Durham University

Durham E-Theses

Behind the Veil: The Quest for Personal Autonomy

KAUSHIK PAUL

How to cite:

PAUL, KAUSHIK (2021) Behind the Veil: The Quest for Personal Autonomy. Doctoral thesis, Durham University.

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a https://etheses.durham.ac.uk/id/eprint/13867/ is made to the metadata record in Durham E-Theses
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the full Durham E-Theses policy for further details.

Academic Support Office, The Palatine Centre, Durham University, Stockton Road, Durham, DH1 3LE
e-mail: e-theses.admin@durham.ac.uk Tel: +44 0191 334 6107
https://etheses.durham.ac.uk

BEHIND THE VEIL:
THE QUEST FOR PERSONAL AUTONOMY

Kaushik Paul

A thesis submitted for the degree
of
Doctor of Philosophy

Durham Law School

Durham University

2020

Abstract

Islamic veiling has attracted a remarkable degree of international and domestic attention in the current political climate. While an increasing number of countries have enacted legislation to prohibit Muslim women from wearing Islamic veils, in some countries Muslim women are coerced into wearing traditional religious dress. Forced veiling is a crucial human rights issue, yet it has not been fully explored in existing legal literature. This study analyses forced unveiling and forced veiling, two completely different stories, simultaneously and with equal importance by centring on the concept of 'personal autonomy'. It examines the implications of forced veiling on Muslim women's right to respect for private life and right to freedom of religion.

In the popular and political debates, three justifications are commonly invoked to justify bans on Islamic veils: social cohesion; public safety and security; and, gender equality. Through the viewpoint of John Stuart Mill's harm principle, this research examines whether a State can legitimately regulate the wearing of Islamic veils on these grounds. This is therefore unique research as it is the first study of this kind and thus, demonstrates an original contribution to knowledge.

This study explores and critically analyses the divergent approaches the European Court of Human Rights (hereinafter "the ECtHR") and the United Nations (hereinafter "the UN") have taken concerning legal bans on Islamic veils. The comparative study reveals that the ECtHR has given weak protection to the religious freedom of Muslim women who want to manifest their religion through the wearing of Islamic veils. Therefore, this thesis offers a systematic analysis as to what lessons the ECtHR can take from the UN to give effective protection to Muslim women's religious freedom, and how the ECtHR can strengthen its proportionality analysis to determine whether a legal ban on wearing the Islamic veil is justified.

Table of Contents

ABSTRACT 2

TABLE OF CONTENTS 3

LIST OF FIGURES 8

LIST OF ABBREVIATIONS 9

DECLARATION 10

STATEMENT OF COPYRIGHT 11

ACKNOWLEDGEMENTS 12

DEDICATION 13

CHAPTER ONE: INTRODUCTION 14

1.1. Introductory Remarks 14

1.2. Islamic Veiling: An Overview 15
1.2.1. What is Islamic Veiling? 15
1.2.2. Is Veiling Compulsory for Women in Islam? 21

1.3. Research Background 25

1.4. Religious Freedom as a Human Right in the UN and European Systems 32
1.4.1. The Right to Manifest Religion or Belief 38

1.5. Literature Review 48

1.6. Research Questions and Objectives 53

1.7. The Philosophical (and Argumentative) Approach of this Study 57

1.8. Research Methodology 59

1.9. Limitations of the Current Study 63

1.10. Structure of the Thesis 63

CHAPTER TWO: TAKING PERSONAL AUTONOMY SERIOUSLY 65

2.1. Introduction 65

2.2. The Harm Principle: An Overview 68

2.3. The Concept of Personal Autonomy 75

2.4. What Does Personal Autonomy Entail? 79
2.4.1. Respect 80
2.4.2. Freedom of Choice for Self-Governance 81
2.4.3. Availability of a Variety of Options 91

2.5. Religious Freedom and Personal Autonomy 93

2.6. Personal Autonomy in Religious Freedom Jurisprudence 96

2.7. Limitations on Personal Autonomy 102

2.8. Concluding Remarks 111

CHAPTER THREE: BANNING ISLAMIC VEILS ON THE GROUND OF SOCIAL COHESION: AN APPRAISAL 117

3.1. Introduction 117

3.2. Living Together: A Newly Developed Category of Justification for Limitations on Religious Freedom 121

3.3. Living Together as a 'Legal' Concept: Is There any Legal Right to Demand Social Interaction Or to See the Faces of Other People? 126

3.4. Does a Ban on Wearing Islamic Veils on the Grounds of 'Living Together' Satisfy the ECHR Standards? 132
3.4.1. The Legitimate Aim Test 133
3.4.2. The Necessity Test 140
3.4.2.1. Who Does the Law Target? 140
3.4.2.2. The Lightness of Criminal Sanctions 142
3.4.2.3. The Number of Muslim Women Using Islamic Full-face Veils 144
3.4.2.4. Breadth of the Ban 145

3.5. Bans on Veiling, Harm, and Living Together: A Reality Check in Light of Empirical Studies 149

3.6. Can a Minority Religious Practice be Prohibited because the Majority of the Society *Dislike* It? A Millian Approach 156

3.7. Living Together, Islamic Veiling, and the Choice of Society: The Future of Pluralism and Tolerance 159

3.8. Concluding Remarks 165

CHAPTER FOUR: BANNING ISLAMIC VEILS ON THE GROUND OF PUBLIC SAFETY AND SECURITY: AN APPRAISAL 168

4.1. Introduction 168

4.2. Are (Islamic) Full-face Veils Real Threats to Public Safety and Security?..... 174

4.3. The ECtHR's Recognition of Public Safety and Security to Justify Bans on Islamic Veils 179

4.4. Public Safety Concerns and a Ban on Islamic Veiling: Convention Standards in Context 182
4.4.1. The Legitimate Aim Test 182
4.4.2. The Necessity Test 185
4.4.3. Reaching Conclusion on the Compatibility of a Ban with the Convention Standards..... 204

4.5. Mill's Harm Principle and a Ban on Islamic Veiling: Prevention of Harm of Others v Protection of Personal Autonomy of the Individual Applicant..... 205

4.6. Concluding Remarks 210

CHAPTER FIVE: BANNING ISLAMIC VEILS ON THE GROUND OF GENDER EQUALITY: AN APPRAISAL..... 214

5.1. Introduction 214

5.2. Why do Muslim Women Wear Islamic Veils? Countering Stereotypical Views in Light of Empirical Evidence 221

5.3. Banning Islamic Veils on Grounds of Gender Equality: A Critical Appraisal of the ECtHR's Approach..... 230

5.4. Compatibility of a Ban with the Convention on the Ground of Gender Equality: The Legitimate Aim Test in Context..... 240

5.5. A Ban is a Hindrance in Achieving Gender Equality 243

5.6. A Ban Disrespects Muslim Women's Autonomy and Dignity 247

5.7. Would John Stuart Mill Have Regulated the Wearing of Islamic Veils on the Grounds of Gender Equality?..... 256

5.8. Concluding Remarks 266

CHAPTER SIX: BANS ON ISLAMIC VEILING: DISPARITY BETWEEN THE UNITED NATIONS AND STRASBOURG PRACTICE..... 270

6.1. Introduction 270

6.2. Divergences between the Approaches of the Strasbourg Court and the UN: A Legal Analysis..... 273
6.2.1. *Mann Singh* before the ECtHR and the HRC..... 273
6.2.2. Taking Personal Autonomy (More) Seriously 278
6.2.3. 'Living Together' as a Ground of Justification to Ban Islamic Full-face Veils: *S.A.S.*, *Yaker* and *Hebbadj* in Context..... 283
6.2.4. The Constitutional Principle of Secularism as a Ground of Justification 286

6.2.5. Gender Equality as a Ground of Justification 292
6.2.6. The Consideration of Harm Suffered by the Individual Applicant 294
6.2.7. The Consideration of the Discriminatory Nature and Effects of Dress Code Regulations: Article 18(3) of the ICCPR and Article 9(2) of the Convention in Context 296
6.2.8. Burden of Proof 298
6.2.9. Application of the Least Restrictive Means-test 301
6.2.10. Some Final Comments on the Comparative Analysis 303

6.3. Some Lessons for the Future: A More Rigorous Proportionality Test to Give Effective Protection of Freedom of Religion 307
6.3.1. A More Careful Examination of Whether the Interference Pursues a Legitimate Aim under Article 9(2) 309
6.3.2. Developing a Series of Questions: The Necessity Test in Context 311
6.3.3. Reversing the Burden of Proof from the Individual to the State 315
6.3.4. Application of the Least Restrictive Means-test: A Pragmatic Approach 316
6.3.5. A Reduced Margin of Appreciation 319

6.4. Concluding Remarks 326

CHAPTER SEVEN: FORCED VEILING 329

7.1. Introduction 329

7.2. Source of Force 330
7.2.1. Government Policies and Legislation 330
7.2.2. Family Members 334
7.2.3. Radical Islamic Groups 337

7.3. The Wrongfulness of Forced Veiling: The Context of Personal Autonomy and Millian Liberalism 339

7.4. Forced Veiling: A Human Rights Perspective 345
7.4.1. The Right to Respect for Private Life 346
7.4.1.1. A Woman's Choice as to Her Desired Appearance: An Expression of Personality and Individual Identity 351
7.4.1.2. Personal Autonomy and a Woman's Choice Not to Wear the Veil: The Context of Private Life 356
7.4.1.3. Private Social Life and Developing Relationships with Other Human Beings 358
7.4.2. The Right to Freedom of Religion or Belief 362
7.4.2.1. Prohibition of Coercion 362
7.4.2.2. The Negative Aspect of Freedom to Manifest One's Religious Beliefs 363
7.4.2.3. The Enforcement of a Compulsory Islamic Dress Code on Women: A Serious Violation of the Right to Freedom of Religion 365
7.4.2.4. Religious Freedom and the Positive Obligations of the State 374

7.5. What Do The UN and the CoE Say about Forced Veiling? 376

7.6. Concluding Remarks 379

CHAPTER EIGHT: CONCLUSION 382

APPENDICES 401

TABLE OF CASES 406

TABLE OF LEGISLATION 417

BIBLIOGRAPHY 418

List of Figures

Figure 1: Different types of Islamic veils **19**

Figure 2: National and regional bans on Islamic veils in Europe **27**

Figure 3: Countries that have enforced a compulsory dress code on women **28**

Figure 4: Ms Harnaam Kaur **89**

Figure 5: Arrests in the EU countries for terrorism-related offences between 2015-2018 ..... **178**

Figure 6: The reasons for wearing the Islamic veil **227**

Figure 7: The Islamic veil before the ECtHR and the UN **305**

Figure 8: Series of questions **314**

List of Abbreviations

CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	Convention on the Rights of the Child 1989
CUP	Cambridge University Press
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECtHR	European Court of Human Rights
EComHR	European Commission on Human Rights
EU	European Union
FoRB	Right to freedom of religion or belief
GC	Grand Chamber
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights 1966
MoA	Margin of appreciation
OUP	Oxford University Press
UDHR	Universal Declaration of Human Rights 1948
UK	United Kingdom
UN	United Nations
USA	United States

1981 Declaration Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981

Declaration

I certify that the contents of this thesis has not been previously submitted to Durham University or any other institution for a higher degree.

Statement of Copyright

The copyright of this thesis rests with the author. No quotation from it should be published without the author's prior written consent and information derived from it should be acknowledged.

Acknowledgements

The completion of this thesis would not have been possible without the unwavering support and assistance of my supervisors, Professor Ian Leigh and Professor Helen Fenwick. I wish to express my sincere gratitude to Professor Ian Leigh for his critical insights, support, guidance and patience throughout the journey. I am grateful to my secondary supervisor, Professor Helen Fenwick, for her insightful comments on an earlier draft of this thesis.

I would also like to thank Professor Thom Brooks and Professor Deirdre McCann for their additional feedback and assistance throughout the review process. They introduced me with the philosophical works of Martha C. Nussbaum and Susan Moller Okin; and, I found these works extremely helpful for my research. Special thanks to Professor Thom Brooks, the Dean of Durham Law School, for helping me during my difficult time.

I am grateful to Durham Law School for providing me financial support, via the Durham Law School Scholarship.

Thanks to my friends and fellow doctoral candidates, Marianne and Sophie, for their tremendous support and encouragement.

Last, but certainly not the least, I would like to express my sincere gratitude to my family members: parents, brother, uncle, auntie, cousin, and wife. I would like to thank to my parents for their endless support, love and encouragement. Thanks to my uncle for his constant support throughout my life and my educational endeavours -- without him I wouldn't be here where I am now. Thanks to my brother and cousin for their wishes and support. Special thanks to my lovely wife, Dipika, for her love, support and patience.

Dedication

This thesis is dedicated **to my father**, who was not privileged enough to gain access to formal education due to extreme poverty, and **to my uncle**, who has inspired me to dream big.

CHAPTER ONE: INTRODUCTION

> 'After the primary necessities of food and raiment, freedom is the first and strongest want of human nature.'
>
> - John Stuart Mill[1]

> 'The right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of the religion or belief that he professes, regardless of his status, and regardless of his condition in life.'
>
> - Arcot Krishnaswami[2]

1.1. Introductory Remarks

This chapter sets the scene for the reminder of the thesis, examining Muslim women's practice of veiling and providing an overview of the protection of the right to freedom of religion or belief[3] (hereinafter "FoRB" or "religious freedom") under international human rights law. This chapter also provides an overview of the relevant literature in the field, the proposed research questions and objectives, the research methodology, and the limitations of the research.

[1] John Stuart Mill, *The Subjection of Women* (London: Gutenberg, 2008) 178. (This book was first published in 1869).

[2] Arcot Krishnaswami, 'Study of Discrimination in the Matter of Religious Rights and Practices', UN Doc. E/CN.4/Sub.2/200/Rev.1 (1960).

[3] The full title is 'the right to freedom of thought, conscience and religion', which is commonly used in many human rights treaties.

1.2. Islamic Veiling: An Overview

1.2.1. What is Islamic Veiling?

The Islamic veil is arguably the most politicised piece of garment in the world, eliciting heated controversy over its significance and complex meaning. 'Veiling is a religious symbol inscribed on the body; it is carried personally but also conveys social information to others.'[4] The religious practice of veiling has generated widespread controversy among ordinary citizens and policy makers in Europe, as well as in many Muslim-majority societies around the world. For over a century, Muslim and non-Muslim communities have been debating the significance of the veil with robust exchanges over: whether Muslim women are required to cover their body contours, face and hair; the extent to which they should cover; and, who has the right to decide and define the complex meaning of veiling.

Veiling is a gendered practice because it specifically concerns women. There are religious requirements of modesty for women in most religions and cultural traditions,[5] but it is safe to say that Muslim women are invariably subjected to more extensive standards of what exactly needs to be covered and how. In this sense, veiling is an issue that is largely associated with Islam today. In this thesis, the reason for describing veiling practices as *Islamic* is that it is specifically Muslim dress

[4] Nilufer Gole, 'The Voluntary Adoption of Islamic Stigma Symbols' (2003) 70(3) Social Research 809, 809.

[5] For instance, Jewish women are required to dress modestly, covering their bodies from the neck and the knee, exposing only the face and hands. A large number of Catholic and Orthodox nuns wear the habit. In conservative Catholic communities and in some Protestant denominations around the world, women wear hats when going to church; other keep their hair long to serve as a head cover. For a more detailed discussion, see Sahar Amer, *What is Veiling?* (Chapel Hill: University of North Carolina Press, 2014) 7-9.

codes which have provided abundant material for legal intervention, media coverage and academic commentary.

The English term 'veil' (like its European variants, such as *voile* in French) is commonly used to refer to Muslim women's traditional head, face and body cover. It is both a noun and a verb. In the Cambridge Dictionary, 'veil' has been described as 'a piece of thin material worn by women to cover the face or head'.[6] However, Muslim women don the veil to cover their hair, heads and other parts of their bodies in various styles, according to professed Islamic codes of modest dress. The practice of veiling varies depending on culture and geographic region and, due to the variation in Islamic veiling practices, there is no single word in Arabic equivalent to the 'veil'. Nor is there a direct equivalent for 'veil' in non-Arabic languages in Muslim-majority societies. It must be emphasised that the English term 'veil' 'is not confined to face covering, but extends to the head and shoulders'.[7] While the literature on Islamic veiling is extensive,[8] the definition of the term 'veil(ing)' has not been disputed by commentators. For instance, El-solh and Marbo note that the term 'veil' is used 'in reference to a range of female attire from the headscarf to

[6] See <https://dictionary.cambridge.org/dictionary/english/veil> accessed 10 October 2016.

[7] Fadwa El Guindi, *Veil: Modesty, Privacy and Resistance* (Oxford- New York: Berg, 1999) 6.

[8] Good starting points are- Elizabeth Bucar, *The Islamic Veil: A Beginner's Guide* (Oxford: Oneworld Publications, 2012); Christian Joppke, *Veil: Mirror of Identity* (Cambridge-Malden: Polity Press, 2009); Amer (n 5); Leila Ahmed, *A Quiet Revolution: The Veil's Resurgence, from the Middle East to America* (New Haven: Yale University Press, 2011); Marnia Lazreg, *Questioning the Veil: Open Letters to Muslim Women* (New Jersey: Princeton University Press, 2009).

the floor length garment covering the head, face and body.'[9] A similar approach has been taken by Gokariksel and Secor who define veiling as 'an Islamic system of modesty in dress' which 'in general may range from just covering the hair with a headscarf to fully covering the body'.[10]

There are indeed many different kinds of Islamic veils, including the *hijab*, *burqa*, *niqab*, *jilbab*, *chador/abaya, al-amira, Shayla,* and the *khimar.* A *hijab* is a piece of cloth covering only hair and neck, usually clasped or tied tightly at the back. The *burqa*, which is the most concealing among all Islamic veils, is a loose garment that covers the whole of the woman's body, from head to toe, with a mesh cloth over the eyes that allows the wearer to see out, but prevents other people from seeing her eyes. The *niqab*[11] is a black clothing that that covers a woman's face with a slit left for eyes. The *jilbab* is a long coat garment covering the whole body and the hair but leaving the face visible. The *chador/abaya* is a full-body cloak which is often accompanied by a smaller headscarf underneath. The *al-amira* is a two-piece veil consisting of a cap or extra-large headband and a tube-like scarf worn over that. The *shayla* is a long, rectangular scarf that is wrapped around the head and tucked or pinned in place at the shoulders. The *khimar* is a circular type headscarf that hangs down to just above the waist and covers the head, neck and shoulders completely, but leaves the face clear. These outfits, worn by many Muslim women and girls, have today become an increasingly common sight in an interconnected,

[9] Camillia Fawzi El-solh and Judy Marbo, 'Introduction: Islam and Muslim Women' in Camillia Fawzi El-solh and Judy Marbo (eds), *Muslim Women's Choices: Religious Belief and Social Reality* (Oxford: Berg, 1994) 9.

[10] Banu Gokariksel and Anna Secor, 'The Veil, Desire, and the Gaze: Turning the Inside Out' (2014) 40(1) Signs 177, 178.

[11] The *niqab* is usually worn with a loose garment that covers from head to feet.

global world. Women do not become invisible when they don the veil, they are simply visible in a particular way. For ease of understanding the differences among the above-mentioned garments, a picture of different types of Islamic veils is presented in Figure 1 below.

Figure 1: Different types of Islamic veils (Graphic source: BBC News).[12]

[12] See 'In graphics: Muslim veils and headscarves' (BBC News) <http://news.bbc.co.uk/1/shared/spl/hi/pop_ups/05/europe_muslim_veils_and_headscarves/html/1.stm> accessed 25 December 2020.

The wearing of veils by Muslim women and girls varies according to their religious persuasion as well as ethnic and cultural background. Styles, colors, and the thickness of the veil vary greatly depending on the preferences of the wearer. Degrees of concealment also vary depending on one's understanding of the Quranic injunctions regarding Muslim veiling[13] and, depending on the socio-economic status of women.[14]

It can be deduced from the above analysis that religious practices of veiling range widely, as do other types of dress and fashion customs. Therefore, as Sahar Amer notes, 'vast variation in Muslim dress truly is the norm.'[15] As there are many different kinds of coverings, the phrase 'Islamic veil' can be used as an umbrella term to refer to all styles of garments which Muslim women wear to observe the Quranic injunction requiring modest dress for Muslim women and girls. Likewise, the term 'Islamic veiling' can be used to refer to the Islamic system of modesty in dress or Islamic ways of dressing. Therefore, this thesis will use the expressions "Islamic veiling" and "Islamic veil" as generic descriptions for a wide range of head, face, and body coverings that Muslim women wear in accordance with their

[13] The question of to what extent a woman should cover her body and/or face according to Islamic teachings is not one with a single, agreed-upon answer. Ask and Tjomsland observe that 'the veil does not necessarily have to cover the face, [but] should meet the Islamic requirements of modesty in dress.' (Karin Ask and Marit Tjomsland, 'Introduction' in Karin Ask and Marit Tjomsland (eds), *Women and Islamization: Contemporary Dimensions of Discourse on Gender Relations* (Oxford: Berg, 1998) 61. Some commentators, however, have taken different views. See for instance, Hania Sobhy, 'Amr Khaled and Young Muslim Elite: Islamism and the Consolidation of Mainstream Piety in Egypt' in Diane Singerman (ed), *Cairo Contested: Governance, Urban Space, and Global Modernity* (Cairo- New York: The American University in Cairo Press, 2009) 440-441.

[14] El-solh and Marbo (n 9) 9-10; Amer (n 5) 14.

[15] Amer (n 5) 14.

religious convictions. Indeed, this thesis will occasionally refer to a specific garment (e.g. the *burqa*) in the interest of precision, but for the most part it uses the general term "Islamic veiling", "Islamic veil" or "Islamic dress" interchangeably.

1.2.2. Is Veiling Compulsory for Women in Islam?

As we will see shortly, there is little (or no) disagreement that Islam requires Muslim women to wear modest dress. Michael Ipgrave writes, '[b]y contrast with Christianity, in Islam there is available a much clearer and more specific sense of obligations directed by God to be observed by men and women.'[16] However, this is not the case on the question of whether or not veiling is compulsory, which is an extremely contentious issue.[17] Many orthodox Muslim scholars, especially those who are aligned with a Salafi ideology, have taken the view that veiling is a strict religious requirement -- so, the wearing of the Islamic veil is obligatory (*fard, wajib*) for Muslim women as part of their Islamic faith.[18] As Anabel Inge notes, 'Salafi scholars agree that [the veil] is compulsory, so failing to wear it is considered as sinful.'[19] These scholars cite or interpret the relevant verses of the Quran as evidence that veil is compulsory for Muslim women.

---

[16] Michael Ipgrave, 'Crosses, Veils and Other People: Faith as Identity and Manifestation' (2007) 2 Religion and Human Rights 163, 176.

[17] On this point, see Bronwyn Winter, *Hijab & The Republic: Uncovering The French Headscarf Debate* (New York: Syracuse University Press, 2008) 22.

[18] See Hauwa Mahdi, *The Hijab in Nigeria, the Woman's Body and the Feminist Private/Public Discourse*, Working Paper No. 09-003 (2009); Israa Tariq, 'The Personal Meanings of the Hijab' <http://www.asrarjournal.com/? escaped fragment =the-personal-meanings-of-the-hijab/cu0t> accessed 13 February 2018.

[19] Anabel Inge, *The Making of a Salafi Muslim Women: Paths to Conversion* (Oxford: OUP, 2017) 170.

The key Quranic verse that instructs Muslim women to observe *modesty* in their dress is Sura 24 (An-Noor) aya (verse) 31, which reads:

> And tell the believing women to reduce (some) of their vision and guard their private parts and not expose their adornment except that which (necessarily) appears thereof and to wrap (a portion of) their headcovers over their chests and not expose their adornment except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their women, that which their right hands possess, or those male attendants having no physical desire, or children who are not yet aware of the private aspects of women.[20]

Sura 33 (Al-Ahzab) aya (verse) 59 is also frequently cited to strengthen the argument that veiling is compulsory: 'O Prophet! T'ell thy wives and daughters and the believing women, that they should cast their outer garments over their persons (when outside): so that they should be known (as such) and not molested.'[21] Sura 33 further reads, 'stay in your houses, and do not display yourselves (adornments) like that of the times of Jaahiliyyah (i.e. the pre-Islamic era).'[22] These passages have been interpreted and understood alongside the following Hadith: "And as regards the (verse of) veiling of the women, I said, 'O Allah's Apostle, I wish you ordered your wives to cover themselves from the men because good and bad ones talk to them'."[23] The fact that the Quran instructed male believers that they should speak to the Prophet's wives behind a veil[24] is also commonly used to argue that the veil is religiously mandated.

[20] The Quran.

[21] ibid.

[22] ibid, 33:33.

[23] Sahih Al- Bukhari, Volume 1, Book 8, Number 395, Verse 2.

[24] The Quran, 33:53.

Conversely, some Islamic and feminist scholars have asserted that the Quran neither mandates Islamic veils nor explicitly commands Muslim women to cover their hair or faces. For these scholars, the status of veiling is therefore recommended (*mustahabb*), not obligatory. Haleh Ashfar, for instance, argues that even though veiling has developed as a religious tradition on the basis of the norms of the Quran, women should not consider it to be an obligation of Islam. She further argues, Islam does not require wearing a veil, but only prohibits immodesty.[25] Likewise, Syed states, '[t]o wear the Hijaab is certainly not an Islamic obligatory on women.'[26] It has also been asserted by some scholars that the practice of veiling is meant to apply specifically to the wives of the Prophet only; this duty does not extend to other women. Therefore, wearing the veil does not amount to an obligation on Muslim women.[27] Indeed, as a result, it has been argued by Diane Morgan that women (except the wives of the Prophet) 'are not absolutely required' to wear a veil, because 'this is cultural rather than a religious practice.'[28]

What appears from the above discussion is that there is a consensus that Islam requires 'modesty' from women (and men). There is, however, extensive disagreement among scholars and Islamic thinkers as to whether the wearing of Islamic veils is compulsory for Muslim women.

---

[25] Haleh Ashfar, 'Gender Roles and the 'Moral Economy of Kin' among Pakistani Women in West Yorkshire' (1989) 15(2) Journal of Ethnic and Migration Studies 211, 219.

[26] Ibrahim B. Syed, 'Is Hijab Compulsory?' <http://www.irfi.org/articles/articles_1_50/is_hijab_compulsory.htm> accessed 28 August 2016.

[27] Ipgrave (n 16) 178.

[28] Diane Morgan, *Essential Islam: A Comprehensive Guide to Belief and Practice* (California: Praeger, 2010) 195.

The approach of the courts as to the obligatory nature of Muslim veiling must now be considered. Domestic courts have shown their reluctance to make a concrete decision on the question of whether the veil is religiously mandated by the Quran, instead leaving it to the discretion of the community or the individual concerned. In fact, the interpretation of religious texts- be it the Quran or otherwise- is not only an extremely difficult task for the courts, but also a highly contentious and sensitive matter. Presumably, this is the main reason for the courts' reluctance to interpret Islamic religious texts in deciding whether wearing the veils is obligatory or not in Islam. The Conseil d'Etat (the highest administrative court in France), in a 1989 Opinion, did not interpret the Quran when giving its viewpoints on the question of whether the wearing of religious symbols was compatible with the principle of *laïcité*.[29] Similarly, the House of Lords has shown its reluctance to become involved in assessing what is or is not required by a particular religion or belief.[30] Baroness Hale, former President of The Supreme Court, stated that 'it is not for the court to seek to resolve doctrinal conflicts about whether wearing the veil is mandatory'.[31]

One can argue that a court may not, and should not determine, by interpreting religious texts, what a religion prescribes or does not prescribe. As the courts do not have expertise to interpret religious texts, they should not walk on this

[29] Avis no 346.893 du 27 November 1989. For an analysis of this Opinion, see Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford-Portland: Hart Publishing, 2006) 9, 68-70.

[30] In *R (Williamson) v Secretary of State for Education and Employment,* a case concerning belief in the use of corporal punishment by the teachers, the House of Lords showed its reluctance to interpret the Bible, and stated that the Court of Appeal was wrong to have entered into an exercise in Biblical interpretation. [2005] UKHL 15 paras 10, 20-40.

[31] Lady Hale, 'Religious Dress' (20 February 2019) <https://www.supremecourt.uk/docs/speech-190228.pdf> accessed 28 March 2019.

theological path.[32] This would avoid excluding religious practices which are unpopular from human rights protection. As Peter W. Edge notes, if the courts 'enter into determining … how one must act, in order to meet religious duties in a particular tradition, it is more likely to have recourse to dominant, well-documented traditions than to the individual beliefs of the applicant.'[33] Arguably, the main concern for a court should be the protection of an individual's voluntary choice as to their faith activity, irrespective of whether their own interpretations of the religious texts are correct or not, and this will be explored over the course of the thesis.

The following section explores the background of the present study.

1.3. Research Background

The wearing of the Islamic veil is a complex and multi-faceted issue which is often raised in legal and political debates. For some people, veiling is a positive, autonomous choice and the veil is a symbol of modesty and chastity. For others, the practice of Muslim veiling is totally unacceptable because veiling indicates a lack of a woman's autonomy, and the veil is a symbol of oppression and inequality of Muslim women. While many countries, by law, prohibit observant Muslim women from wearing Islamic veils in public places, in some countries Muslim

[32] On this point, see Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: OUP, 2001) 120-24; Saila Ouald Chaib and Eva Brems, 'Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe' (2013) 2 Journal of Muslims in Europe 1, 20-21; Saila Oulad Chaib, 'Suku Phull v. France Rewritten from a Procedural Justice Perspective: Taking Religious Minorities Seriously' in Eva Brems (ed), *Diversity and European Human Rights* (Cambridge: CUP, 2012) 229-230.

[33] Peter W. Edge, 'The European Court of Human Rights and Religious Rights' (1998) International and Comparative Law Quarterly 680, 687.

women are forced, against their will, to wear veils in public places. To this end, the controversies about Islamic veiling have been centrally concerned with two different issues: voluntary veiling and forced veiling. Therefore, both need to be considered together with equal importance for an adequate legal analysis of the Islamic veiling debates. In a report submitted to the Commission on Human Rights, the United Nations (hereinafter "the UN") Special Rapporteur on FoRB, Asma Jahangir, stated that:

> When dealing with the issue of religious symbols, two aspects of the question need to be taken into account. On the one hand, many individuals in various parts of the world are prevented from identifying themselves through the display of religious symbols, while on the other hand … some countries … [are] requiring people to identify themselves through the display of religious symbols, including religious dress in public.[34]

At present, nationwide bans on wearing Islamic full-face veils exist in several European countries including Austria, Belgium, Bulgaria, Denmark, France, and the Netherlands; countries where regional ban exits include Germany, Italy, Spain, and Switzerland.[35] Some African countries including Chad, Cameroon, and Niger have also restricted the wearing of Islamic veils. No European country, by law, requires Muslim women to wear Islamic veils. However, the authorities in the Russian republic of Chechnya have enforced a compulsory Islamic dress code for women as

[34] UN Doc. E/CN.4/2006/5 (9 January 2006) para 36.

[35] For a brief summary of a country by country situation, see 'The Islamic veil across Europe' (*The BBC*, 31 May 2018) <https://www.bbc.co.uk/news/world-europe-13038095> accessed 15 May 2020; Open Society Foundations, 'Restrictions on Muslim Women's Dress in the 28 EU Member States: Current Law, Recent Legal Developments and the State of Play' (2018) <https://www.justiceinitiative.org/publications/restrictions-muslim-women-s-dress-28-eu-member-states-2> accessed 4 December 2019.

part of President Ramzan Kadyrov's 'virtue campaign'.[36] In addition, Muslim women in several European countries including the UK and France are being coerced into veiling by their male family members.[37] Recent research by the Pew Research Centre revealed that in various countries across the world where religious dress is officially regulated, failure to comply with the prescribed dress code may lead to harassment directed at Muslim women by private individuals and/or social groups.[38]

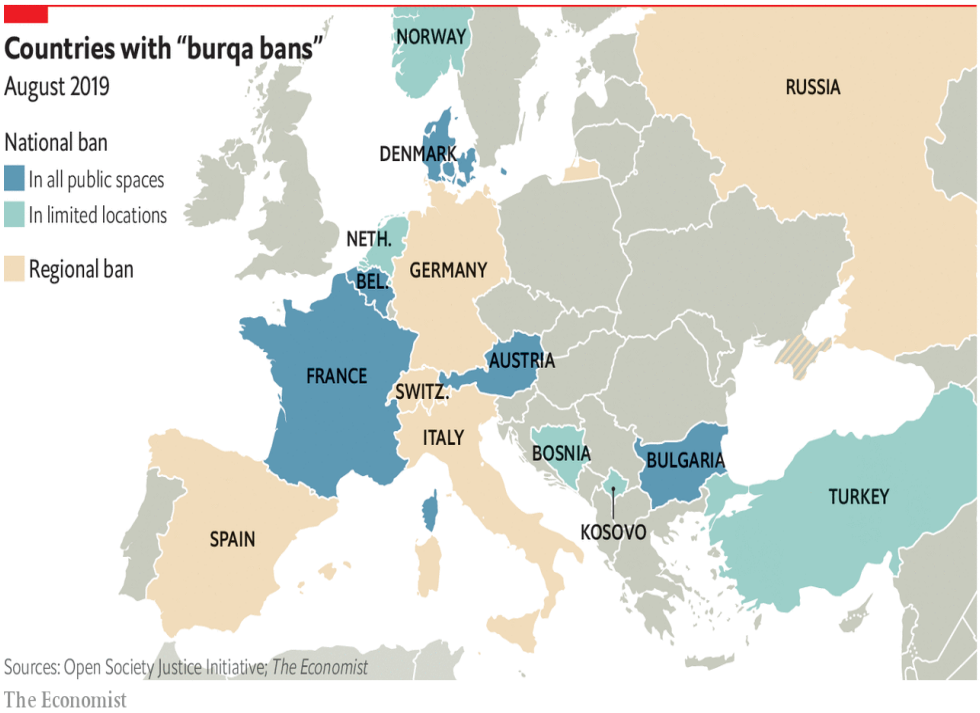

Figure 2: National and regional bans on Islamic veils in Europe (Source: *The Economist*).

[36] For clarity, Russia's Stavropol region has banned the wearing of the *hijab* in public schools and Russia's Supreme Court has upheld the ban; however, in Chechnya, women and girls are required to wear the *hijab* in certain places. For a more detailed discussion, see Pew Research Centre, 'Restrictions on Women's Religious Attire' (2016) <https://www.pewforum.org/2016/04/05/restrictions-on-womens-religious-attire/> accessed 30 February 2019.

[37] For a more detailed discussion, see Section 7.2.2, Chapter Seven.

[38] 'Restrictions on Women's Religious Attire' (n 36).

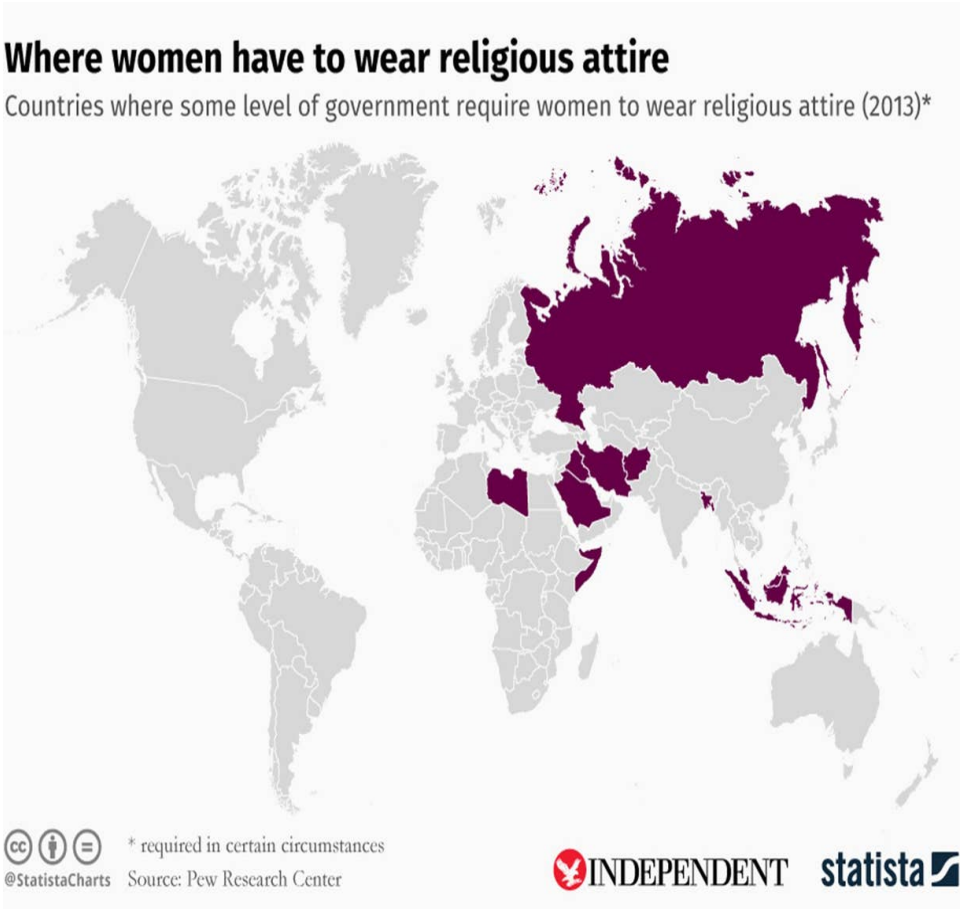

Figure 3: Countries that have enforced a compulsory dress code on women (Source: *The Independent* & Pew Research Centre).

There has been a rise in anti-immigration, Islamophobic political agendas, and Islamophobic hate speech in European countries.[39] As a result of this climate of intolerance, restrictions have increasingly been placed on the manifestation of Islam in public spaces, including bans on Islamic veiling. Veil-wearing Muslim women are experiencing increased expressions of hostility in many European countries. The widespread discrimination and prejudices that Muslims, especially veil-wearing women, suffer in various European countries has been documented in

[39] On this point, see Stephanie E. Berry, 'The Continuing Relevance of the Copenhagen Document – Muslims in Western Europe and Security Dimension' (2016) 15(2) Journal of Ethnopolitics and Minority Issues in Europe 78.

the findings of the Second European Union Minorities and Discrimination Survey, carried out the by the European Union Agency for Fundamental Rights.[40] The survey report revealed that veil-wearing Muslim women are increasingly experiencing unequal treatment in employment *as a result* of their clothing.[41] This report has also documented that *because* of their religious attire, more than 39% of all Muslim women, who wear Islamic dress in public, experienced inappropriate staring or offensive gestures in the twelve months before the survey, 22% experienced verbal insults or offensive comments, and 2% percent were physically attacked.[42] The current UN Special Rapporteur on FoRB, Ahmed Shaheed, has expressed concerns about 'increased' social hostilities in Europe involving religion or belief, especially hostility against Muslims.[43]

In most European countries, where legislative prohibitions on Islamic veiling are instituted or proposed, legislative proposals for banning veils have been initiated and sponsored either by nationalist and far-right political parties or by their members. A very recent example is Sweden. In October 2018, Richard Jomshof, a member of far-right Sweden Democrat (and a Member of Parliament), submitted a bill banning women from wearing full-face veils in public places in Sweden.[44]

---

[40] This survey examined the experiences of more than 10,500 self-identifying Muslims in fifteen EU Member States. (European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey* (Luxemburg: Publications Office of the European Union, 2017) 3).

[41] ibid 11.

[42] ibid 41.

[43] UN Doc. A/72/365 (28 August 2017) para 11.

[44] The Constitutional Committee of the Parliament, however, rejected the bill. (Sylva Frisk and Maris Boyd Gillette, 'Sweden's Burka Ban: Policy Proposals, Problematisations, and the Production of Swedishness' (2019) 27(4) NORA - Nordic Journal of Feminist and Gender Research 271, 271). In the Netherlands, in 2005, Geert Wilders of the far-right, populist

Essentially, countries imposing bans on wearing Islamic veils profess to justify them on a variety of grounds. The Open Society Foundations' recent study concerning restrictions on Muslim women's dress across twenty-eight EU Member States revealed that, during the legislative proposals for bans, politicians cited five common justifications: gender equality; security and counterterrorism; secularism or neutrality; integration and assimilation; and, desire for homogeneity.[45] Of these five justifications, the three that have been mostly cited by politicians are: the protection of social cohesion or living together; the protection of public safety and security; and, the advancement of gender equality. For instance, according to the *travaux preparatories* of the Law of 1 June 2011, which introduced the State-wide ban on wearing Islamic full-face veils in Belgium, three specific aims were sought to be achieved: public safety, gender equality, and a certain conception of 'living together' in society.[46] There are, however, doubts as to whether these are truly

Freedom Party, filed a motion for a ban on wearing Islamic full-face veils in public places. In 2007, he submitted another proposal to ban Islamic veils. On this point, see Annelies Moors, 'Face Veiling in the Netherlands: Public Debates and Women's Narratives' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, CUP: 2014) 28-29.

[45] A number of European countries including the Netherlands, France, Spain, Austria, Finland and Czech Republic have asserted that Islamic full-face veils are barriers to 'social cohesion' or 'social integration'. Gender equality' appears to be one of the most popular grounds for a ban on wearing Islamic dress in many countries including Belgium, Denmark, France, Italy, and Spain. The argument that the Islamic full-face veil harms 'public safety' has been used by most countries that have banned or proposed a ban on veiling: these countries are, among others, Belgium, France, Denmark, Bulgaria, Spain, Italy, Lithuania, and Estonia. France, Belgium, and Germany are among the countries where 'neutrality or secularism' justification has been used. 'Homogeneity' or the 'rejection of diversity' justification has been explicitly used by Hungary only. For a detailed analysis, see 'Restrictions on Muslim Women's Dress in the 28 EU Member States: Current Law, Recent Legal Developments and the State of Play' (n 35).

[46] See Nadia Fadil, 'Asserting State Sovereignty: The Face-veil Ban in Europe' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge: CUP, 2014)

legitimate grounds or valid arguments to prohibit Muslim women from wearing Islamic veils under human rights law.[47]

The political and legal controversies surrounding bans on wearing the Islamic veil found their way to the European Court of Human Rights (hereinafter "the ECtHR", "the Strasbourg Court", or "the Court") and the UN. Domestic case law across several jurisdictions has frequently considered the legitimacy of restrictions or bans on Islamic veiling. The question of lawfulness of a ban on wearing Islamic veils and other religious symbols has been ruled on different contexts allowing distinctions between the addressee of the ban (adult students, school pupils, teachers, witnesses or public employees) as well as the place of religious expression (courtroom, workplaces, public places or publicly-run educational institutions).[48]

The concept of personal autonomy is relevant on the question of Islamic veiling. Every adult woman has the right to make personal decisions about her life and body, free from unjustified, coercive interferences from the State or others. Be it forcible removal of the veil or forceful imposition of the Islamic dress code, the

253; Marcella Ferri, 'Belkacemi and Oussar v Belgium and Dakir v Belgium: The Court again addresses the full-face veil, but it does not move away from its restrictive approach' (*Strasbourg Observers*, 25 July 2017) <https://strasbourgobservers.com/2017/07/25/belkacemi-and-oussar-v-belgium-and-dakir-v-belgium-the-court-again-addresses-the-full-face-veil-but-it-does-not-move-away-from-its-restrictive-approach/> accessed 15 September 2018. Notably, shortly after the enactment of the Belgian ban, it was challenged before the Belgian Constitutional Court, which held that the ban was constitutional, not in violation of fundamental rights including the FoRB, and was necessary for 'public safety', 'living together' and the 'protection of women' (Judgement no. 145/2012 of 6 December 2012).

[47] See Eva Brems, '*SAS v France*: A Reality Check' (2016) 25 Nottingham Law Review 58, 62-70.

[48] These cases will be analysed in chapters Three to Six of this thesis.

coercive nature of the interference prevents a woman from acting in accordance with her own preferences, and adversely affects her ability to lead a life of her own choosing. Thus, both forced veiling and bans on veiling have implications for 'the right to personal autonomy' which, as Judith Sunderland states, is 'a core principle of women's rights'.[49] Forced veiling and bans on veiling raise questions about the appropriate role of the State in matters of religion, including how, when and on what condition the State can, if at all, legitimately impose or limit the wearing of religious attire and the display of religious symbols. Forced veiling and compulsory removal of Islamic veils both have the potential of violating a Muslim woman's religious freedom which is based on the premise of personal autonomy.

The following section offers an overview of the protection of FoRB under human rights framework.

1.4. Religious Freedom as a Human Right in the UN and European Systems

The UN and the ECtHR do not specifically define the concept FoRB. This is perhaps because defining this concept involves complex and sensitive definitional issues.[50] However, a widely accepted definition of FoRB, based on the premise of free choice or personal autonomy, has been provided by the Canadian Supreme Court in the landmark case of *R v Big M Drug Mart Ltd*:

[49] Judith Sunderland, 'Damned If You Do, Damned If You Don't: Religious Dress and Women's Rights' in Minty Worden (ed), *The Unfinished Revolution: Voices from the Global Fight for Women's Rights* (Bristol: The Polity Press, 2012) 301.

[50] Bahiyyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (The Hague: Martinus Nijhoff Publishers, 1996) 2.

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. … Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[51]

FoRB is a fundamental human right recognised in key international and regional human rights treaties. In relation to religious freedom, the most widely accepted text is Article 18 of the International Covenant on Civil and Political Rights 1966 (hereinafter "the ICCPR" or "the Covenant"), with 173 State Parties as of August 2020.[52] Article 18 reads:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others…

[51] [1985] 18 SCR 295, paras 94-95.

[52] <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> accessed 13 August 2020.

At the universal level, FoRB has also been recognised in the Universal Declaration of Human Rights 1948[53] (hereinafter "the UDHR"), the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981[54] (hereinafter "the 1981 Declaration"), and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992.[55]

Furthermore, the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereinafter "the Convention" or "the ECHR"), adopted under the auspices of the Council of Europe (hereinafter "the CoE"), guarantees FoRB in its Article 9:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. 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.

It is noteworthy that FoRB has also been guaranteed in other regional human rights instruments.[56]

---

[53] Article 18.

[54] Article 1.

[55] Article 2.

[56] Charter of Fundamental Rights of the European Union, Article 10; American Convention on Human Rights 1969, Article 12; African Charter on Human and Peoples' Rights 1981, Article 8; Arab Charter on Human Rights 2004, Article 30; ASEAN Human Rights Declaration 2012, Article 22.

The text of Article 9 of the Convention and Article 18 of the Covenant are virtually identical as both are grounded in Article 18 of the UDHR.[57] However, upon careful inspection, certain discrepancies can be observed. The text of Article 9 of the ECHR does not include a provision equivalent to Article 18(2) of the ICCPR. Unlike Article 9 of the ECHR, under Article 18 of the ICCPR the FoRB does not explicitly include 'the freedom to change one's religion'.[58] The Human Rights Committee (hereinafter "the HRC" or "the Committee"), however, in its General Comment no. 22 on FoRB has construed Article 18 as if it contains an express right to change religion.[59] So, there is little doubt that although Article 18 does not explicitly refer to the right to change one's religion, it embraces freedom on the part of the individual at all times to change their religious beliefs.[60] To examine whether a restriction is justified,

[57] For commentary on the drafting of Article 18 UDHR, see Nehemiah Robinson, *Universal Declaration of Human Rights: Its Origins, Significance, Application and Interpretation* (New York: Institute of Jewish Affairs, 1958); Martin Scheinin, 'Article 18', in Asbjorn Eide et al. (eds), *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992).

[58] The Muslim majority Middle-Eastern countries made an objection to the explicit right to change one's religion because Islam does not allow Muslims to reject Islam for another whether religious or non-religious -- such an action is an offence of apostasy and contrary to Islamic law. Because of their objection, Article 18 of the ICCPR included the phrase 'freedom to have or to adopt a religion or belief of his choice' instead. For a discussion on this, see Kevin Boyle, 'Freedom of Religion in International Law' in Javaid Rehman and Susan C. Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State practices* (Leiden- Boston: Martinus Nijhoff Publishers, 2007) 37-39; Dominic McGoldrick, 'Thought, Expression, Association, and Assembly' in Daniel Moeckli (eds), *International Human Rights Law* (3rd edn, Oxford: OUP, 2018) 212-213.

[59] HRC, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion*) UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) para 5.

[60] According to the UN Special Rapporteur on FoRB, '[t]he right to change religion is absolute and is not subject to any limitation whatsoever.' (UN Doc. A/60/399 (30 September 2005) para 58).

while the ECtHR looks at if the restriction in question is necessary 'in a democratic society' (and) for one of the legitimate aims under Article 9(2) of the ECHR; the HRC, under Article 18(3) of the ICCPR, looks for whether it is simply necessary for the purpose of one of the justifiable grounds of restriction.

In a similar fashion to other international and regional human rights instruments, Article 18 of the Covenant and Article 9 of the Convention provide a positive right to both the freedom of thought, conscience and religion and the freedom to manifest one's religion or belief.[61] It follows that, the broader notion 'FoRB' has an internal dimension and an external dimension. The internal dimension of religiosity is often referred to as the '*forum internum*' which secures the 'freedom of thought, conscience and religion', largely exercised inside an individual's heart and mind. The *forum internum* includes the right to hold a religion or belief and to change it. The internal dimension of religious freedom is absolute and unconditional because it concerns deep-rooted ideas and convictions formed in an individual's conscience which cannot, in themselves, disturb public order and consequently cannot be restricted by State authorities. Therefore, limitation on the freedom of thought, conscience and religion can never be justified. The external dimension of religiosity is known as the '*forum externum*', which seeks to ensure that everyone has the right to manifest their religion or belief in a number of ways in both private and public. The right to freely manifest one's religion is a qualified right, and, therefore, can be restricted to protect a range of other interests where it is justified under the

[61] The ECtHR states, 'while freedom of religion is in the first place a matter of individual conscience, it also implies freedom to manifest one's religion alone and in private or in community with others, in public and within the circle of those whose faith one shares.' (*Kurtulmus v Turkey* App no 65500/01 (ECHR, 24 January 2006)).

circumstances given in Article 18(3) of the Covenant or Article 9(2) of the Convention.

As noted by Asma Jahangir, the UN Special Rapporteur on FoRB, international legal standards of religious freedom have provided a 'broad view' of the concepts of religion or belief "due to the problem of finding a satisfactory definition of the 'protected religion or belief'."[62] Thus, a wide range of convictions qualify for protection under the human rights framework. According to the HRC's General Comment no. 22, 'Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. … Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[63] Similar to the UN, the ECtHR has given a broad interpretation of the expression 'religion or belief' by taking a 'generous'[64] approach. Therefore, protection under Article 9 of the Convention is not confined to well-established religions (e.g. Christianity[65], Islam[66], Sikhism[67]), but Article 9 has extended its protection to relatively new religions (e.g. Aumism,[68] Neo-Paganism,[69] the Church of Scientology[70]) and a wide

[62] UN Doc. A/HRC/6/5 (20 July 2007) para 6.

[63] *General Comment No. 22* (n 59) para 2.

[64] Gwyneth Pitt, 'Religion or Belief: Aiming at the Right Target?' in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge, CUP, 2007) 211; Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: CUP, 2005) 208.

[65] *Stedman v UK* App no. 29107/95 (ECHR, 9 April 1997).

[66] *Ahmad v UK* 4 EHRR 126 (ECHR, 1982).

[67] *Phull v France* App no. 35753/03 (ECHR, 11 January 2005).

[68] *Affaire Association des Chevaliers du Lotus d'or v France* App no. 50615/07 (ECHR, 31 January 2013).

[69] *Ásatrúarfélagið v Iceland* App no. 22897/08 (ECHR, 18 November 2012).

[70] *Church of Scientology Moscow v Russia* App no. 18147/02 (ECHR, 5 April 2007).

range of philosophical convictions and political ideologies (e.g. pacifism,[71] the Divine Light Zentrum,[72] the Hare Krishna movement,[73] neo-Nazi principles,[74] fascism[75]). It must, however, be noted that the safeguards of Article 9 do not apply to all convictions or beliefs. In order to be afforded protection under the ECHR, a conviction or belief must 'attain a certain level of cogency, seriousness, cohesion and importance.'[76] In *Pretty v The UK*, the ECtHR held that a belief in and support for the notion of assisted suicide did not constitute beliefs to be qualified for protection under Article 9 of the ECHR.[77] Likewise, in an Optional Protocol case, the HRC stated that 'a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of article 18 of the Covenant'.[78]

1.4.1. The Right to Manifest Religion or Belief

As indicated above, the right to manifest one's religion inheres in the FoRB. The UDHR, the ICCPR, the 1981 Declaration, and the ECHR all give protection to the right

[71] *Arrowsmith v The United Kingdom* App no. 7050/75 (ECHR, 5 December 1978).

[72] *Omkarananda and the Divine Light Zentrum v Switzerland* App no. 8118/77 (ECHR, 19 March 1981).

[73] *Kovalkovs v Latvia* App no. 35021/05 (ECHR, 31 January 2012).

[74] *X v Austria* App no. 1747/62 (ECHR, 13 December 1963).

[75] *X v Italy* App no. 6741/74 (ECHR, 1976).

[76] *Campbell and Cosans v The United Kingdom* App nos. 7511/76; 7743/76 (ECHR, 25 February 1982) para 36. Provided this criterion is met, 'the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed'. (*Eweida and Others v The United Kingdom* Apps nos. 48420/10, 59842/10, 51671/10 & 36516/10 (ECHR, 27 May 2013) para 81).

[77] App no. 2346/02 (ECHR, 29 July 2002).

[78] *M.A.B., W.A.T. and J.A.Y.T. v Canada*, Communication no. 570/1993, UN Doc. CCPR/C/50/D/570/1993 (8 April 1994) para 4.2.

to manifest religion in a similar fashion, namely, 'freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.' The Strasbourg bodies have taken the view that the right to manifest religion on one's own cannot be an adequate alternative for collective manifestation if sought by the applicant. In *X v United Kingdom*, the European Commission on Human Rights (hereinafter "the EComHR") confirmed that "the two alternatives 'either alone or in community with others' in Article 9(1) cannot be considered as mutually exclusive, or as leaving a choice to the authorities, but only as recognising that religion may be practised in either form.'[79] The right to manifest one's religion 'in worship, teaching, practice and observance' encompasses a wide range of activities. The HRC's General Comment no. 22 states:

> The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, *the wearing of distinctive clothing or headcoverings*, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to

[79] App no. 8160/78 (ECHR, 12 March 1981) para 5. See also *Kokkinakis v Greece* App no. 14307/88 (ECHR, 25 May 1993) para 31.

establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[80]

Based on General Comment no. 22, it can be deduced that from the international human rights law perspective 'the wearing of distinctive clothing or headcoverings' constitutes part of the *observance* and *practice* of religion or belief. In a thematic report submitted to the Human Rights Council, the UN Special Rapporteur on FoRB, Heiner Bielefeldt, stated that 'there can be little doubt that observing and practicing one's religion or belief may also include the wearing of distinctive clothing or head coverings in conformity with individual's faith.'[81] Thus, wearing religious dress and other religious symbols amounts to a *manifestation* of religion or belief. Under the jurisprudence of both the HRC and the ECtHR, the wearing of the Islamic veil by Muslim women has been treated as a protected manifestation of religion or belief. In an Optional Protocol case concerning the wearing of the *hijab* in an Uzbek university, the HRC clarified its position regarding the Islamic veil: 'The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public.'[82] Likewise, in *Ebrahimian v France*, the ECtHR stated that the practice of veiling is an 'undisputed expression of … adherence to Muslim faith' and that "the Court has no reason to doubt that

[80] *General Comment No. 22* (n 59) para 4 (emphasis added). See also UN Doc. E/CN.4/2005/61 (20 December 2004) paras 65-66.

[81] UN Doc. A/HRC/16/53 (15 December 2010) para 43.

[82] *Raihon Hudoyberganova v Uzbekistan,* Communication no. 931/2000, UN Doc. CCPR/C/82/D/931/2000 (5 November 2004) para 6.2.

the wearing of [the] veil amount[s] to a 'manifestation' of a sincere religious belief, protected by Article 9 of the Convention."[83]

It should briefly be noted that in order for an act to constitute as 'manifestation' of religion or belief under the Convention, the ECtHR seems to require 'a sufficiently close and direct nexus between the act and the underlying belief'.[84] In *Eweida and Others v The United Kingdom*, the ECtHR commented that:

> Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9.[85]

However, as Taylor observes, there is nothing in the jurisprudence of the HRC which suggests that it requires a direct connection between a belief and its manifestation. He states, 'a looser connection between beliefs and their manifestation appears to be accepted by the Human Rights Committee than for the purposes of Article 9 of the European Convention.'[86]

Article 18 of the ICCPR and Article 9 of the Convention both provide a positive right and a negative right to the manifestation one's religion or belief. It is true that

---

[83] *Ebrahimian v France* App no. 64846/11 (ECHR, 26 February 2016) para 47. See also *Dakir v Belgium* App no. 4619/12 (ECHR, 11 July 2017) para 47.

[84] *Eweida* (n 76) para 82.

[85] ibid. The UK court, in *R (on the application of Playfoot) v Millais School*, provided a useful summary as to what amounted to manifestation of religion under Article 9 ECHR. [2007] EWHC 1698 (Admin) para 21.

[86] Taylor (n 64) 220-221.

Article 18(1) ICCPR and Article 9(1) ECHR have been positively formulated because they convey the idea that an individual will have the (positive) right to manifest their religion. However, it must not be forgotten that 'the express right to do something may carry the implied right not to do it.'[87] Undoubtedly, Article 18 ICCPR and Article 9 ECHR both encompass the right *not* to manifest one's religion or belief. The UN Special Rapporteur on FoRB has stated that, 'the goal must always be to equally protect the positive and the negative aspects of freedom of religion or belief, i.e. the freedom positively to manifest one's belief, for instance by wearing religious clothing, and the freedom not to be exposed to any pressure, especially from the State or within State institutions, to perform religious activities.'[88] The negative aspect of the right to manifest a religion arose in *Grezlak v Poland* where the applicant had chosen not to attend the religious education classes for reasons of personal conviction and had not been offered any alternative ethics classes, resulting in the absence of a mark for 'religion/ethics' on his school report. The ECtHR stated that this 'amounted to a form of unwarranted stigmatisation' of the applicant and that 'the State's margin of appreciation was exceeded in this matter as the very essence of [his] right not to manifest his religion or convictions under Article 9 of the Convention was infringed.'[89] The negative aspect of the right to manifest one's religion will be discussed in more detail in Chapter Seven of this thesis.

[87] McGoldrick (n 29) 244-245.

[88] UN Doc. A/HRC/16/53 (15 December 2010) para 45. See also UN Doc. A/HRC/6/5 (20 July 2007) para 14.

[89] *Grzelak v Poland* App no. 7710/02 (ECHR, 15 June 2010) paras 100-101.

1.4.2. Justification

As indicated above, while no legal restriction can be imposed upon a person's inner thoughts or moral consciousness, the right to manifest one's religion is capable of being subject to proportionate restrictions to protect a range of other interests.[90] The question of whether the limitation on an individual's right to manifest their religion is justified under the limitation clause of the ICCPR (Article 18(3)) and the Convention (Article 9(2)) is answered by reference to three different tests enumerated in these limitation clauses, the wording of which are almost identical. A limitation on the right to manifest one's religion is justified if three pre-conditions are satisfied:

(a) It must be prescribed by law;

(b) It must pursue at least one legitimate aim; and,

(c) It must be necessary, which includes satisfying the demands of proportionality.

