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Gender, Intersectionality and Religious Manifestation Before the European Court of Human Rights

I. Introduction

The gendered dimension of religious manifestation has been brought to the forefront of the European public debate after episodes such as the so-called 'Burkini ban' in France (Zempi, 2016). The controversy showed how women's clothing often become the site of political battles about gender, religion and identity. However, female Muslim clothing is not the only gendered expression of religious manifestation. Veiling practices and gendered dress codes in other religions are equally significant when understanding how religion and gender frequently intersect, as they provide for examples of religious manifestations with clear gender implications. This paper will demonstrate how Qualitative Comparative Analysis (QCA) can be successfully applied to expose the shortcomings of a unidimensional approach to judicial interpretation in these cases and thus serves as a basis for further research along these lines.

The topic of religious manifestation has been for a long time codified in international instruments of human rights protection. In Europe, it is protected by Art.9(2) of the European Convention of Human Rights (hereinafter ECHR), which states that: "*Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*". The protection of religious manifestation provided by the European Court of Human Rights (hereinafter ECtHR) in its interpretation of this provision is particularly important for a number of reasons. First, because these decisions are in principle binding upon State

parties. Second, because the case law of the Strasbourg court is, given its reputation, a source of jurisprudential inspiration for courts in Europe and beyond. And third, because given the national and religious diversity in the European continent, cases on religious manifestation before the ECtHR often express complex and varied intersectional situations with important political consequences. In this regard, intersectionality highlights the interaction of multiple identities and experiences and subordination of women. Crucially, intersectionality, when focusing on the nodes of gender and religion, recognizes that anti-racism often fails to interrogate patriarchy and that feminism can reproduce racist practices (Crenshaw, 1989). As we will show in this article, the case law of the ECtHR on religious manifestation can hardly be understood in the absence of an intersectional approach, as such approach reveals important patters underlying to court decision-making.

In recent years, the social and academic salience of intersectionality has been paralleled by an increasing body of literature analyzing the decisions of the Strasbourg Court from an intersectional perspective. Examining the case of *B.S. v Spain*, Yoshida (2013) has recently argued that the ECtHR might be timidly opening to intersectional considerations. However, somewhat contrarily, Rubio-Marin and Moeschel (2015) have underlined the need for the ECtHR to give further recognition to intersectional discrimination in their analysis of case law on forced sterilization of Roma women. And with regards to the approach of the ECtHR to Islamic headscarf cases, Radacic (2008) has accused the court of being insufficiently sensitive to intersectionality of discrimination. While academic works on this topic vary in the assessments they make of the Courts' case law and in the type of cases they cover, these pieces often have in common the focus only in one or a few cases of the Strasbourg Court, as well as the doctrinal, normative and/or qualitative approach. Although there are instances of works engaging in

statistical description of the cases (see Ferrari, 2012), systematic empirical reviews of intersectionality before the ECtHR, especially with regards to religious manifestation, are to the best of our knowledge largely missing.

This article aims at filling this gap. Using a configurational empirical approach and an original database, we exhaustively analyse the case law of the ECtHR on Art.9(2) ECHR. Our aim is to systematically review the treatment of the ECtHR to intersectional categories defined by their gender, religion and nationality, and in particular to find patterns of litigation success or defeat of these groups. Such a systematic review is important because it will help to expand the focus beyond the most frequently analysed intersectional categories -typically, Muslim women-, and to include also other intersectional groups whose patterns of litigation success or defeat are less known. Additionally, the analysis will provide an input of evidence-based systematic knowledge to academic and social debates on gender and religious manifestation, improving the quality of public deliberation about the topic. Indeed, the article provides for some interesting findings which can help fine-tune some of the existing literature in the field. As expected, Muslim women, which were always nationals of the State addressed by the complaint, had a clear pattern of litigation defeat, and always lost cases about their right to religious manifestation before the ECtHR. But this contrasted with the treatment of Muslim men, that were a very successful category of applicants. These findings underlined both the important of intersectionalizing the analysis and, at the same time, the strong role that the gender dimension plays in cases on religious manifestation.

The remainder of this article is as follows. After this introduction, we will provide some basic explanations about the right to religious freedom in the legal regime of the European Convention of Human Rights. Subsequently, we will present our theoretical

framework, focusing on the importance of intersectionality for the analysis of phenomena in the judicial arena and, more concretely, in human rights cases on religious manifestation. Next, we explain the methodology of this research, multi value QCA, arguing that it is particularly well-suited to explore intersectional groups and to test intersectional hypotheses. In the following section we present our empirical analysis, explaining patterns of litigation success and defeat of intersectional groups. The last section discusses the findings and concludes.

II. The ECHR and the right to religious manifestation

The European Court of Human Rights is the judicial organ of the Council of Europe, which is a supervisory regional human rights body, tasked with protecting the rights enshrined in the European Convention on Human Rights. The importance of freedom of thought, conscience and religion has been stressed on several occasions by the ECtHR. Generally speaking, the freedom of thought, conscience and religion is regarded as one of the foundations of democratic society and has been described as a "precious asset" by the Court (Letsas, 2006).

Whilst Article 9 of the Convention concerns freedom of religion in particular it extends to ideas, philosophical convictions of all kinds provided that they have attained a certain level of cogency, seriousness, cohesion and importance.[1] Once the Court has established that a religious belief meets this test, it falls under the protection of Article 9. Article 9(1) ECHR guarantees freedom of thought, conscience and religion, which includes the freedom to change one's religion or belief and the freedom to worship either alone or in community with others. This freedom of religion is absolute, in the sense that it cannot be limited by the State parties.

