

CAUGHT BETWEEN DIFFERENT LEGAL PLURALISMS: WOMEN WHO WEAR ISLAMIC DRESS AS THE RELIGIOUS ‘OTHER’ IN EUROPEAN RIGHTS DISCOURSES¹³⁴

Amy R. Jackson and Dorota A. Gozdecka

Introduction

I feel it is an obligation upon Muslim women to wear the jilbab,
although there are many other opinions.¹³⁵

Issues concerning law and religion and the wearing of religious garments in Europe stand at the forefront of the current human rights discourse. In this paper, by concentrating on the situation of Islamic dress practices in Europe, we question how the position of the religious ‘other’ can be conceptualized amongst the plurality of intersecting legal and normative orders regulating areas pertaining to religion and identity. We examine diverse methods and approaches of legal

¹³⁴A version of this paper was presented at the Jubilee Conference of the Commission on Legal Pluralism in Cape Town, 8-10 September 2011.

¹³⁵ Shabina Begum quoted in BBC News. ‘School Wins Muslim Dress Appeal.’ 22 March 2006. Available online at:
<http://news.bbc.co.uk/1/hi/education/4832072.stm>.

pluralists to the occurring legal and normative conflicts in cases concerning the wearing of these religious garments in Europe.

The various types of Islamic dress include: women wearing garments such as a *hijab* (headscarf), *niqab* (face veil), *jilbab* (a long coat like garment which covers the body except the hands and face) and *burqa* (a garment worn over daily clothing, along with a *niqab* and *hijab*). Women wearing these garments in Europe have been prohibited from doing so on the basis of the argument that the garments infringe constitutional principles, such as secularism. As a result a Swiss national, Lucia Dahlab, Turkish nationals Leyla Şahin, Sefika Köse and French national Belgin Dogru have all brought claims of infringements of their right to manifest their religion under Article 9 of the European Convention on Human Rights (ECHR).¹³⁶ The European Court of Human Rights (ECtHR) held that institutional policies that prohibit the wearing of *hijabs* in schools and universities were compliant with democratic principles and met requirements of proportionality and necessity.¹³⁷ Recently, domestic legislation in countries such as France and Belgium began to explicitly prohibit wearing of religious garments covering the

¹³⁶ Note that claims have also been brought under other legal provisions. In the United Kingdom (UK), for example, under discrimination provisions provided by Regulation 3 of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) superseded by section 19 of the Equality Act 2010, in effect 1 October 2010. See the Employment Tribunal cases of *Azmi v Kirkless Metropolitan Borough Council*, Employment Appeal Tribunal, Appeal No. UKEAT/009/07/MAA (2007), in which the Tribunal held that the refusal of the Headteacher and Governors of a primary school to allow a teaching assistant to wear a *niqab* was not a form of direct discrimination on the grounds of her religious beliefs; and *Bushra Noah v Sara Desrosiers (Trading as Wedge)*, ET 2201867/ 2007, in which it was held that, whereas a hairdresser's refusal to employ a woman who wore a *hijab* was not a form of direct discrimination (because any employee covering their hair would have been treated in the same way), it was a form of indirect discrimination (because the requirement for employees to display their hair in the salon amounted to a provision that put the claimant's religion at a disadvantage).

¹³⁷ In the cases of *Dahlab v Switzerland*, *Şahin v Turkey*, *Şefika Köse and 93 Others v Turkey*, and *Dogru v France*, the ECtHR expressed its view on the relationship between a *hijab* and other principles of European democracy, such as gender equality.

WOMEN WHO WEAR ISLAMIC DRESS AS THE RELIGIOUS ‘OTHER’
Amy R. Jackson and Dorota A. Gozdecka

face.¹³⁸ These prohibitions may result in further claims being brought before the Court and further conceptualisations of the occurring conflicts.¹³⁹

We contend that the existing Court judgments upholding such prohibitions rely on only one method of approaching legal pluralistic conflicts. The Court only takes into account constitutional legal pluralist approaches to the problems of rights (Besson 2008, 2009a, 2009b, 2011; Sweet 2009), which overemphasise constitutional conflicts and lead to institutional interpretations of terms such as secularism. Meanwhile, social-scientific (Griffiths 1986) and anthropological (Moore 1973) notions of legal pluralism, which focus on the conflicts between state-law and other normative orders (for example, cultural and religious), are neglected in the Court judgments. We ascertain that although these accounts of legal pluralism are divergent they ought to be viewed as supplementary. The current judicial interpretations result in women who wear Islamic dress being caught in a gap between institutional interpretations of constitutional principles and studies that focus on the conflict between personal perceptions of normativity and state-law. The gap between studies of institutional and socio-legal pluralisms appears to be vast and the individual¹⁴⁰ can easily disappear behind larger institutional frameworks

¹³⁸ For example, in France Article L141-5-1(V) of the Education Code regulates, in accordance with the principle of *laïcité*, the wearing of symbols or clothing denoting religious affiliation in schools and colleges (in effect 2 September 2004). The public wearing of the *burqa* was prohibited in France on 13 July 2010 see BBC News, ‘French MPs Vote to Ban Islamic Full Veil in Public’, 13 July 2010, available at: www.bbc.co.uk/news/10611398. It prescribes fines of approximately £119 for women who break the law and a one-year jail term for men who force their wives to wear a *burqa*. Furthermore, the public wearing of the *burqa* was prohibited in Belgium on 29 April 2010: see *Daily Mail*, ‘Belgium Bans Burkas’, 30 April 2010, p. 41.

¹³⁹ In September 2011 two French women, who continued to cover their faces by wearing a *niqab* in public, were issued with fines. Their aim was to exhaust local remedies in order for their case to be admissible for the ECtHR, as stipulated under Article 35(1) ECHR. See BBC News, ‘France Imposes First *Niqab* Fines’, 22 September 2011, available at: www.bbc.co.uk/news/world-europe-15013383.

¹⁴⁰ For the purposes of this paper, we refer to the liberal notion of the “individual” primarily as rights bearer or legal subject. Following Vakulenko (2007) and literature cited therein, we argue that studies of subjectivity (which, in conjunction with legal pluralist studies, we call ‘subjective legal pluralism’) and those with an intersectional focus (such as that advocated for by critical legal pluralists) illustrate

(Frerichs 2010).

In this paper, our aims are to: first, begin bridging the gap in the existing literature between institutional and socio-legal notions of legal pluralism. Second, encourage future analyses by judges and researchers on the relationship between the state, cultural and religious groups and their members to acknowledge that a plurality of legal pluralisms exists and ought to be simultaneously addressed. The paper is structured in three parts. The first part focuses on how women who wear Islamic dress in Europe are constructed as the religious ‘other’ in ECtHR judgments such as in the cases of *Dahlab v Switzerland (Dahlab)*, *Sahin v Turkey (Sahin)*, *Şefika Köse and 93 Others v Turkey (Şefika Köse)*, and *Dogru v France (Dogru)* and how they are subsequently juxtaposed with the necessity of protecting the constitutional order of a Member State. The second focuses on different ways of conceptualising legal pluralism. These include transnational, constitutional and socio-legal approaches. Furthermore, it analyses the consequences of these diverse theoretical responses for the emergence of some, but denial of other, types of rights pluralism. In the final part of the paper, we consider a suggestion for a more contextualised pluralistic resolution of these conflicts of law.

We argue that it is necessary to re-contextualise the analysis of rights in this situation and place the rights bearer (or legal subject) at the centre of future pluralistic discussions in this important area of culture, religion, gender, politics and law. A more contextualised legal analysis of diverse legal and social implications can help to avoid one-sided solutions, such as those focusing on general constitutional notions, and achieve a better balance in which identity, belief and diverse legal orders are taken into consideration.