It is worthwhile to give a brief overview of these pre-conditions.

Limitations on the right to religious manifestation must be prescribed by law -- that is, there must be a legal basis for the interference. In *Sunday Times v The United Kingdom*, the ECtHR held that two requirements flow from the expression 'prescribed by law'. First, the law must be adequately accessible to enable an individual to have an indication of the legal rules applicable to a given case. Second, it must be formulated with sufficient precision to enable an individual to foresee

[90] In *Kokkinakis v Greece*, the ECtHR recognised that 'in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.' (*Kokkinakis* (n 79) para 33).

with reasonable degree of certainty the consequences of his actions.[91] Consistent with this interpretation, the term 'prescribed by law' has been construed so that it 'does not merely refer back to domestic law but also relates to the quality of law, requiring it to be compatible with rule of law'.[92] In *Dorgu v France*, a case concerning the wearing of the Islamic headscarf, the ECtHR held that "the concept of 'law' must be understood in its 'substantive' sense, not its 'formal' one. It therefore includes everything that goes to make up the written law, including enactments of lower rank than statutes and the relevant case-law authority".[93] As Carolyn Evans notes, the purpose of the prescribed by law test 'is to ensure that rights and freedoms are not restricted except by due process of law.'[94]

In order to justify a restriction on the right to manifest one's religion, a State cannot merely argue that its actions are necessary for national interest, it must also show that the actions have a legitimate aim. A restriction on the matters of religious manifestation can only legitimately be imposed on the grounds of public safety, order, health and morals or for the protection of the (fundamental) rights and freedoms of others. Hill and Daniel argue, a justifiable ground of restriction often overlaps with other heads of permissible limitation.[95]

---

[91] *The Sunday Times v United Kingdom* App no. 6538/74 (ECHR, 26 April 1979) para 49. See also *Hashman and Harrup v the United Kingdom* App no. 25594/94 (ECHR, 25 November 1999) para 31.

[92] *Malone v United Kingdom* App no. 8691/79 (ECHR, 2 August1984) para 67.

[93] App no. 27058/05 (ECHR, 4 December 2008) para 52.

[94] Evans (n 32) 138. For a detailed discussion of the 'prescribed by law' test in recent literature, see Bernadette Rainey et al., *The European Convention on Human Rights* (7th edn, Oxford: OUP, 2017) 343-347.

[95] Daniel J. Hill and Daniel Whistler, *The Right to Wear Religious Symbols* (London: Palgrave, 2013) 24.

In order for an interference to be justified, it must be 'necessary'. The necessity test involves two specific requirements as the ECtHR has stated in *Serif v Greece*: the interference must correspond to a 'pressing social need' *and* be 'proportionate to the legitimate aim pursued'.[96] The principle of proportionality requires that a fair balance must be struck between the interests of the State and the interests of the individual applicant. Put differently, the principle of proportionality involves a balancing of the applicant's fundamental right against the State's interest in restricting that right. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

It is noteworthy that, the way in which the ECtHR determines whether an interference is 'necessary' is quite different from the practice of the UN institutions. This is because the ECtHR, unlike the UN bodies, recognises that Member States have a margin of appreciation (hereinafter "MoA"). A brief introduction on the doctrine of MoA would be useful here as the subsequent chapters of this thesis greatly emphasise the ECtHR's use of MoA in cases concerning bans on wearing Islamic veils.

Broadly speaking, the MoA 'refers to the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations'

[96] *Serif v Greece* App no. 38178/97 (ECHR, 14 December 1999) para 49.

under the Convention.[97] The rationale for according States a MoA was summarised by the Court in *Handyside v United Kingdom*: "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."[98] However, the Convention organs have made it clear that the margin conceded to States is not infinite, and is subject to the supervision of the ECtHR. In *Sunday Times v United Kingdom (no. 2)*, the ECtHR highlighted that the domestic MoA goes hand in hand with a European supervision and the Court is empowered to give the *final* ruling on whether a limitation on an individual's right is justified under the Convention.[99] The most crucial question is, what is the breadth of margin? The width of deference given to a State can be a determining factor in the outcome of a complaint, because where States are afforded a wide MoA, the ECtHR usually gives a lower level of scrutiny in determining whether the limitation on the individual right is proportionate. The scope of the MoA will sometimes be wide and sometimes narrow depending on the nature of the rights in question, or on the balancing of competing rights. Malcolm Evans argues, 'the breadth of the margin of appreciation accorded to states will

---

[97] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2000) 4. The literature on MOA is extensive. Good starting points are (among others)- Yutaka Arai-Takanashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia, 2002); Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: OUP, 2012); George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) Oxford Journal of Legal Studies 705.

[98] App no. 5493/72 (ECHR, 7 December 1976) para 48.

[99] App no. 13166/87 (ECHR, 26 November 1991) para 50.

vary depending on the rights and interests at stake, and that is very much a question for the Court itself to decide.'[100] Prominent academic scholars in the field of religious freedom have noted that the ECtHR affords a 'wider' MoA to the domestic authorities in relation to restrictions on the right to religious manifestation under Article 9(2) compared to restrictions on some other qualified rights (e.g. the right to respect for private life), which also contain the requirement that the restriction must be 'necessary in a democratic society' in order to be justified.[101] 'Any consensus and common values emerging from the practices of the States Parties to the Convention' is also an important factor to determine the scope of margin, as pointed out by the ECtHR in *Bayatyan v Armenia*.[102] In *Leyla Sahin v Turkey*, the ECtHR stated that '[i]t is not possible to discern throughout Europe a uniform conception of the significance of religion in society'.[103] Erica Howard argues, '[t]his absence of a pan-European consensus or a common standard on religion in Europe has led the ECtHR to afford States a wide margin of appreciation in relation to restrictions on the right to manifest one's religion under Article 9(2) ECHR.'[104] In a recent resolution concerning religious freedom, the Parliamentary Assembly has stated that:

---

[100] Malcolm D. Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Strasbourg: Council of Europe Publishing, 2009) 20.

[101] Tom Lewis, 'What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56(2) ICLQ 395, 398; Erica Howard, 'Freedom of Speech *versus* Freedom of Religion? The Case of Dutch Politician Greet Wilders' (2017) 17 Human Rights Law Review 313, 320-321; Erica Howard, 'Protecting Freedom to Manifest One's Religion or Belief: Strasbourg or Luxemburg?' (2014) 32(2) Netherlands Quarterly of Human Rights 159,164.

[102] App no. 23459/03 (ECHR, 7 July 2011) para 122.

[103] App no. 44774/98 (ECHR, 29 June 2004) para 109.

[104] Erica Howard, 'Religious Clothing and Symbols in Employment: A Legal Analysis of the Situation in the EU Member States' (2017) p.32

> Certain religious practices remain controversial within national communities. Albeit in different ways, *the wearing of full-face veils*, circumcision of young boys and ritual slaughter are divisive issues and … there is no consensus among Council of Europe member States on these matters. … States Parties to the European Convention on Human Rights have a wide margin of discretion in this field.[105]

1.5. Literature Review

There is a significant body of literature examining the legal and human rights dimensions of Islamic veiling debates in Europe. However, due to the limited space, it is not possible to mention all of the literature in this field. Therefore, this section refers to some, rather than all, important *books* published in the last fifteen years on this topic. The remaining body of literature, especially a significant number of journal articles and book chapters, will be cited in subsequent chapters of the thesis.

One of the first books on legal analysis of Islamic veiling is '*Human Rights and Religion: The Islamic Headscarf Debate in Europe'*, authored by Dominic McGoldrick. In this book, McGoldrick examines 'the role, function, and values of human rights law approaches to the Islamic headscarf- *hijab*.'[106] This book gives an excellent overview of the veiling debates in some selected European and non-European countries, and provides a comprehensive examination of some key cases considered by the domestic and international courts before 2006. The 'thesis of this

<https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=608849> accessed 21 May 2020.

[105] Parliamentary Assembly, 'Freedom of religion and living together in a democratic society', Resolution 2076 (2015) para 8 (emphasis added).

[106] McGoldrick (n 29) 31.

book', as McGoldrick states, is that 'human rights thinking can provide a language, discourse and, in some cases, institutional structures for mediating and resolving headscarf-*hijab* disputes.'[107]

Cecile Laborde, a contemporary legal egalitarian, is among the very few writers who have examined bans on wearing Islamic veils from a philosophical point of view using political theories. Her '*Critical Republicanism: The Hijab Controversy and Political Philosophy*' provides critics of those interpretations of republicanism that justified the prohibition on the wearing of ostentatious religious symbols (especially the *hijab*) in French schools. Laborde has provided an analysis of how religious and ethnic identities should interest with the public sphere in modern pluralistic societies.[108] However, neither Laborde nor any other commentator has examined legal bans on the Islamic veil through the lens of John Stuart Mill's liberalism.

Hilal Elver's '*The Headscarf Controversy*' is an important contribution to the legal analysis of Islamic veiling debates. She discusses the legal developments concerning Islamic veiling of a number of countries including Turkey, Germany, France and the US. Elver examines the anti-Islamic discourse in the West which emerged following the terrorist attacks on the United States in September 2011, characterised by a drift away from a liberal, multicultural paradigm towards a climate of fear in relation to Islam and an outcry in the popular media against the practice of Islamic veiling, which increasingly came to be considered as problematic and unacceptable.

---

[107] ibid 308.

[108] Cecile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: OUP 2008).

She discusses the implications of Islamic veiling on the constitutional principle of secularism, and has argued that 'secularism should not be used as an excuse to punish expressions of religious belief and observance … On the contrary, secularism should be implemented and interpreted as a principle that supports the exercise of religious freedom'.[109]

Myriam Hunter-Henin's edited collection, '*Law, Religious Freedom and Education in Europe*',[110] is a valuable contribution to the existing literature on Islamic veiling. This book examines the debates on displaying religious symbols in the schools context. After analysing some key concepts such as *laïcité*, integration, identity and discrimination, which are useful in understanding the legal debates on Islamic veiling, this book examines the place of Islamic veils (and other religious symbols) in schools. It critically examines, *inter alia*, English school uniform policies, whether students can be prevented from wearing religious symbols, the wearing of Islamic veils and other religious symbols by the teachers in the classroom and its alleged proselytising effect on the school children.

'*Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education'*, authored by Erica Howard, examines the prohibitions on wearing religious symbols in education from a number of different perspectives. Howard provides an overview of various arguments that are put forward for and against bans on wearing religious symbols in the educational

[109] Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford: OUP, 2012) 5.

[110] Myriam Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Surrey-Burlington: Ashgate, 2011).

context. She provides an in-depth analysis of whether bans on wearing various religious symbols in educational contexts violate religious freedom and the right to be free from discrimination, using national and international case law. Howard observes, "the concept of 'justification' plays an important part in both human rights and in anti-discrimination measures, and that claims under either or both are often unsuccessful because the interference or restriction is considered to be justified."[111] She argues, the intensity of scrutiny given to the proportionality analysis in order to examine the legitimacy of a ban on wearing religious symbols varies significantly between different courts.[112]

The objective of Anastasia Vakulenko's '*Islamic Veiling in Legal Discourse*' is to answer an important question, namely, 'what has Islamic veiling come to represent in legal and surrounding discourses in the current historical-political movement?'[113] The three frameworks which she has examined in this book are autonomy and choice, gender equality, and religion and secularism. With regard to the gender equality argument, which is commonly used by the pro-ban advocates on the Islamic veiling, Vakulenko has stated that this argument 'has some longstanding colonial and racist connotations, which make its present-day utlisations suspect.'[114]

Eva Brems' edited collection entitled '*The Experiences of Face Veil Wearers in Europe and the Law*' sought to fill a gap in academic literature about Islamic veiling,

---

[111] Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (1st edn, Abingdon- New York: Routledge, 2012) 102.

[112] ibid 159.

[113] Anastasia Vakulenko, *Islamic Veiling in Legal Discourse* (Abingdon- New York: Routledge, 2012) 7.

[114] ibid 111.

namely, the lack of the 'insider perspective' in published research in this filed. By providing a systematic legal analysis of the findings of some empirical research carried out among women who wear the Islamic full-face veils in Belgium, Denmark, France, the Netherlands and the UK, this book successfully filled a large gap in the existing literature. The empirical findings published in this book reveal that the vast majority of Muslim women who wear full-face veils in European counties do so voluntarily: 'they wear the face veil as a matter of free choice in their personal religious journey.'[115] Despite the fact that some Muslim women are coerced into veiling by their male family members (especially husbands) in some European countries,[116] no legal analysis has been offered in this book or elsewhere about the human rights implications of forced veiling.

The recent publications of some prominent academics in this field address the recent developments of the Islamic veiling debates.[117] Although in recent years, the HRC has examined the European bans on wearing Islamic veils, its jurisprudence on the Islamic veil is not analysed in-depth in the existing academic literature. Similarly, there is a lack of a comprehensive comparative study between the HRC's jurisprudence and the ECtHR's jurisprudence concerning legal bans on wearing the Islamic veil and other religious symbols.

[115] Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Veil* (Cambridge: CUP, 2014) 13.

[116] See Section 7.2.2, Chapter Seven.

[117] See for instance, Neville Cox, *Behind the Veil: A Critical Analysis of European Veiling Laws* (Cheltenham- Northampton: Edward Elgar Publishing, 2019).

1.6. Research Questions and Objectives

This study addresses the following three research questions:

1. Are social cohesion, gender equality or women's rights, and public safety and security convincing arguments and legitimate grounds to prohibit or restrict the wearing of Islamic veils?
2. What are the differences between the approaches of the UN and that of the ECtHR in relation to legal bans or restrictions on wearing the Islamic veil?
3. To what extent do violations of international human rights principles arise when Muslim women are forced to wear Islamic veils against their will?

The discussion in this section will offer some explanations for each research question.

The *first question* has been discussed widely in academic literature and analysed from different angles (e.g. anti-discrimination law, feminism) but is still extremely contestable. However, this question has not been (fully) examined from the viewpoint of John Stuart Mill's harm principle,[118] a principle which is closely connected to the concept of personal autonomy.[119] This thesis applies Mill's harm principle and the concept of personal autonomy to the existing controversies on Islamic veiling in order to evaluate whether Muslim women's choice to wear Islamic veils can/should be overridden by European countries on the grounds of social cohesion, gender equality, and public safety and security. Rather than taking a

[118] John Stuart Mill, *On Liberty* (Kitchener: Batoche Books, 2001) 13. (This book was first published in 1859).

[119] For a brief discussion of the harm principle and the concept of personal autonomy, see Section 1.7 below.

position on one side or the other side of the debate, this research makes an attempt to devise a way to effectively protect the right to religious manifestation of individuals belonging to religious minorities, by giving due weight to the States' legitimate interests in limiting the right to manifest one's religion or belief for the interests of the society as a whole.

With regard to the *second research question*, it is important to highlight why the UN and the ECtHR jurisdictions have been selected. There are several reasons for choosing these two jurisdictions in particular. Firstly, and most importantly, the wording of the provisions which guarantee the FoRB in the ICCPR and the Convention is virtually identical. The HRC, the key 'function' of which is to oversee if the 'State parties live up to their commitments under the Covenant',[120] and the ECtHR, which oversees the ECHR share similar mechanism to examine whether a ban or restriction on Islamic veiling is justified under the respective human rights instrument. Put differently, to determine whether an interference with the right to manifest one's religion is justified, both institutions examine whether the prescribed by law test, legitimate aim test and necessity test are satisfied. The second reason for choosing the UN and the ECtHR jurisdiction is that a significant number of complaints concerning bans on wearing Islamic veils and other religious symbols have been considered by the UN bodies and the ECtHR,[121] compared to other regional judicial institutions or human rights treaty monitoring bodies such

[120] *Silva and Others v Uruguay*, Communication no. 34/1978, UN Doc. CCPR/C12/D/34/1978 (8 April 1981) para 8.3.

[121] More importantly, sometimes the *same* applicant has complained to both the ECtHR and the HRC, but these bodies have taken completely divergent decisions. A critical analysis of these cases will be offered in Chapter Six of this thesis.

as the Court of Justice of the European Union (hereinafter "the CJEU")[122], the Inter-American Commission on Human Rights, and the African Commission/Court on Human and Peoples' Rights. This means that the jurisprudence of the UN and the ECtHR in this area are the richest -- thus, they are able to contribute significantly to the content of this research. Another important reason for selecting these jurisdictions is that the various *divergent* approaches that the ECtHR and the UN bodies have taken as to the bans on wearing Islamic veils are not fully investigated in the existing academic literature.

The purpose of addressing the second research question is not only to identify the different approaches of the UN and the ECtHR as to legal regulation of Islamic

[122] The notable cases before the CJEU concerning bans on wearing the Islamic headscarf (at the workplaces) are - Case C-157/15 *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, ECLI:EU:C:2017:203; Case C-188/15 *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole SA*, ECLI:EU:C:2017:204. For a critique of the CJEU's jurisprudence on Islamic veil, see Mark Bell, 'Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace' (2017) 17 Human Rights Law Review 784, 784-792; Erica Howard, 'Headscarves Return to the CJEU: Unfinished Business' (2020) 27(1) Maastricht Journal of European and Comparative Law 10, 10-28; Erica Howard, 'Islamic headscarves and the CJEU: *Achbita and Bougnaoui*' (2017) 24(3) Maastricht Journal of European and Comparative Law 348, 348-366; Andrew Hambler, 'Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from *Achbita* and *Bougnaoui*' (2018) 47(1) Industrial Law Journal 149, 149-164; Lucy Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8(3) European Labour Law Journal 232, 247-256; Stephanie Hennette-Vauchez, 'Equality and the Market: The Unhappy Fate of Religious Discrimination in Europe' (2017) 13 European Constitutional Law Review 744, 744-758; Titia Loenen, 'In Search of an EU Approach to Headscarf Bans: Where to Go after *Achbita* and *Bougnaoui*?' (2017) 10(2) Review of European Administrative Law 47, 61-72.

veiling, but also to explore the underlying reasons for their different stances on the same topic. Since the UN organs have granted protection where those of the CoE have not, the comparative study can help to identify what lessons the ECtHR might learn from the UN to protect the right to manifest one's religion or belief through the wearing of religious symbols and attire. Drawing on examples from the jurisprudence of the HRC in particular, this thesis makes some specific suggestions as to how the ECtHR can improve the consistency and quality of its own judgments in future when dealing with disputes over the legitimacy of bans on wearing Islamic veils and other religious symbols.

With regard to the *third research question*, forced veiling has not received the attention from academics and human rights activists it deserves and requires. So far as I have been able to find, until today, no comprehensive legal research has been conducted on forced veiling. The present study seeks to fill a substantial gap in the existing academic literature on Islamic veiling by offering an extensive legal analysis of forced veiling. One of the objectives of this research is to provide an overview of various ways in which (Muslim) women are forced to wear Islamic veils in many countries in the contemporary world. This research also aims to examine to what extent international human rights principles are violated when women are forced to wear veils against their will. There is no doubt that involuntary or forced veiling may infringe a woman's wide range of human rights. The HRC, in its General Comment no. 28 on equality of rights between men and women, has stated that any specific regulation of clothing to be worn by women in public 'may involve a violation of a number of rights guaranteed by the Covenant, such as: article 26, on non-discrimination; article 7, if corporal punishment is imposed in order to enforce such a regulation; article 9, when failure to comply with the regulation is punished

by arrest; article 12, if liberty of movement is subject to such a constraint; article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly, article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim.'[123] For reasons of manageability, this thesis does not address all possible types of violations of human rights that may flow from forced veiling. It focuses only, in greater detail, on how the enforcement of a compulsory Islamic dress code on women infringes the FoRB and the right to respect for private life as guaranteed in Article 9 and Article 8 respectively of the Convention.

1.7. The Philosophical (and Argumentative) Approach of this Study

The foundation of this research is the harm principle and the concept of personal autonomy. John Stuart Mill presents his 'harm principle' in *On Liberty*[124], originally published in 1859, as a strict limitation on State interference in the lives and actions of individuals. The State, he argues, may only legitimately interfere with the actions of an individual in order to prevent harm to others. Mill articulated this 'very simple principle' to 'govern absolutely the dealings of society with the individual in the way

[123] HRC, *General Comment No. 28: Article 3 (The Equality of Rights between Men and Women)* UN Doc. CCPR/C/21/Rev.1/Add.10 (29 March 2000) para 13.

[124] Mill described his *On Liberty* as a 'philosophic text-book of a single truth'. (John Stuart Mill, 'Autobiography' in John M. Robson and Jack Stillinger (eds), *Autobiography and Literary Essays (The Collected Works of John Stuart Mill, Vol 1)* (Toronto: University of Toronto Press, 1981) 259.

of compulsion and control' whether the means used are 'physical force in the form of legal penalties or the moral coercion of public opinion.'[125] Mill writes:

> [The] principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[126]

The main idea contained in this passage, namely, that individual liberty can only be restricted if, and only if, the exercise of that liberty inflicts harm on others, is known as the 'harm principle'. The harm principle thus states a necessary condition for legitimate interference with an individual's liberty of action: their liberty can be restrained by law or by opinion only if their action causes *harm to others*. The harm principle is very closely tied with the concept of personal autonomy.[127] The main ideal of personal autonomy is self-governance, that is, the right to govern one's life as one sees fit and the right to be free from unjustified interference in one's actions. By prohibiting unjustified coercive interference with an individual's actions where there is no actual wrongdoing to others, the harm principle, in effect, displays its commitment to personal autonomy. The harm principle and the concept of personal autonomy will be at the centre of this thesis. Applying the harm principle of Mill[128] and the concept of personal autonomy to the existing debates on Islamic

---

[125] Mill (n 118) 13.

[126] ibid.

[127] Joseph Raz says, 'connection between the autonomy and the harm principle is evident.' (Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) 413.

[128] Mill has been described by Martha Nussbaum as the 'first great radical feminist in Western philosophical tradition'. Quoted in Ian Ward and Clare McGlynn, 'Women, Law and John Stuart Mill' (2016) 25(2) Women's History Review 227, 228. Susan Moller Okin

veiling, this thesis will argue that people of all faiths, or none, have the right to dress as they personally consider appropriate. If a Muslim woman chooses to wear the Islamic veil, then the State must not prohibit her from wearing the chosen dress unless her practice of veiling causes *harm* to *others*. In the same vein, a woman must not be for forced to wear the Islamic veil against her will unless the use of such force is strictly necessary to prevent *harm*.

An in-depth analysis of the harm principle and the concept of personal autonomy is provided in Chapter Two of this thesis.

1.8. Research Methodology

The methodology of this study is principally qualitative, via doctrinal research and comparative legal analysis. The legal literature is examined through library research and electronic resources. The key components of this research are qualitative analysis of key international human rights instruments, soft law documents, resolutions and recommendations of the Parliamentary Assembly of the CoE, and the UN reports that address the debates on Islamic veiling. Particular attention is paid to doctrinal analysis of relevant cases which have been considered by domestic courts as well as treaty monitoring bodies in particular, the ECtHR and the HRC.[129] A comparative methodology has also been adopted in this research because it is widely accepted as a valuable tool for researchers wishing to initiate improvements

described Mill as 'the only major liberal political philosopher to have set out explicitly to apply the principles of liberalism to women.' (Susan Moller Okin, *Women in Western Political Thought* (London: Virago, 1980) 188.

[129] It should be made clear that the research is up to date as of August 2020. It does not cover any case which is considered after this date.

in a legal system[130] and for the 'practical improvement of the law'.[131] Therefore, this study identifies and compares the approaches taken by the HRC and the ECtHR as to legal bans on Islamic veiling. This comparative analysis is used to identify what lessons the Strasbourg institutions can learn from the UN to protect the right to religious manifestation of persons belonging to minority religions who want to display their religious affiliation through the wearing of religious symbols and attire.

Another methodological point requires clarification. I have not conducted any independent empirical study to write this thesis. However, empirical data of some well-known sociological studies has been used in this thesis to analyse why so many Muslim women voluntarily choose to veil today and why others, in some countries and more recently, have been coerced to adopt an Islamic dress code. These sociological studies (among others) are:

(a) 'Behind the veil: why 122 women choose to wear full face veil in Britain'[132] (published in 2015 by the Open Society Foundations)

(b) 'After the Ban: The Experiences of 35 Women of the Full-Face Veil in France'[133] (published in September 2013 by the Open Society Justice Initiative)

[130] Konard Zweigert and Hein Kotz, *An Introduction to Comparative law* (Oxford- New York: OUP, 1998) Chapter 2.

[131] W. J. Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23(3) The International and Comparative Law Quarterly 485, 489-490.

[132] Open Society Foundations, 'Behind the veil: why 122 women choose to wear full face veil in Britain' (2015) <https://www.opensocietyfoundations.org/uploads/f3d788ba-d494-4161-ac01-96ed39883fdd/behind-veil-20150401.pdf> accessed 9 July 2018.

[133] Open Society Justice Initiative, 'After the Ban: The Experiences of 35 Women of the Full-Face Veil in France' (2013) <https://www.justiceinitiative.org/uploads/86f41710-a2a5-

(c) 'Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering'[134] (published in June 2012 by the Human Rights Centre of Ghent University)

(d) 'Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France'[135] (published in April 2011 by the Open Society Foundations).

The findings of these socio-logical studies are based on in-depth interviews with women who wore the full-face veils in Britain, Belgium and France. The interviews enquired into their reason(s) for wearing the Islamic veil, their daily experiences while wearing veils in public places, family reactions to the practice of their veiling, their relationship with non-Muslims and their perception of the political and media controversy surrounding the practice of Islamic veiling.

One may doubt the representative value of the sociological studies carried out by the Human Rights Centre, the Open Society Justice Initiative and the Open Society Foundations, specifically, as to whether their findings actually represent the opinion of the wider Muslim population in Europe. An answer might be, as Rojo

---

4ae0-a3e7-37cd66f9001d/after-the-ban-experience-full-face-veil-france-20140210.pdf> accessed 17 November 2018.

[134] Eva Brems et al.,'Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering' (2012) <http://www.hrc.ugent.be/wp-content/uploads/2015/10/face-veil-report-hrc.pdf> (accessed 15 August 2016). A modified version of the findings of this study was subsequently published in Eva Brems et al., "The Belgian 'Burqa Ban' Confronted with Insider Realities" in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, CUP: 2014) 77-114.

[135] Open Society Foundations, 'Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France' (2011) <https://www.opensocietyfoundations.org/sites/default/files/a-unveiling-the-truth-20100510_0.pdf> accessed 20 September 2016.

observes, 'a trend is definitely seen in those interviewed, leading to the idea that these experiences may be more representative than one may assume.'[136] In *S.A.S. v France*, the ECtHR accepted third-party interventions from the Human Rights Centre of Ghent University[137] and the Open Society Foundations.[138] In their submissions, they both provided their legal observations and arguments as to the bans on full-face veils based on the findings of their own empirical studies. In this case, the ECtHR delivered a judgment against the applicant considering these observations and arguments, because empirical data were 'vital to understanding the legal rationale behind the applicant's case.'[139] So, the credibility of the sociological studies of these organisations cannot be undermined. It must be emphasised that accounting for empirical reality concerning the views and experiences of Muslim women who wear Islamic veils (and who do not wear Islamic veils) is of utmost importance to fully examine the human rights dimensions of Islamic veiling debates in Europe. Brems argues, 'empirical findings are crucial for an adequate legal analysis of the human rights dimension involved in face veil bans.'[140]

[136] Fernandez Rojo, 'General Prohibition of the Burka and Niqab in all Public Spaces: A Gender Equality Perspective to the Pending Case S.A.S. v France' <https://www.academia.edu/9757486/General_Prohibition_of_the_Burka_and_Niqab_in_all_Public_Spaces_A_Gender_Equality_Perspective_to_the_Pending_Case_S.A.S._v._France> (accessed 17 September 2016).

[137] *S.A.S. v France* App no. 43835/11 (ECHR, 1 July 2014) paras 95-96.

[138] ibid, para 104.

[139] Eva Brems, 'Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings' (2014) 22(2) Journal of Law and Policy 517, 528.

[140] ibid 519.

1.9. Limitations of the Current Study

There are certain limitations of this study. It is not the objective of this research to intensively analyse all aspects of the Islamic veil debates existing in politics, moral philosophy, society or academia. This thesis analyses bans on wearing Islamic veils specifically from a human rights point of view, asking whether such bans infringe the right to manifest one's religion or belief under international human rights law. In doing so, this study greatly emphasises on Mill's harm principle and the concept of personal autonomy. This study does not intend to look at the State regulations on Islamic veils from an anti-discrimination point of view, asking whether the limitations on wearing Islamic dress contravene prohibitions of discrimination. Girls under the age of sixteen and women with serious mental health conditions are directly excluded from the scope of this research because they do not have sufficient maturity and intelligence to make rational decisions for themselves, and thus are not always capable of acting in a sufficiently autonomous manner.[141]

1.10. Structure of the Thesis

This thesis is comprised of eight chapters. Chapter Two provides a detailed analysis of the concept of personal autonomy by discussing what personal autonomy entails, its relationship with the harm principle, its position in the realm of religious freedom, and its limitations. Chapter Two thus lays the foundation for chapters Three, Four and Five, which address whether social cohesion, public safety and gender equality are convincing arguments or legitimate grounds for banning the voluntary wearing of Islamic veils in a liberal democratic society. Chapters Three, Four and Five also provide a critical analysis of the approaches that the ECtHR has

[141] With regard to 'capacity' to make rational decisions, see section 2.7, Chapter Two.

taken in examining whether bans on wearing Islamic veils on the grounds of social cohesion, public safety and gender equality are justified under Article 9 of the Convention. This critical analysis of the ECtHR approaches lays the foundation for the comparative analysis carried out in Chapter Six, which compares the practices of the UN bodies and the ECtHR when dealing with complaints on legal bans on wearing Islamic veils (and other religious symbols). Chapter Six also provides a thematic discussion as to how the ECtHR's judicial mechanisms for the protection of religious liberties of persons belonging to the minority religions can be improved by taking some useful lessons from the UN jurisprudence on Islamic veiling. Chapter Seven is devoted to forced veiling. After exploring the different ways in which many Muslim women in contemporary societies are coerced into wearing traditional Islamic dress, Chapter Seven presents an extensive legal analysis of the drastic consequences of compulsory veiling on Muslim women's right to respect for private life and the FoRB. Based on the analysis of the first seven chapters, Chapter Eight concludes the thesis and suggests some recommendations.

CHAPTER TWO: TAKING PERSONAL AUTONOMY SERIOUSLY

> 'This is the thesis that political authorities should take an active role in creating and maintaining social conditions that best enable their subjects to lead valuable and worthwhile lives.'
>
> - Steven Wall[1]

> 'Freedom of religion or belief empowers all human beings to freely find their own ways in the broad field of religion or belief, as individuals and in community with others. … [T]he State … should … create favourable conditions for persons belonging to religious minorities to ensure that they can take their faith-related affairs in their own hands in order to preserve and further develop their religious community life and identity.'
>
> - Heiner Bielefeldt, UN Special Rapporteur on FoRB[2]

2.1. Introduction

The notion of 'personal autonomy' has assumed increased significance in contemporary, moral and political philosophy. Prominent philosophers such as Ronald Dworkin, Joseph Raz, John Rawls, Jeremy Waldron, and Robert Wolff have used the concept of personal autonomy to discuss issues such as the characterisation of principles of justice, the limits of individual liberty, and the nature of the liberal society. Personal autonomy is not just a 'philosophical

[1] Steven Wall, *Liberalism, Perfectionism and Restraint* (Cambridge, CUP: 1998) 131.

[2] UN Doc. A/HRC/22/51 (24 December 2012) paras 23-24.

concept'[3], it is also a 'right'[4]. Personal autonomy is a property of an individual's life, and it expresses and unifies their will and choices. We can call an individual autonomous when they can make choices in accordance with their own preferences, tastes, and beliefs and direct or govern their life as they see fit. Autonomous people can determine their own ends and exercise control over their own actions more than their non-autonomous counterparts. Personal autonomy is intrinsically valuable[5] for a person who wants to lead a life of their own choosing without being subject to any coercion from the society or outsiders. Thus, personal autonomy is 'a central component of a fully good life.'[6] According to Mill's *On Liberty*, 'personal impulses and preferences' and 'desires and feelings' constitute the 'raw material of human nature'. The person with the greater amount of raw material has the larger capacity for 'good'. Mill contends that an individual 'whose desires and impulses are his own', and which have been developed by 'his own culture' has 'a character', while 'one whose desires and impulses are not his own, has no character, no more than a steam-engine has a character.'[7] Justification of

[3] Jurgen Habermas, 'The Concept of Dignity and the Realistic Utopia of Human Rights' (2010) 41(4) Metaphilosophy 464, 465.

[4] *Armstrong v State*, No. 98-066 (26 October 1999) para 37; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15, para 32.

[5] For a discussion of the value of personal autonomy, see Thomas Hurka, 'Why Value Autonomy' (1987) 13(3) Social Theory and Practice 361; Marina Oshana, *Personal Autonomy in Society* (Aldershot- Burlington: Ashgate, 2006) Chapter 6.

[6] Wall (n 1) 144.

[7] John Stuart Mill, *On Liberty* (Kitchener: Batoche Books, 2001) 56-57.

liberalism is grounded in the concept of personal autonomy.[8] Safeguarding personal autonomy is one of the core commitments of liberalism.[9]

Religion is certainly an important part of the lives of many people. The freedom to make choices on religious affairs is an important component of an individual's autonomy and by exercising that choice freely they can lead their religious life and seek their happiness in a way that they see fit. 'Individual autonomy requires that one [must] remain free to live according to one's conscience.'[10] Right or wrong, an individual's choice about their own religious matter must be protected as long as it does not harm others. An individual's autonomy is curtailed if their choices about religious affairs are made under coercion.

An analysis of Mill's harm principle will be useful at the outset of this chapter. Therefore, section two provides an overview of the substance of the harm principle which was famously propounded by Mill in his essay '*On Liberty*'. Section three defines the concept of personal autonomy. Section four outlines, in greater detail, what personal autonomy entails. It will be seen in this section that the demands of personal autonomy correspond to the harm principle which Mill has articulated for the protection of individual liberty. Section five argues that personal autonomy

[8] Gerald F. Gaus, 'The Place of Autonomy within Liberalism' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges in Liberalism: New Essays* (Cambridge, New York: CUP, 2015) 273.

[9] Joel Anderson and Axel Honneth, 'Autonomy, Vulnerable, Recognition, and Justice' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges in Liberalism: New Essays* (Cambridge- New York: CUP, 2015) 127. See also Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven- London: Yale University Press, 1980) 369.

[10] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford-Portland: Hart Publishing, 2008) 39.

justifies the protection of religious freedom. Section six gives an overview of the right to personal autonomy in the jurisprudence of FoRB. Section seven analyses the limitations of personal autonomy in order to investigate whether the choice of a child in relation to their religious matters deserves protection.

2.2. The Harm Principle: An Overview

The central question posed in *On Liberty* was: where must one 'place the limit'[11] 'of the power which can be legitimately exercised by society over the individual'?[12] To answer this question, Mill drew a dividing line between *self-regarding* and *other-regarding* conduct. For Mill, society has jurisdiction over an individual's conduct if, and only if, it inflicts harm on others: '[a]s soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion.'[13] What is not open to discussion and what never comes under the jurisdiction of the society is, a person's conduct which 'affects the interests of no person besides himself'.[14] In relation to the part of an individual's conduct which 'merely concerns himself',[15] the individual enjoys, according to Mill, 'perfect freedom, legal and social' to do what he wants to do.[16] This is clarified further in the following paragraph.

[11] Mill (n 7) 9.

[12] ibid 6.

[13] ibid 69.

[14] ibid 69.

[15] ibid 13.

[16] ibid 70.

The harm principle limits liberty-limiting interventions. A necessary condition of legal restriction of conduct is that it must be harmful to nonconsenting others. For Mill, a society can act by the way of 'compulsion', 'control', or 'coercion' to interfere with a person's voluntary actions only to prevent harm to *others*.[17] It cannot advance a person's 'good', cannot presume to make them 'better' or 'happier', cannot do what it might think to be 'wise' or 'right'. Purely self-regarding conduct, even if potentially harmful to the *self*, cannot rightfully be interfered with. To this end, self-regarding conduct is *always* exempted by the harm principle from potential intervention by society. Leighton and Reiman interpret Mill to have said, 'social interference is never justified in those of a man's affairs that concern himself only.'[18] This point can be illustrated with an example, which Mill himself had used in *On Liberty*. As he states, the liberty of action of a 'fornicator' (i.e. sex worker) 'must be tolerated', but a 'procurer' or 'pimp' may be fined or prosecuted because they typically exploit the weakness of others and thereby cause harm.[19] Thus, according to the harm principle, society has no access to the sphere of self-regarding actions of an individual. Peter Suber argues, Mill's "harm principle creates a 'zone of privacy' for consensual or 'self-regarding' acts, within which individuals may do what they wish and the state has no business interfering, even with the benevolent motive of a paternalist."[20]

---

[17] Under the Millian theory, interference with a person's liberty is warranted not only when there is an actual harm but also '[w]henever … there is … a definite risk of damage, either to an individual or to the public'. (ibid 75).

[18] Paul Leighton and Jeffery Reiman, *Criminal Justice Ethics* (Upper Saddle River: Prentice Hall Publishing, 2006) 93.

[19] Mill (n 7) 91-92.

[20] Peter Suber, 'Paternalism' in Christopher B. Gray (ed), *Philosophy in Law: An Encyclopedia* (New York: Garland Pub., 1999) 632-635.

Mill has avoided clarifying his understanding of harm in *On Liberty* (or in his subsequent literature). He uses different words and phrases, often interchangeably with 'harm', including adverse influence on 'interests' as well as 'injury', 'hurt', 'evil', 'loss', 'damage', 'mischief', and 'security'.[21] One of the key criticisms[22] of the harm principle is that Mill did not define the concept of 'harm'. This is understandable to an extent given the scope of the term 'harm' which encompasses a wide range of meanings. This in turn may render the harm principle one of 'dubious clarity'.[23]

A careful reading of the entire essay (*On Liberty*) provides some idea of what may constitute 'harm' under the harm principle. In Chapter 4 of *On Liberty*, Mill states, society may use the law to regulate conduct that consists of 'injuring the interests of one another, or rather certain interests which, either by express legal provision or tacit understanding, ought to be considered as rights.'[24] This implies that, to constitute harm, conduct must set back an individual's 'interests', which are '*rights*' either by 'legal provision' or by 'tacit understanding'. At one point, Mill gave examples of 'acts injurious to others': '[e]ncroachment on their rights; infliction on

[21] See Richard Reeves, *John Stuart Mill: Victorian Firebrand* (London: Atlantic Books, 2008) 265-266.

[22] Hart states that '[v]arious objections may be made to the use' of the harm principle and that 'these objections are not without force.' (H.LA. Hart, *Law, Liberty and Morality* (California: Stanford University Press, 1963) 46). For a discussion about the limitations of the harm principle or Millian liberalism, see James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Indianapolis: Liberty Fund, 1894); Hamish Stewart, 'The Limits of the Harm Principle' (2010) 4 Crim Law and Philos 17.

[23] Jean Bethke Elshtain, 'Mill's Liberty and the Problem of Authority' in David Bromwich and George Kateb (eds), *On Liberty: John Stuart Mill* (New Haven: Yale University Press, 2003) 210.

[24] Mill (n 7) 69.

them of any loss or damage not justified by his own rights'.[25] Mill did not define 'right' in *On Liberty*. However, he offered an explanation of 'right' in another essay which was roughly contemporaneous with *On Liberty*. In *Utilitarianism*, Mill wrote, '[t]o have a right, then, is, I conceive, to have something which society ought to defend me in the possession of.'[26] Thus, one can conclude that to constitute harm under the Millian theory, an action must wrongfully set back another person's interests -- interests, in which they have *rights*.[27]

The above discussion clarifies that not all actions (or inactions) that inflict negative consequences for others constitute harm under the harm principle. This point is elucidated further in the following two examples.

> Example One: I have two functioning kidneys and X, a transplant patient, is in need of a kidney transplant. If I refuse to donate my kidney to X, I am not harming X within the meaning of the harm principle although my conduct will adversely affect X.
>
> Example Two: If Natwest gives me a personal loan of £1000, then I owe to them. When they demand repayment of loan (assuming that I missed the repayment), then the action of Natwest is detrimental and disadvantageous to me. Despite this, Natwest does not cause harm within

[25] ibid 72.

[26] John Stuart Mill, *Utilitarianism* (Kitchener: Batoche Books, 2001) 52. (This book was first published in 1863).

[27] Prominent commentators share a common view that to constitute harm under the harm principle, conduct must be injurious to another individual's vital interests which ought to be considered as *rights*. See David O. Brink, 'Mill's Liberal Principle and Freedom of Expression' in C.L. Ten (ed), *Mill's On Liberty: A Critical Guide* (Cambridge: CUP, 2008) 42; John Gray, *Mill On Liberty: A Defence* (New York: Routledge, 1996) 57.

the harm principle. This is because I do *not* have the right not to repay the loan.

The determining factor therefore, is whether one's conduct adversely affects the *rights* of another.

An individual's alleged abnormal, awful lifestyle or disgusting conduct may be the reason for emotional distress of another. For instance, the sight of a Muslim woman in a veil may offend some followers of other religions who do not like the practice of Muslim veiling. Does emotional distress of this kind constitute *harm* to justify intervention under the harm principle? This question is of utmost importance to the present study. It is argued that Mill's concept of 'harm' cannot be intelligibly constructed in a way which includes emotional distress. Harm is not properly defined to include mere emotional distress, such as, feeling of offensiveness, without any other evidence of injury. Under the Millian theory, to constitute harm, the action of an individual must violate another person's important *rights*, which Mill himself calls 'their constituted rights'.[28] Mere offence or other emotional distress does not go the length of violating another person's constituted rights as there is no such thing as the right *not* be distressed or offended. Many commentators have noted that emotional distress and offence do not constitute harm under the harm principle.[29] Waldron, for instance, argues that 'Mill is precluded, by his arguments for liberty, from making moral distress and offence

[28] Mill (n 7) 69.

[29] For a contrasting view, see Piers Norris Turner, "'Harm' and Mill's Harm Principle" (2014) 124 Ethics 299, 313-314; David Gordon, 'Honderich on Morality-Dependent Harm' (1984) 32 Political Studies 288.

seriously as a form of harm for the purposes of his harm principle.'[30] Therefore, the harm principle denies society the authority to legally regulate conduct which causes nothing more than mere emotional distress. Mill's harm principle 'has found a powerful champion'[31] in modern age at the works of H.L.A. Hart. In '*Law, Liberty and Morality'*, Hart has argued that:

> To punish people for causing … distress would be tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the [Millian] principle is liberty to do those things to which no one seriously objects. Such liberty plainly is quite nugatory.[32]

Based on the foregoing, one can conclude that Mill's harm principle rules out mere emotional distress from being a kind of harm. Put differently, a society has no legitimate authority to prohibit the self-regarding actions of an individual that causes others no perceptible damage other than mere emotional distress or offence. This will be discussed in Chapter Three in greater detail with regard to religious practices of the followers of minority religions.[33]

Scholars have widely invoked Mill's harm principle with regard to the question of regulating various conduct or lifestyles that disturb or offend other people:

---

[30] Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1989* (Cambridge- New York: CUP, 1993) 131.

[31] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) 400.

[32] Hart (n 22) 47.

[33] See Section 3.6.

nudism,[34] prostitution[35], pornography[36] and homosexual relationships.[37] In relation to criminalisation of homosexuality and prostitution in England, the Wolfenden Committee recommended certain changes in the law of both areas.[38] Hart noted that the recommendations of the Committee were 'strikingly similar to those expounded' in Mill's *On Liberty*.[39] Mill's harm principle is also reflected in the Report of the Committee on Obscenity and Film Censorship 1979. Clare McGlynn and Ian Ward note, the 'harm condition' takes 'centre stage' in this Report.[40] Mill's harm principle has been directly deployed by the courts. For instance, in *Armstrong*

[34] Dennis J. Baker, *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* (London- New York: Routledge, 2011) 237.

[35] Jeremy Waldron, 'Mill on Liberty and on the Contagious Diseases Acts' in Nadia Urbanati and Alez Zakaras (eds), *J.S. Mill's Political Thought: A Bicentennial Reassessment* (Cambridge: CUP, 2007); Clare McGlynn, 'John Stuart Mill on Prostitution: Radical Sentiments, Liberal Proscriptions' (2012) 8(2) Nineteenth-Century Gender Studies 8.

[36] David Dyzenhaus, 'John Stuart Mill and The Harm of Pornography' (1992) 102(3) Ethics 534; John Gray, *Liberalisms: Essays in Political Philosophy* (London: New York: Routledge, 1989) 3; Clare McGlynn and Ian Ward, 'Would John Stuart Mill Have Regulated Pornography?' (2014) 41 Journal of Law and Society 500; Robert Skipper, 'Mill and Pornography' (1993) 103 Ethics 726; Richard Veron, 'John Stuart Mill and Pornography: Beyond the Harm Principle' (1996) 106 Ethics 534; Gerald Dworkin, 'Preface' in Gerald Dworkin (ed), *Mill's On Liberty: Critical Essays* (Plymouth: Rowman & Littlefield Publishers, 1997) ix.

[37] Carol V.A. Quinn, 'Mill, Dignity and Homosexuality' in Raja Halwani et al. (eds), *Queer Philosophy: Presentations of the Society for Lesbian and Gay Philosophy* (Rodopi, 2012) 361; Carlos A. Ball, *The Morality of Gay Rights: An Exploration in Political Philosophy* (New York-London: Routledge, 2003) 61-62; David Ingram, *Law: Key Concepts in Philosophy* (London: Continuum, 2006) 136; Ben Saunders, 'Minimum Pricing for Alcohol: A Millian Perspective' in Thom Brooks (ed), *Alcohol and Public Policy* (London- New York: Routledge, 2015) 84.

[38] Report of the Committee on Homosexual Offences and Prostitution (1957).

[39] Hart (n 22) 14.

[40] McGlynn and Ward (n 36) 500.

v State, by explicit reference to Mill's harm principle, the US court invalidated a statute which prohibited abortion at the State level.[41]

Thus the harm principle has been, and continues to be, widely deployed as an authoritative defence in limiting the power of the State and scope of criminal law. Mill died 147 years ago but his seminal work *On Liberty* is still relevant and of great importance in today's society. Prominent commentators have acknowledged that the philosophical controversies relating to criminalisation remain 'dominated by discussion of the harm principle as classically formulated by JS Mill'.[42] As Berlin argues, Mill's *On Liberty* 'is still the clearest, most candid, persuasive, and moving exposition of the point of view of those who desire an open and tolerant society.'[43]

2.3. The Concept of Personal Autonomy

The word 'autonomy' is derived from ancient Greek. It consists of two words: *autos* ("self") and *nomos* ("rule" or "law"). Originally the term 'autonomy' referred to the self-rule or self-governance of independent (Greek) city-states (i.e. a city had *autonomia* when its citizens made their own laws, rather than being under the command of a conquering power) and later to States in general.[44] There was then a natural extension to persons as being autonomous when their actions were their

[41] *Armstrong* (n 4) para 31.

[42] Antony Duff et al, 'Introduction: The Boundaries of the Criminal Law' in R.A. Duff et al. (eds), *The Boundaries of the Criminal Law* (Oxford: OUP, 2010) 15; See also Baker (n 34) 1.

[43] Quoted in- Joseph Hamburger, 'How Liberal was John Stuart Mill' in William Roger Louis (ed), *Adventures with Britannia: Personalities, Politics, and Culture in Britain* (Austin: University of Texas Press, 1995) 109.

[44] See Gerald Dworkin, 'Autonomy and Behaviour Control' (1976) 6 Hasting Centre Report 23, 23; Michael Quante, 'In Defence of Personal Autonomy' (2011) 37 J Med Ethics 597, 597.

own. The impetus for this extension happened when questions of following one's conscience were raised by religious thinkers.[45] Applied to persons, autonomy consists primarily in one's capacity to make decisions about their *own* affairs and to act on the basis of their *own* reasoning. Personal autonomy, as Mele states, 'is a property of persons.'[46]

Individual or personal autonomy can be defined as an individual's 'legal and practical *capacity*'[47] to make their own rules of life and to act upon their own choices, as well as a *right* that they will be completely free in their own sphere, from the interferences of others and the State. An autonomous person, to use Mill's terms, 'choose[s] his plan of life for him'.[48] Waldron argues, 'autonomous people are, in a large part, the authors of their lives in the sense that the shape and direction of their lives can be explained substantially in terms of the deliberate choice they have made.'[49]

Beauchamp and Childress have stated that for an action to be *autonomous*, it must be done '(1) intentionally, (2) with understanding, and (3) without controlling influences that determine [the] action.'[50] An autonomous person thinks and makes

[45] Gerard Dworkin, *The Theory and Practice of Autonomy* (Cambridge: CUP, 1988) 13.

[46] Alfred R. Mele, *Autonomous Agents: From Self-Control to Autonomy* (New York- Oxford: OUP, 1995) 138.

[47] Rhoda E. Howard-Hassmann, 'Universal Women's Rights Since 1970: Centrality of Autonomy and Agency' (2011) 10(4) Journal of Human Rights 433, 433 (emphasis added).

[48] Mill (n 7) 55.

[49] Jeremy Waldron, 'Autonomy and Perfectionism in Raz's The Morality of Freedom' (1989) 62 South California Law Review 1097, 1105.

[50] Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (New York-Oxford: OUP, 2012) 59.

decision according to their own tastes and values, and does not choose to be ruled by others. The core ideal of the concept of personal autonomy is therefore 'self-governance'. Raz writes:

> The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.[51]

A person of diminished autonomy is controlled by others and/or lacks the capacity to make their own decisions about their life. Conversely, an autonomous person not only has the capacity to make independent decisions about matters pertinent to the nature and direction of their life but exercises this capacity. An autonomous person, by virtue of their autonomy, formulates long-term plans for their life and takes the ownership of the successes and failures of their life. Every individual is unique -- they have their own tastes, preferences, and desires. Robert Young argues, the actions of an individual exercising autonomy are not just free but they are also expressive of their own preferences and aspirations.[52] We cannot sensibly claim that an individual is self-governing if State-actors or private individuals interfere with their preferences and choices. In *Defense of Anarchism*, Wolff has remarked that an individual cannot retain their personal autonomy and at the same time be under an obligation to follow the commands of the State exercising 'supreme authority' over them.[53] Wolff writes, '[t]he autonomous man, insofar as

[51] Raz (n 31) 369.

[52] Robert Young, *Personal Autonomy: Beyond Negative and Positive Liberty* (New York: St. Martin's Press, 1986) 8.

[53] Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1979) 9.

he is autonomous, is not the subject to the will of another. He may do what another tells him, but not because he has been told to do it. … For the autonomous man, there is no such thing, strictly speaking, as a command.'[54] Exercising the autonomy is a matter of degree: the more a person directs their own life according to a plan or conception that expresses and unifies their choices, the greater the degree of their autonomy.

There is no single concept of personal autonomy.[55] There is also a lack of agreement as to the 'nature' of personal autonomy in legal and political philosophy.[56] To this end, the concept of (or the right to) personal autonomy does not have a settled meaning in international practice. Nor does it have a unitary meaning in modern philosophy that could help to interpret the principle of personal autonomy for the purpose of the FoRB, which is the main focus of this thesis. However, as Jill Marshall observes, within the liberal tradition there seems to be 'a *common* core' to this principle: the principle of 'personal autonomy has its roots in the idea that provided others are *not harmed*, each individual should be entitled to follow their own life plan in the light of their beliefs and convictions.'[57] Arguably, this core, common conception of personal autonomy is appealing because it corresponds with Mill's liberalism, narrowly speaking, his harm principle.

[54] ibid 14.

[55] On this point, see Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: New York: OUP, 2003) 15-16, 36. See also Dworkin (n 45) 9.

[56] Farrah Ahmed, 'The Autonomy Rational for Religious Freedom' (2017) 80(2) The Modern Law Review 238, 240.

[57] Jill Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Leiden- Boston: Martinus Nijhoff, 2009) 57 (emphasis added).

Finally, for there to be an autonomous action, there must be 'a competent agent'[58] who is able to understand relevant information, think rationally, make a choice, and give consent. This suggests that certain capacities, such as, legal capacity of consenting and mental capacities of reasoning and rationality are necessary for the exercise of autonomy.[59]

2.4. What Does Personal Autonomy Entail?

At the outset, it must be emphasised that this section does not attempt to comprehensively cover all of the matters that personal autonomy requires. Rather, the purpose is to highlight that personal autonomy requires, *inter alia*:

a. respect (for the dignity of human being and their autonomous choice);
b. freedom of choice for self-governance (this in turn requires prohibition of unjustified coercion and paternalistic interventions); and,
c. availability of an adequate range of valuable options.

It is argued that a society's commitment to protecting an individual's autonomy entails a commitment to safeguarding these three important conditions of personal autonomy; this is discussed below.

[58] Y. Michael Barilan, 'Respect for Personal Autonomy, Human Dignity, and the Problems of Self-Directions and Botched Autonomy' (2011) 36 Journal of Medicine and Philosophy 496, 479.

[59] See Section 2.7 below.

2.4.1. Respect

Human dignity and the notion of personal autonomy are 'closely connected'.[60] They share a common theme: *respect*. The eighteenth-century German philosopher, Immanuel Kant (known as 'the father of the modern concept of human dignity'[61]) has argued that 'autonomy is … the ground of the dignity of human nature and of every rational nature.'[62] He says, dignity has generated not only an obligation to respect people's free will, but also the concomitant duty not to abrogate it by treating them as an instrument of another person's free will.[63] Contemporary liberal philosophers have stressed that personal autonomy requires respect for persons because of their 'intrinsic worth' -- their feelings must be taken into account, responded to and respected.[64] To respect a person is to refrain from

[60] Per Lord Hoffmann, *Airedale N.H.S. Trust v Bland* [1993] 1 AC 789, 826. For reason of clarity it is worth mentioning that although human dignity and individual autonomy are closely tied they are two separate principles. Personal autonomy is at the heart of human dignity, however, human dignity deals with issues beyond the pale of autonomy. For an examination of the relationship between human dignity and personal autonomy, see Antonio Barbosa da Silva, 'Autonomy, Dignity and Integrity in Health Care Ethics – A Moral Philosophical Perspective' in Henriette Sinding Aasen (ed), *Human Rights, Dignity And Autonomy In Health Care And Social Services: Nordic Perspectives* (Antwerp: Intersentia, 2009) 13-40; Alec Buchanan, 'Respect for Dignity and Forensic Psychiatry' (2015) 41 International Journal of Law and Psychiatry 12, 14-16.

[61] Giovanni Bognetti, 'The Concept of Human Dignity in European and US Constitutionalism', in Georg Nolte (ed), *European and US Constitutionalism* (Cambridge- New York: CUP, 2005) 85, 89.

[62] Immanuel Kant, *Groundwork for the Metaphysics of Morals* (1785) reprinted in David Bromwich et al. (eds), *Rethinking the Western Tradition* (New Haven: Yale University Press, 2002) 54.

[63] ibid.

[64] Abraham Irving Melden, *Rights and Persons* (Berkley- Los Angeles: University of California Press, 1980) 189.

treating them in a manner that damages their autonomy.[65] Personal autonomy and human dignity go hand in hand. Respect for the inherent dignity of the human being and the concept of personal autonomy both demand the protection of an individual's autonomous choices on the basis of *respect*. An unreasonable interference with their voluntary choice will diminish their autonomy and this, in turn, will ultimately constitute an attack on human dignity. Suppose Samantha is clinically and legally capable of deciding whether she should take contraceptive pills. Forcing her not to take contraceptive pills will be offensive to her human dignity *and* disrespectful of her individual autonomy. Every competent person has a fundamental capacity to form and act on intellectual conceptions of how life should be lived; that is, to choose their life paths. Preventing an individual from exercising a choice that they freely make as an adult does not give them the due respect they deserve as a human being. Similarly, such a coercive interference does not give them any recognition as a person capable of making an autonomous choice for themself.

2.4.2. Freedom of Choice for Self-Governance

The concept of personal autonomy is closely associated with the liberal ideal of *freedom of choice*.[66] Freedom of choice reinforces the idea the every self-governing individual will make intimate and personal choices concerning their life so that they can lead a life of their own choosing. By exercising freedom of choice effectively, an individual effectively exercises control over their life and thus enjoys autonomy

[65] Oshana (n 5) 81.

[66] It is noteworthy that freedom of choice is regarded 'as an integral part of human rights.' (International Forum, *Guaranteeing Freedom of Choice in Matters of Reproduction, Sexuality and Lifestyles in Europe: Trends and Developments* (Strasbourg: Council of Europe Publishing, 1999) 7).

to the fullest degree. Meir Dan-Cohen argues, 'choice and autonomy … mutually reinforce one another: we value autonomy in part because of the freedom to choose it validates, and we value free choice in part because it contributes our autonomy.'[67]

As indicated above, personal autonomy requires that an individual should be able to act in accordance with their *own* preferences. Every legally competent (in terms of age and mental capacity) person has the right to govern the domains of their own mind and body, free from coercive intrusion. They are entitled to choose when to read, what to read, where to pray, how to pray, whether to pray at all, whether to have sex with another consenting adult, and how to take care of their personal hygiene. The concept of personal autonomy allows competent individuals to make such choices as they personally see fit -- it is immaterial whether the choice in question is well-judged or not. A self-governing person may choose to adopt a lifestyle that is unpopular to the majority people of the society. One commentator has argued that personal autonomy encompasses the 'right' 'to choose one's own norms and values with regard to one's own life, even if these differ from those generally accepted.'[68] Barilan argues, 'we have a duty to respect for the autonomy of others, even when their values are different from ours.'[69] Unjustified interferences with an individual's choice prevent them from acting in accordance

[67] Meir Dan-Cohen, 'Conceptions of Choice and Conceptions of Autonomy' (1992) 102 Ethics 221, 221. For a discussion about the relationship between autonomy and choice, see Hurka (n 5); R.S. Downie and Elizabeth Telfer, 'Autonomy' (1971) The Journal of the Royal Institute of Philosophy 293.

[68] Martin Buijsen, 'Autonomy, Human Dignity, and the Right to Healthcare: A Dutch Perspective' (2010) 19 Cambridge Quarterly of Healthcare Ethics 321, 322.

[69] Barilan (n 58) 504.

with their own preferences and this may in turn invade their liberty. This leads to the next point: 'prohibition of coercion'.

Respect for personal autonomy prohibits coercive interventions with an individual's autonomous choices as coercion prevents a person from controlling their life and projects. An action that is carried out under coercion or compulsion cannot be regarded as voluntary. Rawls write, 'persons are at liberty to do something when they are free from certain constraints either to do it or not to do it and when their doing it or not doing it is protected from interference by other persons.'[70] Interference with an individual's liberty also interferes with the ways in which they want to be motivated, the kind of person they want to be, and hence their autonomy. If an adult Jehovah's Witness, who has refused to consent to a blood transfusion being administered, is compelled to have a blood transfusion, this is not only a direct interference with their liberty, but also a violation of their ability to choose for themself what kinds of medical treatment are acceptable for them. It is therefore argued that coercive interferences with a person's autonomous choices are objectionable.