Freedom *to manifest* a religion or belief, however, can be legitimately limited under Article 9(2) of the ECHR. The Court has held that a State cannot assess the legitimacy of the manifestation of the religious belief as this would be a breach of the Contracting Party State's neutrality. Instead the Strasbourg Court clarified that an act motivated by a religion or belief is considered a "manifestation" if it is "intimately linked to the religion or belief" in the sense that there is a "sufficiently close and direct nexus between the act and the underlying belief".[2] The ECtHR highlighted that the religious act should not be "remotely connected to a precept of faith" but it is immaterial whether the manifestation is mandatory or not by a religion or belief which falls under the protection of Article 9.[3] Accordingly, state interference of the manifestation of religion can only be limited if it is prescribed by law, pursues a legitimate aim and is necessary in a democratic society. This means that there has to be a legal basis for the restriction, and that the limitation must be proportionate to its aims. Furthermore, the ECtHR have allowed for a wide margin of appreciation in freedom of religion cases. The "margin of appreciation" refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention) (Letsas, 2005).

This article focuses on this second aspect of the right to religious freedom: its facet of religious manifestation. The reason is the political salience of this right as a preferential site of gendered religious manifestations. As it will be argued in the next section, it is for that reason that an approach based on intersectionality is the most adequate to carry out the analysis.

III. Theory and configurational hypotheses

a. Intersectionality in the courtroom

In this subsection we aim at providing a brief presentation of the idea of intersectionality, as it will be central to the rest of this article, and we will explain how intersectionality can be useful for research on courts. Intersectionality can be considered both as a normative and as an analytical approach. Insofar as we pursue an empirical endeavor, our use of intersectionality in this research is purely analytical and methodological. In the development of intersectionality in the social sciences, however, normative, analytical and methodological considerations have been strongly intertwined.

The emergence of intersectionality as a central concept for the social sciences started approximately three decades ago, when authors such as Kimberle Crenshaw (Crenshaw, 1989) and Audre Lorde (Lorde, 1984) argued about the need to take into account the intersection between the multiples identities of individuals in order to understand social dynamics of exclusion and subordination. These approaches pushed the visibilization of issues of intersectionality, and had an impact on empirical research, which increasingly introduced intersectional categories into its analyses. Over the years, academics have tackled the issue of intersectionality globally over a variety of different issues, including domestic violence, immigration law and policies, family life, the welfare system and institutional racism, sexism, homophobia, ageism, religious discrimination, transgender discrimination and disability discrimination. Feminist theory developed a concept of intersectionality that posed that subjectivity is constituted by mutually reinforcing vectors of race, gender, class and sexuality (Nash, 2008). This signaled a move away from what is described as an additive model of analysis where identity is seen as independent strands of inequality and, rather: "views these vectors of inequality as overlapping and interacting to form complex configurations of subjectivity" (Choo and Ferree, 2010: 131).

Intersectional theory has become an increasingly popular theoretical approach within social research and is considered the key analytical tool in tackling disadvantage. Interestingly, the main question within intersectionality theory is that of who embodies an intersecting subject position within identity politics (Nash, 2008). In her analysis of intersectional theory Nash argues that, "this unresolved theoretical dispute makes it unclear whether intersectionality is a theory of marginalized subjectivity or a generalized theory of identity" (Nash, 2008: 10).

Beyond its obvious normative implications, intersectionality is also a very important tool for empirically-oriented social scientists. One traditional limitation, however, has been the absence of a clear methodology for intersectional research and the lack of a developed research design and methods that could be used universally to apply intersectional theory to research projects (Shields, 2008). One justification for this was attributed in part, to how difficult it is to construct a research paradigm which is attentive to "the complexity that arises when the subject of analysis expands to include multiple dimensions of social life and categories of analysis" (McCall, 2005: 1773). However, as we argue in the methods section, we believe that the emergence of Qualitative Comparative Analysis, which we use in this article, might represent an important improvement in this regard (see also Ragin and Fiss, 2016).

Intersectionality also plays a central role in empirical research in law and courts. In this field, there is a well-stablished tradition of analysis of certain socio-demographic aspects of individuals in the courtroom, such as race (Lizzote, 1978), gender (Daly and Bordt, 1995) or social class (Dalessio and Stolzenberg, 1993). In line with intersectional approaches, these aspects of individuals, however, do not run in parallel to each other, but instead they interact, forming specific intersectional categories of litigants which literature has increasingly investigated, particularly with regards to their impact on

judicial decision-making (Collin and Moyer, 2008). In their recent work, Kahn Best *et al. (2011)* identified two dimensions of intersectionality that are relevant to empirical judicial studies: demographic intersectionality and claim intersectionality. Demographic intersectionality refers to the intersectional socio-demographic categories to which an individual belongs, even if the object of litigation is unrelated to such categories. Claim intersectionality occurs when the very object of litigation is an expression of an intersectional group to which the individual belongs (see Kahn Best *et al, 2011*: 994*)*. The authors theorize that both aspects of intersectionality can drive to different -often less favorable- treatment in the courtroom for certain intersectional categories as a result of mechanisms such as stereotyping or deficient legal regulation of intersectional situations.

b. Art.9(2) and three dimensions of identity

Intersectional considerations play also a role with regards to the right to religious manifestation in cases before the ECtHR. From the perspective of Art.9(2) of the Convention, there are three main dimensions of individuals whose intersections are relevant to understand the cases: religion, gender and nationality. The ECtHR always provides for information about these three dimensions in its rulings, they constitute some of the central elements of demographic intersectionality of the claimants, and very often they are a source of claim intersectionality.

Religion is relevant to cases on Art.9(2) for the very obvious reason that this provision is designed to protect religious manifestation. Different religions follow different patterns of religious manifestation, which might be differently affected by national and supranational regulations about the exercise of this right. In this article, we will focus

specially in the differences in treatment between Christian and Muslim applicants. The reason is that Christianity is traditionally the hegemonic religion in most countries covered by the Convention, while Islam is a minority religion in Europe[4], therefore providing an interesting focus of comparison. We expect, in the regard, a more favorable treatment of Christian applicants by the Court than of Muslim applicants.

