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Islam in the jurisprudence of the European Court of Human Rights (ECtHR): An
Analysis of Selected ECtHR Cases to Evaluate the Court's Approach and its
Consequences

Refah Partisi and others v. Turkey

Molla Sali v. Greece

E.S. v. Austria

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Glossary of Terms

APPGBM: All-Party Parliamentary Group on British Muslims

CoE: Council of Europe

COM: Council of Ministers

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

ISIL: Islamic State of Iraq and Levant

MENA: Middle East and North Africa

OIC: Organization of Islamic Cooperation

ODHR: OIC's Declaration of Human Rights

OHCHR: The Office of the High Commissioner for Human Rights

PAC: Parliamentary Assembly of Council of Europe

UK: the United Kingdom

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Summary

This thesis examines how the ECtHR dealt with cases concerning Islam, exploring the outcomes of selected case law. It provided an opportunity to analyse other rights invoked rather than Article 9 of the ECHR.

The rise of Islam and the Muslim population led to a multicultural environment, yet polarization in Europe, highlighting the need for accommodation of a diversified array of ethnic, cultural, and religious identities and traditions. The ECtHR, a powerful voice for human rights, plays a vital role in this respect.

A range of factors influence the rulings of the Court in the selected jurisprudence, including its strict adherence to principles of liberal democracy and the subsequent reluctance to consider intricacies of Islam, conflicts between rights and context, lack of binding precedents and Islamophobic sentiments. The message to the public is that political Islam and outright expression of Islamic religious identity are considered a threat to democracy and secularism; however, under religious peace, Islam can be protected. These factors and messaging have led to inconsistency in jurisprudence and abstract mechanisms that lack foreseeability.

As a supra-national court, ECtHR must consider diversity, political issues and national sovereignty to maintain their standing and reputation amidst human rights organizations.

Introduction (Statement of Problem/Issue)

Unprecedented influx of migrants and asylum seekers has challenged member states of the Council of Europe on multiple fronts, not only revealing inherent limitations of migration and asylum policies,¹ but also disrupted the internal mechanisms and procedures aimed primarily at protecting fundamental rights while ensuring tolerance, pluralism and diversity.

Muslims constitute a large portion of migrants and asylum seekers in Europe, who largely come from predominantly Muslim countries in Middle East and North Africa (MENA). At a minimum, these migrants often consider themselves as having Islamic religious identity. An assumption exists that the rise in the Muslim population of Europe would continue even if measures were adopted to stop migration from the Muslim countries.² This stems from the idea that the migrants and asylum seekers are mainly among a younger generation, and having as many children as possible is commonplace for many Muslim families, which basically derives from cultural and religious considerations.

However, an increase in the number of migrants is less likely to be the reason for taking restrictive and anti-immigration policies by the European countries. A range of issues from preserving cultural and religious identity to preventing terrorism are also contributing factors. Further, many migrants who enter Europe are unable to find employment, so they make up the poorest social class in the European countries.

Conflicts and contentious debates over human rights issues as well as consequent polarization of the society are inevitable when people of different cultures, religious backgrounds and identities meet and interact each other. Not only can this contribute to an increase in the instances of hostility and discrimination based on religious hatred, it has also the potential to threaten the ability for inter-religious dialogue in the long run.³ Since this could be the case in Europe, in particular with regard to the Muslim population, the role of the protection of human rights and dispute resolution bodies of the Council of Europe (CoE), especially the European Court of Human Rights (ECtHR), comes into play.

The ECtHR can be a powerful voice and play a crucial role in the resolution of conflicts as a “standard setter” for the protection of human rights for the Council of Europe. It can also lead “the development of a legal approach to Islam.” The abundance of the Court’s jurisprudence dealing with Islam not only affects the member states’ engagement with Islam through legislation, but also disseminates specific messages to the public regarding Islam and its place in society.⁴ In this context, the Court’s impact can

¹ MORENO-LAX, Violeta, Philippe DE BRUYCKER, et al. “The EU Approach on Migration in the Mediterranean” *Think Thank European Parliament*, Jun. 2021, Page 27

[www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)694413](http://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)694413).

² Brzozowski, Wojciech. “Is Islam Incompatible with European Identity?” *SSRN*, Dec. 2018, Page 4

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3301195

³ id, Page 1

⁴ Fokas, Effie. “Islam at the European Court of Human Rights.” *NAVEIÑ REET: Nordic Journal of Law and Social Research*, Apr. 2021, Page 121 <https://tidsskrift.dk/njlsr/article/view/125695>.

go beyond Europe and inspire reactions (both positive and negative) in other societies. It has been noted that “its decisions can have a persuasive authority throughout the world.”⁵

Liberal and secular interpretation of fundamental freedoms is a salient feature of democracy in Europe. Notions of liberalism, secularism, neutrality, and equality, although inherently vague and controversial in the western context, are the core of democratic society and the basis for the adjudication of conflicts in Europe. This approach to governance usually detaches religious and traditional considerations of the Muslim community (mainly of refugee or migrant origin) due to ambiguity, misconceptions, and varying interpretations of the religion. This gives rise to the question of whether Islamic law and practices are compatible with European norms and values. This is a question that remains contentious and provoking in spite of the developments in the political, legal and social spheres, and the myriad of scholarly and academic work in this area.

Meanwhile, despite being a human rights stronghold and a hub for migrants and asylum seekers, Europe is currently entangled with security concerns and the fear of terrorism and radicalism.⁶ This has resulted in somewhat of a backslide of individual rights and frequent yet unsettled tensions on how to balance public interests and individual rights. This is undoubtedly a realistic and valid concern given previous terrorist attacks committed in the name of Islam and the ongoing threats posed by radical and insurgent Muslim groups (such as the Taliban, Islamic State of Iraq and Levant (ISIL), Al-Qaeda, Boko-Haram, etc.). One should not ignore that Islamism (Islamic Radicalization) is a threat not only to the West but also to Muslim countries themselves. Cognizant of other factors, war and atrocities committed by Islamic radicalism have caused millions of inhabitants—mainly from pre-dominantly Muslim countries—to flee their home countries and take refuge or seek asylum in Europe, further exacerbating the current migration crisis.

Islam, the second largest religious community in the world (following Christianity), represents a broad group of people with approximately 1.57 billion adherents across the globe.⁷ Islam is not a homogeneous religion, like many other religions in the world. Being excessively divided and heterogeneous, Islam is composed of different jurisprudence, ranging from liberal and moderate to radical and orthodox schools of thought.⁸ Further, Islamic law, the Sharia, and Sharia Law are terms that are used interchangeably by most academics, writers, and researchers. These are rigid yet vague terminologies, which make it hard to define what Sharia constitutes and what a contradiction within Sharia is. According to some Islamic scholars, Sharia includes a comprehensive system of binding divine rules that apply on human existence

⁵ Durham, W. Cole, and Rik Torfs. “Islam, Europe and Emerging Legal Issues” Edited by David M Kirkham, *Taylor & Francis*, May 2016, Page 2 of the Book Preview www.taylorfrancis.com/books/edit/10.4324/9781315589992/islam-europe-emerging-legal-issues-david-kirkham-cole-durham-rik-torfs

⁶ “Europe and the Refugee Crisis: A Challenge to Our Civilization” *United Nations/ Academic Impact*, Sept. 2016 www.un.org/en/academic-impact/europe-and-refugee-crisis-challenge-our-civilization.

⁷ Denny, Frederick. “An Introduction to Islam” *Google Books/Routledge*, 2016, Page1 https://books.google.com/books?id=Cx6aCgAAQBAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

⁸ Brzozowski. *Supra Note 2*, Page 2

and regulate both material and spiritual lives.⁹ In other words, Sharia includes divine and sacred laws and commands to be obeyed, which regulate every aspect of a person's life, both private and public.

Cognizant of the complexity and the varying interpretations of Sharia law, one should avoid generalization, stereotyping, and simplification of Islam and Sharia while dealing with the issues that have to do with Islam. This is of paramount importance in particular when resolving conflicts that arise between Islam and the traditional European democratic values.

Against this background, this thesis is intended to study selected ECtHR case law concerning Islam and analyse their implications in terms of balancing the competing rights and interests, protecting democratic values against inconsistent Islamic practices, ensuring coexistence and pluralism, and integrating Muslims into European society.

The Right to freedom of thought, conscience, and religion enshrined in Article 9 of the European Convention on Human Rights (ECHR)¹⁰ is at stake in most of the ECtHR cases concerning Islam. This right is composed of the right to hold, change, and manifest one's religion. There is an abundance of literature, research, and academic works already conducted on the case law concerning Islam where Article 9 is at stake. Attentive of this matter, this thesis focuses on those Court decisions where other Articles of the ECHR are invoked, including Article 11 (the Right to Freedom of Assembly), Article 10 (the Right to Freedom of Expression), Article 8 (Protection of Privacy and Family Life), and Article 14 (Prohibition of Discrimination) and the Right to Self-Determination.

This thesis seeks to answer to the main question: "How has the ECtHR dealt with Islam in its Jurisprudence?" This will subsequently be followed by responding to the additional sub-questions below:

- a) To what extent has the Court been objective and neutral in dealing with the cases that involved Islam?
- b) To what extent has the Court been influenced by the principles of liberal democracy in dealing with such cases?
- c) Has the Court considered intricacies and sensitivities of the aspects of Islam associated with the cases dealing with Islam?
- d) Has the court struck a right balance between the conflicting rights in the cases concerning Islam?

Considering the nature of the current work (being analytical and qualitative), this thesis relies exclusively on literature review and desk research, taking into consideration previous research and studies, policy papers, reports, resolutions, and the case laws of the ECtHR. This approach may limit the ability to draw on a detailed conclusion on the implementation of related mechanisms and procedures in practice,

⁹ Saedén, Louise. "Alternative Islamic Human Rights" *LUND UNIVERSITY / LUND UNIVERSITY LIBRARIES*, 2010, Page 10 <https://lup.lub.lu.se/luur/download?func=downloadFile&recordOID=1653579&fileOID=1670218>.

¹⁰ "European Convention on Human Rights", *Council of Europe*, 1950, Article 9 www.echr.coe.int/documents/d/echr/Convention_ENG.

however, it provides an in-depth analysis and comparison of varying viewpoints and practices in a systematic and coherent manner. The main part of the analysis is undertaken within the selected case laws themselves. Notwithstanding, for the sake of comparison and drawing a pattern or propensity, other case laws of the ECtHR, if found relevant, are referred to throughout the thesis.

To this end, **the First Chapter** highlights the context in which the ECtHR is called upon to deliver judgements in the cases concerning Islam reflecting on the state's context and the CoE framework. Not only the national measures but also those adopted by the CoE, including resolutions and recommendations of the Parliamentary Assembly and the Committee of Ministers will be discussed. This is critical to getting an insight into the context and the influence they may have on the Court Decisions. In **the Second Chapter**, a summary of each selected case will be presented plus the rationale behind their selection for this thesis. Besides addressing provisions of the ECHR—other than Article 9 about which there are abundance of literature—the scope of work can be narrowed down through the selected jurisprudence of the ECtHR. The **Third Chapter** will focus on analysing the selected case law to identify how the Court treated each case. Parameters such as the influence of the principles of liberal democracy on the objectivity and neutrality of the Court decisions, consideration of the intricacies of Islam and the situation of conflicting rights will be considered in this Chapter. In **the Forth Chapter**, the consequences and implications of the select Court decisions on the efforts by the member states and the CoE organizations to combat against Islamophobia and ensure coexistence and tolerance as well as the compromising of the individual's rights will be debated. Ultimately, the thesis will be wrapped up with the **Concluding Remarks**, including ongoing challenges and proposed recommendations.

1. The Context in Which the European Court of Human Rights Deals with the Cases that Deal with Islam

A comprehensive analysis of how the CoE member states conceive and treat Islam is a complex and broad topic requiring substantial time, research and resources. This is beyond the scope of this paper. Therefore, for the purpose of the current work, this Chapter solely focuses on a general overview of the issue highlighting the general attitude and patterns throughout the CoE member states and organizations. To this end, the first part elaborates on the state context exploring the CoE member states' treatment of issues concerning Islam, including the enforcement of legal restrictions. The second part of this Chapter sheds light on the CoE attempts to address the issue enumerating the most relevant resolutions and recommendations adopted by the CoE organizations (i.e. the Parliamentary Assembly and Committee of Ministers) in this respect.

1.1 The State Context

Islam is becoming a visible and an entrenched religion across the globe, including in Europe. The visibility of Islam in Europe has been enhanced through a number of contributing factors: the growth of the Muslim population in Europe; terrorist acts committed in the name of Islam; the application of the Sharia Law in some of the European nations with the majority Christians population; dependency of Europe on Middle East oil; European Muslims acting upon some of their traditional and religious practices publicly; revolutions in some of the Islamic countries that can directed towards democratization; and war in Iraq and Afghanistan.¹¹

The growing presence of Muslims in Europe has given rise to both risks and opportunities. Difference of religions, culture, traditions and identities has created a state of affairs where some may consider Islam a threat to European norms and values. Further, it can also challenge the ability of host societies to tolerate and accommodate such differences. As a result, violence against Muslims and violence by Muslims becomes commonplace. Islamophobia and Islamic radicalism are the consequences, which are attributable to what we can term “domestication of differences”¹² since all, including Muslims, should be considered as part of the same societal family.

Meanwhile, Europe is experiencing mounting anti-Muslims sentiments, which put the individual rights and group rights of Muslims (who are deemed as a religious and ethnic minority) at risk. This has resulted in the fundamental rights and freedoms of Muslim citizens being under siege and restricted increasingly, especially when attempting to adhere to the precepts of their religion. It is argued that the widespread European trends towards enacting legal restriction on religious freedom of Muslims in the public domain

¹¹ Durham, *Supra* Note 5, Page 3

¹² *ibid*

is a testament to this alleged hostility and the perceived threat of Islam among a number of European nations.¹³

Legal measures adopted by a considerable number of the European countries primarily aim to ban or restrict the Muslim citizens from observing and manifesting their religious precepts and practices publicly. Although, the list of measures laid down in this part is neither exhaustive nor conclusive, it can depict sufficiently some general attitude and patterns towards Muslims in Europe.

A reference to the very first measure dates back to 1990 when the United Kingdom (UK) was challenged before the European Commission by a British Muslim (Mr. Choudhury) who sought to initiate a private persecution against Salman Rushdie, the writer of “The Satanic Verses.” He regarded Rushdie’s act as blasphemous and wanted him to be prosecuted under the English Law of Blasphemy. However, the UK courts withheld his application on the ground that Islam was not recognized in the Law, which was solely applicable on acts to do with Christianity.¹⁴ This case demonstrated the discriminatory nature of the British domestic Law in terms of treating minority groups’ legal claims.

Some of the CoE member states, namely France, Belgium, Denmark, Bulgaria and Austria already enforced the explicit national bans on Muslim religious symbols, including the headscarf and Burqa in public, work, and educational settings. Further, Germany, Italy, Spain, the United Kingdom, Switzerland and Russia “have all taken action toward restricting full-face veils in public.”¹⁵

Although most of the CoE member states adopted particular regulations to prohibit wearing a headscarf and full veil in the public sphere, the restrictions are more intensive in France. France is characterized as a secular state where there is a clear division of the State from the church. Strict adherence to this principle provided the ground for enforcing two controversial laws, which banned the religious symbols in primary and secondary schools in 2004 and prohibited wearing a full-veil (Burqa and Niqab) in the public sphere in 2011 respectively.¹⁶ The visible face veil was deemed as a threat to secularism in France. In spite of an apparent neutralized nature and widespread support within the French context,¹⁷ the laws have been subject to critique and opposition, mainly from a human rights perspective, particularly with regard to minority rights and the manifestation of religious rights. Some scholars considered the Laws to be discriminatory, particularly targeting Muslim women. The French ban started a trend persuading other member states such as Belgium, Austria and Denmark to follow the same attitude toward headscarf and full-veil in the public sphere.

¹³ Gunthel, Natalie, “Freedom under Siege: Determining the Threat Against Muslim Freedom Rights in Denmark and Beyond”, 2016, Page 8

¹⁴ Danchin, Peter. “Islam in the Secular Nomos of the European Court of Human Rights” *SSRN*, Sept. 2010, Page 664 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670671.

¹⁵ “The Islamic Veil across Europe.” *BBC News*, 31 May 2018, www.bbc.com/news/world-europe-13038095.

¹⁶ Tarouzi, Kaoutar. “The Ban of Religious Symbols: Case Study of Veiled Muslim Women in France in the Light of the European Convention on Human Rights” *Global Campus/ Open Knowledge Depository*, 2022, Page 19 <https://repository.gchumanrights.org/items/68e53f25-af4a-4b46-a27d-101cad9c5361>.