It must, however, be emphasised that personal autonomy is not 'absolute'.[71] It is widely accepted that there must be interferences with the exercise of personal autonomy where harm is threatened, or occasioned, to others. One's autonomous choice can be legitimately interfered with if the exercise of that choice creates a

[70] John Rawls, *A Theory of Justice* (Cambridge- Massachusetts: The Belknap Press of Harvard University Press, 1971) 177.

[71] On this point, see Scot B. Rae, *Moral Choices: An Introduction to Ethics* (Michigan: Zondervan, 2009) Chapter 8.

risk of harm or causes harm to others. In other words, the concept of personal autonomy, in similar fashion to the harm principle, does not require that every autonomous choice needs to be respected. Prominent scholars have argued that '[w]e must respect individuals' views and rights as long as their thoughts and actions do not seriously harm other persons.'[72] It is therefore argued that an individual's choices and voluntary decisions about their own life can be deliberately and indiscriminately overridden by the State -- but it must be justified on the basis of the harm prevention.

Paternalistic interventions are generally incompatible with the concept of personal autonomy. An act is paternalistic if it interferes with an individual's voluntary, self-regarding choices for their own good. Perhaps the most widely accepted definition of paternalism has been offered by Gerald Dworkin in his groundbreaking and influential 1972 article entitled 'Paternalism'. Dworkin stated, the concept of paternalism can be defined as 'interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.'[73] Some coercive paternalistic laws *require*, whereas others *prohibit* certain kinds of behavior. John Kleinig labels these categories respectively 'active' and 'passive' paternalism: the former requires an individual 'to do certain things' and the latter requires them 'to refrain from doing

[72] Beauchamp and Childress (n 50) 104.

[73] Gerald Dworkin, 'Paternalism' (1972) 56(1) The Monist 64, 65. The literature on paternalism is extensive. Some recent important literature on this topic are (among others), Jason Hanna, *In Our Best Interest: A Defence of Paternalism* (Oxford: OUP, 2018); Kalle Grill and Jason Hanna (eds), *The Routledge Handbook of the Philosophy of Paternalism* (Abingdon-New York: Routledge, 2018); Christian Coons and Michael Weber (eds), *Paternalism: Theory and Practice* (Cambridge, CUP: 2013).

certain things'.[74] Paternalism has generally been conceived as *coercive* interference with an individual's liberty of action,[75] interference which is sought to be justified on the grounds that it will be *good* for the individual concerned because it will ultimately prevent them from harming themself. Laws forbidding people from swimming at large public beaches when lifeguards are not on duty can be an example of a paternalistic intervention. Opposition to paternalistic intervention with an adult, adequately informed and mentally competent person, whether by the State or by private individuals, is based on a concern to preserve autonomy of the individual concerned. Well-known liberal thinkers hold that paternalism is objectionable from the point of view of autonomy because paternalistic intervention prevents an individual from acting in accordance with their own preferences and invades their liberty of action. According to Joel Feinberg, a coercive, unjustified paternalist act 'invades the realm of personal autonomy where each competent, responsible, adult human being should reign supreme.'[76] Dworkin states, 'autonomy is used to oppose … paternalistic views'[77] and 'there must be a violation of a person's autonomy … for one to treat another paternalistically'.[78] Raz, in his impressive work '*Autonomy, Toleration and the Harm Principle*', remarked

[74] John Kleinig, *Paternalism* (Manchester: Manchester University Press, 1983) 6.

[75] This does not necessarily mean that all paternalistic interferences are unjustified. Some legal theorists have argued that in a very limited number of cases paternalistic interventions may be justified. Feinberg, for example, asserts that 'the state has the right to prevent self-regarding harmful conduct *when but only when* that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not.' (Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self (Volume 3)* (Oxford: OUP, 1989) 12) (emphasis in the original).

[76] ibid 25.

[77] Dworkin (n 45) 10.

[78] ibid 123.

that 'respect for autonomy requires the government to avoid pursuing any conception of the good life.'[79] Likewise, contemporary liberal thinkers have taken the view that acting in a paternalistic way harms an individual's autonomy. Danny Scoccia, for instance, argues that some paternalistic acts may be 'wrong' as they "violate a right to personal autonomy or 'sovereignty'."[80]

Mill is strongly opposed to any form of paternalism. Interference with a person's liberty for the sake of their own good contradicts Mill's central concept of individual sovereignty. At the beginning of *On Liberty*, Mill clarifies that the purpose of this essay is to assert that the harm principle is against paternalism. Mill states:

> His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.[81]

Thus, Millian theory holds that an intervention in an individual's voluntary self-regarding actions, even if committed for the sake of the actor's welfare, is an infringement of their liberty. Put differently, for Mill, coercive interference with a competent person's self-regarding actions, which do *not* cause harm to others,

[79] Joseph Raz, 'Autonomy, Toleration and the Harm Principle' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford: Clarendon Press, 1989) 313.

[80] Danny Sconnia, 'The Right to Autonomy and the Justification of Hard Paternalism' in Christian Coons and Michael Weber (eds), *Paternalism: Theory and Practice* (Cambridge: CUP, 2013) 74.

[81] Mill (n 7) 13.

solely for their own good is prohibited.[82] In commenting on Mill and his *On Liberty*, Feinberg has argued that:

> The central thesis of John Stuart Mill … is that the fully voluntary choice or consent of a mature and rational human being concerning matters that affect only his own interests is such a precious thing that no one else (and certainly not the state) has a right to interfere with it simply for the person's 'own good'.[83]

Harnaam Kaur, a twenty-nine-year-old woman from Berkshire, can be mentioned to provide a classic example to illustrate the autonomy-based justification to prohibit coercive (paternalistic) interventions with regard to various lifestyle choices concerning only the *self*. When Ms Kaur was just eleven years old, she first began to grow a beard as a result of polycystic ovary syndrome, a condition which can cause excessive hair growth. The hair quickly started to spread on her chest and arms. When she was sixteen, she decided to stop cutting her facial hair after being baptised as a Sikh -- a religion in which cutting body hair is not allowed. She also started wearing a turban. Other than a brief period where, at her parents' urging, she tried shaving one more time, she has worn her beard ever since. She suffered intensive bullying throughout her childhood because of her unusual appearance.[84] Needless to say, growing a beard by a *woman* is regarded as a foolish, perverse, wrong and undignified choice or lifestyle by many people in society. But can/should

---

[82] For a useful discussion about Mill's prohibition on paternalism, see Richard J. Anerson, 'Mill versus Paternalism' (1979) Philosophy Research Achieves 470.

[83] Joel Feinberg, 'Legal Paternalism' (1971) 1(1) Canadian Journal of Philosophy 105, 111.

[84] 'It's not easy being different: Harnaam Kaur on overcoming bullying and embracing her natural beauty' <http://www.stylist.co.uk/beauty/Harnaam-Kaur-bearded-lady-dame-model-beauty-image-polycystic-ovaries-women-feminism-tess-holliday> accessed 1 September 2017.

women be forced to cut their facial hair? Can/should the Westminster Parliament enact legislation to restrain women from growing their facial hair on the account that growing a beard by a woman is considered to be *wrong* by the majority people? No. As far as moral wrongness is concerned, 'there do not seem to be any problems with the idea of a *right* to do something that is wrong.'[85] Ms Kaur's alleged unusual lifestyle, which she has freely and happily adopted, is not harmful to others. Ms Kaur (see Figure 4 below) has stated that 'it's the way God made me and I'm happy with the way', 'I feel more feminine, more sexy' by wearing beard, and 'I [do]n't feel like myself without my beard'.[86] Thus, society must not interfere with her choice on the account that she may be more beautiful and more feminine if she cuts her beard.

[85] Waldron (n 30) 86 (emphasis added).

[86] Mark Duell, 'I feel more feminine with my beard': Teaching assistant who suffered taunts because of her excessive hair decides to stop trimming it after being baptised a Sikh' (*The Daily Mail*, 17 February 2014) <http://www.dailymail.co.uk/news/article-2560795/Teaching-assistant-Harnaam-Kaur-condition-causing-excessive-hair-grows-beard.html#ixzz4rfUpmrHs> accessed 3 September 2017.

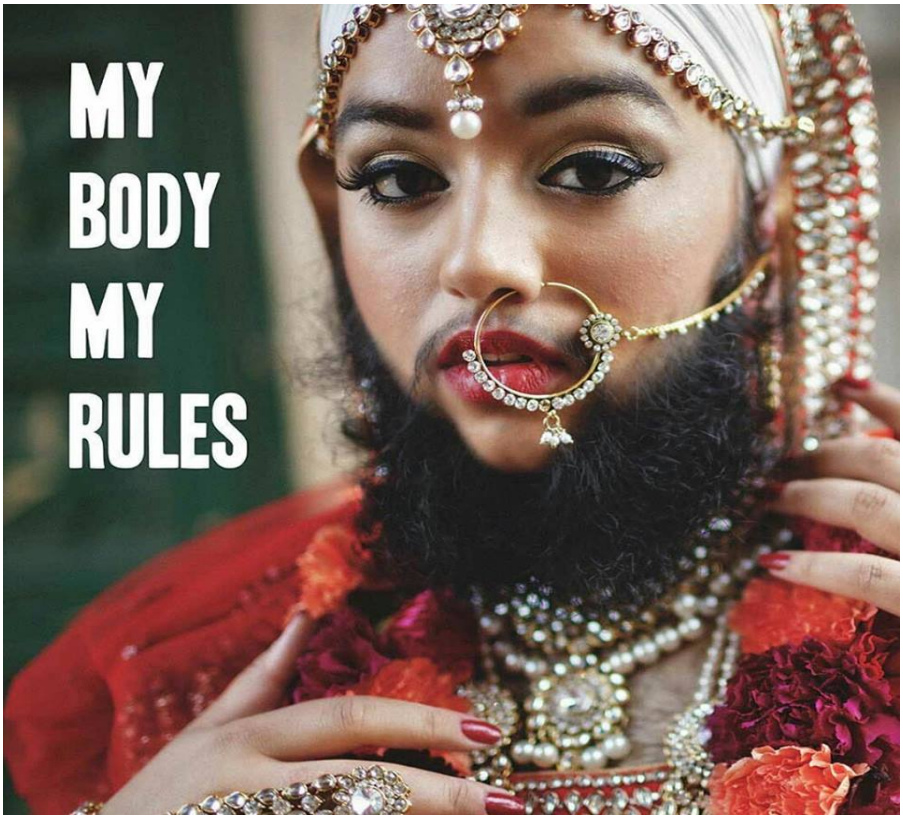

Figure 4: Ms Harnaam Kaur[87]

What approach has been taken by the courts as to an individuals' personal choices about life and their right to be free from unwanted governmental intrusion? The well-established jurisprudence of the ECtHR stresses the need to recognise rights holders as persons who have the right to live a life of their own choosing -- and for the choice element to be protected. In *S.W. v the UK*, a case concerning criminal liability for marital rape, the ECtHR recognised women's personal 'autonomy over their own bodies'.[88] It held that 'the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the

[87] The source of this picture is Ms Kaur's *verified,* public Facebook account, which is available at <https://en-gb.facebook.com/thebeardeddame/> accessed 4 February 2020.

[88] App no. 20166/92 (ECHR, 22 November 1995) para 40.

fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.'[89] In *Cossey v the UK*, a case concerning legal recognition of gender change for transsexual persons under English law, Judge Martens took the view that '[t]he principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality.'[90] Turning to the decisions of domestic courts, in a large number of cases it has been decided that forcing people (specifically speaking, women) to abandon their freely-chosen lifestyles is disrespectful to them and curtails their right to self-determination. The courts have afforded protection to various personal choices including procreation[91] and contraception[92]. Using women's choice to undergo an abortion as an example, in *Thornburgh v American College of Obstetricians & Gynecologists*, several provisions of Pennsylvania Abortion Control Act 1982 were challenged. In invalidating some provisions of this Act, Justice Blackmun accepted that 'a certain private sphere of individual liberty must be kept largely beyond the reach of government'. He stated, '[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision … [about] whether to end her pregnancy. A woman's right to make that choice freely is fundamental.'[93] By explicit reference

[89] ibid, para 44.

[90] App no. 16/1989/176/232 (ECHR, 29 August 1990) Dissenting opinion of Judge Martens, para 2.7.

[91] *Armstrong* (n 4).

[92] *Eisenstadt v Baird* 405 U.S. (1972)**.**

[93] 476 U.S. 772 (1986). See also *Gonzales v Carhart* 18 U.S.C. 1531 (2006).

to the US Supreme Court's decision in *Roe v Wade*[94] concerning a woman's choice to terminate her pregnancy in early stages, the Supreme Court in *Planned Parenthood of Southeastern Pa. v Casey* reiterated that:

> The right to abort … inheres in liberty because it is among a person's most basic decisions; it involves a most intimate and personal choice; it is central to personal dignity and autonomy*;* it originates within the zone of conscience and belief; it is too intimate and personal for state interference*;* it reflects intimate views of a deep, personal character; it involves intimate relationships and notions of personal autonomy and bodily integrity…[95]

2.4.3. Availability of a Variety of Options

The ideal of personal autonomy requires the availability of an adequate range of options for an individual to choose from. One can meaningfully exercise autonomy only if one has a range of significantly different valuable options. An individual's chances of satisfying their preferences is increased if they have more options to choose among. It is somewhat true that the more options an agent has to choose between, the more complex the processes of individual decision-making. However, the greater variety of options an individual has, the more freedom of choice they possess.[96] A choice among fifty lipsticks of the *same shade* is no meaningful choice, compared to a choice among five lipsticks of five *different shades*. So, the crucial factor is *variety* of options, not the *number* of options. By choosing the most preferred one(s) among various alternative options, an individual can do certain things in accordance with their own tastes and preferences. 'Autonomy', Hurka

94 410 U.S. 113 (1973).

95 505 U.S. 833 (1992).

96 Keith Dowding and Martin Van Hees, 'Freedom of Choice' in Paul Anand et al (eds), *The Handbook of Rational and Social Choice* (Oxford: OUP, 2009) 375-376.

argues, 'involves choice from a wide range of options.'[97] Raz observes, '[a]ll that has to be accepted is that to be autonomous a person must not only be given a choice but he must be given an adequate range of choices'[98] because the 'life of the autonomous person consists of pursuits freely chosen from various alternatives which [are] open to him'.[99] With regard to an individual's choices on religious affairs, Evans has argued that 'the fullest personal autonomy will exist in a society in which a person sees the availability of a range of good choices in regard to religion or belief and is able to make meaningful decisions about which, if any, of these choices he or she wishes to adopt.'[100] The following example strengthens Evan's argument.

If a government that is allegedly hostile or unfriendly to Muslims enacts legislation to prohibit the wearing of the Islamic full-face veils in public beaches, then Muslim women, who habitually wear the *burqa* in public places, will have to choose, against their will, alternative forms of dress which fit their deeply-held religious conviction. Perhaps they may then start wearing the *hijab* or *burkini* that leaves their face uncovered. However, one of their preferred options (i.e. the *burqa*) is permanently lost because of the legislation. The adoption of alternative religious attire (e.g. the *hijab* or *burkini*) in place of the *burqa* will be difficult for them, partly because the longer and more deeply a woman is committed to her religious practice the less able she is to leave the practice and to adopt a new one as a substitute. A ban on the *burqa* in this situation reduces the quality and number of her options, prevents

[97] Hurka (n 5) 362.

[98] Raz (n 31) 373.

[99] ibid 391.

[100] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: OUP, 2003) 30.

her from leading a lifestyle that she likes, forces her to adopt a new form of dress against her will, and thus drastically harms her autonomy.

2.5. Religious Freedom and Personal Autonomy

Human rights and personal autonomy are 'highly connected'.[101] Personal autonomy is the 'primary rationale'[102] for the FoRB. Personal autonomy is reflected in an individual's right 'to have or to adopt a religion or belief of his choice' and his freedom not to be 'subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.'[103] FoRB includes the freedom to manifest religion or belief individually or collectively in accordance with one's choice. The ability to act in accordance with an individual's own 'choice' in their religious affairs is essential for an individual believer and for the free exercise of their religion. In this sense, the concept of personal autonomy justifies the protection of religious freedom in an abstract sense. Lucy Vickers argues, 'the case for protecting religious interests [is] based on the notion of autonomy'.[104] Leading experts in the areas of legal, moral and political philosophy, such as, John Rawls, Joseph Raz and Ronald Dworkin have identified the concept of personal autonomy as one of the key reasons for protecting religious freedom.[105] Therefore, it is submitted that personal autonomy should be, and must be, the basis for the construction of religious

[101] Jaunius Gumbis et al, 'Do Human Rights Guarantee Autonomy?'(2008) Cuadernos constitucionales de la Catedra fabrique Furio ceriol 77, 82.

[102] Ahmed (n 56) 239.

[103] Article 18, ICCPR; Article 1, 1981 Declaration.

[104] Vickers (n 10) 39. See also Benjamin L. Berger, 'Law's Religion: Rendering Culture' (2007) 45(2) Osgoode Hall Law Journal 277, 294; Tom Lewis, 'What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56(2) ICLQ 395, 402.

[105] For a discussion on this point, see Evans (n 100) 29-32.

freedom, for the protection of religious freedom, and for a legitimate interference with religious freedom.

The exercise of FoRB serves mainly an *individual* end. Religious beliefs and practices are 'deeply constitutive aspects of people's identity, rather than something like a taste for one candy over another'.[106] In this sense it can be argued that asking people to change their religious belief or to abandon their freely-adopted religious practice is asking them to 'betray … their legitimate sense of who they are'.[107] The use of coercion in an individual's religious affairs will not only hinder them from doing what they truly want to do, but also deny them authorship of their own life. Therefore, it is submitted that a society's coercive interferences with an individual's personal choices in relation to their religious affairs is a terrible error, one of the worst there can ever be. Attempts by the State to coerce an individual's choices in the sphere of their own religious affairs will have serious implications for the moral well-being of that person and their individual autonomy. George has argued that '[a]ny attempt by government to coerce religious faith and practice, even true religious faith and practice, will be futile, at best, and is likely to impair people's participation in the good of religion.'[108] He further states:

[106] Kwame Anthony Appiah, *The Ethics of Identity* (New Jersey: Princeton University Press, 2007) 99.

[107] ibid.

[108] Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993) 220.

> If [religious acts] are not freely done, they are simply not done at all. Compelled prayers or religious professions, or other apparently religious acts performed under compulsion, may bear the external marks of good faith, but they are not, in any meaningful sense, 'religious'. If religion is a value, the value of religion is simply not realized in such acts.[109]

In a liberal democratic society, an individual must have the freedom to carry out their religious activities or practices freely, without being the object of an unjustified restriction, even if they belong to a religious minority group, and even if they defend moral values conflicting with the values of the mainstream society. In her groundbreaking work *Liberalism's Religion*, Laborde has argued that 'the point of a liberal state is to let individuals take responsibility of their own lives' and that a state has 'no business interfering with the way they practice their religion'.[110] Martha Nussbaum argues, a 'good community' is the one that allows 'all people to seek God in their own way'.[111] She goes on to say that '[t]he idea that we are all solitary travellers, searching for light in a dark wilderness, led to the thought that this search, this striving of conscience, is what is most precious about the journey of human life – and that each person - Protestant, Catholic, Jew, Muslim, or Pagan – must be permitted to conduct it in his or her own way, without interference either from the state or from orthodox religion.'[112]

---

[109] ibid 220-221.

[110] Cecile Laborde, *Liberalism's Religion* (Cambridge- London: Harvard University Press, 2017) 73.

[111] Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008) 36.

[112] ibid 37.

The right to personal autonomy of an individual believer implies that their views must be taken into account before embarking on an assessment of the justifiability of restrictions imposed by the State on their right to religious manifestation. It is argued that the principle of personal autonomy should be the paramount consideration for the courts when they deal with religious freedom disputes because this principle fosters liberal goods such as respect for diversity, religious harmony and tolerance. With regard to the Convention, one scholar has suggested that:

> [A]utonomy seems to be the best approach for the Court to interpreting Article 9. It is broadly consistent with the ideas of pluralism, tolerance, and the importance of religion to believers that the Court has already adopted. It allows … a person to be the 'author of his or her own life'. Finally it acknowledges the importance of religion and belief to the individual and the danger of trivializing that importance by unwarranted or unjustified State interference. This approach emphasizes the dignity of all human beings and the importance of allowing them to make and live out decisions about the issues that are most important to them.[113]

The next section demonstrates that courts of various jurisdiction have increasingly identified personal autonomy as one of the key reasons for religious freedom.

2.6. Personal Autonomy in Religious Freedom Jurisprudence

FoRB encompasses, *inter alia,* the *right* to personal autonomy. While no express right to personal autonomy exists in the Convention, such a right is implicitly contained in Article 9 of the Convention. In *Jehovah's Witnesses of Moscow & Others v Russia*, the ECtHR accepted that the refusal of a life-saving medical

[113] Evans (n 100) 33.

treatment by an adult Jehovah's Witness (i.e. a deliberate choice to refuse a blood transfusion based on the belief that the Bible prohibits ingesting blood) fell within an 'individual's right to personal autonomy in the sphere of' 'religious beliefs'. It stated that '[t]he very essence of the Convention is respect for human dignity and human freedom and the notions of self-determination and personal autonomy are important principles underlying the interpretation of its guarantees.' The Court stated further that 'free choice and self-determination [are] fundamental constituents of life' and individuals 'must have the right to make choices that accord with their own views and values, regardless of how irrational, unwise or imprudent such choices may appear to others.'[114] The ECtHR concluded that a State 'must advance serious and compelling reasons for an interference with the choices that people may make in pursuance of the religious standard of behaviour within the sphere of their personal autonomy.'[115]

In *Leyla Sahin v Turkey*, Judge Tulkens gave an influential and strong dissenting judgement. In rejecting paternalistic interferences with a woman's voluntary choice to wear religious dress, she explicitly acknowledged that the ECtHR's jurisprudence 'has developed a real right to personal autonomy'.[116]

An important and positive assertion by the ECtHR with regard to personal autonomy relates to proper proselytism. In relation to proselytism, the leading case is *Kokkinakis v Greece*,[117] which is regarded as 'the most influential ECHR case on

[114] App no. 302/02 (ECHR, 10 June 2010) paras 134-136.

[115] ibid, para 119.

[116] *Leyla Sahin v Turkey* App no. 44774/98 (ECHR, 29 June 2004) Dissenting opinion of Judge Tulkens, para 12. In relation to personal autonomy, Judge Tulkens cited Article 8 ECHR.

[117] App no. 14307/88 (ECHR, 25 May 1993).

religious freedom.'[118] The most enduring aspect in the *Kokkinakis* ruling is the identification of personal autonomy as a tool for protecting religious freedom. In this case, Mr Kokkinakis, a follower of the Jehovah's Witness religion, had been arrested and subsequently sentenced by the Greek courts for proselytism. The majority of the judges held that an interference with Mr Kokkinakis' right to proselytise amounted to a violation of Article 9. The Court accepted that proper proselytism 'is linked to freedom of religion'[119] and a 'perfectly legitimate [method] of manifesting one's religion'.[120] The Court's approach can be explained by reference to the right to personal autonomy of both the proselytiser and proselytised.

With regard to the right of the *proselytiser*, Judge Pettiti, in a partly concurring opinion, explicitly admitted that:

> Freedom of religion and conscience certainly entails accepting proselytism, even where it is 'not respectable'. Believers and agnostic philosophers have a right to expound their beliefs, to try to get other people to share them and even to try to convert those whom they are addressing.[121]

The above statement is arguably very positive from the proselytiser's personal autonomy point of view. Indeed, many religious faiths regard teaching the faith amongst the key duties of believers. Several human rights instruments[122] stipulate and the HRC maintains that the right to manifest one's religion includes carrying out actions to persuade others to believe in a certain religion. In an Optional Protocol case against Sri Lanka, the HRC stated that 'for numerous religions … it is

[118] Ahmed (n 56) 242.

[119] *Kokkinakis* (n 117) Partly concurring opinion of Judge Pettiti.

[120] ibid, Concurring opinion of Judge De Meyer.

[121] *Kokkinakis* (n 119).

[122] For instance, Article 6(d) of the 1981 Declaration.

a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual's manifestation of religion … thus be protected by article 18'.[123] The ECtHR's *Kokkinakis* ruling clearly recognises the personal autonomy of an individual who voluntarily chooses to try to convert others by means of *non-coercive* persuasion.

With regard to the right of the *proselytised*, the Court has arguably taken a positive approach from the personal autonomy point of view because it has outlawed *improper* proselytism and thereby prohibited coercive interferences with the choices of the proselytised. In *Kokkinakis*, the Court took the view that in exercising the right to proselytise, the proselytiser must not 'exert improper pressure' or use 'violence or brainwashing'.[124] Judge Pettiti said, the limits on the exercise of the right to proselytise 'are those dictated by respect for the rights of others where there is an attempt to coerce the person into consenting or to use manipulative techniques.'[125] Judge Martens grounded his partly dissenting decision considering the personal autonomy of the proselytised: 'respect for human dignity and human freedom implies that the State is bound to accept that in principle everybody is capable of determining his fate in the way that he deems best.'[126]

Thus, the ECtHR's *Kokkinakis* ruling protects the right to personal autonomy of the proselytiser by safeguarding their right to try to convert others by means of *non-*

[123] *Sister Immaculate Joseph v Sri Lanka*, Communication no. 1249/2004, UN Doc. CCPR/C/85/D/1249/2004 (2005) para 7.2.

[124] *Kokkinakis* (n 117) para 48. See also *Larrisis and Others v Greece* App no. 22372/94 (ECHR, 14 February 1998) para 51.

[125] *Kokkinakis* (n 119).

[126] *Kokkinakis* (n 117) Partly dissenting opinion of Judge Martens, para 15.

coercive persuasion and protects the right to personal autonomy of the proselytised by giving them the right not to be subject to *coercive* interferences which would impair their choice. The ECtHR's *Kokkinakis* ruling has been admired by many academic commentators; for example, Edge has argued that by taking an autonomy-based approach in *Kokkinakis* the Strasbourg Court 'has implicitly accepted the explicit statement found' in the ICCPR Article 18(2): 'No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.'[127] He further argues that the *Kokkinakis* ruling has recognised a right not to be subject to 'autonomy reducing conversion techniques'.[128]

Domestic courts' jurisprudence on religious freedom protections suggests that FoRB is based upon personal autonomy which justifies the protection of religious freedoms. In *Syndicat Northcrest v Amselem*,[129] the Supreme Court of Canada held that 'freedom of religion … revolves around the notion of personal choice and individual autonomy'[130] and 'integrally linked with an individual's self-definition'.[131] It further stated that personal autonomy and choice 'undergird' the freedom of religion.[132] The autonomy-based approach of the Canadian Supreme Court in *Syndicat* has been adopted by the House of Lords. Citing *Syndicat*, Lord Nicholls in

[127] Peter W. Edge, 'Religious Rights and Choice under the European Convention on Human Rights' (2000) 2 Web JCLI 1, 5.

[128] ibid 3. See also Peter W. Edge, *Religion and Law* (Hampshire- Burlington: Ashgate, 2006) 54.

[129] [2004] 2 SCR 551.

[130] ibid, para 40.

[131] ibid, para 42.

[132] ibid.

the landmark case of *R (Williamson) v Secretary of State for Education and Employment* stated that:

> Freedom of religion protects the subjective belief of an individual… [R]eligious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.[133]

Baroness Hale, in *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*,[134] based her arguments on the ideal of personal autonomy. She described religious choices of adults as 'the product of fully developed personal autonomy'.[135] She endorsed writers' accounts of Muslim veiling by reiterating that the practice of veiling is 'a [woman's] way of regaining control over her body'[136] and 'highly complex autonomous act'[137], a prohibition of which 'risks violating the liberal principle of respect for individual autonomy'.[138]

In the light of the foregoing, it can be strongly argued that the ECtHR and domestic courts have identified the right to personal autonomy as one of the central questions for religious freedom.

[133] [2005] UKHL 15, para 22.

[134] [2006] UKHL 15.

[135] ibid, para 93.

[136] ibid, para 94.

[137] ibid.

[138] (n 134) para 98.

2.7. Limitations on Personal Autonomy

This section will take a step back from the personal autonomy concept, in order to explore limitations on personal autonomy. One of the main purposes of this section is to analyse to what extent, if at all, the choice of *underaged* girls (who have not attained the maturity to comprehend the implications of their decisions) to wear or not to wear the Islamic veil deserve protection.

Personal autonomy helps an individual to lead their life autonomously, but it does not help them to make an informed choice or a rational decision. To make a well-informed choice or to take a logical decision, they must exercise their *capacities*.[139] Feinberg argues, 'all those who have argued for a natural sovereign autonomy have agreed that persons have the right of self-government if and only if they have the capacity for self-government.'[140] This capacity is ascertained by the ability to make an informed choice or a rational decision, a qualification usually interpreted to exclude mentally incapacitated persons and children.

An important question that must be answered before embarking on a detailed analysis is, what is the standard of (in)competence in light of which one can come to the conclusion that an individual does not possess adequate competence to make a well-informed decision for themself? Beauchamp and Childress have identified seven '*in*abilities' in relation to 'standards of *in*competence',[141] which are:

[139] On the point of 'capacity', see Downie and Telfer (n 67).

[140] Feinberg (n 75) 28.

[141] Beauchamp and Childress (n 50) 114 (emphasis in the original).

1. Inability to express or communicate a preference or choice
2. Inability to understand one's situation and its consequences
3. Inability to understand relevant information
4. Inability to give a reason
5. Inability to give a rational decision
6. Inability to give risk/benefit-related reasons
7. Inability to reach a reasonable decision.[142]

Applying these standards of incompetence to mentally incapacitated people (regardless of age) and children under the age of sixteen, it will be argued in this thesis that these two clusters of people lack the cognitive faculties to enable them to make a rational decision in a particular context or situation. This is because they are not always able to understand the relevant information, to assess the information, to take decision in the light of that information, and to communicate properly their wishes. Their lack of capacity in terms of thinking, deciding, consenting, and declining preclude them from exercising the right to personal autonomy.

On Liberty makes it clear that the self-regarding conduct of an *incompetent* person can legitimately be interfered with by the society because Mill himself has stated that the harm principle 'is meant to apply only to human beings in the maturity of their faculties.'[143] He states, 'children, or of young persons below the age which the law may fix as that of manhood or womanhood'[144] and individuals who lack 'the

[142] ibid 114-115.

[143] Mill (n 7) 13-14.

[144] ibid 14.

ordinary amount of understanding'[145] are not in the maturity of their faculties. Mill approves paternalistic interventions against children and persons with mental incapacity as they do not understand the consequences of their own actions and thus may need protection against their will: 'those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.'[146]

Individuals suffering from severe mental disorders lack sufficient understanding and intelligence to be capable of making up their own mind on the matter requiring decision; as such, their personal decisions about religious affairs can be overridden. An example can be used to elaborate this point. Allowing a devout Sikh man, who is mentally ill and has suicidal thoughts, to carry a kirpan (i.e. a small, curved ornamental steel dagger which is commonly 7.5 centimetres long, carried in a sheath, strapped to the body, and usually under clothing) may pose serious risk for him and others. His choice to carry a kirpan, as part of his desire to display his religious affiliation publicly, can be deliberately and indiscriminately overridden -- it is not material that he wants to carry it voluntarily in order to comply with the requirements of his religion. It is therefore submitted that a State's obligation to respect an individual's voluntary choice about their religious affairs does not extend to mentally incapacitated persons who are not capable of acting in a sufficiently autonomous manner.

In the same vein, newborn babies, toddlers, pre-schoolers, school age children, and teenagers under sixteen do not always deserve respect in relation to their

[145] ibid 70.

[146] ibid 14.

autonomous decisions on religious affairs provided that they are living with their parents or legal guardians. This is simply because they may not have sufficient maturity and intelligence to understand the nature and implication of their decisions. If Z, a young fourteen-year-old girl and practising Jehovah's Witness, refuses treatment involving blood transfusion based upon her religious belief, then her decision not to have a blood transfusion can legitimately be overridden, because whether Z (fully) understands the implications of refusing blood transfusion is questionable.[147] In *Begum*, Baroness Hale stated that 'genuine individual consent to a discriminatory practice or dissent from it may not yet be feasible where … girls are not yet adult.'[148] She further stated, '[t]he fact that they are not yet fully adult may help to justify interference with the choices they have made.'[149]

Another reason why the choice of a child in matters of their religion can legitimately be disregarded is the right of the parents to inculcate in their children an adherence to a valued religious belief and to act in accordance with that belief. *Parental rights* concerning the religious upbringing of children and their education is guaranteed in major UN human rights documents. For instance, Article 14(2) of the Convention on the Rights of the Child 1989 (hereinafter "the CRC") provides for a right of the parents to provide direction to the child in the exercise of their right to freedom of

[147] There are cases in support of this argument. See *Re L (Medical Treatment: Gillick Competency)* [1998] 2 FLR 810; *Re E (A Minor)* [1993] 1 FLR 386.

[148] (n 134) para 98 citing Frances Radnay, 'Culture, Religion and Gender' (2003) 1 International Journal of Constitutional Law 663.

[149] ibid, para 93.

religion. The right of the parents with regard to the religious upbringing of their children is also recognised in the ICCPR.[150]

While Article 9 of the ECHR does not make explicit reference to the right of the parents in relation to religious upbringing and education of their children,[151] Article 2 of the First Protocol of the ECHR gives express recognition to parents' right to provide their children with religious education in accordance with their own beliefs. In *Vojnity v Hungary* the ECtHR held that 'the rights to respect for family life and religious freedom as enshrined in Articles 8 and 9 of the Convention, together with the right to respect for parents' philosophical and religious convictions in education, as provided in Article 2 of Protocol No. 1 to the Convention, convey on parents the right to communicate and promote their religious convictions in the bringing up of their children … even in an insistent or overbearing manner'.[152] Therefore, Ahmed argues, 'ECHR jurisprudence protects parental rights to give their children a religious upbringing even when this diminishes the autonomy of children.'[153]

The above analysis makes it clear that parents have the liberty to ensure the religious and moral education of their children in conformity with their own convictions. Ursula Kilkelly argues, in strict terms, parental rights to give children a religious upbringing can be interpreted as a 'limitation' on the exercise of a child's

[150] Article 18(4).

[151] Article 9, however, accepts parents' rights of religious upbringing within its general protection of freedom of religion or belief. (Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, Oxford: OUP, 2013) 204).

[152] App no. 29617/07 (ECHR, 12 February 2013) para 37.

[153] Ahmed (n 56) 257.

choice in relation to their religious affairs.[154] On this basis, it is submitted that a Muslim father can lawfully choose to send his underaged girl in an Islamic school to receive Islamic education where the wearing of the *hijab* is compulsory as part of the school uniform. In addition, parental rights to give their children a religious upbringing entitle a parent to influence and motivate their girl to wear religious clothing even though she is not willing to adopt religious dress or symbols.[155] However, the means of influence or persuasion must *not* involve (threat of) violence or infliction of hardship on the child. Austin argues, there is a difference between telling a person to do something and making him to do it.[156] Rex Ahdar and Ian Leigh argue, '[s]imple discussion of religion by the … parent seems permitted.'[157] It is therefore argued that motivating or influencing underaged girls by their religious parents to wear Islamic veils may not amount to coercion. With regard to the wearing of the *burqa* by *minors*, Nussbaum has argued that:

[154] Ursula Kilkelly, 'The Child's Right to Religious Freedom in International Law: The Search for Meaning' in Martha Albertson Fineman and Karen Worthington (eds), *What is Right for Children? The Competing Paradigms of Religion and Human Rights* (Surrey- Burlington: Ashgate, 2009) 249.

[155] If the child, who is mature enough to express potentially conflicting desires, insists on her own decision and decides not to follow her parent's guideline regarding the religious dress code, then the child's decision should be upheld. This is because the parental right of religious upbringing 'is not an unconfined right.' If there is a conflict between the parent's decision and child's decision, then the child's welfare should be the court's paramount consideration. See *Re N (A Child: Religion: Jehovah's Witness)* [2011] EWHC B26 (Fam).

[156] John Langshaw Austin, 'How to Do Things with Words' (Oxford: Clarendon Press, 1962) 101.

[157] Ahdar and Leigh (n 151) 229.

> If it is imposed by physical or sexual violence, that violence ought to be legally punished. Otherwise, however, it seems to be in the same category as all sorts of requirements, pleasant and unpleasant, that parents impose on their children: wearing 'respectable' clothing, going to the 'right' school, getting top grades, practicing the violin, dating only people of the 'right' religion, getting into top college.[158]

Another reason to protect decisions made by a Muslim parent regarding the wearing of the Islamic veil by their underaged child is, the less drastic consequences of the practice of Muslim veiling when compared to other controversial actions taken by parents under the guise of religion, tradition and culture. Controversial parental choices regarding their children's religion include refusal of a blood transfusion, female genital mutilation, ritual scarification, and ritual circumcision of male infants. Religious practices of children, which are carried out at the wishes of the practising parents and have far-reaching consequences for children's well-being and health, have been discussed in domestic case law. For instance, in a German case concerning a Muslim parent's wishes to have their 4-year-old boy *circumcised for religious reasons,* the Cologne Regional Court decided that 'the circumcision changes the child's body permanently and irreparably. This change runs contrary to the interests of the child in deciding his religious affiliation independently later in life.'[159] Arguably, the wearing of the veils by an underaged girl at the wishes of her parents does not have such grave implications for her future life and health as the

[158] Martha C. Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (Cambridge- Massachusetts- London: The Belknap Press of Harvard University Press, 2012) 125.

[159] Docket no. 151 Ns 169/11 (7 May 2012). See also *SS (Malaysia) v Secretary of State for the Home Department* [2013] EWCA Civ 888; *Re J (child's religious upbringing and circumcision)* [1999] 2 FCR 345.

wearing of veils does not change one's physical appearance permanently. In the course of the personal development, she can modify or even abandon the practice of veiling if she deems fit.

It must, however, be noted that parental rights to give their children a religious upbringing is not absolute. Parents' right of religious upbringing can be overridden in order to prevent harm to the children occurring from religious practices. In *Re N (A Child: Religion: Jehovah's Witness)*, a case concerning a child's religious upbringing following their parents' divorce, Judge Clifford Bellamy held that:

> A parent's right to enable her child to learn about and experience his or her religion is not an unconfined right. Where the practice of that religion involves a lifestyle which conflicts with the lifestyle of the other parent and the court is satisfied that that conflict has had or may in the future have an impact on the child's welfare the court is entitled to restrict the child's involvement in those practices.[160]

In fact, the courts are unsympathetic to those parents who are 'religious fanatics' and who take their religion 'too far' and 'seek to impose [their] religion on everyone around [them].'[161] So, where a child has suffered actual harm or where there is a substantial threat of harm resulting from parent's religious teaching or conduct, parental authority will be overridden and the well-being of the child will then become the paramount consideration. A large number of cases support this view.[162] Therefore, one can conclude that where parents exert pressure (by means of

[160] [2011] EWHC B26(Fam) 85.

[161] *P(D) v S(C)* [1993] 4SCR 141, 187. See also *Re S (Minors)* [1992] 2FLR 313.

[162] *Young v Young* [1993] 4 SCR 3; *Re H* [2000] 2 FLR 334; *Re J* (n 163); *Hoffman v Austria* App no. 12875/87 (ECHR, 23 June 1993); *Re J (An Infant): B and B v Director General of Social Welfare* [1996] 2 NZLR 134; *Re ST (A Minor)*, unreported, Family Division, 19 October 1995.

punishment, physical torture, threat, emotional blackmail etc.) on their underaged girls to manifest religion through the wearing of the Islamic veil or other religious symbols, the choice of the parent can be overridden for the interest of the child in question.

As far as *older* children (i.e. those aged between sixteen and seventeen) are concerned, their capacity to make a rational decision is developing or even sometimes as developed as that of an adult. Therefore, their autonomous decisions in religious matters should be respected. Indeed, the capacity to think rationally and to make well-informed decisions is not achieved on the eve of one's eighteenth birthday. The ability to make decisions and choices is inherent in every human being. Therefore, one should give older children the opportunity to develop their capacity by respecting their decisions in the religious domain. As far as the choice (not) to wear the Islamic veil is concerned, it is submitted that the autonomous choices of girls over the age of sixteen must be respected even against the wishes of their parents. In this context, *Wisconsin v Yoder*, a well-known case concerning the compulsory school attendance by Amish children is worth noting. In this case, Justice Douglas took the view that '[I]f an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections.'[163] Ahdar and Leigh state:

> The right to religious freedom is, after all, the child's. States will respect parental guideline to the extent parents respect their children's own freedom of conscience; but no more. The implication is that states ought not to support parents who insist upon religious education or practices that

[163] 406 U.S. 205 (1972) 242.

> their children do not desire, at least where the children are sufficiently mature and intelligent to gainsay their parent's religious predilections.[164]

As indicated previously, the matter of personal autonomy is the foundation of this research. Therefore, this study will focus *only* on those women who have the capacity to make autonomous decisions. For this reason, two clusters of women are directly excluded from the scope of this research: (a) mentally incapacitated girls and women (b) girls under the age of sixteen. As pointed out previously, this is one of the limitations of this study.[165] In the subsequent chapters, when I use the word 'women' in relation to my discussion on Islamic veiling, I mean those women who are mentally competent *and* aged sixteen or over.

2.8. Concluding Remarks

This chapter has focused on the concept of personal autonomy and Mill's harm principle. The core idea of personal autonomy is that a competent individual has the right to govern and direct the course of their life without any sort of external interference or control. Their personal autonomy cannot legitimately be overridden by the State unless their actions affect the rights of others. Under the harm principle, legal coercion may be justified to restrain other-regarding conduct, but never purely self-regarding conduct. Harm to others is the essential condition for interference under Millian theory -- as long as an individual's actions do not harm others, no interference with them is justified. As argued above, personal autonomy justifies the protection of religious freedom. Religious freedom is an

[164] (n 151) 216.

[165] See Section 1.9, Chapter One.

important aspect of personal autonomy. People's ability to make autonomous decisions about religious affairs is seriously affected if they are subject to coercion.

Human rights have always been women's rights. However, in many male-dominated societies, women are frequently subjected to discrimination and oppression in exercising their religious freedom in the family sphere (e.g. as a daughter, wife etc.) as well as the public sphere (e.g. as an employer, employee, student, social worker etc.). Therefore, States must give due attention to respecting, protecting and fostering women's personal autonomy in the religious domain. A woman's religious choices such as whether she will go to church every Sunday, whether she will observe Lent, whether she will wear religious symbols, whether she will drink alcohol and eat beef, whether she will fast during Ramadan -- must be left with her. It is not for another man or even woman to decide her religious or personal matters. Howard-Hassmann argues, '[a]utonomy means that women have the legal, moral, and personal capacity to make decisions as to … which belief they hold'.[166] In relation to autonomous decisions about one's religious affairs, Hunter-Henin has argued that 'enforcement of a prohibition against autonomous decisions made by adult women is a paternalistic and outdated view of women that reverses feminist achievements'.[167] An unreasonable invasion in women's religious choices harms their autonomy, and this in turn exacerbates their vulnerability in a male-dominated society.

[166] (n 47) 434.

[167] Myriam Hunter-Hennin, 'Why the French Don't Like the Burqa: Laicite, National Identity and Religious Freedom' (2012) 61(3) The International and Comparative Law Quarterly 613, 624.

It must be emphasised that the concept of free choice is not straightforward, particularly in the context of (women's) religious affairs. In real life, decisions are not always clear-cut. Human beings are social and communal beings; therefore, an individual's decision or choice may be shaped by various external factors, such as finances and societal practices. This is particularly true for women who live in male-dominated societies or who are financially dependent on their family members. Thus, it is safe to argue that an individual's choice may sometimes be influenced by some external factors over which they have little or no control. Donna Dickenson argues, 'even if individuals make choices, those choices … are influenced by the social context in which the practice is embedded. It is a blatantly false assumption that whatever you do, you've chosen to do -- and that you've made your individual choice independently of any social, political, or economic factors.'[168] An example can be elaborated to illustrate this point. An indigenous person who does not follow the traditional aboriginal lifestyle and culture may be at risk of exclusion from the indigenous community and traditional land. If living in the aboriginal land and belonging to the indigenous community is more important than following a non-aboriginal lifestyle to that individual, then their desire to follow a different lifestyle has to be given up. Although to some extent they feel pressured (which is entirely self-created) to follow the traditional aboriginal lifestyle, it cannot be said that they are *forced* to follow this lifestyle against their will. This is because the individual concerned has *chosen* to continue following the traditional aboriginal lifestyle after considering the realities or the potential consequences of not following the traditional lifestyle. It is therefore argued that the concept of choice or voluntariness is not always clear-cut. With regard to a choice/decision, the

[168] Donna Dickenson, *Me Medicine vs. We Medicine: Reclaiming Biotechnology for the Common Good* (New York: Colombia University Press, 2003) 26-27.

paramount consideration should be whether the individual concerned has given their 'consent' to a course of action. As long as there exists consent, the action in question should be regarded as 'voluntary' although the choice/decision may not be entirely autonomous or spontaneous in the strict sense. Put differently, as long as an individual has consent to a course of action which is harmless to others, the action in question deserves respect.

It is submitted that with regard to the question of whether or not the wearing of Islamic veils by Muslim women should be allowed in a society, the starting point must be personal autonomy (i.e. wear what you want to wear). It is true that the freedom to manifest one's religion or belief is a qualified right as opposed to an absolute right, and, therefore, States have the right to interfere with the exercise of this right provided that the interference satisfies the human right criteria according to the relevant human right instrument. However, it should be remembered that a litigant only needs to show that there has been an interference with their right to manifest their religion, the onus then falls on the *State* to prove that this interference is justified under Article 9 of the Convention (or Article 18 of the ICCPR).[169] Therefore, in order to override an individual's autonomous decision as to the wearing of symbols of religious affiliation, the State must discharge its burden of proof, i.e. showing that a compelling reason is present to justify the invasion. Only then the State acquires 'sufficient warrant' to intervene. It is also submitted that legally regulating what women can wear must be an exception, *not*

[169] On this point, see Mark Hill, 'Bracelets, Rings and Veils: The Accommodation of Religious Symbols in the Uniform Policies of English Schools' in Myriam Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (London- New York: Routledge, 2016) 309-310; Mark Hill, Russell Sandberg and Norman Doe, *Religion and Law in the United Kingdom* (The Netherlands: Kluwer, 2011) 46-47.

a rule. This approach aligns with Feinberg's 'presumption in favour of liberty': 'liberty should be the norm, coercion always needs some special justification.'[170] Any limitation on the right to manifest one's religion or belief through the wearing of religious dress must comply with the principles of international human rights law and be justified under the harm principle.

As discussed previously, while the wearing of Islamic veils by Muslim women is subject to prohibition in many European and non-European countries, in some parts of the world, Muslim women are forced to wear veils against their will.[171] This thesis will argue that any general ban on the wearing of Islamic veils is a serious invasion of Muslim women's personal autonomy. 'Respect for personal autonomy requires tolerating bad or evil actions'[172] even though these actions *disturb* us or make us *uneasy*. States should respect the voluntary decisions of Muslim women to wear veils, in a way comparable to respecting Christian nuns in habits and orthodox Jewish men in yarmulke. It will also be argued that, right or wrong, the choice of donning the veil is entirely a matter of women's personal autonomy, and therefore, must be protected unless their religious practice in question causes direct harm (e.g. physical injury, loss of property, death) to others. This thesis will submit that if (Muslim) women are coerced into wearing veils against their will, whether in a Western country or in a Muslim-majority country, one should speak out unequivocally and take actions because it is a serious violation of personal

[170] Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law (Volume 1)* (Oxford: OUP, 1984) 9.

[171] Section 1.3, Chapter 1.

[172] Raz (n 79) 321.

autonomy and human rights. These arguments will be developed in the subsequent chapters of this thesis.

Chapter Three will analyse whether the wearing of Islamic veils should be regulated in a liberal democratic State on the grounds of social cohesion or living together.

CHAPTER THREE: BANNING ISLAMIC VEILS ON THE GROUND OF SOCIAL COHESION: AN APPRAISAL

> 'One could not be both Muslim and French; assimilation was the only route to membership in the nation.'
>
> - John Wallach Scott[1]

> 'No doubt the legitimacy of minority practices is too often screened through majoritarian sensibilities. The European Court of Human Rights freedom of religion jurisprudence has notoriously been lenient toward practices of Christian establishment and overtly intolerant toward the presence of Islam in the public sphere.'
>
> - Cecile Laborde[2]

3.1. Introduction

An argument in support of a ban on wearing Islamic veils relates to social cohesion or social integration. There is a widely held view that veil-wearing Muslim women alienate themselves from others and exacerbate their differences by separating themselves from the society they live in, and thus, create or increase societal divisions.[3] In contemporary European societies, the wearing of Islamic veils by Muslim women in public spaces is perceived by many people as 'symptomatic of a

[1] John Wallach Scott, *The Politics of the Veil* (Princeton- Oxford: Princeton University Press, 2007) 135.

[2] Cecile Laborde, *Liberalism's Religion* (Cambridge- London: Harvard University Press, 2017) 33.

[3] See Natasha Bakht, 'Veiled Objections: Facing Public Opposition to the Niqab' in Lori G. Beaman (ed), *Reasonable Accommodation: Managing Religious Diversity* (Vancouver: UBC Press, 2012) 76-78.

reluctance to integrate'[4] and a veil-wearing Muslim woman is seen to be 'distancing herself from other, non-Muslim people and furthering social and cultural division.'[5] It has also been asserted that the religious practice of veiling by Muslim women is problematic because it represents a rejection of values and culture of the society they live in, and a desire to remain isolated from that society. Cynthia DeBula Bains, for instance, states that 'a simple *hijab*, when worn by Muslim girls, signifies to many French a refusal to become French'.[6] The alleged anti-social character of Islamic full-face veils is closely connected with the idea that the most basic human communication is conveyed by the face. Therefore, by concealing their faces with veils, Muslim women sever their links with others,[7] which in turn affects their integration into mainstream society. In a much-debated newspaper column, Jack Straw, the former Member of Parliament for Blackburn, requested that women visiting his surgery remove their full-face veils. He stated, "I felt uncomfortable about talking to someone 'face-to-face' who I could not see." He further commented, 'wearing the full veil was bound to make better, positive relations between the two communities more difficult. It was such a visible statement of

[4] See Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford- Portland: Hart Publishing, 2006) 19-20.

[5] See Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (1st edn, Abingdon- New York: Routledge, 2012) 33.

[6] Cynthia DeBula Baines, 'L'Affaire des Foulards - Discrimination, or the Price of a Secular Public Education System?' (1996) 29 Vanderbilt Journal of Transnational Law 303, 311, quoted in Howard (n 5) 33.

[7] See *Mariana Hebbadj v France*, Communication no. 2807/2016, UN Doc. CCPR/C/123/D/2807/2016 (17 July 2018) Individual dissenting opinion of Committee member Yadh Ben Achour, para 7.

separation and of difference.'[8] Former Prime Minister Tony Blair also contributed to the contentious controversy, echoing Jack Straw's opinion. Blair stated that the full-face veil is 'a mark of separation' which makes 'other people from outside the community feel uncomfortable'. He further stated, 'I think we need to confront this issue about how we integrate people properly within our society'.[9] So, it seems that the perception that the Islamic veil is a barrier to social integration plays a key role in defending bans on Islamic veiling. Academic commentators have indicated that the 'real reason' for which the social cohesion argument is advanced to support bans on the Islamic veil is "the fundamental unease of a large majority of people with the idea of an Islamic face veil, and the widespread feeling that this garment is undesirable in 'our society'."[10]

The social cohesion argument was widely used in parliamentary debates leading up to the bans on wearing Islamic full-face veils in France and Belgium. In June 2009, the French National Assembly established a parliamentary commission to report on 'the wearing of the full-face veil on national territory' which found, *inter alia*, "that the full-face veil represented a denial of fraternity, constituting the negation of contact with others and a flagrant infringement of the French principle of living

[8] Jack Straw, 'I felt uneasy talking to someone I couldn't see' (*The Guardian*, 6 October 2006) <http://www.theguardian.com/commentisfree/2006/oct/06/politics.uk> accessed 3 March 2016.

[9] Quoted in Bakht (n 3) 76-77.

[10] Eva Brems et al., 'Uncovering French and Belgian Face Covering Bans' (2013) 2 Journal of Law, Religion & State 69, 86; Eva Brems, 'S.A.S. v. France as Problematic Precedent' (*Strasbourg Observers*, 9 July 2014) <https://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/> accessed 30 October 2016.

together (*le 'vivre ensemble'*)."[11] The 'Explanatory Memorandum' accompanying the bill,[12] which led to the enactment of Law no. 2010-1192 of 11 October 2010 prohibiting the concealment of one's face in public places in France, stated that the wearing of full-face veils was 'at odds with the social fabric' and "quite simply incompatible with the fundamental requirements of 'living together' in French society."[13] In debates in the Belgian Parliament, it was submitted that the full-face veil 'disrupts' the social environment because members of the general population have indicated 'that they do not wish to encounter something like that in the street … Everyone has his own reasons for this, but this is the common sentiment in any event'.[14] It was also argued that if a woman's face is covered and only her eyes are visible then she would encounter difficulties in participating in the community since 'face-covering garments largely precludes verbal and non-verbal communication.'[15] The intervention with effective communication arising from this circumstance would consequently 'lead to social disruption'.[16]

[11] This report was deposited in January 2010. It recommended 'to adopt a resolution reasserting Republican values and condemning as contrary to such values the wearing of the full- face veil'. Consequently, in May 2010, the National Assembly adopted a resolution 'on attachment to respect for Republic values at a time when they are being undermined by the development of radical practices', which stated that, 'the wearing of the full veil, [is] incompatible with the values of the Republic'. See Tom Syring, 'Introductory Note to the European Court of Human Rights' Judgment on the Legality of a Ban on Wearing Full-Face Veils in Public (Case of S.A.S. V. France)' (2014) 53(6) International Legal Materials 1025. See also *S.A.S. v France* App no. 43835/11 (ECHR, 1 July 2014) paras 15-24.

[12] Bill prohibiting the concealment of one's face in public places, impact assessment, May 2010.

[13] *S.A.S.* (n 11) para 25.

[14] Belgian Chamber 2010-2011, Parliamentary Proceedings, 28 April 2011, No. 53-30, 35.

[15] Belgian Chamber 2010-2011, No. 53-85/1, 3.

[16] ibid 4.

The question remains, however, whether the advancement of social cohesion is a convincing argument or legitimate ground to ban and criminalise the wearing of Islamic veils. This chapter makes an attempt to answer this question through the lens of the European human rights framework and from the perspective of Mill's harm principle. This chapter also aims to explore and critically analyse the approaches the ECtHR has taken regarding French and Belgian anti-veil legislation, enacted on social cohesion grounds.

3.2. Living Together: A Newly Developed Category of Justification for Limitations on Religious Freedom

The ECtHR has accepted that the advancement of 'living together' (or social cohesion) may justify the restriction of the right to manifest one's religion through the wearing of Islamic veils. The concept of 'living together' emerged in the jurisprudence of the ECtHR as a possible justification for limitations on FoRB in July 2014 when the ECtHR declared its judgment in the landmark case of *S.A.S. v France* (hereinafter "*S.A.S.*"). This case concerned an unnamed twenty-four year-old woman of Pakistani origin, a 'perfect French citizen with a university education … who [spoke] of her republic with passion',[17] and who wore both types of Islamic full-face veils, namely the *burqa* and *niqab* in accordance with her faith, culture and personal convictions. She stated that it was a voluntarily and emancipated choice of her to wear the full-face veils.[18] She challenged French Law no. 2010-1192 of 11

[17] Kim Willsher, 'France's burqa ban upheld by human rights court' (*The Guardian*, 1 July 2014) <https://www.theguardian.com/world/2014/jul/01/france-burqa-ban-upheld-human-rights-court> accessed 26 November 2018.

[18] *S.A.S.* (n 11) para 11.

October 2010[19] (hereinafter "the Islamic full-face veil ban in France") which prohibited the concealment of the face in public spaces. She claimed that the Islamic full-face veil ban in France negatively impacted on her free choice to wear the *burqa* and *niqab*, and infringed upon her rights under, *inter alia*, Article 8 and Article 9 of the Convention. The French Government submitted that this ban pursued two aims: (a) 'public safety'; and, (b) 'the protection of rights and freedoms of others' through securing respect for a minimum set of values in an open and democratic society.[20] In support of the second aim, the Government referred to following three values: (a) respect for gender equality; (b) respect for human dignity; and, (c) respect for the minimum requirements of life in society ('*le vivre ensemble'* or 'living together'). The ECtHR dismissed the French Government's arguments relating to public safety, gender equality and human dignity. However, it accepted that "under certain conditions the 'respect for the minimum requirements of life in society' referred to by the Government – or of 'living together' … can be linked to the legitimate aim of the 'protection of the rights and freedoms of others'"[21] in the context of 'the right of others to live in a space of socialisation which makes living together easier'.[22] The ECtHR gave very wide latitude and deference to the French authorities by using the doctrine of MoA, and

[19] Section 1 of Law no. 2010-1192 of 11 October 2010 reads, '[n]o one may, in public places, wear clothing that is designed to conceal the face.' Section 3 states, '[a]ny breach of the prohibition laid down in section 1 hereof shall be punishable by a fine, at the rate applying to second-class petty offences (contraventions) [150 euros maximum]. An obligation to follow a citizenship course … may be imposed in addition to or instead of the payment of a fine.'

[20] *S.A.S.* (n 11) paras 82 & 116.

[21] ibid, para 121.

[22] ibid, para 122.

by fifteen votes to two, concluded that there was no violation of Articles 8 and 9 in this case.

The new concept of 'living together' from the *S.A.S.* ruling has been recently applied by the ECtHR in two *similar* judgements delivered on 11 July 2017 concerning the Belgian equivalent of the French ban on Islamic full-face veils in public spaces: *Belcacemi and Oussar v Belgium*[23] (hereinafter "*Belcacemi*") and *Dakir v Belgium*[24] (hereinafter "*Dakir*"). In both cases, the ECtHR in line with its previous decision in *S.A.S*, upheld the ban on wearing the Islamic full-face veils in public places in Belgium on the grounds of 'living together'. While in both cases the applicants challenged the ban on wearing full-face veils, the specific facts were slightly different. In *Belcacemi*, two applicants (Belgian national Ms Belcacemi and Moroccan national Ms Oussar) challenged the Belgian law of 1 June 2011[25] (hereinafter "the Islamic full-face veil ban in Belgium") which prohibited the wearing of clothing that partially or totally covers the face in public places. Following the enactment of the Islamic full-face veil ban in Belgium, Ms Belcacemi felt that she had no option but to remove her *niqab* temporarily, on account of her fear that she would otherwise be stopped in the street and heavily fined or sent to prison. Ms Oussar decided to stay at home, resulting in a restriction on her private

[23] App no. 37798/13 (ECHR, 11 July 2017).

[24] App no. 4619/12 (ECHR, 11 July 2017).