Gender is important, as religions often have gender-specific forms of expression. Many religions require some form of manifestation, which, similarly to the plight of Muslim women, also disproportionately affects women. In many cases, women are expected to dress in a modest manner and the levels of modesty are similar, depending on the level of religiosity of the individual. Orthodox Christian and Jewish texts both state that women should cover their hair and dress in loose clothing; similarly Catholic doctrine requires that women cover their hair at mass (see Cristofar, 2001: 451). It is important to note that dress is at the centre of identity of an individual, and as argued by the ECtHR the manifestation of religious belief lies at the centre of religious freedom.[5] Even in Buddhism and Hinduism there are conceptions of modesty which require women to manifest their beliefs in certain kinds of ways. Given the persistent discrimination of women in European societies, and the fact that they often present gender-specific forms of religious manifestation, we expect their treatment by the ECtHR to be less favorable than that afforded to male applicants.

Finally, *nationality* is essential to the way in which countries grapple with the right to manifest a religious belief. Migrants often bring with them forms of religious manifestation that are different from those dominant in their host countries. At the same time, the integration of migrants and national minorities has become a focus of political debate in many countries, and at the heart of these debates is to what extent liberal democracies can enforce integration, and how. What is considered integration differs in

each European state depending on the communities' origin, the existence of a colonial history, the existence of national churches, the existence of a state-church relationship, commitment to multiculturalism, national policies towards immigration and "the tone and language of public discourse."[6] Sometimes, however, integration is identified with assimilation. These approaches can give rise to a restrictive regulation of religious manifestation, therefore penalizing non-national groups that are expected to assimilate in return for being allow to reside in the country. This, however, contrasts with the background that drove to the creation of the European Convention on Human Rights, which was strongly related to the violation of human rights suffered by minorities and non-national groups in Europe. Given this background, we expect the ECtHR to be especially considerate with the claims of non-nationals as a result of the recognition of their specifically weak situation.

While each of these three dimensions is individually relevant to analyze cases on Art.9(2), in this article we focused on the intersectional categories to which their interaction gives raise. The reason is that we had a strong theoretical expectation that only through an intersectional approach to the cases we would be able to identify patterns of judicial victory or defeat with sufficient precision. As we will show, this intuition was confirmed by the analyses.

IV. Data and methods

This article uses an original database of cases of the European Court of Human Rights on Art.9(2) of the Convention, codified by the authors for the purposes of this research. The case selection was made using the HUDOC database of the official website of the European Court of Human Rights. The first case on Art.9(2) dates back to 1993. The

search was made for all cases of the Grand Chamber and Chamber, including all rulings of the ECtHR on Art.9(2) in the two official languages of the Court: English and French. The search engine included some cases which however did not actually deal with Art.9(2); such cases were removed[7]. The final database was composed of 66 cases[8]. These 66 cases are not a sample, but the whole population of rulings on Art.9(2) at the time of preparation of the manuscript. The cases are listed in Appendix 1, at the end of this article.

To analyse the treatment of intersectional groups by the ECtHR, the article uses Qualtitative Comparative Analysis. QCA takes a configurational approach to causation, in which the focus is put in the analysis of how different characteristics of the cases interact between themselves: in QCA cases are regarded as 'combinations of properties' (Berg-Scholosser et al, 2009: 6). Unlike statistical techniques, which seek to understand the causal impact of a variable independently of the effect of all other explanatory variables, QCA focuses on how factors interact between themselves in particular cases. This emphasis on interaction and combination of properties makes QCA especially apt to analyse intersectional categories, as showed by recent literature in the field (Ragin and Fiss, 2016). While QCA allows the identification of relevant configurations and interactions of conditions in the production of a result, it also permits identifying factors that are individually sufficient to produce it. This is because QCA uses Boolean minimization to drop redundant conditions (Rihoux and De Meur, 2009: 35). In analysing judicial decisions on Art.9(2), this turned out to be very useful in order to assess whether in each case intersectional categories or uni-dimensional ones were more relevant, without forcing the data to fit into either of them.

Multi-value QCA is a modality of qualitative comparative analysis that allows the use of conditions with more than two categories, therefore avoiding artificial

dichotomizations (Cronqvist and Berg-Schlosser, 2009: 70). As the dimensions of the applicants whose intersections we analyse in this article are categorical and often included more than two possible values, mvQCA was the most adequate technique for this research. To carry out the analyses, the software QCAGUI for R was used (Duşa,, 2007), as it allows the performance of multi value analyses including the use of parsimonious solutions and the display of inclusion, PRI and coverage indicators. Inclusion ('Incl'), similarly to the traditional concept of consistency, indicates the share of cases covered by a path that had the outcome of interest; Proportional Reduction in Inconsistency ('PRI') indicates the extent to which a path is a subset of the outcome rather than of the negation of the outcome; raw coverage ('cov.r') indicates the share of cases with the outcome of interest that are covered by a path, including those that are also covered by other paths of the solution; unique coverage ('cov.u') of a path indicates the share of cases with the outcome of interest that are covered exclusively by that path and not by any other path in the solution (see Rihoux and Ragin, 2009: 182; Schneider and Wagemann 2012: 242). While mvQCA has a specific type of notation, for the sake of simplicity in this article we will use the tag of each category when displaying the models.

The data matrix was prepared by the researchers after a qualitative analysis of each of the rulings covered. The outcome of the research is the declaration of breach of Art.9(2) of the ECtHR. If that provision is declared by the ECtHR to be breached at least in one regard for one applicant to a case, the case is coded as {1}. In the contrary case, it is coded as {0}. The religion of the applicant was coded into three groups: Christian {1}, Muslim {2} and other religion {0}. The gender was coded into male {0}, female {1}, a mix of applicants of different categories (including legal persons) {2} and legal persons {3}. The nationality category was dichotomous: national of the country addressed by the

complaint {0} or not {1}. Following the best practices in QCA, the data matrix is provided in Appendix 2.

