

# THE SUBSTANCE OF SUBSTANTIVE EQUALITY: GENDER EQUALITY AND TURKEY’S HEADSCARF DEBATE

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## INTRODUCTION

This Article addresses the gender equality arguments advanced either to support or to oppose Turkey’s ban on wearing headscarves.<sup>1</sup> As recently as 2005, Turkey defended a challenge to the ban before the European Court of Human Rights. In *ahin v. Turkey*, the Court held that the ban did not offend the petitioner’s right to religious freedom under the European Convention on Human

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1. JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* 16-18 (2007) (describing the dress that covers a woman’s head in observance of Islamic religious tenets).

Rights (“ECHR”).<sup>2</sup> The majority defended Turkey’s interest in secularism, in part by tying secularism to the protection of gender equality.<sup>3</sup> The majority opinion reflected the view that the ban freed women from religious beliefs that signify subordination, and liberated them from the societal pressures to adopt certain patriarchal practices.<sup>4</sup> The dissent in *ahin* also invoked gender equality, but reached the opposite conclusion: the prohibition on, or stigmatization of, the choice to wear a headscarf in compliance with one’s religious beliefs undermined women’s autonomy and denied some women access to higher education.<sup>5</sup>

This Article focuses on how *ahin*’s majority and dissent employ a substantive account of gender equality with very different outcomes in mind. In brief, substantive equality is a departure from classic or formal equality (or treating likes alike) and from equal treatment (ensuring that laws or policies apply to everyone in the same way).<sup>6</sup> Substantive equality, by contrast, is concerned that laws and customary practices do not diminish women’s access to societal goods or perpetuate discrimination.<sup>7</sup> The aim of substantive equality analysis is to use law to remedy past and present disadvantage<sup>8</sup> by

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2. See *ahin v. Turkey*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. 173, ¶¶ 121-123 (see *infra* Part II).

3. See *id.* ¶ 115; see also discussion, *infra* Part II.

4. See *id.* ¶ 111; see also discussion, *infra* Part II.

5. See *id.* ¶¶ 17-19 (Tulkens, J., dissenting); see also discussion, *infra* Part II.

6. See Sandra Fredman, *Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights*, in TEMPORARY SPECIAL MEASURES: ACCELERATING *DE FACTO* EQUALITY OF WOMEN UNDER ARTICLE 4(1) UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 111, 112 (Ineke Boerefijn et al. eds., 2003) (arguing that formal equality is insufficient because it fails to address societal structures that perpetually disadvantage women because of their difference to men).

7. See *id.* at 114 (contrasting the traditional view of equality whereby everyone is treated alike with an equality of results approach, which focuses on “equalizing the starting point” by giving women equal access to the benefits of society).

8. See *id.* at 115 (arguing that the removal of barriers in an effort to treat men and women alike is, by itself, insufficient to reach gender equality and should be accompanied by positive measures aimed at restructuring society to redistribute power and resources); Michael Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687, 1703 (1986) (“Alternatively, the normative aims of the postulate of equality may be satisfied if goods could be distributed so that each individual were able to realize fully his life-plan . . . . [T]hough this distribution would be marginally unequal, a *global* equality would result as measured by the satisfaction of each individual’s life-

examining the context or “lived-experiences” of those to whom equality in result is due.<sup>9</sup> As will be discussed further below, the majority opinion and the dissent of *ahin* invoke the right to substantive equality based on conflicting accounts of women’s experience of wearing a headscarf. This is problematic in one sense because the majority opinion and dissent offered scant reasoning to support their view. But more fundamentally, the Court’s reasoning calls into question the usefulness of substantive equality for understanding the implications of Turkey’s headscarf ban.

Part I of this Article will provide a short history of the headscarf ban, and Part II will examine the treatment of gender equality by the Court in *ahin*. Next, Part III will test the assumptions of the Court by considering the objectives of the women’s rights movement in Turkey and the influence of the United Nations Convention on the Elimination of All Forms of the Discrimination Against Women (“CEDAW”) on reception of substantive equality principles.<sup>10</sup> Last, this Article will conclude with a critique of substantive equality and suggest that recent cases decided by the Constitutional Court of Turkey underscore problems with thinking of the ban in terms of substantive gender equality.

## I. BACKGROUND

The ban on the headscarf at universities (and in other state-operated institutions) has been justified as necessary to protect Turkey’s commitment to a secular society and state, as enshrined in the Turkish Constitution.<sup>11</sup> At the collapse of the Ottoman Empire

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plan.”) (footnotes omitted) (emphasis in original). See generally CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215 (1989); CATHARINE A. MACKINNON, WOMEN’S LIVES – MEN’S LAWS 54 (2005).

9. See Hanna Beate Schöpp-Schilling, *Reflections on a General Recommendation of Article 4(1) of the Convention on the Elimination of All Forms of Discrimination Against Women*, in TEMPORARY SPECIAL MEASURES: ACCELERATING DE FACTO EQUALITY OF WOMEN UNDER ARTICLE 4(1) UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 15, 26 (Ineke Boerefijn et al. eds., 2003) (suggesting that gender-neutral laws perpetuate discrimination because they are interpreted from a male perspective and do not account for women’s life experiences).

10. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13.

11. Türkiye Cumhuriyeti Anayasası [TURK. CONST.] art. 2 (“The Republic of Turkey is a democratic, secular and social state governed by the rule of law;

after World War I, victorious states sought to carve up the region. A former Ottoman army officer, Mustafa “Atatürk” Kemal, resisted encroachment of the World War I powers.<sup>12</sup> Atatürk envisioned a complete break from the religious character of the Ottoman Empire by creating a secular, democratic Turkey.<sup>13</sup> By 1922, Atatürk’s forces abolished the most visible Ottoman-era imperial and Islamic symbols<sup>14</sup> and declared the new nation the Republic of Turkey in 1923.<sup>15</sup> Upon creation of the Republic of Turkey, Atatürk attempted to erase the previous influence and connection between the region’s laws and Islam by drafting a new constitution and new statutes.<sup>16</sup> Religious schools came under the control of the government and religious expression was curtailed through the regulation of dress and speech, although the headscarf was not then regulated.<sup>17</sup>

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bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.”). *See generally* Martha Minow, *Tolerance in an Age of Terror*, 16 S. CAL. INTERDISC. L.J. 453 (2007) (detailing an over-reaction as well as an under-reaction to the perceived threat of fundamentalist Islam).

12. *See* Molly Greene, *The Ottoman Experience*, 134 DAEDALUS 88, 89 (2005) (discussing Atatürk’s efforts at the close of World War I to create a secular state that might better respond to European imperialism).

13. *See id.* at 91, 96-98 (explaining that the Ottoman Empire sought to consolidate its power by emphasizing a shared nationalism through the Muslim identity of its subjects, which was at odds with practices of Ottoman rule that allowed local elites to amass power).

14. *See* OMER TASPINAR, BROOKINGS INST., AN UNEVEN FIT? THE “TURKISH MODEL” AND THE ARAB WORLD 20 (2003), *available at* [http://www.brookings.edu/papers/2003/08islamicworld\\_taspinar.aspx](http://www.brookings.edu/papers/2003/08islamicworld_taspinar.aspx) (noting the abolishment of the Sultanate and the Caliphate).