I. The Religious ‘Other’ Against a Constitutional System – Asymmetry of the Position

The cases of *Dahlab*, *Sahin*, *Şefika Köse* and *Dogru* were concerned with whether prohibitions on a *hijab* for a teacher at a Swiss state school; a student at a Turkish university; students of secondary schools in Turkey; and a girl in secondary school

the futility of constructing the individual as atomistic, detached and ‘relentlessly self-interested’. Instead, studies of different social influences illustrate that structural and communal influences are always subsumed and internalised in the individual (Vakulenko 2007: 186).

WOMEN WHO WEAR ISLAMIC DRESS AS THE RELIGIOUS 'OTHER'
Amy R. Jackson and Dorota A. Gozdecka

who wore a headscarf during physical education classes in France, infringed the applicants' rights to manifest their religion under Article 9 ECHR. In all of the cases ECtHR constructed a negative image of the *hijab* as a symbol that is non-compliant with the values of European democracy. Beginning from the case of *Dahlab* the ECtHR held that:

The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, 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. (*Dahlab*: para.1.)

We argue that this type of reasoning constructed the image of women who adopt Islamic dress code as the religious 'other'.¹⁴¹ As shown above, a prohibition on wearing a *hijab* was juxtaposed with principles of tolerance and respect for others. This interpretation constructed a generalised image of Islam and equated the applicant's religious perceptions of normativity with intolerance and discrimination. As Motha argues, equal liberty of a woman to practice her religion has been put into opposition with her emancipation (Motha 2007: 144-145). Evans has also observed the problem of stereotypical images of the religious dress practises of women in the Court's reasoning (Evans 2006: 71-73). Stereotypical images promote a vision of religion and normativity as 'foreign' and in a negative sense strongly concentrated on 'otherness'. Gunn suggests that such 'otherisation' is caused by the fear of secularists

¹⁴¹ We use the term 'othering', 'other' and 'otherisation' in accordance with the terminology used in social sciences and which emphasises exclusion from what is considered the standard. In the context of religion, 'otherisation' in the European context refers primarily to traditions alien to a particular nation state's religious tradition(s). Depending on the traditional place of a religion in a nation state's legal system, religious (or non-religious) adherents of non-traditional religion (or non-religion) are often legally marginalised. Law is either shaped in a way which leads to 'otherisation' or is applied in a way which leads to it.

that a headscarf interferes with the image of a secular Europe and therefore it becomes the first line symbol in a battle over what is perceived as the dangers of Islamism (Gunn 2005: 27).¹⁴² Marshall underlines that there exists an assumption that Islam, in particular, is patriarchal and against gender equality (Marshall 2008: 187). Meerschaut and Gutwirth similarly observe that the ECtHR frequently holds an essentialising view of Islam in its jurisprudence. First, the Court sees Islam as static and always incompatible with the Convention; and second, it always views Islam as interventionist (Meerschaut and Gutwirth 2008: 447-448). For these reasons, ‘fearful symbols’ (Gunn 2005) are simply juxtaposed with values of equality. The view of equality is however very narrow as Rebouché argues. She asserts that the analysis is too narrow, because ‘it fails to adequately weigh the implications of repressive state conduct – in the name of secularism – on women’ (Rebouché 2009: 733). Such juxtaposition can impact upon the believer’s own perceptions of garments such as a *hijab* and classify believers as undemocratic without due attention to differences between them and their self-perception of inter-normativity. As Vakulenko contends, even though no evidence of interventionist Islamist pressure on the applicants was produced, their agency became obscured by overwhelming structural forces and as a result religion, as a part of the identity of an individual, was ignored in favour of a perception of religion as a homogeneous organising principle of society (Vakulenko 2007: 192).

As a result of the otherisation of religious individuals and the equation of religion with institutional, rather than identity related notions, we argue that decisions concerning headscarves focus upon constitutional aspects of prohibitions. Institutional perception of Islam is simply juxtaposed with the constitutional principle of secularism and a wide margin of appreciation, in regulating matters of law and religion, is frequently invoked. Accordingly, the ECtHR decided that the case of *Dahlab* was manifestly ill-founded due to the potential proselytising effect of the garment which justified intervention of the state. The Court underlined that:

[...] the Federal Court held that the measure by which the applicant was prohibited, purely in the context of her activities as a teacher, from wearing a headscarf was justified by the potential interference with the religious beliefs of her pupils at the school and the pupils’ parents, and by the breach of the principle of denominational

¹⁴² Further arguments on the oppositional relationship between Islamic and Western values exposed by the wearing of religious garments, such as *hijabs*, are made by Joppke (2009) and Todorov (2010).

neutrality in schools. (*Dahlab*: para.1.)

Given that no complaint from the parents was ever brought against the applicant, Lucia Dahlab, the ECtHR's dismissal of the case was primarily based on the protection of denominational neutrality of the state as a preventive method of securing potential beliefs of others. In *Sahin*, again by applying the doctrine of the margin of appreciation, a prohibition on the wearing of a *hijab* in a Turkish university was found to be compliant with the constitutional principle of secularism and therefore did not constitute infringement of Article 9. Here the Court referred even less to the applicant's rights and extensively elaborated on the Turkish constitutional principle of secularism and the entitlement of local authorities to preserve the principle:

Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court, which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such context, where the values of pluralism, respect for others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as the present case, the Islamic headscarf. (*Sahin*: para.1.)

Similarly, in the case of *Şefika Köse* the ECtHR upheld the prohibition on wearing headscarves in Muslim state-funded Imam-Hatip Secondary Schools. It relied similarly on the domestic constitutional principle of secularism:

In conclusion, the Court finds that the restriction in issue and the related measures were justified in principle and proportionate to the pursued aims of protecting the rights and freedoms of others, preventing disorder and preserving the neutrality of secondary education. (*Şefika Köse*: para.1.)

Analogically in *Dogru* the Court once more refused to examine compliance of secularism with freedom of religion as entrenched in the Convention and instead emphasised that in the French context when the applicant was forbidden to wear a headscarf while attending physical education classes:

[...] the purpose of that restriction on manifesting a religious

conviction was to adhere to the requirements of secularism in state schools, as interpreted by the Conseil d'Etat in its opinion of 27 November 1989 and its subsequent case-law and by the various ministerial circulars issues on the subject. (*Dogru*: para.1.)

Consequently, reference to a 'wide margin of appreciation', and concern over preservation of constitutional principles of the state, created a form of legal reasoning that focused on larger institutional frameworks such as constitutional order and left the identity and autonomy aspect of freedom of religion on the margins. Focusing on general notions such as secularism, democracy and tolerance these judgments artificially reduced discussion of identity related aspects of religion and the rights bearer's own perception of religious normativity. Subsequently a religious individual now equated with 'other' non-democratic and structural religions became juxtaposed with another institutional structure, namely constitutional and 'democratic' secularism. Therefore, in finding a balance between secularism and religion the arguments of the applicants regarding *their own* religious precepts were simply overlooked: considered irrelevant. In positioning the individual against institutional and constitutional notions the Court, for instance in *Şefika Köse*, simply considered it 'sufficient to note that both the parents and the pupils were informed of the consequences of not obeying the rules' (*Şefika Köse*: para.1.). This type of reasoning creates a problematic asymmetry between an individual and the national system that prevents the ECtHR from elaborating on the interaction between gender, religion and identity (Vakulenko 2007: 190). Motha ascertains that autonomy lies at the foundation of emancipatory politics in a heterogeneous society (Motha 2007: 145). When autonomy is universalised and standardised it generates a specific type of subjectivity and the emancipatory project turns against itself.¹⁴³ For example, juxtaposing the wearing of a *hijab* with values (such as gender equality, tolerance and a standardised image of a citizen in a democratic society) results in a denial of autonomy of the rights bearer (see the quotation from the *Dahlab* judgment, above). In her dissenting opinion in *Sahin*, Judge Tulkens also emphasised that what was essentially lacking from the debate on religious dress are the actual voices of women who wear these garments themselves (*Sahin* judgment: para. 11). For this reason, European Governments and Courts should take into account the complex reasons why women choose to cover their heads and/or bodies.