For Boolean minimization, this article is using intermediate solutions and a consistency cut-off of 0.75, therefore allowing the inclusion of some contradictory configurations only when they had a high share of positive cases. The impact of this in the results is transparently discussed through information about inclusion and coverage indicators, and by identifying the cases that are inconsistent within each configuration. The reason for this decision is twofold. First, it is related to the general challenge that the analysis of judicial decisions pose for QCA: unlike other objects of study in the social sciences, judicial behaviour is often the result of case-specific and idiosyncratic factors, in addition to cross-case conditions. Think for instance about the specific legal rules (out of the thousands of them contained in the legal system) that apply to one case, and only to that case and not to the others. Or about the range of facts analysed by the court, which is potentially infinite and by definition vary from case to case. Judicial decision-making is often the result of cross-case factors but also of case-specific idiosyncratic reasons. For this reason, contradiction-free models will often be very difficult to develop (albeit not always impossible), unless databases are artificially inflated with the inclusion of conditions that refer to case-specific events, to the detriment of the parsimony of the models. This points at the need, in configurational research, to develop strategies to deal with this peculiar nature of judicial behaviour. A transparent, fully explained use of slightly lower consistency cut-offs is in our view the best such strategy in the case of this research.

The use of lower consistency cut-offs has to do also with the specific aims of this article. This research does not seek to explain all causal factors that account for judicial decision-making in cases on Art.9(2), but rather it aims at understanding patterns of litigation

success or defeat of certain intersectional social categories. While those two enterprises clearly overlap, they are slightly different and the theoretical focus of this article is on the latter one. For that reason, the analyses did not include all potential conditions explaining judicial behaviour. In this article, logical contradictions are the unavoidable consequence of the focus on the patterns of success and defeat of certain intersectional social groups, rather than on judicial behaviour as such. The inclusion of contradictory configurations when they had a high consistency score allowed a better understanding of the litigation success and defeat patterns of the relevant intersectional groups, while inconsistent cases where transparently indicated and qualitatively discussed.

V. Analyses

a. Winner intersectional categories

Our first model shows categories which were generally successful litigants. Regarding the directional expectations, being not national, male or Christian were expected to contribute to the declaration of breach of Art.9(2).

- TABLE 1 ABOUT HERE-

The model has a very high inclusion of 0.889, meaning that almost 90 per cent of the cases covered by these paths were effectively cases in which a breach of Art.9(2) was declared. It also has a high coverage of 0.681, meaning that almost 70 per cent of the cases of breach of Art.9(2) were covered by at least one of the paths of the model. Indeed, the model shows some interesting findings.

The most frequent path to the declaration of breach of Art.9(2) is in fact not intersectional, while the remaining paths are so. This shows that both intersectional and not

intersectional categories of applicants might exhibit high rates of litigation success. Furthermore, the not intersectional path -displayed the first in the model- refers to applications that have applicants which belong to different groups in the "gender" condition. This is interesting, because by definition these cases are those in which the claim is less likely to have a clearly gendered dimension. Said in other terms: when claims on religious manifestation were gender-neutral the outcome of litigation was usually a victory. This safe path to the victory of the claimants had an inclusion score of 0.867. This means that only less than 14 per cent of the cases with mixed gender applications ended up in a defeat of the applicants.

According to the second path, male Muslims were actually one of the most successful categories of applicants. Indeed, this is the second most frequent route to litigation success (19 per cent of all claimants' victories), and at the same time an overwhelming majority of cases brought by this type of applicants (90 per cent) were successful. This finding contrasts with the model for litigation defeat (see below) which shows the opposite effect for (national) female Muslims. Furthermore, this points at the scarce explanatory capacity of the unidimensional category "Muslim" and at the need to intersectionalize the analysis of this religious group by introducing the gender dimension in order to find clear patterns. Something similar happens with the third path, as it points at being a Christian female as a very safe route to litigation success, again the opposite result as for Muslim females. In the case of Christian women, however, it needs to be noted that only one case is covered by this path, so we should be particularly careful when extracting conclusions.

The paths four and five show that legal persons, either Muslim or Christian, are a successful type of litigants (although, again, only one instance existed of a case brought about by a Muslim legal person). These cases are also less likely to have a clear gendered

dimension as they are usually brought about by religious denominations themselves. Another possible explanation for the high success rates of these types of applicants is that, being legal persons, they can mobilize higher litigation resources than most other applicants.

The final path shows that being a male non-national has often been a safe route to litigation success. It is interesting to note that this is the only path to victory in which the nationality of the applicant seemed to have any relevance, having disappeared in Boolean minimization for all other cases.

b. Loser intersectional categories

The second model analyses the absence of the outcome: declarations by the ECtHR that Art.9(2) has not been violated and, therefore, patterns of defeat of the applicant. Directional expectations are that being a female, Muslim and national contribute to litigation defeat.

- TABLE 2 ABOUT HERE-

The path is striking for a number of features. First, the only sure path to defeat is being a Muslim woman national of the country addressed by the complaint. Despite the low consistency cut-off selected, no other uni-dimensional or intersectional category seems to have similarly high rates of litigation defeat as national female Muslims. Second, this is indeed a strikingly safe route to defeat: 100 per cent of claimants belonging to this intersectional category lost their case. Thirdly, this group of claimants actually make a relatively high share of the total cases of litigation defeat: more than 30 per cent.