¹⁷ Loreggia, Fabio. “The Ban of Religious Symbols in Primary and Secondary Schools in France: A Short Analysis of its Compatibility with Pettit’s Theory of Non-Domination” *University of Uppsala/ Department of Philosophy*, 2018, Page 2 www.diva-portal.org/smash/get/diva2:1240622/FULLTEXT01.pdf.

Turkey experienced protracted Secularist-Islamist cleavages and social polarization since the collapse of Ottoman empire after the World War I. The origin of the current polarization in Turkey dates back to 1920 when Mustafa Kamal Atatürk, the founder of modern Turkey, embarked on the radical reforms to separate religion from the state aimed at implementing modernization and secularism in line with the western democratic values and principles.¹⁸ The principle of secularism envisaged in the Turkish Constitution paved the way for military secularist elites, who were the dominant political group in 1980s, to introduce headscarf bans for university students.¹⁹ In the aftermath of the 2002 elections, Justice and Development Party (AKP) took the power under the leadership of Recep Tayyip Erdoğan. Since the main actors have been religious political figures in Turkish society with a tendency towards Islam, some secularists view the party as having a secret agenda to turn the government into an Islamic state.²⁰ The Party lifted the ban on headscarf in 2013 through a bylaw.²¹

In 2009, Switzerland introduced a Constitutional amendment banning minaret constructions nationwide, following a referendum in which the Swiss people voted against the construction of minarets by Muslims across the country. Minarets, of course, are tall slender towers that are essential parts of a mosque, from which prayers are typically called. This law, which was viewed as democratic backsliding, has been criticized for demonstrating intolerance and lack of coexistence towards other religions and beliefs. It also questioned the status of Switzerland as a neutral state and “an ambassador for diplomacy.”²² This law is viewed as discriminatory against Muslims residing in Switzerland infringing their rights to manifest religion.

Another heated controversy currently facing Europe is defamation of religion or insulting religious beliefs. Relying mainly upon the Right to Freedom of Expression and Freedom of Press, as well as the secular/liberal nature of the human rights protection mechanisms in Europe, there is a contention, including in ECtHR jurisprudence, about to what extent it is legitimate to express ideas that can offend specific religions and beliefs. Contribution to public debate of such expressions could also be given a significant weight in this context. Therefore, offending Islam and Islamic beliefs has not been uncommon in Europe.

The “Cartoon controversy” is an example of how Islam has been portrayed by some of the media outlets in Europe under the right to freedom of expression and press as well as the right to ridicule. For instance, Danish cartoons of 2005 and Charlie Hebdo’s caricatures of 2015 entailed publication of what are widely considered derogatory cartoons of Prophet Mohammad, which provoked Muslims’ sentiments and

¹⁸ Aydın-düzgüt, Senem. “The Islamist-Secularist Divide and Turkey’s Descent into Sever Polarization” *Brookings* (Sept. 2019), Page 18 www.brookings.edu/wp-content/uploads/2019/04/9780815737216_ch1.pdf.

¹⁹ Burak, Begüm. “Can Secularism Hinder Democracy? The Turkish Experiment” *Dergipark* (Dec. 2016), Page 75 <https://dergipark.org.tr/en/download/article-file/2445346>.

²⁰ Id, page 76

²¹ Akoglu, Kerime Sule. “Piecemeal Freedom: Why the Headscarf Ban Remains in Place in Turkey.” *LIRA@BC Law* (May 2015) Page 278 <https://lira.bc.edu/work/ns/c6802da1-7ea1-40ff-b4f0-26710d1ac508>.

²² Wyler, Dina. “The Swiss Minaret Ban Referendum and Switzerland’s International Reputation: A Vote with an Impact” *Journal of Muslim Minority Affairs*, Dec. 2017, Page 413 <https://www.tandfonline.com/doi/full/10.1080/13602004.2017.1405506>.

caused outrage and violent protests around the World, including in Europe.²³ In retaliation, the Charlie Hebdo office was attacked few days after the publication of cartoons, leaving 12 dead. Such tensions not only widened the cleavages between the Muslim Community and the rest of Europe but also intensified discussions about whether the human rights mechanisms are intended to protect religions and religious beliefs or not (protection against defamation of religions). This issue has long constituted a source of conflict between the Islamic countries and the West when it comes to debates over blasphemy laws and defaming religions.

An objective assessment of this area also requires thorough consideration of the context and characteristics of European liberal democracy in which secularism, neutrality, and equality underpin the protection of human rights and interpretation of relevant concepts, provisions, and procedures to do so. In addition, domination of the securitarian logic has been prevalent in Europe resulting mainly from the heinous terrorist attacks perpetrated in the name of Islam or by insurgent groups identifying themselves as Muslim. Radicalization of the new generation of migrants and the security threat they pose have been on the rise. As a result, there is a negative public perception associating Islam and Muslims with terror, violence, and oppression—when in reality it is only among a minority of followers. Further, the rise of populist politics that introduce Islam and/or Muslims as a potential threat to the European societies for political purposes has intensified the current state of affairs with respect to Muslims in Europe. It is also important to note that the media has been playing a vital role in feeding and guiding the public conception—or misconception—of Muslims and Islam.

The legal restrictions adopted by member states of the CoE are perceived to primarily target the Muslim population, although their proponents claim they are neutral and equally applicable to all. Misapplication and misinterpretation of these measures has led to discriminatory treatment, violence, hatred, stereotyping, and negative generalization towards Islam and Muslims. While affecting the integration policies, this can contribute to the reinforcement and spread of Islamophobia which is regarded as a daunting challenge facing Europe today. (Islamophobia will be discussed in further details in Chapter four of this thesis.)

1.2 The Council of Europe Framework

Taking the above challenges into consideration, the CoE organizations adopted a number of resolutions and recommendations concerning Islam and Muslims. The Parliamentary Assembly adopted a resolution in 2010 on “Islam, Islamism and Islamophobia.”²⁴ This resolution made a clear distinction between Islam and Islamism (Islamic extremism) and viewed Islam not only as a religion but also as a social, legal and political code of conduct. It sets an obligation for the member states to combat against all forms of the Islamic radicalism (violent, mainstream or peaceful) as it “opposes human rights and democratic values” and does not recognize the democratic principle of separation between the state and religion. The

²³ Barlas, Asma. “Reprinting the Charlie Hebdo Cartoons Is Not About Free Speech” *Media | Al Jazeera*, 10 Sept. 2020 www.aljazeera.com/opinions/2020/9/10/reprinting-the-charlie-hebdo-cartoons-is-not-about-free-speech.

²⁴ “Islam, Islamism and Islamophobia in Europe” *Parliamentary Assembly/ Council of Europe*, May 2010 <https://www.refworld.org/pdfid/4c6b8eb011.pdf>.

member states are also provided with the leeway to restrict Islamic organizations that have been initiated, financed, and supported by foreign states to pursue political a agenda rather than religious objectives outlined under Article 11 (2) of the ECHR. The Resolution also stressed fighting against Islamophobia, stereotyping, discrimination, and political extremism against Muslims and to end their social marginalization, asking member states to adopt the necessary measures in this respect.²⁵ The objective of this resolution was to address extremism against and by Muslims through reconciling Islam with the democratic values and combatting negative repercussions resulting from the misinterpretation of Islamic rules and democratic principles. Recognition and the political will behind this move is promising, however has yet to yield tangible results.

The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly published a report in January 2019 entitled “Compatibility of Sharia Law with the European Convention on Human Rights: Can State Parties to the Convention Be Signatories to the Cairo Declaration?”²⁶ The report included a draft resolution and an explanatory memorandum, in which the Committee found the 1990 Cairo Declaration of Human Rights in Islam²⁷ incompatible with the norms and values enshrined in the ECHR. The Report concludes that the Declaration is not legally binding and “fails to reconcile Islam with the universal human rights since it considers the Sharia as the sole source of reference and does not contain certain rights.” It referenced ECtHR case law (*Refah Partisi and others v. Turkey*²⁸) where the Court stated that “the institution of Sharia Law and a theocratic regime were incompatible with the requirements of a democratic society.” The Committee asserted that as far as human rights are concerned, no religious or cultural exceptions are permitted asking the members states to bolster religious pluralism and reconciliation of religion with human rights provided that the ECHR pre-empts as an international legal binding document.²⁹ Notable is the replacement of the Cairo Declaration with a new declaration, the 2020 Organization of Islamic Cooperation’s Declaration of Human Rights (ODHR), in which all the references to the Sharia have been removed.³⁰

The Committee of Ministers (COM) adopted a resolution in June 2010 on the Implementation of the Framework Convention for the Protection of National Minorities by Liechtenstein, including the positive developments, issues of concerns and recommendations as regards the measures taken by Liechtenstein to implement the Convention. The Resolution identified cases of xenophobia and intolerance against

²⁵ *ibid*,

²⁶ GUTIÉRREZ, Antonio. “Doc. 14787 - Report - Details Tab” *Parliamentary Assembly/ Council of Europe* , Jan. 2019 https://www.ecoi.net/en/file/local/1456044/1226_1547028478_document.pdf.

²⁷ “The Cairo Declaration on Human Rights in Islam” *Organization of Islamic Cooperation*, 1990 [https://elearning.icrc.org/detention/en/story_content/external_files/Human%20Rights%20in%20Islam%20\(1990\).pdf](https://elearning.icrc.org/detention/en/story_content/external_files/Human%20Rights%20in%20Islam%20(1990).pdf).

²⁸ *Refah Partisi (the Welfare Party) and Others v. Turkey*, nos. 41340/98 and 3 Others, ECHR 2003

²⁹ GUTIÉRREZ, *Supra* Note 22

³⁰ Mozaffari, Mohammad Hossein. “OIC Declaration on Human Rights: Changing the Name or a Paradigm Change ...” *ResearchGate*, Feb. 2021, Page 13

https://www.researchgate.net/publication/349412937_OIC_DECLARATION_ON_HUMAN_RIGHTS_CHANGING_THE_NAME_OR_A_PARADIGM_CHANGE_Abbreviations_CDHRI_Cairo_Declaration_of_Human_Rights_in_Islam_OIC_Organization_of_Islamic_Cooperation_HRC_Human_Rights_Council_I

persons of different religions and ethnic origins, specifically Muslims, and recommended the state to take concrete measures “to prevent, combat and monitor any manifestation of xenophobia and intolerance.”³¹

Other relevant resolutions of the CoE³² include:

- Recommendation 1805 (2007) of Parliamentary Assembly on Blasphemy, religious insults and hate speech against persons on grounds of their religion;
- Resolution 1846 (2011) of Parliamentary Assembly on Combating all Forms of Discrimination based on Religion;
- Recommendation 1987 (2011) of Parliamentary Assembly on Combating all forms of discrimination based on religion;
- Recommendation 1720 (2005) of Parliamentary Assembly on Education and Religion;
- Resolution 1247 (2001) of Parliamentary Assembly on Female Genital Mutilation;
- Resolution 1510 (2006) of Parliamentary Assembly on Freedom of Expression and Respect for Religious Belief;
- Resolution 2076 (2015) of Parliamentary Assembly on Freedom of Religion and Living Together in a Democratic Society;
- The Committee on Equality and Non-Discrimination Report (September 2022) of Parliamentary Assembly on Raising Awareness of and Countering Islamophobia, or Anti-Muslim Racism, in Europe;
- Resolution 2457 (2022) of Parliamentary Assembly on Raising Awareness of and Countering Islamophobia, or Anti-Muslim Racism, in Europe;
- Resolution 2069 (2015) of Parliamentary Assembly on Recognizing and Preventing Neo-Racism;
- Recommendation 1962 (2011) of Parliamentary Assembly on The Religious Dimension of Intercultural Dialogue;
- Recommendation 1804 (2007) of Parliamentary Assembly on State, Religion, Secularity and Human Rights; and
- Resolution 1464 (2005) of Parliamentary Assembly on Women and Religion in Europe.

The Contribution of ECtHR and implications of its judgments on the human rights situation of European Muslims will be analysed in more details in the next chapters of this thesis. Likewise, due to the limited scope of this paper, it is not feasible to study other related mechanisms and procedures of the CoE. However, some patterns and trends can be drawn from what has already been discussed. The mentioned state of affairs has yielded the two competing trends in the CoE member states, which can reinforce each other. The fear of Islam usually termed as “Islamophobia,” and “Islamism or Islamic Extremism.” The rise of all other phenomena such as xenophobia, discrimination, hatred, violence, social marginalization, stigmatization, terrorism, and political extremism, can relate or be attributed to these two main trends. It

³¹ “Resolution CM/ResCMN(2010)9 on the Implementation of the Framework ...” *The Committee of Ministers/ Council of Europe*, June 2010 www.refworld.org/pdfid/4c76146b2.pdf.

³² For accessing to and further information on resolutions, please refer to the CoE website at: <https://www.coe.int/en/web/portal>

can be inferred that these phenomena would impact both Muslims and non-Muslims living in the CoE member states, however, the extent to which this occurs varies. They can also influence the way in which the ECtHR handles cases involving Islam, which will be further examined in the next parts of this paper.

2: Selected ECtHR Case Laws and Rational for Their Selection in This Study

2.1 Selected Case Laws

This Chapter entails a brief summary of each selected case law of the ECtHR, and why they have been selected for inclusion in this study. Not only does it provide an insight into the selected cases for drawing on propensities, comparison, and analysis in the next parts, the reasons for their selection will also be highlighted.

2.1.1 *REFAH PARTISI v. TURKEY (2003)*³³

Refah Partisi was a political party established on 1989 in Turkey. The Party saw a fast political gain since its establishment by securing seats in Parliament. As a result of the 1995 general elections, it became the largest political party in Turkey, and came to power in 1996 by forming a coalition government. The State authorities initiated proceedings in 1997 in the Turkish Constitutional Court to “have the party dissolved on the grounds that the Party was the centre of activities contrary to the principle of secularism.” (para. 23.). Subsequently, the Constitutional Court, through its judgment of 1998, dissolved the party and prohibited its leaders from political activities for five years on the basis that Refah was a centre for anti-constitutional activities violating the principle of secularism.

The Constitutional Court based its judgement on the facts that Party leaders advocated for abolition of secularism in Turkey and its replacement with a theocratic regime based on Sharia Law. In a series of public events and speeches, Refah Party leaders and members expressed remarks on establishing the supremacy of Holy Quran through Jihad, and if necessary by force. Whether the changes in the social order that the Party pursued would be achieved peacefully or violently, it sought to create a plurality of legal systems where the adherents of each religion could follow their own rules rather than the rules of the Turkish law. Party leaders encouraged wearing the headscarf in public and education settings, and expressed support for Islamist movements. Refah did not not initiated any disciplinary measures against those responsible for the above remarks.

The applicants (the Party and three party leaders who were deprived of political activities by the Constitutional Court) alleged that the dissolution of the Party and suspension of their political rights had violated Articles 9, 10, 11, 14, 17, and 18 of the Convention, and also violated Article 1 and 3 of Protocol No 1 of the Convention. However, the Court in its judgement only assessed whether Article 11 (The Right to Freedom of Association and Peaceful Assembly) was violated.

The Court held that the dissolution of the party and restricting its leaders’ political rights resulted in an interference with the applicants’ exercise of the right to freedom of association. However, the restrictions

³³ *Refah Partisi (the Welfare Party) and Others v. Turkey*, nos. 41340/98 and Others, ECHR 2003

would be justified if they were: 1. prescribed by law; 2. pursued legitimate aims; and 3. were necessary in a democratic society (using a proportionality testing). The Court stressed on the precision, accessibility, and foreseeability of the law in which the impugned measures are laid down. It further noted that since the case concerned the constitutionality of a political party activities, the Constitution was the most relevant written law where the measures are envisaged, which are predictable enough to fulfil the criteria of “Prescribed by Law.” (para. 58.). Considering the principle of secularism enshrined in the Turkish Constitution, the Court concluded that the measures taken pursued some of the legitimate aims listed in Article 11(2) of the Convention, namely, protection of national security and public safety, prevention of disorder and crime, and protection of the rights of others.

In examination of the “pressing social need” and whether the measures were proportionate and “necessary in a democratic society,” the Court asserted that the Sharia Law is not compatible with the democratic regime, and referred to the Turkish Constitutional Court’s standing and case law in this respect. The Court specifically noted that “Sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it.” (para. 123.).

While emphasizing pluralism and coexistence of different religions, the Court reiterated that any legal changes proposed by the political parties must be compatible with democratic principles. To protect democracy and the rule of law from destruction by political parties aimed at setting up a regime based on the Sharia, some limitations on individuals’ rights can be justified. In this case, as *Refah* clearly declared, its long-term policy of establishing a theocratic regime within the framework of a plurality of legal systems, without excluding recourse to force for achieving them, it posed a more tangible and immediate threat to democracy. Therefore, the interference in question met a “pressing social need” and was “necessary in a democratic society” despite the narrow margin of appreciation being granted to the member states in this respect (para. 135.).