¹⁴³ Bhandar, for example, argues that the liberal ideologies of secularism and multiculturalism, both employed as techniques by political states to govern the differences between people, generate their own particular type of subjectivity: a liberal individual who is ostensibly Christian (Bhandar 2009).

To summarise, the ECtHR has upheld decisions made by public institutions which have banned a *hijab* from being worn. The decisions discussed in this section of the paper focused on the institutional aspect – the maintenance of the secular tradition and the right of the ECtHR to interfere in the constitutional tradition – rather than the complex relationship between autonomy, heteronomy and a woman's own perception of *her* body and identity and the reasons behind *her* behaviour, which *she* believes to be dictated by another normative order other than state-law.

II. Different Conceptualisations of Legal Pluralism

We argue that the unwillingness of the ECtHR to provide a clear articulation of whether the foundations of the constitutional system are in fact compliant the requirements 'necessary in a democratic society', aspects which the Court weighs simultaneously, stem from its decisions being based on considerations prevalent in transnational and constitutional pluralist ideas concerning the multiplicity of intersecting legal orders. In the following sub-sections, we contend that because of a constitutional (or institutional) pluralistic focus, and the marginalisation of socio-legal studies, no attempt to contextualise rights and the position of rights bearers in their specific legal, historical and social context is presently undertaken (Vakulenko 2007).

A. Transnational and Constitutional Pluralist Approaches to Rights

Transnational and constitutional pluralists are primarily concerned with the coexistence of external legal orders interfering with the state legal order, for example, the human rights norms created by supranational and international legal systems. Following the Habermasian analysis of cosmopolitan justice (Habermas 2001), the theory of European constitutional pluralism focuses upon the tensions between national and *inter* and *supranational* normative orders and the functioning of the post-national community(ies) (Fine and Smith 2003). European human rights theorists are increasingly interested in the relationship between international human rights and domestic human rights as well as human rights and domestic democracy (Besson 2011: 33). And even though human rights play a pivotal role in searching for new models of supranational governance, the dominant approach in analyses of European rights pluralism is primarily constitutional and institutional. European rights theorists analysing European legal orders attempt to describe and classify the plurality of different constitutional and rights orders in diverse ways, but primarily do so through the perspective of the mutual influence between these orders. In the

pluralist interpretation of the relationship between legal orders, individuals are seen by European legal pluralists as a part of imagined communities (Anderson 1991) – national and international (Nash 2003) – rather than rights bearers. In the analyses of European rights pluralism, rights bearers are absorbed by imagined community(ies) representing larger constitutional and legal frameworks. As a result legal orders such as systems of human rights protection are seen as interacting orders (Besson 2009a). Typically then, these theoretical arguments focus primarily upon the polarization between international constitutionalisation of human rights standards and their pluralisation: in other words, coherence and fragmentation of legal orders and human rights approaches.

For example Sweet argues that international regimes, such as the EU or ECHR, naturally create tensions between systems (Sweet 2009). In fact, these tensions can, and normally do, generate norms that gradually become constitutional and thus legitimate. The fact of pluralism can never be extinguished and the pluralist-constitutional dichotomy is only a different way of describing the same variable. Eventually constitutional pluralism generates a body of *jus cogens* norms, which among others, argues Sweet, include basic human rights norms. In other words, appropriate contextualisation and interpretation of freedom of religion, for example, happens over time as a result of tension between national and international orders and necessarily bears costs such as controversial judgments.

Besson, on the other hand, puts primary emphasis on the question of legitimacy of human rights norms in a condition of legal pluralism (Besson 2008). Besson questions perspectivist approaches in which every order has its own perspective and its own solutions for the pluralism of norms. In her account, any monist approaches to international regimes are unwarranted due to their limited democratic pedigree. Coherence, argues Besson, is far from logical consistency and therefore coherence between fundamental rights and other fundamental values guaranteed by national normative orders, the ECHR and other international human rights instruments, is not enough to resolve conflicts of law (Besson 2009a). Therefore, the close relationship between human rights and democracy requires legalisation of human rights being created in each given political community. That requires, given the current state of the international community which lacks appropriate legitimacy, legalisation of human rights primarily at the domestic level. International human rights then, argues Besson, can be regarded as human rights only if they match in a minimal way an existing set of domestic human rights (Besson 2011: 40).

Having similar concerns in mind, Joseph Weiler in his commentary concerning another case dealing with religious symbols, this time crucifixes, argues that:

The European Court of Human Rights is not an Oracle. It is a dialogical partner with the Member States Parties to the Convention, and the legitimacy and persuasiveness of its decisions resides both in their quality and communicative power. The ECtHR is simultaneously reflective and constitutive of the European constitutional practices and norms. When there is a diverse constitutional practice among the Convention States – and there certainly is in this area – the Court needs to listen, not only preach, and to be seen to be listening. (Weiler 2010: 1, commenting on *Lautsi v Italy*.)

These fears of unwarranted interference in a domestic constitutional order by international courts such as the ECtHR results in what Carrozza calls being caught on the dual horns of affirming unity and respecting diversity (Carrozza 1997-1998: 1217-1237). Greer and Williams affirm that the ECtHR has been perplexed by the problem of delivering both individual justice and constitutional justice. As constitutional justice, the authors understand delivering justice through primary constitutional principles: 'democracy', 'priority of rights', 'the rule of law', 'proportionality' and 'margin of appreciation' (Greer and Williams 2009: 467-470). With the emergence of the EU's rights regime, possible conflicts between unity and diversity have increased and so have possibilities of interpretation. Greer and Williams observe the emergence of the EU's institutional justice interpretation, which seeks justice for an institution rather than for individuals (Greer and Williams 2009: 478).

Due to the concerns for legitimacy and democracy of international human rights, the ECtHR's judgments in matters such as regulating religious garments, focus on a 'wide margin of appreciation' as a safe balancing principle. Individual justice becomes secondary and instead we find a simple reference to constitutional systems of the Member States. Rejection of individual conduct contradictory to these principles is left without due analysis and rather than examine whether the constitutional principles infringes upon rights of individuals and therefore in unwarranted ways impacts upon their belief, autonomy and identity, the analysis is reversed. The question that the Courts dealt with was not whether Turkey, France and Switzerland infringed freedom of religion of the applicant but whether the applicants infringed the constitutional principles, with which the ECtHR did not find itself legitimate to interfere.

B. Missing Insights in the European Rights Discourses – Socio-Legal Perspectives

Alongside constitutional and transnational legal pluralists, socio-legal pluralists also present an image of law as a multiplicity of interacting normative orders. However, their focus is directed frequently towards the analysis of intersections between state-law and other normative orders, such as religious law (Sandberg 2011).¹⁴⁴ In their analysis the concerns are not related to preservation of a legitimate human rights order but instead focus on the legitimacy of the state order to interfere with other normative orders structuring the identity of legal subjects.

The current sub-section considers three legal pluralist analyses of the leading UK case on religious dress *R (on the application of Begum) v Headteacher and Governors of Denbigh High School (Begum)*. Since the case was never brought to the ECtHR, the discussion did not oscillate between preservation of state-law and its relationship with the ECHR norms but rather focused on the applicant and the question of whether the alleged exclusion of a student for breaching the school's uniform policy by wearing a *jilbab* infringed her right to manifest her religion under the Human Rights Act 1998. (This Act largely incorporates the ECHR into English state-law.) In contrast with the concern as to whether a constitutional principle shall be sufficiently respected and whether territorial divisions between constitutional and international law are maintained, socio-legal pluralists focus on illuminating the multiplicity of other normative conflicts and their impact upon the autonomy of the believer. The three legal pluralist analyses focused upon in the current sub-section are: first, social-scientific legal pluralism; second, a notion of legal pluralism that is sensitive to the cultural and religious diversity of normative orders; and finally, critical legal pluralism.