[25] Law of 1 June 2011 came into force on 23 July 2011. It inserted Article 563*bis* into the Belgian Criminal Code, which reads, '[u]nless otherwise provided by law, persons who appear in a place that is accessible to the public with their faces completely or partially covered or hidden, such as not to be identifiable, shall be liable to a fine of between fifteen and twenty-five euros [read: between 120 and 200 euros] and imprisonment of between one and seven days, or to one of those penalties alone.'

and social life. In *Dakir*, the applicant, Ms Dakir, challenged Article 113*bis*[26] (hereinafter "the local ban in Belgium") of the consolidated municipal by-laws of the Vesdre police district, adopted in June 2008, which prohibited the wearing of clothing concealing the face in all public places in three municipalities, namely Pepinster, Dison and Verviers. Ms Belcacemi, Ms Oussar, and Ms Dakir all emphasised that they had decided, on their own initiative, to wear the *niqab* on account of their religious convictions. They argued that the prohibition on wearing the *niqab* in public places infringed their rights, *inter alia*, under Article 9 of the Convention. In *Belcacemi*, it was argued by the Belgian Government that 'dress codes are the product of a societal consensus and the result of a compromise between individual liberties and codes of interaction in society, and that people who wear a garment concealing their face give to others the signal that they do not want to participate actively in society while one of the values that constitute the basis of the functioning of the democratic society is that an active exchange between the individuals is possible.'[27] In *Dakir*, the Belgian Government submitted that 'those who wore clothing concealing their face were signalling to the majority that they did not wish to take an active part in society'[28], and thus, "undermined the very essence of the principle of 'living together'".[29] Therefore, by enacting the local ban in Belgium, 'the legislature had sought to defend a societal model … [in order] to encourage the full integration and enable citizens to share a common heritage of fundamental values'.[30]

---

[26] Article 113*bis* reads, **'**[t]he wearing of clothing concealing the face shall be forbidden at all times and in all public places.'

[27] *Belcacemi* (n 23) para 42.

[28] *Dakir* (n 24) para 31.

[29] ibid, para 29.

[30] ibid, para 32.

Similar to *S.A.S.*, in the Belgian cases *Belcacemi* and *Dakir*, the ECtHR found that the Islamic full-face veil ban in Belgium and the local ban in Belgium were justified on the grounds of 'living together'. In giving its rulings in these twin cases, the ECtHR firstly acknowledged that 'the terms of the issue as debated in Belgium very closely resemble those surrounding the enactment of the … French ban examined by the Court in the judgment *S.A.S. v. France*.'[31] In fact, the ECtHR referred to the *S.A.S.* case nineteen times in its decision in *Belcacemi* and fifteen times in its decision in *Dakir*. In *Belcacemi* and *Dakir* the ECtHR held, along with the same lines of reasoning as those set out in *S.A.S.*, that in adopting the bans, the law makers in Belgium 'sought to address a practice which it deemed incompatible, in Belgian society, with the ground rules of social communication and more broadly the establishment of human relations that are essential for living together'.[32] Affording Belgium 'a very wide margin of appreciation'[33] it stated that the respondent State was 'protecting a condition of interaction between individuals which for the State was essential to ensure the functioning of a democratic society.'[34] The ECtHR unanimously held that the Islamic full-face veil ban in Belgium and the local ban in Belgium did not infringe the applicants' FoRB under Article 9 of the Convention.

[31] *Belcacemi* (n 23) para 50; *Dakir* (n 24) para 52.

[32] *Dakir* (n 24) para 56; *Belcacemi* (n 23) para 53.

[33] *Belcacemi* (n 23) para 55; *Dakir* (n 24) para 59.

[34] See ECtHR's Press Release on *Belcacemi and Oussar* v *Belgium*, 'Ban on wearing face covering in public in Belgium did not violate Convention rights' (11 July 2017). See also *Belcacemi* (n 23) para 53; *Dakir* (n 24) para 56.

3.3. Living Together as a 'Legal' Concept: Is There any Legal Right to Demand Social Interaction Or to See the Faces of Other People?

The enigmatic concept of 'living together' is absent from the text of the ECHR. As noted above, this concept first emerged in *S.A.S.* and was recently endorsed in *Belcacemi* and *Dakir*. The ECtHR, in cases concerning the bans on the use of the Islamic veil, has done little to define the concept of 'living together'. However, it seems that, as Trotter argues, the central idea of 'living together' in the European human rights framework is a "state-defined vision of 'social interaction' of collective life".[35]

In the parliamentary debates leading up to the Islamic full-face veil ban in France, seeing the face of others had been put forward as a 'moral right', based on the work of the French philosopher Emmanuel Levinas and his famous 'face-to-face counter' concept.[36] Levinas was very critical of a society in which people did not properly relate to one another, thus being depersonalised.[37] In '*Totality and Infinity*', Levinas argued that the presence of the face is paramount for 'human fraternity' and a face-to-face encounter is the prerequisite for human communication.[38] It is, however, arguable that effective human interaction is still possible although the face is

[35] Sarah Trotter, "'Living together', 'Learning Together' and 'Swimming Together': *Osmanoğlu and Kocabaş v Switzerland"* (2017) and the Construction of Collective Life' (2018) 18 Human Rights Law Review 157, 160.

[36] See Eva Brems, '*SAS v France*: A Reality Check' (2016) 25 Nottingham Law Review 58, 67.

[37] See Francois-Xavier Millet, 'When the European Court of Human Rights Encounters the Face' (2015) 11 European Constitutional Law Review 408, 417.

[38] Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* (The Hague: Martinus Nijhoff Publishers, 1979) 187-219.

partially or totally concealed.[39] Even if one agrees with Levinas' *philosophical* argument that a face-to-face encounter is the only effective way to create meaningful relationships with others, legal bans on Muslim veiling is still problematic. Forbidding Muslim women to wear full-face veils, on pain of a criminal sanction, 'is a huge step from a postmodern philosophical argument to a criminal prohibition.'[40] In addition, a liberal democratic society should not use criminal law to regulate morality when no significant harm is involved.[41]

Returning to the newly-developed concept of 'living together', it is strongly arguable that this concept lacks sufficient legal basis to restrict the right to manifest one's religion. This is due to the malleable nature of this concept. In *S.A.S.*, the ECtHR itself took an understandably cautious approach to using living together as a justification for restricting the Convention rights because of the "flexibility of the notion of 'living together' and the resulting risk of abuse".[42] The hostility towards the wearing of the Islamic full-face veil in public spaces and its perceived harmful impact on (harmonious) 'living together' is based upon 'social expectations as to how to behave in the society'[43]: "the face plays a significant role in human

[39] Many people appear in social gatherings or public places wearing Santa consumes on Christmas day and face-concealing mask on Halloween. Nobody claims that in such situations effective communication or social interaction is hindered because of unrecognizability.

[40] Brems (n 36) 67.

[41] On morality, harm and criminal law, see Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law (Volume 1)* (Oxford: OUP, 1984); Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others (Volume 2)* (Oxford: OUP, 1988).

[42] *S.A.S*. (n 11) para 122.

[43] Myriam Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*' (2015) 4 Oxford Journal of Law and religion 94, 97.

interaction … [and] [t]he effect of concealing one's face in public places is to break social ties and to manifest a refusal of the principle of 'living together'"[44] because 'individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships'.[45] In fact, face-to-face interaction, maintaining eye contact, handshaking, engaged listening, warm greeting etc. are mere social expectations, not *legal* obligations. Converting social expectations or behavioral norms (e.g. face-to-face encounters) into legal prescription is undesirable and problematic. In this sense, converting the social norm of 'living together' into a legal concept begs many questions. Armin Steinbach notes, "accepting a uniform behavioural rule on the basis of considerations related to the notions of 'living together' lacks sufficient legal ground."[46] Likewise, Hunter-Henin argues, the legal basis of the notion of living together is 'flawed'.[47] It is therefore submitted that the concept of 'living together' has no (or very little) legal basis.

By giving 'particular weight … to the interaction between individuals'[48] in both French and Belgian cases concerning bans on Islamic full-face veils, the ECtHR accepted that 'the barrier raised against others by a veil concealing the face … breach[es] the *right of others to live in a space of socialisation which makes living*

[44] *S.A.S.* (n 11) para 82.

[45] ibid, para 122.

[46] Armin Steinbach, 'Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights' (2015) 4(1) Cambridge Journal of International and Comparative Law 29, 52.

[47] Hunter-Henin (n 43) 96-98. For a contrasting view, see Matthew Nicholson, 'Majority Rule and Human Rights: Identity and Non-identity in *SAS v France*' 67(2) Northern Ireland Legal Quarterly 115, 124.

[48] *S.A.S.* (n 11) para 141; *Dakir* (n 24) Concurring Opinion of Judge Spano Joined by Judge Karakaş, para 3.

together easier.'[49] This suggests that the CoE has now recognised a legal right, endorsed by the ECHR for individuals to be able to socialise in public spaces. It also suggests that barriers to the possibility of such socialisation, such as hiding facial expression of emotions behind Islamic full veils, amounts to an infringement of that right. In commenting on the ECtHR's jurisprudence on Islamic veils, academic commentators have noted that the ECtHR has now created 'a legal right for people to see each other's smile and frowns in public spaces'[50] and a corresponding legal 'duty to engage to some degree in social interaction with fellow citizens.'[51] John Adenitire argues, '[i]t is, however, doubtful that such a general right has ever existed, either as a matter of law or morality … [and] that such a legal duty is desirable specially if its breach is sanctioned by a criminal penalty.'[52] This research upholds Adenitire's view, and the rationale for this is given in the following two paragraphs.

Indeed, it is difficult to argue that there exists a general *legal right* to see the face or facial expressions of an individual (against their wishes). The 'right' to live in a space of socialisation, which is allegedly affected by the covered faces of veil-

[49] *S.A.S.* (n 11) para 122; *Dakir*, (ibid) (emphasis added). It is noteworthy that in its Resolution 2076 (2015) entitled 'Freedom of religion and living together in a democratic society', adopted on 30 September 2015, the Parliamentary Assembly of the CoE has stated that 'the right to freedom of religion safeguarded by Article 9… coexists with the fundamental rights of others and with the right of everyone to live in a space of socialisation which facilitates living together.'

[50] John Adenitire, 'Has the European Court of Human Rights Recognised a Legal Right to Glance at a Smile' (2015) Law Quarterly Review 43, 47.

[51] Hunter-Henin (n 43) 97.

[52] Adenitire (n 50) 47. Juss argues, '[o]ne did not know until [S.A.S.] decision that living in Europe entailed with it a legitimate right to peer into the faces of others in public.' (Satvinder Juss, 'Burqa-bashing and the *Charlie Hebdo* Cartoons' (2015) 26(1) King's Law Journal 27, 30).

wearing Muslim women, suggests that one has some kind of entitlement to demand a face-to-face encounter or social interaction with these women and that this right is unjustly infringed if they decline to interact by uncovering their faces. It also suggests that one can lawfully demand that women forgo their sense of modesty and demands of conscience so that one can interact with them in public places. Amid the Coronavirus pandemic, when the society is changing beyond imagination and new customs and manners are appearing, such as, social distancing and wearing face-masks, the right to live in a space of socialisation means that one can claim that other individuals do not wear face-masks because these coverings allegedly hinder social interaction. However, there are doubts as to whether any such right actually exists. Cox argues, "there are no 'rights' that derive from the concept of *vivre ensemble* [or living together] that encompass an entitlement to demand that other people do not wear face veils" which allegedly makes social interaction harder.[53] It is therefore submitted that an individual cannot claim that they have a general *legal right* to have a society free from barriers to living together where such so-called barriers are created by Islamic veils concealing women's faces. In this sense, the ECtHR's reasoning in *S.A.S.*, *Belcacemi* and *Dakir* is unconvincing, because in these cases the ECtHR restricted the applicants' 'Article 9 right in favour of another right, the existence of which is questionable.'[54] In *S.A.S.*, the dissenting judges rejected the majority's implication of the right to interact with others against their will by stating that 'it can hardly be argued that an individual has a right to enter into contact with other people, in

[53] Neville Cox, *Behind the Veil: A Critical Analysis of European Veiling Laws* (Cheltenham-Northampton: Edward Elgar Publishing, 2019) 240-246.

[54] Gabrilee Elliot-Williams, 'Protection of the Right to Manifest Religion or Belief Under the European Convention on Human Rights in SAS v France' (2016) 5(2) Oxford Journal of Law and Religion 344, 347.

public places, against their will.'[55] Similarly, the HRC has recognised that there is no such right 'to interact with any person in a public space' against their wishes.[56]

If there is a legal right to live in a space of socialisation that makes living together easier, then there must be a corresponding *legal obligation* to make socialisation easier and if there is a right to enter into or attempt to enter into contact with people in public places notwithstanding their wishes to the contrary, then there must be a countervailing *obligation* on the part of the other party to facilitate that contact or attempt at contact.[57] It is unclear, however, on what basis such *legal obligation* might rest. The concept of 'personal autonomy' implies that each individual should be free to decide whether or not they like to engage with others. In liberal democracies, an individual must have the possibility to define their degree of membership in society provided that they do not harm others. If they decide to refrain from interacting other people in public spaces without causing harm, then one must respect that autonomous decision. So, the guiding principles should be personal autonomy and the harm principle. As far as social context is concerned, it is difficult to argue that the negation of sociability by covering one's face with a face-veil causes any significant harm to others.[58] It is clear that in *S.A.S.*, *Belcacemi* and *Dakir* the ECtHR failed to recognise that veiled women have the right *not* to

[55] *S.A.S. v France* App no. 43845/11 (1 July 2014) Joint Partly Dissenting Opinion of Judges Nussberger and Jaderblom, para 8.

[56] *Sonia Yaker v France*, Communication no. 2747/2016, UN Doc. CCPR/C/123/D/2747/2016 (17 July 2018) para 8.10; *Mariana Hebbadj v France*, Communication no. 2807/2016 UN Doc. CCPR/C/123/D/2807/2016 (17 July 2018) para 7.10.

[57] On this point, see Elliot-Williams (n 54) 347.

[58] Ioanna Tourkochoriti, 'The Burqa Ban before the European Court of Human Rights: A Comment on S.A.S. v France' (*I.CONnect*, 9 July 2014) <http://www.iconnectblog.com/2014/07/the-burka-ban-before-the-european-court-of-human-rights-a-comment-on-s-a-s-v-france/> accessed 7 December 2016.

interact with others in public. In *S.A.S.*, dissenting judges Nussberger and Jaderblom pointed out that 'the right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places – the right to be an outsider.'[59] The ECtHR in its jurisprudence on Article 8 has accepted that the right to respect for private life under Article 8 entails the right to exclude 'the outside world',[60] and that the Article 8 right is applicable even in public spaces.[61] In this sense, legally compelling a veil-wearing Muslim woman to interact or socialise with others in public spaces against her wishes is deeply problematic. It begs many questions when the breach of such an undesirable obligation is sanctioned by criminal penalties as in the cases of *S.A.S.*, *Belcacemi* and *Dakir*. Many academic commentators have therefore criticised the ECtHR's findings in these cases. Idriss, for example, observes that '[i]n terms of personal autonomy, the burqa ban violates Article 8 because there exists a general right to be left alone … which the State or others should not allowed to penetrate.'[62]

3.4. Does a Ban on Wearing Islamic Veils on the Grounds of 'Living Together' Satisfy the ECHR Standards?

Placing *S.A.S, Belcacemi* and *Dakir* in context, this section will examine whether a general ban on Islamic veiling on the grounds of social cohesion or living together satisfies the justification test under Article 9 of the ECHR.

---

[59] (n 55) para 8.

[60] *Niemitz* v *Germany* App no. 13710/88 (ECHR, 16 December 1992) para 29.

[61] *Von Hannover v Germany (no. 2)* App nos. 40660/08 and 60641/08 (ECHR, 7 February 2012) para 95.

[62] Mohammad Mazhar Idriss, 'Criminalisation of the Burqa in the UK' (2016) 80 Journal of Criminal Law 124, 135. See also Millet (n 37) 409.

3.4.1. The Legitimate Aim Test

Assuming that the notion of 'living together' has a sufficient legal basis, the ECtHR still needs to decide whether 'living together' may be considered as a valid legitimate aim that might, in principle, justify a restriction of Convention rights. It is, however, difficult to argue that a ban on the grounds of living together satisfies the legitimate aim test within the meaning of Article 9(2); this is explained below.

Compared to Articles 8, 10 and 11 of the Convention, Article 9 specifies a very limited number of grounds restricting the legitimate aims for interference and uses restrictive wording: 'shall be subject *only* to such limitations…'.[63] With regard to the legitimate aims enshrined in Article 9(2), the ECtHR in many cases including *S.A.S.* itself has stated that 'the enumeration of the exceptions to the individual's freedom to manifest his or her religion or beliefs, as listed in Article 9(2), is exhaustive and that their definition is restrictive'.[64] If the list of legitimate aims under 9(2) is *exhaustive*, then one can reasonably argue that the notion of 'living together' cannot be a legitimate aim on its own. This is simply because of the fact that 'living together' (or social cohesion) is not itself contained in Article 9(2). Neither does it expressly correspond with any of the permissible grounds of limitation articulated in Article 9(2) of the Convention.

However, a ban on the grounds of living together may, in theory, still satisfy the legitimate aim test within Article 9 if it can be shown that the concept of living together has a sufficiently strong link to 'the rights and freedoms of others' which

[63] Article 9(2) ECHR (emphasis added).

[64] *S.A.S.* (n 11) para 113; *Svyato-Mykhaylivska Parafiya v Ukraine* App no. 77703/01 (ECHR, 14 June 2007) para 132.

qualifies as a legitimate aim under Article 9(2). In such circumstances, the ECtHR must interpret the 'living together' justification as falling within the broad 'protection of the rights and freedoms of others', which can be found in this provision. The ECtHR effectively did this in *S.A.S.*, *Belcacemi* and *Dakir*.

In *S.A.S.*, the ECtHR held that "under certain conditions the 'respect for the minimum requirements of life in society' referred to by the Government or of 'living together' … can be linked to the legitimate aim of the 'protection of the rights and freedoms of others'."[65] An important point merits special attention here. In *Belcacemi* and *Dakir*, Belgium Government, unlike the French Government, did not refer to 'living together' as 'respect for the minimum requirements of life in society' originating from 'respect for the minimum set of values of an open and democratic society'. Rather, they invoked 'living together' as a stand-alone legitimate aim stating that the wearing of Islamic full-face veils "undermined the very essence of the principle of 'living together'."[66] However, the ECtHR was still prepared to accept that the Belgian bans pursued the legitimate aim of 'living together' under the protection of the rights and freedoms of others. The ECtHR regarded 'living together' "as an element of the 'protection of the rights and freedoms of others'."[67]

It is argued that the ECtHR conclusion that the French and Belgian bans pursued the legitimate aim of 'living together' within the broad justification of the 'protection of the rights and freedoms of others' is unconvincing. Given that gender equality and human dignity arguments failed for *not* fulfilling a legitimate aim in

[65] *SAS* (n 11) para 121.

[66] *Dakir* (n 24) para 29; *Belcacemi* (n 23) para 40.

[67] *Dakir* (n 24) para 51; ECtHR's Press Release (n 34).

S.A.S.,[68] questions arise in relation to how the ECtHR reached the conclusion that the 'living together' argument was in pursuit of the legitimate aim of the protection of the rights and freedoms of others.

Surprisingly, the ECtHR in *S.A.S, Belcacemi* and *Dakir* did not offer a clear explanation as to how the phrase 'rights and freedoms of others' captured the vague concept of 'living together'. The only explanation given by the ECtHR in these cases was that the wearing of the Islamic full-face veils in public places breaches 'the right of others to live in a space of socialisation' because faceless communication would be tantamount to a violation of the right to live in an environment facilitating living together. Such reasoning of the Court may raise two questions which the Court does not address: (a) what rights do others have? (b) what is the nature of those rights?

There is no specific category of rights or interests that may qualify as the rights and freedoms of others.[69] However, as Bomhoff notes, 'the specific use of the phrase *rights* rather than *interests* in the limitation clause, and the presumption in favour of fundamental rights protection inherent in the whole set-up of the Convention' clearly suggests that not all individual interests can qualify for inclusion under the rights of others.[70] In paragraph 122 of *S.A.S.* judgement, the majority recognised

[68] *S.A.S.* (n 11) paras 119-120.

[69] In *S.A.S.,* the dissenting judges admitted that "the Court's case-law is not clear as to what may constitute 'the rights and freedoms of others' outside the scope of rights protected by the Convention."((n 55) para 5).

[70] Jacco Bomhoff, 'The Rights and Freedoms of Others: The ECHR and its Peculiar Category of Conflicts between Fundamental Rights' in Eva Brems (ed), *Conflicts Between Fundamental Rights* (Antwerp- Oxford: Intersentia, 2008) 624 (emphasis in the original). See also Jill Marshall, '*S.A.S. v France*: *Burqa* Bans and the Control or Empowerment of

the public interest in having public spaces free from practices 'which would fundamentally call into question the possibility of open interpersonal relationships'. In the next sentence of the same paragraph they stated that '[t]he Court is therefore able to accept that the barrier raised against others by a veil concealing the face … breach[es] the right of others to live in a space of socialisation which makes living together easier.' This is absurd. The ECtHR's ruling, that allowing Islamic full-face veils in public spaces infringes the *right* of others to live in a space of socialisation stretches the term 'right' to cover a rather intangible and elusive 'public interest'.[71] However, it is well recognised that the subjects of protection within the meaning of rights of others are individual rights, *not* general public interests. Steinbach argues, with regards to Article 9(2) of the ECHR, the 'rights of others include rights granted by national legal norms (both constitutional and other norms of lower rank) and rights accruing from the ECHR; they must be stipulated by law. There is thus no caveat for considerations rooted in general public interest making a restrictive interpretation of the grounds of justification necessary.' Therefore, Steinbach has criticised the Court's expansion of grounds for justification 'to general public interest considerations' in order to restrict a minority practice.[72] Similarly, Stephanie Berry has criticised the ECtHR for accepting that the prohibition on wearing the Islamic full-face veils pursues the legitimate aim of

Identities' (2015) 15(2) Human Rights Law Review 377, 385.

[71] See Eoin Daly, 'Fraternalism as a Limitation on Religious Freedom: The Case of *SAS v France*' (2016) 11 Religion and Human Rights 140, 144; See also Zia Akhtar, 'Court Evidence, "Veils" and the Human Rights Defence' (2017) 181 JPN 830, 833.

[72] Steinbach (n 46) 44-45.

'living together' under the banner of the 'protection of rights and freedoms of others'.[73]

A closer inspection of the ECtHR's ruling in *S.A.S.*, *Belcacemi* and *Dakir* makes clear that the majority's preference for open face communication rather than faceless communication for the establishment of human relations has been uncritically accepted by the ECtHR as 'the rights and freedoms of others'. Arguably, the underlying reason for the majority's preferences for face-to-face encounters is based upon on a 'behavioural norm' of the society: you must uncover your face during verbal or non-verbal communication. In *Dakir*, judge Spano and Judge Karakaş highlighted that "[t]he requirement of 'living together' has its ideological basis in some kind of societal consensus or a majoritarian morality of how individuals should act in the public spaces."[74] However, it is argued that the behavioural norms of society (e.g. open-face communication, recognisability of faces) deduced from the concept of 'living together' do not constitute an *individual right* as required for interference with religious freedom to protect 'the rights and freedoms of others'. Academic commentators have noted that the "subject of protection within the meaning of the 'rights of others' are individual rights, while vague notions of behavioural norms of society or considerations related to the general public interest do not qualify."[75] This suggests that a mere behavioural custom adapted in the majority part of society does *not* qualify as an individual right to fall under the banner of 'rights of others'. Therefore, Vickers has argued that

[73] Stephanie Berry, 'SAS v France: Does Anything Remain of the Right to Manifest Religion?' (*EJIL: Talk*, 2 July 2014) <https://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/> accessed 30 December 2015.

[74] *Dakir* (n 48) para 7.

[75] Steinbach (n 46) 45; Idriss (n 62).

living together 'must surely be one of the weakest of legitimate aims identified by the court' under the Convention.[76] In their dissenting opinion in *S.A.S.*, Judges Nussberger and Jaderblom heavily criticised the majority's judgement for accepting living together as a justifiable aim to restrict the Convention rights. They argued that the idea of living together is 'very general'[77], 'far-fetched and vague'[78] and it is unclear 'which concrete rights of others' this concept aims to protect.[79] They further argued that the 'concrete individual rights' protected by the ECHR were 'sacrificed' in the majority judgement to the 'abstract principles'.[80] Likewise, in *Dakir*, Judge Spano and Judge Karakaş stated that "[i]t is far from self-evident that it can be legally tenable to interpret the legitimate aim of the rights and freedoms of others to include the concept of 'living together' in … factual situations where the State wishes to regulate human behaviour thereby restricting Convention rights."[81] Similarly, the HRC has rejected living together as a legitimate ground for the limitation of religious freedom because it cannot be a part of the fundamental rights and freedoms of others under Article 18 ICCPR.[82] It is therefore submitted that that the protection of 'living together' cannot be regarded as a legitimate dimension of the 'rights and freedoms of others' capable of justifying restrictions on the right to religious manifestation under Article 9 of the Convention.

---

[76] Lucy Vickers, 'Conform or be Confined: S.A.S. v France' (*Oxford Human Rights Hub*, 8 July 2014) <http://ohrh.law.ox.ac.uk/conform-or-be-confined-s-a-s-v-france/> accessed 23 January 2017.

[77] (n 55) para 5.

[78] ibid, para 5.

[79] ibid, para 10.

[80] ibid, para 2.

[81] (n 48) para 5.

[82] *Hebbadj* (n 56) para 7.10.

It is further submitted that by accepting that the concept of living together "can be linked to the legitimate aim of the 'protection of the rights and freedoms of others'"[83] (*S.A.S.*) and that this concept can "be regarded as an element of the 'protection of the rights and freedoms of others'"[84] (*Dakir*, *Belcacemi*) the ECtHR has contradicted itself because it had previously stated that the permissible grounds of limitation 'must be narrowly interpreted'.[85] If the permissible grounds of limitation are to be narrowly interpreted, then why read into the 'rights and freedoms of others' so broadly to include the vague and under-defined concept of 'living together'? One specific point warrants some consideration here. Should an interpretation of the so-called legitimate aim of 'living together' fall exclusively within a respondent State's MoA? No. It is true that, the ECtHR afforded a wide MoA to France and Belgium. However, the margin cannot be used to extend the wording of the Convention or to create a new category of justification for violations of fundamental rights.[86]

In summary, a ban on Islamic veiling on the grounds of 'living together' may *not* satisfy the legitimate aim test because the 'far-fetched and vague'[87] concept of 'living together' is neither listed as a permissible ground of limitation under Article

[83] *S.A.S.* (n 11) para 121.

[84] *Dakir* (n 24) para 51.

[85] *Sidiropoulos and Others v Greece* App no. 57/1997/841/1047 (ECHR, 10 July 1998) para 38. In *Feldbrugge v The Netherlands*, the dissenting judges stated that *'*[a]n evolutive interpretation allows variable and changing concepts already contained in the Convention to be construed in the light of modern-day conditions, but it does not allow entirely new concepts or spheres of application to be introduced into the Convention'. (App no. 8562/79 (ECHR, 29 May 1986) Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt And Gersing, para 24).

[86] On this point, see Steinbach (n 46) 52.

[87] (n 55) para 5.

9(2) on its own nor does it directly fall under the 'protection of the rights and freedoms of others' which is listed there. Therefore, one can argue that, in relation to the 'living together' argument, the ECtHR should have concluded that the French and Belgian bans did not pursue any legitimate aim, and thus failed to satisfy the legitimate aim test under Article 9 ECHR.

3.4.2. The Necessity Test

Assuming that a ban on wearing Islamic veils, enacted on 'living together' grounds, pursues the legitimate aim of the 'protection of the rights and freedoms of others', in order for Article 9(2) to be satisfied, the ECtHR would still have to examine that the restrictive measure in question is proportionate to that aim. The crucial question, however, is does a blanket criminal prohibition on wearing Islamic veils satisfy the proportionality test under the Convention? Placing *S.A.S., Belcacemi* and *Dakir* in context, this sub-section will argue that a blanket ban on the grounds of 'living together' may not satisfy the necessity test within the meaning of Article 9(2).

3.4.2.1. Who Does the Law Target?

To assess the proportionality of the Islamic full-face veil ban in France in the case of *S.A.S.*, the ECtHR stated that the ban 'does not affect the freedom to wear in public any garment or item of clothing – with or without a religious connotation – which does not have the effect of concealing the face.'[88] It took a similar approach in *Dakir*.[89] Thus, the ECtHR found a 'clever way'[90] to loosen the proportionality

[88] *S.A.S.* (n 11) para 151.

[89] *Dakir* (n 24) para 58.

[90] Brems (n 10).

assessment. It is, however, argued that while the terms of the Islamic full-face veil ban in France were neutral, the explanatory notes attached to the legislation and the nature of political debates reveal that it was enacted with the sole aim of targeting Muslim women who wore the *burqa* and *niqab*.[91] As far as the Belgian bans are concerned, although the wording of the relevant provisions does not explicitly refer to the Islamic dress, the political discourse, parliamentary discussions and media coverage leaves no room for doubt that these bans targeted a small minority of Muslim women who wore the Islamic full-face veils in public.[92] Against this background, it is implausible for the Court simply to hold that French and Belgian bans are not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face. Even though one accepts the Court's observation that French and Belgian bans did not directly target religious dress or any specific religion, one question would still remain unanswered: why did the Court afford a wide MoA to the respondent States by stating that '[w]ith regard to Article 9 of the Convention, the State should … be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is necessary'?[93] The answer to this question cannot be found in the *S.A.S.*, *Belcacemi* and *Dakir* rulings.

[91] For a more detailed discussion on this, see Syring (n 11) 1025-1026; Adenitire (n 50) 45.

[92] Eva Brems et al., 'The Belgian 'Burqa Ban' Confronted with Insider Realities' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge: CUP, 2014) 78.

[93] *S.A.S.* (n 11) para 129; *Dakir* (n 24) para 54.

3.4.2.2. The Lightness of Criminal Sanctions

The ECtHR concluded that restrictions imposed on the exercise of Article 9 right due to the prohibitions on wearing full-face veils in France and Belgium were justified and proportionate because of the light sanctions provided for by the French and Belgian laws. In *S.A.S.*, the ECtHR stated that the Islamic full-face veil ban in France was justified as 'the sanctions provided for by the Law's drafters are among the *lightest* that could be envisaged, because they consist of a fine at the rate applying to second-class petty offences (currently 150 euros maximum) with the possibility for the court to impose, in addition to or instead of the fine, an obligation to follow a citizenship course.'[94] With regard to the Islamic full-face veil ban in Belgium, the ECtHR noted that the 'offence', which is constituted due to the concealment of the face in places that are accessible to the public, is classified as a 'hybrid offence' in Belgian law (partly under criminal law and partly administrative law). The sanction for the non-compliance with the restriction could range from a fine (which the Court considers as 'slightest penal sanction'[95]) to a prison sentence of up to one to seven days (which the Court considers as 'heavier penalty'[96] and is reserved for repeat offenders *only*). Consequently, the ECtHR conceded MoA to the Belgian Government and showed its usual reluctance to scrutinise the proportionally of using criminal sanction in the enforcement of restrictions on the rights of women choosing to wear the Islamic veil: 'it is … for the national courts to decide on the severity of sanctions that can be imposed in the specific circumstances of each case and to ensure that the sanction is in compliance with the principle of

[94] *S.A.S.* (n 11) para 152 (emphasis added).

[95] *Belcacemi* (n 23) para 57.

[96] ibid.

proportionality'.[97] This thesis submits that the 'lightness' of the criminal sentence, a factor which had been taken into account by the ECtHR in assessing the proportionality of French and Belgian bans and in upholding underserved restrictions on religious freedom, is problematic.

A liberal democratic regime must not punish a woman for wearing the Islamic veil as long as her religious practice in question does not cause harm to others. Put differently, if veiling does not present a danger in itself, then criminal conviction for Muslim women who voluntarily wear the veil is unlawful, immoral, and thus a serious wrong. Undoubtedly, the lightness of the sanctions does not remove the wrongfulness of such an unlawful punishment. Hunter-Henin notes, '[h]eavy sanctions may be the downfall of a justified ban but light sanctions cannot save an unjustified prohibition.'[98] Even though the punishment for the offence of wearing Islamic full-face veils in public places is primarily a fine only, the slightest penal sanction, the light character of the sanctions is not so straightforward because, as the dissenting judges rightly stated in *S.A.S.* that 'where the wearing of the full-face veil is a recurrent practice, the multiple effect of successive penalties has to be taken into account.'[99] It is also arguable that, irrespective of the heaviness of the punishment or the amount of fine, a *criminal* punishment, for wearing a veil, in itself can be a very embarrassing experience for a Muslim woman because she is treated (and declared) as a criminal in public for her behaviour. The ECtHR itself has acknowledged that 'being prosecuted … is traumatising for women who have chosen to wear the full-face veil'.[100] Indeed, a criminal conviction, however light,

[97] ibid, para 60; *Dakir* (n 48) para 12.

[98] Hunter-Henin (n 43) 108.

[99] (n 55) para 22.

[100] *S.A.S.* (n 11) para 152.

may have profound implications on a Muslim woman's ability to lead a stress-free life, because it might adversely affect her employment (i.e. job applications), immigration (i.e. travelling abroad) and so forth. Therefore, Brems has criticised the ECtHR's findings by stating that 'when citizens' regular behavior that used to be ignored by the law, is turned into an offence, the amount [of fine] is secondary, it is the criminalisation that matters.'[101]

3.4.2.3. The Number of Muslim Women Using Islamic Full-face Veils

It seems that in upholding the proportionality of the French and Belgian bans, the ECtHR did not take into account the total number of full-veil wearing women in France and Belgium. According to the report of 'On the wearing of the full-face veil on national territory', there were only 1,900 *burqa* or *niqab*-wearing women in France (of whom approximately 270 were living in French overseas administrative areas) by the end of 2009 within a Muslim population in France of 4.7 million.[102] This was approximately 0.0004% of the relevant population; a ratio less than 1 in 2500. As far as Belgium is concerned, fewer than 300 Muslim women are estimated to wear full veils out of the country's 375,000 Muslims.[103] This suggests that an average person would encounter a *burqa* or *niqab*-wearing woman only in an extremely rare occasion and thus, the possible threat to the social harmony that these women allegedly pose is extremely limited. With the small number of women wearing full-face veils in France and Belgium in mind, the ECtHR should have

[101] Brems (n 10).

[102] This report was published in January 2010.

[103] Amnesty International, 'Choice and Prejudice: Discrimination against Muslims in Europe' (2012) p.92 <https://www.amnesty.org/download/Documents/20000/eur010012012en.pdf> accessed 10 December 2019; Ilias Trispiotis, 'Two Interpretations of 'Living Together' in European Human Rights Law' (2016) 75(3) Cambridge Law Journal 580, 586-588.

concluded that the impact of wearing Islamic full-face veils in public spaces on 'living together' was minimal. In *S.A.S.*, the Court acknowledged that a blanket ban may be an 'excessive'[104] response given the very small number of women wearing the full-face veil in France. That being said, the Court contradicted itself by concluding that bans in France and Belgium were proportionate responses to the aim of living together.

3.4.2.4. Breadth of the Ban

It is argued that, the scope of the French and Belgian bans on wearing full-face veils were broader than necessary for the purpose intended to achieve. The ECtHR acknowledged this in *S.A.S.* and *Dakir* stating that 'it is true that the scope of the ban is broad'.[105] Indeed, the Islamic full-face veil bans in France and Belgium, even the local ban in Belgium, covered almost all public areas and so could criminalise Muslim women going about their day-to-day business: taking children to the school, going to see a doctor in a private clinic, or returning home from work at midnight. Assuming that a ban on wearing the Islamic full-face veils is necessary to facilitate verbal or face-to-face communication or to promote social integration; nevertheless, social cohesion does not require a ban on full-face veils in *all* public spaces at *all* times. There are many situations in public places where the relationship between a veiled Muslim woman and an uncovered person is so superficial that an effective facial communication is rarely necessary. To illustrate, if a *niqab*-wearing woman walks alone at midnight on a local road where only few pedestrians are present, there is no need to force her remove the veil on the

[104] *S.A.S.* (n 11) para 145.

[105] ibid, para 151; *Dakir* (n 24) para 58.

grounds of living together as she does not need to interact verbally or non-verbally with other pedestrians. Similarly, when a veiled woman goes to a public library to borrow books, she does not need make a verbal communication with the librarian(s) or other library users, provided that she is using a self-service machine instead of using counter services to borrow the books. Thus, one can persuasively argue that a face-to-face encounter is not needed in all public places and at all times.

It is therefore submitted that a blanket ban on wearing Islamic veils in all public places open to the general public, would be highly unlikely to satisfy the proportionality test under the Convention because a partial ban which is limited only to certain places, for example, where face-to-face communication is necessary, could accomplish the aim of living together. With regard to blanket bans, Cumper and Lewis have argued that 'a broadly framed law which is designed to pursue a particular legitimate goal, but casts its net so wide as to interfere with human rights and takes no account of the circumstances of the individual appears to be disproportionate: the less fact-sensitive a measure is, the less likely it is to be found substantively proportionate.'[106] The ECtHR itself has acknowledged that 'a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate.'[107] It is a pity that despite admitting this, the Court came to the conclusion that bans in France and Belgium were compatible with the ECHR standards.

[106] Peter Cumper and Tom Lewis, 'Blanket Bans, Subsidiarity and the Procedural Turn of the European Court of Human Rights' (2019) 68 ICLQ 611, 630.

[107] *S.A.S.* (n 11) para 147.

The most-far reaching ban on the wearing of religious symbols to have been considered by the ECtHR prior to *S.A.S., Belcacemi* and *Dakir* was *Ahmet Arslan and Others v Turkey*,[108] another case which involved a ban on the wearing of certain religious clothing in public places. In *Arslan*, the ban was held to be a disproportionate interference with religious freedoms, because the scope of the ban was too wide. The Court observed that there was a difference between prohibiting religious dress in all public places, including roads that are accessible to all and prohibiting religious dress in State schools and public institutions where religious neutrality might take precedence over the free exercise of the right to manifest one's religion.[109] *Arslan* suggests that a blanket ban in *all* public places as in *S.A.S., Belcacemi,* and *Dakir* is an extreme measure and disproportionate. In fact, the factors that influenced the ECtHR to find a violation of Article 9 in *Arslan* were also present in *S.A.S., Belcacemi,* and *Dakir*: the restriction on wearing religious clothes in ordinary places against ordinary people. Therefore, it is argued that Court should have transported the reasoning of *Arslan* in these cases and reached the conclusion that bans in France and Belgium were disproportionate to the aim pursued.

To summarise the above discussion regarding the necessity test, proportionality analysis requires the Court to consider all circumstances of the case and pay attention to the effects of the restrictive measure on the free exercise of the rights. In a recent case, *Ibragim Ibragimov and Others v Russia*, the ECtHR has stated that 'in exercising its supervisory jurisdiction … what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine

[108] App no. 41135/98 (ECHR, 23 February 2010).

[109] ibid, para 49.

whether it was 'proportionate to the legitimate aim pursued'".[110] However, based on the foregoing analysis, it is possible to underline that the ECtHR did not consider *all* relevant circumstances in its proportionality analysis in *S.A.S.*, *Belcacemi* and *Dakir*, and thus failed to carry out a rigorous proportionality analysis with regard to the French and Belgian bans. The ECtHR chose certain factors, in particular the MoA, in its proportionality analysis that favoured the respondent States and completely overlooked some important factors (e.g. the particular segment of the population that was the actual target of anti-veiling laws, the harmfulness of criminal punishments, the number of women wearing Islamic full-face veils, scope of the bans) which would surely lead the Court to conclude that the restrictive measures were disproportionate. One can reasonably argue that had the ECtHR given greater scrutiny to the proportionality of the bans in *S.A.S*, *Belcacemi* and *Dakir* cases, it would have found that blanket criminal prohibitions on wearing Islamic full-face veils in France and Belgium to pursue the aim of 'living together' were unnecessary in a democratic society under Article 9(2).

The following section will argue that rather than facilitating living together, a prohibition on Muslim veiling increases societal division between Muslim community and the mainstream society, and thus ultimately harms harmonious coexistence.

[110] App nos. 1413/08 and 28621/11 (ECHR, 28 August 2018) para 97.

3.5. Bans on Veiling, Harm, and Living Together: A Reality Check in Light of Empirical Studies

It is submitted that bans or limitations on wearing Islamic veils exacerbate the division between Muslim women and non-Muslim people in a society, and thus harm social harmony. As will be shown in Chapter Five, based on the empirical evidence from a number of studies in a range of countries, that the vast majority of Muslim women who wear Islamic veils in many European countries do so voluntarily as part of their religious belief.[111] This is not to deny that some Muslim women are coerced into wearing some form of Islamic dress by their families. For many women who wear veils willingly and voluntarily, the practice of veiling is associated with their modesty, and they sincerely believe that veiling is the only way in which a decent and God-fearing Muslim woman should appear in public. Masood Khan notes, many Muslim 'women use veiling as a tool to further their own interests in a society where they have no other means of doing so. In this way, veiling provides women with an opportunity to have access to public sphere of society which otherwise is inaccessible to them.'[112] A law or regulation, which prohibits or governs the wearing of Islamic veils in the public sphere, pressurises pious Muslim women (i.e. who habitually wear veils in public) to stay home and to avoid public places.[113] Thus, anti-veiling laws create or exacerbate the polarisation

[111] See Section 5.2.

[112] Masood Khan, 'The Muslim Veiling: A Symbol of Oppression or a Tool of Liberation?' (2014) 32 UMASA Journal 1, 3.

[113] Accordingly, one may argue that a ban on Muslim veiling violates the right to respect for private life under Article 8 of the ECHR because it hinders a woman's ability to establish a social life and to develop relationships with others outside the inner circle of the home. (*Niemitz* (n 60) para 29). Further discussion about the impact of a ban on a woman's Article 8 right is beyond the scope of this research.

between the mainstream society and the Muslim community, leading to the isolation of veil-wearing Muslim women in the society. There is ample evidence to support his view; and this is detailed below.

The Open Society Justice Initiative's empirical study '*After the Ban: The Experiences of 35 Women of the Full-Face Veil in France'* (hereinafter "*After the Ban* report") has documented the effects of the Islamic full-face veil ban in France on Muslim women who wore full-face veils prior to the ban. A significant majority of interviewees stated that they went out less often than before the implementation of the ban and thus had become less sociable than what they were before the ban. *After the Ban* report states:

> The research shows that a clear majority of women substantially reduced their outdoor activities, including taking their children to school, family outings, shopping, and going to the post office. Many respondents described their perception of living 'in a jail' since the ban's enforcement.[114]

The Open Society Foundations' sociological study '*Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France*' (hereinafter "*Unveiling the Truth* report") was carried out just before the Islamic full-face veil ban in France came into force. This study revealed that criminal prohibitions on full-face veil further marginalise an already unpopular minority, namely the Muslim, and undermine rather than facilitate societal cohesion. According to the *Unveiling the Truth* report:

[114] Open Society Justice Initiative, 'After the Ban: The Experiences of 35 Women of the Full-Face Veil in France' (2013) p.8 <https://www.justiceinitiative.org/uploads/86f41710-a2a5-4ae0-a3e7-37cd66f9001d/after-the-ban-experience-full-face-veil-france-20140210.pdf> accessed 17 November 2018.

> A majority of respondents said that [once the ban is implemented] their ideal solution for the future was to leave France and settle in a Muslim country. … A couple of interviewees also mentioned the United Kingdom, which they consider to be more tolerant towards Muslims than France. … Of more concern was the fact that many respondents said that they would avoid, as much as possible, going outside.[115]

The results of an empirical study conducted by Eva Brems and others in Belgium reveal that women voluntarily practising veiling state that they will live a less social life if they are prohibited from wearing the veil, because they will not feel at ease in a number of circumstances. Some interviewees stated that veiling gave them 'more freedom' to 'go out more'.[116] The Human Rights Watch undertook an empirical research regarding restrictions on female civil servants and schoolteachers wearing the headscarf in Germany, and the consequences of these restricted measures. It concluded that:

[115] Open Society Foundations, 'Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France' (2011) p.73 <https://www.opensocietyfoundations.org/sites/default/files/a-unveiling-the-truth-20100510_0.pdf> accessed 20 September 2016.

[116] Brems et al. (n 92) 96-101. It is noteworthy that, this study reflects the experiences of twenty-seven women in Belgium who wore full veils. This study consists of twenty-seven interviews conducted between September 2010 and September 2011 and two focus group discussions in April and May 2012. Fourteen interviewees were conducted before the adoption of the Islamic full-face veil ban in Belgium and thirteen after the adoption.

> [B]anning the headscarf is the worst possible policy response to the need to bring people into mainstream society. Our research showed that the ban serves to exclude, rather than include. Many women we talked to felt alienated by the bans, even though some had lived in Germany for decades or even their entire lives.[117]

Therefore, there is credible evidence to argue that blanket bans on wearing Islamic veils in public spaces rather than promoting social harmony and avoiding segregation and separation can have the opposite effect: a ban may stop pious, veil-wearing women from taking part in society, leaving the house, getting jobs or going to educational institutions. Thus, it is safe to argue that a ban may have profound, negative effects on Muslim women's lives because it hinders their ability to go out leading to the deterioration of their social lives, dictates to them in a discriminatory way how to behave and dress in public spaces, and prevents them from living a life of their own choosing. The ECtHR has acknowledged this danger in *S.A.S.*: 'there is no doubt that the ban has a significant negative impact on the situation of women who … have chosen to wear the full-face veils … [because] the ban may have the effect of isolating them and restricting their autonomy'.[118] Academic commentators have argued that a ban on the grounds of living together may not achieve the desired result because, in reality, it reduces the social interaction of Muslim women who, despite the ban, do not wish to go out uncovered. Howard states, rather than facilitating societal cohesion, 'bans can have the opposite effect: the polarisation between the majority and the Muslim

[117] Gauri van Gulik, 'Headscarves: The Wrong Battle' (14 March 2009) <https://www.hrw.org/news/2009/03/14/headscarves-wrong-battle> (accessed 4 September 2016).

[118] *S.A.S.* (n 11) para 146.

community gets aggravated and the majority community gets less tolerant.' She further states, "banning full-face veils might equally be seen as going against the 'living together'".[119] Likewise, Adenitire argues, a ban on Islamic veiling 'is itself a barrier to 'living together'."[120] Therefore, this thesis submits that an anti-veil law, which is enacted on the grounds of social cohesion, cannot be expected to have the desired effect of promoting integration and social harmony. Conversely, the restrictive measure may harm veil-wearing women by undermining their personal autonomy and preventing them from integrating in the mainstream society. It may also harm society more generally, by frustrating social interaction between veiled women and followers of mainstream religions.

One further matter warrants particular attention. As indicated above, some Muslim women are coerced into wearing veils by their male family members. Does a ban on Islamic veils help these women to integrate? Perhaps, not. A ban on veiling might have the effect of further oppression by stopping these women from leaving home at all. Therefore, a ban may isolate them from society entirely. Teresa Sanader writes, 'a ban on wearing the full veil in public might produce counter-productive effects for women who are forced into wearing the *niqab* or *burqa*: they stay at home instead of being able to integrate themselves by means of education or employment.'[121]

---

[119] Erica Howard, 'S.A.S. v France: Living Together or Increased Social Division' (*EJIL: Talk,* 7 July 2014) <https://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/> accessed 4 March 2017.

[120] John Adenitire, 'SAS v France: Fidelity to Law and Conscience' (2015) *European Human Rights Law Review* 78, 85-86.

[121] Teresa Sanader, 'S.A.S. v France – the French principle of "living together" and the limits of individual human rights' (*LSE Human Rights Blog*, 14 July 2014) <http://blogs.lse.ac.uk/humanrights/2014/07/14/s-a-s-v-france/> accessed 3 March 2016.

Another obvious consequence of anti-veiling laws is the increase of harassment and abuse directed towards veil-wearing Muslim women in public places by anonymous people. The harmful effect of a ban as a catalyst of serious street harassment against veil users has been documented in the sociological study by the Open Society Justice Initiative on the effects of the Islamic full-face veil ban in France. Its findings indicate that Muslim women who are habitually attached to the veil, (will) continue to wear it despite the ban. According to the *After the Ban* report:

> Verbal abuse and harassment by members of the public is still a very common experience for the respondents who have chosen to continue wearing their full-face veil. [The interviewees] reported physical assaults such as having their veil pulled off, being violently pushed or spat on. The ban and public discourse seems to have implicitly legitimized the abusive treatment of veiled women. … [T]he women's testimonies reveal that some members of the public seem to think the law allows for or legitimizes private enforcement.[122]

Empirical research thus suggests that a general ban in public places on wearing Islamic veils may result in *inter alia*, hate crime, physical assault, verbal abuse and harassment by the members of public, specifically targeting Muslim women. These incidents will ultimately harm Muslim women who choose to wear a veil in times of growing Islamophobia in Europe. If veil-wearing Muslim women are fearful of being subjected to abuse in public spaces, then they will avoid going out as much as possible,[123] which will seriously harm the societal cohesion by increasing alienation and marginalisation. Furthermore, practically thinking, it is unreasonable

[122] (n 114) 14.

[123] Empirical findings suggest that some veil-wearing women avoid 'certain activities outside the house' or avoid 'as much as possible to go out on their own, because of fear of aggressive reactions of others'. See Brems et al. (n 92) 96.

to expect that a victimised woman would socially interact with an abuser or create a hospitable relationship with those individuals who intensely dislike the presence of Islamic veils in the public places.

One final matter warrants detailed exploration. The anti-veil legislation in France and Belgium had been enacted 'on the basis of the assumption', *inter alia*, that by wearing the *burqa* and *niqab* Muslim women were distancing themselves from others and showed that they did not want to interact.[124] However, empirical findings, do not confirm the idea that by wearing full-face veils Muslim women signal their withdrawal from society or their unavailability for social interaction. *Unveiling the Truth* report and Eva Brems' empirical research in Belgium revealed that women who wore the full-face veils in France and Belgium before the bans came into force were happy to be socially active publicly and to integrate with mainstream society. The empirical data also revealed that many people in the public, particularly the people of the dominant religion, did not want to interact with veiled women, and that these women were the subject of regular verbal abuse in public spaces.[125] The findings of these sociological studies align with the findings of Pew Research Centre. A recent research by Pew clearly suggests that a vast majority of European people, particularly those who identify themselves as Christian, hold negative views towards Muslims and Muslim women's religious attire.[126] Essentially, the widespread debates surrounding bans on Islamic veiling in Western society are the result of intolerance, namely from those who do not like

[124] On this point, see *S.A.S.* (n 11) para 95.

[125] Brems et al. (n 92); *Unveiling the Truth* report (n 115).

[126] Pew Research Centre, 'Being Christians in Western Europe' (2018) <http://www.pewforum.org/wp-content/uploads/sites/7/2018/05/Being-Christian-in-Western-Europe-FOR-WEB1.pdf> accessed 3 December 2018.

the idea of veiling and intensely feel that this religious practice is incompatible with the values of 'our' society and, are therefore, undesirable in 'our' society. While this is the real scenario of contemporary European society, it is arguable that people within mainstream society should show their tolerance towards disadvantaged veil-wearing Muslim women who are already experiencing widespread discrimination. In other words, mainstream society needs to make a greater effort to interact with veil-wearing Muslim women. The UN Special Rapporteur Ahmed Shaheed states, 'ensuring the right to freedom of religion or belief for all persons reduces conflict involving religion or belief, thereby better facilitating social cohesion.'[127] It is therefore argued that instead of enacting anti-veil legislation, governments should create a positive and friendly environment, enabling Muslim women to integrate socially, politically, and culturally. A truly free and liberal society should accommodate a wide range of customs, beliefs, and codes of conduct, and should not eliminate pluralism from the social sphere by erasing the unpopular religious practices of individuals belonging to minority communities.

3.6. Can a Minority Religious Practice be Prohibited because the Majority of the Society *Dislike* It? A Millian Approach

As discussed previously, emotional distress does not count as harm under the harm principle and therefore a society has no legitimate authority to interfere with an individual's voluntary action if there is no evidence of definite damage or definite

[127] UN Doc. A/73/362 (5 September 2018) para 11.

risk of damage to others apart from their distress.[128] This point will be elaborated here in relation to religious practices of persons belonging to *minority* religion.

A mere dislike does not constitute harm in itself because by implication, harm is never properly defined to include mere dislike without any other evidence of damage. The worshipping of a cow by a Hindu man[129] is, generally speaking, a self-regarding conduct because such conduct does not by itself cause other persons any perceptible damage, such as physical injury or loss of property.[130] However, other persons who have different religious beliefs may dislike this sort of religious practice or activity (and, to this end, they may feel compelled to avoid the Hindu man). The dislike is self-induced as it depends completely on their own attitudes; it is not the direct consequence of the Hindu man's self-regarding conduct, as others with more tolerant attitudes do not experience such distress or emotional disturbance. In addition, the persons who are claiming to have been affected by the sight of a Hindu man worshipping the cow do not have a right to be protected from the distress occasioned by the fact that one is doing something they dislike. If an action does not cause another person's perceptible damage apart from generating mere emotional disturbance, then a society cannot justifiably use its coercive power to constrain individual liberty under Mill's harm principle. In commenting

[128] See Section 2.2, Chapter Two.

[129] According to Hinduism, cows are the 'most sacred of animals' and 'symbol of divine'. For more discussion on this and cow worshipping, see Xenia Zeiler, "Benevolent Bulls and Baleful Buffalos: Male Bovines versus the 'Holy Cow' in Hinduism" in Celia Deane-Drummond (eds), *Animals as Religious Subjects: Transdisciplinary Perspectives* (London: Bloomsbury, 2013) 128.

[130] Cow worshipping may become an other-regarding conduct when it poses a risk (e.g. spread of tuberculosis) to the health of another person. On this point, see *Suryanda v The Welsh Ministers* [2007] EWCA Civ 893.

upon the harm principle, Jonathan Riley stated that "[i]n my view Mill takes for granted that 'mere dislike' (that is, no perceptible damage beyond the relevant individual's emotional distress or expression of dislike) in not properly defined as harm in any civilized society."[131] Applying the harm principle to the self-regarding religious activities of persons belonging to *minority* religion, one can argue that Millian theory prohibits society's interferences with religious activities, of which the only effect on others is to cause mere dislike or emotional disturbance since such practices are considered offensive or threatening to the majority faith. If a State prohibits a religious practice of persons belonging to a minority on account that such practice causes emotional distress or feelings of offensiveness to the 'majority' (whom Mill has described as the 'most numerous or the most active part of the people') then such an interference may constitute, to use Mill's words, 'the tyranny of the majority'.[132] This argument can be further strengthened by giving two examples which Mill himself used in *On Liberty* to suggest that a self-regarding action cannot be prohibited to protect the sensibilities of the followers of dominant religion. Firstly, Mill argued against the prohibition of pork consumption in Muslim majority countries, stating that 'the public has no business to interfere' 'with the personal tastes and self-regarding concerns of individuals'.[133] Secondly, Mill argued that Puritan's ban on public and private leisure activities (e.g. music, dancing, public games, theatre) in societies where 'the Puritans have been sufficiently powerful' would be illegitimate and unacceptable. Mill stated, the religious 'sentiments' of

[131] Jonathan Riley, 'One Very Simple Principle' (1991) 3(1) Utilitas 1, 6. See also Jonathan Riley, *Mill On Liberty* (London- New York: Routledge, 2011) 94-98; Martha C. Nassbaum, *Hiding From Humanity: Disgust, Shame and the Law* (Princeton- Oxford: Princeton University Press, 2004) 65.

[132] John Stuart Mill, *On Liberty* (Kitchener: Batoche Books, 2001) 8-9.

[133] ibid 79.

Puritans, who avoided recreational activities on account of their religious conviction, were inadequate to prohibit the leisure activities of others.[134]

Based on the above analysis, it is submitted that 'mere dislike' to certain kinds of minority religious practices cannot be a sufficient warrant under the harm principle for the exercise of compulsion or coercion aimed at interfering with the exercise of such religious practices and/or protecting the sensibilities of followers of mainstream religions.

3.7. Living Together, Islamic Veiling, and the Choice of Society: The Future of Pluralism and Tolerance

In *S.A.S.*, the Government submitted that in French society Islamic veiling was regarded as an obstacle to pluralism, tolerance and broadmindedness because the religious practice of veiling was "deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of 'living together'", and the ECtHR eventually accepted that 'the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.'[135] In *Belcacemi* and *Dakir*, the Court concluded, as for France in *S.A.S.*, that 'whether or not it should be permitted to wear the full-face veil in public places in Belgium constitutes a choice of society.'[136] Judge Angelika Nussberger (a dissenting judge in *S.A.S.*), writing extrajudicially, has remarked that 'the main message of the judgment is that the blanket ban on wearing the burqa in public is

[134] ibid 80.

[135] *S.A.S.* (n 11) para 153.

[136] *Belcacemi* (n 23) para 53; *Dakir* (n 24) para 56.

justifiable as a 'choice of society'."[137] The focus of the ECtHR on the importance of 'choice of society' warrants particular attention here. It is submitted that the 'choice of society' criterion is a worrying development and a cause for serious concern because the Court seems to have accepted that the 'unease' of the majority when confronting with a veil-wearing Muslim woman will take priority over the religious freedoms of individuals belonging to minorities.

It is clear that the ECtHR's reference to 'ground rules of social communication'[138] (*S.A.S.*, *Belcacemi*, *Dakir*) or the 'principle of interaction between individuals'[139] (*S.A.S.*) are based on the preferences of the *majority* whose 'right to live in a pace of socialisation' is breached by the existence of Islamic full-face veils in public spaces. It is questionable, though, whether a State can/should legitimately compel veil-wearing Muslim women, on pain of criminal punishment, to remove their veils because these garments are sources of discomfort for the majority parts of the society.

There are many ways of dressing or presenting the body, which may cause others to experience personal discomfort, but such ways of dressing – be it with the *burqa* or the *bikini* - cannot be prohibited on the considerations that these garments offend others, specifically speaking, the majority people. An individual's conduct may be deemed by others as deeply offensive because it could cause a negative emotional reaction, but it does not necessarily mean that the conduct causes harm to others so as to justify its restriction in a liberal society under the harm principle.

---

[137] Angelika Nussberger, 'Procedural Review by the ECHR: View from the Court' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge: CUP, 2017) 163.

[138] *S.A.S.* (n 11) para 153; *Dakir* (n 24) para 56; *Belcacemi* (n 23) para 53.

[139] *S.A.S.* (n 11) para 153.