Ultimately, the Courts unanimously “held that there has been no violation of Article 11 of the Convention” and it did not find it “necessary to examine separately the complaints under Articles 9, 10, 11, 14, 17 and 18 of the Convention and Article 1 and 3 of Protocol No. 1 (paras. 137. and 139.).”

2.1.2 *E.S. v. AUSTRIA (2019)*³⁴

E.S. was an Austrian woman who taught a series of seminars in January 2008 entitled “Basic Information about Islam” in an education institute where she made derogatory statements about Prophet Mohammad and Islam. At the request of a Journalist who attended two of her seminars in 2009, a criminal investigation was brought against her. The investigation focused on provoking statements she made about Muslims and Islam during the seminars, including linking paedophilia with Islam. She alleged that the Prophet Mohammad was a warlord and paedophile who had many women and liked to have sex with children. Since Mohammad is seen as an “ideal man, the perfect human, the perfect Muslim” for

³⁴ *E.S. v. Austria*, no. 38450/12, ECHR 2018

Muslims, any effort to criticize him results in “Muslims getting into conflict with democracy and our value system.” (para. 13.).

Though the Vienna Prosecution Office charged her with incitement to hatred, the Vienna Regional Criminal Court acquitted her of this charge, as the Court could not establish that “the applicant had intended to decry all Muslims” or introduce them as paedophiles but “was criticising the unreflecting imitation of a role model.” (para. 14.). However, the Court convicted her for degrading an object of veneration, then Prophet Mohammad, which was likely to arouse justified indignation under Article 188 of the Criminal Code that criminalizes “disparaging religious doctrines.” The Court found that E.S. conveyed a message that “Mohammad had paedophilic tendencies and was not worthy object of worship.” (para. 14.). The Court also considered that what E.S. stated in the seminars were not statements of facts but derogatory value judgements that could not contribute to a debate of public interest, and exceeded permissible limits under Article 10(2) of the Convention (limitations on the Freedom of Expression). This would hurt religious feelings of the followers, violate the spirit of tolerance, and jeopardize religious peace that “could invoke the state’s responsibility to guarantee the peaceful exercise.” A distinction was made between paedophilia and child marriage in the court judgement.

Both the Vienna Court of Appeal and the Supreme Court dismissed the applicants’ appeals upholding “the legal and factual findings of the lower court.” While focusing on the limits under Article 10(2), they mainly referred to the relevant case law of the ECtHR (*J.A. v. Turkey*, App. No. 42571/98, 2005, *Otto-Preminger-Institut v. Austria* App. No. 13470/87, 1994 and *Wingrove v. the United Kingdom* App. No. 17419/90, 1996).

When brought before The ECtHR, it considered whether the Austrian authorities appropriately balanced the freedom of expression with the freedom of religion in finding that the interference with E.S.’s rights to freedom of expression under Article 10 of the Convention was necessary in a democratic society.

E.S. argued that her statements were historical facts “made in the framework of an objective and lively discussion” and must have been protected under Article 10 of the Convention. However, the Austrian authorities argued that the Law did not criminalize critical or offensive statements about religions or religious beliefs but regulated the manner in which such statements are made. The main purpose of the restriction was to protect religious peace and rights of others since the statements made by the applicants were contrary to “the values of tolerance, social peace and non-discrimination.” (para. 37.).

To determine the justifiability of the measure, the Court applied the proportionality testing, and assessed if the restriction was prescribed by law, had a legitimate aim, and was necessary in a democratic society. The Court concurred that the limitation was prescribed by law as far as the application of Article 118 of the Penal Code was concerned. It also accepted that this Article pursued the legitimate aim of protecting the rights of others served by the protection of religious peace and religious feelings.

In finding whether the measure was proportionate to the aim pursued and necessary in a democratic society, the Court referred to the general principles derived from its previous case laws, which laid down that “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment” and stressed that Article 10 concerns not only expressions that are favourable but also those that “offend, shock and disturb.”

(para. 42.). While the states have a narrow scope in limiting political expression or those that contribute to a public debate, religions are not exempt from criticism and their adherents should tolerate denials and hostile doctrines to their faith. The Court also asserted that the enjoyment of the freedom of religion under Article 9 is not threatened by the “gratuitously offensive” statements and “expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention.” (para. 43.). Though the states have a wide margin of appreciation, the Court closely supervises the implementation of the state restrictions.

To determine the social pressing need, the Court considered the content of the impinged statements, the context in which they were made and severity of the penalty/measures imposed. The Court agreed with the domestic courts that the statements were value judgements rather than facts and “exceeded the permissible limits of an objective debate and was considered an abusive attack on Prophet Mohammad.. Ultimately, the Court considered the wider context of S.E.’s statement and held that the domestic courts had not overstepped their margin of appreciation and appropriately balanced the the right to freedom of expression with the rights of others to have their religious feelings protected (the concept of religious peace – or freedom from criticism of one’s religion). Unanimously the Court decided that there was no violation of Article 10.

2.1.3 *MOLLA SALI v. GREECE (2018)*³⁵

The case concerned a complaint brought by Ms. Molla Sali against Greece. She was a widow to a Greek national from the Muslim minority living in Thrace, where Sharia law was applied to Greek nationals of Muslim faith in relation to their personal issues, including inheritance. Prior to his death, Ms. Sali’s husband prepared a notarized public will according the Greek Civil Law bequeathing all of his estate to his wife, part of which was located in Turkey. Following her husband death, Ms. Molla Sali completed all the required legal proceedings and “accepted her husband’s estate by notarized deed.” (para. 10.).

Meanwhile, the deceased husband’s sisters had challenged the will before the domestic courts asserting a claim to three-quarters of the property bequeathed through the will. They argued that inheritance issues are regulated through the Sharia Law in Thrace, and are under the jurisdiction of the Mufti (Sharia Judges) rather than Greek Civil Law. They argued that the laws of succession applicable to Muslims are based on intestacy, based on which the will applies solely to one-third of the property and the rest is regulated by intestate succession. According to a rule of intestate succession, “when a man dies leaving a wife and children, the widow receives one-eighth of the net estate. When there are no children, the widow receives one-quarter.”³⁶ The latter applies to the current case, and was argued to apply by the sisters of Ms. Sali’s husband.

The Greek courts found the will invalid and devoid of effect, and applied the Sharia Law rules concerning inheritance based on the 1923 Treaty of Lausanne, to which Greece is a party, which recognizes Muslims as a minority in Greece and permits the implementation of the Sharia law on matters of personal status

³⁵ *Molla Sali v. Greece*, no. 20452/14, ECHR 2018

³⁶ Reyaz, Shaik. “Muslim Law of Inheritance” *Studocu*, 2022, page 9 www.studocu.com/in/document/sinhgad-technical-education-society/masters-in-business-administration-mba/jcponduru/61339140.

law. Accordingly, the applicant was deprived of the three-quarters of the inherited estates, in contradiction to the husband's will and Greek civil law.

The applicant, Ms. Sali, alleged a violation of Article 6(1) of the Convention, and argued that the Greek Courts refused to apply the ordinary law on her case applicable to all Greek citizens. In conjunction with Article 14 of the Convention, she also claimed to have suffered a difference in treatment on the ground of religion. Under Article 1 of Protocol No. 1, she submitted that the Greek Courts had deprived her of three-quarters of her inheritance by applying Sharia law instead of the Greek Civil Code. However, the Court considered the case only under Article 1 of Protocol No 1, in conjunction with Article 14 of the Convention.

The Court initially sought to identify "whether there was a difference in treatment potentially amounting to discrimination, as compared with the application of the law of succession, as laid down in the Civil Code, to those seeking to benefit from a will, as drawn up by a testator who was not of Muslim faith." (para. 86.). To this end, the Court assessed if the applicant, whose deceased husband belonged to a Muslim minority, was in a similar situation to that of a beneficiary of a civil will prepared by a non-Muslim person and whether she was treated differently. The Court established that there was an analogous situation and the applicant experienced a discriminatory treatment based on her deceased husband's religion. It further noted that the application of Sharia could be discriminatory, particularly against women and children.

Afterwards, the Court considered if there was an objective and reasonable justification for the difference in treatment. In doing so, the Court interpreted the Treaties of Sevres and Lausanne widely, overriding their application by Greek courts, and found that they do not actually require Greece to apply the Islamic Law. The Court specifically declared that "no bilateral or multilateral treaty or other instrument requires anyone to submit against his or her wishes to a special regime in terms of protection of minorities." (para. 157.). The Court further stressed that "it cannot be assumed that a testator of Muslim faith, having drawn up a will in accordance with the Civil Code, has automatically waived his right, or that of his beneficiaries, not to be discriminated against on the basis of his religion. A person's religious beliefs cannot validly be deemed to entail waiving certain rights if that would run counter to an important public interest. Nor can the State take on the role of guarantor of the minority identity of a specific population group to the detriment of the right of that group's members to choose not to belong to it or not to follow its practices and rules." (para. 156.). Based on the above arguments, the Court found that "the impugned measure was not proportionate to the aims pursued" and "difference of treatment had not objective and reasonable justification." (para. 161.).

Ultimately, the Court concluded that denying the Muslim minorities in Thrace the right to freely choose and benefit from the ordinary law constituted not only discrimination on the ground of religion but also violated the right to free self-identification, in which the negative aspect of the right (to choose not to be treated as a minority) is of cardinal importance. So, there had been a violation of Art. 14, taken in conjunction with Art. 1 of Protocol No 1.

In respect of the application of Article 41 of the Convention that authorized the Court to afford just satisfaction in terms of pecuniary and non-pecuniary damages to the injured party, the Court decided that

the issue was not ready for decision and must be reserved in whole for a future proceeding. In a separate judgement dated June, 2020, the Court set a one-year deadline for the Greek government to take measures “to ensure that the applicant retains her ownership of the properties bequeathed to her in Greece” or in case of amending the land register in favour of the deceased sisters, all of her rights to those properties must be restored. If Greece failed to take such measures within one year, it was ordered to pay a sum corresponding to the price of the properties of which she was deprived. Finally, the Court further decided that the principle judgement in 2018 concerned solely the properties located in Greece and not in Turkey. Payment of non-pecuniary damage to the applicant, costs and expenses of the Court, as well as interest rate were also covered by the Court decision.³⁷

2.2 Rationale for Selection of Case Laws for this Analysis

A main reason for selecting the above ECtHR case laws was to consider and examine the cases involving Islam in which Articles of the ECHR—other than Article 9—are invoked. Given the abundance of scholarly Articles and researches that focused on the freedom of religion, the current paper is geared towards having a more in-depth and comparative analysis of the cases that dealt with other Articles (related to freedom of association, freedom of expression, and the right to self-identification).

The ECtHR considered the compatibility of Islamic law with the norms and values enshrined in the ECHR at some points, but the most remarkable case was the *Refah Partisi and others v. Turkey*, in which the Court expressed a very vivid stance on the issue.³⁸ Given the messages that the Court can communicate and spread through its judgments, this case law not only establishes a precedent and inspires national courts’ engagement with future cases in the future, but it can also consolidate public perception—and misperception—of Islam and Muslims, and antagonize the Muslim population.

Plurality of legal systems, designed in many contexts to protect the rights of the minority groups to live according their own rules and follow the precepts of their religions and traditions in private matters, had been the focus of one of the cases selected for this thesis (*Refah Partisi and others v. Turkey*). In that case, the Court expressly found such a system and legal order incompatible with the ECHR values. Again, the perceived incompatibility of the Islamic rules with the ECHR, particularly in terms of discriminatory treatment of women and children as mentioned in the reasoning of the Court in the *Molla Sali v. Greece* case³⁹ constitute the basis for this conclusion.

The right to freedom of expression has been invoked in most of the cases concerning insult or defamation of Islam. Expressions both for and against Islam have been claimed to be protected under Article 10 of the Convention. A notable case in this respect is *E.S. v. Austria* where the Court found there had been no violation of Article 10. Considering the context specific to each case, the Court has not taken a consistent approach in dealing with such cases. So, a comparative analysis will be provided in this thesis to figure out the possible trends and the reasons for inconsistencies.

³⁷ *Molla Sali v. Greece*, no. 20452/14, ECHR 2020

³⁸ Brzozowski, Supra Note 2, Page 5

³⁹ Supra Note 31

3. Analysis of the Court's Approach (How the Court Treated the Cases)

Litigation based on universal human rights standards have been initiated more often by the European Muslims in recent decades. They have usually lodged the individual human rights' applications with the ECtHR to defend group rights. Therefore, the European human rights system, particularly through the ECtHR, is considered one of the strongest regional human rights protection system and an effective supra-national court which enables the individuals to hold their national authorities accountable when an alleged violation occurs.⁴⁰ There also exist situations in which Islam is involved but the claimant alleging a violation is non-Muslim, as was the case in the *Molla Sali v. Greece* case. Therefore, the applicants in such cases include both Muslims and non-Muslims.

In general, the case law demonstrates the Court's reliance on the nature and content of the rights concerned, and the circumstances, background and overall context specific to each case when dealing with the alleged violations of human rights.⁴¹ Both the individuals and the states are permitted to lodge such applications. It should be emphasized that the contested rights are unique in nature and placed within different member states of the CoE. Further, the Court's previous rulings (case law) have a determining role in adjudicating only the case before it—not establishing binding rules for all member states. The case law are usually used in other decisions as persuasive or authoritative. There is no provision in the ECHR that denotes the binding nature of jurisprudence. This legal structure of the case decisions also helps to illuminate why the Court is not coherent in some of its judgements which depart from the previous case law with similar legal or factual issues. The Court decisions do not primarily establish a common law and only resolve a single controversy, but are often looked to in other cases as well.

This has arguably led to the inconsistency in some of the case laws of the Court. Those cases concerning Islam have not been exempted and therefore, the Court's approaches to such cases are not often viewed as coherent and consistent. Such inconsistency was evident in the cases that concerned religious symbols. The Court reached a different conclusion with respect to the presence of Christian symbols (crucifix and cross) in public sphere than those of Muslims (headscarf) in somewhat comparable situations. It is remarkable that the Muslim veils were regarded by the Court as a "powerful strong symbol" that could have indoctrination effects on pupils in contradiction with the principles of gender equality and secularism but the crucifix or cross were considered to be "passive or discreet symbols" with no proselyting effects.⁴² It is therefore argued that the Court's approach to Islam is narrow and influenced

⁴⁰ Gunthel, *Supra* Note 13, Page 69-70

⁴¹ Referring to these parameters is prevalent in the case law of the Court. For instance, the Court in paragraph 57 of the *E.S v. Austria* judgement reminded that the impugned interference with the freedom of speech should have been considered not only "in the light of the content of the statements at issue, but also the context in which they were made".

⁴² Please refer to *Dahlab v. Switzerland*, *Leyla Shahin v. Turkey*, *Luatsi v. Italy* and *Eweida and others v. UK* in the ECHR case law/database: hudoc.echr.coe.int/

by the dominant public opinion that Islam is a threat to democracy and the European culture and identity.⁴³

Generally, there are a number of factors and parameters that impact and influence the Court's reasoning and rulings. It ranges from the dominance of the principles of secularism underpinning the Court's understanding of the limits of freedoms to its reluctance to take the intricacies and specificities of a specific religion (in the current case Islam) into consideration. This prompted the Court to generally preempt fundamental rights over the religion. While the Court's treatment of religion is determined by the liberal democratic principles such as secularism, neutrality, or equality, it tends to fight against all types of religious extremism, religious hatred and discrimination which is prevalent in Europe currently. Balancing the Court's latter task with the former is of paramount importance specifically when noting that some of its case laws seem to strengthen and contribute to the extremism by and against Islam.

Applying a narrow approach towards Islam and the Court's different treatment of Christian and Islamic religious symbols has raised questions about the Court's neutrality and objectivity in dealing with the cases involving Islam. This is also relevant when the Court has to consider the cases concerning religious defamation or insult. For instance, the Court has been criticized for favouring the dominant and mainstream forms of Christianity when religious freedom is concerned, which has affected its case law as well. Muslims are considered to suffer the most from such a differential treatment of Islam and Christianity by the Court. Secular values have been used to restrict the rights of Muslims specially when manifesting the precepts of their religion, but at the same time provided "preferential treatment to members of the majority religion."⁴⁴

It has been debated that some case laws of the Court (*i.e. Refah Partisi v. Turkey*) contributed to generalization, misconception, simplification, and stereotyping of Islam. Further, Islamic duties were treated as the freedom of choice in line with the principles of liberal democracy in the headscarf ban cases,⁴⁵ and legal pluralism was declared as incompatible with the Convention system in the case of *Refah Partisi v. Turkey*. This has cast doubt over the Court's knowledge of the intricacies of Islam and its willingness to dig into them when considering such cases.