A qualitative review of the cases shows that something they generally had in common is that these were judicial decisions about situations of 'claim intersectionality', usually about gendered religious clothing. It wasn't until 1993 that the first case in relation to Article 9(2) was heard by the ECtHR.[9] Around the same time in the early 1990s, the act of wearing an Islamic headscarf was banned in schools across Turkey. This prohibition was followed by a similar ban on 'conspicuous religious signs' in France a decade later. This led to the cases levied against France and Turkey for infringing the right to manifest a religious belief. The case before France considered female applicants in high school who wanted to wear the Islamic headscarf. The case before Turkey concerned a university student who wished to wear an Islamic headscarf at university. In both these cases the Court upheld the ban on the basis of gender equality, secularism, neutrality. The Court relied on its previous opinions, such as the cases *Kalac v Turkey*[10], in which the ECtHR held that the manifestation of religion of a public official can be legitimately limited, notably because it is incompatible with the functions that a public official should uphold. A public official according to the Court should be neutral when dealing with the public and should not publicly affiliate themselves to any particular religious belief. A similar ruling was held in the case of educators in primary school. Accordingly, in the case of *Dahlab v Switzerland*[11], the Court upheld the Swiss ruling that a primary school teacher named Miss Lucia Dahlab should not wear the headscarf. According to Article 9(2) of the ECHR, state interference of the manifestation of religion can only be limited if when prescribed by law, pursues a legitimate aim and is necessary in a democratic society. The first two conditions weren't problematic, but the Court instead placed emphasis on the principle of proportionality. In so doing, it gave itself the power to judge the symbolic meaning of the headscarf and whether it was in harmony with the values of an educator. Accordingly, the Court held that the headscarf was "imposed on women" and, thus, that it becomes "difficult to reconcile the wearing of the Islamic

headscarf with the message of tolerance, of respect for others and above all of equality and non-discrimination that, in a democratic society, every teacher must transmit to his or her pupils."[12] The Court did state, though, that this was not sufficient to limit the right of manifesting her religious beliefs, as there needs to be evidence of the head scarf having a "proselytizing effect".[13]

The analysis in Table 2 shows that the European Court of Human Rights has been very consistent in its approach to this topic. While cases brought about by Muslim women generally had in common their relation to religious female clothing, the claims presented before the Court have not been identical. On the contrary, they have covered a variety of situations, clothing modalities and legal systems. As we will argue in the discussion section of this article, the consistent approach of the Court to these similar but varied cases might be expressing an important element of path-dependency.

c. Remaining groups

The rest of intersectional groups did not seem to exhibit clear patterns of success or defeat in litigation, but rather mixed results. Given the low consistency scores of those configurations, they were not included in any of the minimizations. In observing the Truth Table, we can understand which were those groups. The Truth Table displays all combinations of conditions –i.e. all possible intersectional groups with the three dimensions included in the analysis-. It also shows the number of cases covered by the configuration, as well as the inclusion of each configuration (which can be read as the share of cases in that configuration that had a declaration of breach of Art.9(2) as an outcome).

- TABLE 3 ABOUT HERE-

In Table 3 we can observe a group of configurations with high inclusion scores (configurations 1 to 11). These are the configurations included for minimization in the analysis of sufficient conditions for the breach of Art.9(2), which we displayed in Table 1. Additionally, below, the configuration 15 has an inclusion score of 0.000. This was the configuration included in the analysis of sufficient conditions for the absence of declaration of breach of Art.9(2), in Table 2. Between rows 11 and 15, however, we find a number of configurations, some of them with a high number of cases, which displayed intermediate inclusion scores and that were not included in any minimization. The existence of these configurations (and more generally, the existence of contradictory configurations) points at the existence of additional conditions, not included in the analysis, that would be necessary if we wanted explain judicial behaviour in its entirety. As said in the methods section, rather than that, the aim of this article is to analyse the treatment that certain intersectional social groups receive in judicial decision-making.

In configuration 12 we observe the success rate of national male Christians, which constitute the greatest majority of applications by Christian men in general. The inclusion of this configuration is 0.68, which is a very intermediate rate of litigation success. A possible explanation for this could have been that these applicants often belong to minority, as opposed to mainstream, Christian denominations. However, in Table 1 we observed that applications by similar Christian groups were more successful when filled by legal persons, and also in the only case of women application.

Finally, the configurations 16 to 24 are logical remainders: configurations of conditions that are logically possible but never occurred. In most of these configurations we observe a common element: being not national. Therefore, the low overall number of applications by non-nationals may be part of the explanation for these configurations empty of cases. Also, note that one of these configurations is women Muslim non-national. This qualifies

the finding in Table 2: being a national Muslim women is not only a safe route to defeat, but it actually was also the only type of applications filled by Muslim women, as never a member of this group never filed a complaint as not-national.

VI. Discussion

This article has researched patterns of litigation success and defeat of different groups in cases on Art.9(2) ECHR. One of our most salient findings has to do with the importance of intersectional approaches when trying to understand the enforcement of human rights in the judicial arena. Intersectionality, operated through a methodology which is particularly well-suited to capture its complexity, allowed us to observe patterns that would have been rendered invisible by unidimensional analyses. In general, unidimensional categories did not exhibit patterns of clear victory or clear defeat in the activity of the ECtHR. Not even categories over which there could be strong presumption of specific judicial treatment, such as being a male applicant, a female applicant, or a Muslim applicant. However, simultaneously, the analyses revealed that many intersectional categories of applicants did exhibit such clear patterns.

The case of Muslims applicants is particularly interesting. The idea that the Court could be less favorable to these applicants was mostly refuted by the analyses and needs to be qualified: it was not Muslims in general, but Muslim women in particular, that were systematically defeated in the cases they presented. In fact, male Muslims were a very successful category of litigants, wining the greatest majority of the cases they brought about. The case presented by a Muslim legal person was also successful. It was Muslim women, and only this group, that exhibited a clear pattern of litigation defeat. Indeed, strikingly, members of this group lost all cases presented before the Court. Muslim

women were not only much less successful litigants than their male counter-parts, but were indeed by far the most unsuccessful group of all intersectional categories in this study. All of this makes clear the importance of intersectionalizing the approach when analyzing judicial patterns along identity lines.