This point has been explored in-depth previously.[140] A Muslim majority European State such as Azerbaijan or Turkey cannot prohibit the wearing of mini-skirts and backless dress in public places on the consideration that such outfits, which are alien in Muslim societies, disturb and offend Muslim majority. Equally, Christian-dominant Western European countries, such as France and Belgium, cannot legitimately regulate the wearing of Islamic veils on account that such outfits are offensive to followers of mainstream religions. This is because, as already noted above, mere offensiveness or emotional distress does not constitute harm under Mill's model as it does not go to the length of violating another person's constituted rights.[141] As along as a Muslim woman's voluntary choice of donning the veil does not violate or threaten imminent violation of another person's interests in which they have a right, her choice in question will not lose the self-regarding status and, as a consequence, it will remain in the domain of absolute liberty. It is therefore submitted that the majority's 'unease' when communicating with a covered Muslim woman or their 'feeling of offensiveness' by the sight of a Muslim woman in full-face veil, cannot be a convincing stand-alone ground for limiting religious liberties of Muslim women. In *Begum*, Baroness Hale stated that 'the sight of a woman in full purdah may offend some people, … but that cannot be a good reason for prohibiting her from wearing it.'[142]

[140] Section 2.2 Chapter Two; Section 3.6, Chapter Three.

[141] For a more detailed discussion, see David O. Brink, 'Millian Principles, Freedom of Expression, and Hate Speech' (2001) 7 Legal Theory 119, 120; Joaquin Rodriguez-Toubes Muniz, 'Freedom of Expression from the Standpoint of J. S. Mill's On Liberty' 16(2) Revista Iberoamericana de Estudios Utilitaristas 75, 88.

[142] [2006] UKHL 15 para 96.

In *Hebbadj* and *Yaker*, the HRC took the view that 'the right not to be disturbed by other people wearing the full-face veil are not protected by the Covenant and therefore cannot provide the basis for permissible restrictions within the meaning of article 18 (3).'[143] A similar approach has been taken by the dissenting Judges in *S.A.S.*: 'there is no right not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the traditional French and European life-style.'[144] This reasoning is very convincing. A restriction on the right to religious manifestation through the wearing of religious attire cannot be justified by reference to majority values alone. In *Young, James and Webster v the UK***,** the ECtHR stated that 'democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.'[145] Prohibiting Islamic full-face veils in public spaces in the name of 'the right of others to live in a space of socialisation', due to the majority's unease when confronting with a veiled woman, will leave religious liberties at the mercy of the majority's will. Therefore, Edwards has criticised the ECtHR's findings arguing that the overall message given by the Court is that any minority practice that is 'disapproved of by the majority will in fact not be tolerated but simply eradicated and erased and extinguished.'[146]

Another danger, inherent in the 'choice of the society' criterion, is that it undermines the personal autonomy of veil users and open the door to the forcible

[143] *Yaker* (n 56) para 8.10; *Hebbadj* (n 56) para 7.10.

[144] (n 55) para 7.

[145] Application nos. 7601/76, 7806/77 (ECHR, 13 August 1981) para 63.

[146] Susan S.M. Edwards, 'No Burqas We're French: The Wide Margin of Appreciation and the ECtHR Burqa Ruling' (2014) 26 Denning Law Journal 246, 255.

imposition of majoritarian preferences about how to behave or appear in public spheres. As already indicated, in a liberal democratic society, the starting point should be allowing individuals to make their own choices on what to wear and how to appear in public spaces. Arguably, by accepting that whether veiling should be permitted depends on the 'choice of society', the Convention organs have set limits on a free-choice conception of human rights in general and to religious freedom in particular. The ECtHR's rulings that the French and Belgian bans did not amount to an infringement of Article 9 because faceless communication would be tantamount to a violation of the right of *others*, namely the majority, to live in an environment facilitating living together - sent a message to European societies that whether or not Islamic dress should be worn by Muslim women depends on the choice of the society, not on the choice of the individual concerned.

Another difficulty of using the 'choice of society' criterion is its negative impact on pluralism and tolerance. According to the ECtHR, 'pluralism, tolerance and broadmindedness are hallmarks of a democratic society.'[147] In *Moscow Branch of the Salvation Army v Russia*, the ECtHR stated that 'pluralism is … built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions … [and] religious beliefs.'[148] Such a position raises a number of questions: will not pluralism be diminished if and when the Strasbourg Court upholds, in the name of 'choice of society', only the religious practices which are acceptable in the majority parts of the society and do not recognise the minority practices that make the majority feel uncomfortable?; would not a truly tolerant society accept

[147] *Chassagnou and Others v France* App nos. 25088/94, 28331/95, 28443/95 (ECHR, 29 April 1999) para 112.

[148] App no. 72881/01 (ECHR, 5 October 2006) para 61.

unpopular religious practices even though these cultures are inconsistent with the dominant norms of the mainstream society?; and, will it not create a climate of intolerance when streets are freed from Islamic veils which allegedly disturb and offend the majority population?

'Religious toleration', as Laborde argues, is 'one of the key principles of liberalism'.[149] 'Tolerance requires us to accept people and permit their practices even when we strongly disapprove of them'.[150] It is argued that a truly pluralist and tolerant society must accommodate strange, unpopular and non-dominant religious practices, provided that they do not harm others, even though they offend, shock or disturb the majority population. The ECtHR has established in its Article 10 jurisprudence that the Convention protects not only "those 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society'."[151] Thus, it can

[149] Cecile Laborde, 'Secular Philosophy and Muslim Scarves in Schools' (2005) 13(3) The Journal of Political Philosophy 305, 305.

[150] Thomas Scanlon, *The Difficulty of Tolerance* (New York: CUP, 2007) 187. See also Gerard Bouchard, 'What is Interculturalism?' 56(2) McGill Law Journal 435, 445-468; Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge-Massachusetts: Harvard University Press, 2011) 47.

[151] *Handyside v UK* App no. 5493/72 (ECHR, 7 December 1976) para 49. For a detailed discussion of 'the right not to be offended' in the jurisprudence of the ECtHR, see Ian Leigh, 'Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack' (2011) 17 Res Republica 55, 65-68; Erica Howard, *Freedom of Expression and Religious Hate Speech in Europe* (Abingdon- New York: Routledge, 2018) 23-28; George Letsas, 'Is There a Right Not to be Offended in One's religious Beliefs?' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge: CUP, 2012) 243-249.

persuasively be argued that European societies and its citizens should tolerate the practice of Islamic veiling although it is alien to the European culture, and a potential source of distress or unease feeling of many people, particularly the majority.

3.8. Concluding Remarks

In conclusion, this chapter has focused on examining whether social cohesion is a convincing argument or legitimate ground to ban the wearing of Islamic veils in public places. As indicated above, there is a widely held view that the wearing of Islamic full-face veils, namely the *burqa* and *niqab*, in the public places should be banned by law because the concealment of the face creates and/or fosters an obstacle to social cohesion. One of the justifications which the French and Belgian legislators invoked to legislate anti-veiling laws was the promotion of social cohesion or social interaction.[152] Analysing the ECtHR's rulings in *S.A.S.*, *Belcacemi* and *Dakir*, it has been shown that by giving respondent States a 'very wide margin of appreciation',[153] the ECtHR has uncritically accepted that blanket criminal prohibitions on Islamic full-face veils, such as those currently enacted in France and Belgium, are justified on the grounds of 'living together' under the Convention. However, this chapter, has disagreed with the findings of the Court. One can rightly argue that instead of granting a 'very wide margin of appreciation' to the French and Belgian authorities, the ECtHR should have provided a more thorough examination of the relevant issues in determining whether the bans were justified under Article 9 of the ECHR. This would have accorded with the dissenting judges

[152] There are some other European countries which also have invoked the social cohesion justification to enact anti-veil legislation. On this point, see Section 1.3, Chapter One.

[153] *Belcacemi* (n 23) para 55; *Dakir* (n 24) para 59; *S.A.S.* (n 11) para 155.

in *S.A.S.* who felt that although a State may have a wide MoA, 'it still remains the task of the Court to protect small minorities against disproportionate interferences.'[154]

As shown above, the 'legal' basis of the concept of 'living together' is highly questionable. It is difficult to argue that there exists a legal right for people to live in a society free from barriers to social cohesion. Similarly, people can hardly have a right to approach or right to attempt to socialise where those advances are unwanted. Even if such rights *did* exist, it would be difficult to show why those rights would prevail over the FoRB or the right to respect for private life. It has been argued that a ban on the grounds of living together or social cohesion may not satisfy the legitimate aim test under the ECHR because 'living together' is neither itself contained in Article 9(2) as an exception, nor does it have a sufficiently strong link to other permissible grounds of limitation, such as, 'protection of the rights and freedoms of others'. Placing *S.A.S.*, *Belcacemi* and *Dakir* in context, it has been emphasised that a criminal, blanket prohibition on wearing Islamic veils in all public places at all times on account of living together may fall foul of European requirements for lack of proportionality. Therefore, it has been concluded that a blanket ban on account of living together or social cohesion may not satisfy the justification test under Article 9(2) of the Convention. It has also been argued that the alleged inherently offensive nature of the Islamic veil, by itself, cannot be a tenable ground to prohibit the voluntary wearing of Islamic veils. Applying Mill's harm principle to the minority religious practices, such as Islamic veiling, which are disliked by majority people of the mainstream society, this chapter has argued that

[154] (n 55) para 20.

majority's feeling of offensiveness or emotional disturbance by the sight of the Islamic veil in public places is not enough to justify a limit on individual liberties in a liberal State. Therefore, one can come to the conclusion that social cohesion is *not* a legitimate ground or convincing argument to prohibit the wearing of the Islamic veil by Muslim women who freely choose to wear it.

The discussion of this chapter can be closed by acknowledging the 'viewpoints' of the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, regarding bans on Islamic veiling in Europe:

> **'**Prohibition of the burqa and the niqab will not liberate oppressed women, but might instead lead to their further exclusion and alienation in European societies. A general ban on such attire constitutes an ill-advised invasion of individual privacy and, depending on its terms, also raises serious questions about whether such legislation is compatible with the European Convention on Human Rights. … A prohibition of the burqa and the niqab would in my opinion be as unfortunate as it would have been to criminalise the Danish cartoons. Such banning is alien to European values.'[155]

The following chapter will explore whether the protection of public safety and security can be a legitimate ground to ban the wearing of Islamic veils.

[155] Thomas Hammarberg, *Human Rights in Europe: No Grounds for Complacency* (Strasbourg: Council of Europe Publishing, 2011) 39 & 43.

CHAPTER FOUR: BANNING ISLAMIC VEILS ON THE GROUND OF PUBLIC SAFETY AND SECURITY: AN APPRAISAL

> 'The question of how to effectively address national security exigencies while respecting human rights constitutes a pivotal challenge to human security today.'
>
> - Ahmed Shaheed, UN Special Rapporteur on FoRB[1]

4.1. Introduction

The public safety and security argument is widely used to defend legal bans on wearing Islamic veils. There are three different safety-related concerns that are usually referenced by the States in justifying anti-veil legislation. These concerns are:

1. that Islamic veiling is perceived as a symbol of Islamic fundamentalism;
2. that in the wake of heightened terrorist (or Islamic militant) attacks across Europe, an individual must be recognisable and identifiable in public places for various safety reasons and these will require them to expose their face;
3. that the loose-fitting, head-to-toe covering Islamic veils, such as the *burqa*, can be used to disguise identity and conceal explosives and weapons.[2]

[1] UN Doc. A/73/262 (5 September 2018) para 7.

[2] Neville Cox, *Behind the Veil: A Critical Analysis of European Veiling Laws* (Cheltenham-Northampton: Edward Elgar Publishing, 2019) 118.

The first safety-related concern, namely, that the Islamic veil is a symbol of extremism, is often used by critics of veiling to justify the argument that a ban on Muslim veiling is necessary for the sake of public safety. Howard writes, an 'argument against a ban is that … the wearing of the *hijab, niqab* or *burqa* is a security risk because they are symbols of Islamic fundamentalism [which] is based on the stereotype that all Muslims are terrorists, or, if not terrorist themselves, support terrorism.'[3] Howard further notes, '[t]he *hijab*, *niqab* and *burqa* are seen as symbols representative of extremist Muslim politics and a threat to and rejection of common liberal Western values.'[4] As McGoldrick states, '[f]or Western observers perhaps the most frightening image is of the veiled Muslim woman hiding terrorist bombs or on a suicide mission.'[5] In enacting anti-veil legislation, a number of European countries have advanced the argument that Islamic veiling is a sign of Islamic fundamentalism and therefore, legal bans on Islamic veils are necessary to combat Islamic fundamentalism and terrorism. 'Wearing Clothing Covering or Hiding the Face Act', the bill which led to the nation-wide ban in Bulgaria on wearing face veils in public, provided reasons for the necessity to ban the Islamic full-face veils in public. Those reasons included claims that 'the face veil is a demonstration of radical Islam and … banning face covering is a mechanism to counter terrorism'.[6]

---

[3] Erica Howard, 'School Bans on the Wearing of Religious Symbols: Examining the Implications of Recent Case Law' (2009) 4 Religion and Human Rights 7, 13.

[4] Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (1st edn, Abingdon- New York: Routledge, 2012) 31.

[5] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford- Portland: Hart Publishing, 2006) 20.

[6] See Open Society Foundations, 'Restrictions on Muslim Women's Dress in the 28 EU Member States: Current Law, Recent Legal Developments and the State of Play' (2018) p.28 <https://www.justiceinitiative.org/publications/restrictions-muslim-women-s-dress-28-eu-member-states-2> accessed 4 December 2019.

When the Dutch Government announced its plans in 2006 to enact anti-veiling legislation, various political parties endorsed the decision, stating that, 'clothing that covers the face causes unacceptable feelings of insecurity among the general public.'[7] One of the primary reasons for which the French Government enacted the Islamic full-face veil ban in France was to tackle the 'homegrown' 'Muslim radicalization'.[8] In 2016, the Mayor of Cannes, David Lisnard, banned the *burkini* (i.e. full body suits worn by Muslim women as beachwear) on public beaches, calling them the 'uniform of extremist Islamism'. He further stated that '[b]eachwear which ostentatiously displays religious affiliation, when France and places of worship are currently the target of terrorist attacks, is liable to create risks of disrupting public order.'[9] Georgio Ghiringhelli, who constructed the proposal to outlaw the wearing of the Islamic dress in Ticino (Switzerland), stated that the measure would send a message to 'Islamic fundamentalists' who he claimed were in Ticino and across Switzerland.[10]

The second security-related concern is that, in an era of terrorist attacks there is an urgent need for the States to facilitate surveillance of people in some, or more

[7] See Natasha Bakht, 'Veiled Objections: Facing Public Opposition to the Niqab' in Lori G. Beaman (ed), *Reasonable Accommodation: Managing Religious Diversity* (Vancouver: UBC Press, 2012) 86.

[8] See Khaled A. Beydoun, 'Beyond the Paris Attacks: Unveiling the War Within French Counterterror Policy' (2016) 65(6) American University Law Review 1273, 1298.

[9] See <http://qz.com/757070/citing-terrorism-the-french-mayor-of-cannes-has-banned-muslim-women-from-wearing-burkini-swimwear/> accessed 29 August 2016.

[10] The local government approved the anti-veiling law, and the Swiss Parliament ruled that it did not contradict Swiss federal law. See Harriet Agerholm, 'Muslims face fines up to £8,000 for wearing burkas in Switzerland' (*The Independent*, 7 July 2016) <https://www.independent.co.uk/news/world/europe/muslims-fined-8000-wearing-burkas-niqab-switzerland-ticino-islamic-dress-a7124586.html> 20 June 2020.

controversially, all public spaces, and to prohibit people from doing certain things that may impede surveillance. Understandably, identification of persons is of paramount importance in security and surveillance. As the wearing of the Islamic full-face veil makes it harder to detect and recognise one's face, pro-ban advocates have argued that it must be prohibited by law. For instance, in 2017, Paul Nuttal, the former leader of the UK Independence Party, stated that his Party would campaign to ban the *burqa* and *niqab* in the UK. He stated, 'we have a heightened security risk at the moment and for CCTV to be effective you need to see people's faces, because whether we like it or not in this country there's more CCTV per head than anywhere else on the planet.'[11] To justify the anti-veil legislation in Bulgaria, the ruling centre-right GERB Party stated that the law was 'aimed at boosting national security and allowing better video surveillance' in the wake of Islamic militant attacks in Europe.[12] In Italy and Spain, at the local level, some municipalities and regional governments introduced restrictions on the use of the Islamic veil as it could hinder personal identification when accessing public buildings and facilities.[13]

Another safety-related concern for banning the wearing of the Islamic full veil is that it may allow terrorists and criminals to disguise themselves and to conceal arms and explosive devices. Advocates of the bans therefore argue that a

[11] See Jessica Elgot, 'Ukip to campaign to ban burqa and sharia courts, says Paul Nuttall' (*The Guardian*, 23 April 2017) <https://www.theguardian.com/politics/2017/apr/23/ukip-to-campaign-to-ban-burka-and-sharia-courts-says-paul-nuttall> accessed 10 November 2018.

[12] See Angel Krasimirov, 'Bulgaria bans full-face veils in public places' (*The Reuters*, 30 September 2016) <https://www.reuters.com/article/us-religion-burqa-bulgaria/bulgaria-bans-full-face-veils-in-public-places-idUSKCN1201FV> 1 May 2019.

[13] See (n 6) pp.56 & 69.

prohibition on Islamic veiling is justifiable because it would prevent such acts from happening. Howard writes, '[a]nother part of [the safety and security] argument is that any terrorist could disguise themselves with a *burqa*, as they cover a person from head to foot and only show the eyes, or sometimes even the eyes are covered by a piece of gauze. The *niqab* could also be used as a disguise when combined with clothing covering a person fully.'[14] One of the primary justifications claimed by several States for their anti-veil legislation is that the *niqab* and *burqa* can be used to hide the identity and weapons, and therefore, Islamic garments pose a threat to public safety and security. For instance, to enact the anti-veil legislation in France and Belgium, legislators argued that the concealment of the face in public places was a threat to public safety and security. It was specifically argued that Islamic veils could be used to commit crimes and to hide weapons.[15] In support of the ban, Members of Parliament of both countries made specific reference to criminal activities where Islamic full-face veils were used as disguise.[16] As Vaira Vike-Freiberga, the former president of Latvia, commenting about a proposed ban on the Islamic veil stated, 'covering one's face in public at the time of terrorism presents a danger to society. … Anybody could be under a veil or under a burqa. … You could carry a rocket launcher under your veil.'[17]

[14] Howard (n 4) 31.

[15] National Assembly, 'Information Report' 178; Parliamentary Documents of the House of Representatives, Session 2009-10, 9 April 2010, Doc no. 52 2289/005, 8 & 16; Parliamentary Documents of the House of representatives, Session 2010-11, 18 April 2011, Doc no. 53 0219/004, 7.

[16] For a more detailed discussion, see Eva Brems et al, 'Uncovering French and Belgian Face Covering Bans' (2013) 2 Journal of Law, Religion & State 69, 82-84.

[17] See 'Latvia Wants to Ban Face Veils, for All 3 Women Who Wear Them' (*The New York Times*, 19 April 2016) <https://www.nytimes.com/2016/04/20/world/europe/latvia-face-veils-muslims-immigration.html> accessed 15 June 2020.

It should briefly be noted that, the politicians of some European States such as Estonia[18] and Latvia[19] made proposals to limit the wearing of the Islamic veil for security reasons. However, proposals to ban the wearing of the Islamic veil based on security concerns were rejected. Recent legal developments on restrictions on Islamic veiling reveal that several non-European, Muslim countries have enacted anti-veil legislation for security concerns. For instance, being a predominantly Muslim country, Chad has banned the wearing of full-face veil to enhance security and prevent large-scale terrorist attacks.[20] Similarly, Egypt has recently started to debate legislation to ban the wearing of the *burqa* and *niqab* because many male and female terrorists have reportedly used these garments to hide their identities.[21]

Based on the above it can be deduced that a number of European States have enacted or proposed a ban on wearing Islamic veils; in doing so, they have advanced

---

[18] The Estonian Social Security Minister, Margus Tsahkna, introduced a proposal to ban Islamic veils for security concerns. Shortly after, the Estonian Justice Ministry formalized the proposal and submitted a bill banning women from wearing the *hijab* and *niqab* in certain public places. However, the Ministry of Foreign Affairs did not support the bill. (See (n 6)).

[19] Members of Parliament from the Union of Latvia's Regions submitted a draft law which prohibited the wearing of face coverings in public places in the interests of public safety. However, the majority of the Parliament rejected it. See Enes Bayrakly and Farid Hafez (eds), 'European Islamophobia Report 2015' (SETA, 2016) p.320 <https://www.islamophobiaeurope.com/reports/2015/en/EIR_2015.pdf> accessed 13 January 2019.

[20] See 'Chad bans Islamic face veil after suicide bombings' (*BBC Online News*, 17 June 2015) <http://www.bbc.co.uk/news/world-africa-33166220> accessed 5 January 2017.

[21] See 'Egypt considers banning the burqa as part of anti-extremism campaign' <https://www.jpost.com/middle-east/egypt-considers-banning-the-burqa-as-part-of-anti-extremism-campaign-571157> accessed 1 March 2019.

the public safety and security argument. The question, however, is whether the protection of public safety and security is a valid argument to ban the voluntary wearing of Islamic veils. Through the lens of the European human rights framework and from the perspective of Mill's harm principle, this chapter examines whether legal bans on wearing Islamic veils based on safety and security considerations can be justified in a liberal democratic society. It also gives an overview of the approaches the ECtHR has taken regarding the bans on Islamic veiling on the grounds of public safety and security.

4.2. Are (Islamic) Full-face Veils Real Threats to Public Safety and Security?

One can persuasively argue that the covering of the faces by individuals may endanger public safety and security, especially in areas of heightened security risk. Being able to identify a person in certain public areas is crucial to guarantee public safety and order. The concealment of the faces or the wearing of the full-face veils is undoubtedly problematic where individuals are required to reveal their identities or where security is genuinely an issue: airport and similar identity checkpoints, courtrooms, banks, international conferences, and polling stations. The concealment of faces poses a threat to safety and security because individuals cannot be identified in person or when analysing the CCTV footage. People can use full-face veils to deceive and to avoid detection. Anything that makes it harder to identify someone can potentially make a police investigation more challenging. In this sense, it can be strongly argued that Islamic face-and full body coverings, namely the *niqab* and *burqa*, can indeed pose serious threats to public safety and public security in certain contexts. This is simply because these garments allow the perpetrators, both males and females, to disguise themselves. Another difficulty of the loose-fitting, head-to-toe length, Islamic full-face veil is that it can be used to

conceal arms and explosive devices. The covering of one's face also arises as an issue for security when a veil-wearing Muslim woman provides an identity photograph showing her wearing a face covering for an identity document such as passport or driving licence.

There is ample evidence to suggest that criminals and terrorists are increasingly using the *burqa* and *niqab* to assist in the commission of the crimes and terrorist attacks and to evade detection after these have been committed. Some perpetrators disguise themselves in Islamic full-face veils to make access easier and detection harder, because, as mentioned above, face coverings may make it harder, or indeed impossible, to identify an individual. For instance, a gang of male robbers, dressed in burqas, committed robbery at a Selfridges departmental store in London, deceiving staff into thinking that they were Muslim women shoppers but using the burqas to avoid detection.[22] Similarly, one of the terrorists, who was accused of hatching an extremist plot to detonate shrapnel-packed rucksack bombs on the London transport system in July 2005, escaped from the police and fled from London to Birmingham wearing a *burqa*.[23] Furthermore, in 2017, an Indian bank was robbed by some burqa-clad gunmen who were terrorists of a pro-Pakistani militant organisation named Hizbul Mujahideen.[24]

---

[22] See 'Selfridges robbery: 'Men in burkas' in 'smash and grab' (*BBC Online News*, 7 June 2013) <https://www.bbc.co.uk/news/uk-england-london-22811466> 12 April 2020.

[23] See "Court shown July 21 suspect 'fleeing in burka'" (*The Guardian*, 20 February 2007) <https://www.theguardian.com/uk/2007/feb/20/terrorism.world1> accessed 18 June 2017.

[24] See 'Burqa-Clad Hizbul Terrorists Rob Bank In Jammu And Kashmir, Escape With 5 Lakhs' (*The NDTV*, 31 July 2017) <https://www.ndtv.com/india-news/burqa-clad-hizbul-terrorists-rob-bank-in-jammu-and-kashmir-escape-with-5-lakhs-1731516> accessed 10 May 2019.

It can also be said that Islamic full-face veils have been used to commit large-scale terror attacks. In recent years, certain incidents have taken place where the *burqa* and the *niqab* have been used to hide bombs and explosives. For instance, a woman suicide bomber dressed in a *burka* detonated her explosive belt at a UN food distribution point in Khar, Pakistan killing forty-five people in 2010.[25] More recently, in Chad, a group of suicide bombers of Boko Haram used the Islamic full veil as a 'camouflage' to commit suicide bombings that killed over twenty people in 2015.[26] During anti-colonial and self-determination conflicts, veiled women had committed suicide missions and terrorist attacks in Sri Lanka, Turkey, Afghanistan and Lebanon.[27] During the Algerian war against France, Algerian insurgents, both male and female, used the *burqa* to commit militant attacks.[28] Based on these examples, it is submitted that allowing individuals to wear full veils in certain places, may pose a major security threat because loose-fitting, head-to-toe length Islamic veils, namely the *burqa* and *niqab*, allow perpetrators to gain access to places, to avoid the detection of their identity, and to hide weapons under their loose clothing.

Recent years have witnessed a remarkable rise in the number of jihadist terrorist attacks in various European States including France, the Netherlands, and the UK. Recent attacks in Barcelona and Berlin, where Islamic extremists have driven into

---

[25] See Anwarullah Khan, 'Burqa-clad Suicide Bomber Kills 45 in Pakistan' (*The Independent*, 25 December 2010) <http://www.independent.co.uk/news/world/asia/burqa-clad-suicide-bomber-kills-45-in-pakistan-2169050.html> accessed 23 September 2016.

[26] Shortly after the attacks, Chad banned wearing full-face veils, and declared that the security forces would burn all full-face veils that were kept in markets for sale. See (n 20).

[27] See V. G. Julie Rajan, *Women Suicide Bombers: Narratives of Violence* (Oxon: Routledge, 2012) 1-2.

[28] See John Wallach Scott, *The Politics of the Veil* (Princeton- Oxford: Princeton University Press, 2007) 61.

crowds of people demonstrate that crowded, sensitive public places are no longer safe zones. In its Resolution 1605 (2008), the Parliamentary Assembly expressed its concerns about 'the threat of terrorism' on 'European soil' by Islamic fundamentalists.[29] According to the European Union Terrorism Situation and Trend Report 2019, in 2018 alone, twenty-four jihadist terrorist attacks were reported in various European Union Member States. Five hundred and eleven individuals were arrested in the EU on suspicion of jihadist terrorism. Women accounted for 22% of arrestees suspected of jihadist terrorism, compared to 16% in 2017 and 26% in 2016.[30] In the context of this reality in contemporary Europe, it is of utmost importance to the European States to identify and locate possible suspects who may have travelled through different countries to arrive at their targeted locations and may have availed themselves of the Islamic full-face veil to go unnoticed.

[29] Parliamentary Assembly, Resolution 1605 (2008) 'European Muslim Communities Confronted with Extremism', para 1.

[30] European Union Agency for Law Enforcement Cooperation, 'European Union Terrorism Situation and Trend Report 2019'.

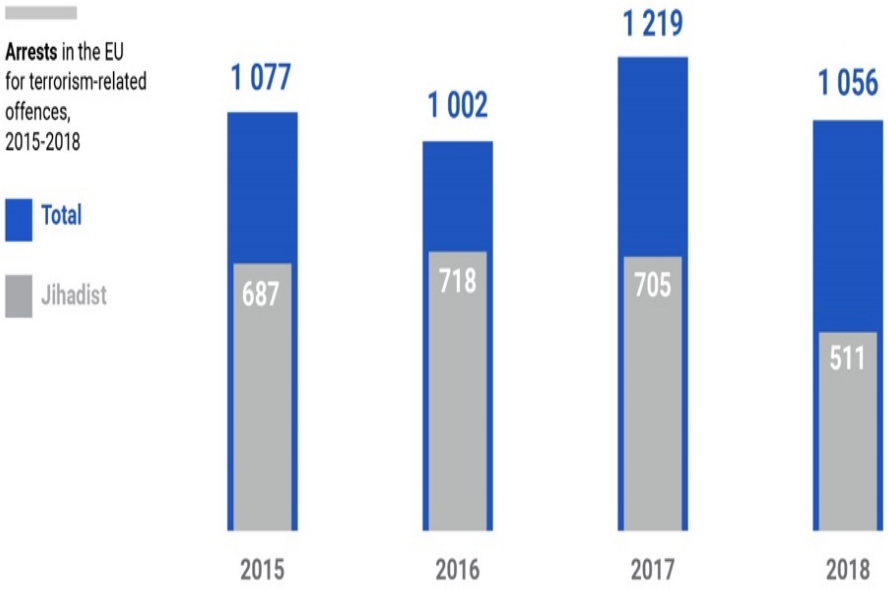

Figure 5: Arrests in the EU countries for terrorism-related offences between 2015-2018 (Source- The European Union Terrorism Situation and Trend Report 2019).

From the above discussion, it can be inferred that the wearing of the Islamic full-face veils, namely the *niqab* and *burqa*, may sometimes pose a threat to public safety. In this sense, the harmfulness of the *niqab* and *burqa* to public safety and security may be used as a justification to ban Islamic veiling in a liberal democratic State. With regard to the requirement of a ban on wearing Islamic full-face veils in certain high security zones, commentators have argued that '[o]f course, public security may justify specific human rights interferences'.[31] It is therefore argued that the protection of public safety and security may be a convincing argument for prohibiting the wearing of Muslim women's full-face veils in certain contexts, provided that the restrictive measures meet human rights standards.

[31] Emmanuelle Bribosia and Isabelle Rorive, 'Insider Perspectives and the Human Rights Debate on Face Veil Bans' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge: CUP, 2014) 172.

4.3. The ECtHR's Recognition of Public Safety and Security to Justify Bans on Islamic Veils

The ECtHR has accepted that the protection of public safety is a justifiable ground for limitations on the right to religious manifestation through the wearing of Islamic veils. In *S.A.S.*, the ECtHR stated that 'a State may find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud.'[32] Citing its previous decisions in *Phull v France*,[33] *El Morsli v France*,[34] and *Mann Singh v France*[35] -- cases concerning bans on wearing religious dress -- the ECtHR concluded that 'the obligation to remove clothing with a religious connotation in the context of security checks and the obligation to appear bareheaded on identity photos for use on official documents'[36] constitutes an interference with the right to manifest one's religion or belief, but the resulting interference is justified for the protection of public safety and thus, it does not constitute a violation of Article 9 of the Convention.

Similarly, the HRC has accepted that a State can legitimately impose restrictions on Islamic veils and other religious dress on the grounds of public safety. In the analogous cases of *Mariana Hebbadj v France* and *Sonia Yaker v France* concerning the Islamic full-face veil ban in France, the HRC acknowledged 'the need for the State party, in certain circumstances, to require individuals to reveal their face,

[32] *S.A.S. v France* App no. 43845/11 (ECHR, 1 July 2014) para 139.

[33] *Phull v France* App no. 35753/03 (ECHR, 11 January 2005).

[34] *El Morsli v France* App no. 15585/06 (ECHR, 4 March 2008).

[35] *Mann Singh v France* App no. 24479/07 (ECHR, 13 November 2008).

[36] *S.A.S.* (n 32) para 139.

which could entail on occasion uncovering their face in the specific circumstances of a risk to public safety or order, or for identification purposes.'[37]

Likewise, domestic courts of various countries have accepted that public safety and security is a possible justification for limitations on the right to religious manifestation through the wearing of religious symbols and attire. For instance, with regard to the Islamic full-face veil ban in Belgium, the Constitutional Court of Belgium held that 'anyone present in … a public place must be identifiable, [as] wearing clothing which completely conceals the face poses problems in terms of public safety.'[38] In the Netherlands, the Equal Treatment Commission admitted that prohibitions on the wearing of the *niqab* by pupils, although indirectly discriminatory, was objectively justified as it was a necessary measure to accomplish a number of legitimate objectives, including the importance of being able to establish the identity of individuals entering the school.[39] Furthermore, the US Court of Appeals has upheld bans on the wearing of Sikh kirpans at schools, stating that there is a 'compelling interest in protecting the welfare and safety' of the school children.[40] Similarly, in a UK case, *Chaplin v Royal Deveon & Exeter NHS Foundation Trust*, the Employment Tribunals unanimously held that prohibiting a nursing sister from wearing a cross over her uniform pursued a legitimate aim, namely, the 'health and safety of both staff and patients.'[41] In addition, in *R v D(R)*,

[37] *Mariana Hebbadj v France*, Communication no. 2807/2016 (17 July 2018) UN Doc. CCPR/C/123/D/2807/2016, para 7.7; *Sonia Yaker v France*, Communication no. 2747/2016 (17 July 2018) UN Doc. CCPR/C/123/D/2747/2016, para 8.7.

[38] Judgement no. 145/2012 of 6 December 2012 cited in *Dakir v Belgium* App no. 4619/12 (ECHR, 11 July 2017) para 20.

[39] *Commissie Gelike Behandeling*, Judgement, 2003-40, 4.10 cited in Howard (n 4) 32.

[40] *Cheema v Thompson*, No. 04-16868 [1995].

[41] [2010] ET 1702886/2009, para 29.

where the wearing of the *niqab* by a defendant during Crown Court proceedings was the issue, Judge Peter Murphy ruled that:

> It is essential to the proper working of an adversarial trial that all involved with the trial – judge, jury, witnesses, and defendant - be able to see and identify each other at all times during the proceedings. This is partly a matter of identification. It is obviously essential for the Court to know the identity of the person who comes before it as a defendant…[42]

The above discussion makes it clear that the Strasbourg bodies (as well as the HRC and some domestic courts) have accepted that public safety and security is a justifiable ground for limitations on the right to wear Islamic veils. It should be noted, however, that a ban on wearing the Islamic veil on the grounds of public safety and security *must* be justified from a human rights perspective. According to the Ottawa Principles, 'any measures, criminal, quasi-criminal, or otherwise, taken by or on behalf of a state to prevent terrorism, must comply with international human rights standards.'[43] Furthermore, in the UN Resolution 60/288, entitled 'The United Nations Global Counter-Terrorism Strategy', it has been stated that 'States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law'.[44] This means that, a ban on the Islamic veil aimed at protecting and advancing public safety and security must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society. The matter of whether a ban on the grounds of public safety

[42] Unreported (16 September 2013) para 30.

[43] Ottawa Principles on Anti-terrorism and Human Rights (2006) para 2.2.1.

[44] General Assembly Resolution 60/288, 'The United Nations Global-Terrorism Strategy' (8 September 2006).

and security would satisfy the justification test within the meaning of Article 9(2) of the Convention is analysed below.

4.4. Public Safety Concerns and a Ban on Islamic Veiling: Convention Standards in Context

This section offers an in-depth analysis of whether a ban on the grounds of public safety and security may satisfy the Convention standards. At first, focus will be given to the legitimate aim test. Then, focus will be shifted to the necessity test within the meaning of Article 9 of the Convention.

4.4.1. The Legitimate Aim Test

It is submitted that a ban on Islamic veiling on the grounds of public safety would be most likely to satisfy the legitimate aim test because 'the interests of public safety' is a listed exception which qualifies as a legitimate aim for the purpose of Article 9(2) of the ECHR. In finding that the Islamic full-face veil ban in France satisfied the legitimate aim test under Article 9 on public safety considerations, both the majority and dissenting judges admitted in *S.A.S.* that 'the need to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud is a legitimate aim protected by the Convention'.[45] Similarly, in *El Morsli v France*, the ECtHR found that forcing a veiled Muslim woman to remove her veil to undergo an identity check was justified because the impugned measure pursued 'at least one of the legitimate aims listed in the second paragraph of Article 9, that is, guaranteeing public safety or the protection of public order.'[46]

[45] *S.A.S.* (n 32) para 115 & Joint Partly Dissenting Opinion of Judges Nussberger and Jaderblom, para 3.

[46] (n 34).

Likewise, in *Phull v France,* the applicant, a practising Sikh, was compelled by the security staff at Entzheim Airport to remove his turban for inspection as he made his way through the security checkpoint prior to entering the departure lounge. In this case, the ECtHR held that the 'disputed measure constituted interference' with his freedom to manifest his religion or beliefs, but the measure was justified because it was taken 'in the interests of public safety', a listed legitimate aim in the second paragraph of Article 9.[47] Based on the ECtHR's decisions in the aforementioned cases in relation to prohibitions on wearing religious clothing on public safety concerns, it can be strongly argued that a ban on Islamic veils on the grounds of safety and security will highly likely pass the legitimate aim test under the ECHR. Moreover, if it is clear that allowing Muslim women to conceal their faces is a major and substantial threat to the general public and, consequently, disrupts or threaten to disrupt public order, then a ban on veiling may be imposed on the grounds of 'protection of public order', which also qualifies as a permissible ground of limitation under Article 9(2).[48]

Before moving on to the necessity test, one specific matter merits some discussion. Article 9(2) of the Convention, in contrast to Articles 8(2), 10(2) and 11(2), does not enumerate 'national security' as a legitimate aim. Similarly, Article 18 of the ICCPR, which guarantees the FoRB, also omits national security grounds of limitation.[49] No

[47] (n 33).

[48] 'Public order' is synonymous with public peace, safety and tranquility, and, an absence of violence and public disorder. *Ramburn v Stock Exchange Commission* [1981] LRC (Const) 272; *Re Munhummeso* [1994] 1 LRC 282.

[49] The HRC states, 'paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.' HRC, *General Comment*

clear-cut answer can be found in the *travaux preparatoires* to the Convention as to why national security was omitted as a basis for the limitation of the right to manifest religion or belief. However, scholars have put forward two explanations for the omissions: (a) the expression 'national security' was regarded as being too vague;[50] and, (b) it was thought that there were no reasons for ever limiting the FoRB on national security considerations.[51] The obvious consequence of the omission is that 'national security' cannot be pleaded by the States as a permissible ground of limitation with regard to the right to manifest one's religion through the wearing of religious symbols or attire. However, given the broad scope of activities that can be perceived as a threat to public safety, 'there is a risk that states will cite them to justify restrictions on religious freedom imposed for reasons tantamount to national security interests.'[52] Therefore, the distinction between public safety (which is permissible ground of limitation) and national security (which is *not* a permissible ground of limitation) is pertinent to this discussion.

No. 22: Article 18 (Freedom of Thought, Conscience or Religion) UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) para 26.

[50] The UN, with regard to the limitation clause of Article 18 ICCPR, stated that the term 'national security' was 'not sufficiently precise to be used as a basis for the limitation of the exercise of the right guaranteed.' (Agenda Item 28, Part II, Annexes, UN Doc. A/ 2929 (1955) 49).

[51] Iain Cameron, *National Security and the European Convention on Human Rights* (The Hague- London- Boston: Kluwer Law, 2000) 349.

[52] Donna J. Sullivan, 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82(3) American Journal of International Law 487, 496-499. See also Karen Murphy, *State Security Regimes and the Right to Freedom of Religion and Belief: Challenges in Europe since 2001* (Oxfordshire- New York: Routledge, 2013) 49-50.

Public safety has been defined as 'protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.'[53] In *Re Munhummeso*, the Supreme Court of Zimbabwe held that 'public safety' means security of the public or their freedom from danger, and the safety of the community from external or internal danger.[54] Conversely, national security concerns are much more severe than public safety concerns in the sense that failure to mitigate a threat to national security risks national extinction. Jayawickrama argues, national security is invoked to justify measures taken 'to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.'[55] The Siracusa Principles make it clear that 'national security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.'[56]

4.4.2. The Necessity Test

Even if a State shows that a legislative ban on wearing Islamic veils pursues the legitimate aim of the protection of public safety and/or public order, it is not enough to justify the ban. To fully justify, the State must also show that the ban in question is 'necessary in a democratic society' under Article 9(2) of the Convention.

---

[53] Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4 (1985) para 33.

[54] (n 48).

[55] Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge: CUP, 2002) 193.

[56] (n 53) para 30. Kiss argues, States cannot invoke national security grounds of limitation if the sole purpose of the interference is to avoid riots or other disturbances or to frustrate revolutionary movements that are not threats for the life of the whole nation. (Alexander Charles Kiss, 'Permissible Limitations on Rights' in Louis Henkin (ed), *The International Bill of Rights* (New York: Colombia University Press, 1981) 290, 297.

The principle of proportionality plays an important role in examining whether a limitation on the right to manifest one's religion is necessary and justified. The proportionality test requires the ECtHR to balance the severity of the limitation placed on the individual against the importance of the public interest. Commentators have argued that '[b]alancing is a metaphor that refers to the requirement that *all* relevant things need to be considered' by the ECtHR.[57] This thesis will submit that the following five factors (among others) must be taken into account by the ECtHR to examine whether an anti-veiling law, enacted on safety and security considerations, satisfies the necessity test under Article 9(2).

(a) A Blanket Ban in All Public Places v A Tailored Ban in Specific Places

A ban on Islamic veiling in all public places, not only in specific places, may not be proportionate within the meaning of Article 9(2) of the Convention. A general or complete ban on wearing Islamic veils in every public place and at all times may not be necessary to safeguard public safety. To illustrate this point, the concealment of the face is not problematic for public safety when a *burqa*-wearing woman goes to a public zoo or park with her children. Being able to identify individuals is of course vital to maintain public safety and for the prevention of identity fraud. However, banning full-face veils altogether in all public places, at all times, to achieve these purposes is unlikely to be necessary. This is because a tailor-made ban for specific circumstances would be sufficient -- that still leaves enough room for religious

[57] Mattias Kumm,'The Turn to Justification: On the Structure and Domain of Human Rights' in Adam Etinson (ed), Human Rights: Moral or Political? (Oxford: OUP, 2018) 250 (emphasis added). See also Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden- Boston: Martinus Nijhoff Publishers, 2009) 210.

choice to be exercised. In *S.A.S.*, to examine the proportionality of the Islamic full-face veil ban in France for the interests of public safety, the ECtHR observed that a blanket ban was not necessary to ensure public safety. It stated that 'a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate *only* in a context where there is a general threat to public safety.'[58] Likewise, the HRC in its Optional Protocol decisions has implied that the threshold is high if a State seeks to justify an 'absolute' ban which is not limited to specific contexts but comprehensively forbids the wearing of the Islamic full-face veils in public at all times on the grounds of public safety and public order.[59] It is therefore submitted that a blanket ban on Islamic veiling in all public places open to the general public would satisfy the proportionality test *only* where there is 'a general threat to public safety'[60] and if a large scale of interference is strictly necessary for the protection of public safety. However, specific bans narrowly tailored for places and situations where there are increased safety risks, such as identity checkpoints at airports, will be highly likely to fulfil the proportionality test, and thus be justified.

(b) Head Covering Veils v Face Covering Veils

As discussed in Chapter One, in the contemporary world, Muslim women and girls wear a range of veils in accordance with their religious convictions.[61] While some veils (e.g. the *hijab*) cover one's head and neck only, others (e.g. the *burqa*) cover the full face and entire body. It is submitted that a ban on wearing 'all' types of

[58] *S.A.S.* (n 32) para 139 (emphasis added).

[59] *Hebbadj* (n 37) para 7.7; *Yaker* (n 37) para 8.7.

[60] *S.A.S.* (n 32) para 139.

[61] See Section 1.2.1.

Islamic garments used by Muslim women on safety grounds may not always be proportionate within the meaning of Article 9. A *hijab* or an *al-amira* does not cover one's body and face -- it covers one's hair and neck (and possibly a very small part of forehead) only. It follows that a head covering veil such as the *hijab* is not problematic for identity checks and that it cannot be used to hide explosives. It is therefore argued that the *hijab* cannot not be a threat to public safety unless a serious health issue, for instance, the wearing of a *hijab* by a female motorcyclist,[62] is established. States hardly argue that the wearing of beanie hats (which are comparable to the *hijab* in the sense a beanie hat does not cover one's face) need to be prohibited in public places to enhance safety and security. With regard to the wearing of the Sikh turban and its alleged adverse impact on public safety and public order, the HRC has taken the view that a turban may not make it difficult to identify an individual because it 'covers the top of the head and a portion of forehead but leaves the rest of face clearly visible'. Consequently, it has decided

[62] In this context, a 2019 case of the Federal Administrative Court in Leipzig is of relevance. In this case, the applicant claimed that he should be exempted from the obligation to wear a helmet when riding his motorcycle because, as a devout Sikh, he must wear a turban and the helmet would not fit over his turban. He further argued that the mandatory wearing of protective helmet when riding a motorcycle infringed his religious freedoms under Article 4(1) of the Basic Law. The Presiding judge, Renate Phillip, ruled that 'people wearing a turban on religious grounds are not for that reason alone exempt from the obligation to wear a helmet'. It was further ruled that the law regarding the obligation to wear a helmet was enacted not only to protect the driver but also to protect the physical and psychological integrity of others involved in an accident. (See 'German court: Sikhs have to wear helmets on motorbikes' (*DW*, 4 July 2019) <https://www.dw.com/en/german-court-sikhs-have-to-wear-helmets-on-motorbikes/a-49475615> accessed 30 August 2019). In a case against the UK, the EComHR decided that the crash helmet requirement imposed on motorcyclists did not violate the turban-wearing Sikh applicant's FoRB under Article 9 of the Convention because the measure was taken for the protection of health. (*X v United Kingdom* App no. 7992/77 (ECHR, 12 July 1978)).

that a ban on the wearing of a turban is not a proportionate measure to protect public safety and order.[63] Therefore, one can persuasively argue that a ban on wearing *all* types of Islamic veils indiscriminately may not be regarded as necessary in a democratic society for the interests of public safety within the meaning of Article 9 of the ECHR. However, loose-fitting face-and body-coverings, namely the *niqab* and *burqa,* can potentially be used to hide explosives and/or to disguise one's identity. Thus, subject to the requirement of prohibition of discrimination,[64] a ban on the *niqab* and *burqa*, may arguably be regarded as a justified and proportionate response aimed at protecting or advancing public safety and security.

(c) A Targeted Ban v A Neutrally Formulated Anti-Veiling Law

The wearing of Islamic veils should not be prohibited only because it is a symbol of *Islam*. If a State is genuinely concerned about the security threat arising from of the possibility that criminals and terrorists use face coverings to disguise their identity, then it should prohibit the wearing of all types of face veils including balaclavas and Halloween masks that are problematic for identification and face recognition. If a State is genuinely concerned about the need to automatically be able to identify people in public places, then it should ban the wearing of, *inter alia*, hoodies, broad-brimmed hats, sunglasses, long beards and heavy makeup that can potentially be used to obscure one's face (from a CCTV camera). An anti-veiling law which is deliberately enacted to ban or restrict the wearing of the *niqab* and *burqa* to the detriment of pious, veil-wearing Muslim women would be highly likely regarded as discriminatory on the grounds of religion or race. This is because the purpose of

[63] *Ranjit Singh* (n 37) para 8.4.

[64] See discussion in the following paragraph.

such an enactment for safety reasons should be to forbid people from concealing their faces in public places, or more specifically speaking, in high security zones, to facilitate identification, not to prevent Muslim women from wearing clothing with a religious connotation. In short, an anti-veiling law must not specifically target Muslim women or their religious dress only; it must apply to any individual who wear items concealing the face in public spaces, regardless of gender and rationale, religious or otherwise. The Conseil d'Etat took the view that public safety, a key component of public order, could not be advanced as a justification to impose a ban or restriction targeted only at the *burqas.*[65] It is therefore submitted that a ban on security concerns may not pass the proportionally test under Article 9(2) if it specifically targets Islamic dress and Muslim women.

(d) Availability of Evidence

As indicated above, Islamic veiling is perceived by many people, especially by followers of the mainstream religion, as a symbol of Islamic fundamentalism. This security-related concern had been referenced by some European countries to justify the anti-veiling laws. For instance, in the Belgian parliamentary debates leading to the Islamic full-face veil in Belgium it was argued by legislators that, because of its connection with fundamentalism or terrorism, other people might feel uneasy in the presence of a woman wearing an Islamic veil.[66] It will, however, be argued that the majority's subjective feelings of insecurity, which is allegedly generated by the sight of Islamic veils, cannot be a sufficient basis to support a ban

[65] Etude relative aux possibilities juridiques d'interdiction du port du voile integral (25 March 2010) 9-17.

[66] Parliamentary Documents of the House of Representatives, Session 2010-2011, Plenary Assembly (CRIV 53 PLEN 030) 55. See also (n 7).

on Islamic veiling with the aim of safeguarding public safety. It will also be argued that a ban on the grounds of public safety and security may only be justified under Article 9 if there is evidence to suggest that allowing individuals to wear Islamic veils endangers public safety or disrupts public order and peace, and, therefore, a restrictive measure is strictly necessary for the prevention of harm.

The wearing of Islamic veils cannot be prohibited simply on the basis of stereotypical views of Islam and veil-wearing Muslim women. In other words, the blanket and abstract assumption, not based on evidence, that allowing Muslim women to wear Islamic garments would pose a threat to public safety is not enough to limit the right to manifest one's religion through the wearing of religious dress. This is because a ban may not be compatible with human rights principles if it is based upon negative-subjective perceptions and feelings of insecurity.[67] The ECtHR's ruling in *Vajnai v Hungary* must be highlighted at this point. This case concerned an individual's criminal conviction for wearing a 'red star' symbol on his jacket, which was regarded as a 'totalitarian symbol' under Hungarian law. At the outset of the proportionality analysis in this case, the ECtHR stressed that limitations on fundamental rights are 'justified *only* in so far as there exists a clear' 'and specific social need' and that 'utmost care must be observed in applying any restrictions, especially when the case involves symbols which have multiple meanings.'[68] By emphasising the need that the government must show an 'instance where an actual or even remote danger of disorder triggered by

[67] Francois-Xavier Millet, 'When the European Court of Human Rights Encounters the Face: A Case-note on the Burqa Ban in France' (2015) 11(2) European Constitutional Law Review 408; Eva Brems et al., (n 16) 91.

[68] App no. 33629/06 (ECHR, 8 July 2008) para 51 (emphasis added).

the public display of the red star', the ECtHR held that "the containment of a mere speculative danger … cannot be seen as a 'pressing social need'."[69] The Court concluded that 'a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs' within the meaning of the Convention.[70] Based on the ECtHR's ruling in *Vajnai*, it can be strongly argued that a subjective feeling of insecurity or uneasiness generated by the mere sight of a Muslim woman in veil cannot be a sufficient basis to support a ban on Islamic veiling on the grounds of public safety. Therefore, Bribosia and Rorive have noted that under the 'European human rights standards, forbidding the full veil could be justified neither by virtual or unproven risk for public security nor on mere speculation or presumption. The suitable test relates to an actual threat to public security or the sufficiently strong likelihood of one.'[71]

It is further submitted that a ban on Islamic veils on safety considerations may only be justified and proportionate under Article 9(2) if there is tangible evidence (e.g. a secret intelligence report) which suggests that allowing Muslim women to wear veils endangers public safety, and thus Islamic veiling represents a genuine security threat. In other words, there must be a cogent evidentiary basis to justify a ban on the grounds of public safety and security. An Islamic veil does not present a danger *per se,* unlike some religious symbols such as a Sikh kirpan, i.e. a dagger. A ban on wearing Islamic veils on safety concerns may not satisfy the proportionality test

[69] ibid, para 55.

[70] ibid, para 57. In this case, the ECtHR unanimously held that the applicant's conviction for wearing a red star symbol was not justified under Article 10 of the Convention.

[71] (n 31) 172.

under the Convention unless there is an objectively discernible danger to the lives and properties of people or to the interests of the society as a whole.

In *Leyla Sahin v Turkey*[72] (hereinafter "*Sahin*"), Ms Sahin had been denied access to lectures, examinations and enrolment in a Turkish university, and was eventually suspended as she was wearing a *hijab*. The ECtHR (by majority) decided that a ban on wearing the *hijab* at the university was justified because the measure pursued the legitimate aim of public order. However, a number of questions remained unanswered by the ECtHR: was there any reliable evidence which suggested the wearing of a *hijab* by the applicant, or by any other students, posed a serious threat to safety and order?; was there any extremist group in the university?; and, if so, which activities of these groups disrupted public order? Instead of answering these questions, the ECtHR gave priority to the danger caused by Islam in Turkey in general over the facts of the case.[73] In her dissenting opinion, Judge Tulkens pointed out that 'there was no evidence before the Court to suggest that … there was … any disorderly conduct, as a result of the applicant's wearing the headscarf.'[74] It is therefore argued that the reasoning of the majority in *Sahin* was not convincing. The majority should have found a violation of Article 9 in this case, because there was no evidential basis in support of the conclusion that a restriction on the wearing of the *hijab* in the university was required on the grounds of public order.

[72] App no. 44774/98 (ECHR, 10 November 2005).

[73] On this point, see Kerem Altiparmak and Onur Karahanogullari, 'European Court of Human Rights after S*ahin:* The Debate on Headscarves Is Not Over, *Leyla* s*ahin* v. *Turkey*, Grand Chamber Judgment of 10 November 2005, Application No. 44774/98' (2006) 2 European Constitutional Law Review 268*,* 278-280.

[74] (n 72) Dissenting opinion of Judge Tulkens, para 8.

However, the ECtHR departed from *Sahin's* ruling and exercised a higher level of scrutiny in the proportionality analysis, and emphasised the need for evidence to justify restrictions on wearing religious attire in *Ahmet Arslan and Others v Turkey*[75] (hereinafter "*Arslan*"). In this case, the applicants were convicted of offences relating to the wearing of religious dress in public pursuant to Turkish legislation enacted in 1925 and 1934 that prescribed the wearing of a brimmed hat, prohibited the wearing of a fez or other style of religious head coverings and banned religious dress in public.[76] The facts of this case emerged when the applicants met in Ankara for a religious ceremony held in a mosque and toured the streets of the city while wearing the distinctive clothing. In this case, the applicants complained that their conviction violated their right to religious manifestation under Article 9. In direct contrast to its decision in *Sahin*, the ECtHR found a violation of the applicants' Article 9 right in *Arslan* because there was no evidence which suggested that the manner in which the applicants had manifested their beliefs by their religious attire represented or might have represented a threat for public order or a form of pressure on others.

The divergent outcomes in *Sahin* and *Arslan* clearly demonstrate that an evidence-based approach in examining the proportionality of a ban protects an individual's religious freedom and personal autonomy in greater extent. There is no doubt that governments have a legitimate responsibility to protect public safety, to control violence against the State, and to prevent disruptions of the public peace. However,

[75] App no. 41135/98 (ECHR, 23 February 2010).

[76] On the laws of 1925 and 1934, see Yasemin Doganer, 'The Law on Headdress and Regulations on Dressing in the Turkish Modernization' (2009) 51 Bilig: Journal of the Social Sciences of the Turkish World 33, 38-43.

this does not ultimately give a right to governments to ban Islamic veiling based on the mere fact that the presence of Islamic veils in public places causes feelings of insecurity or intimidation to some followers of other religions who perceive Islamic veiling as a symbol of fundamentalism. The presence of knives or guns in public spaces may endanger one's safety but the mere sight of a *niqab* or *burqa* cannot or should not generate feelings of insecurity in the viewer's mind. Therefore, unreasonable or unfounded fears, such as that Islamic full-face veils are being used by Muslim women to hide weapons, do not justify State regulation of the wearing Islamic veils in public places. In *Cheema v Thompson*, a case concerning bans on wearing kirpans by Sikh schoolchildren on safety concerns, the US Court of Appeals for the Ninth Circuit admitted that 'unfounded or irrational fears do not constitute a compelling interest.'[77] Although the States enjoy a MoA in restricting the right to religious manifestation by symbols and attire, the lack of evidence to support a restriction is a worrying factor. Upholding a ban without the existence of evidence would give precedence to the majority's discomfort or unfounded fears over Muslim women's free choices on religious matters. Thus, with regard to bans on veiling on the grounds of public safety, Schyff and Overbeeke raise the question, 'how can a far-reaching measure be justified without there being convincing empirical or other evidence before a court, or legislature for that matter?'[78] One can therefore argue that to examine whether a ban on Islamic veils on security concerns is proportionate under Article 9(2), the ECtHR must satisfy that the State concerned has produced sufficient evidence to establish beyond reasonable doubt

[77] (n 40).

[78] Gerhard van der Schyff and Adriaan Overbeeke, 'Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans' (2011) 7(3) European Constitutional Law Review 424, 446.

that allowing Muslim women to wear Islamic veils would harm public safety or security and/or cause disruptions to public order or peace.

It should be briefly noted that some domestic courts have given special importance to the availability of evidence in examining whether forcible removal of religious symbols is justified for the interests of public safety. For example, in *State v Singh*, the Court of Appeal of Ohio took the view that criminal prosecution of Dr Harninder Singh for carrying a kirpan was unlawful because there was 'no evidence that Singh possessed or carried the kirpan as a weapon and no evidence that the kirpan was designed or adapted for use as a weapon.'[79] In *Multani v Commission scolaire Marguerite-Bourgeoys*, Mr Multani, a Sikh schoolboy, wished to wear his ceremonial dagger, the kirpan. The School's governing board, however, prohibited this, saying it posed a danger to others. The Supreme Court of Canada held that prohibiting Mr Multani from wearing a kirpan constituted a violation of FoRB. The Supreme Court's decision was based on the fact that there was no evidence which suggested that the presence of kirpans in school posed a safety risk to other students or that the kirpans could be used for violent purposes, either by those who wear them or by other students who might take hold of them by force.[80] Likewise, the Conseil d'Etat ruled that the ban imposed by the mayor of Villeneuve-Loubet on the wearing of the *burkini* on the town's beaches was unlawful because there was 'no evidence that wearing a *burkini* posed any risk in these areas'. It was also stated that any measure restricting public freedoms had to be justified by clearly

[79] 117 Ohio App. 3d 381 [1996].

[80] [2006] SSC 6, paras 56- 69. For an analysis of this case, see Valerie Stoker, 'Zero Tolerance? Sikh Swords, School Safety, and Secularism in Quebec' (2007) 75(4) Journal of American Academy of Religion 814.

demonstrable risks to peace and good order, safety, and security.[81] Likewise, in a report concerning the relationship between religious freedom and national security, the UN Special Rapporteur, Ahmed Shaheed, stated that before imposing a limitation on religious freedoms to tackle any security threats 'States must demonstrate with clear evidence that individuals or groups of individuals have been involved in activities that incite … violence, or that they are undermining the rights and freedoms of others in other tangible ways.'[82]

(e) Availability of Less Restrictive Means to Attain the Objective

The principle of proportionality is commonly thought to encompass the least restrictive means-test.[83] The least restrictive means-test requires that of all the instruments that could be chosen to achieve the objectives pursued, that instrument has to be selected which is least onerous from the perspective of the individual rights at stake.[84] Jonas Christoffersen notes, 'the obligation to adopt a less restrictive means in essence leads to the obligation to use the least restrictive instrument because the least restrictive will be preferred over the second-least onerous one.'[85] The least restrictive alternative approach goes in one direction only because a State cannot justify the interference by arguing that it could have

[81] CE, Ordonnance du 26 aout 2016, Nos. 402742, 402777.

[82] (n 1) para 27.

[83] Davor Susnjar notes, 'the least restrictive means test forms an element of the proportionality test under the Convention.' (Davor Susnjar, *Proportionality, Fundamental Rights and Balance of Powers* (Leiden- Boston: Martinus Nijhoff Publishers, 2010) 89). See also Steven Greer, 'Constitutionalizing Adjudication under the European Convention on Human rights' (2003) 23 Oxford Journal of Legal Studies 405, 409.