When it comes to Islam, the ECtHR's case laws demonstrate its tendency to grant a wide margin of appreciation to member states on the basis of defending secularism and equality as well as combating religious extremism. Proportionality testing has led the Court to give a substantial deference to the state authorities in restricting the rights of Muslim applicants enshrined in the Convention.⁴⁶ However, as a general reminder, which has been emphasized repeatedly in this thesis, it is far more important to consider

⁴³ Gunthel, *Supra* Note 13, Page 71-72

⁴⁴ Smet, Stijn. "Freedom of Religion Versus Freedom from Religion: Putting Religious Duties Back on the Map" *ResearchGate*, Dec. 2011, Pages 17-18
www.researchgate.net/publication/256018751_Freedom_of_Religion_Versus_Freedom_from_Religion_Putting_Religious_Duties_Back_on_the_Map.

⁴⁵ *id.*, page 17

⁴⁶ Fadel, Mohammad. "Muslim Reformists, Female Citizenship, and the Public Accommodation of Islam in Liberal Democracy: Politics and Religion" *Cambridge Core*, Mar. 2012, Abstract www.cambridge.org/core/journals/politics-and-religion/article/abs/muslim-reformists-female-citizenship-and-the-public-accommodation-of-islam-in-liberal-democracy/6669EEF76B2CF20EDEFBF20018A9F6B8.

the context and unique nature of each case before rendering any judgement or coming to a conclusion with respect to the Court performance.

All these parameters along with their implications will be analysed in this section with the main focus on the selected case law and how the Court dealt with them.

3.1 Influence of the Principles of Liberal Democracy on the ECtHR Decisions

The Court has regularly referred to the terms “secularism,” “neutrality,” and “tolerance” in its judgements that had to do with Islam, which may have notable implications for the Convention rights invoked—especially the right to freedom of religion. The Court applied two forms of secularism (fundamental secularism and liberal secularism) in its approaches towards the selected cases for analysis in this thesis. Both forms interpret the religion as an issue of private life, but in two different ways. Both ideas imply that neither religion nor the public institutions should be dominated or controlled by each other. It makes a clear distinction between the public and private spheres and demarcates specific roles for the religion and public institutions in this respect. However, the main distinction between the two notions are the extent to which religious manifestations are permitted in the public sphere. Liberal secularism is flexible in allowing such manifestations in the public realm but fundamental secularism emphasizes that as such should be solely kept within the private life sphere (homes and places of worship).⁴⁷

The key idea behind secularism is the self-sufficient organization of public space to organize the rights, render judgements, facilitate discourse, and foster governance without recourse to any particular faith or religion.⁴⁸

Incompatibly of Islam and Sharia with the Convention—system particularly with the notions of personal autonomy, privacy, and pluralism which underlie the liberal democratic order in Europe—has been observed in several judgements of the ECtHR. A notable case in this respect is the case of *Refah Partisi v. Turkey*, which was the starting point for using the term “Militant Democracy.” It means that democracy should pre-empt when it is under threat in any way, and ensure its existence and continuity even at the cost of limiting or encroaching on fundamental rights. In upholding the decision of the Turkish Constitutional Court to dissolve the Refah Party, the Strasbourg Court specifically mentioned in its judgement that the Party was “the centre of activities contrary to the principle of secularism.” This decision demonstrated a profound fear of political Islam⁴⁹ in Europe by making explicit pronouncements about the role Islam and Sharia have in the European democracies.⁵⁰

⁴⁷ Plesne, Ingwill Thorson. “The European Court on Human Rights Between Fundamentalist and Liberal Secularism” *Norwegian Centre for Human Rights*, July 2005, Pages 2-3
www.jus.uio.no/smr/om/aktuelt/arrangementer/historikk/forum/plesnerpaper.pdf.

⁴⁸ Danchin, Supra Note 14, Page 674

⁴⁹ The idea is to reshape the state, society and politics along with the Islamic lines calling for the establishment of an Islamic state in which the Islamic outlook prevails in the polity.

⁵⁰ MacCrea, Ronan. “Limitations on Religion in a Liberal Democratic Polity: Christianity and Islam in the Public Order of the European Union” *London School of Economics and Political Science/ Law Department*, 2007, Page 15
www.lse.ac.uk/law/working-paper-series/2007-08/WPS18-2007McCrea.pdf.

It is also remarkable that the Court found a violation of the Convention in previous cases where the Turkish authorities dissolved non-religious political parties (United Communist party and Socialist party in 1998, and Freedom and Democracy Party in 1999). It indicates the degree to which the Court considers political Islam a threat to the European public order. In its judgement, the Court recognized democracy as the only political model laid down by the Convention and “the only one compatible with it,” and endorsed a western definition of religion in which the freedom to manifest religion was viewed as part of the individual conscience which was different from the sphere of private law.⁵¹ In this case, the Court opted to follow fundamental notion of liberalism in which religion has no place in the public sphere and directed that the member states should act as “an impartial and neutral organizers of the exercise of different religions.”

Although the Court admitted that the dissolution of a political party was a “drastic measure” that can be applied only in the most serious occasions, it found such measure appropriate in the *Refah Partisi* case as proportionate to the aims pursued and necessary in a democratic society. Protecting democracy and secularism from potential threats that could have been posed by an Islamic party taking over the government in future elections justified the Court’s decision.

In *Molla Sali v. Greece*, the Court ruled in the applicant’s favour who wished to resolve an inheritance dispute which was considered a private law (family) issue through the ordinary (secular) courts. The Court indicated in its decision that rejecting a minority group’s claim to the right to voluntarily benefit from ordinary law by Greece was not only discriminatory on the basis of religion but also breached the negative aspect of the right to self-identification (“the right to choose not to be treated as a minority group”).⁵²

Since the Greek courts are supposed to apply a secular approach to resolving the disputes over the fundamental rights versus Sharia, which completely rejects secularism, the Strasbourg Court was more inclined to sustain the applicant’s claim and found the impugned measure (deferring to Sharia in personal matters of the Greek Muslim citizens living in Thrace) in violation of the Convention. Gender equality and equal treatment before the law of all persons regardless of gender, race, or religion is an important principle underpinning the rule of law in the European democracies. In contrast, Sharia differentiates between men and women when regulating the inheritance. In general, Sharia’s treatment of women and non-Muslims is often criticized for being discriminatory as compared with liberal democracies. It is an area of repeated yet unresolved contention between democracy and Islam. Intestacy involves rigid rules in Islam that cannot be subject to any change as they are contemplated in the Holy Quran. In sustaining the applicant’s claim in *Molla Sali v. Greece*, the Court protected personal autonomy and emphasized on the individuals’ will in freely choosing what rule to opt for and benefit from in their personal matters. Personal autonomy and free will are viewed as the core values in the liberal democracy which can barely be compromised.

The Court is expected to comply by another set of liberal democratic values (pluralism, tolerance, combating hate speech and religious discrimination and contribution to an issue of public debate/interest),

⁵¹ id, pages 16-17

⁵² Fokas, *Supra* Note 4, Page 131

which are arguably complementary and of equal importance to secularism, neutrality, equality, etc. This can potentially protect the minority rights against the majority rule, which is pertinent to sustaining a democratic society. Hence, the Court has issued striking judgments with respect to Islam and a notable case in this respect is *E.S. v. Austria*⁵³ in which the ECtHR upheld the conviction of an Austrian citizen by the Austrians courts for insulting an object of veneration (Prophet Mohammad) under the notion of religious peace and tolerance. The case concerned the freedom of expression in the religious context and it somewhat diverged some of the previous case laws of the Court which tended to protect the individuals against the blasphemy laws mainly on the basis of protecting the freedom of expression.⁵⁴

According to the ECtHR, “the freedom of expression constitutes one of the essential foundations of a democratic society” which carries with it duties and responsibilities. Almost in all of its case laws dealing with the freedom of expression, the Court has used this formula to demonstrate both the importance and the limits of this right.⁵⁵

The *E.S. v. Austria* case led to contentious debates over the limits of the freedom of expression and the extent to which the Court can censor expressions about religions on the ground of ensuring religious peace and tolerance.

For some scholars, the Court’s originalist interpretation to describe an old Islamic phenomenon through a “modern disparaging category” (marriage of prepubescent girls during Prophet Mohammad in around 1500 years ago and whether we can term it as “paedophile,” a modern concept) and its efforts to relate the facts to their context was viewed as legitimate in this case. Further, calling an object of veneration “paedophile” could potentially lead to a justified indignation among the believers endangering religious peace and tolerance in a community.⁵⁶ However, there are serious considerations and criticisms about the Court decision particularly in relation to how such judgement protects religious peace, living together and multiculturalism to the detriment of truth based justice which is also crucial for sustaining lasting peace in a democratic society. Without truth, it is argued, that the freedom of expression becomes of less value and a mandatory tolerance would prevail anyway.⁵⁷

The opponents maintain that the applicant pointed out a historical and factual truth that contributed to a debate of public interest (issue of child marriage and its prevalence in the current world). They argued that the “requirements to prove the truth of value judgements are impossible to fulfill” and even the value judgements could rely on a factual basis. The fact that she referred to an Islamic hadith source (Sahih Bukhari) in her lecture about Islam to describe the paedophilic nature of Prophet Mohammad’s marriage amounted to facts.⁵⁸

⁵³ Supra Note 30,

⁵⁴ Puppinc, Grégor. "The censorship of speech about Islam before the European Court of Human Rights: the appalling case of *ES v. Austria*" *WORLD• POLITICS* 1: 6 (2020), Page 104

⁵⁵ “Guide on Article 10 - Freedom of Expression” *European Court of Human Rights/ Council of Europe* , Aug. 2022, Page 11 www.echr.coe.int/documents/d/echr/Guide_Art_10_ENG.

⁵⁶ id, page 7

⁵⁷ Puppinc, Supra Note 49, Page 112

⁵⁸ id, page 107

The militant notion of democracy was raised in this case in that “it goes beyond the natural framework of a democratic society” and both the Austrian state and the Court acted as vigilant legal systems and tended to regulate closely the ethical issues of a society for ensuring stability and religious harmony. “Tyranny of values” is a resultant danger facing an ethical state that focuses solely on “the manner the citizens interact among them or in respect of the state.” This approach and over focusing on the states’ positive obligation to protect the freedom of religion has the potential to risk pluralism and the effective protection of the fundamental rights as enshrined in the Convention.⁵⁹

The Court’s case law mentioned above demonstrates that adherence to the principles of democracy can be both detrimental and favourable to the rights of Muslims in Europe. There are a number of factors that determine the scope of such variation. When it comes to political Islam or the Sharia-based plurality of legal systems that risk threatening the overall liberal democratic system and its founding principles such as secularity and equality, the Court has a tendency towards applying a more rigid supervision, including harsh measures impugning certain fundamental rights. That is why it upheld the dissolution of a political party with an Islamic agenda that progressed through the democratic processes (elections) on the fear that the party could have challenged democracy if it had taken over power in the upcoming elections.

However, the Court seems to be more lenient towards Islam as far as religious hatred and discrimination, religious peace and tolerance as well as an unjustified indignation of Muslims are concerned. Even if as a result, the freedom of expression, which is viewed as an essential foundation and critical to the truth based justice in a democratic society is encroached upon. As such gave rise to two notions of militant democracies but in the opposite directions. Militant democracy in a sense that democratic principles should be safeguarded at any cost, even if interfering with private views and personal autonomies (*Refah Partisi v. Turkey*). In contrast, militant democracy can also be attributed to ensuring religious peace and stability by focusing on the states’ positive obligation to protect the freedom of religion and belief (*E.S. v. Austria*).

3.2 Objectivity and Neutrality of the Court (Consistency in the Court Rulings)

The ECtHR has played a significant role in transformation of the Rule of Law in Europe providing a judicial forum for both individuals and member states to resolve disputed questions of fundamental rights. The Court gave depth to the Convention text by declaring the Convention as “a living document to be interpreted in the light of evolving circumstances.” It also expressed that the Convention is intended to guarantee the rights that are practical and effective rather than illusory and theoretical, and emphasized on the Judiciary’s role in exerting an effective control over the executive authorities’ interference with the individual’s fundamental rights.⁶⁰

In the cases in which the Court finds a violation of the Convention rights, the judgements are not always welcome by the member states concerned. This gave rise to major criticisms of the Court competence

⁵⁹ Gatti, Andrea. "Freedom of expression and protection of religious peace in Europe: considerations on ES v. Austria ECtHR case law" *Revista general de derecho público comparado* 24.11 (2018), Page 11

⁶⁰ “The European Court of Human Rights and Its Discontents” Edited by Spyridon Flogaitis et al., *Google Books*, 2013, Page 2 <https://books.google.com/books?id=JlmzrKol2oC>

and legitimacy to overturn the decisions of national institutions as well as the Court's ever-increasing case backlog, which stems mainly from the repeated violations of human rights by the member states due to inefficiency of the national legal systems to deliver justice.⁶¹

Inconsistency and lack of common standards in applying procedures and rationales established in the previous case laws has been observed in some of the Court judgements. This prompted some scholars to question the neutrality of the Court in coming to different conclusions while dealing with somewhat similar cases through applying varying approaches, norms and standards. In the context of the selected case law for this thesis, such criticisms work both ways. Some blame the Court for being dominantly influenced by the Christianity which is the majority religion in Europe (the headscarf ban) and some highlight the cases in which the Court has given preferential status to Islam for ensuring religious peace and tolerance (*E.S. v. Austria*) antagonizing the Christian faith followers, particularly when handling the cases in which the freedom of speech is concerned.

The Court has been criticized for exercising a double standard while treating Islam as compared with its treatment of Christianity. This is evident, as already mentioned, in the cases concerning religious symbols in the public sphere. It is argued that the secularism has not affected the Court case law to do with the majority Christianity in the same manner as it impacted the cases concerning Islam.⁶² Not only neutrality, but also the effectiveness of the remedies available under key human right instruments in Europe are questioned as to whether they could serve objectively both Muslim and non-Muslim population in the same way.⁶³

The Strasbourg Court is perceived to make normative and essentialised statements about Islam in the cases of *Refah Partisi v. Turkey* and *Molla Sali v. Greece*. This has led to the Muslim antagonism in Europe furthering the allegations of the Court's subjectivity in rendering judgments dealing with Islam. Further, it is debated that political consideration played a significant role in the Court's decision, which was influenced by the pending Turkish EU membership at the time.⁶⁴

It is significant to note that the 9/11 terrorist attacks occurred shortly before the Grand Chamber issued its ruling in the *Refah Partisi* case. This incident shocked the World and resulted in the European public opinion becoming more sensitive about security issues, Islamist extremism, and religious terrorism. Consequently, stricter measures were adopted and attitudes towards Muslims changed rapidly. In particular, national courts enlarged the competencies of the governments to combat terrorism. Acting as a political institution rather than an impartial and neutral international human right tribunal, the ECtHR arguably pre-empted security over democracy and human rights. So, it included such political terms as "Islamic fundamentalism," "totalitarian movements," and "threat to the democratic regime" in its judgement.⁶⁵ This looks valid and justified to prioritize security issues, however, political judgements by

⁶¹ id, pages 3-5

⁶² Please see and compare, for instance, the cases of *Dahlab v. Switzerland (2001)* and *Leyla Shahin v. Turkey (2005)* with *Luatsi v. Italy (2011)*

⁶³ Fokas, *Supra* Note 4, Page 132

⁶⁴ id, page 134

⁶⁵ KIZILYEL, Serkan. "Law and Justice Review" *Justice Academy of Turkey* , June 2014, Page 45
<https://lawandjustice.taa.gov.tr/yuklenenler/dosyalar/dergiler/law/law-8/law8.pdf>

a court of justice under the influence of terrorist attacks can potentially undermine the neutrality and autonomy of the law, weaken the rule of law and democracy, and pave the ground for arbitrariness in judiciary. A distinction of law from politics can avoid all the above.

The case of *Molla Sali v. Greece* concerned an international private law issue in which the applicability of Sharia law on personal matters of the Greek Muslim minority and the subsequent Mufti jurisdiction in a CoE member state was challenged before the ECtHR.⁶⁶ Not only does the case demonstrate an inherent conflict between Sharia and Greek law, it also reflects a broader contention over the compatibility of the European liberal democracy with Islam. The institution of Mufti and some cultural traditions of Islam are not always compatible with the rules of fundamental human rights, particularly in terms of the treatment of women and children—the principle quest in this case.