Cases presented by Muslim women, and which were a path to litigation defeat, had a clear intersectional dimension. The very terms used by the Court suggest that the garment in question is religious in nature. It is also clearly gender-specific, as only Muslim *women* adopt the practice of wearing veilings; as a result, the debate on the Islamic veil, both in the form of the headscarf and the face veil, is intersectional insofar as it involves at the very least gender and religion. These bans have clear implications on Muslim women who veil. When forced to make the decision between manifesting religious beliefs and remaining in the public sphere; Muslim women who veil may choose to remain in the private sphere and become disconnected from public life. The intersectional framework provided a particularly useful lens to make sense of the asymmetry between gender assumptions in the freedom of religion cases and the reality lived by Muslim women.

The findings speak to existing literature on gender and human rights. While there has been some disagreement, as to whether intersectionality is a framework, a theory or a type of politics (Carbin and Edenheim, 2013), the literature has been clear that Muslim women suffer from intersectional discrimination as a result of their intersectional identities as both Muslim and female (Vakulenko, 2007). The limited research done on Muslim women in Europe highlights that they face exclusion and subordination based on their religious belief and gender. In Sweden, studies suggest that the group which is the least integrated into the labour market and in education consists of Muslim women from Asian and African descent. Greece has also been criticised, after empirical research

evidenced that the State treats Muslim women as second class citizens, despite a large proportion of them having Greek citizenship (Schiek and Lawson, 2011). Empirical research done in Greece and based on the performance of courts suggests that the exclusion and subordination faced by Muslim women, like women in the rest of Europe, is distinct, in that these women face discrimination on three grounds, on the basis of their ethnicity, as Muslims and finally as women (Vakulenko, 2007). This has been especially the case in Germany and Netherlands for people from Turkey and Moroccan descent, in France and Spain for those from North Africa and in the UK for people from the Indian subcontinent, the Middle East and East African (Rosenberger and Sauer, 2010). This article adds to this literature, showing that Muslim women have had clear patterns of litigation defeat before the ECtHR. The Court has in the past, positioned the Islamic veil, to be antithetical to the concept of gender equality. [14] The Court has also held in its case law regarding religious manifestations, that gender equality is a cornerstone of the ECHR. Yet its case law has allowed Member States to prohibit the wearing of religious signs in an increasing number of settings, consequently restricting Muslim women who veil to the private sphere.

Our findings also speak to literature on judicial decision-making and judicial behavior. We believe that the main contribution of the paper is, in this regard, that it shows that QCA can be a powerful tool to understand how judicial decisions have a differential impact in different intersectional categories. This might open avenues for future research. At the same time, the patterns found by the analyses can be read on the light of some of the literature in the field. Research on judicial politics suggests that courts often seek strategies to avoid decisions that are politically costly (Closa, 2013). Such literature also suggests that judicial decision-making is by definition about creating winners and losers (Stone Sweet, 2002), and in principle whatever decision a court makes

it will very likely leave dissatisfied at least one of the parties. These two aspects are relevant to the cases presented by Muslim women in this research. These cases often had an element of 'claim intersectionality' related to gendered religious clothing. As said in the introduction, these manifestations have in fact become a central object of political controversy in Europe involving aspects related to identity, the role of religion in the public sphere, the treatment of minorities, conflicting gender narratives, etc. In this context, the Court might have preferred to follow a strategy of deference to States in order to minimize costs of deciding on a politically sensitive issue. Precisely because this topic is highly contentious, a judicial decision against State legislation could have been framed by its opponents as an illegitimate expression of judicial activism imposing judges' preferences on democratically elected national legislators. Of course, by deciding against the petition of the applicant, the Court is still making a contentious choice and adjudicating against the preferences of one of the parties. But in so doing, the Court might present itself as leaving the final decision on the right of religious manifestation of Muslim women in the hands of the States, in order to try to minimize the blame. The Court might interpret this as the least costly option, one that allows it to appear as simply exercising judicial restraint and legitimate deference towards the Contracting Parties, that carry the ultimate responsibility for the decision.

Additionally, an important element of path dependency may underlie to the rulings. The idea of path-dependency in the judicial arena poses that previous decisions condition judicial decision-making for subsequent cases, increasing the incentives to persevere in the same jurisprudential line (Stone Sweet, 2002). This might be an additional factor limiting the chances that the Court reverses its doctrine on Muslim female clothing in the medium run. Was the Court to change its course of action in the future, it is expectable that it would do it with regards to new cases that presented new aspects not

analyzed in previous case-law. That would offer the Court an excuse to change its approach in an incremental way. The option of a radical break-up with previous case-law, while not impossible, is costly from the perspective of jurisprudential consistency, and therefore it is less expectable, especially in a scenario of political polarization.

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[1] *Campbell and Cosans v UK, App No 7511/76 and 7743/76 (ECtHR, 25 February 1982)*, paragraph 36.
[2] *Eweida and others v the United Kingdom App No 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013)*, para. 82.
[3] Ibid.
[4] 36.7% Roman Catholic, 30% Orthodox, 15% Muslim, 14.5% Protestant, 2.3% other, 0.6% free church/ non-conformist/evangelical, 0.2% Jewish, 0.1% Hindu and 0.1% Buddhist.
[5] *Eweida and others v the United Kingdom App No 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).*
[6] Ibid. page 18.
[7] *Dimitrova v. Bulgaria, App No 15452/07 (ECtHR, 10 February 2015); L.L. v. France, App No 7508/02 (ECtHR, 10 October 2006); Sener v. Turkey, App No 26680/95 (ECtHR, 21 October 1997).*
[8] For the most recent case at the time of preparation of this manuscript (*Association for Solidarity with Jehovah's Witnesses and others v. Turkey, App No 36915/10 and 8606/13 (ECtHR, 24 May 2016)*), the text of the ruling was not yet available on line, so it was not included in the database.
[9] *Kokkinakis v Greece App No 3/1992/348/421(ECtHR, 19 April 1993).*
[10] *Kalac v Turkey App No 20704/91 (ECtHR,1 July 1997).*
[11] *Dahlab v Switzerland App No 2346/02 (ECtHR, 29 April 2002).*
[12] Ibid. at 463.
[13] Ibid.
[14] *Dahlab v Switzerland App No 42393/98 (ECtHR 15 February 2001)* P15.