15. Greene, *supra* note 12, at 89.

16. *See* Dora Glidewell Nadolski, *Ottoman and Secular Civil Law*, 8 INT’L J. MIDDLE EAST STUD. 517, 527 (1977) (noting that Atatürk spent 1924 to 1926 trying to convince the nation and legal scholars of the importance of adopting a Western civil code system). Scholarship shows that the secularization of Turkish law, as evidenced by the transplantation of the Swiss Civil Code, was a process in motion before the establishment of the Republic. *Id.* at 519-26.

17. *See* Benjamin D. Bleiberg, Note, *Unveiling the Real Issue: Evaluating the European Court of Human Rights’ Decision to Enforce the Turkish Headscarf Ban in Leyla ahin v. Turkey*, 91 CORNELL L. REV. 129, 134-35 (2005) (outlining the genesis of regulation restricting certain religious dress); Özlem Denli, *Freedom of Religion: Secularist Policies and Islamic Challenges*, in HUMAN RIGHTS IN TURKEY at 87, 90 (Zehra F. Kabasakal Arat ed., 2007) (cataloging several of the significant secular changes made to Turkish law in the late 1920s and 30s); *see also* Seval Yildirim, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 PACE INT’L L. REV. 347, 368-69 (2005) (noting that the rhetoric of

Upon Atatürk's death in 1946, the single party system began to deteriorate and political parties challenging secularism started to amass power.<sup>18</sup> Beginning in 1960, military coups erupted in response to perceived threats to Atatürk's secular nationalism.<sup>19</sup> In 1980 the military-controlled National Security Council ("NSC") introduced a new constitution and seized control of the legislative process.<sup>20</sup> The NSC successfully overturned legislative measures that recognized or protected religious practices and expression.<sup>21</sup>

The Constitution supported by the NSC, established in 1982, prohibited any constitutional amendment or law that would contradict the principle of secularism.<sup>22</sup> In addition, the Constitution guaranteed an array of civil and political liberties, and included a non-discrimination statement prohibiting sex discrimination.<sup>23</sup> These constitutional protections were undermined by the government's ability to limit or to derogate from the enforcement of rights in order to defend principles like secularism.<sup>24</sup>

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breaking from the religious aspects of Ottoman governance was "exaggerated" and designed more for public mobilization and does not reflect of the state of Ottoman law reform before the revolution).

18. See Bleiberg, *supra* note 17, at 135-36 (commenting that after Atatürk's death, private religious schools were allowed to open, religious classes were offered in public primary secondary schools, and Islamic religious education became mandatory in public schools).

19. *Id.* at 136 (describing the 1960 military coup that emphasized secularism).

20. *Id.* at 137-39.

21. See *id.* at 138 (explaining that, in reaction to separatist movements by Islamic groups, the drafters of the 1982 Constitution were focused on protecting secularism and the indivisibility of the nation); Christopher D. Bebelieu, Note, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the Sahin Judgment*, 12 COLUM. J. EUR. L. 573, 581 (2006) (describing the NSC as one of the "main guardians of secularism") (citation omitted).

22. *Id.* art. 4 ("The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed.").

23. *Id.* art. 10 ("All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.").

24. See, e.g., *id.* art. 14 ("None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights."); see Zehra F. Kabasakal Arat, *Collisions and Crossroads: Introducing Human Rights in Turkey*, in HUMAN RIGHTS IN TURKEY, *supra* note 17, at 1, 6 (Zehra F.

The rationale for banning the headscarf at universities was to promote secularist values.<sup>25</sup> The 1981 Regulation Concerning the Dress of Students and Staff in Schools prohibited the headscarf, and the Higher Education Council banned headscarves in lecture rooms in 1982.<sup>26</sup> The ban was upheld by the Supreme Administrative Court, not only as a means to protect secularism but also as a measure to promote gender equality.<sup>27</sup> In its judgment, the Supreme Administrative Court stated that “[b]eyond being a mere innocent practice, wearing the headscarf is . . . becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic.”<sup>28</sup> In a subsequent decision, the Constitutional Court overturned a law that would have granted amnesty to students disciplined for wearing the headscarf while the application of the ban was unclear.<sup>29</sup>

In 1988, the Parliament attempted to soften the application of the ban. The Higher Education Act was amended to allow for a headscarf “covering the neck and hair” to be worn at universities,<sup>30</sup> but the Constitutional Court found the law in violation of the “principles of secularism, equality before the law, and . . . freedom of religion.”<sup>31</sup> The Constitutional Court held that embedded in these

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Kabasakal Arat ed., 2007) (stating that the NSC argued that derogation from individual freedoms and rights under the 1982 Constitution was necessary to curb “excessive freedoms” of the 1961 Constitution); Bleiberg, *supra* note 17, at 139 (arguing that the 1982 Constitution’s “guaranteed freedoms” could be meaningless given the caveats provided in Article 14 and noting the Constitution’s vague and malleable language).

25. See *ahin v. Turkey*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. ¶¶ 35, 37 (discussing the opposing views that the headscarf ban either promotes secularism and is “a symbol of a political Islam” or represents a religious duty or expression of religious belief); Belelieu, *supra* note 21, at 584 (characterizing the Headgear Act of November 28, 1925 as the first of several laws in Turkey to view dress as an issue important to secularism); Bleiberg, *supra* note 17, at 140.

26. *ahin*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. ¶¶ 36-37.

27. *Id.* ¶ 37.

28. *Id.*

29. Bleiberg, *supra* note 17, at 141.

30. See *ahin*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. ¶ 38 (citing the December 10, 1988 transitional section 16 of the Higher Education Act, which provided that “[m]odern dress or appearance shall be compulsory in the rooms and corridors of the institutions of higher education, preparatory schools, laboratories, clinics and multidisciplinary clinics. A veil or headscarf covering the neck and hair may be worn out of religious conviction”).

31. Bleiberg, *supra* note 17, at 141. As one note explains, the Constitutional Court held that the amendment to the Higher Education Act offended the freedom

constitutional values was a commitment to gender equality that was incompatible with the Islamic principles the headscarf symbolized.<sup>32</sup> Parliament passed a subsequent amendment to the Higher Education Act that implied a right to wear headscarves as a right to “choice of dress . . . that does not contravene the laws in force.”<sup>33</sup> The Constitutional Court upheld the amendment, but noted that it did not permit wearing a headscarf because the Court’s previous judgment had already held the headscarf to be incompatible with the Constitution.<sup>34</sup>

As this short history suggests, the ban evolved from legislative action to protect secularism (introduced by the NSC-controlled Parliament) to a policy insulated from challenge (from a differently-controlled Parliament); from a prophylactic measure to a constitutionally-mandated regulation necessary to secure secularism. The introduction of gender equality, as part of and independent of a defense of secularism, would become much clearer (and more important) in Leyla ahin’s case before the European Court of Human Rights.

## II. THE CASE OF LEYLA AHIN

Leyla ahin was a medical student who enrolled in the Cerrahpa a Faculty of Medicine at Istanbul University in 1998.<sup>35</sup> Later that year, Istanbul University issued a circular that notified students with beards or wearing headscarves that they would not be added to the list of registered students and could not attend lectures or tutorials.<sup>36</sup> Students defying this circular were subject to discipline. ahin, who had worn a headscarf throughout her time at a previous university in Turkey, was denied entrance to an oncology exam and then refused enrollment by the secretariat of the chair of orthopaedic traumatology.<sup>37</sup> ahin challenged the circular before the Istanbul Administrative Court, arguing that the ban infringed her Article 8

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of religion because it singled out one religious symbol (the headscarf) for state regulation rather than being neutral as to all forms of religious expression. *Id.* at 142.