The Court pursued the overall sentiment in the *Refah Partisi v. Turkey* case and found the Thrace territory legal system incompatible with the Convention system on the ground of being discriminatory which hindered the state from protecting the fundamental rights and acting as an impartial organizer of the exercise of religions. Since the case concerned a widow who had been discriminated against by the Greek law on the ground of religion, overall neutrality and impartiality of the Court has not been challenged in the literature. Notwithstanding, the Court's treatment of Islam was somewhat analogous to that of the *Refah Partisi* case, particularly in the overall defiance with a system of conflict resolution under the jurisdiction of religious Mufties. In the end, it was considered discriminatory on the basis of religion. Lastly, the Court acted more leniently towards Islam in this case than the *Refah Partisi* case through making opting-out from a minority legal order or identity completely optional and voluntary provided it is informed.⁶⁷ So, the applicants were provided with the options whether to choose Sharia based rule or the Greek law rules for resolving their disputes in personal matters.

It is striking that the critics of the *E.S. v. Austria* case emphasized on the equal protection of all religious beliefs and symbols on a non-discriminatory basis by the Court which is supposed to take the “fair balance” test into consideration.⁶⁸ Noting a special attention to be given to the beliefs of minority groups, they questioned the neutrality and impartiality of the Court in this case pointing out that it disregarded the findings of the previous similar case laws in which the Court found the government's intrusion into the individual's freedom of expression in violation of Article 10 of the Convention.⁶⁹ In addition to highlighting the factual basis of what she stated in her lecture and the fact that forced marriage and child marriage are the pressing issues of public interest currently, the European judges were assumed to be

⁶⁶ Araújo, Marisa Almeida, and Ana Raquel. “The Sharia Law (and the Jurisdiction of the Mufti) in the Europe. the Molla Sali Case” *ResearchGate*, July 2019, Pages 58-59
www.researchgate.net/publication/334520121_The_Sharia_law_and_the_jurisdiction_of_the_Mufti_in_the_Europe_The_Molla_Sali_case.

⁶⁷ Fokas, Effie. “On Aims, Means, and Unintended Consequences: The Case of Molla Sali” *MDPI*, Oct. 2021, Page 8
www.mdpi.com/2077-1444/12/10/859.

⁶⁸ GRONOWSKA, BOŻENA. “Gloss on the Judgment of the European Court of Human Rights of 25 October 2018 in Case E.S v. Austria, Appl. No. 38450/12” *Ius Novum*, Feb. 2019, Page 295
<https://journals.indexcopernicus.com/search/journal/issue?issueId=284232&journalId=8125>

⁶⁹ Please refer to the cases: *Handyside v. the United Kingdom* (1976), *Aydin Tatlav v. Turkey and Giniewski v. France* (2006), *ECtHR's first judgment in Luatsi v. Italy* (2009), *Stern Taulats and Roura Capellera v. Spain*, *Sekmadienis Ltd. v. Lithuania* and “Pussy Riot” (2018)

afraid of provoking aggression by the radical Muslim population as seen in the aftermath of the Danish cartoons in 2005. Focusing on providing similar justifications for similar cases, they criticized the Court of reaching a different conclusion in this case that can potentially cast doubt over its neutrality and impartiality.⁷⁰

It seems that Islamophobia has influenced the way in which the Strasbourg Court decides cases that have to do with religious indignation. The Court followed the same propensity and reasoning in the case of *I.A. v. Turkey*.⁷¹ The Court is conceived to issue rulings that stood out from the majority of its previous case laws to avoid retaliation, bloody incidents, and instability under the notion of religious peace and tolerance. Even to some scholars, this judgement meant an endorsement of the blasphemy laws that have long been fought against by the human rights advocates in Europe. Today, there is a trend towards decriminalization of religious insult/offense in Europe.⁷² The current case has also dropped the degree of importance of the offense principle through which the Court required a solid proof of an actual offense to the followers in the previous cases. However, such a proof was missing here, as it was initiated by a Journalist and no reaction or resentment was expressed by Muslims.⁷³

The Court's judgement in *E.S. v. Austria* indicates that it mainly focused on the manner in which the statements were made rather than the content or nature of the statements. Paragraph 36 of the judgement referred to Article 188 of the Austrian Criminal Court stating: "it did not prohibit critical or offensive statements about a church or religious community per se, but merely regulated the manner in which such statements could be made." This raises the question of how objective or subjective the Court could be in assessing the manner and behaviour of people who bypass morality standards in a society.

It should be emphasized that the Court has to deal with a variety of the human rights applications lodged by legal and natural persons⁷⁴ with different values, traditions, and cultures. Different contexts require different thresholds. Treating the Convention as a living document and reconciliation of the universal rights with diversity require the Court to respond to each case based on the subject matter, the circumstances and its background. Therefore, the Court needs tools and mechanisms to ensure a room for manoeuvre and flexibility of its case law. Pursuing a context-based approach, proportionality testing and the margin of appreciation are among the strategies used by the court to fulfil its tasks in an impartial and neutral manner however political consideration and respecting diversity and the state sovereignty render this task challenging.

3.3 Consideration of the Intricacies of Islam

Islam is an Abrahamic and monotheistic religion in which faith (in God and Prophet) and Sharia constitute its main aspects. The Sharia is basically divided into two sets, one regulating affairs of man to

⁷⁰ GRONOWSKA, *Supra* Note 63, Pages 296-8

⁷¹ *I.A. v. Turkey*, no. 42571/98, ECHR 2005

⁷² Puppinc, *Supra* Note 49, Page 108

⁷³ Gatti, *Supra* Note 54, Page 9

⁷⁴ Please refer to Articles 33 and 34 of the ECHR which lays down inter-state and individual complaints respectively

man (Mu ‘amalāt) and other concerns affairs of man to God (‘ibādāt). The latter deals mainly with how to perform religious rituals and to manifest the religion.⁷⁵

The main sources of the Sharia (Quran and Sunnah)⁷⁶ entail general, abstruse, and abstract principles that are subject to interpretation. They need elaboration in an intelligent manner not only to abide by God’s will. but also to respond to the needs of Muslim. Variability and instability of the Sharia can be seen in the countries practicing the Sharia. Interpretation of the Islamic rules and principles vary across the Muslim world.

The jurisprudence in Islam stems from Fiqh, which is a human science for extracting the meaning and interpretation of divine commandments. It is used to apply a specific ruling on a particular situation given the context and circumstances of each case.⁷⁷ This gave rise to the formation of various schools of Islamic jurisprudence, of which the Sunni and the Shia constitute two main branches. There are four schools of Sunni jurisprudence (Hanafi, Maliki, Shafii and Hanbali) and at least two schools of Shia jurisprudence (Jafari and Zaydi).

Given heterogeneous nature of Islam involving varying and often conflicting schools and jurisprudence, it is hard to view Sharia as a convergent and unified legal system, as it varies from country to country, and itself can vary within a country. Defining the Sharia through the criteria and principles of international laws and universal rights has the potential of diminishing its content and complexity.

Such difference has caused various understanding and perception of human rights phenomenon among Islamic countries and scholars. Some Muslim scholars reject any connection between Islam and human rights organizations viewing it as a set of mere western world values and civilization which are not compatible with the Islamic teachings. Some define human rights within the ambit of Islamic rules and principles arguing that the western understanding of human rights should conform to the Islamic version of human rights. They are of the opinion that Islam covers all the issues related to human rights, including liberation of human being from slavery, fighting, oppression, and preserving all types of justice. The third group accepts the concept of human rights (the UN and other regional human rights instruments) as far as they conform to the teaching of Islam.⁷⁸

To deliver justice to the greatest extent possible, the ECtHR is generally expected to adequately take into account the cultural and social specificity and the complexity of Islam and its legal system while adjudicating the cases to do with Islam. The Court’s failure to do so has been raised in the *Refah Partisi* case in which the plurality of legal system (legal pluralism) based on the Sharia was rejected. The judgements were also criticized for relying on the nuanced understanding of Islam. In particular, some scholars debated that the deprivation of individual’s rights in the *Refah Partisi* case was based on “stereotypes, prejudice and undocumented fear about potential risk they could pose to national security

⁷⁵ Saedén, *Supra* Note 9, Page 9

⁷⁶ Quran is the primary source of law in Islam which is perfect and unchangeable however understanding of its verses requires interpretation. Sunna is the traditions and practices of the Prophet.

⁷⁷ Saedén, *Supra* Note 9, Page 11

⁷⁸ Mwamburi, Adam Hamisi, and AbdulGafar, Olawale Fahm. “Islam and Human Rights with Special Reference to the Universal Human Rights and the Cairo Declaration of Human Rights” *Shariah Journal*, Vol. 26, No. 1, 2018, Pages 126-127 <https://ejournal.um.edu.my/index.php/JS/article/download/13260/8363/26084>.

interests.” This stereotypical perception of Islam is conceived to impact the subsequent cases concerning Islam—specially the headscarf bans. It was striking when the Court used the clichéd understanding of the Islamic concepts such as “Sharia” and “Jihad” to demonstrate their incompatibility with the Convention system without having a precise study of their connotations and interpretations under the Islamic jurisprudence.⁷⁹ The Court also refrained from providing a definition for Sharia in its judgement to remove misunderstandings and doubt as to what was considered to be incompatible with the Convention rights.⁸⁰ In addition to establishing a problematic precedence for the prospect cases and perpetuating an unrealistic picture of Islam in Europe, this case law has the potential to make it difficult to reconcile Islam with democracy.

Various concepts and definitions of legal pluralism have been provided so far. However, variability of concepts about what the law is and the role it can play in ensuring public and social order contributes to this notion. The premise that the law exists in plurality leads to the plurality of legal systems.⁸¹ Legal pluralism is defined as a legal order in which two or more legal systems operate and “coexist in the same social field.” It is an inevitable part of a legal system that evolves in the form of customary laws, alternative dispute resolution, arbitration agreements, and international treaty agreements.⁸² However, the scope of the state control over such mechanisms depends on the level of the state’s capacity and development in the rule of law, human rights, and democratization.

A main dilemma facing legal pluralism is adjudication of conflicts by the religious norms, which is also commonplace worldwide. For instance, in North America and Europe, non-state community tribunals and actors form the legal systems apply religious norms to the adherent of a specific religion particularly in private issues such as marriages, divorces, and inheritance. In addition, Islamic countries allow the application of the religious norms to the adherents of a specific religion living in their territory as part of the state legal system. Both cases represent legal pluralism.⁸³ Notwithstanding, the main question is how effective and just such mechanisms could be for those subjecting to these norms specially for women and children.

Afghanistan experienced a western and internationally instituted democracy that underwent mainly top-down reforms since the fall of the Taliban in 2001 until the regainig of power by the Taliban in 2021. Democracy was characterized as nascent and fragile in a post-conflict and traditional context. The plurality of legal systems was manifested in Article 131 of the Afghanistan Constitution,⁸⁴ which

⁷⁹ Durham, *Supra* Note 5, Page 12

⁸⁰ Brzozowski, *Supra* Note 2, Page 6

⁸¹ Dupret, Baudouin. “Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques and Praxiological Re-Specification” *European Journal of Legal Studies: Issue 1*, 2007, Page 7
https://cadmus.eui.eu/bitstream/handle/1814/6852/EJLS_2007_1_1_12_DUP_EN.pdf.

⁸² Swenson, Geoffrey. “Legal Pluralism in Theory and Practice” *OUP Academic*, Jan. 2018, Page 1
<https://academic.oup.com/istr/article/20/3/438/4817016>.

⁸³ Hofri-Winogradow, Adam S. “A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State: Journal of Law and Religion” *Cambridge Core*, 24 Apr. 2015, Extract www.cambridge.org/core/journals/journal-of-law-and-religion/article/abs/plurality-of-discontent-legal-pluralism-religious-adjudication-and-the-state/5E3B24B28378BC7E600AF5214F0CDEC7.

⁸⁴ Afg. Const.(2004), available at: <http://www.afghanembassy.com/pl/afg/images/pliki/TheConstitution.pdf>

authorized the Afghan courts to “apply the Shia jurisprudence⁸⁵ in cases involving personal matters of followers of the Shia sect in accordance with the provisions of the law.” In other cases, if no clarification in this Constitution and other laws existed, the courts had to rule according to laws of this sect. Relying upon this Article, the former Afghanistan Parliament enacted the Shia Personal Status Law in 2009.⁸⁶

Although the initial objective of the Law was to ensure pluralism and tolerance towards the minority religions (Shia), it was subjected to an intense debate and criticism for being mainly in contradiction with the Human rights obligations of the former Islamic Republic of Afghanistan. The Law is believed to include provisions that inserted undue restrictions on Afghan women, violating their fundamental rights. It ruled that women needed their husband’s permission for leaving the house, seeking job opportunities, seeking education, and visiting a doctor. Further, women were not allowed to refuse their husband’s request for sex, and parents could use corporal punishment while raising their children.⁸⁷ The Afghanistan practice indicates the complexity and challenges associated with legal pluralism in an Islamic context which is not uncommon in most of the Muslim countries, let alone the liberal democracy.

The Malaysian legal system presents an interesting case study and relatively a good practice in respect of legal pluralism, which substantially varies from the European legal systems. Cultural tolerance that has also extended to the legal world is prevalent in the South East Asia. This is a legacy of the colonial rule which perpetuated coexistence and the culture of tolerating varying traditions and legal systems in the region.

Being a democratic constitutional state through envisaging democracy, checks and balance, the rule of law, and fundamental rights in the Constitution, the Malaysian Constitution also recognizes group-specific collective rights and quotas in education and employment. This prompted some scholars to label it as “communitarian-liberal democracy” or “a liberal democracy with communitarian ethos.” Unlike Turkey, Malaysia has not expressly opted for secularism in the Constitution neither has it interpreted secularism as a rigid separation of religion from the state. Islam is considered the official religion of the federal government in the Constitution that enjoys a privileged status both in law and in policy. However, the principles of secularism have inevitably impacted social, political, and legal systems in Malaysia. This is why it is viewed as “a quasi-secular or quasi-Islamic state.”⁸⁸

Malaysia has used creative and contextual institutional and legal approaches to interacting and compromising between the state and religion. A modern and effective system of checks and balance and judicial review is in place where the Constitution and other federal laws and institutions have supremacy over the state laws and courts, including Islamic laws and courts. All the state actions are subject to the Constitutionality test. Federal courts adhere to the democratic and liberal principles while adjudicating the cases. Sharia law is never considered the main and only source of reference and interpretation for legislation and adjudication, as is the case in other Islamic countries like Egypt or Saudi Arabia. The

⁸⁵ Shia/Shiite is one of the major sect in Islam that after the Sunni jurisprudence have the most followers across the globe.

⁸⁶ “English Translation/Shiite Personal Status Law” *Refworld*, Apr.2009, www.refworld.org/pdfid/4a24ed5b2.pdf.

⁸⁷ Please refer to Articles 132, 133, 177 and 194 of the Law in: www.refworld.org/pdfid/4a24ed5b2.pdf

⁸⁸ Meerschaut, Karen, and Serge Gutwirth. “Legal Pluralism and Islam in the Scales of the European Court of Human Rights : The Limits of Categorical Balancing” *Bepress TM*, 2008, Pages 17-19
https://works.bepress.com/serge_gutwirth/25/.

scope of its application is only limited to the family and private matters but not matters in the public domain. The adherents of other religions can freely practice and even propagate their beliefs and religions in the country, subject to same the restrictions brought by the state legislatures through enacting anti-propagation laws among the Muslims.⁸⁹ The Malaysian example indicates the possibility of relative reconciliation of the Islamic law with the liberal democratic values and traditions. Nevertheless, one should not overlook the context and the culture of tolerance and coexistence already institutionalized during the colonial era.

Meanwhile, it should be emphasized that defying legal pluralism has implications as regards the tolerance and pluralism in a democratic society. The *Refah Partisi* judgement is argued to contradict liberal toleration and the recognition of various forms of legal accommodations between religion and the states, which constitute the foundation of value pluralistic tradition in Europe. A robust pluralist liberalism rejects the idea that being democratic necessarily requires being anti-religious and focuses on respecting the freedom of religion and defining the scope of the public sphere in light of “the religious heritage, symbols and collective identity of its people.” The claim is not only legal in terms of protecting the rights of a specific religious groups, including religious minorities, but also ethical and cultural in terms of protecting collective rights and preserving the identity of a special social group.⁹⁰ That is why critics called for the reconsideration of the Court’s decision that erroneously declared a plurality of legal systems as incompatible with the ECHR. The fact that many constitutions and legal systems around the world have already recognized legal pluralism supports their argument. For instance, in India and South Africa, where diverse religious, ethnic, cultural and linguistic groups live, it provides the religious groups, including minorities with juridical autonomy over family matters through personal status laws.⁹¹

In *Molla Sali* case, legal pluralism was concerned in respect of a private matter. The judgement left the compatibility of Sharia with democracy open to discussion by recognizing the voluntary opting-in to Sharia rules in private matters. The Court referred to the Greek government’s submission in its judgement, asking the Court to refrain from addressing the compatibility of a Sharia based plurality of legal systems with the fundamental rights, as was the issue in the *Refah Partisi* case. The Court was expected to examine this case in “concreto” (“a case by case examination of each rule of the Sharia applying to the actual cases concerning Muslims”), considering “multiculturalism in today’s Europe, difficulty of formulating policies applicable on religious communities and the complexity of the “modern identity” of the inhabitants of Europe”.⁹²

The Court’s decision in the *Molla Salli* case moved away from its previous judgement (*Refah Partisi*) that permitted the Contracting Parties to avoid the application of Sharia based private-law rules within their jurisdiction, which are prejudicial to the principles and values of democracy.⁹³ Therefore, implicit regard had been given by the Court to the plurality of legal systems and the recognition of the voluntary and informed opting-in to either civil law or Sharia law. The Court seemed to be cognizant of the

⁸⁹ id, Pages 19-21

⁹⁰ Danchin, Supra Note 14, Page 718

⁹¹ id, page 723

⁹² Paragraph 111 of *Molla Sali v. Greece* case Judgement

⁹³ Paragraph 128 of *Refah Partisi and Others v. Turkey* case Judgement

importance and complexity of Sharia rules with regard to their application to the Islamic followers in a member state.