[84] Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers) (Oxford: OUP, 2002) 68.

[85] Christoffersen (n 57) 114.

employed *more* restrictive means to pursue the aim: '[t]he use of a cannonball to kill a fly cannot be defended on the ground that a nuclear missile might have been used instead'.[86] Therefore, Lavrysen and Brems argue that '[o]nly the existence of the [less restrictive means] matters, not the existence of more restrictive means.'[87]

Scholars have remarked that the Strasbourg organs, generally speaking, have shown a willingness not only to enquire about less restrictive alternatives, but also require States to indeed choose such alternatives where possible.[88] In *Supreme Holy Council of the Muslim Community v Bulgaria*, a case concerning the placement of a divided Muslim community under a single leadership, the ECtHR took the view that 'State measures favouring a particular leader or group in a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion'[89] partly because the Bulgarian government had not stated why 'their aim to restore legality and remedy injustices could not be achieved by other means, without compelling the divided community under a single leadership.'[90] In *Bayatyan v Armenia*, a case concerning the conviction of a Jehovah's Witness for

[86] Opinion Advocate General Jacobs to the CJEU, Case C-24/90, C-25/90 and C-26/90, *Hauptzollamt Hamburg-Jonas v Werner Faust* [1991] ECLI:EU:C:1991:310, para 46. He further stated that 'the principle of proportionality is not satisfied simply because the administration refrains from using the most drastic weapon in its arsenal'. (para 46).

[87] Eva Brems and Laurens Lavrysen, 'Don't Use a Sledgehammer to Crack a Nut: Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139, 143.

[88] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp- Oxford- New York: Intersentia, 2002) 130; Schyff and Overbeeke (n 78) 443-444.

[89] App no. 39023/97 (ECHR, 16 December 2004) para 76.

[90] ibid, para 97.

refusing to perform military service on religious grounds, the ECtHR found a violation of Article 9 because 'there existed viable and effective alternatives capable of accommodating the competing interests'.[91] Likewise, as far as the religious freedom jurisprudence is concerned, the HRC,[92] the CJEU,[93] and domestic courts[94] have emphasised that a State must choose the least restrictive option, i.e. the one which is less burdensome to the individual applicant, to accomplish the desired legitimate objective(s).

It is submitted that a ban on Islamic veiling on the grounds of public safety and security should only be imposed a matter of last resort. This is because a prohibition on wearing Islamic dress ultimately requires a woman to give up an essential element of her religious identity and causes undue hardship in exercising control over her religious affairs. If public safety objectives can be achieved without imposing a ban on veiling, then the ban is less likely to meet the proportionality test. Similarly, where threats to public safety can be sufficiently countered through specific bans, then nation-wide, blanket criminal prohibitions on wearing Islamic full-face veils, such as those currently enacted in France, Denmark and Bulgaria, may not be regarded as proportionate within the meaning of Article 9(2). Furthermore, safety requires identifiability, not permanent recognisability. If a veiled woman is willing to show her face by removing or lifting her veil in order to be identified, then requiring her or indeed forcing her to remove the veil is

[91] App no 23459/03 (ECHR, 7 July 2011) para 124.

[92] See for example, *Yaker* (n 37) para 8.8.

[93] See for example, Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*[2018] ECR II-257, para 68; Case C-68/17 *IR v JQ* [2018] ECR-II 696, para 54.

[94] See for example, *R v Edwards Books and Art Ltd.* [1986] 2 SCR 713, para 122; *Cheema* (n 40).

unnecessary. Put differently, if the public safety objective can be attained by a mere obligation to show the face where a risk of safety of person and property is clearly established, then forcible removal of a veil is unnecessary and thus, disproportionate. In this sense, the ECtHR's decision in *El Morsli v France*[95] is unconvincing.

In *El Morsli*, the applicant, Ms Morsli was a Moroccan national who regularly wore a veil. She went to the Consulate-General of France in Marrakesh to request an entry visa to France so that she could join her husband. However, she was not allowed to enter the consulate premises as she refused to remove her veil in front of a male security officer for an identity check. She stated that she was prepared to remove her veil to be identified, but only in the presence of a woman. She then submitted her visa application by a registered letter, but the application was refused. Invoking Article 9 of the Convention, she complained of a violation of her FoRB, attributable to the actions of the consular authorities. In her submission, Ms Morsli emphasised that the 'violation was even more unjustified as she had been prepared to remove her veil, but only in the presence of a woman and had therefore not refused to be identified.' The ECtHR held that this case was manifestly ill-founded and thus inadmissible. To arrive at such a conclusion, the Court stated that Ms Morsli's proposal 'to remove her veil only in the presence of a woman, assuming that the consular authorities were asked this question, the fact that they did not assign a female officer to carry out the identification of the applicant does not exceed the State's margin of appreciation in these matters.'[96] Disappointingly, the ECtHR did not state its rationale for the decision that France acted within the

[95] (n 34).

[96] ibid.

boundary of its margin while it was clear that the authorities did not adopt the less restrictive options or take into account the applicant's proposal for an alternative measure in their decision-making process. It is argued that in *El Morsli*, the ECtHR should have concluded that the interference with the applicant's right to manifest religion was unnecessary in a democratic society because she had not refused to be identified and the consular authorities would not have sustained any significant harm or undue hardship or administrative complexities by accommodating the applicant's requests in assigning a female officer to carry out the identity check. In other words, the consulate authorities' objective could have been achieved successfully in an alternative manner, which would have been less invasive for Ms Morsli.

It is important to note that to declare Ms Morsli's complaint inadmissible, the ECtHR relied on its previous rulings in *Phull v France*[97] where like *El Morsli* case, it failed to apply the least restrictive alternative criterion in carrying out the proportionality analysis. The facts of *Phull* have been introduced above. In this case, Mr Phull argued that it was unnecessary for the security officers to make him remove his headgear, especially as he had not objected to go through the walk-through scanner or to be checked with a hand-held detector. Put differently, by expressing his willingness to be screened by scanners/detectors, Mr Phull proposed an alternative measure for safeguarding public safety. Thus, it can be argued that the public safety objective could have been achieved successfully even though Mr Phull would keep his turban on because he was willing to go through the security checks. Modern technology has paved the way for the airports to use various

[97] (n 33).

screening equipment, such as, millimetre wave scanners, backscatter x-ray, metal detectors and cabinet x-ray machines. Even if one assumes the worst case scenario that Mr Phull was carrying explosives or other dangerous objects under his turban, it is difficult to argue that Mr Phull could have escaped the airport security had he not been forced by the security officers to remove his turban. Individuals can hide weapons under their trousers, but airport security officers do not force passengers to remove their trousers for security purposes, rather, screening devices are used to scan the bodies of passengers. Entzheim Airport, a busy international airport located in the French city of Strasbourg, was presumably well-equipped to screen passengers' bodies. In this sense, there was no need for the security staff to force Mr Phull to remove his turban, which he considered an important element of his faith and identity. By adopting a less restrictive measure (e.g. screening Mr Phull's body by a scanner), the intended legitimate objective could (less easily) have been achieved. Therefore, it can be argued that the ECtHR should have declared *Phull* case admissible and found a violation of Article 9.

It should be highlighted that, empirical research has consistently shown a general willingness among veil-wearing Muslim women to uncover their faces for identification purposes when requested to do so by a security officer. The vast majority are willing to do so regardless of the gender of that official.[98] Even in high-profile ECtHR cases such as *S.A.S.*, the applicants maintained that they were happy

[98] See Open Society Foundations, 'Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France' (2011) p.45 <https://www.opensocietyfoundations.org/sites/default/files/a-unveiling-the-truth-20100510_0.pdf> accessed 20 September 2016; See also Eva Brems et al., 'The Belgian 'Burqa Ban' Confronted with Insider Realities' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge: CUP, 2014) 103.

to remove their veils in areas of heightened security risks such as airports, without arguing that those instances of State coercion violated their religious freedom.[99] If public safety needs can be successfully achieved by adopting viable alternative measures such as a requirement to remove face veils in front of a female security officer for identification or investigation purposes, and a veil-wearing woman is willing to take off her veil when requested to do so for necessary checks, then forcible removal of the veil must be regarded as a drastic measure because a lesser restrictive means is available to promote the same end. In this context, *R (on the application of Watkins-Singh) v Aberdare Girls' High School & Anor*, a case concerning the wearing of a Kara (i.e. a plain steel bangle which may Sikhs wear as a visible sign of their identity and faith) by a Sikh schoolgirl is worth mentioning. In this case, Justice Silber stated:

> I should repeat that the health and safety factors … are not valid reasons for refusing to allow the claimant to wear the Kara as the claimant has said that she is quite prepared to compromise and to remove … the Kara … during any lessons such as Physical Education where health and safety might be an issue.[100]

Based on the above analysis, it can be deduced that that before instituting a ban on the wearing of Islamic veils on the grounds of public safety and security, a State must carefully consider whether a less restrictive alternative exists. If a less restrictive alternative solution is found, and if the adoption of that alternative does not place any undue hardship on the State, then a ban may not satisfy the proportionality test under Article 9 of the Convention. This is because the

[99] *S.A.S.* (n 32) para 13.

[100] [2008] EWHC 1865 (Admin) para 87.

employment of the least intrusive alternative 'would cause less damage to the fundamental right in issue whilst fulfilling the same aim'.[101]

4.4.3. Reaching Conclusion on the Compatibility of a Ban with the Convention Standards

To summarise the above discussion about the compatibility of an anti-veiling law with the Convention standards, the public safety and security argument seems to be a legitimate ground to ban the voluntary wearing of Islamic veil. This is because, the interests of public safety and the protection of public order have been enumerated as permissible grounds of limitation under Article 9(2) of the Convention. However, upon close examination of the argument in favour of a blanket ban on safety considerations, it would appear that that a blanket ban may not always be justified, because such a measure is neither relevant to achieving, nor proportionate with, its objective. It has been argued above that a blanket ban may be regarded as proportionate and justified *only* if there is a general threat to public safety or if a large-scale act of violence or attack is imminent. However, a pragmatic, situation-by-situation approach (i.e. a ban which is limited to space and time) would highly likely satisfy the proportionality principle under Article 9(2) on the grounds of public safety and security. It has been indicated that the provisions of anti-veiling legislation should be framed in a neutral fashion so that it is not aimed at *Islamic* dress specifically, but at face coverings more generally. As argued above, verifying whether there exists a less intrusive measure is central to proportionality analysis. If the objective to limit the right to wear Islamic veil is the

[101] *Nada v Switzerland* App no. 10593/08 (ECHR, 12 September 2012) para 183.

protection of public safety and security, then the government must explore whether a less restrictive measure can achieve that aim. It has been argued that if a ban on Islamic veils were to be imposed on safety considerations, then it must be based on genuine evidence. If a ban on Islamic veiling is instituted on the basis of the unfounded fears or subjective feeling of insecurity, then the interference may fall foul of European requirements for lack of proportionality.

The following section examines whether a ban on Islamic veiling on grounds of public safety and security may be justified from the viewpoint Mill's harm principle.

4.5. Mill's Harm Principle and a Ban on Islamic Veiling: Prevention of Harm of Others v Protection of Personal Autonomy of the Individual Applicant

Proponents of Islamic veils may argue that a free, healthy democratic State should not enact anti-veiling laws forbidding Muslim women from wearing Islamic dress even on safety and security considerations because such legislation limits personal autonomy of the wearers and thus contravenes the liberal values. In fact, such an argument is not hard to counter. Rights are politically constructed; they are not natural. Therefore, rights and liberties can be lawfully restricted in the name of the 'common good' of the society.[102] Although such an approach is not liberal in the classical sense, liberalism does recognise that in order to prevent harm, a State can use its coercive powers to limit individual liberty. The harm principle states that a society has legitimate authority to interfere with one's action if the act meets the threshold of threating someone else's rights, and this threshold is what is invoked

[102] Ioanna Tourkochoriti, 'Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.' (2012) 20(3) William & Mary Bill of Rights Journal 790, 833.

by the phrase 'harm to others'. Mill states, when 'actions are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment'.[103]

As indicated in Chapter Two, the distinction between self-regarding and other-regarding spheres is one of the key characteristics of the Millian theory.[104] Mill clarifies that an individual's liberty is absolute in relation to their self-regarding conduct, but legal and moral coercion may be justified to restrain their other-regarding conduct. Arguably, the self-regarding/other-regarding status of an action may change depending on the situation. Consider this example, drinking alcohol by X, in itself, is a self-regarding behaviour. However, where X's drinking harms Y because X loses control over their own mental and physical functioning, then X's action (i.e. drinking alcohol) loses the self-regarding status, and as a consequence, it becomes an other-regarding behaviour. Thus, drinking alcohol by X while driving a vehicle on a busy public road becomes an other-regarding conduct, and, consequently, can be legitimately interfered with for the prevention of harm. It is therefore argued that an action, which is generally self-regarding, can become an other-regarding action in specific contexts. Generally speaking, donning the veil by a woman, who holds the religious conviction that Muslim women are required by their faith to cover up, is a self-regarding action. However, if her religious practice of veiling harms the safety of others, then her religious behaviour no longer remains self-regarding. Any direct, negative consequences on non-consenting others resulting from her self-regarding religious conduct, makes the conduct other-regarding. Therefore, Mill states, 'the case is taken out of the self-regarding

[103] John Stuart Mill, *On Liberty* (Kitchener: Batoche Books, 2001) 86.

[104] See Section 2.2.

class' when the conduct of an individual 'violate[s] a distinct and assignable obligation to any other person or persons'.[105] It is therefore argued that as soon as the wearing of the veil by an individual endangers public safety, then their action in question loses the self-regarding status, and society acquires sufficient warrant to intervene.

As already established, the wearing of the Islamic full-face veils, namely the *burqa* and *niqab*, may indeed pose a threat to the safety of public in areas of heightened security because these garments allow an individual to disguise their identity. The loose-fitting, head-to-toe covering *burqa* can also be used by criminals and terrorists to conceal explosives and arms. Drawing on examples from a number of different countries it has been illustrated that perpetrators are increasingly using Islamic full-face veils to commit crimes and large-scale terrorist or jihadist attacks.[106] Undoubtedly, individuals suffer irreparable harm when they become the victim of crime or terrorism. The failure of the State to safeguard public safety and security may lead to a person's death, physical and psychological injury, financial loss, damage to or the loss of property, and so forth. These losses certainly set back an individual's important 'interests', which in Mill's words, can be described as 'rights' 'by express legal provision'.[107] This is because the right to life (which is affected by one's death), the right to heath (which is affected by physical and psychological injury) and the right to property (which is affected by financial loss or damage of properties) are guaranteed in major human rights treaties including the Convention as well as in constitutional law. Thus, it can be strongly argued that by

[105] Mill (n 103) 75.

[106] See Section 4.2 above.

[107] Mill (n 103) 69.

using Islamic veils for improper purposes, perpetrators may *harm* innocent people by affecting their interests in which they have 'rights'. In addition, the commitment of a crime or terrorist attack by a veil-wearing individual harms the society as a whole because the government has to spend money on security forces, ambulances and hospitals.[108] Thus, where Islamic veils are used by perpetrators, for example, a jihadist, to assist in the commission of the terrorist attack, then the assessment of harm can be carried out at a dual level: that of the individual and the society. Accordingly, based on Mill's harm principle, it can be strongly argued that a liberal democratic State can legitimately limit (which *must* be justified from a human rights viewpoint) the right to manifest one's religion or belief through the wearing of Islamic veils on safety and security considerations in order to prevent a veiled (wo)man from harming others and to prevent harm to others. With regard to the wearing of Islamic veils, Baroness Hale has remarked that 'we don't object to allowing people to do things for sincerely held religious reasons if they don't do any harm. If it does harm, we have to be a bit tougher.'[109] It is therefore concluded that a ban on Islamic veiling in order to protect and promote public safety and security would not contravene liberal values despite the fact the interference curtails the personal autonomy of a Muslim woman who wishes to wear a veil.

The proponents of the Islamic veil may argue that a truly liberal State should not forbid a pious, veil-wearing woman to wear her veil (in high security zones) unless she actually commits a crime which has the effect of causing harm to others.

[108] These may be regarded as social harm.

[109] Martin Bentham, 'Top judge calls for rules which force women to take off veils when giving evidence in court' (The *Evening Standard*, 12 December 2014) <https://www.standard.co.uk/news/uk/top-judge-calls-for-rules-which-force-women-to-take-off-veils-when-giving-evidence-in-court-9920224.html> accessed 4 March 2018.

However, it seems that Millian liberalism does not endorse this line of argument. Under the harm principle, one of the primary functions of criminal law is to proscribe actions or behaviours which are likely to harm others. Mill states that, 'whenever there is a definite damage, or *a definite risk of damage*, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.'[110] Further explanation has been offered by Mill, as he goes on to state that, '[i]t is one of the undisputed functions of government to take precautions against crime before it has been committed, as well as to detect and punish it afterwards. … A public authority…[is] not bound to look on inactive until the crime is committed, but may interfere to prevent it.'[111] Moreover, in an era of global terrorism, it is prudent for the government to guard against a potential threat rather than to only be reactive when threats have come to fruition. It is therefore submitted that, given that there is reliable and genuine evidence that veiled (wo)men may commit crimes and cause harm to others by disguising their identity and/or hiding arms or explosives under their loose-fitting, full-body covering Islamic dress, it is not necessary for a liberal State to wait for the harm to occur before correcting the situation.

Based on the above discussion, it can be concluded that by virtue of the harm principle a State can legitimately prohibit Muslim women from wearing Islamic full-face veils on the grounds of public safety and security provided that the State is genuinely convinced that allowing Muslim women to wear loose-fitting, head-to-toe covering veil poses a direct threat to the safety of others. It is true that such an intervention curtails a veil-wearing woman's personal autonomy, nevertheless, it

[110] Mill (n 103) 75 (emphasis added).

[111] ibid 88.

may not constitute unreasonable, unjustified limits on individual liberty because, under Millian theory, a society has sufficient warrant to exercise its coercive power when an individual's action is injurious to others: 'Acts injurious to others require a totally different treatment.'[112]

4.6. Concluding Remarks

In the years that followed terrorist attacks on the World Trade Centre and the Pentagon in 2001, security discussions increasingly referred to an assumed link between terrorism and religion. Silvio Ferrari writes, religious terrorism is not limited to Muslims; it concerns many religions, including Christianity. In the West, however, the controversy on religion and security mainly focuses on Islam.[113] In recent years, Islamic extremists or jihadists have committed religiously motivated acts of terrorism in several European and non-European countries and perpetrators have increasingly used Islamic full-face veils, namely the *burqa* and *niqab*, to disguise their identity and conceal explosive devices.[114] Terrorism and other criminal activities pose direct threats to the enjoyment of human rights, ranging from the right to life to the right to religious freedoms. Therefore, States have a legitimate interest to protect their citizens by adopting various security-oriented measures. However, failure to strictly comply with the obligations stipulated by international human rights law while pursuing these measures has caused an alarming uptick in human rights violations, including unjustified restrictions on the right to religious manifestation by Muslim minorities.

---

[112] ibid 72.

[113] Silvio Ferrari, 'Individual Religious Freedom and National Security in Europe After September 11' (2004) 2 BYU Law Review 357, 360.

[114] See Section 4.2 above.

Opponents of Islamic veils have referenced various safety-related concerns to justify their argument that the wearing of Islamic veils should be prohibited by law to protect public safety and security.[115] This chapter has argued that the protection of public safety and security seems to be a convincing argument and legitimate ground to ban Islamic veiling. As argued above, a legal ban or restriction on Islamic veils, enacted in order to prevent the danger to the public safety, would be highly likely justified under Mill's harm principle. Since public safety and public order have been enumerated as permissible grounds of limitation under Article 9(2) of the Convention, and the concealment of faces is a genuine barrier to recognisability and identification and thus ultimately presents obvious security issues, the determination that a ban on the Islamic veil pursues a legitimate aim within the Convention is not problematic. It has been argued that whether or not a ban on Muslim veiling would be regarded as proportionate under Article 9(2) would depend on a number of considerations, which are, *inter alia*: the availability of evidence; the existence of less intrusive alternatives to achieve the public safety goal; the breadth of the ban in terms of timing and geographic locations; and, whether the ban specifically targets Islam and/or Muslim women. It has been suggested that the ECtHR should carry out a 'rigorous' proportionality test to examine whether a ban on wearing Islamic veils is necessary in a democratic society on the grounds of public safety and security. In this context, a recent German case on religious freedom is noteworthy. This case concerned the Fourth Ordinance to Combat the Corona Virus of the Hessian State Government 2020. This Ordinance prohibited meetings, *inter alia*, in churches. The applicant of this case was of Catholic faith and regularly attended the Holy Mass. Since the Ordinance came into

[115] See Section 4.1 above.

force, it was impossible for him to attend Mass. The Federal Constitutional Court held that the prohibition on Holy Masses constituted an 'extremely serious interference with freedom of belief' of the applicant, but it was 'justifiable' because the measure was taken 'in order to protect health and life'.[116] The Constitutional Court further stated that 'a *strict examination* of proportionality must be carried out with regard to the relevant prohibition of meetings in churches in the present proceedings'.[117]

It must be highlighted that the fear of terrorism cannot be exploited to justify baseless restrictions on FoRB. In the parliamentary debates leading up to the nation-wide, criminal bans on wearing Islamic full-face veils in Belgium and France, the public safety argument was invoked not only as an argument of objective safety, but also as one of the *subjective* safety. It was specifically stated that the sight of an Islamic veil generates feelings of unsafety among the majority population.[118] However, it has been argued above that unfounded fears or subjective feelings of insecurity of the majority when encountering an individual in the Islamic veil cannot be used to justify a limitation on Muslim women's right to manifest religion through the wearing of religious attire. Eliminating the majority's unfounded fears or feeling of unease at the expense of the Muslim women's religious freedom will contravene the principles of human rights law. Therefore, with regard to the *burkini* ban in the seaside town of Villeneuve-Loubet in France amid to terrorist attacks in Nice, the Conseil d'Etat took the view that 'public sentiment or fears arising from terrorist attacks, including the one committed in

[116] 1 BvQ 28/20 (10 April 2020) para 2.

[117] ibid (emphasis added).

[118] See Eva Brems, '*SAS v France*: A Reality Check' (2016) 25 Nottingham Law Review 58, 66. See also (n 66).

Nice on July 14 are not enough to justify the ban.'[119] By endorsing the Conseil d'Etat's ruling that 'the ban constitutes a grave and illegal breach of fundamental freedoms'[120] the UN stated:

> We fully understand -- and share -- the grief and anger generated by the terrorist attacks carried out in France in recent months, including the atrocious 14 July attack in Nice. … Clearly, individuals wearing burkinis, or any other form of clothing for that matter, cannot be blamed for the violent or hostile reactions of others. Any public order concerns should be addressed by targeting those who incite hatred or react violently, and not by targeting women who simply want to walk on the beach or go for a swim wearing clothing they feel comfortable in. … Dress codes such as the anti-burkini decrees disproportionately affect women and girls, undermining their autonomy by denying them the ability to make independent decisions about how to dress...[121]

The following chapter will analyse whether the protection of gender equality is a convincing argument or legitimate ground to ban the wearing of Islamic veils.

[119] (n 81).

[120] ibid.

[121] See 'Press briefing notes on France and Bolivia' (30 August 2016) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20430&LangID=E> accessed 23 December 2019.

CHAPTER FIVE: BANNING ISLAMIC VEILS ON THE GROUND OF GENDER EQUALITY: AN APPRAISAL

> 'If a Sikh man wears a turban or a Jewish man a yamoulka, we can readily assume that it was his free choice to adopt the dress dictated by the teachings of his religion. I would make the same assumption about an adult Muslim woman who chooses to wear the Islamic headscarf. There are many reasons why she might wish to do this.'
>
> - Baroness Hale[1]

> 'I conclude that legal bans on the wearing of Muslim religious clothing are unnecessary and could even be counterproductive to the promotion of equality between women and men and to the emancipation of Muslim women and girls.'
>
> - Erica Howard[2]

5.1. Introduction

Protection of gender equality is widely used by way of justification in defending bans on wearing Islamic veils. The use of the gender equality justification 'is so widespread in public discussion that it is the main argument raised by those who oppose the [Islamic] veil'.[3] Opponents of the Islamic veil make different types of

[1] *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, para 94.

[2] Erica Howard, 'Banning Islamic Veils: Is Gender Equality a Valid Argument?' (2012) 12(3) International Journal of Discrimination and the Law 147, 149.

[3] Francois-Xavier Millet, 'When the European Court of Human Rights Encounters the Face' (2015) 11 European Constitutional Law Review 408, 416.

gender equality arguments in support of their claim that legislative bans on wearing Islamic veils are necessary for the promotion or protection of gender equality.[4]

One of the major arguments put forward to support bans on Islamic veiling relates to 'women's rights', that is, a ban seeks to liberate and protect rights of Muslim women from being forced to wear Islamic veils. In this line of argument, Islamic veiling is perceived as a symbol of women's oppression because it is asserted that women who wear the Islamic veil do not *choose* to wear veils, rather these garments are forcefully *imposed* on them by men.[5] Muslim veiling is thus understood by many as an oppressive practice which reflects the subordination of Muslim women to the men.[6] Fadela Amara, an influential feminist and politician, for instance, observes that the practice of Islamic veiling in Europe is an extension of an oppressive practice from Islamic countries. For her, the practice of veiling is a gesture of subservience in response to male pressure.[7] Critics of Islamic veiling also

[4] On this point, see Eva Brems, '*SAS v France*: A Reality Check' (2016) 25 Nottingham Law Review 58, 62.

[5] See Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford-Portland: Hart Publishing, 2006) 13-15; Erica Howard, 'Bans on the Wearing of Religious Symbols in British Schools: A Violation of the Right to Non-Discrimination' (2011) 6 Religion and Human Rights 127, 130-131; Jan Goodwin, *Price of Honor: Muslim Women Lift the Veil of Silence on the Islamic World* (New York: Plume, 1994) 55, 78-79, 107-109; Mark Freeland and Lucy Vickers, 'Religious Expression in the Workplace in the United Kingdom' (2009) 30 Comparative Labour Law and Policy Journal 597, 615; Banu Gokariksel and Katharyne Mitchell, 'Veiling, Secularism and the Neoliberal Subject: National Narratives and Supranational Desires in Turkey and France' (2005) 5(2) Global Networks 147, 158.

[6] See Cecile Laborde, 'Secular Philosophy and Muslim Headscarves in Schools' (2005) 13(3) The Journal of Political Philosophy 305, 306.

[7] Fadela Amara, *Ni Putes Ni Soumises* (Paris: La Decouverte/Porche, 2003) cited in Ulrike Spohn, 'Sisters in Disagreement: The Dispute Among French Feminists About the 'Burqa Ban' and the Causes of Their Disunity' (2013) 12 Journal of Human Rights 145, 151.

maintain that Islam, as a patriarchal religion, has portrayed men as the superior sex, making women subservient and subject to male dominance. The key idea behind this line of argument is that the requirement of a modest dress code, as stipulated in the Islamic texts, applies only to women. Howard writes, 'Islam is … perceived as a paternalistic religion which does not recognize the equality of the sexes and holds that women are inferior to men.'[8] Likewise, Sharia Nanwani notes, "[t]o many, the veil represents an oppressive instrument that signifies women's second-class status in Islam …. [because] the Quran instructs men to ensure that women under their care or responsibility are 'covered' when they go out in public".[9] Thus, there is a suspicion that the Islamic modest dress code violates women's right to equality. It is therefore widely assumed that a ban on veiling would liberate Muslim women and promote their right to gender equality. Another equality-related concern, as raised by the proponents of the ban, is that Muslim veiling can never be a truly voluntary practice. Opponents of the Islamic veil argue that a Muslim woman's belief, that she freely chooses to wear Islamic dress, is no more than the product of false consciousness. This line of argument maintains that veil-wearing Muslim women are either brainwashed or have internalised the

[8] Erica Howard, 'Islamic Veil Bans: The Gender Equality Justification and Empirical Evidence' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, CUP: 2014) 207. See also Titia Loenen, 'The Headscarf Debate: Approaching the Intersection of Sex, Religion and Race under the European Convention on Human Rights and EC Equality Law' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Abingdon: Routledge-Cavendish, 2008) 315.

[9] Sharia Nanwani, 'The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?' (2011) 25(3) Emory International Law Review 1431, 1438.

oppression so well that they do not recognise their own freedom.[10] An additional related argument put forward by the pro-ban advocates is that Islamic veiling undermines the dignity not only of the wearer, but also other women who share public spaces with her.[11] In short, these are the primary considerations which underpin the argument that the wearing of Islamic veils should be prohibited by law for the protection and promotion of gender equality.

The background documents of the national debates, the preparatory work in the parliaments, and the political debates in the parliaments leave no room for doubt that gender equality considerations have played a key role in motivating the law and policymakers of several European States including Belgium, France, Luxemburg, and Spain to enact anti-veil legislation or to propose such legislation.[12] Therefore, many prominent writers such as Lourdes Peroni, Ralph Grillo, and Prakash shah have noted that '[t]he negative stereotype of Muslim women as oppressed in need of protection has been at the heart of the debates surrounding bans on full-face veils in Europe.'[13] The Stasi Commission, which recommended a

[10] See Neville Cox, *Behind the Veil: A Critical Analysis of European Veiling Laws* (Cheltenham-Northampton: Edward Elgar Publishing, 2019) 144-146.

[11] See Sibohan Mullally, 'Civic Integration, Migrant Women and the Veil: At the Limits of Rights?' (2011) 74(1) Modern Law Review 27, 39. See also Howard (n 8) 207.

[12] See Open Society Foundations, 'Restrictions on Muslim Women's Dress in the 28 EU Member States: Current Law, Recent Legal Developments and the State of Play' (2018) p.7 <https://www.justiceinitiative.org/publications/restrictions-muslim-women-s-dress-28-eu-member-states-2> accessed 4 December 2019. See also Eva Brems et al., 'The Belgian 'Burqa Ban' Confronted with Insider Realities' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge: CUP, 2014) 78-79.

[13] Lourdes Peroni, 'Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising' 10(2) International Journal of Law in Context 195, 217; Ralph Grillo and Prakash shah, 'Reasons to Ban? The Anti-Burqa

ban on wearing ostentatious religious symbols at public schools in France, noted that '[o]bjectively the veil stands for alienation of women.'[14] In endorsing the views of a group of French legislators who perceived the Islamic full-face veil as a threat to gender equality, President Nicolas Sarkozy stated that:

> The problem of the burka is not a religious problem, it's a problem of liberty and women's dignity. It's not a religious symbol, but a sign of subservience and debasement. I want to say solemnly, the burka is not welcome in France. In our country, we can't accept women prisoners behind a screen, cut off from all social life, deprived of all identity. That's not our idea of freedom.[15]

The 2010 report of the Parliamentary Commission, recommended prohibiting the concealment of faces in public places to the French Government; it stated,

> The practice of wearing the full veil is an infringement of the principle of freedom … The full veil is the symbol of subservience, the ambulatory expression of a denial of liberty that touches a specific category of population: women. It … constitutes a negation of the principle of equality.'[16]

Stating that the Islamic veil was 'a symbol of submission and oppression', the regional councillor of Veneto, Alberto Villanova, announced that his regional government would submit a bill imposing a ban on wearing full-face veils

---

Movement in Western Europe' (2012) MMG Working Paper, pp.27-28 <https://core.ac.uk/download/pdf/30696227.pdf> accessed 21 February 2018.

[14] Cited in Anastasia Vakulenko, the 'Gender Equality as an Essential French Value: The Case of Mme M' (2009) 9(1) Human Rights Law Review 143, 148.

15 See 'Nicolas Sarkozy says Islamic veils are not welcome in France' (*The Guardian*, 22 June 2009) <https://www.theguardian.com/world/2009/jun/22/islamic-veils-sarkozy-speech-france> accessed 30 November 2019.

[16] See <http://www.assemblee-nationale.fr/13/pdf/rap-info/i2262.pdf> 12 November 2018.

throughout Italy.[17] Furthermore, in political debates in Spain, the *burqa* was described as 'degrading to women' and 'hardly compatible with human dignity.'[18] Likewise, in a newspaper column, current British Prime Minister, Boris Johnson has commented that while he does not support a ban on wearing the burqas, he thinks that they are 'ridiculous' because they make women look like 'letter boxes'.[19]

The above discussion makes it clear that in political and popular debates it is commonly argued that the wearing of Islamic veils should be banned for the promotion of gender equality. The question remains, however, whether gender equality is a convincing argument or legitimate ground to ban the voluntary wearing of Islamic veils. The objective of this chapter is to answer this question through the lens of European human rights law and from the viewpoint of Mill's harm principle. This chapter will also highlight some important cases concerning Islamic veils to reflect on the approach taken by the ECtHR in relation to the gender equality argument.

---

[17] The actual bill, however, had not been submitted. See Deliberation 4/2017, Veneto Regional Council <http://www.consiglioveneto.it/crvportal/dcr/2017/DCR_0004/1001_5Ftesto_20approvato_20da_20Consiglio.html> accessed 21 November 2019.

[18] B Johnson, 'Spanish lawmakers to take up burqa ban' (18 July 2010) <http://world-news.about.com/b/2010/07/18/spanish-lawmakers-to-take-up-burqa-ban.htm> cited in Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (1st edn, Abingdon- New York: Routledge, 2012) 36.

[19] Boris Johnson, 'Denmark has got it wrong. Yes, the burka is oppressive and ridiculous – but that's still no reason to ban it' (*The Telegraph*, 5 August 2018) <https://www.telegraph.co.uk/news/2018/08/05/denmark-has-got-wrong-yes-burka-oppressive-ridiculous-still/> accessed 9 June 2020.

Section two, in light of empirical findings, explores the accuracy of the widespread stereotype that all Muslim women who wear Islamic veils do so under duress. Following this, section three identifies what approaches the ECtHR has taken as to the bans on wearing Islamic veils on the grounds of gender equality. Subsequently, section four investigates whether a ban on the ground of gender equality or women's rights satisfies the legitimate aim test under the Convention. The fifth section explores the consequences of veiling bans on the lives of veil-wearing Muslim women. Section six then establishes that a ban on the wearing of Islamic veils undermines women's human dignity and personal autonomy. Finally, section seven critically assesses the credibility of the gender equality argument through the lens of Mill's harm principle.

Before moving on to a more detailed discussion, one must note that prominent writers have done a significant amount of scholarly work examining whether gender equality is a valid argument to ban the wearing of the Islamic veil. The most notable work has been done by Erica Howard[20] who has argued that gender equality is not a valid argument for the banning of Islamic veils. While ultimately arriving at the same conclusion, this chapter departs from the approach adopted by Howard and other commentators, in that it explores whether a ban on the ground of sexual equality may satisfy the legitimate aim test under Article 9(2) of

[20] See Howard (n 2) 147-160; Howard (n 5) 130-136; Howard (n 8) 206-215. Other commentators' works on the topic of Islamic veiling and gender equality include- Shaista Gohir, 'The Veil Ban in Europe: Gender Equality or Gendered Islamophobia' (2015) Georgetown Journal of International Affairs 24; Eva Brems, 'Equality Problems in Multicultural Human Rights Claims: The Example of the Belgian 'Burqa Ban'' in Marjolein van den Brink et al. (eds), *Equality and Human Rights: Nothing but Trouble* (Utrecht: Utrecht University Publications, 2015) 75-83; Anastasia Vakulenko, *Islamic Veiling in Legal Discourse* (Oxon- New York: Routledge, 2012) Chapter 4.

the Convention, it discusses personal autonomy in greater detail, and most importantly, it analyses the gender equality argument from the viewpoint of Mill's harm principle.

5.2. Why do Muslim Women Wear Islamic Veils? Countering Stereotypical Views in Light of Empirical Evidence

It is submitted that the argument that Muslim veiling needs to be prohibited in order to preserve and promote gender equality is grounded in stereotypical views of Islam, Muslim women and Islamic veils, and that these stereotypical views ignore the many different reasons why women wear traditional religious attire. As Howard writes, [t]he argument that bans on [Islamic veils] are necessary to promote gender equality is based on one of the prevalent stereotypes, that all Muslim women who wear these garments are forced to do so and thus need emancipating.'[21] The stereotypical supposition that veiling is an oppressive practice which is *imposed* on Muslim women, and thus measures must be taken for 'liberating' these 'oppressed' women motivates the opponents of Islamic veils to argue that legislative bans on Muslim veiling are necessary. However, Katherine Bullock highlights the problem with this stereotypical viewpoint noting 'the popular Western notion that the veil is a symbol of Muslim women's oppression is a constructed image that does not

[21] Howard (n 2) 158. As Carolyne Evans argues, the gender equality argument is based on two contradictory stereotypical views of Muslim women: 'The first stereotype is that of victim - the victim of a gender oppressive religion, needing protection from abusive, violent male relatives, and passive, unable to help herself in the face of a culture of male dominance. … The second stereotype … is that of aggressor - the Muslim woman as fundamentalist who forces values onto the unwilling and undefended.' (Carolyn Evans, 'The 'Islamic Scarf' in the European Court of Human Rights' (2006) 7 Melbourne Journal of international Law 52, 71-72).

represent the experience of all those who wear it.'[22] In other words, the 'Western'[23] perception that every Muslim woman wearing the veil is doing so out of force or coercion does not reflect the opinion of veil-wearing Muslim women as to why they wear veils, and does not portray the multiple meanings of veiling that shift according to context and individual differences. Shaista Gohir asserts, 'the debates about the veil bans are based on assumptions about the experiences and motives of women who wear the face veil rather than factual support. No effort is made to consult these women in the process leading up to the ban.'[24] With regard to political debates surrounding the Islamic full-face veil ban in Belgium on the grounds of, *inter alia*, gender equality, Brems et al. observed that there was 'a complete lack of knowledge about women who wear the face veil in Belgium … [and] complete absence of the voices of women wearing the face veil in this debate.'[25] As Howard notes, the tendency to neglect the voices of veil-wearing women can also be observed in political debates leading up to the bans in France and the Netherlands.[26]

---

[22] Katherine Bullock, *Rethinking Muslim Women And the Veil: Challenging Historical and Modern Stereotypes* (Herndon-Surrey: IIIT, 2010) 3.

[23] For a detailed critical appraisal of the 'Western' view of 'veiled women', see Homa Hoodfar, 'The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women' (1993) 22 Resources for Feminist Research 5. See also Lama Abu-Odeh, 'Post-Colonial Feminism and the Veil: Considering The Differences' (1992) 26 New England Law review 1527.

[24] Gohir (n 20) 27.

[25] Eva Brems et al., 'Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium Concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering' (2012) p.2 <http://www.hrc.ugent.be/wp-content/uploads/2015/10/face-veil-report-hrc.pdf > (accessed 15 August 2016).

[26] Howard (n 8) 208-209.

There is a growing body of evidence suggesting that in contemporary Western societies the vast majority of Muslim women who veil have voluntarily and autonomously decided to wear Islamic clothing. As will be seen shortly, there are various complex, personal and multidimensional reasons for which these women freely choose to wear Islamic veils. The Human Rights Watch's empirical research in Germany revealed that '*all* women who spoke to Human Rights Watch emphasized that the decision to cover their head was a private choice'.[27] Two qualitative sociological studies, conducted in Belgium and France, highlighted that in most cases, women who wear the full-face veils have adopted these because of their personal religious conviction, as opposed to any form of pressure or intimidation by their families. The most striking discovery of these sociological studies is that some interviewees and respondents had decided to wear the Islamic dress despite opposition from their families, particularly their husbands.[28] In addition, some veil-wearing Muslim women live independently and do not have their fathers or brothers or husbands with them. For instance, there are some unmarried, veil-wearing, young Algerian Muslim women in various French cities

[27] Human Rights Watch, 'Discrimination in the Name of Neutrality: Headscarf bans for Teachers and Civil Servants in Germany' (2009) p.56 <https://www.hrw.org/sites/default/files/reports/germany0209_webwcover.pdf> accessed 1 October 2017 (emphasis added).

28 Eva Brems et al., (n 12) 82-87; Open Society Foundations, 'Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France' (2011) <https://www.opensocietyfoundations.org/sites/default/files/a-unveiling-the-truth-20100510_0.pdf> accessed 20 September 2016. See also Myfanwy Franks, 'Crossing the Border of Whiteness? White Muslim Women Who Wear the Hijab in Britain Today' (2000) 25 Ethnic and Racial Studies 917, 925.

who do not have a family with them.[29] It is therefore submitted that the aforementioned stereotypical ideas surrounding Muslim women and veiling are problematic and questionable.

It is of utmost importance to shed some light on why Muslim women wear Islamic veils. Khan argues, 'to fully comprehend the practice of veiling it is necessary that close attention be paid to the experiences of the veiled women who adopt the veil for myriad different reasons.'[30] In fact, the practice of Islamic veiling has different meanings depending on the context,[31] and Muslim women adopt this practice for many different reasons. For instance, some Muslim women wear Islamic dress out of their desire to comply strictly with their Islamic faith duties. However, the vast majority do not regard veiling as a mandatory religious duty, but rather as 'a voluntary commitment to a higher level of religious practice.'[32] Some women wear veils as an expression of their religious and cultural identity[33] and others wear Islamic dress as an expression of a sense of belonging to their country of origin.[34]

---

[29] See Catherine Wihtol de Wenden, 'Young Muslim Women in France: Cultural and Psychological Adjustments' (1998) 19(1) International Society of Political Psychology 133, 135.

[30] Masood Khan, 'The Muslim Veiling: A Symbol of Oppression or a Tool of Liberation?' (2014) 32 UMASA Journal 1, 1.

[31] See Myriam Hunter-Henin, 'Children's Religious Freedom in State Schools: Exemptions, Participation and Education' in James G. Dwyer (ed), *The Oxford Handbook of Children and the Law* (Oxford: OUP, 2019) Chapter 25.

[32] See Eva Brems et al., (n 12) 82.

[33] See Marina Lazreg, *Questioning the Veil: Open Letters to Muslim Women* (Princeton-Oxford: Princeton University Press, 2009) 55. See also Khan (n 30) 5.

[34] See Caitlin Killian, 'The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair' (2003) 17(4) Gender & Society 567, 572. See also Françoise Gaspard and Farhad Khosrokhavar, *Le Foulard et la République* (Paris: La

Additionally, women who never used to veil before, may start veiling as a token of protest when governments discuss bans, showing solidarity with those affected by these interferences.[35] Therefore, it can be strongly argued that veiling carries *different meanings* for Muslim women and there are *multiple reasons* for which these women freely opt for Islamic veils.

It must be noted that in recent years a significant number of empirical studies have been conducted in various countries, mainly in Europe, by different organisations and commentators examining the experiences of veil-wearing women and exploring the reasons for which Muslim women may decide to wear Islamic veils.[36]

Découverte, 1995) 35; Christian Joppke, *Veil: Mirror of Identity* (Cambridge: Priory Press, 2009) 12.

[35] Aheda Zanetti, the designer credited with inventing the *burkini*, stated that French bans on the *burkini* increased the *burkini* sales by 200%. See 'It's about freedom: Ban boosts burkini sales by 200%' (*BBC*, 24 August 2016) <http://www.bbc.co.uk/news/world-europe-37171749> (accessed 1 September 2016). See also Dianne Gereluk, *Symbolic Clothing in Schools: What Should be Worn and Why* (London: Continuum, 2008) 116-117.

[36] These emperical studies are (among others), Open Society Foundations, 'Behind the veil: why 122 women choose to wear full face veil in Britain' (2015) Chapters 3-6 <https://www.opensocietyfoundations.org/uploads/f3d788ba-d494-4161-ac01-96ed39883fdd/behind-veil-20150401.pdf> accessed 9 July 2018; Kate Østergard et al., 'Niqabis in Denmark: When Politicians Ask for a Qualitative and Quantitative Profile of a Very Small and Elusive Subculture' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, CUP: 2014) 59-61; Eva Brems et al., (n 12)) 82-87; Annelies Moors, 'Face Veiling in the Netherlands: Public Debates and Women's Narratives' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, CUP: 2014) 30-32; Andrew Gilligan, 'Why banning the veil would only cover up the real problems for British Muslims' (*The Telegraph,* 16 April 2011) <https://www.telegraph.co.uk/journalists/andrew-gilligan/8455884/Why-banning-the-veil-would-only-cover-up-the-real-problems-for-British-Muslims.html> accessed 10 March 2020; 'Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France' (n 28) pp.40-41; Bullock (n 22) Chapter 3; Killian (n 34). See also Lynda Clarke, 'Women in Niqab

These studies reveal that in *most* cases, Muslim women make conscious, deliberate choices about whether and for what purpose to wear the veil. After extensively analysing the interview data and findings of these studies, I have discovered that the following reasons, shown in Figure 6 below,[37] motivate Muslim women's decisions to wear the Islamic veil in Western societies.

Speak: A Study if the Niqab in Canada' (2014) <https://ccmw.com/women-in-niqab-speak-a-study-of-the-niqab-in-canada/> accessed 19 April 2017; Jim A.C. Everett et al., 'Covered in Stigma? The Impact of Differing Levels of Islamic Head-covering on Explicit and Implicit Biases toward Muslim Women' (2014) Journal of Applied Social Psychology 1.

[37] The reasons shown in this chart are not exhaustive.

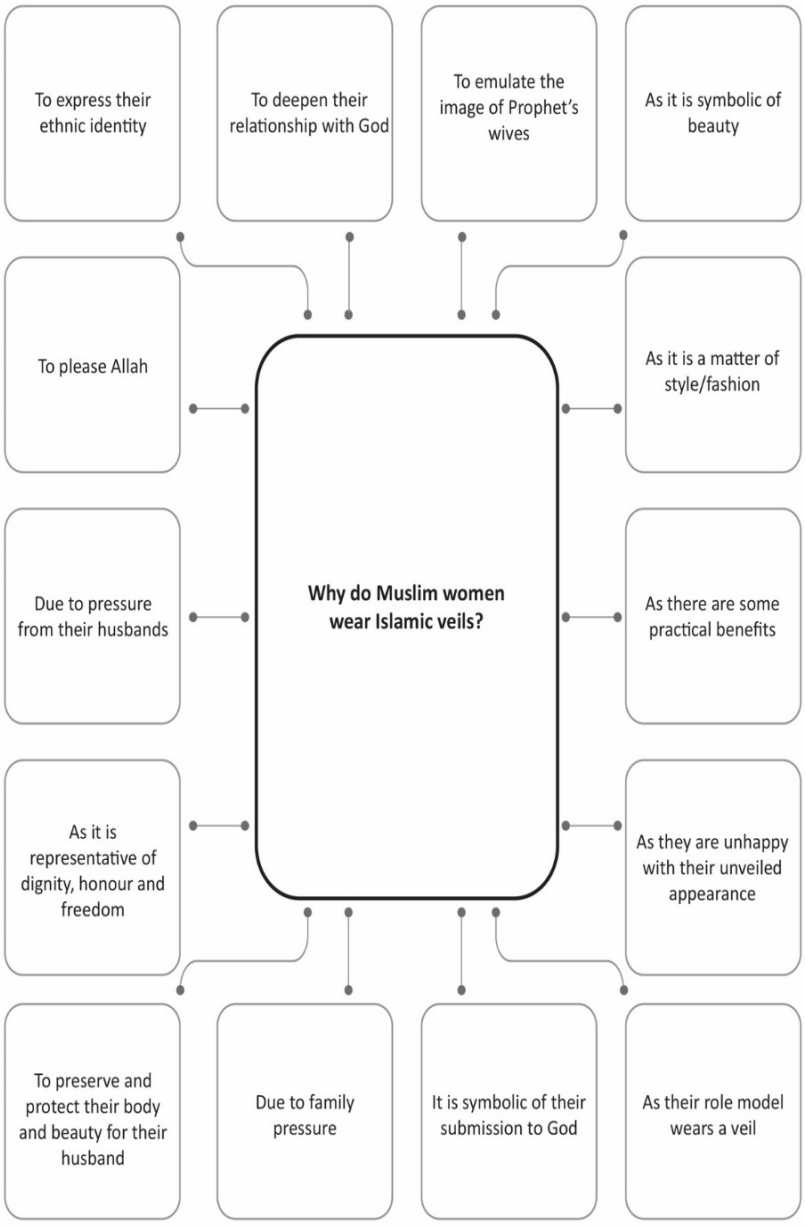

Figure 6: The reasons for wearing the Islamic veil

From the above discussion it can be deduced that Muslim women adopt the practice of veiling for a wide range of reasons. Although some women are forced to wear veils, in *most* cases the adoption of the Islamic veil has been a personal choice, and is not enforced by male family members. It is therefore submitted that the popular, Western stereotype that all Muslim women who wear veils have to do it because veils are *imposed* on them by *men* is erroneous. In other words, the stereotypical idea that the Islamic veil is a symbol of Muslim women's oppression or subordination is questionable.[38] The vast majority of Muslim women who make a personal choice to wear a veil tends to be ignored in the political debates on this topic. Instead, lawmakers are influenced by the long-held assumption that women who wear veils are the victims of male oppression and thus need liberating. Therefore, in *Sahin*, Judge Tulkens highlighted that '[w]hat is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.' By citing a German case, she further stated that 'wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men'.[39] Likewise, Howard argues, '[t]he justification for enacting bans on the wearing of face veils and headscarves is thus based on a false premise and does not give any attention to the voices of the women involved.'[40]

It must, however, be noted that this thesis does not argue that no Muslim women are forced to wear Islamic veils against their will. Of course, there are some women

[38] See Bhikhu Parekh, 'A Varied Moral World' in Susan Moller Okin (ed), *Is Multiculturalism Bad for Women?* (New Jersey: Princeton University Press, 1999) 73.

[39] *Leyla Sahin v Turkey* App no. 44774/98 (ECHR, 10 November 2005) Dissenting opinion of Judge Tulkens, para 11.

[40] Howard (n 8) 212.

who are coerced into wearing some form of Islamic dress by their male family members or relatives, or by male religious leaders, or by male community leaders.[41] These women must be freed from male dominance -- governments must take effective measures aimed at liberating these women from male oppression. This thesis argues that forbidding all veil-wearing Muslim women to wear a veil regardless of whether it is voluntarily chosen or otherwise is severely problematic. Depriving a large number of Muslim women from the opportunity to manifest their religion by wearing the religious clothing in the name of protecting and liberating a few victimised women is questionable because it does not respect the autonomy of women who freely choose to wear veils.

To summarise the discussion of this section, the argument that Muslim veiling needs to be prohibited in order to preserve and promote gender equality is based on the stereotypical views of Islam, Islamic veils and Muslim women. These stereotypical views ignore the many different reasons why women wear the Islamic veil and lack an understanding of what wearing it means for the individual person. As indicated above, in light of empirical findings, veiling has multiple meanings and there are complex and multidimensional reasons why Muslim women wear the Islamic veil. In fact, each individual wearer may have her own particular view and each person observing will have their own particular subjective view too. The most important thing, however, is giving recognition to the view or voice of the veil-wearing woman in question. Lister et al. states, '[t]he decision to wear a headscarf may be interpreted as a symbol of oppression or as a woman's choice to practice their religion, or, in the context of Islamophobia, a form of pride and political

[41] For a more detailed discussion, see Section 7.2, Chapter Seven.

resistance. What is important is an understanding of the political and cultural context in which women may choose to wear or not a headscarf, and the meanings which women attribute to that context.'[42] Referring to the findings of various available empirical studies, it has been demonstrated that the vast majority of Muslim women who wear veils do so out of their own free will and therefore, for these women, the wearing of the veil is the result of a well-informed, deliberate choice as opposed to being the outcome of coercion or intimidation. In this sense, donning the veil can be regarded as a free, well-informed, autonomous choice. Therefore, one can conclude that Muslim veiling is *not* a symbol of subordination or oppression as argued by the opponents of Islamic veils, but rather it is a token of positive self-assertion and independence. One important lesson to be learned from this discussion is, a court should not make decisions based on the erroneous supposition that all Muslim women who wear veils do so under duress.

The next section explores what approach has been taken by the ECtHR as the legal bans on wearing Islamic veils on the grounds of gender equality.

5.3. Banning Islamic Veils on Grounds of Gender Equality: A Critical Appraisal of the ECtHR's Approach

In its early jurisprudence on Islamic veiling, the ECtHR had accepted that gender equality was a valid justification for limiting the right to religious freedom and more particularly the right to manifest publicly one's faith. The ECtHR's approaches concerning the gender equality argument can be found in its *Dahlab v Switzerland*

[42] Ruth Lister et al, *Gendering Citizenship in Western Europe: New Challenges for Citizenship Research in A Cross-National Context* (Bristol: The Polity Press, 2007) 99.

(hereinafter "*Dahlab*")[43] and *Sahin*[44] judgements. In both cases it took the view that gender equality was a possible justification to limit the right to manifest one's religious affiliation through the wearing of the Islamic headscarf.

In *Dahlab*, Ms Dahlab abandoned the Catholic faith and converted to Islam. After few months, she started wearing the Islamic headscarf. She was prohibited from wearing the headscarf while in her employment as a primary-school teacher. Ms Dahlab submitted that the measure of prohibiting her from wearing the headscarf in the performance of her professional duties violated her freedom to manifest her religion under Article 9 of the Convention. The ECtHR, in ruling on admissibility, found that the Islamic headscarf was a threat to gender equality. The Court described the Islamic headscarf as a 'powerful external symbol' and stated that the wearing of a headscarf 'appears to be *imposed* on women by a precept which is laid down in the Koran and which … is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination'.[45]

Subsequently, the Grand Chamber (hereinafter "the GC") of the ECtHR took a similar approach and upheld a ban on the Islamic headscarf on the grounds of gender equality in the landmark case of *Sahin* where the applicant, Ms Sahin, challenged bans on wearing the Islamic headscarf in Turkish universities. In this case, Ms Sahin was a fifth-year medical student at Istanbul University. As a

[43] App no. 42393/98 (ECHR, 15 February 2001).

[44] App no. 44774/98 (ECHR, 10 November 2005).

[45] (n 43) (emphasis added).

practicing Muslim, she adhered to the wearing of the Islamic headscarf. The Vice-Chancellor of the university issued a circular with the following stipulation:

> By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose 'heads are covered' (who wear the Islamic headscarf) … must not be admitted to lectures, courses or tutorials.[46]

Thereafter Ms Sahin, who refused to abandon the headscarf, had been denied access to a written examination, prevented from enrolling in classes, refused admission to a lecture and, finally, refused entrance to a further written examination. Ms Sahin made an application for an order to set aside the circular, arguing that the rights guaranteed by the Convention had been infringed upon. The Istanbul Administrative Court rejected the application, holding that the dress code regulation articulated in the Vice-Chancellor's circular was lawful based on the precedent of the Constitutional Court and the Supreme Administrative Court. Subsequently, she lodged an appeal to the Supreme Administrative Court which found that it was 'unnecessary' to examine the merits of the appeal.[47] Ms Sahin then chose the Strasbourg route. *Sahin* case first went to a Chamber of Seven ECtHR judges[48] and then, following an appeal by the applicant, to the GC of the ECtHR, which confirmed the Chamber's decision by upholding bans on the wearing of the Islamic headscarf in Turkish universities by Muslim students. The GC, by sixteen votes to one, held that there was no violation of the applicant's FoRB under Article

[46] (n 44) para 16.

[47] ibid, paras 25-28.

[48] *Leyla Sahin v Turkey* App no 44774/98, Chamber (ECHR, 29 June 2004).

9 of the Convention because the interference was justified in principle and proportionate to the objective of, *inter alia*, the protection of women's rights or the promotion of equality between men and women. By specific reference to its *Dahlab* decision, the ECtHR reiterated that the Islamic headscarf was '*imposed* on women by a religious precept that was hard to reconcile with the principle of gender equality.'[49]

A closer inspection of the *Dahlab* and *Sahin* decisions makes it clear that in both cases the ECtHR asserted that wearing the Islamic headscarf was incompatible with gender equality. However, the Court did not fully explain how or why wearing the headscarf adversely affected sexual equality or undermined women's rights in either case. The only explanation given by the ECtHR was that the Islamic headscarf was 'imposed on women by a precept which is laid down in the Koran'.[50] Commentators have argued that the way in which the word 'imposed' was used by the Court in *Dahlab* and *Sahin* is unconvincing. Elver, for instance, argues that 'the ECtHR used highly questionable language in its *Dahlab* and *Sahin* judgments in referring to the Quranic view of the headscarf'.[51] Carolyn Evans writes:

> Most religious obligations are 'imposed' on adherents to some extent and the Court does not normally refer to the obligations in such negative terms. It is not clear why wearing the headscarves is any more imposed on women by the Qur'an, than abstentious from pork or alcohol imposed on all Muslims, or than obeying the Ten Commandments is imposed on Jews and Christians.[52]

[49] (n 44) para 111 (emphasis added).

[50] (n 43).

[51] Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford: OUP, 2012) 81.

[52] Evans (n 21) 65.

This thesis upholds Evans' view. Most religions require the adherents to do certain things. However, it is incorrect to assert that these things have been forcefully 'imposed' on the adherents. This is because, in most cases, if not all, the choice is made by an individual believer who decides whether or not to comply with the religious obligations/guidelines. Hinduism requires married women to wear the *bindi* (a dot of red colour of sandalwood paste, turmeric or vermilion applied in the centre of the forehead) and the *sindoor* (a red or orange-red coloured cosmetic powder in the parting of their hair). However, it would be unjust to assert that the wearing of these religious symbols by Hindu married women contravenes the principle of gender equality since they are 'imposed' on Hindu women by a patriarchal religion, namely, Hinduism. It is therefore argued that the ECtHR's reasoning that the Islamic veil is 'imposed' on Muslim women is unconvincing.

In *Dahlab* and *Sahin*, there was no evidence that the wearing of the headscarf was anything other than the choice of the applicants. Ms Dahlab and Ms Sahin were both well-educated, autonomous women who were aware of their legal and human rights, and therefore 'might reasonably be expected to have a heightened capacity to resist pressure'.[53] Ms Sahin joined an assembly in her university to protest against its dress code regulation. Against this factual background, one can reasonably assume that the decisions of Ms Dahlab and Ms Sahin to wear the headscarf were personal, not forced. Therefore, it is argued that the ECtHR should not have concluded that the headscarf was 'imposed' on the applicants in *Dahlab* and *Sahin*. The ECtHR's *Dahlab* and *Sahin* judgements imply that all veil-wearing

[53] (n 39) para 10.

Muslim women fall into one single category: oppressed women needing protection from coercion.