First, social-scientific legal pluralists tend to question which normative order(s) have jurisdiction over a particular legal subject in a situation at a given time. Drawing upon Griffiths' (1986) descriptive definition of legal pluralism, several laws can be seen to be operating in the particular situation that occurs in *Begum*. These are: *state-law* is apparent in the various court judgments of the case; *human rights law* on which Shabina's claim was based; institutional policies (notably the *uniform policy*) of Denbigh High School; and the *religious laws* Shabina viewed as obligating women to wear a *jilbab*. As well as illuminating the existence of a multiplicity of laws in this situation, a social-scientific legal pluralist analysis of

¹⁴⁴ Sandberg calls 'internal' spiritual laws made by religious groups themselves 'religious law' (Sandberg 2011: 10).

Begum details the particular interactions between the various normative orders (Jackson 2010). This analysis includes consideration of whether, and how, normative order(s) are incorporated into state-law.¹⁴⁵ For example, the decision upholds a weak element of pluralism by allowing schools discretion over their own uniform policies.¹⁴⁶ The overlapping relationships between different normative orders are illuminated by the social-scientific legal pluralist approach and the impact of the overlaps for situating the legal subject in particular rather than artificially reduced structural context is underlined.

Second, scholars such as Shah criticise Griffiths' legal pluralist approach for failing to account for the cultural and religious diversity of normative orders (Shah 2009). In comparison with Griffiths' image of law as the self-regulation of normative orders, Shah contends that Chiba's dynamic notion of the three-level system of law (which consists of official law, unofficial law and legal postulates) conceives a dynamic relationship between official and unofficial law (Chiba 1986). Menski extends Chiba's three-level system of law in his 'kite model' (Menski 2009).¹⁴⁷ Bhamra affirms that Menski's kite model illustrates that law is "the product of a variety of sources and processes that go beyond the nation-state" (Bhamra 2011: 93). Bhamra provides a full account of Menski's kite model in Bhamra 2011: Chapter 9). When people encounter situations of legal pluralism they are not passive recipients of legal regulations; rather, they are active agents who actively choose to adopt a particular law from the multiplicity of rules that exist. Menski and Pearl further formulate a notion of hybrid laws, such as '*Angrezi*

¹⁴⁵ One example is incorporation of certain rights under the ECHR into English state-law, for example, Article 13(2) of the Human Rights Act 1998 incorporates Article 9 of the ECHR into English law.

¹⁴⁶ Following the reasoning of the ECtHR in the *Sahin* case, which applies the doctrine of margin of appreciation in relation to the accommodation of religious dress by state parties, it was held that the school was given power by Parliament to decide on the appropriateness of its own school uniform policy.

¹⁴⁷ Menski further described his model in a plenary session entitled 'Legal Pluralism and the Search for the "Right Law": Law as Kite Flying' at the Jubilee Congress on Legal Pluralism 8-10 September 2011, hosted by the University of Cape Town, South Africa. In his model Menski identifies four main sources of law: the state, society, natural and international law. He likens the push-and-pull factors of these sources of law to be like a flying kite. Absent from Menski's kite model, however, is the position of the legal subject.

Shari'a law (Menski and Pearl 1998). Following this conception, the dynamism of official and unofficial law is revealed as legal subjects adapt their customary traditions into the regulations found in English law. A legal subject is perceived to be an active agent who chooses to follow both English law and their traditional customs simultaneously. In relation to the inter-normative conflicts created in cases such as *Begum*, Shah illustrates how this is generated by the struggle between the legal postulates of modernity and uniformity, on the one hand, and individual legal agency, on the other (Shah 2005: 177-179). Whereas the first is strongly affirmed by state-law, the second is relied upon by the applicant.

In liberal democratic societies, all citizens have a general duty to obey state-law, even though they may not agree with a particular policy. Any person who decides to break the law will be subject to judgment and the punishment which the state imposes. In his work Ssenyonjo considers the normative conflict(s) that surround the religious dress practices of women who wear a *hijab*, *jilbab*, *niqab* or *burqa* in Europe (Ssenyonjo 2008). In the search for appropriate solutions he refers to two perspectives of Islamic scholars. The first view is that Islamic religious dress practices are a strict religious obligation that applies to all women regardless of the laws of the state in which they reside. Under this view, passing a law which prohibits the wearing of a *hijab*, *jilbab*, *niqab* or *burqa* interferes with women's freedom of religion and forces them to disobey *Allah*. The second view held by Islamic scholars recognises the obligatory nature of covering but argues that this is not obligatory in a non-Islamic state. Ssenyonjo refers to the statement of al-Azhar Muhammad Sayyid Tantawi to the French Minister of Internal Affairs (Nicholas Sarkozy), in 2003, that:

The veil is a divine obligation for Muslim women [...] No Muslim ruling or ruled, has the right to oppose this obligation. However, this obligation is valid if Muslim women live in a Muslim state. Yet if they find themselves in a non-Muslim state (like France, for example) and their rules want to adopt law in opposition to the veil, it is their right. (Ssenyonjo 2008: 214).

Framed in the discourse of rights, Ssenyonjo states that Tantawi's argument is based upon his interpretation of the verses of the *Qur'an*, so that a woman who is prohibited by state-law from following the dress practices her religion commands should not fear divine punishment. Following this argument, in non-Islamic secular societies, such as Turkey or France, there is no religious obligation for a woman to cover. Ssenyonjo then goes on to state that the "obligation to wear the *hijab*, in a non-Islamic state which respects freedom of religion or belief, should

be generally observed” (Ssenyonjo 2008: 164). Therefore, in non-Islamic societies that respect freedom of religion and belief, such as the UK, women should be allowed to follow their obligation to cover. Prohibitions of religious dress in these states are not justified, unless there is a special ground that justifies interference with one’s religious beliefs (as provided under Article 9(2) ECHR).

Nevertheless, both Shah’s and Ssenyonjo’s approaches risk being overly simplistic: any approach that is sensitive to the cultural and religious diversity of *normative orders* can be criticised for essentialising human experiences of these orders and communities.¹⁴⁸ The communities and their boundaries might appear unsurpassable and homogenous. Scholars such as Al-Hibri, for example, observe that the religious practice of covering the head and/or body by a woman is not simply a religious *or* a cultural practice, rather a merger of both these realms (Al-Hibri 1999). Malik also illustrates the need to move from “single axis” descriptions, in terms of culture, *or* religion *or* gender, to pluralistic articulations (Malik 2008). She discusses the cases of *Sahin* and *Begum* to illustrate how women who wear a *hijab* or a *jilbab* receive gender inequality in state-law’s narrative. As part of the UK-based feminist judgments project, Malik agrees with the dissenting opinion of Judge Tulkens in *Sahin* that an analysis is needed of the perspective of women who adopt Islamic dress practices (Malik 2010). Malik argues that, rather than creating a conflict for the respondent in cases, such as *Begum*, between the applicant’s choice of religious dress as a member of a particular branch of Islam and her choice of preferred school as a British citizen and a member of the wider community, state-law should enable both the recognition of her culture as well as her religion and right to access education (or employment): both are public goods which are also important for her autonomy. While there is much to be credited by Malik’s approach, which places Shabina at the centre of the House of Lords’ decision, she does not consider Shabina’s own narrative or how she experienced wearing a *jilbab* as law.

Finally, in order to overcome the potential essentialisation of personal experiences, critical legal pluralists such as Kleinhans and Macdonald challenge assumptions that confine an image of law to simply legislation interpreted by state institutions or to the self-regulation of normative orders (Kleinhans and Macdonald (1997).