However, this judgement was criticized for missing an opportunity to concretely decide the application of Sharia rules to cases of personal status. Without setting any limitation, the Court made it completely voluntary to choose between civil and Sharia rules provided it is informed. The Court's critiques focused on the nature of Sharia and the way it is practiced with insufficient procedural safeguards encompassing low quality judgments. To them, this decision has implications in terms of waiving the rights to a fair trial and equality before the law if one is to opt out of the provisions of civil law and jurisdiction of the civil courts. The critiques further argued that an informed consent is hard to be guaranteed in a Muslim context, considering the peer and social pressure for preserving group identity and religious tradition.⁹⁴

There are pros and cons with respect to the application of a plurality of legal systems, particularly applying religious norms to adherents of a specific religion concerning their private matters. It can guarantee the autonomy of the religious groups over the effective resolution of their adherents' personal issues. In addition, respecting religious, traditional, and customary norms corresponds to the proposition of cultural relativism that would enhance pluralism, coexistence, tolerance, and diversity in a democracy. As far as Islam is concerned, there exist circumstances in which religious norms are in conflict with fundamental rights. For instance, Sharia's treatment of women, children, minority groups, and non-Muslims is of great concern in liberal democracies. In general, inadequacy of procedural safeguards, differentiated treatment of beneficiaries, quality of judgements, and Sharia's perceived defiance with international standards of human rights are major criticisms directed at the Muftis,⁹⁵ the Sharia councils' adjudication process, and their decisions. This stands in contradiction with the equality, anti-discrimination, and due process norms that are considered core democratic values in Europe. That is why, in spite of accepting the religious groups' autonomy over resolving dogmatic issues (and even allowing for divergence from the general rules on the basis of religion), the Court has maintained its judicial review and supervision to assess whether the measures are justified and compatible with the Convention system.⁹⁶ Such dual legal systems are still in place in Greece (Muftis) and the UK (Shaira Councils) and were implemented in the French Territory of Mayotte until 2011.⁹⁷ However, while the case of *Molla Sali* was being processed at the ECtHR in 2018, Greece introduced legal reforms in Western Thrace making it completely optional to resort to Sharia rules in private matters of the Muslim minority. The Law also required a pre-agreement between parties of a dispute to establish the Mufti jurisdiction.⁹⁸

The human rights standards and norms seem to be the main criteria for legitimizing or outlawing the application of religious norms. So, as far as they are in line with the universal human rights system, their

⁹⁴ Fokas, *Supra* Note 62, Pages 8-9

⁹⁵ Muftis are individuals who act in both religious and judicial capacities to resolve the family issues related disputes in Western Thrace area of Greece.

⁹⁶ Koumoutzis, Nikos, and Christos Papastylianos. "Human Rights Issues Arising from the Implementation of Sharia Law on the Minority of Western Thrace-ECtHR *Molla Sali v. Greece*, Application No. 20452/14, 19 December 2018" *MDPI*, Apr. 2019, Page 3 www.mdpi.com/2077-1444/10/5/300/htm.

⁹⁷ GUTIÉRREZ, *Supra* Note 26, Pages 10-16

⁹⁸ Nardocci, di Costanza. "Light on Article 14 between Discrimination by Association & Self..." *Federalismi.It - ISSN 1826-3534*, Oct. 2019, Page 20 <https://air.unimi.it/bitstream/2434/692168/2/03102019233411.pdf>.

importance and role in the daily lives of their adherents should be recognized and respected. On the other hand, although the Court firmly declared the Sharia law as incompatible with the Convention system in the *Refah Partisi* case, this should never be interpreted as an absolute incompatibility between Islam and the Convention. The Court has already asserted that religion is “one of the most vital elements that go to make up the identity of believers and their conception of life.” Instead, there are structural incompatibilities between the Convention and Sharia, and such a decision should not lead to the rejection of all the elements of Islam as whole.⁹⁹

3.4 Conflicting Rights

Conflicts between rights is inevitable in the current human rights discourse. The proliferation of rights today has led to an increase in the occurrence of this phenomenon, which requires the Court to carefully balance competing rights and interests (absolute vs. qualified rights, core vs. periphery rights, individual rights vs. public interests, and conventional vs. non-conventional rights). Rights must be balanced based on the context and specific situation of each case. Resolution of conflicts usually requires a close examination of the factual issues in each case that can lead to a departure from precedent and subsequently to the progressive development of the Court’s case law, which is highly context-based. As such, the application of a static rules-based technique and using general propositions to concrete cases does not yield optimal results.¹⁰⁰

Conflicts between rights can be both horizontal and vertical. The horizontal conflict of rights arises in situations where two right holders are contesting to “make their own right prevail over the other’s right” by seeking redress from the judges and judiciaries. This notion constitutes the general perception of conflict of rights. However, since the Convention system only permits application against States, horizontal situations are treated through the states’ positive obligations. As a result, the State is responsible for the way it handles private conflicts. In vertical situations, an individual becomes in opposition with the State with no third party involved where the State interest (i.e. the protection of public interest, public moral, national security, prevention of crime and disorder, etc.) are usually involved. In both situations, the State is a major party to the conflict, creating a vertical form of conflict rather than a horizontal one.¹⁰¹

The Court has relied on a variety of methodologies and techniques to resolve disputes over conflicting rights and interests. The classic test of “proportionality” or of “necessity,” the mysterious notion of the “balancing” of rights, and the controversial margin of appreciation are among the major tools used by the Court in these situations.

The proportionality test is envisaged in the structure of some Articles of the Convention, which stipulate the rights or freedoms first and the restrictions to them can be justified if they are “prescribed by law,”

⁹⁹ GUTIÉRREZ, *Supra* Note 26, Page 9

¹⁰⁰ De Schutter, Olivier, and Françoise Tulkens. “The European Court of Human Rights as a Pragmatic Institution” *SSRN*, 12 June 2014, Page 3 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446909.

¹⁰¹ “Conflicts between fundamental rights” Edited by Eva. Brems, *Berkeley Law*, 2006, Pages 219-222 <https://lawcat.berkeley.edu/record/213792?ln=en>.

“pursue legitimate aims,” and “are necessary in a democratic society.” Thus, the measures should be proportionate to the aims pursued and follow a “pressing social need.” To this end, the limitation of a right should be permitted only if it is the least restrictive measure (no other means are available that could meet the objective with a lesser cost to the rights concerned). However, this method is criticized for directly confronting conflicting rights and prioritizing Convention rights. To focus on confronting competing rights less directly, the “balancing” method has been introduced, in which the value and weight of the rights are assessed. Still, it affords priority to the rights that are of greater value.¹⁰²

The concept of the margin of appreciation is rooted in the subsidiarity implying that the members states of the Council of Europe have the primary responsibility of ensuring that the Convention rights are upheld and respected.¹⁰³ In the context of the ECHR, the Margin of Appreciation concerns mainly the deference the Strasbourg Court provides to member states in the implementation of the Conventions’ rights and norms.¹⁰⁴ The main logic behind the doctrine is the “better position rationale” –implying that national authorities are, in principle, in a better position than the international court to decide whether restrictions and impugned measures are necessary and if the convention criteria are fulfilled due to their proximity to the context of a given society.¹⁰⁵

Striking a balance between the competing rights and the resolution of conflicts between rights and public interests is “the heartland of the Margin of Appreciation.” Granting a role in demarcating the rights from public interests to state authorities can be justified on the ground that doing so involves a difficult task of weighing controversial national matters for which national authorities have local knowledge and expertise. Likewise, there might be pros and cons in a member state with respect to conflicting matters, and each idea can be equally defensible. Therefore, if the “Court substitutes its own conception of what is appropriate,” it can be regarded as taking a side in the resolution of a genuine human rights conflict for which figuring out a legal solution is not straightforward. However, the Court supervision and review remains crucial in order to avoid arbitrary interference by member states that could risk the Convention’s objectives and substantially impact the essence of the rights concerned.¹⁰⁶

All the above mechanisms are interrelated and somewhat complementary to each other. They are better studied and analysed in conjunction with each other and one should refrain from treating them individually as single and independent approaches. The Court usually mentions them simultaneously and sometimes interchangeably in its judgements. The Margin of Appreciation is often referred to in cases

¹⁰² De Schutter, *Supra* Note 85, Pages 20-2

¹⁰³ Williams, Paul. “Subsidiarity and the Margin of Appreciation in Protocol 15 of the ECHR: Substantial or Symbolic Change?” *Public International Law & Policy Group*, 5 July 2021, www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2021/7/5/subsidiarity-and-the-margin-of-appreciation-in-protocol-15-of-the-echr-substantial-or-symbolic-change.

¹⁰⁴ Kratochvíl, Jan. “The Inflation of the Margin of Appreciation by the European Court Of Human Rights” *Netherlands Quarterly of Human Rights*, Vol. 29/3, Netherlands Institute of Human Rights, 2011, Page 327 www.corteidh.or.cr/tablas/r26992.pdf.

¹⁰⁵ Greer, Steven C. “The Margin of Appreciation: Interpretation and Discretion Under the European Convention of Human Rights.” *Google Books*, July 2000, Page 8, books.google.com/books?hl=en.

¹⁰⁶ *id.*, page 33

where the Court applies the proportionality testing. (The latter is usually deemed to mean the balancing of rights too.)

The Court applied the proportionality testing in the *E.S. v. Austria* and *Refah Partisi v. Turkey* cases. In both cases, the Court found no violations of Articles 10 and 11 of the Convention respectively by the states concerned.

The measures in the *Refah Partisi* case were considered an interference with the Applicants' right to freedom of association. Since the case concerned constitutionality of a political party, the Constitution was the most relevant law in which the measures (dissolution) and their aims (protection of secularism) were contemplated. So, they met the requirements of being "prescribed by law" and "pursuing legitimate aims." In identifying the necessity and proportionality of the measures, the Court concluded that the Sharia is not compatible with the Convention system and Refah's programs and policies by the introduction of Sharia-based legal pluralism were deemed as an immediate and tangible threat to democracy and secularism. Therefore, the interference met the "pressing social need" and was proportionate to the aims pursued. So, the Turkish authorities had acted within their margin of appreciation. However, the Court's judgement has been criticized for departing subjectively from its previous case laws where a narrow margin of appreciation was granted to the states with regard to the dissolution of political parties. This case also represents a situation of conflict of the individual's right versus a public interest, where the latter prevails.

In *E.S v. Austria*, the measures were considered to "be prescribed by law" and "pursue legitimate aims" as the government applied a Criminal Law in which both measures (fine/penalty) and aims (protecting the rights of others by safeguarding religious peace and religious feelings) were anticipated. To determine "the pressing social need," the Court considered the content of the impinged statements, the context in which they were made, and the severity of the penalty/measures imposed. The Court agreed with the domestic courts that the statements were value judgements rather than facts and "exceeded the permissible limits of an objective debate and was considered an abusive attack on Prophet Mohammad." Ultimately, the Court held that the domestic courts had not overstepped their margin of appreciation and appropriately balanced the applicants' right to freedom of expression with the rights of others to have their religious feelings protected (religious peace). This ECtHR judgement showcases the balancing exercise where the Court's task was to strike a balance between two competing rights enshrined in the Conventions. At last, freedom of speech was given lower weight than "the right of others" to protect them from injury to their religious feelings.

The above judgements seem to be at odd with a general rule in the Convention system that "freedom should be interpreted in the widest sense and limitations on the right in their narrowest."¹⁰⁷ This can be justified on the ground that each situation is unique in nature and context, so it is far from practical to always apply general propositions to the concrete cases. Having a high regard for the above mechanisms, the Strasbourg judges tend to treat them as the accepted standards for resolving disputes which have evolved over time and played a crucial role in the Court's jurisprudence. They provide the Court with

¹⁰⁷ Gunthel, *Supra* Note 13, Page 34

the flexibility required to respond to each application based on the specifics of the facts of each case in question. In the face of flexibility, however, they create uncertainty and unpredictability in relation to the Court's case law, procedures, and rationale used in decisions.

A wide judicial discretion is one of the main criticisms of the techniques employed by the Court to resolve the cases involving conflict of rights. They are viewed as abstract processes with no specific formula on how they work. The consequence of refereeing to them cannot be foreseeable based on the clear procedures. This has led to inconsistency in the application and lack of rationale standards required in reconciling the competing rights and interests. Notwithstanding, given a considerable variety of the conflicting situations and their complexity, it is hard to envisage a single rule to address all of them in a satisfactory manner. That is why the Court has not taken a steady and clear methodology for addressing the conflicting rights. In most cases, choices have to be made and a win-win solution and even a compromise is hard to reach. A single method is not able to cope with the complexity of situations and cases brought before the Court.

4. Anticipated Consequences/Implications of the Court Decisions on the treatment of future cases involving Islam in Member States

The ECtHR is a standard setting body within the Council of Europe whose primary objective is to safeguard the fundamental rights and freedoms laid down in the ECHR.¹⁰⁸ Not only does it serve as a supranational court to resolve disputes, but its judgements can also impact public perception and national legal approaches towards disputed concepts and ideologies. When dealing with the cases to do with Islam, other than affecting the member states' engagement with Islam through legislation and adjudication, the Court—whether intentionally or not—disseminates specific messages to public about Islam, its role in the community, and the possibility of its reconciliation and/or incompatibility with the democratic norms and standards.

Sometimes, the Court's impact can expand beyond the Europe and reach out all over the world. Its decisions can be treated as having a persuasive authority in other jurisdictions, and therefore instigate inspiration and reactions with unknown impact. The Court may have to confront defiance and fierce reactions when dealing with issues of a sensitive nature, particularly those concerning religious freedom and its conflict with other fundamental rights, as well as the religious defamation and insult. Adjudication of disputes involving Islam is always a hard choice to make for the ECtHR. This holds true especially when the Court has to justify the defamation of Islam under the freedom of expression or on the basis of other core democratic values. This may ignite a negative sentiment among the Muslim population around the world. As a result, on the pretext of defending the divine rules, the orthodox and radical Islamic groups may react to retaliate.

Undoubtedly, the fear of Islam or Islamophobia has become commonplace in Europe. Terrorist attacks by insurgent groups, which are usually labelled as Islamism, have been used by mainstream media and politics feeding a negative public perception of Islam and disseminating Islamophobic sentiments throughout Europe. This phenomenon can also work its way through the Court's reasoning and judgements, as the Strasbourg institutions are not immune from the effects of public perception, policies, and trends in Europe. As already mentioned, some critics have asserted that the fear of future retaliation by Islamic radical groups influenced the Court's decision to restrict the freedom of expression in the case of *E.S. v. Austria*. The Court justified its ruling on the basis of the religious peace doctrine, which is also vital for ensuring tolerance, coexistence, and pluralism. Further, the standards set by the Court's jurisprudence also have the potential to either deter or contribute to Islamophobia. This can be seen in the *Refah Partisi v. Turkey* judgement. It is evident that the Court's decisions have implications and consequences. Given the context of the selected case laws, this Chapter focuses on the repercussions of the Court's judgements in terms of their correlation with Islamophobia, ensuring coexistence and religious tolerance as well as compromising individual rights.