One may therefore choose to criticise the Strasbourg Court because it seemed to have taken the decision based on the erroneous stereotypical supposition that Ms Dahlab and Ms Sahin, like other Muslim women who wear veils, were oppressed and wore the Islamic headscarf under coercion.[54] Another reason for which the ECtHR's *Dahlab* and *Sahin* decisions can be criticised is that the Court completely ignored the voice of the applicants who always maintained that wearing the headscarf was their deliberate, well-informed choice. Moreover, it failed to take into account the fact that there are many different reasons for which so many Muslim women wear veils in contemporary European societies and that veiling has multi-layered meanings. In criticising the ECtHR's approach in *Sahin*, Bleiberg has argued that 'the ECtHR's stereotypes about the Islamic headscarf are not necessarily true; there are many reasons other than coercion that women choose to wear headscarves.'[55] One can reasonably argue that instead of taking decisions on the premise of stereotypical assumptions, the ECtHR should have taken into

[54] In academic circles, the ECtHR's *Dahlab* and *Sahin* decisions have attracted huge criticism. See for example, Pierre Bosset, 'Mainstreaming religious diversity in a secular and egalitarian State: The road(s) not taken in Leyla Şahin v. Turkey' in Eva Brems (ed.) *Diversity and European Human Rights: Rewriting Judgements of the ECHR* (Cambridge: CUP, 2012) 192-207; Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Cheltenham- Northampton: Edward Elgar, 2018) 122-125; Jill Marshall, 'Freedom of Expression and Gender Equality: Sahin v Turkey' (2006) 69(3) Modern Law Review 452; Rafaella Nigro, 'The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic veil' (2010) 11 Human Rights Review 531, 542-544.

[55] Benjamin D. Bleiberg, 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v Turkey' 91(129) Cornell Law Review 139, 162.

account the empirical evidence on why Muslim women in contemporary European societies wear the Islamic veil, because as a judicial organ the ECtHR had an obligation to interpret the Convention 'in the light of present-day conditions'.[56]

If the ECtHR's *Dahlab* and *Sahin* decisions are compared to domestic cases on the Islamic veil, then it appears that the national courts have sometimes done far better than the ECtHR.[57] The Federal Administrative Court of Germany and the Supreme Court of Spain did not base their decisions on the assumption that veil-wearing Muslim women were the victims of oppression or that veils had been imposed on Muslim women by a patriarchal system. Nearly seventeen years ago, in *Ludin* case, the Federal Administrative Court of Germany held that the wearing of the *hijab* had multi-layered meanings and could even be emancipating for women.[58] The judgement of the Spanish Supreme Court of 6 February 2013 quashed the decision of the Catalonia High Court of Justice which wrongly decided that 'whether or not it was voluntary, it was hard to reconcile the wearing of the full-face veil with the principle of gender equality'. The Spanish Supreme Court stated that 'voluntary nature or otherwise of the wearing of the full-face veil was decisive, since it was not possible to restrict a constitutional freedom based in the supposition that the

[56] *Marckx v Belgium* App no. 6833/74 (ECHR, 13 June 1979) paras 41 & 58.

[57] On this point, see Satvinder Juss, 'Burqa-bashing and the Charlie Hebdo Cartoons' (2015) 26(1) King's Law Journal 27, 31.

[58] BVerfG, Judgement of the Second Senate of 24 September 2003- 3 BvR 1436/02. For a discussion of this case, see Aernout Nieuwenhuis, 'European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey, Decision of 29 June 2004, Application Number 44774/98' (2005) 1 European Constitutional Law review 495, 507.

women who wore it did so under duress.'[59] Conversely, the ECtHR, despite the existence of uncontested evidence that Ms Dahlab and Ms Sahin opted for the headscarf voluntarily and willingly, concluded that the Islamic headscarf was contradictory with gender equality by stating that the headscarf was 'hard to reconcile' with the principle of sexual equality. However, the Court did not fully explain where the difficulty lay. Therefore, in her impressive dissenting opinion in *Sahin*, Judge Tulkens criticised the reasoning of the majority. Judge Tulkens questioned, 'what, in fact, is the connection between the ban and sexual equality?'[60] She stated, 'I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted.'[61]

It is arguable that by endorsing the Swiss and Turkish bans on the Islamic headscarf the ECtHR adopted a 'paternalistic' approach, that is, veil-wearing Muslim women are victims of gender oppressive religion, needing protection from their abusive, fundamentalist father or husband. This approach is unconvincing because of the fact that Ms Dahlab and Ms Sahin stated that they adopted the headscarf freely. By stating that the ECtHR's *Sahin* decision is 'incorrect', one commentator has argued that the Court 'adopted a paternalistic approach' because it believed that a ban

[59] Judgment of 6 February 2013, App no 693/2013, Appeal no 4118/2011. It is, however, noteworthy that in relation to the gender equality justification, a different opinion was taken by the Conseil d'Etat in the case of *Mme M*. (No. 286798, Conseil d'Etat, séance du 26 mai 2008, lecture du 27 juin 2008). For an analysis of *Mme M*, see Per-Elik Nilsson, *Unveiling the French Republic: National Identity, Secularism, and Islam in Contemporary France* (Leiden-Boston: Brill, 2017) 186-88.

[60] (n 39) para 11.

[61] ibid, para 12.

would improve the rights of women.[62] In her strong dissenting opinion in *Sahin*, Judge Tulkens criticised the paternalism of the majority who did not permit an adult, well-educated woman to act in a manner consistent with her personal choice. Judge Tulkens stated:

> The applicant, a young adult university student, said - and there is nothing to suggest that she was not telling the truth - that she wore the headscarf of her own free will. … Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. 'Paternalism' of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of Article 8.[63]

To summarise the above discussion, in its early case law (*Dahlab* and *Sahin*) on the Islamic veil, the ECtHR accepted gender equality as a justifiable ground for limitations on human rights. However, in these cases it failed to explain how preventing a woman from doing something what she wishes to do would promote her right to gender equality. As argued above, the ECtHR's *Dahlab* and *Sahin* decisions are merely the reflection of long-held, common Western stereotypes about Muslim veiling. The ECtHR has made a major error in these cases, which is, in Evan's words, that it 'refuse[ed] to engage with the reality of Muslim women's lives and the complex and multiple reasons for which different women wear the veil.'[64] Therefore, it has been argued that the ECtHR's reasoning in both *Sahin* and *Dahlab* is unconvincing.

[62] Bleiberg (n 55) 149 & 161.

[63] (n 39) para 12.

[64] Evans (n 21) 67.

It must, however, be noted that in the recent case of *S.A.S.*, the ECtHR rejected the gender equality argument and took the view that the respect for equality between men and women could not legitimately justify a ban on the wearing of Islamic full-face veils in public places. In *S.A.S.*, the Court stated that 'a State Party cannot invoke gender equality in order to ban a practice that is defended by women'.[65] With regard to the gender equality justification, this marks a significant departure (positively in my view) from the ECtHR's previous reasoning in *Dahlab* and *Sahin*. Chaib notes that in relation to the gender equality argument, 'one of the most noteworthy aspects [of the S.A.S. decision] is the Court's explicit departure from its highly criticized stance towards the practice of wearing religious garment by Muslim women.'[66] In *S.A.S.*, the ECtHR placed due weight on the applicant's views, without associating her chosen way of religious manifestation with negative stereotypes about gender relations between Muslim men and women.[67] It is also argued that from the perspective of personal autonomy, the Court's *S.A.S.* decision, as far as the gender equality argument is concerned, is an important development because by seriously taking into account the voice of the applicant, the Court recognised her freedom of choice, her right to self-determination. Arguably, as Jill Marshall contends, in accepting a version of gender equality that enables every woman equally to have the freedom to develop her personality or identity as she deems appropriate, the ECtHR's reasoning in *S.A.S.* harmonises personal autonomy

[65] *S.A.S. v France* App no. 43845/11 (ECHR, 1 July 2014) para 119.

[66] Saila Oulad Chaib, 'S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil' (*Strasbourg Observers*, 3 July 2014) <https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/> accessed 25 September 2016.

[67] See Peroni (n 13) 201-206. See also Ilias Trispiotis, 'Two Interpretations of 'Living Together' in European Human Rights Law' (2016) 75(3) Cambridge Law Journal 580, 556-577.

and gender equality. This is in line with the dissenting opinion of Judge Tulkens in *Sahin* and is, as Marshall argues, 'a step forward'.[68] The ECtHR's new and sophisticated approach in *S.A.S.* also aligns with the Resolution 1743 of the CoE, where the Parliamentary Assembly stated that:

> The veiling of women, especially full veiling through the *burqa* or the *niqab*, is often perceived as a symbol of the subjugation of women to men … Neither the full veiling of women, nor even the headscarf, are recognised by all Muslims as a religious obligation of Islam, but they are seen by many as a social and cultural tradition. … [A] general prohibition of wearing the *burqa* and the *niqab* would deny women who freely desire to do so their right to cover their face.'[69]

5.4. Compatibility of a Ban with the Convention on the Ground of Gender Equality: The Legitimate Aim Test in Context

Assuming that the wearing of the Islamic veil by Muslim women undermines gender equality, and therefore, Islamic veiling needs to be prohibited for the protection of gender equality -- nevertheless, it is difficult to show that a ban on Islamic veils on account of 'gender equality' satisfies the legitimate aim test within Article 9 of the Convention. This is partly because the 'protection of gender equality' or the 'protection of women's rights' is not listed as a permissible ground for limiting the right to religious manifestation. The ECtHR's case law shows that, of the five grounds of limitation enumerated in the limitation clause of Article 9, the grounds which are usually invoked by the States to justify bans on wearing Islamic veils on gender equality considerations are: (a) protection of public order and, (b)

[68] Jill Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities' (2015) 15(2) Human Rights Law Review 377, 384.

[69] Parliamentary Assembly, Resolution 1743 (2010): Islam, Islamism and Islamophobia in Europe (2010) paras 15-16.

protection of the rights and freedoms of others.[70] The objective of this section is to examine whether a State can legitimately prohibit the voluntary wearing of Islamic veils on the grounds of gender equality or women's rights in pursuit of the legitimate aim of the protection of the public order and/or the rights and freedoms of others, and thus meet the legitimate aim test within the meaning of Article 9(2).

The relationship between gender equality and public order is so remote that it may be difficult to show that a ban on the voluntary wearing of the Islamic veil on gender equality concerns is in pursuit of the legitimate aim of the public order. It is argued that a mere *assumption* that Muslim women who wear Islamic veils are forced to do by men, in itself, does not constitute public disorder. Likewise, mere *worries or fears* of the public (for example, that veil-wearing Muslim women use the veil with a view to proselytise or that they may exercise pressure on uncovered women to wear the veil) are not the signals for public disorder within the meaning of Article 9(2). Public order justification can certainly be used to prevent public disorder or to protect public order but it must be demonstrated that public order is truly at stake -- a mere assumption or unfounded fear does not constitute public disorder to justify an intervention on the right to manifest one's religion. It is therefore argued that a State cannot legitimately invoke the 'public order' justification under Article 9(2) to forbid the voluntary wearing of Islamic veils based on gender equality concerns.

[70] In *Sahin*, Turkey sought to justify the ban on gender equality considerations by invoking the 'public order' and 'rights and freedoms of others' justifications ((n 44) para 99). A similar approach was previously taken by the Swiss Government in *Dahlab* (n 43). In *S.A.S.*, with regard to the gender equality argument, France relied on the 'rights and freedoms of others' justification only ((n 65) para 82).

It is further submitted that the argument that a ban on the grounds of sexual equality pursues a legitimate aim within the broad justification of the 'protection of the rights and freedoms of *others*' is problematic. If a State interferes with a woman's right to manifest religion through the wearing of Islamic veils on gender equality considerations, then the State does not always act to promote the gender equality of *other* women, but rather it seeks to protect the rights of the veiled woman in question. An example can be used to elaborate this point. In the political debates leading up to the bans on wearing the full-face veil in the Netherlands it was stated that the wearing of Islamic veils by Muslim women prevented them from getting jobs. It was therefore considered that a ban on full-face veils would increase Muslim women's opportunities of finding employment and thus increase their chances to become emancipated.[71] Arguably, a ban on that consideration may protect the rights of a particular Muslim woman (who is not getting a job for wearing the veil) for the sake of her own emancipation, but the ban may not protect the rights of other women. It is therefore argued that a ban on the grounds of gender equality may not always protect the rights and freedoms of *others* (as victims entailed to compensation).[72] In *S.A.S.,* the gender equality argument failed for not satisfying the legitimate aim test because the ECtHR refused to accept that a ban on the wearing of full-face veils on gender equality considerations would correspond to the 'rights and freedoms of others' justification under Article 9(2).[73]

---

[71] See Howard (n 18) 37. See also Klaus Dahmann, 'The prospect of a burqa ban spreads across Europe' (*DW*, 21 May 2010) <https://www.dw.com/en/the-prospect-of-a-burqa-ban-spreads-across-europe/a-5594778> accessed 20 October 2017.

[72] However, a restriction on Islamic veils, adopted on women's right or gender equality considerations, may fall under the 'protection of rights and freedoms of others' if it is shown that the restrictive measure in question will protect the right of others to be free from pressure to wear something they do not wish to wear.

[73] (n 65) para 119.

In summary, the 'protection of gender equality' is not itself contained within the limitation clause of Article 9. In addition, a ban on Islamic veils aimed at protecting 'gender equality' may not adequately correspond with the legitimate aims of the protection of 'public order' or the protection of the 'rights and freedoms of others', which are listed there. Furthermore, it is well established that the grounds of justification under Article 9(2) are 'exhaustive'[74] and thus they 'may not be loosened nor be extended'.[75] Therefore, one can reasonably argue that a ban on the wearing of the Islamic veil on the grounds of gender equality or women's rights may *not* satisfy the legitimate aim test within Article 9(2) of the Convention.

5.5. A Ban is a Hindrance in Achieving Gender Equality

To examine whether there should be a ban on wearing Islamic veils, the consequences and the impact of such a ban in women's lives in practice need to be fully evaluated. This section will argue that gender equality cannot be achieved or furthered by forbidding women to wear Islamic veils, rather, a ban on veiling increases sexual inequality by hindering the emancipation of Muslim women. This is true for both clusters of Muslim women: those who voluntarily wear veils, and those who are forced to wear veils.

It is submitted that the long-term consequences of a ban will worsen rather than improve gender equality. An unwanted consequence of the ban might be that pious Muslim women who feel duty-bound to wear veils in public places will choose to stay at home. This implies that a ban on veiling may prevent a woman, who wears

[74] ibid, para 113.

[75] Armin Steinbach, 'Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights' (2015) Cambridge Journal of International and Comparative Law 29, 49. See also Section 3.4.1, Chapter Three.

veils in accordance with her deeply-rooted religious faith, from going out, getting a degree which she deserves and entering the job market.[76] Getting an education and a job are crucial for women's empowerment because education makes people aware of their rights, and employment gives people the opportunity to achieve financial independence. Therefore, a ban on veils aimed at 'liberating' veil-wearing Muslim women from the so-called 'oppressive' practice of Islamic veiling will not achieve the intended results, but the intervention will drastically harm them and result in their marginalisation in the male-dominated communities where Muslim women are already experiencing widespread discrimination and intolerance. As Gulik notes, the bans do [veil-wearing women's] harm, leaving them unable to work in the jobs they had chosen, causing them to lose financial independence.'[77] Therefore, Howard argues, 'not only are bans on the wearing of Islamic clothing not necessary for the promotion of equality between men and women, but they can

[76] For a more detailed discussion about the impact of a ban on veil-wearing Muslim girls and women, see Howard (n 2) 158-59. See also Dagmar Schiek, 'Just a Piece of Cloth? German Courts and Employees with Headscarves' (2004) 33(1) Industrial Law Journal 68, 72; Human Rights Watch, 'Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf' (2004) pp.29-30 <https://www.hrw.org/legacy/backgrounder/eca/turkey/2004/headscarf_memo.pdf> (accessed 17 July 2016); Jane Freedman, 'Women, Islam and Rights in Europe: Beyond a Universalist/Culturalist Dichotomy' (2007) 33(1) Review of International Studies 29, 29; Ute Sacksofsky, 'Religion and Equality in Germany: The Headscarf Debate from a Constitutional Debate' in Dagmer Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Abingdon: Routledge-Cavendish, 2009) 361.

[77] Gauri van Gulik, 'Headscarves: The Wrong Battle' (2009) <https://www.hrw.org/news/2009/03/14/headscarves-wrong-battle> accessed 4 September 2016.

even be counterproductive and hinder the emancipation of Muslim women and girls.'[78]

For Muslim women who are forced to wear traditional Islamic clothing, veiling is a tool that enables them to pursue their own interests in a society where they have no other means of doing so. The practice of veiling gives them an opportunity to have access to the public sphere of society which is inaccessible to them since wearing a veil is a prerequisite to leaving their homes. A prohibition on veiling does not free these women, who are already at a disadvantage for want of emancipation from male oppression. Conversely, a ban makes them more vulnerable as they are deterred from entering public life, education, employment or otherwise are forced to stay home, preventing them from going outdoors and taking part in the mainstream society. As Howard argues, women who are forced to wear veils 'will not be helped by bans … [but] may well suffer most from a legal ban, because it will stop them from going out, from gaining more emancipation through education and work.'[79] Likewise, with regard to Muslim women who are pressured into wearing Islamic veils, Roseberry states, a ban on veiling 'would most likely only marginalise these women further.'[80] It is also arguable that a woman who is forced to wear a veil by her male family members, will be less able to *resist* the pressure if the practical consequence of a ban is to take away her source of economic independence because donning the veil is the only way for her to go to work.

---

[78] Howard (n 2) 158.

[79] Howard (n 8) 215.

[80] Lynn Roseberry, 'Religion, Ethnicity and Gender in the Danish Headscarf Debate' in Dagmer Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Abingdon: Routledge-Cavendish, 2009) 344.

As already outlined in Chapter Three, another obvious consequence of a ban is the increase of harassment and abuse directed towards veil-wearing Muslim women in public places.[81] The *After the Ban* report has documented that despite the existence of a ban on veiling, many Muslim women continue wearing veil.[82] This is because they feel that veiling is an inherent and intrinsic part of their religion, but, these women experience widespread harassment, verbal abuse, and physical assaults by members of the public.[83] Hence, a ban results in harassment and acts of hostility directed at veil-wearing women by private individuals in public spaces. Gohir therefore argues, restrictions prohibiting Muslim women from wearing the Islamic veil 'fuel gendered Islamophobia' instead of promoting gender equality.[84] Commenting on the Islamic full-face veil ban in France, Shami Chakrabarti, director of the UK human rights pressure group Liberty, stated that the ban 'has nothing to do with gender equality and everything to do with rising racism in western Europe'.[85] So, one can reasonably argue that the policy of banning Muslim women

[81] See Section 3.5.

[82] The majority of the interviewees of this survey stated that they did not stop donning the full-face veil even after the implementation of the Islamic full-face veil ban in France. (Open Society Justice Initiative, 'After the Ban: The Experiences of 35 Women of the Full-Face Veil in France' (2013) p.2 <https://www.justiceinitiative.org/uploads/86f41710-a2a5-4ae0-a3e7-37cd66f9001d/after-the-ban-experience-full-face-veil-france-20140210.pdf> accessed 17 November 2018).

[83] ibid, p.3. After the provincial government in Quebec introduced the 'charter of values' in 2013 which would have prohibited the civil servants from wearing 'conspicuous' religious symbols including the *hijab*, women's centers in Quebec reported an increase in verbal and physical attacks on Muslim women. (Human Rights Watch, 'World Report 2014: Canada' <https://www.hrw.org/world-report/2014/country-chapters/canada> accessed 26 October 2017).

[84] Gohir (n 20) 24 & 29.

[85] See Kim Willsher, 'French Muslim women on burqa ban ruling: 'All I want is to live in peace'' (*The Guardian*, 1 July 2014)

from wearing the veils is self-defeating as the ban deteriorates Muslim women's vulnerability. It is further arguable that, as Adams and Joshi note, 'hate crimes and harassment directed against minority religious symbols put extreme pressure on those religions' adherents'.[86] Arguably, the risk or fear of being harassed by members of public due to the wearing of the veils may discourage devout, veil-wearing Muslim women from appearing veiled in public places. To this end, a ban may lead to these women being withdrawn from the social life of the community.

Based on the foregoing considerations, it can be deduced that a ban *harms* Muslim women by preventing them from becoming empowered. Hence, Heiner Bielefeldt, the UN Special Rapporteur, has stated that before placing any restrictions on the right to observe religious dress codes, 'women's rights, and in particular the principle of equality between men and women … should be duly taken into account.'[87] This thesis concludes that a ban on Islamic veiling should *not* be imposed on the grounds of gender equality because such a ban would worsen the marginalisation of Muslim women that is said to be combating.

5.6. A Ban Disrespects Muslim Women's Autonomy and Dignity

A healthy liberal State should not legally regulate the dress code of adherents of minority religion, as long as it does not present a danger in itself, especially when the clothing bears a certain meaning or conveys certain values that are important

<https://www.theguardian.com/world/2014/jul/01/french-muslim-women-burqa-ban-ruling> accessed 30 January 2020.

[86] Maurianne Adams and Khyati Y. Joshi, 'Religious Oppression Curriculum Design' in Maurianne Adams et al. (eds), *Teaching for Diversity and Social Justice* (New York: Routledge, 2007) 265.

[87] UN Doc. A/66/156 (18 July 2011) para 17.

to these people. Liberalism holds that in a free and democratic society every adult individual has the 'right' to determine their own paths of life and to make their own choices including decisions on what sort of lifestyle to adopt, free from any kind of coercion or indoctrination. Legal bans on Islamic veiling prevents pious Muslim women from leading a life in accordance with their own preferences and thus 'deny their autonomy'.[88] Therefore, Radney writes, 'a prohibition of veiling risks violating the liberal principle of respect for individual autonomy.'[89] The 'liberal conception of autonomy … is rooted in the idea that individuals should be able to pursue their own goals according to their own values, beliefs and desires.'[90] If personal autonomy encompasses the 'right' to make 'intimate and personal choices'[91] to pursue one's own independent paths through life, then a society must allow Muslim women to wear such dress as they see fit. A ban on veiling hinders Muslim women from making essential choices and thus harms their right to personal autonomy as guaranteed in Article 8 of the Convention.[92] It is further arguable that by wearing the veil a Muslim woman shows to others an important element of her identity. A ban on veiling compels Muslim women 'to give up completely an

[88] Dawn Lyon and Debora Spini, 'Unveiling the Headscarf Debate' (2004) 12 Feminist Legal Studies 333, 344.

[89] Frances Radnay, 'Culture, Religion and Gender' (2008) 1 International Journal of Constitutional Law 663, 709.

[90] Emily Jackson, 'Abortion, Autonomy and parental Diagnosis' 9(4) Legal & Social Studies (2004) 467, 468-469. See also Marilyn Friedman, 'Autonomy and Male Dominance' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge: CUP, 2005) 163.

[91] *Armstrong v State*, No. 98-066 (1999) para 37.

[92] For a detailed discussion of Article 8 of the Convention, see Section 7.4.1, Chapter Seven.

element of their identity that they consider important'[93] -- such a sacrifice may have profound effect on exercising control over her own life, body and mind.

A Muslim woman's ability to exercise autonomy over her physical appearance through the choice of clothing is an intimate aspect of her personal life and self-determination. In *Christine Goodwin v The United Kingdom*, the ECtHR stressed that '[u]nder Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual'.[94] Thus, the concept of 'private life' under Article 8 encompasses 'the right to personal autonomy'.[95] Coercing a veil-wearing Muslim woman to abandon the veil against her wishes harms her right to personal autonomy. So it can be argued that anti-veil legislation may infringe the right to respect for private life under Article 8 of the Convention. Therefore, in *Sahin*, Judge Tulkens stated that prohibiting a veil-wearing Muslim woman from following a voluntarily-adopted practice infringed her 'real right to personal autonomy on the basis of Article 8.'[96] It is further arguable that personal choices as to an individual's desired appearance relate to an expression of their personality and individual identity, and thus fall within the ambit of 'private life' under Article 8.[97] An important ECtHR case concerning the freedom to determine one's personal appearance is *Popa v Romania*.[98] In this case the applicant, a

[93] *S.A.S.* (n 65) para 139.

[94] App no. 28957/95 (ECHR, 11 July 2002) para 90.

[95] *Tysiąc v Poland* App no. 5410/03 (ECHR, 20 March 2007) para 107.

[96] (n 39) para 12.

[97] *Birzietis v Lithuania* App no. 49304/09 (ECHR, 14 June 2016).

[98] Application no. 4233/09 (18 June 2013).

Romanian national, was serving a prison sentence. He had been wearing very long hair (about 45 cm long) for more than twenty-five years. However, during the course of his imprisonment, he was forced to cut it to a length of about 10-15 cm. According to him, he seriously opposed the cutting of his hair. The Court took the view that the treatment imposed on the applicant could constitute an interference with his right to respect for his private life guaranteed by Article 8 of the Convention, and such an interference must be justified under the second paragraph of Article 8.[99] The Court further stated that forcing him to cut his hair to a particular length could deprive him of the possibility of styling himself according to his own choice and undermine a way of expressing his personality.[100] It is therefore safe to argue that coercing a Muslim women not to wear the veil limits the possibility of expressing her personality and individual identity through the choice of clothes. Therefore, it is submitted that anti-veil legislation may infringe the right to respect for private life under Article 8 of the ECHR. The forcible imposition of a specific dress code on woman and its impact on their right to respect for private life will be discussed in greater detail in Chapter Seven of the thesis.[101]

A State-imposed obligation on Muslim women not to wear the Islamic veil does not allow Muslim women to exercise their choices to the fullest extent. The restrictive nature of a ban deters women from pursuing their own interests, and thus exercising their autonomy, to the fullest degree. The *Sahin* case can be used to elaborate this point. A ban on veiling in the university placed Ms Sahin in a dilemma: she was *forced to choose between* acting in a manner contrary to her belief, that is,

[99] ibid, para 32.

[100] ibid, para 33.

[101] See Section 7.4.1.

attending the university *without* wearing a headscarf, or staying at home *without* a degree. However, a choice-based approach would have accommodated both choices, which are, getting the university education *and* manifesting her religious affiliation in the university premises by wearing the Islamic headscarf. A woman cannot be said to be exercising free choice if she is compelled to choose between two 'equally' important choices. It is therefore submitted that a ban may preclude Muslim women from exercising their (multiple) choices to the fullest degree, and this may in turn curtail their autonomy.

As indicated above, arguments in favour of bans on Muslim veiling on account of sexual equality have primarily been based on the assumption, *inter alia*, that those wearing the Islamic veil cannot be said to have exercised a genuine choice because donning the veil can never be a voluntary action.[102] This popular assumption implies that when a woman says she has freely chosen to wear the Islamic veil, she is either not being truthful or she is acting under some kind of false consciousness.[103] Such an implication is disrespectful for an individual wearer who holds that the wearing of the veil is the result of her deliberate choice. This supposition also leads to the conclusion that she does not understand the correctness of her own actions. If a society is concerned that veil-wearing Muslim women may be the victim of false consciousness, then it can take initiatives to educate these women so that they may challenge existing traditions, discover how women in other parts of the world are living their lives, and explore their options for the future. In its Recommendation

[102] See Section 5.1.

[103] Ben Saul, 'Wearing Thin: Restrictions on Islamic Headscarves and Other Religious Symbols' in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Portland: Hart Publishing, 2008) 182.

on 'Education and Religion', the Parliamentary Assembly stated that '[e]ducation is essential for combating ignorance, stereotypes, and misunderstanding of religions.'[104] By obtaining an education, veil-wearing Muslim women, who have allegedly internalised male pressure, can challenge, and potentially escape from, patriarchy and compete in public spaces and institutions on purportedly equal terms with their male counterparts. However, a criminal prohibition on Islamic veiling aimed at 'liberating' Muslim women is entirely problematic because an adult woman who claims to be free or does not want to be free cannot legitimately be forced to be liberated. With regard to prohibition on veiling, Millet argues:

> [I]ndividuals can possibly consent to their own inequality and even waive their right to autonomy as long as it is their own decision. No matter what is consented to, the mere fact of consenting is paramount… This approach is in keeping with a liberal version of feminism under which the respect on its own for the will of a woman, irrespective of its content, ensures gender equality.[105]

As indicated in Chapter Two, the core ideal of personal autonomy is allowing an individual to direct their own life in a way that they deem best. Paternalistic interventions are incompatible with personal autonomy.[106] Marina Oshana states, '[w]e offend a person's autonomy by paternalistic means when we endeavour to impose on the person a conception of what is a worthy and proper life.'[107] Bans on

---

[104] Parliamentary Assembly, 'Education and Religion', Recommendation 1720 (2005), para 6.

[105] Millet (n 3) 416. See also Susanna Mancini, 'Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism' (2012) 10(2) I.Con 411.

[106] See Section 2.4.2.

[107] Marina Oshana, *Personal Autonomy in Society* (Aldershot-Burlington: Ashgate, 2006) 108. See also Doglous H. Husak, 'Legal Paternalism' in Hugh LaFollette (ed.) *The Oxford Handbook of Practical Ethics* (Oxford: OUP, 2005) 402.

veiling on the grounds of gender equality may arguably be regarded as 'paternalistic interventions' aimed at paternalistically protecting veil-wearing Muslim women against their harmful choices. This is because the central idea of a ban on sexual equality concerns is arguably something like this line of reasoning: 'veils are imposed on you by men. If you think that you have autonomously chosen a veil and that donning the veil is a good thing, you are wrong. If you really knew your own interests as a woman, you would know that it is not a good thing. A ban on veiling will free you from male domination, will give you a good life whereby your opportunities to be equal with men will flourish.' It follows that, forbidding Muslim women to wear a veil for the sake of their sexual equality is paternalistic, and thus problematic. State regulation of Islamic dress prevents a veil-wearing Muslim woman from having what she wishes done, and in that way interferes with her *liberty* on the grounds that the State or regulation knows best what is for her own good. However, the use of coercion against Muslim women to achieve a *good* for them may not be recognised as such by these women for whom the good is intended. What legislators interpret as harm done to oneself may be regarded by the individual concerned as beneficial, that is, a reasonable choice consistent with their interests. In short, a ban based on the premise that the intervention will be good for 'oppressed' veil-wearing women is an authoritative, paternalistic interference -- it disrespects the autonomy of Muslim women by enforcing on them a new concept of a good life, which overturns the wearers' own version of a good life. As Laborde argues, a ban on the *hijab* is 'inadmissibly paternalist in its wrongheaded assumption that the wearing of *hijab* is a form of domination.'[108] Howard asserts, banning Islamic veils 'is just as paternalistic and oppressive of

[108] Cecile Laborde, 'State Paternalism and Religious Dress Code' (2012) 10(2) I.Con 398, 409.

women as forcing them to wear these.'[109] Likewise, Marshall writes, 'banning means imposing one set of standards and denies [Muslim] women their right to personal identity: freedom as persons in their own right, ironically in the name of gender equality.'[110]

The matter of human dignity now must be considered. As mentioned in Section 5.1 above, the proponents of the ban argue that the practice of veiling offends human dignity and thus a ban is necessary to protect veil-wearing Muslim women's dignity.[111] There are, however, some flaws in this argument. It is submitted that the exercise of a *voluntary* choice, i.e. donning the veil by an adult woman, does not undermine the dignity of the wearer, but a constraint on this choice, in itself, constitutes an affront to her human dignity. 'Human dignity', as Liebenberg argues, 'undeniably requires respect for personal autonomy and choice.'[112] An individual's

[109] Howard (n 8) 214.

[110] Jill Marshall, 'Women's Right to Autonomy and Identity in European Human Rights Law: Manifesting One's Religion' (2008) 14 Res Publica 177, 189. See also Jill Marshall, 'Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate' (2008) 30 Human Rights Quarterly 631, 650; Marshall (n 54) 460.

[111] On this point, see Jennifer Heider, 'Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights' (2012) 22(1) Indiana Journal & Comparative Law Review 93, 93. For a contrasting view, see L. Ali Khan, *A Theory of Universal Democracy: Beyond the End of History* (The Hague: Kluwer Law Review 2003) 110.

[112] Sandra Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' in Aj van der Walt (ed), *Theories of Economic and Social Justice* (Stellenbosch: Sun Press, 2005) 148. Dupre argues, 'human dignity is focused on individuality and autonomy.' (Catherine Dupre, *Importing the Law in Post-Communist Traditions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford: Hart Publishing, 2003) 122.) Kant argues, 'autonomy is the ground of the dignity of human nature.' (Immanuel Kant, *Grounding for the Metaphysics of Morals* (Cambridge: CUP, 1998) 41).

human dignity cannot be fully respected or valued if they are not allowed to live a life of their own choosing. Joseph Raz writes, 'respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, the right to control their future.'[113] Therefore, human dignity 'empowers'[114] a person to take control of their life without any interference, or indeed any help, from others or from the State. A ban on veiling to safeguard the human dignity does not value the dignity of Muslim women who have autonomously chosen to wear veils, because the ban precludes them from exercising their choice freely and thus prevents them from living a life of their choosing. It is further arguable that, to force Muslim women to remove their religious clothing in public is as humiliating as obliging people to remove their trousers. In order to treat a person with respect, the person must first be 'recognised' as capable of making decisions for themselves. Constraints on Muslim women's free choice to wear veils imply that this group of people is unintelligent, incapacitated, far from autonomous and cannot decide what is good for them by themselves. Marshall has convincingly argued that '[l]egally banning [a Muslim woman] from exercising a choice she says she freely makes as an adult does not respect her as an equal and give her any recognition as a person capable of making her own choices as an adult. Such bans exclude, judge, disrespect, and thus do not safeguard her identity or personality rights.'[115] It is therefore argued that forcing a Muslim woman to adopt a particular lifestyle against her will or to

[113] Joseph Raz, *The Authority of Law* (Oxford: OUP, 1979) 221.

[114] Roger Brownsword, 'Freedom of Contract, Human Rights and Human Dignity' in Daniel Friedman and Daphne Barek-Erez (eds), *Human Rights in Private Law* (Oxford- Portland Oregon: Hart publishing, 2001) 183.

[115] Jill Marshall, 'The Legal Recognition of Personality: Full-face Veils and Permissible Choices' (2014) 10 International Journal of Law in Context 64, 75.

abandon a lifestyle that she has freely chosen does not enhance her dignity, but rather the use of such force, in itself, undermines her dignity.

To conclude this section, veil-wearing Muslim women deserve respectful treatment and respect for their voluntary choices. A society must respect a Muslim woman's autonomous choice to wear the Islamic veil in a way comparable to respecting a Christian nun in habit, a Hindu woman in Sindoor, and an orthodox Jewish man in yarmulke. It appears from the above discussion that a regulation on Islamic veiling is disrespectful for Muslim women and it prevents them from exercising their 'real right to personal autonomy' in following through with their own choices. One may therefore come to the conclusion that gender equality does *not* provide a justification for prohibiting a Muslim woman from following a voluntarily adopted practice.

5.7. Would John Stuart Mill Have Regulated the Wearing of Islamic Veils on the Grounds of Gender Equality?

In the previous section, prohibition on wearing Islamic veils was considered from the perspective of personal autonomy. This section examines the same topic through the lens of Mill's harm principle.

Before embarking on a discussion of how Mill would have responded to about today's bans on Islamic veiling, it is important to highlight his commitment to 'gender equality'. Mill, one of the nineteenth century's greatest philosophers, took a position against the prejudices and inequality that kept women in a subordinate position in family, social and political life. Mill spoke about many areas where women suffered discrimination in his time: suffrage, employment, rights over

children, earnings, property, and so forth. Mill has acknowledged that the main problem encountered by women is that they are denied the 'freedom of individual choice'[116] as to how they are to lead their lives. He holds that the emancipation of women to a level of equality is needed not only for the increased happiness of women themselves; it is also an important condition for the improvement of mankind.[117] Mill, in the very first paragraph of his excellent essay *The Subjection of Women*, wrote that:

> The legal subordination of one sex to the other--is wrong in itself, and now one of the chief hindrances to human improvement; and … it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other. [118]

Mill's nineteenth century England presented a different set of religious issues to those of today's multicultural Britain. Upon closer scrutiny of his *On Liberty*, however, it can be strongly argued that Mill would not support a ban on Muslim women's religious practice of veiling on gender equality concerns. This is because such an intervention arguably constitutes a wrongful and unjustified constraint on a woman's individual liberty, and thus contravenes the harm principle. There are three different rationales for this argument and these are mentioned below.

Mill's *On Liberty* (narrowly speaking, his harm principle) very clearly answers an important question: what part of life should be assigned to *individuality* and what part to *society*? As discussed previously, the harm principle relies on a divergence

---

[116] John Stuart Mill, *The Subjection of Women* (London: Gutenberg, 2008) 19.

[117] For a detailed discussion on this point, see Susan Moller Okin, *Women in Western Political Thought* (London: Virago, 1980) 188-230.

[118] Mill (n 116) 3.

between self-regarding and other-regarding actions. A self-regarding action of an individual, Mill says, 'concerns only himself'[119] and the other regarding action 'concerns others'.[120] While an individual's other-regarding harmful actions can be justifiably prohibited for the interests of society, the self-regarding sphere, however, 'is the appropriate region of human liberty',[121] that is, the sphere where liberty is rightfully protected by society. As indicated in Chapter Four, unless the Islamic veil is worn with an ill-motive, such as to hide one's identity or to conceal a weapon, donning the veil by a woman is purely a self-regarding conduct, that is, to use Mill's terms, 'a person's conduct [which] affects the interests of no persons beside himself'.[122] This is because, in most cases, a Muslim woman's voluntary wearing of the veil is nothing but an expression of her genuinely held religious belief. Additionally, it does not, in itself, harm others. Mill claims that by virtue of the harm principle, a society must never interfere with an individual's purely self-regarding conduct as an individual is sovereign over their own affairs. It is therefore submitted that intrusions into a Muslim woman's self-regarding conduct, i.e. wearing the veil, contravenes the harm principle. It is worth noting that, in *On Liberty*, Mill has convincingly defended his argument that 'the individual is not accountable to the society for his actions, in so far as these concern the interests of no person but himself'[123], as he goes on to say that:

---

[119] Mill, however, has admitted that '[n]o person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them.' (John Stuart Mill, *On Liberty* (Kitchener: Batoche Books, 2001) 74).

[120] ibid.

[121] ibid 15.

[122] ibid 69.

[123] ibid 86.

> The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it.[124]

The second argument that Mill would have advanced against the ban on wearing Islamic veils is his commitment to respect the self-regarding *decision* of the decision maker. Mill always maintained that as long as no harm is caused to others, a society must allow a competent individual to act on the basis of their own judgment because the individual knows their interests best and they should be allowed to look after their interests in their own way: 'He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interest which society has in him individually … is fractional.'[125] Mill further writes:

> The [harm] principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures … The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual.[126]

An adult Muslim woman may be presumed to be in the best position to decide what is in her own best interest and how best to lead her own life. She is the person most

[124] ibid 94.

[125] ibid 70.

[126] ibid 16.

likely to know her own beliefs, motivations, preferences, and goals. If she freely and voluntarily decides, for whatever reason, to wear a veil, a society must not interfere with her decision as long as her decision is not harmful for others. Society must allow her to act on the basis of her own judgments, as those judgments are the best guide to what will make her life go well. Under Mill's theory, an interference with her self-regarding decision will do more harm than good as each person knows best where their best interests lie.

But what if an adult, adequately informed, and mentally competent Muslim woman makes a *wrong* decision about donning the veil? Would Mill force her to abandon her wrong, foolish decision? This would be unlikely and this is explored further below.

Mill always maintained that a competent member of civil society may make foolish or self-defeating decisions that displease us: 'Though doing no wrong to any one, a person may so act as to compel us to judge him, and feel to him, as a fool, or as a being of an inferior order'.[127] But a society has no legitimate authority to interfere with their foolish or degrading decision because an intervention with such a decision may constitute unreasonable limits on individual liberty. Mill clarifies that a person has no 'socially obligatory' duty to be prudent in their self-regarding decisions: 'self -regarding faults … may be proofs of any amount of folly, or want of personal dignity and self-respect', but by themselves they are not 'a subject of moral reprobation'.[128] This concept needs to be applied in relation to a Muslim woman's decision of donning the veil. Assuming that wearing the Islamic veil is a

[127] ibid 71.

[128] ibid 72-73.

foolish choice by itself, Mill's liberty theory would still protect this choice as long as the exercise of that choice does not cause harm to others. Society does not have sufficient warrant to override her voluntary decision, no matter how foolish the decision is and how harmful the decision is for herself. Arneson writes, 'Mill clearly believes that in the sphere of self-regarding action people have the right to make their own mistakes and suffer the consequences, without interference by society. … Mill is quite prepared to tolerate deviations from rationality that occur through a person's exercise of autonomous choice.'[129] Himmelfarb describes Mill as saying '[w]here there was no actual wrongdoing to others, where the person was only harming himself by his vicious conduct, society had no cause to interfere.'[130] The only thing a society can do, according to Mill, is 'remonstrating with him, or reasoning with him, or persuading him, or entreating him', but it cannot 'compel him'.[131] So, if one believes that the decision of a Muslim woman to wear veils is wrong or imprudent because the wearing of it will not liberate her, then the response is for one to speak out, to express a contrary opinion (without offending her), to give her advice and information, and to help her to see her error. She is free to disagree with this opinion, to reject the advice, and to carry on with her self-regarding behaviour although her decision to don the veil has been considered to be foolish and it may in fact be foolish. If she ignores this advice, it is not because she cannot understand or respond rationally to what has been advised, but simply because she is in disagreement regarding what is good for her. One should not

[129] Richard J. Arneson, 'Mill versus Paternalism' (1979) 90(4) Ethics 470, 485.

[130] Gertrude Himmelfarb, *On Liberty and Liberalism: The Case of John Stuart Mill* (New York: Alfred A. Knopf, 1974) 99-100. See also Jonathan Riley, 'Mill's Absolute Ban on Paternalism' in Kalle Grill and Jason Hanna (eds), *The Routledge Handbook of the Philosophy of Paternalism* (Abingdon- New York: Routledge, 2018)156-60.

[131] Mill (n 119) 13.

override her decision with force. Mill holds that an individual's superior knowledge of their state of mind, preferences, motivations, and peculiar self-regarding circumstances give them the right to do what they deem fit after receiving the advice and warning, and evaluating these in the light of their own preferences. Their 'absolute' liberty in self-regarding actions guarantees that they are free to act as they wish and to ignore advice which conflicts with their decisions, no matter how foolish such decisions may be and/or how prudent the advice may be. Mill believes, '[a]ll errors which [an individual] is likely to commit against advice and warning are far outweighed by the evil of allowing others to constrain him to what they deem his good.'[132] It is therefore concluded that individually, one may think that a Muslim woman's decision of donning the veil is foolish, wrong, or perverse -- but this is a different matter, one must not compel her to act against her own decision if her judgment is wrong. This is because under Millian theory, a competent individual knows their interests better than anyone else, and thus their own good is better left in their own hands.

The third reason why Mill would have opposed an anti-veiling law, enacted on gender equality considerations, is his 'absolute ban'[133] on paternalism. Mill's account of anti-paternalism has already been introduced in Chapter Two.[134] His uncompromising position about anti-paternalism stems from: (a) the harm principle, which does not allow forceful prevention of harm if the impact of such harm is limited to the actor themself, and (b) his argument that only the individual

[132] ibid 71.

[133] Arneson states, 'Mill meant to assert … [an] absolute ban on paternalism'. (Arneson (n 129) 470).

[134] See Section 2.4.2.

themselves occupies the best position to evaluate their own needs and to know what is good for them. 'Mill's antipaternalism' is, as Laselva says, 'a corollary of his harm principle'.[135] Under Mill's model of liberty, a State cannot exercise its own initiative by means of compulsion/coercion to overrule a fully voluntary individual choice for the chooser's *own good*. Mill makes it very clear that an individual 'cannot rightfully be compelled to do or forbear because it will be better for him to do so, [or] because it will make him happier'[136] or even because to do so would prevent self-harm. Interferences for any of these purposes will constitute paternalistic intervention and Mill forbids this.

It has been argued in the previous section that a ban on Islamic veiling is a *paternalistic* intervention as it is instituted on account that the ban will liberate Muslim women and will free them from an oppressive religious practice. On that foundation, it is further argued that Mill would have said that forbidding Muslim women to wear the veil is a paternalistic interference on their liberty of action and thus, is unjustified. This argument needs to be elaborated upon. Every individual has *sovereignty* over themselves, which allows them freely dispose of their body and mind: 'over himself, over his own body and mind, the individual is sovereign.'[137] The metaphor of sovereignty over self is powerful, and it captures an important aspect of Millian liberalism. A woman's choice to wear a veil is an important form of control over her body (and mind). A legal ban on veiling precludes a veil-wearing Muslim woman from exercising sovereignty over her own body (and mind) because

[135] Samuel V. Laselva, 'A Single Truth: Mill on Harm, Paternalism and Good Samaritanism' (1988) Political Studies 486, 488.

[136] Mill (n 119) 13.

[137] ibid 13.

the government tells her to dress in a different way which the government believes to be good for her. Thus, legislative bans on veiling on gender equality concerns would not have been acceptable for Mill. Mill provides a general picture of the kinds of interferences that he considers as unjustified 'paternalistic' interventions on individual liberty (subject to some caveats): legislation in relation to the sabbath, prohibition of gambling and drunkenness, legal or de facto prohibitions on certain ideas such as atheism, interferences with homosexuality and transgender lifestyles, legal punishment for idleness, and bans on Mormon women's willful participation in polygamous marriages. Due to the lack of space it is not possible to discuss all of these examples. However, it is important to highlight Mill's discussion of Mormon polygamy to effectively argue that a prohibition on Muslim women wearing the Islamic veil for the sake of gender equality or women's rights would have been regarded as a paternalistic intervention for him. Mill discusses Mormon 'polygamy'[138] as an example to demonstrate how majorities sometimes impose general rules of conduct on others based on their ideas about what is 'religiously wrong'.[139] In Chapter 5 (entitled 'Applications') of *On Liberty*, where Mill applied his harm principle, he defended the 'voluntary' participation in polygamous marriage by Mormon women who 'prefer being one of several wives'. He acknowledged that Mormon polygamous marriages were oppressive to Mormon women, but he had no hesitation in saying that no 'community has a right to force another to be civilized. So long as the sufferers … do not invoke assistance from other communities, I cannot admit that persons entirely unconnected with them ought

[138] Although Mill has used the term 'polygamy', Mormon communities refer to it as 'plural marriage'.

[139] Mill (n 119) 83.

to step in'.[140] If Mill's example of Mormon polygamy is directly applied to Muslim women's choice of donning the veil, then it can be strongly argued that Mill would have defended Muslim women's *voluntary* practice of veiling regardless of its alleged oppressive character; and an interference by the State with such religious practice for the sake of Muslim women's own good, happiness and emancipation would have been regarded by Mill as, to use his own words, an 'illegitimate interference with the rightful liberty'[141] of Muslim women. This argument can further be strengthened by quoting the following statement of Mill:

> [N]either one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it.[142]

Before moving on to the concluding comments, it is important to summarise the key arguments of this section. This section has explored how Mill would have responded to an anti-veiling law enacted on grounds of gender equality. It has been argued that Mill would not have supported a ban on Islamic veils for three different reasons: (a) purely self-regarding actions are exempted by the harm principle from potential interference by society; (b) Mill's idea that an individual's own good is better left in the individual's own hand because 'he himself is the final judge'[143]; and (c) Mill's absolute ban on paternalism. Taking these three reasons together, this thesis submits that under Mill's theory, forbidding a Muslim woman to wear a veil against her will is unjustified because the wearing of a veil by an adult woman for religious reasons is a purely *self-regarding act* and the use of coercive power by

[140] ibid 85.

[141] ibid 83.

[142] ibid.

[143] ibid 71.

the society for her own liberation or good is a *paternalistic intervention* because as a competent woman capable of self-government, *she knows where her best interests lie*. Thus, one may come to the conclusion that Mill would *not* have regulated the wearing of the Islamic veil on the grounds of gender equality.

5.8. Concluding Remarks

In conclusion, the idea of gender equality is used in support of arguments to prevent Muslim women from wearing Islamic veils. Islamic veiling is perceived by the supporters of a ban as detrimental to achieving gender equality. However, this chapter has argued against this view because it is based on some stereotypes, such as, that the Islamic veil is a symbol of women's oppression and that all Muslim women who wear Islamic veils do so under duress. These stereotypical ideas ignore the wide range of reasons why women opt for Islamic veils, and, therefore, are problematic. The popular, Western perception that veiling by Muslim women is the result of pressure from fundamentalist men, be they family members or religious leaders, has been widely questioned in academic circles.[144] This chapter has argued, relying on relevant empirical research, that women wearing the Islamic veil may do so for a number of reasons. This chapter has demonstrated how diverse these reasons can be, and it has also illustrated that Islamic veiling carries various meanings per the context in which the veil is worn. As indicated above, empirical findings revealed that in most cases Muslim women who wear veils are not forced to do so by men, rather, they make their own personal *choice*. Therefore, it has been concluded that the widespread supposition that the Islamic veil is a sign of

[144] On this point, see Nilufar Gole, 'The Voluntary Adoption of Islamic Stigma Symbols' (2003) 70(3) Social Research 809, 817.

women's oppression and inequality is erroneous. As argued above, the gender equality argument may fail for not fulfilling a legitimate aim because 'protection of gender equality' is not itself contained within the limitation clause of Article 9 of the Convention and it cannot even be connected with the vague 'protection of the rights and freedoms of others', which is listed there. Applying Mill's theory directly to the Islamic veiling debates, this chapter has argued that a legislative ban on Islamic veiling, enacted on the grounds of gender equality, may not be justified from the perspective of the harm principle because such a ban may be regarded as a paternalistic intervention on Muslim women's liberty.

This chapter has underscored that a ban on the Islamic veil disrespects veil-wearing Muslim women's dignity and curtails their personal autonomy. As Amartya Sen notes, freedom is 'to live the way we would like, do the things we would choose to do, achieve the things we would prefer to achieve'.[145] A legislative ban on the wearing of Islamic veils precludes a Muslim woman from exercising control over her own body and mind, prevents her from leading a life of her own choosing, and thus constitutes an unreasonable limit on her liberty. It is also arguable that criminalising the wearing of Islamic veils means putting veiled women in a dilemma: either women should comply with the ban and give up a way of dressing that is their own choice; or, refuse to comply with the ban and face criminal sanctions. Thus, countries such as France, the Netherlands, and Belgium that use the criminal law in the enforcement of the ban have a contradictory idea of women's liberation: criminalising women in order to emancipate them. As Lyon and Spini argue, 'crucially, the answer to one constraint (the religious obligation to wear the *foulard*)

[145] Amartya Sen, 'Welfare, Freedom and Social Choice: A Reply' (1990) 56 Louvain Economic Review 451, 471.

cannot be another constraint (the obligation not to wear it): *an effective process of liberation cannot be based on a prohibition*.'[146] A reality check shows that a ban is counterproductive in achieving the emancipation of veil-wearing Muslim women. As established above, rather than empowering veil-wearing Muslim women, a ban on Muslim veiling increases gender inequality because a ban marginalises these women, excluding them from access to education and employment, leading to their isolation from mainstream society. In this sense, a ban constitutes a violation of Muslim women's rights. Therefore, one can come to the conclusion that the protection of gender equality or women's rights is *not* a convincing argument or legitimate ground to ban the voluntary wearing of Islamic veils.

Two important lessons can be learnt from the discussion of this chapter. First, in deciding the legitimacy of a ban on wearing the Islamic veil, a court must take into account that the practice of Islamic veiling has a myriad of different meanings and that Muslim women adopt this practice for a wide and variable range of reasons. A court should not prefer abstract assumptions about a religious practice over its concrete individual meanings. Second, right or wrong, the choice of a Muslim woman to wear the veil is matter of personal autonomy, and therefore must be protected. Many Muslim women choose to wear religious dress as an act of pity and modesty, similar to Christian nuns. The European States should respect the voluntary decisions of Muslim women to wear the veil, in a way comparable to respecting a Christian nun's decision to wear the habit. A State may interfere with a woman's voluntary choice to wear religious dress if, and only if, the exercise of her choice causes harm to others. Therefore, the rule of thumb should be (personal

[146] Lyon and Spini (n 88) 341 (emphasis in the original).

autonomy and) the harm principle. Put differently, allowing Muslim women to wear the Islamic veil must be the *norm* and a ban must be the *exception*.

CHAPTER SIX: BANS ON ISLAMIC VEILING: DISPARITY BETWEEN THE UNITED NATIONS AND STRASBOURG PRACTICE

6.1. Introduction

The primary aim of this chapter is to identify the 'divergent' approaches that the ECtHR and the UN have taken regarding legal bans on wearing Islamic veils. This chapter also aims to use this comprehensive comparative analysis to explore what lessons (if any) the ECtHR can learn from the UN to protect the right to religious manifestation of Muslim women who wish to manifest their religion or belief through the wearing of Islamic veils.

The FoRB, as guaranteed in Article 18 of the ICCPR and Article 9 of the Convention, has a common origin in the UDHR. Despite this, the HRC and the ECtHR have taken contradictory decisions in directly analogous cases concerning the right to manifest one's religion through the wearing of religious dress by persons belonging to minority religions. A glimpse at the reasoning of the ECtHR and the HRC indicates that both human rights bodies accept that a ban on wearing Islamic veils represents a limitation on the right to manifest one's religion. However, striking divergences can be seen between the approaches of the HRC and that of the ECtHR regarding whether this limitation satisfies the requirements of Article 18(3) of the ICCPR or Article 9(2) of the Convention. In the previous fifteen years (specifically speaking, since March 2004 when France prohibited ostentatious religious symbols in public

schools[1]) the ECtHR had dealt with a growing number of cases where it was asked to consider the legitimacy of veil bans in the context of schools, universities, private and public workplaces, public places, and courtrooms. The HRC, in contrast, had not had the opportunity to develop extensive case law in this field as it considered only one case[2] up until June 2018 in which the ban on wearing the Islamic veil was an issue. So understandably, it was very difficult for commentators and academic scholars to make a 'comprehensive' comparative analysis between the practices of the ECtHR and that of the UN as to the legal bans on wearing the Islamic veil, and, as a consequence, there was, and indeed there is still a lack of academic commentary and scholarly work in this field.

However, in July 2018 alone, the HRC gave four important decisions concerning prohibitions on wearing Islamic veils in Turkey and France .[3] Therefore, it is now possible and indeed, necessary to make a comprehensive comparative analysis. The recent rulings of the HRC on Islamic veils, its strong jurisprudence on Sikh religious dress, its General Comments, and the annual reports of the UN Special Rapporteurs on FoRB will surely allow a comprehensive, critical comparative analysis between the approaches of the UN and Strasbourg institutions to be made.

[1] Act No. 2004-228 of 15 March 2004.

[2] *Raihon Hudoyberganova v Uzbekistan,* Communication no. 931/2000, UN Doc. CCPR/C/82/D/931/2000 (5 November 2004).

[3] *F.A. v France*, Communication no. 2662/2015, UN Doc. CCPR/C/123/D/2662/2015 (16 July 2018); *Sonia Yaker v France*, Communication no. 2747/2016, UN Doc. CCPR/C/123/D/2747/2016 (17 July 2018); *Seyma Turkan v Turkey*, Communication no. 2274/2013, UN Doc. CCPR/C/123/D/2274/2013/Rev.1 (17 July 2018); *Mariana Hebbadj v France*, Communication no. 2807/2016, UN Doc. CCPR/C/123/D/2807/2016 (17 July 2018).

At the outset, it is important to briefly note some discrepancies between the HRC and the ECtHR as treaty monitoring human rights bodies. The 'views' of the HRC on the merits of a communication are not binding for the State Party concerned. It contrasts markedly with the ECtHR, decisions of which are legally binding and thus create legal obligations regarding the Member State concerned.[4] The HRC has admitted that 'the Committee has no power to hand down binding decisions as does the European Court of Human Rights.'[5] At the universal level, there is no higher authority expressly empowered to review or supervise the implementation of the HRC's views. Again, this contrasts with the implementation systems under the Convention.[6] As discussed in Chapter One, the ECtHR gives Member States a MoA in cases where a clear consensus has not emerged on a particular issue among the Member States, to ensure that it does not exceed the frontier of State sovereignty.[7] In contrast, the HRC does not recognise that State Parties have a MoA, therefore this body is less concerned with State sovereignty. Furthermore, the HRC has no authority like the ECtHR to award damages or costs in 'just satisfaction' under Article 41 of the Convention. It is also noteworthy that the relative homogeneity of the legal and democratic systems across European States contrasts

[4] For a more detailed discussion about the nature of the 'views' of the HRC, see P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Dartmouth: Ashgate, 1998) Chapter 13. See also T. Tomuschat, 'Evolving Procedural Rules: The United Nations Human Rights Committee's First Two Years of Dealing with Individual Communications' (1980) 1 HRLJ 249, 255. Regarding the decisions of the ECtHR, see Bernadette Rainey et al., *The European Convention on Human Rights* (7th edn, Oxford: OUP, 2017) Chapter 3.

[5] HRC, 'Selected Decisions of the Human Rights Committee under the Optional Protocol: Volume 2' (1990) 1.

[6] Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1994) 151.

[7] Section 1.4.2.

with the vast range of ideological and religious foundations of the systems of government of the nations represented within the universal system.[8] Against this background, some variance must be expected between the decisions of the international HRC and the regional ECtHR as to legal prohibitions on wearing Islamic veils. However, these basic discrepancies should not lead to *contradictory* decisions in directly analogous cases which may create inconsistency on the 'universality' of international human rights standards or result in uncertainty on the future of religious freedoms of women belonging to minority religions.

6.2. Divergences between the Approaches of the Strasbourg Court and the UN: A Legal Analysis

This section explores and critically analyses the different approaches that the UN bodies and the ECtHR have taken concerning legal ban on wearing Islamic veils.

6.2.1. *Mann Singh* before the ECtHR and the HRC

Striking divergences between the approaches of the ECtHR and the HRC regarding regulations on wearing religious clothing can be observed from Mr Mann Singh's complaints where he claimed that the obligation to appear bareheaded in an identity photograph infringed his FoRB.

Although not directly related to the wearing of Islamic veils, *Mann Singh v France*[9]

[8] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: CUP, 2005) 5.

[9] *Mann Singh v France* App no. 24479/07 (ECHR, 13 November 2008). This judgement is available in French only. Regarding the admissibility ruling of *Mann Singh*, the ECtHR published a press release (English version) which is available at this URL:

is a useful starting point for a comparative study between the jurisprudence of the ECtHR and that of the HRC on religious attire. The background of *Mann Singh* was that in 2004, the applicant Shingara Mann Singh had requested a duplicate driving license with a photograph showing him wearing a turban, after the original had been stolen. The authority refused his request because it was a requirement that a photograph, intended for use on driving licenses, should show the subject 'bareheaded', whereas the identity photographs he had provided showed him wearing a turban. An interesting characteristic of this case is that the applicant had previously been able to renew his license in 1987, 1992 and 1998 by providing photographs which showed him wearing a turban.[10] In this case, the ECtHR was confronted with the question of whether the impugned regulation which required the applicant to appear 'bareheaded' in the identity photograph on his driving license constituted a violation of FoRB under Article 9 of the Convention. The French Government sought to justify the interference on the grounds of public safety and public order.

In giving its decision on admissibility, the ECtHR found that 'identity photographs for use on driving licences which showed the subject bareheaded were needed by the authorities in charge of public safety and law and order, particularly in the context of checks carried out under the road traffic regulations, to enable them to identify the driver and verify that he or she was authorised to drive the vehicle concerned.'[11] The ECtHR declared that the application was manifestly ill-founded

<https://hudoc.echr.coe.int/eng#{"itemid":["003-2558814-2783003"]}> accessed 29 May 2019.

[10] ibid.