32. Leila ahin, App. No. 44774/98, 2005-XI Eur. Ct. H.R. ¶ 39.

33. *Id.* ¶ 40.

34. *Id.* ¶ 41.

35. *Id.* ¶ 15.

36. *Id.* ¶ 16.

37. *Id.* ¶ 17.

right to respect for private and family life;<sup>38</sup> Article 9 right to freedom of thought, conscience, and religion;<sup>39</sup> Article 14 right to non-discrimination<sup>40</sup> under the ECHR as well as her right to education under Article 2 of the First Protocol to the ECHR.<sup>41</sup> The Istanbul Administrative Court dismissed her application, and the Supreme Administrative Court rejected her appeal.<sup>42</sup> ahin continued to wear a headscarf and was ultimately suspended from the university for a semester.<sup>43</sup> She returned to the Istanbul Administrative Court and petitioned for her suspension to be set aside, but her application was dismissed.<sup>44</sup> In 1999, ahin left Turkey and enrolled at Vienna University.<sup>45</sup>

ahin pursued her case before the European Court of Human Rights. A Chamber of the Court upheld the ban in 2004, finding no

38. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (“(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary . . .”).

39. See *id.* art. 9(1) (“Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”).

40. See *id.* art. 14 (“The enjoyment of rights and freedoms set forth in this Convention shall be secure without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

41. See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Mar. 20, 1952, 213 U.N.T.S. 262 (“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”). ahin’s claim under Article 2 of the First Protocol was that “there was no statutory basis for the circular” and that the university department issuing the circular had no regulatory authority. Leila ahin, App. No. 44774/98, 2005-XI Eur. Ct. H.R. ¶ 18.

42. *ahin*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. ¶¶ 19-20.

43. See *id.* ¶¶ 21-25 (describing the series of escalating disciplinary actions taken against ahin, culminating in her suspension).

44. *Id.* ¶ 25. ahin had been granted amnesty after disciplinary action had been taken against her by the university under a law that was ultimately struck down by the Constitutional Court of Turkey. *Id.* ¶ 26. On appeal, the Supreme Administrative Court held that amnesty made it unnecessary to examine the merits of ahin’s case. *Id.* ¶ 27.

45. *Id.* ¶ 28.

violation of ahin's right to religious expression under Article 9 and no distinct claims of merit under Articles 8 and 14 of the ECHR, or Article 2 of the First Protocol.<sup>46</sup> ahin requested reconsideration before the Grand Chamber.

#### A. THE MAJORITY OPINION

In a judgment issued in 2005, the Grand Chamber of the Court upheld the headscarf ban under Articles 8, 9, and 14 of the ECHR and Article 2 of the First Protocol to the ECHR.<sup>47</sup> Contrary to the Chamber's 2004 ruling, the Grand Chamber held that the ban restricted ahin's religious expression in violation of Article 9(1), but was justified under Article 9(2).<sup>48</sup> Article 9(2) states that the right to religious expression "shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."<sup>49</sup> The Court held that the ban was prescribed by law because it was clear before ahin attended classes that the university prohibited wearing a headscarf;<sup>50</sup> legitimate because the law furthered state interests in protecting the rights and freedoms of others and maintaining public order by promoting secularism;<sup>51</sup> and necessary in a democratic society because the ban embodied pluralism, secularism, and gender equality—principles fundamental to the Court's interpretation of Turkish democracy.<sup>52</sup>

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46. *Id.* ¶ 8; *see also id.* ¶¶ 106, 127, 157-65 (finding that Article 9 permits restrictions on religious practices in order to manifest respect for differing practices and that the right to education under Article 2 of the First Protocol is not necessarily violated by banning the headscarf from universities).

47. *See id.* ¶ 165 (dealing briefly with ahin's discrimination under Article 14, stating, first, that ahin "did not provide detailed particulars in her pleadings," and second, that "the reasons which led the Court to conclude that there has been no violation of Article 9 . . . incontestably also apply to the complaint under Article 14").

48. *Id.* ¶¶ 71-75, 99.

49. ECHR, *supra* note 38, art. 9(2).

50. *See ahin*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. ¶ 84 (stating that the law prescribing conduct must be sufficiently clear such that the consequences are foreseeable).

51. *See id.* ¶ 99 (noting that both parties agreed that the purpose of the law was to protect public order).

52. *Id.* ¶ 116.

Even though the Court's holding was based on religious expression, a discussion of gender equality pervades the opinion. The Court's attention to gender equality was not part of an Article 14 sex discrimination claim. Rather, ahin argued that the ban on headscarves required students to choose between their education and their religion and thus discriminated between believers and non-believers. Despite the absence of a gender equality argument offered by ahin, the Court relied on familiar, though poorly supported, assumptions about the harm to women that toleration of headscarves might cause. In the "History and Background" section of the opinion, the Court grounded the protection of secularism in Turkey's recognition of gender equality:

The defining feature of the [Turkish] Republican ideal was the presence of women in public life and their active participation in society. Consequently, the ideas that women should be freed from religious constraints and that society should be modernised had a common origin. Thus, on 17 February 1926 [Turkey's] Civil Code was adopted, which provided for equality of the sexes in the enjoyment of civic rights, in particular with regard to divorce and succession. Subsequently, through a constitutional amendment of 5 December 1934 (Article 10 of the 1924 Constitution), women obtained equal political rights to men.<sup>53</sup>

The Court proceeded to describe, in the terms used by the Supreme Administrative Court of Turkey, why "the headscarf [is] in the process of becoming the symbol of a vision that [is] contrary to the freedoms of women."<sup>54</sup> The Court defined secularism as the freedom from religion (as well as the right to subscribe to religious belief) and the duty of the state to endorse no religion.<sup>55</sup> The headscarf, the Court reasoned, undermines that choice, and symbolizes an "imposed" and "mandatory" tenet of Islam that is contrary to secularism.<sup>56</sup> The religious values that mandate that women wear a headscarf are "incompatible with those of

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53. *Id.* ¶ 32.

54. *Id.* ¶ 93.

55. *See id.* ¶ 39 (distinguishing a right to choose whether to subscribe to religious beliefs from a right to wear a specific religious attire).

56. *See id.* (explaining that, in a Muslim-majority country like Turkey, the official endorsement of a headscarf would result in discrimination against secular Muslims and non-Muslims who declined to wear a headscarf).

contemporary society”—a modern, progressive society where secularism rather than religion shapes women’s status.<sup>57</sup> The Court suggested that the ban creates room for women’s freedom of expression, whereas religion conscripts women into the service of religious duty.<sup>58</sup> More subtly, the majority opinion’s treatment of Turkey’s history links the promotion of a secular regime (the primary justification for the ban) with greater civil freedoms for women; for example, the Court suggests that only a secular government would have granted women the right to vote and equal rights in the family so early in the Republic’s life. The Court framed the ban as a policy designed to protect the rights of women.

But the Court did not fully explain how wearing a headscarf and the “particularities of Islam” might subordinate women. The Court suggested that the headscarf has an inherently coercive effect, regardless of whether the woman wearing it claims to have chosen freely to do so.<sup>59</sup> The Court made this point in describing *Dahlab v. Switzerland*, a case in which a Swiss law prohibited an elementary school teacher from wearing a headscarf while teaching.<sup>60</sup> The Court repeated reasoning from *Dahlab*: “[The Court] questioned whether [the headscarf] might have some kind of proselytizing effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality.”<sup>61</sup> Although the Court did not explain the incompatibility between gender equality and certain forms of religious observance, or describe the “religious precept” at work, the Court’s statements depicted the headscarf as a symbol of the patriarchal family where women live in a status subordinate to their fathers, husbands, and

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57. *Id.* ¶ 39.