¹⁴⁸ In order to overcome this criticism, Bano captures the narrative accounts of British Pakistani Muslim women to document what they make of the claims of *shari’a* councils, in relation to divorce proceedings, in their own lives (Bano 2008).

Instead, they imagine law as autobiographical: what *is* law, in a particular situation, is found in the human imagination and is captured in the narrative accounts of people (Macdonald 2002). On the one hand, scholars such as Melissaris question whether a pluralistic approach that locates law within the subjectivity of people can “say anything meaningful about the concept of law” (Melissaris 2009: 5). This is because every person, out of approximately the seven billion in the world, will have their own ideas about what law *is*. On the other hand, Kleinhans and Macdonald affirm that their notion of critical legal pluralism does not undermine the concept of law, instead it is:

[...] a call for a more intense scrutiny of the legal subject conceived as carrying a multiplicity of identities [...] It takes as its starting point the assumption that all hypotheses of normativity merit consideration from a legal point of view. (Kleinhans and Macdonald 1997: 40)

Macdonald convinces us that “rules are only as good as the reasons behind them” (2002: 86). For this reason, law is also phenomenological. In the broad sense, philosophical phenomenology can be defined as the analysis and description of everyday life – the life world and the associated states of consciousness of human beings (Sokolowski 2000: 2).¹⁴⁹ Phenomenology stresses the importance of analysis and interpretation of the structure of conscious experiences of the relationships of human agents. A phenomenological study of law reveals the importance of reasons behind establishing law-inventing and law-abiding behaviours of the state, cultural and religious groups and their members.¹⁵⁰

Empirical research conducted with a random sample of women who wear a *hijab* or a *niqab* in the UK indicates that these participants are aware that their human rights may be infringed by any prohibition of these religious practices (Jackson

¹⁴⁹ Critical legal pluralists follow the dialectical-phenomenology of the Hegelian tradition (for an introduction see Taylor 1985), rather than the transcendental-phenomenology established by Husserl (for an introduction to this approach see Sokolowski 2000), or the methodological approach of hermeneutic-phenomenology proposed by Schutz (1962).

¹⁵⁰ In comparison to the approach proposed in this paper, Reinarch conducted a phenomenological study of positivist law. He uses a phenomenological approach to reveal the essence of the structure of civil law by engaging in descriptions of a claim, an obligation and a promise. (Reinarch 1983)

2011). For example, participants in the study stated that “there are human rights as well...the Universal Declaration of Human rights...is a very solid basis on which they [European states’ infringements of the right to religion] can be challenged” (Mona, a post-graduate student from Pakistan who wears a *hijab*). Another participant commented that “I don’t think that they [European governments] have a right to tell us how to practice our religion” (Raani, an undergraduate student born in the UK, whose parents originate from Pakistan and who wears a *hijab*). However, one study participant, Cynthia (a contractual negotiator for a finance company, who wears a *hijab*, and whose family originates from Mauritius) stated that even if she were to take her employers to court, if they were to introduce a prohibition of the garment at her place of work, she felt that the court would find in favour of her employer. On this point another study participant, Ghazala (who wears a *hijab* and is a nursery nurse from Algeria) asserted that “I would stop, to be honest with you, I wouldn’t carry on [working there]; the work is not my life, the religion is my life”. Forcing or prohibiting women to wear a *hijab*, *jilbab*, *niqab* or *burqa* is equally limiting to a woman’s liberty.

Building upon the arguments made in the previous section, what is omitted in the ECtHR’s analysis in the cases such as *Dahlab*, *Sahin*, *Şefika Köse* and *Dogru* are the normative perspectives of the legal subject (or rights bearer) themselves.

III. Encouraged and Discouraged Forms of Legal Pluralism – Internal and External Perspectives

Bearing in mind the divergent legal pluralist analyses of rights illustrated above, we ask the question how the diverse legal pluralist theory impacts upon the fact of the legal pluralism of rights, which we understand to be the fact of coexistence of diverse legal and normative orders regulating rights, for instance state law, international law, European law, religious law, custom, legal postulates and other forms of law distinguished in scholarship. In the section below we illustrate how certain types of rights pluralism are slowly acknowledged as acceptable while others are systematically discouraged. We also examine what these developments mean for freedom of religion in particular.

Despite the importance of socio-legal studies for the intersectional (Vakulenko 2007) positioning of legal subjects and in spite of socio-legal pluralists’ pleas for more culture-sensitive, context-specific and autonomy-related approach to rights mentioned above, European courts such as the ECtHR either carefully omit or specifically reject forms of internal legal pluralism. Meerschaut and Gutwirth

illustrate that the ECtHR explicitly rejects legal pluralism of different legal regimes within state-law as contrary to human rights (Meerschaut and Gutwirth 2008). In the case of *Refah Partisi (the Welfare Party) and Others v Turkey*, for example, the Court elaborated that “a difference in treatment between individuals in all fields of public and private law according to their religion and belief manifestly cannot be justified under the Convention” (*Refah Partisi*: para. 119). In this judgment the Court explicitly rejected a form of internal legal pluralism, meaning multiplicity of different legal orders within a territory of the same state (Maduro 2007; Kleinhans and Macdonald 1997). The Court emphasised that this type of pluralism is contrary to the principle of equality and may lead to unjustified discrimination.

At the same time, however, forms of external legal pluralism have become a reality of European rights regimes. External legal pluralism we understand to be pluralism created by regimes stemming from outside of the legal order of a state (Maduro 2007). Institutional, constitutional and competence driven interpretations of human rights are slowly becoming a reality of European human rights regimes. In the European legal space, external human rights pluralism stems from the existence of at least three mutually influencing rights orders. These are: first, the constitutional traditions of European states; second fundamental rights protection based on the EU normative order, including the Charter of Fundamental Rights (EU Charter), and third, international law protection stemming from the ECHR.¹⁵¹ We argue that European Courts, including both ECtHR and ECJ thanks to their constitutional and institutional interpretation, create external forms of legal pluralism of human rights. Overlaps and conflicts between the constitutional and international rights and their implication for women who cover their heads and bodies are illustrated here by the cases that emerged before the ECtHR. More interestingly, however, strong forms of external pluralism are created by jurisprudence concerning the relationship between European human rights stemming from the ECHR and fundamental rights stemming from the EU Charter.

The cases of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*

¹⁵¹ Another possible overlap of human rights protection systems that may develop further pluralisation of rights standards stems from non-regional international human rights documents. For example, in the latest periodic report concerning Turkey CEDAW focused on possible consequences of headscarf bans and exclusion of women that such a ban may lead to (UN 2010).

WOMEN WHO WEAR ISLAMIC DRESS AS THE RELIGIOUS 'OTHER'
Amy R. Jackson and Dorota A. Gozdecka

(*Kadi*) before the ECJ, and *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland (Bosphorus)* before the ECtHR, as well as multiple cases referring to “wide margin of appreciation” accept uneven and interwoven force of diverse interacting legal regimes. In other words external legal pluralism of rights is not discouraged. Concerns for independence of legal regimes and “territory” of influence of international, European and constitutional law in regulating a person’s basic rights have lead gradually to the coexistence of different rights regimes (Greer and Williams 2009).

In the case of *Kadi*, the ECJ emphasised the importance of former Article 6 (now Article 2) in protection of fundamental rights and expanded the competence of the Court to review compliance as entrenched in the Treaties. However, the approach to rights remained Europe-centred and based upon the idea of compliance with EU constitutional principles and fundamental rights rather than international human rights obligations (Besson 2009b). Gráinne de Búrca criticised the pluralist interpretation of European and international law despite greater significance given to rights (de Búrca 2009). Pluralist reading, according to de Búrca, underlined the internal and external autonomy of the EU legal order, which may encourage other systems to assert their local constitutional norms as a barrier to enforcement of international law. In other words, the ECJ encouraged the assertion of local understandings of human rights and their particular constitutional priorities over international law. If the Court sustains its current approach, the Community order will continue to be governed by the Community order itself. In the case of international law obligations permeating to the EU order, it will still be the EU norms and internal fundamental rights understanding that will be seen as taking priority over international law (Besson 2009b: 252). For women adopting religious dress practises, this type of rights pluralism may generate problematic situations when permissible forms of covering become regulated differently when in employment relations with EU institutions and in other relationships between the rights bearer and the state.