Tables

Table 1. Analysis of sufficient conditions for declarations of breach of Art.9(2)

Path	**Incl**	**PRI**	**cov.r**	**cov.u**	**Cases**
Mixed_gender	0.867	0.867	0.277	0.277	**25,27,30; 12,22,26,37,42, 43,56,**<u>*63,64;*</u> **1; 18; 31**
Male*Muslim	0.900	0.900	0.191	0.191	**6,28,29,32,46,47,**<u>*48*</u>**,55,57,59**
Female*Christian	1.000	1.000	0.021	0.021	**40**
Legal_person*Christian	0.800	0.800	0.085	0.085	**9,**<u>*10*</u>**,20,39,45**
Legal_person*Muslim	1.000	1.000	0.021	0.021	**50**
Not_national*Male	1.000	1.000	0.085	0.085	**44; 3,33,38**
Model	***0.889***	***0.889***	***0.681***		

Cases in bold are consistent (breach). Cases in italics and underlined are inconsistent (no breach). See Appendix for the names of the cases.

Table 2. Analysis of sufficient conditions for absence of declaration of breach of Art.9(2)

Path	Incl	PRI	cov.r	cov.u	Cases
national*Muslim*female	1.000	1.000	0.316		**5,7,34,35,49,52**
Model	***1.000***	***1.000***	***0.316***		

All cases are consistent (no breach). See Appendix for the name of the cases.

Table 3. Truth Table

#	National	Gender	Religion	N	Incl	PRI	Cases
1	Yes	Female	Christian	1	1.000	1.000	**40**
2	Yes	Mixed	Other	3	1.000	1.000	**25,27,30**
3	Yes	Mixed	Muslim	1	1.000	1.000	**1**
4	Yes	Legal p.	Muslim	1	1.000	1.000	**50**
5	No	Male	Other	1	1.000	1.000	**44**
6	No	Male	Christian	3	1.000	1.000	**3,33,38**
7	No	Mixed	Other	1	1.000	1.000	**18**
8	No	Mixed	Christian	1	1.000	1.000	**31**
9	Yes	Male	Muslim	10	0.900	0.900	**6,28,29,32,46,47,** *48*,**55,57,59**
10	Yes	Legal p.	Christian	5	0.800	0.800	**9,***10*,**20,39,45**
11	Yes	Mixed	Christian	9	0.778	0.778	**12,22,26,37,42,43,56,***63,64*
12	Yes	Male	Christian	16	0.688	0.688	*2,4*,**8,***11*,**14,15,16,17,19,***51*,**53,54,61,62,65,66**
13	Yes	Legal P.	Other	3	0.667	0.667	**36,41,***58*
14	Yes	Male	Other	5	0.400	0.400	*13,21,23,***24,60**
15	Yes	Female	Muslim	6	0.000	0.000	*5,7,34,35,49,52*
16	Yes	Female	Other	0	-	-	
17	No	Male	Muslim	0	-	-	
18	No	Female	Other	0	-	-	
19	No	Female	Christian	0	-	-	
20	No	Female	Muslim	0	-	-	

21	No	Mixed	Muslim	0	-	-	
22	No	Legal p.	Other	0	-	-	
23	No	Legal p.	Christian	0	-	-	
24	No	Legal p.	Muslim	0	-	-	

Cases in bold indicate declaration of breach (consistent cases). Cases in italics and underlined indicate no declaration of breach (inconsistent cases). See Appendix for the names of the cases.