¹⁰⁸ Please refer to the Preamble and Article 19 of the European Convention on Human Rights (1950)

4.1 ECtHR Judgements and Islamophobia

4.1.1 Definition and Background of Islamophobia

A widely accepted definition for Islamophobia has not yet been established. It is an emerging and contested concept in the social science field. Generally, Islamophobia is defined as “an extreme fear of and hostility toward Islam and Muslims.” It represents an anti-Muslim sentiment and racism with widespread and negative impacts. This phenomenon can lead to hate speech and hate crimes, social and political disenfranchisement, negatively influence domestic and foreign policies, and promote discriminatory policies, including mass surveillance and incarceration, all which mainly serve the interests of political actors instead of serving a legitimate purpose in governance.¹⁰⁹

A working definition for Islamophobia was prepared for the report to the 46th session of Human Rights Council as follows: “A fear, prejudice and hatred of Muslims or non-Muslim individuals that leads to provocation, hostility and intolerance by means of threatening, harassment, abuse, incitement and intimidation of Muslims and non-Muslims, both in the online and offline world. Motivated by institutional, ideological, political and religious hostility that transcends into structural and cultural racism which targets the symbols and markers of a being a Muslim.”¹¹⁰

However, using this concept was contested for having the potential of conflating criticism of Islam and criticism of Muslims themselves. This could be instrumental in the efforts by Islamic countries and organizations to denounce and suppress any legitimate criticism of Islamic interpretation and practices to ensure conformity among Muslims.¹¹¹

A Gallop Poll in 2011 found that many Muslims do not feel respected by the western societies. A considerable number of the respondents in this survey, mainly from the US (52%) and Canada (48%) admitted that the West does not respect Muslim societies or treat them fairly. Religion and political interests were viewed as the root causes of tension between Muslims and western societies. Even one-third of those who showed no prejudice toward Muslims regarded Islam as an intolerant religion that does not accept other religions.¹¹²

¹⁰⁹ Humanity, One New. “Dismantling Anti-Muslim Sentiment in the United States” *One New Humanity CDC*, 10 Jan. 2023, www.onenewhumanitycdc.org/blog/dismantling-anti-muslim-sentiment-in-the-united-states?gclid=CjwKCAjwzJmlBhBBEiwAEJyLu3_bDORtzKB1UUyqQ0R9uorW0XpRW9piDdngdVW0ZVN_pZf8Aesczh_oCFC8QAvD_BwE.

¹¹⁰ Awan, Imran, and Irene Zempi. “A WORKING DEFINITION OF ISLAMOPHOBIA: A Briefing Paper Prepared for the Special Rapporteur on Freedom of Religion or Belief” *OHCHR*, Nov. 2020, Page 2 <https://www.ohchr.org/sites/default/files/Documents/Issues/Religion/Islamophobia-AntiMuslim/Civil%20Society%20or%20Individuals/ProfAwan-2.pdf>.

¹¹¹ Page 464, “Routledge Handbook of Islam in the West.” Edited by Roberto Tottoli, *Google Books*, 2022, Page 464, books.google.com/books?hl=en.

¹¹² “Islamophobia: Understanding Anti-Muslim Sentiment in the West” *Gallup.Com*, 2011, <https://news.gallup.com/poll/157082/islamophobia-understanding-anti-muslim-sentiment-west.aspx>.

The term Islamophobia was initially used in 1990 to describe French treatment of Muslims in its former northern African colonies.¹¹³ In the contemporary discourse, the term has been frequently referred to after the publication of the Runnymede Trust Report “Islamophobia: A Challenge for Us All” in 1997. An updated version of this report in 2017 and an All-Party Parliamentary Group on British Muslims Report “Islamophobia Defined” (APPGBM Report, 2018), defined Islamophobia as “a type of racism that targets the expressions of Muslimness or perceived Muslimness”. Therefore, “Anti-Muslim racism” and “anti-Muslimism” are alternative terms used by some scholars and a debate about whether it concerns religion, ethnicity or culture still persists.¹¹⁴

Several events in Europe have put Muslims in the spotlight. A dramatic unemployment following the collapse of communist regimes caused Europeans to view the Muslim immigrants as a burden and a threat to their economic system, jobs, and welfare. At the European Union level, the Schengen system introduced strict rules for immigration and travel to Europe. The 9/11 attacks shifted the public perception of Muslims from being an economic burden to a threat to national security, charging them with much more dangerous attributes. Muslims have been stigmatized and alienated because of their cultural and social attributes, and have been claimed to be incompatible with the “European identity.” Anti-immigrant and specifically anti-Muslim policies have become an asset for public popularity and political gains in a number of European countries.¹¹⁵ It can be said that generalization and stereotyping of Islam and Muslims is becoming commonplace in the social, political, and cultural arenas throughout Europe. Muslims are frequently perceived to have a connection with terror and violence, and even mainstream naturalized Muslims in Europe are attributed to radical groups in Afghanistan, Iraq, and Iran. This state of affairs has not only impacted media, politics and public opinion in CoE member states, they can also influence the Strasbourg institutions, in particular the ECtHR’s approach to handling cases concerning Islam.

4.1.2 Correlation of ECtHR Judgements with Islamophobia

Drawing a direct link between the Court’s judgements and Islamophobia is of less concern for this thesis, as the main mandate of the ECtHR is to resolve disputes over the fundamental rights laid down in the Convention, and not to combat Islamophobia. However, it examines a correlation between the Court’s judgment and public or political actions against Muslims in Europe.

In general, the Court’s impact is not limited to the case or country in question. In addition to establishing persuasive or authoritative precedent and standards to be followed in the later similar cases, the Court’s rulings affect national legislation and legal systems in the CoE member states. It has also been argued that the Court’s decisions have potential indirect and radiating effects on society at large and subsequently on the public perception of fundamental rights through communicating and splashing specific messages across the European community. This can even be considered far more important than its impact on a specific case or a country. Due to “the sheer volume of relevant case laws,” the ECtHR is

¹¹³ Elsheikh, Elsadig, and Basima Sisemore. “Islamophobia through the Eyes of Muslims” *Othering & Belonging Institute*, Sept. 2021, Page 2 <https://belonging.berkeley.edu/sites/default/files/2021-09/Islamophobia%20Through%20the%20Eyes%20of%20Muslims.pdf>.

¹¹⁴ Sealy, Thomas. “Islamophobia: With or without Islam?” *MDPI*, 21 May 2021, Page 1 www.mdpi.com/2077-1444/12/6/369/htm.

¹¹⁵ Erdenir, Burak. “The Future of Europe: Islamophobia?” *Esiweb.Org*, Oct. 2005, Pages 2-3 www.esiweb.org/pdf/esi_turkey_tpg_id_34.pdf.

considered to have far greater impacts than any other CoE organizations in terms of beneficiaries' perception of their rights.¹¹⁶ However, the messages communicated by the Court regarding Islam are not consistent, as the Court acts in a case and country specific manner. When it comes to religious hatred and discrimination, or the Muslim community's autonomy claims,¹¹⁷ it rules in favour of Muslims, however, a difference in the Court's approach arises when there exists a threat to secularism or expression of religious identity is concerned. Two selected cases studied for this thesis--*E.S. v. Austria* and *Refah Partisi v. Turkey*--support this argument.

The Court made generalized and stereotypical statements about Islam and Islamic concepts in the *Refah Partisi* case, disregarding the complexity and heterogeneity of Islam. That is why some scholars called for the expert views that could have introduced "a more nuanced and balanced" perspectives about the Islamic concepts and practices. They regarded this decision as coming close to "orientalism" and Islamophobia" rather than a mere human rights dispute resolution.¹¹⁸ This could lead to the Muslims' antagonism and alienation in Europe making it harder to integrate them into the social, cultural, political, and economic lives. Integration of Muslim immigrants into the European societies has posed an enormous challenge in Europe due to the perceived incompatibility of Muslims' religion, cultures, and traditions with the European identity. The Islamophobic views, which have gained momentum in European countries, further complicates the integration process. It is also perceived that many migrants who enter Europe are unable to find employment, so they make up the poorest social class in European countries. In addition, this precedent is considered to have paved the way for limiting the rights of the European Muslims to express their identity through wearing a veil or headscarf. It has the potential to escalate the public fear (or perception) of Islam and Muslims in European societies through introducing Islam as a violent religion that can never be reconciled with democratic values.

The rise in the anti-Islamic sentiment globally is a current reality. The impacts of Islamophobia have been documented by varying international institutions, including non-governmental organizations. A resolution was unanimously adopted the United Nations in 2022 proclaiming 15 March as the International Day to Combat Islamophobia.¹¹⁹ A study carried out to evaluate the impact of Islamophobia on Muslim women in the UK (2015) found that other than being discriminated in the labour market, Muslim women encounter high degree of racism, harassment, and abuse because of their religious identity.¹²⁰

ECtHR was also criticized of issuing the *E.S. v. Austria* judgement under the fear of Muslims. Critiques maintained that the Court approval of the Austrian measures to impinge remarks by Ms. Sabaditsch-Wolff for preserving the "religious peace" demonstrated an inherent fear of violent reaction and

¹¹⁶ Fokas, Supra Note 4, Page 140

¹¹⁷ Please refer to the cases of *Serif v. Greece* (1999) and *Hasan and Chaush v. Bulgaria* (2000).

¹¹⁸ Meerschaut, Supra Note 88, Page 17

¹¹⁹ "General Assembly Unanimously Adopts Texts on Combating Islamophobia, Protecting Rangelands, Tackling Difficulties for Widows, Bicycles as Public Transportation|UN Press" *United Nations*, Mar. 2022
<https://press.un.org/en/2022/ga12408.doc.htm>.

¹²⁰ Kurić, Đermana. "ENAR Forgotten Women Report: The Impact of Islamophobia on Muslim Women." *European Network against Racism*, 2016, Page 4
www.academia.edu/30449522/ENAR_Forgotten_Women_report_The_impact_of_Islamophobia_on_Muslim_women.

retaliation by the radical Islamic groups. So, the criteria used by the Court to restrict the freedom of expression was the possibility of arousing violence rather than seeking and offering the truth.¹²¹ The rationale of using this standard was weakened, because of the fact that only a journalist's claim triggered the case and the *possibility* of violence seemed less likely, and there was no public reaction to the impugned speech. Nevertheless, Europe experienced violent reactions to the insult cases of Islam by radical Muslims. For instance, Charlie Hebdo office was attacked in January 2015, where 12 people were killed in retaliation of its satirical weekly about Islam. A month later, a person was killed at a public event entitled "Art, Blasphemy and Freedom of Expression" in Copenhagen.¹²²

It is safe to say Islamophobic sentiments in Europe may have influenced the Strasbourg judges in the *E.S. v. Austria* case to rule in the Muslims' favour. As a result, they confronted the liberal activists who claimed that the Court's preferential treatment of Islam conflicted the previous similar case laws where offense to the majority Christian was justified under the freedom of expression which constitutes the essential foundation of a democratic society.

4.2 Coexistence and Tolerance (Religious Peace)

Human rights discourse always advocates for the promotion of pluralism, coexistence, and tolerance in a democratic society. They are considered to provide a counterbalance against majority rule and contribute to combating Islamophobia (or reducing its impacts). The Court's case law instantly provides for the Protection of individuals from intrusion on their Convention rights on the basis of predisposed bias toward majority against minority.¹²³

Religious coexistence and tolerance emerged through the evolution of the Court's jurisprudence on religious matters since it considered the first case concerning freedom of religion in 1993.¹²⁴ The freedom of religion was initially given a broad definition which allowed for the implicit protection of blasphemy laws in favour of the majority religion (Christianity) sustaining negative religious freedom claims. However, since then, there is a tendency "towards a more secularist approaches" in the related case law.¹²⁵ The Court referred to the religious peace doctrine in its case laws to protect the followers of a religion from injury to their religious feelings.

The popular cases in this respect are *Otto-Preminger-Institut v. Austria*,¹²⁶ and *Wingrove v. United Kingdom*,¹²⁷ in which the Court upheld state bans on films that were considered to be offensive to the Christian veneration. The former ban was sustained on the basis of a "pressing social need for the

¹²¹ Puppinc, Supra Note 49, Pages 113-114

¹²² Fiss, Joelle. "Anti-Blasphemy Offensives in the Digital Age: When Hardliners Take Over" *Brookings*, Sept. 2016, Page 6 www.brookings.edu/wp-content/uploads/2016/09/brookings-analysis-paper_joelle-fiss_web.pdf.

¹²³ Please refer to the cases of Smith and Grady v. the United Kingdom (1999) at [121]; L. & V. v. Austria (2003) at [52] and *Identoba and others v. Georgia* (2015).

¹²⁴ *Kokkinakis v. Greece*, no. 14307/88, ECHR 1993

¹²⁵ Fokas, Effie. "Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence" *Oxford Journal of Law and Religion*, Volume 4, Issue 1, Feb. 2015, Pages 61-62 <https://academic.oup.com/ojlr/article/4/1/54/1427661>.

¹²⁶ *Otto-Preminger-Institut v. Austria*, no. 13470/87, ECHR 1994

¹²⁷ *Nigel Wingro Against the United Kingdom*, no. 17419/90, ECHR 1996

preservation of social peace” and a necessity to “protect public order.” The Court upheld the latter restriction under protecting “the rights of others.” In doing so, the Court asserted that unwarranted and gratuitous attacks on individuals’ religious beliefs and objects of veneration can risk religious peace and harmony in a society. Under the “liberal project,” “everybody is equal before the law and the aim of the law is to create and maintain public order.” However, this aim in the above cases was geared toward the interests of the majority population. The Court was deemed to have interplayed and resorted to various techniques including the margin of appreciation, proportionality, and the protection of the rights of others and public order to cover the contestability and partiality of its reasoning.¹²⁸

The Court’s judgment in the case of *E.S. v. Austria* was based on the religious peace doctrine. However, Islam as a minority religion in Europe was involved this time. The outcome of the case can respond to the criticism of the Court that it favours the concerns and attitudes of the majority religion in its judgments. The case involved the difficult task of balancing the right to freedom of expression and the protection of religious feelings. In spite of highlighting the importance of the former and that “the religions have to tolerate criticisms, including those that may offend, shock or disturb,” the Court excluded the expressions that “seek to spread, incite or justify hatred based on intolerance, including religious intolerance” from the protection accorded under Article 10 of the Convention. To the Court, the attitude of Ms. S. toward an object of veneration (Prophet Mohammad) was “disrespectful beyond justification and gratuitously offensive.”

The Court was challenged to pursue judicial activism in that case by safeguarding not only the individual’s rights but also a specific ethos in society. Invoking the prohibition of abuse of a right in Article 17 of the Convention has provided an instrument for the Court to ensure pluralism, multiculturalism, and tolerance. This is the case especially when the Court has to deal with the sensitive issues or “the most intimate sphere of the individual’s personality.”¹²⁹ The cases concerning a violation of privacy under Article 8 and offense to religious feelings protected under Article 9 of the Convention are often weighted against safeguards afforded under Article 10. As mentioned earlier, solving such conflicts involves employing various methods with the particular reasoning based on the context of each case which make it hard to satisfy all.

The extent to which religious peace was actually threatened by Ms. Sabaditsch-Wolff in the case of *E.S. v. Austria* statement is the subject of further debate. Although the Court stressed in its judgement that the meeting was made public that could result in Muslims being offended, there was no single reaction or claim by Muslims or the Muslim community about the incident. So, the *potential* of threat to religious peace was the main reason for the ruling. That is why the notion of militant democracy emerged, which aimed at protecting democracy through ensuring religious peace and coexistence and at the cost of infringing the freedom of expression.

In contrast, the Court’s approach and reasoning in the *Refah Partisi* case was quite different. In that case, there existed a treat to secularism and an overall democratic regime. Pluralism and tolerance was given

¹²⁸ Danchin, Supra Note 14, Pages 693-696

¹²⁹ Gatti, Supra Note 54, Page 2

less weight and importance when secularism seemed to be threatened by the Sharia-based plurality of legal systems or by political Islam. In general, legal pluralism is argued to ensure religious tolerance and peace in a democratic society by respecting the autonomy of religious groups in private matters. However, the mention and discussion of this notion was side-lined in the Court's decision. Finally, the imminence of a threat to democracy, another rationale used by the Court, was questionable, as the evidence presented in the ruling included only the party leaders' remarks. They were regarded to represent the overall party programs and policies for overturning democracy in future in spite of taking over the power through democratic means (elections).

Ensuring religious peace is closely linked to the recognition of the blasphemy laws. Commentaries in the *E.S. v. Austria* case touched upon the issue, where both the government and the Court rejected any approval or recognition of anti-blasphemy laws. Europe has long advocated for the abolition of such laws, which has also been a point of conflict with the Islamic countries. Islamic states have always called for the criminalization of insult or defamation of religion at the international fora, which was opposed by the western block on the basis of liberal democratic values.

