* (Routledge 2014).

Daly E, 'Political Liberalism and French National Identity in the Wake of the Face-Veiling Law' (2013) 9 *International Journal of Law in Context* 366.

Daum CW, 'Feminism and Pornography in the Twenty-First Century: The Internet's Impact on the Feminist Pornography Debate' (2008) 30 *Women's Rights Law Reporter* 543.

De Rossa F and Ferrario M, 'Governance or Women's Rights. How Much Room for the Gender Equality Argument In The Swiss Headscarf Debate?' (2021) 48 *DPCE Online* <<https://doi.org/10.57660/dpceonline.2021.1417>> accessed 13 February 2025.

Delapré EC, 'Judging From Above: French Feminists & Their Influence on the Veil Debate' (2022) 2022 *Claremont-UC Undergraduate Research Conference on the European Union* <<https://scholarship.claremont.edu/urceu/vol2022/iss1/8>>.

Diffendal C, 'The Modern Hijab: Tool of Agency, Tool of Oppression' (2006) 5 *Chrestomathy* 129.

Duits L and Van Zoonen L, 'Headscarves and Porno-Chic: Disciplining Girls' Bodies in the European Multicultural Society' (2006) 13 *European Journal of Women's Studies* 103.

Dworkin A and MacKinnon CA, *Pornography and Civil Rights: A New Day for Women's Equality* (2. printing, Organizing Against Pornography 1989).

Dworkin R, 'Is There a Right to Pornography?†' (1981) 1 Oxford Journal of Legal Studies 177.

Eidgenössisches Departement für auswärtige Angelegenheiten EDA. 'Religion'. Accessed 1 March 2025. <https://www.eda.admin.ch/aboutswitzerland/en/home/gesellschaft/religionen.html>.

Ellis K, O'Dair B and Tallmer A, 'Feminism and Pornography' (1990) 36 Feminist Review 15.

Farooq MU, 'The Face Veil Bans Only Reveal Europe's Entrenched Cultural Prejudices' (*Religion and Global Society*, 12 April 2021) <<https://blogs.lse.ac.uk/religionglobalsociety/2021/04/the-face-veil-bans-only-reveal-europes-entrenched-cultural-prejudices/>> accessed 13 February 2025.

Gubar S, 'Representing Pornography: Feminism, Criticism, and Depictions of Female Violation' (1987) 13 Critical Inquiry 712.

— (ed), *For Adult Users Only: The Dilemma of Violent Pornography* (Indiana University Press 1989).

Heinrich F, 'Gender Aspects and Human Rights Implications of Pornography' (Council of Europe Parliamentary Assembly 2021) 15406.

Henley J, 'Geert Wilders Will Have to Scrap Most of Manifesto to Enter Government, Say Experts' *The Guardian* (28 November 2023) <<https://www.theguardian.com/world/2023/nov/28/geert-wilders-will-have-to-scrap-most-of-manifesto-to-enter-government-say-experts>> accessed 13 February 2025.

Heredia AV, 'Feminism and Pornography: From Mainstream Pornography (Hetero-Patriarchal) to Post-Porn (Non Binary)' [2022] *The Age of Human Rights Journal* 221.

Hirschmann NJ, 'Eastern Veiling, Western Freedom?' (1997) 59 *The Review of Politics* 461.

Howard E, 'Banning Islamic Veils: Is Gender Equality a Valid Argument?' (2012) 12 *International Journal of Discrimination and the Law* 147.

Institute for Advanced Study, 'Cover-Up: French Gender Equality and the Islamic Headscarf - Ideas' (26 June 2015) <<https://www.ias.edu/ideas/scott-cover-up>> accessed 13 February 2025.

Jans JM, 'Just a Piece of Cloth? The European Debate on "the Islamic Headscarf" as a Case Study and Paradigm for an Emergent Intercultural Ethics' (2008) 28 *Journal of the Society of Christian Ethics* 25.

Johnson PJ, 'Pornography and the European Convention on Human Rights' (2014) 1 *Porn Studies* 299.

Justice Initiative, 'Restriction on Muslim Women's Dress Factsheet' (*Justice Initiative*) <<https://www.justiceinitiative.org/uploads/47ccdb53-649b-4cce-aaba-8bc3628dad63/restrictions-on-muslim-women%27s-dress-fact-sheet-20180710.pdf>> accessed 13 February 2025.

Kassam A and correspondent AKE community affairs, 'Government Offices in EU Can Ban Wearing of Religious Symbols, Court Rules' *The Guardian* (29 November 2023) <<https://www.theguardian.com/world/2023/nov/29/government-offices-in-eu-can-ban-wearing-of-religious-symbols-court-rules>> accessed 13 February 2025.

Knights S, 'Face Veils and the Law: A Critical Reflection' (2016) 25 *Nottingham Law Journal*.

Koyuncu Lorasdağı B, 'The Headscarf and Emancipation in the Netherlands' (2009) 19 *Feminism & Psychology* 328.

Laborde C, 'State Paternalism and Religious Dress Code' (2012) 10 *International Journal of Constitutional Law* 398.

Le Monde, '« Nous ne voulons pas de femmes voilées » : Sarkozy parlait « bien évidemment » de la burqa' (19 February 2015) <https://www.lemonde.fr/politique/article/2015/02/19/nous-ne-voulons-pas-de-femmes-voilees-sarkozy-parlait-bien-evidemment-de-la-burqa_4579960_823448.html> accessed 13 February 2025.

Liberman R, "'It's a Really Great Tool": Feminist Pornography and the Promotion of Sexual Subjectivity' (2015) 2 *Porn Studies* 174.

MacKinnon CA, 'Sexuality, Pornography, and Method: "Pleasure under Patriarchy' (1989) 99 *Ethics* 314.