58. *Id.* See generally Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women’s Equality Under International Law*, 45 COLUM. J. TRANSNAT’L L. 367, 374-75 (2007) (offering a critique of the relationships between secularism, religion, and women’s rights).

59. *ahin*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. ¶ 111 (“[M]easures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who did not practise their religion or who belonged to another religion were not considered to constitute interference for the purposes of Article 9 of the Convention.”).

60. *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, 463.

61. *ahin*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. ¶ 111.

sons.<sup>62</sup> The effect of that secondary status is to reduce opportunities for women in education, employment, and other areas of public life.<sup>63</sup> As suggested by the Court, the proselytizing effect is the headscarf's ability to communicate this subordination to all that view it and to encourage Muslim women (and presumably Muslim men) to adhere to those beliefs.

The ban, following from the Court's reasoning, protects women from a set of practices that would relegate women to a private, male-controlled sphere. This characterization of Islam (as well as the headscarf) embeds a threat to gender equality that is distinctly substantive in nature. The Court's focus on the headscarf's effects, both on the individual woman and on society as a whole, depends on a vision of what a state must do to promote women's full equality in public life (here, by banning certain items of religious dress). In this way, the Court used substantive equality as a legitimating principle for the ban, the enforcement of which, the Court intimated, creates a society more hospitable to women's rights.

#### B. THE DISSENTING VIEW

Judge Tulkens, the sole dissenting judge in *ahin*, suggested a competing view of the ban. First, Judge Tulkens criticized the majority opinion for the dearth of its reasoning:

[W]hat, in fact, is the connection between the ban and sexual equality? The judgment does not say. Indeed, what is the signification of wearing the headscarf? . . . . It is not the Court's role to make an appraisal of this type—in this instance a unilateral and negative one—of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant.<sup>64</sup>

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62. See Pinar Ilkcaracan, *Islam and Women's Sexuality: A Research Report from Turkey*, in GOOD SEX: FEMINIST PERSPECTIVES FROM THE WORLD'S RELIGIONS 61, 63-64 (Patricia Beattie Jung, Mary E. Hunt & Radhika Balakrishnan eds., 2001) (noting how Islamic beliefs as practiced may accord women secondary status and limit women's opportunities).

63. See generally Scott, *supra* note 1, at 153, 155, 157, 168 (describing perceptions of Islam and the headscarf, including misunderstandings by non-Muslims about the meaning or significance of the headscarf).

64. *ahin*, App. No. 44774/98, 2005-XI Eur. Ct. H.R., ¶¶ 11-12 (Tulkens, J., dissenting).

If a headscarf in fact undermines gender equality, Judge Tulkens, asked where is the majority's proof that the headscarf ban has promoted women's equality in Turkey? The dissent expressed concern that the majority's conception of Islamic belief ignored the significance that the headscarf has for the woman wearing it and fashioned a false choice between religious freedom and gender equality.<sup>65</sup> Judge Tulkens explained further what troubled her about the majority opinion in this regard:

I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. "Paternalism" of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy . . . .<sup>66</sup>

Judge Tulkens argued that it is not religious belief that endangers women's equality, but the state's conscription of their expressional choices. Without "concrete examples" showing how gender equality (or secularism) is at risk without the ban, its known impact is that women like Leyla ahin are subjected to state paternalism that limits their personal choices.<sup>67</sup>

Judge Tulkens was also unconvinced by the Court's argument that the headscarf has a coercive effect on other women. Specifically, Judge Tulkens stated that the analogy to *Dahlab* appeared strained given the different facts of the two cases.<sup>68</sup> Central to the Court's reasoning in *Dahlab* was the influence of a state school teacher over

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65. *Id.* See generally Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L’Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 COLUM. J. GENDER & L. 199, 254 (2007); Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women’s Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 334-35 (2005).

66. *ahin*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. ¶ 12 (Tulkens, J., dissenting).

67. *Id.* ¶ 5.

68. See *id.* ¶¶ 7-8 (distinguishing *Dahlab* by noting that ahin was not a teacher of young, impressionable children, nor, as a student, had she "voluntarily taken [a] post[ ] in a neutral environment").

young children in compulsory primary education,<sup>69</sup> and the petitioner's choice to teach in a state school system that has a well-established interest in pluralism.<sup>70</sup>

The dissent went beyond criticizing the majority's reasoning as deficient. The dissent argued that the ban itself may have worrying consequences for women's equality. According to Judge Tulkens, the ban may work to women's disadvantage by reducing women's access to higher education and prohibiting some observant, Muslim women from seeking a university education where "the true meaning of [secularism and equality] can take shape and develop."<sup>71</sup> The dissent concluded that exclusion from higher education, and the resulting obstacles to achieving professional success, may have consequences for women's equality more detrimental than the repeal of the headscarf ban.

But like the majority, Judge Tulkens offered no proof of the ban's potential impact on women, other than to suggest that women like *ahin* who resist the ban and are thus excluded from education are emblematic of the ban's consequences. Both the dissent and the majority call for the recognition of women's experience in a society with or without the ban and reach opposite conclusions. Both assert that their respective conception of equality best promotes a more just society for women. In the next Part, this Article tests those conclusions by examining the gender equality movement in Turkey and campaign to incorporate international human rights norms as part of Turkey's plan to accede to the European Union.

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69. *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, 45810 (comparing the effect of a teacher wearing a headscarf on the student versus the student wearing a headscarf).

70. *Id.* at 459.

71. *ahin*, App. No. 44774/98, 2005-XI Eur. Ct. H.R., ¶¶ 18-19 (Tulkens, J., dissenting). Fatma Gök and Deniz Ilgaz describe women's education levels in Turkey as sub-par in comparison to men's: for example, the illiteracy rate for women, at least in 2003, was three times that of men's. Fatma Gök & Deniz Ilgaz, *The Right to Education*, in HUMAN RIGHTS IN TURKEY 130, 134 (Zehra F. Kabasakal Arat ed., 2007); see also COMMISSION STAFF WORKING DOCUMENT, TURKEY 2008 PROGRESS REPORT 20 (May 11, 2008), available at <http://www.cor.europa.eu/cor/cms/ui/ViewDocument.aspx?contentid=66f3aea1-d9ac-4cd2-b871-0eb1a4782f54> [hereinafter TURKEY PROGRESS REPORT] (noting "[w]omen's access to education is the lowest among the EU Member States").

### III. THE DUAL ROLE OF SUBSTANTIVE EQUALITY

*ahin* does not indicate where one might look to understand these competing accounts of what women's lives are like. CEDAW has been offered as a lens through which to examine what serves women's interests.<sup>72</sup> As the primary international convention on women's rights, CEDAW encapsulates (and helped shape) the meaning of substantive equality.<sup>73</sup> In describing the object and purpose of CEDAW, General Recommendation 25 adopted by the CEDAW Committee makes clear that CEDAW aims to eliminate *de jure* and *de facto* discrimination.<sup>74</sup> The Recommendation accords *de facto* equality and substantive equality the same meaning in that both are strategies seeking to "achieve equality of result" and to redistribute resources and power between men and women.<sup>75</sup> For women's rights advocates disappointed by the limits of formal equality, substantive equality presents an opportunity to recognize women's differences from men as a source of continuing disadvantage even if law accords men and women the same rights or status.<sup>76</sup>

CEDAW's embrace of substantive equality has influenced national definitions of equality and domestic gender debates.<sup>77</sup> This

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72. Bennoune, *supra* note 58, at 375, 402-03 (describing CEDAW as the "international yardstick" for measuring a country's success in eliminating discrimination against women).