Appendix 1. List of cases

1	CASE OF İZZETTİN DOĞAN AND OTHERS v. TURKEY	34	CASE OF DOGRU v. FRANCE
2	CASE OF MOZER v. THE REPUBLIC OF MOLDOVA	35	CASE OF KERVANCI v. FRANCE
3	CASE OF MOZER v. THE REPUBLIC OF RUSSIA	36	CASE OF LEELA FORDERKREIS E.V. AND OTHERS v. GERMANY
4	CASE OF SÜVEGES v. HUNGARY	37	CASE OF RELIGIONSGEMEINSCHAFT DER ZEUGEN JEHOVAS AND OTHERS v. AUSTRIA
5	CASE OF EBRAHIMIAN v. FRANCE	38	CASE OF PERRY v. LATVIA
6	CASE OF GÜLER AND UĞUR v. TURKEY	39	CASE OF SVYATO-MYKHAYLIVSKA PARAFIYA v. UKRAINE
7	CASE OF S.A.S. v. FRANCE	40	CASE OF IVANOVA v. BULGARIA
8	CASE OF KRUPKO AND OTHERS v. RUSSIA	41	CASE OF CHURCH OF SCIENTOLOGY MOSCOW v. RUSSIA
9	CASE OF BIBLICAL CENTRE OF THE CHUVASH REPUBLIC v. RUSSIA	42	CASE OF BISERICA ADEVARAT ORTODOXA DIN MOLDOVA v. MOLDOVA
10	CASE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS v. THE UNITED KINGDOM	43	CASE OF KUZNETSOV AND OTHERS v. RUSSIA
11	CASE OF AUSTRIANU v. ROMANIA	44	CASE OF IGORS DMITRIJEVS v. LATVIA
12	CASE OF EWEIDA AND OTHERS v. THE UNITED KINGDOM	45	CASE OF THE MOSCOW BRANCH OF THE SALVATION ARMY v. RUSSIA
13	CASE OF FRANCESCO SESSA v. ITALY	46	CASE OF AGGA v. GREECE (N° 3)
14	CASE OF FETİ DEMİRTAŞ v. TURKEY	47	CASE OF AGGA v. GREECE (N° 4)
15	CASE OF BUKHARATYAN v. ARMENIA	48	CASE OF KOSTESKI v. "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"
16	CASE OF TSATURYAN v. ARMENIA	49	CASE OF LEYLA ŞAHİN v. TURKEY (1)
17	CASE OF ERÇEP v. TURKEY	50	CASE OF SUPREME HOLY COUNCIL OF THE MUSLIM COMMUNITY v. BULGARIA
18	CASE OF DIMITRAS AND OTHERS v. GREECE 1	51	CASE OF VERGOS v. GREECE
19	CASE OF BAYATYAN v. ARMENIA	52	CASE OF LEYLA ŞAHİN v. TURKEY (2)
20	CASE OF ASSOCIATION LES TÉMOINS DE JÉHOVAH v. France	53	CASE OF POLTORATSKIY v. UKRAINE
21	CASE OF WASMUTH v. GERMANY	54	CASE OF KUZNETSOV v. UKRAINE
22	CASE OF BOYCHEV AND OTHERS v. BULGARIA (Nº1)	55	CASE OF AGGA v. GREECE (No. 2)
23	CASE OF HERRMANN v. GERMANY	56	CASE OF METROPOLITAN CHURCH OF BESSARABIA AND OTHERS v. MOLDOVA
24	CASE OF JAKÓBSKI v. POLAND	57	CASE OF HASAN AND CHAUSH v. BULGARIA (HASAN)
25	CASE OF GRZELAK v. POLAND (1)	58	CASE OF CHA'ARE SHALOM VE TSEDEK v. FRANCE
26	CASE OF JEHOVAH'S WITNESSES OF MOSCOW AND OTHERS v. RUSSIA	59	CASE OF SERIF v. GREECE
27	CASE OF DIMITRAS AND OTHERS v. GREECE 2	60	CASE OF BUSCARINI AND OTHERS v. SAN MARINO
28	CASE OF AHMET ARSLAN AND OTHERS v. TURKEY	61	CASE OF LARISSIS AND OTHERS v. GREECE
29	CASE OF SİNAN IŞIK v. TURKEY	62	CASE OF PENTIDIS AND OTHERS v. GREECE
30	CASE OF KIMLYA AND OTHERS v. RUSSIA	63	CASE OF VALSAMIS v. GREECE
31	CASE OF MIROLUBOVS AND OTHERS v. LATVIA	64	CASE OF EFSTRATIOU v. GREECE
32	CASE OF MASAEV v. MOLDOVA	65	CASE OF MANOUSSAKIS AND OTHERS v. GREECE
33	CASE OF NOLAN AND K. v. RUSSIA	66	CASE OF KOKKINAKIS v. GREECE

Appendix 2. QCA DATA MATRIX

Ruling	Breach	Not national	gender	religion
IZZETTIN	1	0	2	2
MOZERvMOLDOVA	0	0	0	1
MOZERvRUSSIA	1	1	0	1
SUVEGES	0	0	0	1
EBRAHIMIAN	0	0	1	2
GULERANDU	1	0	0	2
SAS	0	0	1	2
KRUPKOAND	1	0	0	1
BIBLICALCENTRE	1	0	3	1
CHURCHOFJESUSCHRISTvUK	0	0	3	1
AUSTRIANU	0	0	0	1
EWEIDA	1	0	2	1
FRANCESCOSESSA	0	0	0	0
DEMERTA	1	0	0	1
BUKHARATYAN	1	0	0	1
TSATURYAN	1	0	0	1
ERCEP	1	0	0	1
DIMITRAS1	1	1	2	0
BAYATYAN	1	0	0	1
TEMOINSJEHOVAHvFRANCE	1	0	3	1
WASMUTH	0	0	0	0
BOYCHEV1	1	0	2	1
HERRMANN	0	0	0	0
JAKOBSKI	1	0	0	0
GRZELAK1	1	0	2	0
JEHOVAHSMOSCOWvRUSSIA	1	0	2	1
DIMITRAS2	1	0	2	0
AHMETARSLAN	1	0	0	2
SNANIIK	1	0	0	2
KIMLYA	1	0	2	0
MIROLUBOVS1	1	1	2	1
MASAEV	1	0	0	2
NOLANK	1	1	0	1
DOGRU	0	0	1	2
KERVANCI	0	0	1	2
FORDERKREIS	1	0	3	0
RELIGIONSGEMEINSCHAFTEHOVASvAUSTRIA	1	0	2	1
PERRY	1	1	0	1
SVYATOMYKHAYLIVSKA	1	0	3	1
IVANOVA	1	0	1	1
SCIENTOLOGYMOSCOW	1	0	3	0
BISERICAMOLDOVA	1	0	2	1

KUZNETSOV	1	0	2	1
DMITRIJEVS	1	1	0	0
MOSCOWSALVATIONARMY	1	0	3	1
AGGA3	1	0	0	2
AGGA4	1	0	0	2
KOSTESKI	0	0	0	2
LEYLA	0	0	1	2
COUNCILMUSLIMCOMMUNITYvBULGARIA	1	0	3	2
VERGOS	0	0	0	1
LEYLASAHINvTURKEY	0	0	1	2
POLTORATSKIY	1	0	0	1
KUZNETSOV	1	0	0	1
AGGA2	1	0	0	2
CHURCHBESSARABIA	1	0	2	1
HASANANDCHAUSH	1	0	0	2
CHAARESHALOM	0	0	3	0
SERIF	1	0	0	2
BUSCARINI	1	0	0	0
LARISSIS	1	0	0	1
PENTIDIS	0	0	0	1
VALSAMIS	0	0	2	1
EFSTRATIOU	0	0	2	1
MANOUSSAKIS	1	0	0	1
KOKKINAKIS	1	0	0	1

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