Finally, in the case of European legal orders a different constellation in the relationship between the EU and ECHR may give rise to a certain asymmetry of rights. The question of the revision of the Community’s obligations in the light of human rights standards came under judicial scrutiny in the case of *Bosphorus* before the ECtHR where an equivalence of a rights test was developed. In the case, the ECtHR dealt with questions of jurisdiction over provisions of Community law. The key issue in the case was whether Ireland infringed the provisions of the ECHR by application of Community law. Upon analysis the ECtHR found the protection of rights provided by the Community law ‘equivalent’ to that of the Convention system

(*Bosphorus*: para. 165). However, in agreement with Douglas-Scott, we see it as necessary to emphasise that the equivalence test was very general and focused on the overall evolution of ECJ fundamental rights rather than the actual circumstances of the case and the actual approach to particular rights (Douglas-Scott 2006). The presumption of equivalence is therefore criticised for creating a potentially privileged position for EU law before the ECtHR without actual review of the standard in question (Sumner 2008). Following van den Berghe, if the EU's fundamental rights are automatically presumed to protect rights in the same way as the ECHR does, two standards of interpretation of rights obligations may occur (van den Berghe 2010). The first one will be applied to the Member States and the second one, based on the assumption of equivalence to the EU; this may lead as a result to inequality in treatment. Equivalence presumption may diversify the European understanding of rights in the name of autonomy of various normative orders. In the case of religious dress practices of women, this type of asymmetry may mean that the rights obligations of member states and EU organs could be outlined differently. If any norms under the EU system concerning the religious dress practices develop, they might be automatically presumed as 'equivalent' to those of the ECtHR.

Multiple combinations of equally effective systems with differently understood and selectively applicable concepts of freedom of religion may occur in European rights systems leading to visible differences in treatment. Thus, a multiplicity of legal orders may apply in, for instance, a situation of a Muslim civil servant working in an EU institution who decides to start wearing a *niqab* leading to possible difference in treatment at work. In this case, the freedom to wear such a garment could be defined and limited differently if applicable in connection with EU law, when understood as freedom of religion under the ECHR and in the constitutional system of the particular state. The ECJ has not yet considered religious dress practices in its case-law, but this issue may arise before the ECJ in the area of employment relations and fall under the Employment Equality Directive (Council Directive 2000/78/EC). Due to problems of enforceability such as limited *locus standi* and limited area of competences to which the fundamental rights norms of the Charter apply (Gozdecka 2012) it might take time before such a case is brought before the ECJ. However, should such a case arise, it would define the number of possible rights overlaps in the context of religious garments.

These diverse rights constellations create an external European legal pluralism of rights stemming from considerations of autonomy of legal orders, which may lead to internal pluralism and to difference in treatment. Unlike with internal legal pluralism, however, external pluralism contextualises rights by their placement closer to imagined rather than relevant legal and political communities – European

and national. These communities being far from the rights bearer's own community are likely to have different concerns than the questions of autonomy, heteronomy, majority, minority, subjectivity and identity in the conflict of rights such as freedom of religion. Having in mind the complex nature of rights such as freedom of religion it appears unjustified that external legal pluralism of human rights appears possible, whereas internal legal pluralism is discouraged. Given the complex reasons behind practices such as wearing *hijab* or *jilbab*, it appears more legitimate to contextualise rights by placing them closer to communities relevant for rights bearers. Categorisation of internal pluralism as 'undemocratic' as in the *Refah Partisi* case, and equation of Islam as 'undemocratic' as with the cases concerning religious garments, appears less convincing given the growing external pluralism of European human rights.

We argue that this development is misguided and leads to the situation of a deadlock in interpretation of rights such as freedom of religion. In the context of religious garments, rights bearers are caught between a plurality of potentially competing understandings of human rights none of which takes into consideration the applicants' own understanding of rights and normative obligations. If the current diverse interpretation of human and fundamental rights in combination with equivalence standards but without regard to deep conflicts of other normative orders encountering state law is sustained, many different normativities concerning religious dress practises may arise and bring about what Motha calls a "civil war" of different heteronomies encountering autonomy (Motha 2007: 155). In order to avoid such intransigent war of different heteronomies we argue that European rights pluralism requires contextualisation which could be based upon adopting the forms of analysis applied by socio-legal pluralists. Institutional legal pluralist analyses of interactions between different legal orders are not sufficient to cover the multiple levels of inter-normativity faced by religious believers.

IV. Towards Greater Contextualisation of Rights – Combining Transnational, Constitutional and Socio-Legal Perspectives

As illustrated by the findings from an empirical study conducted with women who wear a *hijab* or *niqab* in the UK (Jackson 2011), people are constantly pushed and pulled in various directions due to their normative commitments. Within these situations, however, there exists a space within which a person can interpret the way his or her commitments make sense for them. A person holds a consciousness and creative capacity to overcome possible normative conflicts between, for example, gendered, cultural, religious and Western values. Some normative

conflicts may prove difficult to resolve, as they result in a position of deadlock.¹⁵² A deadlock position between two or more laws is generated for a variety reasons. One example of such a conflict is the situations encountered by applicants or claimants wanting to wear a *hijab* or *jilbab* and work, or attend a school or university. In such cases, although the courts are provided the authority to decide these conflicts, judges do not appear to take into consideration the aspects of inter-normativity that cause applicants to be caught between different forms of pluralism. Whereas external forms of legal pluralism are increasingly accepted and given consideration, internal forms are explicitly discouraged. Nevertheless, as we have shown and as Kleinhans and Macdonald observe, law (including state-law) is not homogenous:

There will always be a plurality of unofficial legal orders competing with each other and with State law. And State law itself is multiple. This latter multiplicity is both internal and external [...] In other words, for legal pluralists, State law itself typically comprises multiple bodies of law, with multiple institutional reflections and multiple sources of legitimacy. (Kleinhans and Macdonald 1997: 31-32)

Divergent approaches of legal pluralists generate diverse responses to the problem of conflict of laws. European legal pluralists focus upon the conflict of institutional legal orders. However, as stated above, this is likely to result in the omission of the relevant perspectives of the rights bearer (or legal subject) in the space where legal and normative orders intersect. Following Macdonald we contend that “[t]he best response to the inevitable existence of informal [law] is not to suppress it...[r]ather, the best response is to give it a productive institutional outlet” (Macdonald 2002: 28). In this final part of the paper we argue for a more contextualised approach to the conflicts of laws in the situations concerning women who follow Islamic dress practices.

However, we do not understand contextualisation as legalisation of rights by their placement closer to a domestic state law system, as for instance argued by Besson (2011) or by reference to an even wider ‘margin of appreciation’ as Weiler (2010) does, nor by greater reliance on constitutional principles as argued by Greer and

¹⁵² The result of, and other possible ways to overcome, an impossible compromise stemming from the deadlock position is discussed elsewhere (Sandberg and Jackson n.d.).