Blasphemy laws are considered to breach several international standards, including freedom of expression and freedom of religion and belief. Their supporters view them as “a variant of hate speech.” However, blasphemy laws are intended to protect theology of the state while the protections against hate speech focus on safeguarding the individual's right. Blocking ideas from spreading through blasphemy laws hinders the society from cultural, intellectual, and democratic development and flourishing. Peaceful expression of views without fear of attack and retaliation is a prerequisite to pluralism. Although anti-blasphemy advocates permit states to determine which statements about religion are admissible, they emphasise that any peaceful expressions either religious or political should be protected from government interference. Such laws are also detrimental to the social cohesion as they facilitate imposition of majority view or religion on the dissidents and minority groups.¹³⁰

Under the religious peace doctrine, the Court referred to the aims of “protecting the rights and freedom of others” and safeguarding “public order and safety.” So, the expressions that are gratuitously offensive to others and don't contribute to any public debate should be prevented. They are considered “malicious violation of the spirit of tolerance” in a democratic society. Notwithstanding, a liberal and secular view of pluralism, tolerance and broadmindedness calls for protecting individuals holding specific beliefs rather than protecting the belief systems from criticism. So, people can be exposed to any opposite opinions, including harsh and unreasonable criticism of beliefs, opinions and institutions as far as they don't amount to incitement for violence, hatred and discrimination.¹³¹ This is what the supporters of cultural relativism specially Islamic countries has opposed to so far because they become in sharp contradiction with the Islamic rules and interpretations.

¹³⁰ Fiss, *Supra* Note 107, Page 7

¹³¹ Venice Commission. “Blasphemy, Insult and Hatred - Finding Answers in a Democratic Society (Science and Technique of Democracy No.47) (2010)” *Council of Europe*, 2010, Pages 23-24 www.coe.int/en/web/education-and-religious-diversity/resources/-/asset_publisher/fQaSCQ5K0u4n/content/blasphemy-insult-and-hatred-finding-answers-in-a-democratic-society-science-and-technique-of-democracy-no-47-2010-

4.3 Compromising “Individual Rights”

The European society is evolving as a result of modernization, globalization, and heterogeneity of countries and communities encompassing diversified religious, cultural, social, and political groups. This has led to the introduction of new models and arising the new challenges which calls for “upholding and promoting the principle of inclusion in the context of diversity.” So, a clash between the rights and interests is commonplace in such a complex and multicultural context.¹³² As a general principle, when two rights conflict with one another, the indivisibility of human rights requires that both rights should be given equal weight and none should pre-empt the other.¹³³ Nevertheless, as already discussed, finding a straightforward solution that satisfies all is not feasible in most of the situations where conflict arises between competing rights and interests. Therefore, a compromise is an inevitable part of the Court adjudication process.

The case of *E.S. v. Austria* represents a genuine conflict between the right to freedom of expression and the negative aspect of the right to freedom of religion and belief (protecting individuals from injury to their feelings). The Court had to weigh the value and importance of each right considering the context and the specifics of the facts of the case. Following the “preferential method” of resolving disputes which is not uncommon in the Court’s jurisprudence, it upheld the measures taken by the Austria to limit the freedom of expression in order to ensure religious tolerance and coexistence, and to prevent gratuitous and unjustified attacks to religious feelings. The freedom of expression was compromised to ensure religious peace.

In the *Refah Partisi* case, the Court sustained the Turkish government’s interest in protecting and maintaining democracy and secularism through compromising the right to freedom of assembly. An individual’s right was given less weight and importance in the wake of the public interests. The Court pursued somewhat similar approach used in the *E.S. v. Austria* case by upholding and prevailing exception to the general rule. However, one cannot overlook the specificity of each case.

The case of *Molla Sali v. Greece* was originally a conflict between two individuals’ rights in an inheritance dispute where the case transformed into a vertical one at the international level and a third party right was side-lined to the background. So the main issue at stake was the applicant’s claim of being subjected to a discriminatory act by the Greek government. The applicant’s claim was sustained at the cost of compromising both the Greek government’s interest in respecting the Muslim minority traditions and practices, and the third party rights.

“Preferential framing” was a common tool used by the Court to resolve disputes in the above cases. Such approach is problematic because it results in the unsatisfactory resolution of conflicts by giving preference and priority to a Convention right to the detriment of other competing right. One right is sacrificed to protect the other. Further, the third party rights are often neglected by the Court that only recognizes the applicant and the respondent state party as the main parties to the dispute. This is contrary

¹³² id, page 69

¹³³ SMET, STIJN. “Freedom of Expression and the Right to Reputation: Human Rights in Conflict” *The American University International Law Review*, 2010, Pages 184-185 <https://digitalcommons.wcl.american.edu/auilr/vol26/iss1/8/>.

to the principle of the indivisibility of the human rights. Employing a constructive methodology to correctly identify the situation of conflicts and a resolution based on the transparent and coherent reasoning to avoid any preference and priority among the rights are therefore recommended.¹³⁴

“Practical concordance” developed by the German Constitutional Court has been proposed as a solution for the situation of conflicts between human rights. The doctrine involves a compromise solution in which the competing rights are strived to remain intact to the greatest extent possible by giving away to each other. Under this doctrine, human rights are weighed against each other to reach a compromise based on a number of criteria such as seriousness of the infringement, being a core or periphery rights, the involvement of additional rights or general interests, purpose and responsibility criteria.¹³⁵ Guidance and some standards extracted from the doctrine can provide invaluable and flexible tools to the Court for addressing the dilemma. Nonetheless, this solution is not absolute and may not work in some situations where the Court has no way but to make a choice and preference between the conflicting rights. The Court is yet to adopt a general doctrine as regards the conflict of rights.

¹³⁴ id, Page 185

¹³⁵ id, Pages 189-191

Conclusion

The growth of Islam and the Muslim population in Europe due mainly to the influx of Muslim migrants into the European countries, which has challenged and disrupted both the migration policies and the mechanisms that are in place for the protection of human rights. Needless to say, the conflict of fundamental rights and social polarization are the inevitable consequence of ethnic, cultural, traditional, and religious diversity in a pluralistic context like Europe.

The CoE organizations that are responsible for the adjudication of conflicts are key to providing effective remedies for the infringement of fundamental rights. Deciding whether restrictions on rights are legitimate and based on criteria set by the Convention is also an indispensable part of the human rights discourse. The most remarkable and powerful voice in this respect is the ECtHR, which serves as a “standard setter” for the protection of fundamental rights contemplated in the ECHR. Not only can the Court’s jurisprudence concerning Islam lead the development of legal approaches toward Islam in member states, it further disseminates specific messages to the public about Islam and its place in society.

Security concerns and the fear of terrorism and radicalism have also impacted the public perception of Islam and Muslims in Europe. Such negative perception has associated Islam and Muslims with terror, violence, and intolerance, while this only holds true about only a minority of followers. Strict national security policies and measures have resulted in the backslide of rights in the name of balancing public interests versus individual rights.

Further complicating this issue, Islam is a heterogeneous religion which is comprised of the various schools of jurisprudence that apply different interpretations of Islamic rules and principles. These inherent characteristics make Islam susceptible to generalization, stereotyping, and simplification by the public and national authorities in Europe who might not understand the intricacies of Islam. This trend has also influenced the way in which the CoE organizations deal with Islam. In addition, notions of liberalism, secularism, neutrality, and equality deemed as the cornerstone of a democratic society provide the guiding principles for the resolution of conflicts in Europe. These, however, often contradict with Islamic rules and tenets. This has led to the protracted and yet unresolved rivalry between Islam and democracy.

The current thesis sought to identify how the ECtHR dealt with the cases concerning Islam and the balance of rights examining selected case laws. By selecting limited jurisprudence, it narrowed down the scope of the study and provided an opportunity to analyze other rights invoked rather than Article 9 of the ECHR. This included the right to freedom of assembly, the right to freedom of expression, and the right to self-identification. The parameters employed for this research included the objectivity and neutrality of the procedures, influence of the principles of liberal democracy on the proceedings and outcomes, and taking into consideration by the Court of the intricacies of Islam while processing the cases. Since the study relied exclusively upon literature review and desk research, the ability to draw a detailed conclusion about the implementation of the procedures and mechanisms in practice may be

limited. However, an in-depth analysis and comparison of various viewpoints and practices in a systematic and coherent manner are presented.

Considering the significance of the context in which the ECtHR is called upon to resolve disputes involving Islam, an overview of the state context and the CoE framework was provided. This included measures adopted by member states and various CoE organizations. The recommendations and resolutions by the CoE have been geared considerably toward abating tensions raised by the legal restrictions of member states on Muslims. This demonstrated that “Islamic Radicalism” and “Islamophobia” are the main competing trends in Europe that reinforce each other and impact both Muslims and non-Muslims. It should be asserted that the context and consideration of national policies and public opinion eventually influence the way in which the Court deals with the cases concerning Islam.

The principles of liberal democracy have undoubtedly impacted the Court’s judgements concerning Islam. Incompatibility of Sharia with the Convention system in the *Refah Partisi* case rested mainly upon the premise that Islamic rules and traditions conflict with notions of privacy, personal autonomy, neutrality, and equality—all which underlie the liberal democratic order in Europe. Among other factors, the fact that the Greek civil courts apply a secular approach to dispute resolution could have influenced the Court decision in the *Molla Sali* case. It is also argued that the secularism has not influenced the Court’s judgements concerning the Christian majority and those dealing with Islam in the same manner.

Adhering to a different set of democratic principles (i.e. tolerance, coexistence, pluralism and combatting hate speech and discrimination) led the Court to protect Muslims from injury to their religious feelings in the *E.S. v. Austria* case. Following the religious peace doctrine, the Court upheld an infringement of the freedom of expression by Austrian authorities, which instigated enormous criticism by liberal activists in Europe. However, the Court’s attitude was quite different when it came to the outright expression of an Islamic identity (headscarf ban) or political Islam (dissolution of an Islamic party). As a result, two opposite concepts of militant democracy were introduced by the Court, one to the detriment of Muslim population (*Refah Partisi v. Turkey*) and another in their favor (*E.S. v. Austria*).

Differentiated treatment of Islam and Christianity by the ECtHR could be showcased in the cases that dealt with the religious symbols. The Court considered the Islamic headscarf a powerful symbol that can have indoctrination effects while wall-mounted crucifix/cross was regarded as a passive symbol with no proselyting effect. This approach followed by the *Refah Partisi* case can also be linked to the spread of overall national policies and public opinion in Europe that Islam and Muslims are a threat to the Europeans’ security, identity and traditions.

The selected case law also reveals some degree of uncertainty about the neutrality and objectivity of Court judgments. The Court made essentialized and normative statements about Islam in the *Refah Partisi* case that demonstrated its profound lack of knowledge about the intricacies of Islam. This could have led to Muslim antagonism furthering allegations of the Court’s subjectivity to deal with the cases concerning Islam. A similar criticism has been made with respect to the *E.S. v. Austria* case, that the Court had a preferential treatment of Islam disregarding a majority of its precedents that protected the

freedom of expression against the state interference. This highlights the vital role that context plays in the Court's judgments, which lead to opposite criticisms about neutrality of the Court.

The Court's reluctance to take the intricacies of Islam into account in their jurisprudence has led to an overall conclusion that Sharia and the plurality of legal systems are incompatible with the Conventions system, as noted in the *Refah Partisi* case. That judgment overlooked the heterogeneity of Islam and the complexity of its concepts and methodologies. However, the Court had a lenient attitude toward legal pluralism in the *Molla Sali* case by allowing opting out of the minority legal order (Mufti jurisdiction) optional, provided it is informed. Thus, legal pluralism has proved an effective mechanism for the protection of minority rights and their autonomy in private matters worldwide. It further ensures pluralism, tolerance, and coexistence in a diverse and multi-cultural context. However, the application of religious norms and the extent to which they are compatible with the universal human rights remains contentious. The Afghanistan and Malaysian experiences demonstrated the challenges facing legal pluralism and a good practice to alleviate its negative impacts respectively.

Resolving the situation of conflict between rights is always a difficult task for the ECtHR to fulfil. Application of a static rule-based technique or using general propositions to concert cases does not always work. The relevant case law of the Court often shows a departure from precedent and progressive development of jurisprudence in this respect, which is highly context-based. Ample judicial discretion is the major criticism of the mechanisms used by the Court to deal with the situation of conflict. They are considered abstract processes with no specific formula, which lack foreseeability. However, the complexity of conflicting rights often requires choices to be made and a win-win solution or even a compromise is hard to reach. So, the Court needs flexibility in employing various techniques that enable the resolution of conflicts in an effective manner considering the facts and context of each case.

This study focused on a correlation between the Court's judgements and Islamophobia. The correlation is drawn from the potential indirect and radiating effects ECtHR rulings can have on public perception of fundamental rights through communicating specific messages to society about Islam. Drawing on a direct link was of less concern, since the Court's task is not to combat this phenomenon. For example, the Court's considerations about Islam in the *Refah Partisi* case have the potential of contributing to radicalism against (and by) Muslims in Europe. It strengthened the idea that Islam is an intolerant and violent religion whose tenets are impossible to reconcile with the democratic values. That is why this decision was regarded as coming close to "orientalism" and "Islamophobia." Further, some critics argued that the *E.S. v. Austria* judgment was rendered under the fear of Muslims and their violent reactions. In ensuring religious peace, the Court is perceived to be cognizant of the previous terrorist attacks committed in retaliation of the Islam defamation cases in Europe, and the risk of future attacks. This message strengthens the polarized viewpoint that Islam is an inherently violent religion.

Since the Court acts in a case and country specific manner, the messages communicated by the Court regarding Islam are not consistent. When it comes to religious hatred and discrimination, or the Muslim community's autonomy claims, it considers ruling in favour of Muslims, however, a difference in the Court's attitude arises when there exists a threat to secularism or expression of religious identity is at stake.

The religious peace doctrine has evolved through the Court's case law to ensure pluralism, tolerance, and coexistence among various beliefs (believers, atheist, non-theist, agnostic). Meanwhile, the doctrine is criticized for recognizing and encouraging blasphemy laws. In the *E.S. v. Austria* case, the Court relied upon this doctrine to protect Muslim believers from injury to their religious feelings. Since this case concerned Islam, the outcome can respond to the criticism that the Court tends to prefer the interests of the majority Christianity in its judgments. However, the Court's zero tolerance policy toward religious hatred and discrimination in any form appears to have a determining role in this decision. In contrast, religious pluralism and tolerance were given less weight in the *Refah Partisi* case due to a potential threat to overall democracy by Sharia and political Islam.

Since choices have to be made by the Court in the situation of conflicts between rights, compromising rights and interests is considered a practical solution to addressing conflicts. The Court has mainly resorted to the "preferential framing" method to weigh the values and importance attached to each right and interest to reach a compromise. This approach is problematic, since it prioritizes fundamental rights against the principle of indivisibility of universal rights. The "practical concordance," which has been proposed as a solution to prevent from protecting a right to the detriment of other rights, is not absolute. A compromise in which competing rights are strived to remain intact to the greatest extent possible is hard to reach and the Court has yet to adopt a general doctrine in this respect.

Overall, the Court's reliance on the specific context of each case, which is considered to be unique in nature and content, and the fact that the Court's case law does not establish binding rules for future cases, has led to inconsistency in the Court's jurisprudence. Because of this, it is hard to predict a tendency or consistent approach toward analogous topics and applications brought before the Court. This inconsistency also exists in the cases concerning Islam. The Court sometimes interplays the key concepts in the human rights discourse (neutrality, equality, national identity, etc.) and employs various long-established techniques and methods (margin of appreciation and proportionality testing) to justify its rulings or respond to the prospect criticisms that might come out about its judgements. The ECtHR's inability to adopt consistent jurisprudence when dealing with cases involving Islam has led to an overall detriment and threat to the protection of individual religious rights among Muslims in Europe.

There are a number of factors that impact the Court's reasoning and rulings in the select jurisprudence examined in this thesis, ranging from the Court's strict adherence to the principles of liberal democracy to its reluctance to consider the intricacies and specificities of Islam. The latter stems mainly from the liberal idea, which is prevalent in Europe that the primary purpose of the freedom of religion is to protect the individuals and not the ethos system. This could further be noted in the cases that dealt with the religious symbols. The Court considered the Islamic headscarf a powerful symbol that can have indoctrination effects while a wall-mounted crucifix/cross was regarded as a passive symbol with no proselytizing effect. This approach followed by the *Refah Partisi* case can also be linked to the spread of overall national policies and public opinion in Europe that Islam and Muslims are a threat to the Europeans' security, identity, and traditions.

As a supra-national Court, the ECtHR has to deal with various cases from across the member states. It is cognizant that each member state has an independent legal system and a sovereign political regime along with national priorities and local traditions. The Court's decisions may encounter backlash if it does not

take into account the diversity of the European context and the sovereignty of the member states. Arguably, the flexibility of judgments and room for maneuver are required to render the context-based decisions that treat the Convention as a living document and reconcile the universal rights with the diversity, sovereignty and local traditions. However, the lack of rigidity and predictability in the Court's decision and approach may lead to further harm for Muslims in Europe.

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