73. See Rebecca J. Cook & Susannah Howard, *Accommodating Women's Differences Under the Women's Anti-Discrimination Convention*, 56 EMORY L.J. 1039, 1043-48 (2007) (explaining how CEDAW envisions transformative and substantive equality); see also Fredman, *supra* note 6, at 116 (noting that CEDAW, by its very title, does not seek to abolish all gender *distinctions*, but rather to eliminate *discrimination*).

74. General Assembly, *Report of the Committee on the Elimination of Discrimination Against Women*, ¶ 4, U.N. Doc. A/59/38/Annex (2004).

75. *Id.* ¶ 9.

76. See Fredman, *supra* note 6, at 115-16 (noting that "[e]quality as transformation does not aim at a gender neutral future, but one which appropriately takes gender into account"); see also Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J.L. & FEMINISM 345, 356 (2002) ("Rights-based narratives are not the only powerful narratives—and in some cultural contexts they may be much less effective than in others—but for many of the world's women, they offer the best way to buttress arguments for change.").

77. See Mattias Kumm, *Democratic Constitutionalism Encounters*

influence is particularly strong when national institutions and instruments require that domestic law comply with international standards.<sup>78</sup> Under the Turkish Constitution, for example, international law supersedes national law when the two conflict,<sup>79</sup> and the Constitutional Court of Turkey has been described as “progressive” in referencing CEDAW in its jurisprudence.<sup>80</sup>

Two campaigns came together to strengthen support for gender equality principles: the movement for women’s rights led by local activists and accession to the European Union. Both agendas rely on CEDAW and frame legal reforms for women as equality issues. Substantive equality, however, may sit uncomfortably with the headscarf issue because the focus on equality might mask the deeper implications of the ban, such as the extent to which a government may repress religious expression for political ends. While the accession and the women’s rights agendas revolve around international alliances and the revision of legislation and the Constitution, the ban has a complicated relationship with women’s experiences and state priorities.

#### A. GENDER EQUALITY AGENDA

Early gains in civil and political rights for women took place as part of a nation-building project for the Republic and due to agitation from women’s rights advocates. More attentive to women’s rights than most governments of the region at that time, Turkey granted complete suffrage to women in 1934 after women mobilized to pressure Atatürk and his single-party government for suffrage.<sup>81</sup>

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*International Law: Terms of Engagement*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 256, 277 (Sujit Choudhry ed., 2006) (arguing that human rights treaties exert a moral influence on the interpretation of domestic rights and their legitimacy is premised on “[o]utcome related reasons”).

78. *Id.* at 280.

79. TURK. CONST. art. 90 (“International agreements duly put into effect bear the force of law.”)

80. Yasemin Çelik Levin, *The Effect of CEDAW on Women’s Rights*, in HUMAN RIGHTS IN TURKEY, *supra* note 17, at 202, 208 (Zehra F. Kabasakal Arat ed., 2007). At the same time, the Constitutional Court has been criticized for employing an overly formalistic account of equality, despite being a signatory to CEDAW. Hilal Elver, *Gender Equality from a Constitutional Perspective: The Case of Turkey*, in THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 285, 289 (Beverly Baines & Ruth Rubio-Marin eds., 2004).

81. See Yildiz Ecevit, *Women’s Rights, Women’s Organizations, and the State*,

Property law reform gave women increased rights of ownership, and liberalized family laws eliminated polygamy and amended the grounds for divorce to be the same for women and men.<sup>82</sup> These early reforms in the Kemalist era envisioned women as protectors of secularism, and granted women rights as a means to “strike at the foundations of the religious hegemony.”<sup>83</sup>

Continued discrimination in law and gender segregation in Turkish society signaled the prevalence of *de jure* as well as *de facto* inequality.<sup>84</sup> Reform strategies pursued by activists fared poorly until the 1990s when the gender equality movement’s campaign to implement the provisions of CEDAW<sup>85</sup> found support in Turkey’s agenda to accede to the European Union.<sup>86</sup> A well-established human rights regime is at the core of the requirements for accession.<sup>87</sup> Turkey’s commitment to constitutional revision and ratification of international human rights agreements reflects its accession agenda.<sup>88</sup>

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*in* HUMAN RIGHTS IN TURKEY, *supra* note 17, at 187, 188-91 (Zehra F. Kabasakal Arat ed., 2007) (summarizing the history of the Turkish women’s suffrage movement).

82. Yildirim, *supra* note 17, at 357-58.

83. Pinar Ikkaracan, Women for Women’s Human Rights, *A Brief Overview of Women’s Movement(s) in Turkey (and the Influence of Political Discourses)*, at 5, Sept. 1997.

84. Levin, *supra* note 80, at 204 (noting continued gender segregation in Turkish society, particularly in the workplace and in family life).

85. See Ecevit, *supra* note 81, at 199 (referencing about 300 women’s rights organizations engaged in campaigns to promote compliance with and CEDAW).

86. See *id.* at 199-200 (listing withdrawal of reservations to CEDAW’s Optional Protocol and the enactment of a new Labor Code with more favorable provisions for women as a step taken to build a case for Turkey’s accession to the European Union).

87. See *European Council in Copenhagen, Conclusions of the Presidency*, June 21-22, 1993, at 13, available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/72921.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf) (last visited Mar. 23, 2009) (emphasizing that the standards by which Turkey, or any other country seeking membership, will be judged for admittance to the European Union include: adhering to the rule of law, maintaining a functional market economy, stabilizing democratic institutions, and promoting human rights principles); see also Treaty on European Union art. J.1(2), Feb. 7, 1992, 1992 O.J. (C 191) (stating the objectives of the foreign and security policy of the European Union, including promoting democracy, rule of law, human rights, and fundamental freedoms); Arat, *supra* note 24, at 97 (stating that since 1999, one-third of Turkey’s Constitution has been amended in order to comply with the Copenhagen criteria); Denli, *supra* note 17, at 97 (noting that most of Turkey’s constitutional reforms address “freedom of religion and consciousness, freedom of expression, and freedom of association”).

88. See TURKEY PROGRESS REPORT, *supra* note 71, at 6-7 (recounting steps that

Turkey ratified CEDAW's Optional Protocol in 2002,<sup>89</sup> and designed partnerships between national machinery and international bodies to help the country meet its international obligations. Turkey's Directorate General on the Status and Problems of Women received support from the United Nations Development Program to create a new set of institutions—for example, the National Program for the Enhancement of Women's Integration in Development Project.<sup>90</sup> The World Bank sponsored a project with the Directorate to study aspects of workplace discrimination against women and sexual harassment.<sup>91</sup> This activism gained momentum as Turkish women's rights activists identified with global feminism:

Women from different NGOs participated in the Fourth World Women's Conference in Beijing in 1995. Particularly important in this respect was the Habitat Conference held in Istanbul in 1996. This conference allowed many women's organizations to acquire pro-feminist perspectives, revise their agendas, and strengthen their resolve.<sup>92</sup>

State support for the implementation of CEDAW translated to law reform efforts on the national level<sup>93</sup> with the reform of the penal and civil codes and constitutional amendments as its primary objectives.<sup>94</sup> The Turkish government amended the Constitution in two significant ways: First, the equality article now states that “[m]en and women shall have equal rights” and obligates the state to

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Turkey has taken to meet the criteria for accession and noting areas that require improvement).

89. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (Oct. 15, 1999); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination, Signatures and Ascensions, *available at* <http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm> (last visited Mar. 6, 2009).

90. *See* Levin, *supra* note 80, at 207 (noting that the goal of the National Program for the Enhancement of Women's Integration in Development Project is “to change the negative images of women in all fields of life and to integrate women's issues into development plans”).

91. *Id.* at 211.

92. Ecevit, *supra* note 81, at 201.

93. *See generally* Levin, *supra* note 80 (citing adoption of penalties for “custom killings” as an attempt to comply with CEDAW).

94. *See id.* at 210 (noting that the revised penal code of 2004 addressed several conflicts with Article 2 of CEDAW).

“realize this equality in life.”<sup>95</sup> Second, a right guaranteeing equality between husbands and wives in a family was added.<sup>96</sup> Effective in 2002, significant changes to the Civil Code were made as a part of the country’s CEDAW reform agenda: For example, amendments deleted references to a husband’s legal status as “the head of the family”; gave spouses equal rights over marital property; and abolished the legal distinction of illegitimate children.<sup>97</sup> Revision of the Penal Code followed in 2004: amendments included making sexual harassment and marital rape crimes; increasing sentences for sexual crimes; removing references to consensual rape and the defense of marriage to rape; redefining customary killings as aggravated homicide; and removing legal distinctions between virgin, non-virgin, married, and unmarried women.<sup>98</sup> These reforms do not appear to be efforts to purge the civil or penal code of its Islamic character. Instead, these projects were intended to meet the international expectations of how law should accord status to women in a member state of the European Union.

Absent from this agenda is the headscarf; it appears that the ban does not readily figure into this campaign as helping women achieve substantive equality or, alternatively, threatening women’s equality.<sup>99</sup> This point is illustrated in Turkey’s 2008 Progress Report

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95. TURK. CONT. art 10.

96. TURK. CONT. art. 41; *see also* Levin, *supra* note 80, at 208 (noting the Constitutional Court’s decision to decriminalize adultery because Turkish law had defined different standards for men and women).

97. Women for Women’s Human Rights, The Campaign for Full Gender Equality in the Civil Code, [http://www.wwhr.org/civilcode\\_reform.php](http://www.wwhr.org/civilcode_reform.php) (last visited Mar. 23, 2009); *see also* Yildirim, *supra* note 17, at 365-66 (noting that the new Civil Code establishes a married couple’s right to choose the form of ownership over marital property).

98. *See generally* Women for Women’s Human Rights, The Campaign for the Reform of the Penal Code from a Gender Perspective, [http://www.wwhr.org/penalcode\\_reform.php](http://www.wwhr.org/penalcode_reform.php) (last visited Mar. 23, 2009).

99. Women for Women’s Human Rights, one of Turkey’s leading women’s rights groups, embarked on “the most widespread, sustainable and comprehensive” human rights education campaign for women, and none of the materials on its website mention the ban. Women for Women’s Human Rights, About Us, [http://www.wwhr.org/biz\\_kimiz.php](http://www.wwhr.org/biz_kimiz.php) (last visited May 14, 2009); *see also* Levin, *supra* note 80, at 209-10 (explaining that Turkey’s National Action Plan emphasized “critical areas of concern,” of which the headscarf ban—its continued enforcement or its repeal—was not one); Women for Women’s Human Rights, Human Rights Education Program for Women (HREP), <http://www.wwhr.org/hrep.php> (last visited Mar. 23, 2009) (listing the objectives of the organization’s

issued by the Commission to the European Parliament and the Council Enlargement on obstacles to Turkey's accession to the European Union. The report notes that "the legal framework guaranteeing women's rights and gender equality is broadly in place" but that "significant efforts are needed" to prevent honor killings and domestic violence and to reduce educational and employment disparities between men and women.<sup>100</sup> The headscarf is mentioned only once in the context of a Constitutional Court case described below. This lone reference is not made in terms of equality or women's rights, but is expressed as a concern with the freedom of association of political parties.<sup>101</sup>

### B. CEDAW AND THE HEADSCARF BAN

The CEDAW Committee has considered the ban, and its treatment of the issue looked similar to the arguments advanced by the *ahin* dissent. At the 32nd Session of the CEDAW Committee in January 2005, Turkey presented its fourth and fifth periodic reports to the Committee. The CEDAW Committee praised Turkey for its ratification of international documents like CEDAW's Optional Protocol and noted Turkish women's representation in international organizations such as the Commission on the Status of Women.<sup>102</sup> Several members of the Committee questioned Turkish state representatives about the impact of the headscarf ban and expressed concerns about its potential consequences. For example, Committee Member Françoise Gaspard "expressed concern that [the ban was]

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human rights education campaign for women in Turkey, such as informing them of their constitutional, civil, and economic rights); Women for Women's Human Rights, Coalition for Sexual and Bodily Rights in Muslim Societies (CSBR) Sexuality Institute 2008, 16-23 Aug. 2008, Kuala Lumpur, Malaysia, <http://www.wwhr.org/news.php?detay=25> (listing issues that the organization will address to promote understanding of sexuality in Muslim societies, such as honor crimes, forced marriage, and sexual health and reproduction rights).

100. TURKEY PROGRESS REPORT, *supra* note 71, at 21.

101. *See id.* at 6-7 (reporting that in February of 2008, the Parliament amended Article 10 and Article 42 to lift the ban on headscarf for university students, but later that year the Constitutional Court annulled the amendments for offending "the secular nature of the state").

102. *See* Committee on the Elimination of Discrimination against Women, *Summary Record of the 678th Meeting*, ¶¶ 3, 7, 14, U.N. Doc. CEDAW/C/SR.678 (Jan. 20, 2005) (reporting, for example, that the Ministry of Labour and Social Security had distributed grants in order to bolster employment of various underrepresented groups, including women).

incompatible with the right to equal access to education and employment.”<sup>103</sup> Committee Member Salma Kahn questioned why headscarves were singled out as contraband religious symbols, which could offend a woman’s right to freedom of religious expression.<sup>104</sup> Committee Member Mary Regina Tavares da Silva asked if the ban was itself a form of oppression, particularly for women in rural areas who predominantly wear headscarves.<sup>105</sup> In response to the Committee’s questions about the ban’s potential to deter women from seeking higher education, the Turkish government’s representative stated that “[i]n Turkey there are no legal obstacles for girls to go to school; on the contrary, there are efforts to increase the number of girls that go to school.” After describing the regulations prohibiting beards (as well as headscarves), the representative further commented: “There is no discrimination between men and women in the regulations regarding outfits. The rules to be followed by both men and women are clearly stated.”<sup>106</sup>

The state’s justification is one based on principles of formal equality: The ban treats men and women equally because both sexes are denied the right to manifest certain religious beliefs. This explanation appears out of step with the CEDAW Committee’s concern that laws respect women’s substantive equality.<sup>107</sup> However, the Committee’s Concluding Comment does not note this, and does not draw a conclusion about the effect of the ban.<sup>108</sup> The Concluding

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103. *Id.* ¶ 13.

104. See Committee on the Elimination of Discrimination against Women, *Summary Record of the 677th Meeting*, ¶ 49, U.N. Doc. CEDAW/C/SR.677 (Jan. 20, 2005) (querying how officials hoped to integrate rural women into mainstream society on an equal basis if they were banned from wearing headscarves in public schools and hospitals).

105. *Id.* ¶ 13.