MacKinnon CA, *Toward a Feminist Theory of the State* (1. paperback ed., 5. [print.], Harvard Univ Pr 1991).

Mancini S, 'Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism' (2012) 10 *International Journal of Constitutional Law* 411.

Marshall J, 'Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate' (2008) 30 *Human Rights Quarterly* 631.

McCrea R, 'The Ban on the Veil and European Law' (2013) 13 *Human Rights Law Review* 57.

McGoldrick D, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Pub 2006).

Okin SM, 'Is Multiculturalism Bad For Women?' [1997] *Boston Review* <<https://www.bostonreview.net/forum/susan-moller-okin-multiculturalism-bad-women/>> accessed 13 February 2025.

Pearson M, 'What Happened to "Vivre Ensemble?": Developments after *SAS v France*' (2022) 10 *Oxford Journal of Law and Religion* 185.

Pei S, 'Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights' (2012) 122 *The Yale Law Journal*.

Person C, Hurka S and Knill C, 'Opposite Trends in the Regulation of Pornography? Policy Differentiation and Policy Convergence Across 26 Countries Between 1960 and 2010' (2016) 53 *The Journal of Sex Research* 860.

Piatti-Crocker A and Tasch L, 'Veil Bans in Western Europe: Interpreting Policy Diffusion' (2015) 16 *Journal of International Women's Studies* 15.

Prada Prada N, '¿Qué Decimos Las Feministas Sobre La Pornografía? Los Orígenes de Un Debate' (2016) 5 *La Manzana de la Discordia* 7.

Rashid A, 'The Politics of Veiling and Unveiling' (2023) 23 *Feminist Media Studies* 723.

Rijksoverheid, 'Gedeeltelijk Verbod Gezichtsbedekkende Kleding | Gezichtsbedekkende Kleding (in de Media 'Boerkaverbod')' <<https://www.rijksoverheid.nl/onderwerpen/gezichtsbedekkende-kleding-in-de-media-boerkaverbod/gezichtsbedekkende-kleding-gedeeltelijk-verbieden>> accessed 13 February 2025.

Rosenberger S and Sauer B (eds), *Politics, Religion and Gender: Framing and Regulating the Veil* (Routledge 2013).

Scherz A, 'How Should Personal and Political Autonomy Feature in the ECtHR's Margin of Appreciation?' [2023] *Jus Cogens* 149.

Sjöholm M, 'Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems', *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (Brill Nijhoff 2017) <<https://brill.com/display/title/34698>> accessed 18 February 2025.

Steinbach A, 'Burqas and Bans: The Wearing of Religious Symbols Under the European Convention of Human Rights' (2015) 4 *Cambridge Journal of International and Comparative Law* <<https://papers.ssrn.com/abstract=2636170>> accessed 18 February 2025.

The Justice Initiative, 'S.A.S. v France' <<https://www.justiceinitiative.org/litigation/sas-v-france>> accessed 30 January 2025.

Tong R, 'Feminism, Pornography and Censorship' (1982) 8 *Social Theory and Practice* 1.

Trouw, 'Bij Opzij geen hoofddoek' (*Trouw*, 26 August 2016) <<https://www.trouw.nl/voorpagina/bij-opzij-geen-hoofddoek~bbb8c9bb/>> accessed 18 February 2025.

Vakulenko A, 'Islamic Headscarves' and the European Convention On Human Rights: An Intersectional Perspective' (2007) 16 *Social & Legal Studies* 183.

Wallach Scott J, *The Politics of the Veil* (8. printing and 1. paperback printing, Princeton Univ Press 2010).

—, 'The Veil and the Political Unconscious of French Republicanism - Ideas | Institute for Advanced Study' (10 October 2016) <<https://www.ias.edu/ideas/2016/scott-veil-in-france>> accessed 18 February 2025.

Waltman M, *Pornography: The Politics of Legal Challenges* (Oxford University Press 2021).

Weaver M, 'Burqa Bans, Headscarves and Veils: A Timeline of Legislation in the West' *The Guardian* (31 May 2018) <<https://www.theguardian.com/world/2017/mar/14/headscarves-and-muslim-veil-ban-debate-timeline>> accessed 18 February 2025.

Weichie, 'The Results Are In: Poll on Best and Worst ECtHR Judgment of 2014' (*Strasbourg Observers*, 12 February 2015) <<https://strasbourgobservers.com/2015/02/12/the-results-are-in-poll-on-best-and-worst-ecthr-judgment-of-2014/>> accessed 23 November 2024.

Wiles E, 'Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality' (2007) 41 *Law & Society Review* 699.

Willsher K, 'France's Burqa Ban Upheld by Human Rights Court' *The Guardian* (1 July 2014) <<https://www.theguardian.com/world/2014/jul/01/france-burqa-ban-upheld-human-rights-court>> accessed 18 February 2025.

Zempi I, 'Veiled Muslim Women's Views on Law Banning the Wearing of the Niqab (Face Veil) in Public' (2019) 42 *Ethnic and Racial Studies* 2585.

European Convention on Human Rights 1950.

Legal Cases

Chocholáč v Slovakia App no 81292/17 (ECtHR, 07 July 2022).

Dahlab v Switzerland App no 42393/98, (ECtHR, 15 February 2001).

The Principle of Gender Equality 'Unveiled'

How does European law treat veiling and pornography and what does this reveal about European gender equality and multiculturalism?

Pryanishnikov v Russia App no 25047/05 (ECtHR, 10 September 2019).

Leyla Şahin v Turkey App no 44774/98 (ECtHR, 10 November 2005).

S.a.s v France App no 43835/11 (ECtHR, 01 July 2014).