Williams (2009). Such conceptualisations take into consideration only one side of inter-normativity and do not sufficiently conceptualise the position of a rights bearer (or legal subject) in situations where constitutional conflict pertains to the area of basic rights relevant for autonomy and identity. Frerichs observes the problem of abstract conceptualisation of “fictional” units such as nations, regions, normative orders and other functional systems in the European legal pluralist discourses (Frerichs 2010). Functional collectives identified by transnational legal pluralists, underlines Frerichs, work “behind the backs” of individuals who are unable to identify with them. Trying to integrate the two perspectives, Frerichs proposes a cobweb model of pluralisms consisting of concentric circles joined by radii. Seen from the centre, the cobweb of pluralisms represents the rights bearers (or legal subjects) perspective. The concentric web circles represent territorial collectives and functional systems, whereas the radii in the cobweb illustrate pluralisation and constitutionalisation.

While, the question of how these three perspectives interact remains rather open in Frerichs work, we argue that it may serve as a useful and valuable model in better contextualizing human rights. In conflict of laws, including practices affecting identity and autonomy, we argue that it is necessary to look at normative conflicts, not merely through a systemic and institutional lens. We must examine how people make sense of diverse obligations and how their autonomy and identity are impacted by the coexistence of diverse legal and normative obligations. Frerichs’s cobweb model opens up a possibility of a more comprehensive approach to the conflict of rights by focusing the analysis both on the constitutional and institutional aspects as well as the perspectives of the rights bearers.

Following Meerschaut and Gutwirth we argue that:

[...] a multiplicity of human rights, constitutional principles and interests are interwoven in the matter of legal pluralism – some overlapping, some competing. When balancing these rights and interests in relation to the accommodation of religious law, one should contextualise. Balancing Islamic law and religious freedom on the one hand, and secularism and equality on the other is far too reductionist and simplistic. The issue of accommodation of Islamic law is not an issue of general and abstract statements but it demands careful attention to practice and understanding of Islamic law. Such balancing is thus not about ‘the’ sharia or ‘the’ Islam or ‘the’ secular republic. [...] Human agency plays a crucial role in the conception and development of Islamic laws. (Meerschaut and

Gutwirth 2008: 464)

Human rights pluralism becomes a reality of our time as Kinley notices (Kinley 2012). A growing need to secure democratic legitimacy of rights and the necessity of taking diverse dimensions of rights into consideration reveals the inherent indeterminacy of human rights and their necessary openness to some degree of differential application. Due to this indeterminacy, human rights will naturally be “bendable” and open to pluralistic interpretations. The central problem of rights pluralism becomes its manageability in a way where the potential of rights is retained. A plurality of legal pluralisms can, according to Kinley, be manageable only by sketching certain roughly drawn limits that should not be crossed. These limits in Kinley’s account, include among others the potential of rights for empowerment of rights bearers (or legal subjects) and they cannot be empowered if their identity and agency is not viewed as an integral part of legal pluralistic equations (Kinley 2012).

Conclusion

As illustrated by the reasoning in the ECtHR cases such as *Dahlab*, *Sahin*, *Şefika Köse* and *Dogru* the European rights discourse does not adequately discuss the lived reality of pluralism. In these cases women who wear a *hijab* are caught between multiple of approaches towards these garments. These include, for example: different forms of dress expected from the perspective of their faith; different expectations of dress when working or studying at an institution, such as a state school or university, and yet other expectations of dress when walking down the street.

In Europe, the reaction to garments such as *hijabs* provides an example that the depth of normative conflicts of rights may not be limited to procedural and functional conflicts between state and inter-state normative orders. The conflict may go deeper and touch upon the very core of our notion of “freedom”. In our analysis of various normative pressures on women wearing *hijabs*, *niqabs* and *jilbabs*, we have shown that normative overlaps become most apparent when they incorporate perspectives of rights bearers: a perspective otherwise overlooked by an institutional interpretation of legal conflicts.

In this paper, our primary goals were to first, begin bridging the gap between studies of transnational, constitutional and socio-legal pluralisms and their respective areas of concern - external and internal pluralism of rights; second, encourage future

analyses by judges and researchers on the relationship between the state, cultural and religious groups and their members to acknowledge the plurality of legal pluralisms that exists; and finally, contextualize rights by considering a person's understanding and autonomy related to inter-normative conflicts. Having in mind the dichotomy of analysing pluralisms, observed by Frerichs, we have attempted to shift the focus of analysis from functional and institutional to a perspective that pays attention to legal subjects' accounts. Whereas we do not aim to exhaust possibilities of reconstruction, we approach the plurality of pluralisms from the centre of Frerichs' cobweb. In the case of basic rights of pivotal importance, such as freedom of religion, it is not enough to search for institutional legitimacy. By removing rights bearers from the center and approaching rights pluralism only institutionally we may cross the roughly sketched lines that Kinley draws when he speaks about the "bendability" of boundaries of rights (Kinley 2012).

For the reasons outlined in this paper, we suggest more contextualised analysis of rights focusing on relevant rather than imagined communities. Such analyses could be conducted if the perspectives of rights bearers (or legal subjects) remain in the center of discussions concerning institutional inter-normativity. In the case of freedom of religion, it is necessary to investigate *both* how this freedom is influenced by diverse normative orders and how people make sense of being the irreducible site of inter-normativity. This is achieved by taking into account socio-legal methodologies such as qualitative methods of data gathering. What is currently missing from the European rights discourse on the topic of Islamic dress practices is the belief that rights bearers have autonomy and the creative capacity to construct their own *unique* identities. Since we suggest, that more contextualised versions of European legal pluralist analyses be undertaken, the question remains: Is it possible for judges and researchers analysing the relationship between law and society to combine institutional and socio-legal perspectives of legal pluralism as we propose? Or, are these perspectives incompatible or opposing ways of theorising (or approaching) infinite scenarios of legal pluralism?

Legislation and Cases

European Convention on Human Rights and Fundamental Freedoms (1950) ETS
No 5.

Charter of Fundamental Rights of the European Union, *Official Journal of the European Union*, C 303/1.

Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland [2005] ECHR
2005-VI.

- Dahlab v Switzerland* [2001] ECHR 2001-V.
Dogru v France [2009] 47 ECHR.
Lautsi v Italy [2009] ECHR and Grand Chamber judgment [2011], Application No. 30814/06.
R (on the application of Begum) v Headteacher and Governors of Denbigh High School [2007] 1 AC 100; [2006] UKHL 15; [2006] 2 WLR 719; [2006] HRLR 21 (HL).
Refah Partisi (the Welfare Party) and Others v Turkey [2003] ECHR 37.
Sahin v Turkey [2005] 44 ECHR 5
Şefika Köse and 93 Others v Turkey [2006] ECHR 20
Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Joined Cases C-402/05 P and C-415/05 P.

References

- AL-HIBRI, Aziah Y.
1999 'Is Western Patriarchal Feminism Good for Third/World Minority Women?' Pp. 41-46 in Susan Okin Miller et al. (eds.) *Is Multiculturalism Bad for Women? Susan Okin Miller With Respondents*. Princeton: Princeton University Press.
- ANDERSON, Benedict
1991 *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London and New York: Verso.
- BANO, Samia
2008 'In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Shar'ia Debate' in Britain'. *Ecclesiastical Law Journal* 10: 282-309.
- BESSON, Samantha
2008 'How International is the European Legal Order?: Retracing Tuori's Steps in the Exploration of European Legal Pluralism'. *Journal of Extreme Legal Positivism* 5: 50-70.
- 2009a 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy'. Pp. 381-407 in Jeffrey L. Dunoff and Joel P. Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance*. Cambridge: Cambridge University Press.
- 2009b 'European Legal Pluralism after Kadi'. *European Constitutional Law Review* 5: 237-264.