106. Committee on the Elimination of Discrimination against Women, Pre-Session Working Group, *Responses to the List of Issues and Questions for Consideration of the Combined Fourth and Fifth Periodic Reports*, ¶ 26, U.N. Doc. CEDAW/PSWG/2005/I/CRP.2/Add.7 (Jan. 10-28, 2005).

107. See Committee on the Elimination of Discrimination Against Women, *Concluding Comments*, ¶ 34, U.N. Doc. CEDAW/C/TUR/4-5 (Feb. 15, 2005), ¶ 34 (questioning whether the legal gains for women’s rights result in social change by noting an NGO survey finding that 55% of Turkish women need their husband’s permission before leaving the home).

108. See generally Women for Women’s Human Rights, Shadow NGO Report on Turkey’s Fourth and Fifth Combined Periodic Report to the Committee on the Elimination of Discrimination Against Women, <http://www.wwhr.org/files/WWHRNewWaysShadowReportTurkey.pdf> (last visited Mar. 23, 2009) (assessing

Comment asked for “the State party to monitor and assess the impact of the ban on wearing headscarves and to compile information on the number of women who have been excluded from schools and universities because of the ban.”<sup>109</sup> The Committee made no recommendation as to the ban’s continued enforcement. Instead, the comment asked the Turkish government to gather evidence of the ban’s effect on women’s equality—evidence that the majority and dissent in *ahin* presumed exists but may be difficult to capture fully using an equality perspective.<sup>110</sup>

#### IV. THE PROBLEM WITH SUBSTANTIVE EQUALITY?

Substantive equality may not explain how women are affected by the headscarf ban. First, substantive equality is employed too narrowly and too broadly in this situation. The application of substantive equality may be too broad because characteristics in addition to gender, such as rural or urban residence and socio-economic status, may prove instructive as to the ban’s effect.<sup>111</sup> For example, between 62% and 69% of all Turkish women wear a headscarf,<sup>112</sup> and within that group is a diversity of views and lifestyles. Closer examination of that population may show divergent reasons for why the ban affects some women more distinctly than others. Pinar Ikkaracan has demonstrated that complexity by noting the role of urbanization and migration to cities by predominantly Islamic women and the lack of social and economic support for

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the substantive impact of constitutional amendments regarding gender equality, but not addressing the headscarf ban).

109. *Concluding Comments*, *supra* note 107, ¶ 28.

110. *Cf.* AKDER, *A Statistical Examination of the Condition of Women in Turkey and the Impact of the Headscarf Ban on Turkey’s Gender Equality Ranking* (2008), <http://www.ak-der.org/?p=reports&lang=eng&m=a8445719836f2d5e8b51986410e14728> (suggesting that because two thirds of all women over the age of 17 wear a headscarf and substantial amounts of female students are adversely affected by the headscarf ban).

111. *See* Dhanmanjiri Sathe, *Talking Headscarves in Turkey*, INDIAN EXPRESS, Aug. 5, 2007, <http://www.indianexpress.com/news/Talking-headscarves-in-Turkey/208766> (explaining that, “[t]he hijab, or headscarf, is more of a class issue than a gender issue”).

112. *See* AKDER, *supra* note 110 (citing a 2006 report by TESEV Religion Society and Politics in Changing Turkey and a 2007 report by Milliyet/KONDA Research Center).

women moving to urban areas for work. The women's rights group, AKDER, recently issued a report that illustrates the ways in which the ban harms already marginalized women by further exacerbating access to the workplace for low-income women or access to urban resources for rural women.<sup>113</sup> Sub-populations of women wearing headscarves may share characteristics that are stronger indicators of their disadvantage than gender.

A substantive equality analysis may be too narrow as well. A return to the Court's reasoning in *ahin* highlights the point. What offends equality principles is what diminishes women's status *as women*. The majority's apparent focus is on the ways in which religion subjects women to stigma based on their gendered characteristics—the role that Islam presupposes for women or the effect that women would feel viewing the headscarf on other women. The dissent makes similar claims about the specific gendered effect of the ban: that women's exclusion from education will perpetuate attitudes of women's inferiority, and more education *for women* will result in greater societal equality. The analysis is too narrow because it fails to adequately weigh the implications of repressive state conduct—in the name of secularism—on women (or does not weigh the implications of repressive state conduct at all). The Court's reliance on substantive equality may not elucidate the consequences of the ban on speech that challenges state power (however configured) and could potentially undermine the Court's intention to foster an environment where women's rights thrive.<sup>114</sup>

Second, the promise of substantive equality, as embodied in CEDAW, is that an evaluation of women's experiences can solve problems of over- and under-inclusion. But this has been easier said than done in the headscarf debate. Some have suggested the problem

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113. *See id.* (suggesting that women who wear the headscarf are not hired often by private firms because employers stereotype them as being aligned with fundamentalist Islam).

114. *See* JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 321, 341-43 (2006) (noting the consequences of feminism's failure to consider the costs of advancing a feminist agenda); *see also* Brenda Cossman et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 *COLUM. J. GENDER & L.* 601, 608 (2003) (Janet Halley writing that the feminist movement's inability to "see injury to men by women" and criticizing "this refusal" as "a textbook case of bad faith").

is with CEDAW.<sup>115</sup> Beyond a feminist critique of the adequacy of rights,<sup>116</sup> it is not altogether clear how context should be evaluated in determining what reforms might redress women's lived discrimination. The court in enforcing the ban (or the legislature in attempting to repeal it) is one place to look.<sup>117</sup> Indeed, the type of substantive equality envisioned by CEDAW and echoed in *ahin* works at the behest of state power and its successful recognition depends on the state.<sup>118</sup> But implementing measures to promote gender equality in order to be in compliance with CEDAW may not avoid state co-optation of gender equality for political purposes.<sup>119</sup> As demonstrated by the Court in *ahin*, a state may claim that it is acting to further women's equality, but the failure to justify its

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115. See Brooks, *supra* note 76, at 351 (suggesting that CEDAW might be unresponsive to the headscarf debate because the equality norms in CEDAW are patterned after the rights that have been important to men, which are by and large civil and political rights); Choudhury, *supra* note 65, at 253 (arguing that equality rights of the kind found in CEDAW do not adequately recognize women's rights to religious and cultural expression).

116. See Tracy Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 103-04 (1996) (proposing that global feminists have spent much of their advocacy efforts on considerations of the adequacy of rights rather than the justification for implementing those rights).

117. See Belelieu, *supra* note 21, at 585 (observing that while the Constitutional Court and secular establishment have supported banning headscarves, the legislature has amended the Higher Education Act twice to permit freedom of choice of dress at universities).

118. Cf. Tracy E. Higgins, *Are Women Human? And Other International Dialogues By Catharine A. MacKinnon*, 18 YALE J.L. & FEMINISM 523, 538 (2006) (book review) ("[N]o matter how good the legal definition of equality might be, no matter how fully the Aristotelian concept of equality is repudiated in favor of substantive equality, the unequal conditions . . . women live [in] will not change without the exercise of state power, something that women do not fully control").