WOMEN WHO WEAR ISLAMIC DRESS AS THE RELIGIOUS 'OTHER'
Amy R. Jackson and Dorota A. Gozdecka

- 2011 'Human rights and democracy in a global context: decoupling and recoupling'. *Ethics and Global Politics* 4(1): 19-50.
- BHAMRA, Meena K.
2011 *The Challenges of Justice in Diverse Societies: Constitutionalism and Pluralism*. London: Ashgate.
- BHANDAR, Brenna
2009 'The Ties that bind: Multiculturalism and Secularism Reconsidered'. *Journal of Law and Society* 36(3): 301-326.
- BÚRCA, Gráinne de
2009 'The European Court of Justice and the International Legal Order after *Kadi*'. *Harvard International Law Journal* 51(1): 1-51.
- CARROZZA, Paolo G.
1997-1998 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights', *Notre Dame Law Review* 73(5): 1217-1237.
- CHIBA, Masaji (ed.)
1986 *Asian Indigenous Law in Interaction with Received Law*. London: KPI.
- DOUGLAS-SCOTT, Sionaidh
2006 'Bosphorus Hava Yollari Turzim Ve Ticaret Anonim Sirketi v. Ireland'. *Common Market Law Review* 4: 243-254.
- EVANS, Carolyn
2006 'The "Islamic Scarf" in the European Court of Human Rights. *Melbourne Journal of International Law* 7: 52-73.
- FINE Robert and Will SMITH
2003 'Jürgen Habermas's Theory of Cosmopolitanism'. *Constellations: An International Journal of Critical and Democratic Theory* 10(4): 469-487.
- FRERICHS, Sabine
2010 'Constitutional Ideal Types in the Global Age: A Sociological Review'. Pp. 69-88 in Kaarlo Tuori, and Suvi Sankari, *The Many Constitutions of Europe*. Farnham/Burlington: Ashgate Publishing.
- GOZDECKA, Dorota A.
2012 'Human rights, fundamental rights and the common constitutional traditions in the protection of religious pluralism and diversity in Europe – a study in the democratic paradox. *Finnish Yearbook of International Law* 2010(1): 169-190.
- GREER, Steven and Andrew WILLIAMS
2009 'Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?' *European Law Journal* 14(4): 462-481.

GRIFFITHS, John

1986 'What is Legal Pluralism?' *Journal of Legal Pluralism*, 24: 1-55.

GUNN, Jeremy T.

2005 'Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights.' *Strasbourg Consortium: Freedom of Conscience and Religion at the European Court of Human Rights*, available at: <http://www.strasbourgconsortium.org/document.php?DocumentID=3846>, accessed on 30 April 2012.

HABERMAS, Jürgen

2001 *The Postnational Constellation: Political Essays*. Cambridge, Mass.: MIT Press.

JACKSON, Amy

2010 'A Critical Legal Pluralist Analysis of the *Begum* Case'. *Osgoode Hall LawSchool Comparative Research in Law and Political Economy Research Paper Series*, Research Paper No. 46/2010: 1-25.

2011 *What is Law? Unveiling Subjective Legal Pluralism*. PhD Thesis, University of Reading.

JOPPKE, Christopher

2009 *Veil: Mirror of Identity*. Cambridge: Polity.

KINLEY, David

2012 'Bendable Rules: The Development Implications of Human Rights Pluralism'. Pp. 50-65 in Brian Z. Tamanaha, Caroline Sage and Michael Woolcock (eds.), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*. Cambridge: Cambridge University Press.

KLEINHANS, Martha-Marie and Roderick A. MACDONALD

1997 'What is a Critical Legal Pluralism?' *Canadian Journal of Law and Society* 12(2): 25-46.

MACDONALD, Roderick A.

2002 *Lessons of Everyday Law*. Montreal: McGill Queen's University Press.

MADURO, Miguel Poiaras

2007 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism'. *European Journal of Legal Studies* 2(1): 1-21.

MALIK, Malieha

2008 'Complex Equality; Muslim Women and the Headscarf'. *Droit et Société, Revue Internationale de Théorie du Droit et Sociologie Juridique* 68(1): 127-152.

2010 '*R (Begum) v. Governors of Denbigh High School*: Judgment.' Pp. 336-344 in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds.) *Feminist Judgments: From Theory to Practice*. Oxford: Hart Publishing.

WOMEN WHO WEAR ISLAMIC DRESS AS THE RELIGIOUS 'OTHER'
Amy R. Jackson and Dorota A. Gozdecka

MARSHALL, Jill

2008 'Women's Right to Autonomy and Identity in European Human Rights Law: Manifesting One's Religion'. *Res Publica* 14: 177-192.

MEERSCHAUT, Karen and Serge GUTWIRTH

2008 'Legal pluralism and Islam in the scales of the European Court of Human Rights: the limits of categorical balancing'. Pp. 431-465 in Eva Brems (ed.) *Conflicts Between Fundamental Rights*. Antwerp: Intersentia.

MELISSARIS, Emmanuel

2009 *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism*. Bodmin: MPG Books.

MENSKI, Werner

2009 'Flying Kites in a Globalizing Sky and Dodgy Weather Forecast: Accommodating Ethnic Minority Laws in the UK'. *Journal of Multilingual Multicultural Studies and Practices* 2: 26-45 (in Japanese with an English abstract).

MENSKI, Werner and David PEARL

1998 *Muslim Family Law*. London: Sweet and Maxwell.

MOORE, Sally Falk

1973 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study'. *Law and Society Review* 7(4): 719-746.

MOTHA, Stewart

2007 'Veiled Women and the Affect of Religion in Democracy'. *Journal of Law and Society* 1(34): 139-162.

NASH, Kate

2003 'Cosmopolitan Political Community: Why Does It Feel So Right?' *Constellations* 10(4): 506-518.

REBOUCHÉ, Rachel

2009 'The Substance of Substantive Equality: Gender Equality and Turkey's Headscarf Debate'. *American University International Law Review* 24 (4): 711-737.

REINARCH, Adolf

1983 'The Apriori Foundations of the Civil Law', trans John F. Cosby. *Alethia* 3: 1-142.

SANDBERG, Russell

2011 *Law and Religion*. Cambridge: Cambridge University Press.

SANDBERG, Russell and Amy JACKSON

n.d. *Religion and Legal Pluralism*. Farnham: Ashgate, forthcoming.

SCHUTZ, Alfred

1962 *Collected Papers I: The Problem of Social Reality*. The Hague: Martinus Nijhof.

SHAH, Prakash

2005 *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law*. London: Glasshouse Press.

2009 'Transforming to Accommodate? Reflections on the Shari'a Debate in Britain'. Pp. 73–93 in Ralph Grillo et al. (eds.), *Legal Practice and Cultural Diversity*. London: Ashgate.

SOKOLOWSKI, Robert

2000 *Introduction to Phenomenology*. Cambridge: Cambridge University Press.

SSENYONJO, Manisuli

2008 'Moslem Women, Religion and the Hijab: A Human Rights Perspective'. *South East African Journal of Peace and Human Rights* 14(1): 148–198.

SUMNER, Geoff

2008 'We'll Sometimes Have Strasbourg: Privileged Status of Community Law before the European Court of Human Rights'. *Irish Student Law Review* 16: 127-170.

SWEET, Alec Stone

2009 'Constitutionalism, Legal Pluralism, and International Regimes'. *Indiana Journal of Global Legal Studies* 16(2): 621-645.

TAYLOR, Charles

1985 *Human Agency and Language*. Cambridge: Cambridge University Press.

TODOROV, Tzvetan

2010 *Fear of the Barbarians*. Cambridge: Polity.

UN (UNITED NATIONS)

2010 'Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Turkey.' United Nations: CEDAW/TUR/CO/6.

VAKULENKO, Anastasia

2007 "'Islamic Headscarves" and the European Convention on Human Rights: an Intersectional Perspective'. *Social and Legal Studies* 16: 183-199.

VAN DEN BERGHE, Frederic M.

2010 'The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?' *European Law Journal* 16(2): 112-157.

WEILER, Joseph H.H

2010 'Lautsi: Crucifix in the Classroom Redux'. *European Journal of International Law* 21(1): 1-6.