119. See Andrew Byrnes, *Toward More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 189, 192 (Rebecca J. Cook ed., 1994) (noting that states comply with human rights law for any number of self-serving reasons; for example, a state may seek to be in compliance with human rights law to minimize pressure from other states or civil society or the state desires the prestige and the status that results from appearing to be gender equality compliant); see also Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT'L L. 759, 774-76 (2007) (proposing that international law compliance increases respect from other countries).

actions using a litmus test of outcome or results may mean that women's rights are either too narrowly or too broadly understood.<sup>120</sup>

Two recent cases decided by the Constitutional Court of Turkey are illustrative. The first decision struck down constitutional amendments that would have created an exception for students wishing to wear a headscarf.<sup>121</sup> The amendments were proposed by the ruling party in government, the Adalet ve Kalkınma Partisi ("AK Parti"), which has supported measures to overturn the ban.<sup>122</sup> The Constitutional Court struck down the amendments by relying on an implied, constitutional power to annul provisions that are contrary to secularism. This aspect of the court's decision has been criticized as overstepping its authority: Article 148 of the Turkish Constitution appears to give the court power to review the procedure of constitutional amendment, but not the substance of the amendments.<sup>123</sup> The second case was brought by the public prosecutor against the AK Parti, charging that the AK Parti's actions in proposing the constitutional amendments were contrary to the

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120. See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 341-42 (2006) (contrasting governance feminism's focus on stringent criminal enforcement with international environmental law, which concerns principles that are "negotiated" and "rearranged" according to evolving interests).

121. Law Number 5735, on Amending Certain Articles in the Constitution of the Republic of Turkey art. 1-2. The law would have added a clause to Article 42 of the Constitution of Turkey, Right and Duty to Training and Education: "No one shall be prevented from exercising the right to higher education for any reason not explicitly set forth in the law. Restrictions to the exercise of this right shall be determined by the law." *Id.* The phrase, "and in utilization of public services of every sort," would have been added to Article 10, Equality before the Law, to conclude the sentence: "State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings." *Id.*; see also Greenville Byford, *In Crisis*, NEWSWEEK, June 18, 2008, available at <http://www.newsweek.com/id/142058> (arguing that the amendments' language did not specifically mention the headscarf and therefore would not only protect women's right to wear a headscarf, but also the right not to wear a headscarf).

122. See Noah Feldman, Op-Ed., *Veiled Democracy?*, N.Y. TIMES, Feb. 8, 2008, at A19 (noting that the introduction of the amendments may have been poorly timed and politically risky).

123. See Metin Arslan, *Turkey Heads Toward Juristocracy With Court's Scarf Ruling*, TODAY'S ZAMAN, Oct. 24, 2008, <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=156798> (reporting the court's reasoning that when legislation is against "the fundamental principles of the Republic" they may hear appeals regarding substance as well as procedure).

principle of secularism.<sup>124</sup> In a close decision, the Constitutional Court dismissed the case against the AK Parti, allowing it to remain in power, but penalized the party by reducing its public financing by half.<sup>125</sup> The case, which could have de-seated the democratically-elected governing party, threatened accession negotiations with the European Union, had a chilling effect on effort to reform the constitution,<sup>126</sup> and highlighted the fragility of Turkish politics.<sup>127</sup>

In both cases, the Constitutional Court invoked gender equality in the same vague fashion as the *ahin* Court,<sup>128</sup> and in annulling the amendment, the Court relied explicitly on *ahin* as justification. Could the *ahin* Court have predicted that its decision would be the basis of national court decisions that would draw Turkey into a constitutional crisis? Probably not; a gender equality argument may highlight background conditions related to improving women's status as women, but may also justify policies that threaten the democratic process. "Authoritarian secularism"<sup>129</sup> is not just a

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124. hsan Da i, *AK Party Survives Closure Case: What is Next?*, TODAY'S ZAMAN, Aug. 25, 2008, <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=151167>.

125. See Sabrina Tavernise & Sebnem Arsu, *Court Declares Turkey's Ruling Party Constitutional but Limits its Financing*, N.Y. TIMES, July 31, 2008, at A6 (describing the background of political and social tension in Turkey at the time of the ruling).

126. See *European Union Presses Turkey for Deeds, Not Words*, TODAY'S ZAMAN, Dec. 4, 2008, <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=160580&bolum=102> (quoting Dutch Christian Democrat Parliamentarian Ria Oomen-Ruijten: "a clear signal to be given by the Turkish government for proceeding with reforms, which have slowed down in the past three years, will be for the good of both the European government and Turkey").

127. See TURKEY PROGRESS REPORT, *supra* note 74, at 6-7, 69 (noting the case brought against the AK Parti and the concerns it raised about state intervention in political officials' rights to freedom of expression and association); see also Sabrina Tavernise, *Turkey's High Court Overtuns Headscarf Rule*, N.Y. TIMES, June 6, 2008, at A6 (predicting a "showdown between Turkey's secular elite – its military, judiciary and secular political party – and [Turkey's prime minister], an observant Muslim with an Islamist past").

128. See Ergun Özbudun, *Reasoning for the Headscarf Decision: New Constitution is Now a Must*, TODAY'S ZAMAN, Oct. 26, 2008, <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=156932> (criticizing the Constitutional Court's decision for being undemocratic).

129. TASPINAR, *supra* note 15, at 7-8 (employing the phrase "authoritarian secularism" to illustrate how the headscarf ban may suppress religious expression and thereby threaten democracy).

concern for those aligned with Islamic politics.<sup>130</sup> Advocates for gender equality have felt the sting of political censorship. Women's rights groups aligned with leftist politics have been under state surveillance, had their offices raided, and their members arrested<sup>131</sup> and imprisoned.<sup>132</sup>

## CONCLUSION

This Article has argued that the gender equality arguments relied upon in *ahin* reveal problems with applying substantive equality to the headscarf debate in Turkey. The intent of this Article is not to critique compliance with international treaties like CEDAW or to suggest that substantive equality cannot be a valuable, normative tool. The invocation of substantive equality may serve well some reform projects and provide support for amendments guaranteeing gender equality in a constitution and in the civil and penal codes. But substantive equality, applied without substance, may do little to assist its intended beneficiaries and may obscure complex questions of political importance for women (and men). Understanding equality in context is a difficult task and ignoring law's coercive aspects or distributive consequences may undermine the very outcome that women's rights reform seeks to achieve.<sup>133</sup>

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130. Kavakçi v. Turquie, Requête. No. 71901/01, Eur. Ct. H.R., *available at* <http://www.echr.coe.int/echr/> (last visited Feb. 6, 2009). A recent case of the European Court of Human Rights overturned the decision of the Constitutional Court of Turkey dissolving the Fazilet party based on allegations of anti-secular activities and to strip its members elected to Parliament of their seats. *Id.* The charge was supported by evidence introduced by the Principal State Counsel that Merve Kavakçi, a newly-elected member, wore a headscarf when taking the oath of office. The European Court of Human Rights did not rule on grounds of religious expression, but held for Kavakçi on the grounds that the Court's decision violated Article 3 of Protocol 1 of the Convention, the right to free elections. *Id.* The Court held that the sanctions imposed on the applicants were not proportionate to the legitimate aim of protecting secularism. *Id.*

131. *See* Ecevit, *supra* note 83, at 194-95 (noting that state officials accused the Association of Progressive Women of pursuing a socialist agenda).

132. *See* Women for Women's Human Rights, Imprisoned Iranian Women's Rights Activists, Nahid Keshavarz and Mahboubeh Hossein Zadeh, Writing Their Experiences from Prison, <http://www.wwhr.org/news.php?detay=9> (last visited Mar. 24, 2009) (documenting the arrest and imprisonment of activists in April 2007 while collecting signatures in support of the One Million Signatures Campaign—a campaign to end legal discrimination against women).

133. *See* Higgins, *supra* note 121, at 542 (criticizing Catharine MacKinnon for failing to address when the law should “respect or override women's choices”).