[11] ibid.

and, thus, inadmissible on the basis that France had a wide MoA with regard to public safety and public order. In declaring the application inadmissible, the ECtHR relied on the EComHR's early decision in *Karaduman v Turkey* where a Muslim student supplied an identity photograph wearing the Islamic headscarf, contrary to the University's regulations that an identity photograph affixed to the degree certificate must show the individual bareheaded. In *Karaduman*, it was decided that the University's refusal to issue a degree certificate to her, did not violate Article 9.[12]

After losing the case in the ECtHR, Mr Mann Singh tried another route in 2008– the HRC – on a very similar issue. *Shingara Mann Singh v France*[13] was triggered by refusal of his passport renewal application under strikingly similar circumstances. His application was rejected even though the authority had previously issued and renewed his passport which included a photograph showing him with a turban. Again, the ground of refusal was his failure to provide bareheaded photographs. Before the HRC, he complained that the regulation requiring individuals to appear bareheaded in their passport photographs constituted a violation of FoRB under Article 18 of the ICCPR. The HRC took precisely the opposite view from the ECtHR. By specific reference to its earlier decision in *Ranjit Singh v France*,[14] the HRC found a violation of Article 18; it stated,

[12] App no. 16278/90 (ECHR, 3 May 1993).

[13] *Shingara Mann Singh v France*, Communication no. 1928/2010, UN Doc. CCPR/C/108/D/1928/2010 (19 July 2013).

[14] Communication no. 1876/2000, UN Doc. CCPR/C/102/D/1876/2009 (22 July 2011).

> [T]he State party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead, but leaving the rest of the face clearly visible, would make it more difficult to identify the author, who wears his turban at all times, than if he were to appear bareheaded. Nor has the State party explained in specific terms how bareheaded identity photographs of people who always appear in public with their heads covered help to facilitate their identification in everyday life and to avert the risk of fraud or falsification of passports.[15]

In the absence of this evidence, the HRC had no hesitation in concluding that the requirement to remove the turban to produce a bareheaded photograph for the identity document was a disproportionate limitation on Mr Mann Singh's FoRB in violation of Article 18 under the ICCPR.

One may conclude from the outcome of Mr Mann Singh's complaints that ECtHR and the HRC have taken completely divergent approaches as to the legal bans on wearing religious dress.

In Mr Mann Singh's claim, the ECtHR and the HRC both acknowledged the importance of identification for public safety and public order, and admitted that the obligation to appear bareheaded in the identity photograph on the identity documents interfered with his right to manifest his religion. However, in direct contrast to the HRC, the ECtHR concluded that the impugned interference was proportionate to the aims pursued. The ECtHR conceded a wide MoA to the French authorities in matters of public safety and public order by stating that 'the detailed arrangements for implementing [identity] checks fell within the respondent State's margin of appreciation'.[16] Consequently, it refrained from carrying out a more

[15] *Shingara Mann Singh* (n 13) para 9.5.

[16] *Mann Singh* (n 9).

detailed proportionality analysis. While it is true that States have a MoA in certain areas, this does not mean that the margin is unlimited. The MoA, as the ECtHR itself asserts, 'goes hand in hand with a European supervision'.[17] Arguably, the ECtHR should have carefully examined how a photograph showing the applicant wearing a turban would increase the risk of driver's license falsification and how a bareheaded photograph would help the law-enforcing agencies to identify a person, with a maximum degree of certainty, who wears a turban *at all times* in his everyday life. It should have also examined why the (new) requirement to use bareheaded photographs on identity documents would be regarded as necessary in a democratic society while the use of photographs showing people with their head covered with a turban had, in previous times, been tolerated. Had the ECtHR given greater scrutiny to the justifications given by France for the limitation of the applicant's right to manifest his religion, it would have found that the measure was disproportionate. Contrary to the ECtHR, the HRC carried out a rigorous proportionality test between the aims allegedly pursued and the harm caused to the author.[18] The HRC considered that the disputed interference had the potential to result in continuous violations of the author's religious freedoms: 'even if the obligation to remove the turban for the identity photograph might be described as a one-time requirement, it would potentially interfere with the author's freedom of religion on a continuing basis because he would always appear without his religious head covering in the identity photograph and could thus be compelled to remove his turban during identity checks.'[19]

---

[17] *Leyla Sahin v Turkey* App no. 44774/98 (ECHR, 10 November 2005) para 110.

[18] The Canadian Supreme Court, in *Alberta v Hutterian Brethren of Wilson Colony*, exercised a higher level of scrutiny to examine whether a mandatory photo requirement for driver's license constituted a violation of religious freedom. [2009] 2 SCR 567.

[19] *Shingara Mann Singh* (n 13) para 9.5.

The divergent decisions by the ECtHR and the HRC on an identical issue attracted a great deal of attention from academic scholars who criticised the ECtHR's reasoning in *Mann Singh*. Chaib, for example, argued that '[b]y one-sidedly accepting the legitimate aim put forward by the state without examining the applicant's claim and by relying on the margin of appreciation, the European Court of Human Rights did not give sufficient attention to the applicant's claim and as such did not recognize or at the least gave the impression not to understand the importance of the applicant's concerns.'[20] Likewise, Berry criticised the ECtHR for its failure to exercise 'a higher level of scrutiny' in the proportionality analysis.[21]

6.2.2. Taking Personal Autonomy (More) Seriously

The UN has acknowledged that the concept of (free) choice 'lies at the very heart' of the FoRB.[22] Article 18(2) of the ICCPR prohibits coercion: '[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.' In *Mariana Hebbadj v France* (hereinafter "*Hebbadj*"), the HRC stated that the Islamic full-face veil ban in France amounted to a violation of the Covenant because it 'disproportionately affects … Muslim wom[e]n who choose to wear the full-face veil'[23] and forces them 'to give up dressing in accordance with

[20] Saïla Oulad Chaib, 'Mann Singh wins turban case in Geneva after losing in Strasbourg' (*Strasbourg Observers*, 19 November 2013)<https://strasbourgobservers.com/2013/11/19/mann-singh-wins-in-geneva-after-losing-in-strasbourg/> accessed 10 May 2019.

[21] Stephanie Berry, 'Freedom of Religion and Religious Symbols: Same Right – Different Interpretation?' (*EJIL:Talk*, 10 October 2013) <https://www.ejiltalk.org/freedom-of-religion-and-religious-symbols-same-right-different-interpretation/> accessed 19 November 2018.

[22] UN Doc. A/67/303 (13 August 2012) para 59.

[23] (n 3) para 7.7.

[their] religious beliefs.'[24] Commenting on the burkini ban in France, the UN stated that '[d]ress codes such as the anti-burkini decrees disproportionately affect women and girls, undermining their autonomy by denying them the ability to make independent decisions about how to dress', and, therefore, 'constitute a grave and illegal breach of fundamental freedoms'.[25]

The approach of the UN in relation to the protection of free choice in matters of religious manifestation through the wearing of Islamic veils can also be identified from the Special Rapporteur's Mission Report on France. As Asma Jahangir stated after her Country Visit to France in 2005, bans on conspicuous religious symbols in French public schools, introduced by the Law 2004-228 of 15 March 2004, denied the right of the children who had freely chosen to wear a religious symbol as part of their religious belief. She further stated that 'the individual character of the right to freedom of religion and … the exercise of this right, which would include the right to wear the headscarf, should be based on free and individual choice.'[26] In a different report, Jahangir noted that '[d]enying girls and women the right to wear religious symbols when they freely choose to do so may pose a problem in terms of international human rights law.'[27]

The HRC, in its Optional Protocol cases, has endeavoured to protect Muslim women's voluntary choice to don the veil in the name of *prohibition of coercion*

[24] ibid para 7.3.

[25] OHCHR, 'Press briefing notes on France and Bolivia' (30 August 2016) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20430&LangID=E> accessed 10 October 2019.

[26] UN Doc. E/CN.4/2006/5/Add.4 (8 March 2006) para 55.

[27] UN Doc. A/HRC/4/21 (26 December 2006) para 36.

under the rubric of Article 18(2). In this context, an analysis of *Raihon Hudoyberganova v Uzbekistan*[28] (hereinafter "*Hudoyberganova*") is necessary. In this case, Ms Hudoyberganova was excluded from her university because she insisted, for religious reasons, on wearing the Islamic headscarf. Relying on, *inter alia*, Article 18 of the ICCPR, she complained that Uzbekistan had violated her religious freedom by expelling her from the university because she wore the headscarf and refused to remove it.

A remarkable characteristic of this case is that Uzbekistan did not invoke any legitimate aim as the basis for the prohibition against the Islamic headscarf. It merely argued that the applicant did not comply with the dress code regulation. The HRC found that the expulsion of Ms Hudoyberganova from the university, for insisting on wearing the headscarf, infringed her FoRB. Citing its General Comment no. 22 the HRC expressed and reasoned its position, arriving at the conclusion of an infringement of Article 18(2). It stated that:

> [T]he State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. … In the particular circumstances of the present case, … *the Committee is led to conclude, in the absence of any justification provided by the State party*, that there has been a violation of article 18, paragraph 2.'[29]

The HRC's reasoning in *Hudoyberganova* attracted criticism from many prominent scholars who had asserted that the HRC was 'unwillingly compelled'[30] to find a

[28] (n 2).

[29] ibid, para 6.2 (emphasis added).

[30] Jane Foster, 'Is it a Breach of Religious Rights' (2006) Human Rights Research 1, 8.

violation of the author's FoRB under the second paragraph (as opposed to the third paragraph) of Article 18 because Uzbekistan did not invoke any justification as to why the restriction on wearing the headscarf would be necessary.[31] McGoldrick, for instance, asserts that the HRC's reasoning is not 'entirely satisfactory'.[32] He further asserts, the HRC's decision is 'effectively a default decision and as such must be interpreted very carefully.'[33] One may agree with this assertion and persuasively argue that the HRC's *Hudoyberganova* decision, in itself, cannot be a definitive view of the UN regarding legal bans on wearing Islamic veils. This is because, Uzbek Government's failure to justify the interference under Article 18(3), in effect, led the HRC to find a violation under Article 18(2) of the ICCPR. Jeroen Temperman writes, the 'outcome of the similar cases before the Committee could be different in the future if the state could convincingly argue that recognized grounds for limitations are at stake'.[34]

Despite these criticisms, the importance of the HRC's reasoning in this case cannot be undermined because *Hudoyberganova* gives the impression that the UN organs are always willing to protect religious freedoms of veil-wearing Muslim women so long as the practice of veiling is a product of their free choice. The HRC's decision

[31] Khaliq notes, the HRC's view is not 'satisfactory' because the analysis and outcome in this case should have centred on Article 18(3) and not rested solely on Article 18(2). Urfan Khaliq, 'Freedom of Religion and Belief in International Law: A Comparative Analysis' in Anver M Emon et al. (eds), *Islamic Law and International Human Rights Law: Searching for Common Ground* (Oxford: OUP, 2012) 209-210.

[32] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Portland: Hart Publishing, 2006) 228.

[33] ibid 230.

[34] Jeroen Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Government* (Leiden: Martinus Nijohff, 2010) 284.

in *Hudoyberganova* also generates a clear message that Muslim women's free choice to wear the veil is protected under Article 18(2) of the ICCPR, and any unreasonable intrusion by the State on a Muslim woman's autonomous decision to wear the Islamic veil may constitute 'coercion' under Article 18 (2), and thus be unacceptable from the human rights point of view.

The ECtHR, however, in its jurisprudence on the Islamic veil, has given less weight to the free 'choice' of the applicants who voluntarily choose to wear Islamic veils out of their desire to comply with their religious duties. In these cases, the preferences, wishes, beliefs, and values of adherents of the dominant religion prevailed over the free choices of Muslim women. As Berry observes, the ECtHR has "construed the permissible limitations of freedom of religion in a manner that permits the restriction of freedom of religion of minorities by reference to the majorities 'worries or fears' and ideological beliefs."[35]

In *S.A.S.*, the ECtHR acknowledged that 'there is no doubt that the ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full-face veil' …[because] 'the ban may have the effect of … restricting their autonomy.'[36] So far as I have been able to discover, this is the *only* ECtHR case where the ECtHR, at the stage of examining whether a limitation on wearing Islamic dress is necessary in a democratic society, considered that such a limitation may impair the personal autonomy or free choice of a veiled women. Notwithstanding the fact that the ECtHR made reference to the concept of personal autonomy or free choice in *S.A.S.*, it came to the conclusion that 'the question

[35] Berry (n 21).

[36] App no. 43835/11 (ECHR, 1 July 2014) para 146.

whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.[37] In *Dakir* and *Belcacemi*, the Court reiterated that 'it seems that the question whether or not it should be permitted to wear the full-face veil in public places in Belgium constitutes a choice of society.'[38]

Based on the above, it can be deduced that in direct contrast to the UN, the ECtHR has given less weight to the free and autonomous choice of a Muslim woman who wishes to wear the Islamic veil.

6.2.3. 'Living Together' as a Ground of Justification to Ban Islamic Full-face Veils: *S.A.S.*, *Yaker* and *Hebbadj* in Context

As discussed in Chapter Three, the ECtHR has accepted that the concept of 'living together' may constitute a legitimate ground to justify restrictions on the right to religious manifestation through the wearing of Islamic veils. It is worth recalling that the Court took this view in *S.A.S.*, one of its many high profile cases concerning bans on wearing Islamic full-face veils.[39]

In the analogous cases of *Hebbadj*[40] and *Sonia Yaker v France*[41] (hereinafter "*Yaker*"), the HRC came to the opposite conclusion to the ECtHR regarding whether the concept of 'living together' can be a valid justification for limiting the right to

[37] ibid, para 153.

[38] *Dakir v Belgium* App no. 4619/12 (ECHR, 11 July 2017) para 56; *Belcacemi and Oussar v Belgium* App no. 37798/13 (ECHR, 11 July 2017) para 53.

[39] See Section 3.2.

[40] (n 3).

[41] (n 3).

religious manifestation through the wearing of Islamic veils. These cases can be analysed together as the facts are similar and the HRC's finding in each is identical.

Ms Hebbadj and Ms Yaker were devout Muslims and freely chose to wear the *niqab* in accordance with their religious beliefs. They were convicted of the minor offence of wearing a garment to conceal their faces in public in 2012, having been stopped on the street in Nantes wearing the *niqab*. Consequently, the Community Court in Nantes ordered them each to pay a fine of 150 euros under the Act no. 2010-1192 of 11 October 2010 (i.e. the same law which was unsuccessfully challenged before the ECtHR by the applicant in *S.A.S.*). It is worth recalling that this Act criminalised the wearing of garments in public that concealed the face; it is being referred to as the 'Islamic full-face veil ban in France' in this thesis. Ms Hebbadj and Ms Yaker both argued that the criminal penalties against them infringed their rights, *inter alia*, under Article 18 of the Covenant and that the Islamic full-face veil ban in France prevented Muslim women from wearing religious dress in accordance with their own choice.

In *Hebbadj* and *Yaker*, the French Government sought to justify the restrictions on the grounds of the protection of public safety and public order, and the protection of rights and freedoms of others.[42] With regard to the 'protection of rights and freedoms of others', as in *S.A.S.*, it invoked the concept of 'living together', which is sometimes also referred to by the French Government as the 'respect for the minimum requirements of life in society'. France submitted that:

[42] *Yaker*, para 8.6; *Hebbadj*, para 7.6.

> [T]he face plays a significant role [in social interactions], since it is the part of the body that reflects one's shared humanity with an interlocutor. Showing one's face not only signals a person's readiness to be identified as an individual by the other party, but also not to unfairly conceal the frame of mind in which they interact with him or her, and is thus a manifestation of the minimum degree of trust that is essential for living together in an egalitarian and open society such as France. The concealment of the face … is likely to impair interaction between individuals and undermine the conditions for living together in diversity.[43]

This argument was not accepted by the HRC. In direct contrast to the ECtHR, the HRC refused to accept that the concept of 'living together' fell within the broad justification of 'the fundamental rights and freedoms of others' under Article 18 of the ICCPR. Whereas the ECtHR accepted that "under certain conditions the 'respect for the minimum requirements of life in society' … or [the concept] of 'living together'… can be linked to the legitimate aim of the "protection of the rights and freedoms of others",[44] the HRC required that France must identify the 'specific fundamental rights or freedoms of others that are affected by the fact that some people present in the public space have their face covered, including fully veiled women.'[45] In the absence of the identification of such a specific right, the HRC was not prepared to accept that the 'very vague and abstract'[46] concept of living together falls under the banner of 'the fundamental rights and freedoms of others' to justify restrictions on wearing Islamic veils. Consequently, it held that the

[43] *Yaker*, para 7.7; *Hebbadj*, para 5.7.

[44] (n 36) para 121.

[45] *Yaker*, para 8.10; *Hebbadj*, para 7.10.

[46] ibid.

conviction of Ms Hebbadj and Ms Yaker for wearing the *niqab* constituted a violation of their FoRB under Article 18.

Overall, the HRC's reasoning in *Hebbadj* and *Yaker*, as Berry argues, is a 'positive development'[47] concerning legal bans on wearing Islamic veils. Notably, the HRC's treatment of living together echoes the views of the Dissenting Judges in *S.A.S.* where they asserted that it is difficult to see which 'concrete rights of others' can be inferred from the 'very general', 'vague', and 'abstract' principle of living together.[48] As two Committee members, Ilze Brands Kehris and Sarah Cleveland, in their joint concurring opinion in *Hebbadj* and *Yaker* noted, the abstract concept of living together does not relate to the broad justification of the rights and freedoms of others because 'there is a lack of clarity regarding which fundamental rights [of others] are specifically intended to be protected.'[49] This is also in line with the central argument of Chapter Three that social cohesion or living together cannot be a legitimate ground to ban Islamic veils under human rights law.

6.2.4. The Constitutional Principle of Secularism as a Ground of Justification

Like the ECtHR, the HRC has accepted that secularism is a valuable means to protect overall religious freedom.[50] However, in direct contrast to the ECtHR, the HRC has

[47] Stephanie Berry, 'The UN Human Rights Committee Disagrees with the European Court of Human Rights Again: The Right to Manifest Religious by Wearing a Burqa' (*EJIL:Talk,* 3 January 2019) <https://www.ejiltalk.org/the-un-human-rights-committee-disagrees-with-the-european-court-of-human-rights-again-the-right-to-manifest-religion-by-wearing-a-burqa/> accessed 15 October 2019.

[48] (n 36) Joint Partly Dissenting Opinion of Judges Nussberger and Jaderblom, paras 5 & 10.

[49] *Hebbadj*, Joint Opinion of Ilze Brands Kehris and Cleveland, para 2; *Yaker*, Joint Opinion of Ilze Brands Kehris and Cleveland, para 2.

[50] The HRC states, '[T]he principle of secularism (*laïcité*) is itself a means by which a State party may seek to protect the religious freedom of all its population.' *(Bikramjit Singh v*

stated that secularism is insufficient by itself to justify restrictions on the right to religious manifestation through the wearing of religious clothing. The HRC gave its opinion concerning legal bans on wearing religious dress and the principle of secularism following the French ban on the wearing of ostentatious religious symbols and clothing in public schools. This ban was introduced by Act No. 2004-228 of 15 March 2004 (hereinafter "the conspicuous religious dress ban in French public schools") in conformity with the principle of secularism (*laïcité*).

In *Bikramjit Singh v France*[51] (hereinafter "*Bikramjit*") the applicant, Mr Singh, was a student in a public secondary school. He was expelled for choosing to wear the Sikh *keski* (i.e. a mini-turban). He submitted that this violated his rights, *inter alia*, under Article 18 of the ICCPR. France submitted that, the ban on the applicant wearing the *keski* 'was intended, in pursuit of the constitutional principle of secularism, as a means of preserving respect for neutrality in public education and peace and order in schools.'[52] In this case the HRC did not accept that the restriction on wearing the *keski* was justified by the pursuit of secularism alone. It found that France was unable to produce 'compelling evidence' to support the claim that the wearing of a *keski* by Mr Singh would jeopardise the rights and freedom of others or the order at the school.[53] It concluded that the ban on wearing the *keski* and the permanent expulsion of Mr Singh from the public school, in pursuit of the principle of secularism, as a means of preserving respect for neutrality in public education

France, Communication no. 1852/2008, UN Doc. CCPR/C/106/D/1852/2008 (4 February 2013) para 8.6).

[51] ibid.

[52] ibid, para 5.8.

[53] ibid, para 8.7.

and peace and order in school, was disproportionate and thus constituted a violation of Article 18.

The HRC's line of reasoning can be traced back to the Concluding Observations on the fourth periodic report of France, where in relation to the conspicuous religious dress ban in French public schools, the HRC stated that 'respect for a public culture of *laïcité* would not seem to require forbidding wearing … common religious symbols' 'such as a skullcap (or *kippah*), a headscarf (or *hijab*), or a turban' worn by 'observant Jewish, Muslim, and Sikh students'.[54] Similarly, the UN Committee on the Rights of the Child, in its Concluding Observations concerning France, stated that the conspicuous religious dress ban in French public schools was not consistent with religious freedoms and neglected the principle of the best interests of the child.[55] Based on these UN reports and the HRC's decision in *Bikramjit*, one can conclude that secularism, as a constitutional principle, has not been accepted by the UN as sufficient to justify the regulation of religious symbols and attire in State schools (or other public institutions).

Conversely, in a well-known series of cases [56] against France, concerning the expulsion of pupils from public schools for wearing the Islamic headscarf --

[54] 'Concluding observations of the Human Rights Committee: France', UN Doc. CCPR/C/FRA/CO/4 (31 July 2008) para 23.

[55] 'Concluding Observations: France' UN Doc. CRC/C/15/Add.240 (30 June 2004) paras 25-26; See also 'Summary Record of the 968th Meeting: France' UN Doc. CRC/C/SR.968 (14 June 2004) para 82.

[56] See Blandine Chelini-Pont, 'The French Model: Tensions Between Laic and Religious Allegiances in French State and Catholic Schools' in Myriam Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Surrey: Ashgate, 2011) 153-169.

including *Dogru v France*,[57] *Kervanci v France*,[58] *Aktas v France*,[59] *Bayrak v France*,[60] *Gamaleddyn v France*[61] and *Ghazal v France*[62] -- the ECtHR found that the impugned measures were proportionate to the legitimate aim of protecting the rights and freedoms of others as well as public order, through safeguarding the constitutional principle of secularism (*laïcité*) in public schools.[63] *Aktas*, *Bayrak*, *Gamaleddyn*, and *Ghazal* all resulted from the conspicuous religious dress ban in French public schools as in the HRC case of *Bikramjit*. The ECtHR declared these cases as manifestly ill-founded, and thus, inadmissible. It entered into a detailed analysis on the merits, however, in the analogous case of *Dogru* and *Kervanci* concerning the applicants' expulsion from public secondary school because of their refusal to remove the Islamic headscarves during physical education and sports classes. It accorded a broad MoA to France and unquestioningly accepted that the limitation on the right to manifest religion did not violate Article 9. The ECtHR's reasoning in *Dogru* and *Kervanci* is identical. In *Dogru,* it stated that restrictions on the applicant's right to manifest their religion had pursued the aim of defending the requirements of secularism in the public sphere of education.[64] It maintained that 'the wearing of religious signs was not inherently incompatible with the principle of

[57] App no. 27058/05 (ECHR, 4 December 2008).

[58] App no. 31645/04 (ECHR, 4 December 2008).

[59] App no. 43563/08 (ECHR, 30 June 2009).

[60] App no. 14308/08 (ECHR, 30 June 2009).

[61] App no 18527/08) (ECHR, 30 June 2009).

[62] App no. 29134/08) (ECHR, 30 June 2009).

[63] In a number of cases against Turkey, the Strasbourg institutions upheld bans on wearing the Islamic headscarves in order to preserve the 'neutral character' of the education system. See *Kose and Others v Turkey* App no. 26625/02 (ECHR, 24 January 2006); *Karaduman v Turkey* App no. 16278/90 (ECHR, 3 May 1993); *Bulut v Turkey* App no. 18783/91 (ECHR, 3 May 1993).

[64] (n 57) para 69.

secularism in schools, but became so according to the conditions in which they were worn and the consequences that the wearing of a sign might have.'[65] The ECtHR concluded that:

> [I]n France, … secularism is a constitutional principle, … the protection of which appears to be of prime importance, in particular in schools. The Court reiterates that an attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention. Having regard to the margin of appreciation which must be left to the member States with regard to the establishment of the delicate relations between the Churches and the State, religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention.[66]

It is also noteworthy that the ECtHR has recognised that States may rely on the constitutional principles of State secularism and State neutrality to justify restrictions on wearing Islamic veils and other religious dress by civil servants, due to their status as *public employees*, which distinguishes them from *ordinary citizens*. In the Court's view, since civil servants act as representatives of the State in performing their duties, States may require their appearance to be neutral in order to preserve the principle of secularism and its corollary and the principle of neutrality in public services.[67] For instance, in *Kurtulmus v Turkey*,[68] the applicant, an associate professor at the University of Istanbul, challenged the rules on the dress applicable to civil servants which required female members of staff not to

[65] ibid, para 70.

[66] ibid, para 72.

[67] *Hamidovic v Bosnia and Herzegovina* App no. 57792/15 (ECHR, 5 March 2018).

[68] *Kurtulmus v Turkey* App no. 65500/01 (ECHR, 24 January 2006).

wear any head covering on work premises. Relying on Article 9, she argued that the ban on wearing an Islamic headscarf had infringed her right to manifest her religion freely. The ECtHR stated that '[a]s public servants act as representatives of the State when they perform their duties, the [dress code] rules require their appearance to be neutral in order to preserve the principle of secularism and its corollary, the principle of a neutral public service.'[69] Consequently, it concluded that 'the rules complained of by Ms Kurtulmus were justified by imperatives pertaining to the principle of neutrality in the public service and, in particular in the State education system, and to the principle of secularism.'[70]

Another related case is *Ebrahimian v France*[71] where the ECtHR was confronted with the question of whether prohibiting a hospital social worker from wearing a headscarf at a public health establishment was justified on the basis of the constitutional principle of secularism. This case concerned a Muslim social assistant, employed in a public hospital who declined to remove her headscarf while at work and whose contract was not renewed as a result. The ECtHR took the view that manifestations of religion should be restricted to the private sphere in order to maintain a neutral space in which all persons can be treated equally regardless of their religion. It stated, 'the neutrality of the public hospital service may be regarded as linked to the attitude of its staff, and requires that patients cannot harbour any doubts as to the impartiality of those treating them.'[72] The

[69] ibid.

[70] ibid.

[71] App no. 64846/11 (ECHR, 26 November 2015).

[72] ibid, para 64.

ECtHR held that the impugned measure, taken in order to adhere to the requirements of secularism, did not constitute a violation of Article 9.

The comparative analysis of the legal reasoning of the HRC and the ECtHR in the above-mentioned cases reveal that the ECtHR has allowed the principle of secularism to justify restrictions on wearing Islamic veils. The UN organs, however, have considered that secularism is not a sufficient reason in and of itself to systematically regulate religious apparel.

6.2.5. Gender Equality as a Ground of Justification

As discussed in Chapter Five, gender equality was accepted by the ECtHR in its early jurisprudence (*Dahlab* and *Sahin*) as a justifiable ground for banning Islamic veils.[73]

In sharp contrast to the ECtHR, the UN organs have rejected the gender equality argument. With regard to the burkini ban in France, the UN High Commissioner for Human Rights stated that:

> Achieving gender equality requires understanding the barriers that prevent women and girls from making free choices, and creating an environment which supports their own decision-making, including but not limited to choice of dress. Gender equality cannot be achieved by restricting individual freedoms including by policing what individual women choose to wear.[74]

An interesting characteristic of the French Government's position in relation to the Islamic full-face veil ban in France is that, whereas in *S.A.S.* it sought to justify the ban on the grounds (among others) of gender equality, in *Yaker* and *Hebbadj*, it did

[73] See Section 5.3.

[74] (n 25).

not explicitly put forward the gender equality objective. The Government seemed to have realised that the gender equality argument would be rejected by the HRC, based on its previous experience from *S.A.S.*, where both the majority and dissenting judges stated that the respect for equality between men and women could not legitimately justify bans on full-face veils. Notwithstanding that the Government did not invoke the gender equality objective, in their joint concurring opinion the Committee Members Ilze Brands Kehris and Sarah Cleveland highlighted that the policy documents and discussion preceding to adoption of the Islamic full-face veil ban in France clearly revealed that gender equality concern was 'a significant factor' in the enactment of the impugned law. They took the view that '[t]he equality argument is … not convincing as a legitimate aim for a blanket prohibition of full-face veils in all public spaces in France.'[75] Their joint concurring opinion is, however, considerably more nuanced than the reasoning of the ECtHR on the same point. In *S.A.S.*, the ECtHR merely asserted that 'a State Party cannot invoke gender equality in order to ban a practice that is defended by women'.[76] However, in *Yaker* and *Hebbadj* cases, Kehris and Cleveland grounded their opinion on the premise of personal autonomy. They stated that the use of the gender equality argument to ban the wearing of full-face veils, on pain of criminal sanctions, 'seems to imply that whenever a woman dons a full-face veil it cannot be her own informed and autonomous decision, which may reinforce a stereotype that Muslim women are oppressed.'[77] They stated further that '[p]enalizing wearing the full-face veil in order to protect women could thus, instead of promoting gender equality, potentially contribute to the further stigmatization of Muslim women who

[75] *Yaker* (n 49) para 3; *Hebbadj* (n 49) para 3.

[76] (n 36) para 119.

[77] *Yaker* (n 49) para 3; *Hebbadj* (n 49) para 3.

choose to wear the full-face veil, as well as more broadly of Muslims, based on a stereotypical perception of the role of women among Muslims.'[78] This clearly demonstrates a more developed line of reasoning by the HRC than the ECtHR. The above-mentioned opinion of Kehris and Cleveland also align with the argument of this thesis, as adduced in Chapter Five, that gender equality *cannot* be a legitimate ground to ban the voluntary wearing of Islamic veils.

6.2.6. The Consideration of Harm Suffered by the Individual Applicant

In complete opposition to the jurisprudence of the ECtHR, in balancing different competing interests, the HRC has seriously considered the 'harm' directly caused to the individual applicant by the dress code regulation.

In *Seyma Turkan v Turkey* (hereinafter "*Turkan*"), the HRC stated that, the refusal of the university to register Ms Turkan as a student for the wearing of a wig 'caused harm to the author'[79] and 'disproportionately affected [her], who lost the opportunity to pursue her university studies. In these circumstances, the Committee considers that the facts as presented reveal a violation of the author's rights under article 18'.[80] The Committee member, Olivier de Frouville, in giving an individual opinion in this case noted that 'the author is a genuine victim and deserves reparation.'[81] Similarly, in *Bikramjit*, the HRC found a violation of Article 18 because the 'penalty of the pupil's permanent expulsion from the public school … led to serious effects on [his] education' and thereby 'the State party imposed [a]

[78] ibid.

[79] (n 3) para 6.4.

[80] ibid, para 7.6.

[81] ibid, Individual opinion (concurring) of Olivier de Frouville, para 10.

harmful sanction on the author'.[82] However, in factually analogous cases concerning bans on wearing Islamic veils and Sikh *keski* in French public schools, the ECtHR had not seriously considered the harm caused to the applicants who had been expelled from their schools *only* for wearing religious attire. In these cases, the ECtHR held that the penalty of expulsion was not disproportionate because the applicants were still able to continue their schooling by correspondence courses or could pursue their studies in a different school where wearing religious garments was not an issue.[83]

In *S.A.S.*, *Belcacemi* and *Dakir,* to examine whether a 'blanket' ban on wearing Islamic full-face veils in all public places open to general public was proportionate within the meaning of Article 9(2) of the Convention, the ECtHR did not consider the drastic impacts of such broad bans on veil-wearing Muslim women. However, in the factually similar cases, *Yaker* and *Hebbadj*, the HRC took the view that 'the blanket ban on the full-face veil' in France had the 'effect of confining [fully veiled women] to the home, impeding their access to public services and exposing them to abuse and marginalization.'[84] One may therefore criticise the ECtHR because in order to carry out a meaningful and rigorous proportionality test between the aims allegedly pursued and the infringement caused to the individual claimant, the ECtHR should have seriously considered the *harmful* effects of a ban on the applicant.

[82] (n 50) para 8.7.

[83] *Aktas* (n 59); *Bayrak* (n 60); *Kervanci* (n 58); *Jasvir Singh v France* App no. 25463/08 (ECHR, 30 June 2009); *Dogru* (n 57).

[84] *Hebbadj*, para 7.15; *Yaker*, para 8.15.

6.2.7. The Consideration of the Discriminatory Nature and Effects of Dress Code Regulations: Article 18(3) of the ICCPR and Article 9(2) of the Convention in Context

A comparative analysis between the HRC's and the ECtHR's jurisprudence in cases involving the Islamic veil reveals that the HRC takes a more cautious approach than the ECtHR concerning the discriminatory impacts of a dress code regulation in determining whether a limitation on wearing Islamic veils is proportionate. This is particularly apparent from the HRC's recent rulings on the Islamic full-face veil ban in France.

The UN Special Rapporteur, Heiner Bielefeldt, has emphasised that 'any restrictions on the freedom to observe religious dress codes deemed necessary in a certain context must be formulated in a non-discriminatory manner.'[85] Citing its General Comment no. 22, the HRC held in *Turkan* that 'restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.'[86] In *Yaker* and *Hebbadj*, to determine whether the Islamic full-face veil ban in France was justified for public safety reasons, the HRC found that the impugned interference was disproportionate because there was no justification 'for why covering the face for certain religious purposes - i.e., the niqab – is prohibited, while covering the face for numerous other purposes, including sporting, artistic, and other traditional or religious purposes, is allowed.'[87] Notably, when the same law was previously challenged at the ECtHR in *S.A.S.*, the Court did not seem to have sufficiently weighed the requirement that restriction must *not* be imposed for discriminatory

[85] UN Doc. A/66/156 (18 July 2011) para 17.

[86] (n 3) para 7.2.

[87] *Yaker*, 8.7; *Hebbadj*, para 7.7.

purposes or applied in a discriminatory manner. By contrast, in *Hebbdaj* and *Yaker*, at the outset of the proportionality analysis under Article 18(3), the HRC signalled that it considered the impugned ban to be discriminatory in effect because it disproportionately affected veil-wearing *Muslim* women and allowed a broad range of exemptions.[88] Indeed, upon closer inspection of the exception clause, it becomes apparent that notwithstanding the fact that it was drafted in neutral terms, the clause gave advantage to the adherents of the majority religion. Whereas the impugned ban, in effect, by virtue of the exception clause, allowed Christian majorities to wear face-concealing clothing (e.g. Santa Claus costume) in public spaces during Christmas, Muslim women wishing to go to mosque wearing their *niqab* or wishing to appear fully covered in public during Ramadan remained bound by the ban. Needless to say, the impugned law was primarily enforced against Muslim women wearing the full-face veils in public. One can reasonably argue that to determine the necessity of the impugned measure under Article 9(2) in *S.A.S.*, the ECtHR should have taken into account that the Islamic full-face veil ban in France had 'disproportionately prejudicial effects' on a particular group, namely veil-wearing Muslim women. In *Hugh Jordan v the UK*, the ECtHR acknowledged that 'where a general policy or measure has disproportionately prejudicial effects on a particular group … this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.'[89] In direct contrast to the ECtHR, the HRC highlighted the 'numerous exceptions' of the Islamic full-face veil ban in France that favoured the followers of majority religions and the 'considerable impact' of the ban on 'Muslim wom[e]n wearing the full-face veil'.[90]

[88] *Yaker*, para 8.2; *Hebbadj*, para 7.2.

[89] *Hugh Jordan v The UK* App no. 24746/94 (ECHR, 4 May 2001) para 154.

[90] *Hebbadj*, para 7.8.

6.2.8. Burden of Proof

A review of the Special Rapporteurs' reports and the HRC's views in individual communications clearly indicates that the UN has imposed the burden of proof on the *State* when the proportionality of a limitation on wearing Islamic veils is examined under Article 18(3) of the ICCPR.

The UN Special Rapporteurs on FoRB have emphasised that, as a precondition for restricting certain external manifestations of religious beliefs, States have to bear a burden of justifying any limitation as required by Article 18(3) of the ICCPR. Ahmed Shaheed, the current Special Rapporteur, has asserted that where a State imposes a restriction on the right to manifest religion, the 'burden of justification for such restrictions falls on those who wish to impose them, often Governments or State organs'.[91] Likewise, his predecessor, Heiner Bielefeldt, commented that '[t]he onus of proof … falls on those who argue in favour of the limitations, not on those who defend the full exercise of a right to freedom.'[92]

Similarly, the HRC, in its Optional Protocol cases, has stated that the burden of justifying a restriction on wearing Islamic veils rests with the State, not the author who complains that the restriction on wearing a veil violates her FoRB under Article 18. *Turkan* can be used as an example. In this case, Ms Turkan was a headscarf-wearing Muslim woman who became eligible to enrol at Kahramanmaraş Sütçü İmam University. She went to the University for registration wearing a wig (instead of the Islamic headscarf) to cover her hair in accordance with her religious beliefs.

[91] UN Doc. A/HRC/34/50 (17 January 2017) para 30.

[92] UN Doc. A/69/261 (5 August 2014) para 36.

She said that wearing a wig in place of the headscarf was 'uncomfortable'[93] for her, but she had no choice because the dress code regulations forbade the wearing of the Islamic headscarf. The University refused to register her as a student because she was wearing a wig and did not want to take it off. In this case, the HRC gave a ruling in favour of Ms Turkan because '[t]he state party *does not refute*' her assertions that the ban does not apply to certain kinds of people and because 'the State party *has not attempted to explain* how the restriction … satisfies the requirements of article 18(3)'.[94] Likewise, in *F.A. v France*, the HRC took the view that 'the State party *has not provided sufficient justification* that would allow the Committee to conclude that the wearing of a headscarf by an educator in the childcare centre would violate the fundamental rights and freedoms of the children and the parents attending the centre.'[95] On the basis of the lack of evidence of the necessity of the limitation, a violation of Article 18 was found in this case. Therefore, it is clear that the UN bodies have imposed the burden of justifying a restriction on wearing Islamic veils on the State.

The ECtHR seems to have taken quite a different approach to the burden of proof in its jurisprudence on the Islamic veil. The ECtHR's willingness to grant the State a MoA and its reluctance to carry out a rigorous proportionality test, in effect, has reversed the onus of proof on the individual applicant to show that the restriction imposed on her right to manifest religion through the wearing of the Islamic veil is disproportionate to the aim pursued. As highlighted by academic scholars, the ECtHR's lower level of scrutiny in the proportionality analysis 'has shifted the

[93] (n 3) para 2.1.

[94] ibid, paras 7.3 & 7.6 (emphasis added).

[95] *F.A.* (n 3) para 8.8 (emphasis added).

burden of proof away from the state and on to the applicant to prove' that the limitation on her right to wear the Islamic veil is unnecessary.[96] The ECtHR's reasoning in *Dahlab* deserves some comments in this regard. As discussed previously, Switzerland never established that the wearing of the Islamic headscarf by Ms Dahlab while teaching had any adverse impact on the children.[97] Nevertheless, the ECtHR took the view that 'it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children' and concluded that 'the Court is of the opinion that the impugned measure may be considered justified in principle and proportionate to the stated aim of protecting the rights and freedoms of others, public order and public safety.'[98] What is the implication of this? Is not the Court suggesting that Ms Dahlab, in order to win the case, has to prove that her wearing of the headscarf in the classroom does not affect the beliefs of the children given that 'it is very difficult to assess' what impact the headscarf has on the children?

Based on the above analysis, it can be strongly argued that whereas under the UN system the burden of justifying a restriction on wearing the Islamic veil lies with the State Party, the Strasbourg institutions have (implicitly) shifted the burden onto the individual applicant.

---

[96] See Berry (n 21). See also Myriam Hunter-Henin, 'Believing in Negotiation: Reflection on Law's Regulation of Religious Symbols in State Schools' in Francois Guesnet et al (eds), *Negotiating with Religion: Cross-Disciplinary Perspectives* (London: Routledge, 2017).

[97] See Chapter 5.3, Chapter Five.

[98] App no. 42393/98(ECHR, 15 February 2001).

6.2.9. Application of the Least Restrictive Means-test

Comparative analysis also suggests that unlike the UN, the ECtHR is less willing to impose an obligation on States to use the least restrictive means to pursue legitimate aims. As discussed in Chapter Four in relation to the *El Morsli* and *Phull* cases, the ECtHR did not thoroughly examine whether the States had adopted the least drastic means in achieving the aim of public safety.[99] It did not even enquire whether the national authorities had included a consideration of less restrictive alternatives in their decision-making process. In *Dogru*,[100] despite the applicant's proposal to wear a hat or balaclava instead of the Islamic headscarf, she had continually been refused permission to participate in physical education and sports classes because the wearing of the headscarf was thought to be harmful for the safety of the pupils. Even if one assumes that the wearing of an Islamic headscarf or a hat or a balaclava is problematic for the applicant's safety because they do not allow the wearer to move freely and thus there is a risk of physical injury if she falls or trips, the school authority could permit/advise the applicant to wear an *elastic sports* headcovering instead which has no religious meanings and does not hamper one's movement during exercises or other sport activities. Presumably, an elastic sports headscarf would be acceptable for Ms Dogru because she was willing to abandon the headscarf and to wear a hat instead in order to cover her hair. From the perspective of her religious practice (or religious freedom), wearing an elastic sports headcovering would be preferable to appearing bareheaded in sports classes. In examining the proportionality of the interference, the ECtHR neither considered the suitability of alternatives proposed by the applicant, nor enquired about whether any other less restrictive measure was available to France to pursue

[99] See Section 4.4.2.

[100] (n 57).

the objectives. Having stated that 'it is difficult for the Court to judge whether wearing a hat instead would be compatible with sports classes' the ECtHR concluded that 'the applicant's proposal to replace the headscarf by a hat, … the question whether the pupil expressed a willingness to compromise … falls squarely within the margin of appreciation of the State.'[101] Likewise, in *S.A.S.*, the ECtHR did not consider whether the interference was the least restrictive alternative, despite the third party intervener, ARTICLE 19 (a non-governmental organisation), urging it to do so.[102] However, when the Islamic full-face veil ban in France was challenged before the HRC in the cases of *Yaker* and *Hebbadj*, it declared the interference to be disproportionate because France had not 'attempted to demonstrate that the ban was the least restrictive measure necessary to ensure the protection of the freedom of religion or belief.'[103]

The UN bodies suggest that the principle of necessity implies that certain restrictive measures cannot be legitimate if less far-reaching interventions could accomplish the same results. In *Malcolm Ross v Canada*, a case concerning the right to express freely one's religious opinions, the HRC stated that, restriction must 'not go any further than that which [is] necessary to achieve its protective functions.'[104] This is particularly true in relation to prohibitions on wearing religious symbols and clothing. The Special Rapporteur, Heiner Bielefeldt, has asserted that '[s]tates have always to look for the least intrusive measure available' if they intend to persuade that a ban on the wearing of religious dress or displaying other religious symbol is

[101] ibid, para 75.

[102] (n 36) para 92.

[103] *Yaker* 8.8, 8.11; *Hebbadj* 7.7, 7.11.

[104] Communication no. 736/1997, UN DOC. CCPR/C/70/D/736/1997(2000) para 11.8.

proportionate.[105] He has further stated that 'limitations cannot be legitimate if the respective purpose could also be served by a less far-reaching intervention.'[106] Thus, the UN requires that restrictions on wearing Islamic veils and other religious symbols must always be limited to the minimum degree of interference that is necessary to pursue a legitimate purpose.

Based on the above analysis, it can be argued that the Strasbourg Court's approach regarding the application of the least restrictive alternative criterion is quite different from that of the UN in the context of bans on wearing Islamic veils.

6.2.10. Some Final Comments on the Comparative Analysis

Quantitative data may be used to elaborate the comparative study in question. Until August 2020, the Strasbourg institutions considered the legitimacy of bans on wearing various religious symbols on twenty-eight occasions: twenty concerned the wearing of Islamic veils; five concerned the wearing of Sikh dress; one concerned the wearing of distinctive clothing of a religious group; and, two concerned the wearing of Christian symbols. Out of twenty cases where the wearing of Islamic dress was an issue, eleven cases were declared inadmissible, seven complaints led to a finding of non-violation of Article 9, and two complaints led to a finding of an infringement of Article 9 of the ECHR. In both complaints where the restrictions on wearing or displaying Christian symbols were challenged, the applicants won the case. The outcome of all the ECtHR cases concerning religious symbols, has been attached at "Appendix A".

[105] UN Doc. A/70/286 (5 August 2015) para 52.

[106] UN Doc. A/HRC/31/18 (23 December 2015) para 25.

Conversely, until August 2020, the UN treaty monitoring bodies considered ten communications where bans on wearing various religious clothing were challenged: six cases involved Islamic veils and four cases involved Sikh headgear. Out of six communications where the wearing of the Islamic veil was an issue, one application was declared inadmissible by the Committee on the Elimination of Discrimination against Women because of the author's failure to exhaust domestic remedies.[107] The other five communications led the HRC to find that limitations on wearing Islamic veils infringed Article 18 of the Covenant. The outcome of all ten communications concerning bans on religious symbols considered by the UN bodies, can be viewed at "Appendix B".

[107] *Rahime Kayhan v Turkey*, Communication no.8/2005, UN Doc. CEDAW/C/34/D/8/2005 (2006). In this case, the applicant was dismissed from her position as a public school teacher after she refused to stop wearing the Islamic headscarf.

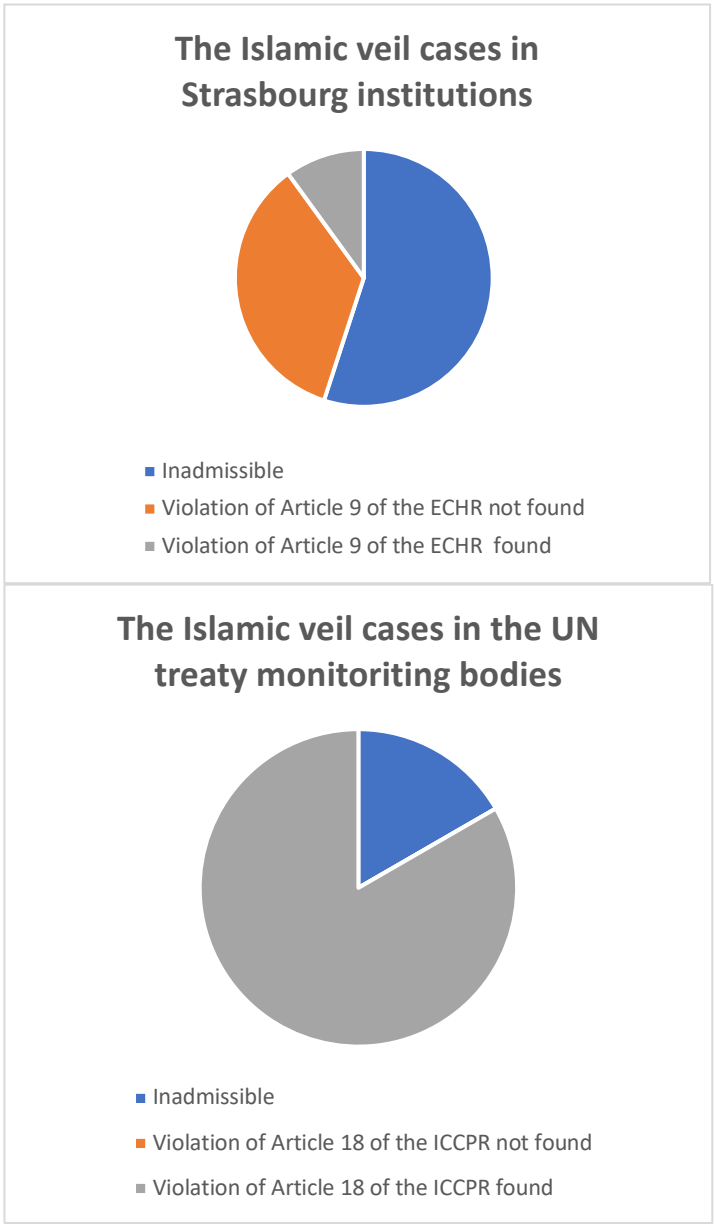

Figure 7: The Islamic veil before the ECtHR and the UN

The statistics at Figure 7 above, along with the fact that the ECtHR has failed to apply a strict, more rigorous proportionality test in cases concerning ban on wearing Islamic veils, clearly indicates that the protection given by the ECtHR to the religious freedom of Muslim women is not as strong as the one provided by the UN

bodies. It has been argued that in direct contrast to the UN, the ECtHR has attributed meanings to religious symbols in order to protect Christian symbols and to uphold restrictions on displaying or wearing non-Christian symbols.[108] The ECtHR's favourable treatment to Christian symbols is evident from its well-known case, *Lautsi and Others v Italy*.[109] In this case, the central question was whether the presence of a crucifix in an Italian public school classroom infringed the right of a parent to have her children educated in accordance with her religious or philosophical convictions, a right provided for in Article 2 of the First protocol to the ECHR, taken in conjunction with Article 9. The GC, in quashing the Chamber decision, which created an unprecedented amount of reactions among State and non-State actors across Europe, stated that the mandatory presence of crucifixes on the classroom walls of Italian State schools did not violate the Convention rights. One of the distinguishing features of the *Lautsi* ruling is that whereas in *Dahlab* the Islamic headscarf was described by the ECtHR as 'a powerful external symbol' capable of undermining the religious rights of the young pupil,[110] in *Lautsi* it was different. In *Lautsi*, the GC held that 'the crucifix is above all a religious symbol',[111] and, therefore, '[i]t cannot be deemed to have an influence on pupils'.[112] Thus, the

[108] Stephanie E. Berry, 'A 'Good Faith' Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) Legal Studies 672, 689.

[109] App no. 30814/06 (ECHR, 18 March 2001).

[110] (n 98).

[111] (n 109) para 66.

[112] ibid, para 72.

Strasbourg institutions have 'attribute[d] meanings to religious symbols to justify their differential treatment.'[113]

The following section analyses what lessons the ECtHR can take from the UN to give (more) effective protection to Muslim women who wish to manifest their religion through the wearing of Islamic veils.

6.3. Some Lessons for the Future: A More Rigorous Proportionality Test to Give Effective Protection of Freedom of Religion

The above comparative analysis between the HRC's jurisprudence and the ECtHR's jurisprudence on Islamic veils clearly demonstrates that the Strasbourg institutions, to a certain extent, have failed to give effective protection to Muslim women's right to manifest their religion through the wearing of Islamic veils. As Cumper and Lewis note, the ECtHR provides 'very weak protection … to Muslim women and girls wishing to manifest their religion thorough the wearing of the headscarf or face veil'.[114] By applying a meaningful, more rigorous proportionality test and by strictly scrutinising the justifications given by the States for the limitation, the HRC had examined the necessity of the interference and found violations of Article 18 of the ICCPR when State Parties unreasonably imposed limitations on the right to manifest one's religion through the wearing of Islamic veils and other religious apparel. The ECtHR, on the other hand, by deferring to the State's MoA refrained from carrying

[113] Berry (n 108) 689. For a more detailed discussion about *Lautsi*, see Jeroen Temperman, *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden: Martinus Nijhoff, 2012) Part V.

[114] Peter Cumper and Tom Lewis, 'Empathy and Human Rights: The Case of Religious Dress' (2018) 18 Human Rights Law Review 61, 63.

out a more rigorous justification and proportionality test between the aim(s) allegedly pursued and the harm or infringement caused to the individual wearer. Likewise, as Ian Leigh argues, the ECtHR has sometimes given its judgments in 'a rather confused way' and 'the structured analysis that ought to be applied under Article 9(2) has been neglected'.[115]

As the UN, compared to the Convention organs, has given a stronger or more effective protection to Muslim women's religious freedom, this thesis submits that the ECtHR can and should take some lessons from the UN to give effective protection to Muslim women who wish to manifest their religion by wearing religious attire. The 'effective protection' of fundamental rights, as Kristin Henrard argues, 'depends crucially on the level of scrutiny adopted by the international court in relation to the proportionality test. When the level of scrutiny is high, so is the level of protection of the right concerned. Conversely, when the level of scrutiny is low, the effective protection of the rights concerned is jeopardised.'[116] Therefore, it is submitted that similarly to the HRC, the ECtHR *must* subject a dress code regulation to a stricter proportionality review. The application of a more rigorous proportionality test by the ECtHR will lead to a better balance between competing interests, and this will result in a stronger protection of the right to religious manifestation through the wearing of religious dress under the Convention. In addition, the application of a strict, rigorous proportionality test will assist the ECtHR to scrutinise the claims against bans on the wearing of Islamic veil

[115] Ian Leigh, 'New Trends in Religious Liberty and the European Court of Human Rights' (2010) 12(3) Ecclesiastical Law Journal 266, 270-271.

[116] Kristin Henrard, 'How European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of freedom of Religion' (2015) 4 Oxford Journal of Law and Religion 398, 399.

more closely, and improve the consistency and quality of its own judgments. This thesis suggests that the ECtHR may take the following lessons from the UN to strengthen its proportionality analysis and to give a greater level of scrutiny to the limitation of a Muslim woman's right to manifest her religion freely.

6.3.1. A More Careful Examination of Whether the Interference Pursues a Legitimate Aim under Article 9(2)

Unlike the HRC, the Strasbourg institutions have upheld bans on wearing Islamic veils on the grounds of living together, gender equality and secularism despite that these 'abstract'[117] concepts have not been articulated as permissible grounds of limitation to limit the right to manifest one's religion under Article 9(2) of the Convention. In doing so, the ECtHR has used a common technique: invoking the broad justification of the 'protection of the rights and freedoms of others'.[118] As argued in Chapters Three and Five, the protection of 'living together' and 'gender equality' cannot be regarded as legitimate dimensions of the 'rights and freedoms of others' capable of justifying restrictions on religious freedom under Article 9.[119] Likewise, the ECtHR's acceptance of the principle of secularism as a ground of justification by linking this principle to the 'rights and freedoms of others' begs many questions because it has been argued that 'secularism as ground for justification lacks clarity in its concept and produces legal uncertainty in its

[117] (n 48) para 2; *Ebrahimian* (n 71) Dissenting Opinion of Judge De Gaetano; Partly Concurring and Partly Dissenting Opinion of Judge O'leary.

[118] In *S.A.S.*, the ECtHR itself admitted that the Court is 'quite succinct' when it examines if an interference satisfies the legitimate aim test under the limitation clause. ((n 36) para 114).

[119] Section 3.4.1; Section 5.4.

application.'[120] It is therefore suggested that where a European State relies on various 'abstract' principles to justify a ban on veiling, the ECtHR should apply a stricter justification test, i.e. legitimate aim test, to investigate whether the interference pursues one or more of the legitimate aims set out in Article 9(2).

It is suggested that similarly to the HRC, the ECtHR should interpret the permissible grounds of limitation 'strictly' to examine whether a restriction on wearing the Islamic veil satisfies the legitimate aim test under the limitation clause of Article 9 of the ECHR. The HRC's General Comment no. 22 may be an important resource for the ECtHR to determine what a strict interpretation entails: 'paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there … Limitations may be applied only for those purposes for which they were prescribed and must be directly related … to the specific need on which they are predicated.'[121] In an Optional Protocol case against Kazakhstan, the HRC established that in interpreting the scope of legitimate grounds of limitation under Article 18, the 'State parties should proceed from the need to protect the rights guaranteed under the Covenant.'[122] In a thematic report concerning religious discrimination in the workplaces, the Special Rapporteur Heiner Bielefeldt has given some useful guideline as to what strict interpretation entails in relation to the legitimate aim test. He writes, 'any stipulations negatively affecting freedom of religion or belief must be precisely and narrowly defined. Limitations *must* always clearly relate to

[120] Armin Steinbach, 'Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights' (2015) 4(1) Cambridge Journal of International and Comparative Law 29, 39.

[121] HRC, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion*) UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) para 8.

[122] *Viktor Leven v Kazakhstan*, Communication no.2131/2012, UN Doc. CCPR/C/112/D/2131/2012 (2015) para 9.3.

one of the legitimate purposes enumerated in article 18, paragraph 3, of the Covenant.'[123]

6.3.2. Developing a Series of Questions: The Necessity Test in Context

Examining whether a legal ban on Islamic veiling is 'necessary in a democratic society' under Article 9(2) is not an easy task. Different matters should be taken into account to determine the proportionality of an interference. Similar to the UN, the ECtHR should develop a series of questions that it would take into account in future cases to determine whether a limitation on wearing religious attire is proportionate and thus justified under Article 9(2) of the Convention. A critical analysis of the ECtHR's case law clearly demonstrates that the ECtHR's frequent reference to the doctrine of MoA in cases concerning the Islamic veil led it to choose only few elements of the proportionality test that went in favour of the State and ignore the remaining elements, the consideration of which would have led the Court to decide differently in favour of the applicant.[124] In other words, in balancing between various competing interests the ECtHR has used only a few elements which give more wight to the 'restriction side' of the scale and less weight to the 'rights side' of the scale. However, a more rigorous justification test requires the ECtHR to take into account *all* of the relevant elements regardless of whether these are favourable for the State or the individual applicant. It is therefore argued that the ECtHR should develop and follow a set of questions in striking a proper balance between the right of an individual applicant to manifest her religious manifestation through the wearing of the Islamic veil on the one hand and what is necessary in a

[123] UN Doc. A/69/261 (5 August 2015) para 38 (emphasis added).

[124] See Section 3.4.2, Chapter Three; Section 4.4.2, Chapter Four; Section 5.3, Chapter Five.

democratic society on the other. One of the benefits of using such pre-set questionnaires is that it may reduce the risk of inappropriate use of the MoA doctrine.

In her annual report (2006) submitted to the Commission on Human Rights, the UN Special Rapporteur, Asma Jahangir, dedicates an entire section to religious symbols, reflecting that it is a relevant issue in the exercise of FoRB.[125] In this report, she has suggested that a series of questions needs to be answered to determine the proportionality of a limitation on wearing religious symbols and clothing. She states, where a policy decision has been adopted at the domestic level to limit the right to manifest one's religion with regard to wearing religious symbols, the issues of proportionality or commensurability need to be assessed in the light of these questions.[126] In the three recent cases, *Yaker*, *F.A.*, and *Hebbadj*, the HRC has made specific reference to this series of questions to determine whether the restrictions imposed on the authors by French authorities were proportionate to the legitimate aims pursued.[127]

[125] UN Doc. E/CN.4/2006/5 (9 January 2006).

[126] These Questions are:

- 'Was the interference, which must be capable of protecting the legitimate interest that has been put at risk, appropriate?
- Is the chosen measure the least restrictive of the right or freedom concerned?
- Was the measure proportionate, i.e. balancing of the competing interests?
- Would the chosen measure be likely to promote religious tolerance?
- Does the outcome of the measure avoid stigmatizing any particular religious community?'(ibid, para 58).

[127] *Yaker*, para 8.8; *F.A.*, para 8.6; *Hebbadj*, para 7.8.

Inspired by the series of questions developed by Asma Jahangir, this thesis suggests that the Strasbourg organs should develop and follow a set of questions to assess whether a ban on wearing the Islamic veil satisfies the necessity test under Article 9(2). It is submitted that the ECtHR may follow the model outlined in Figure 8 below.

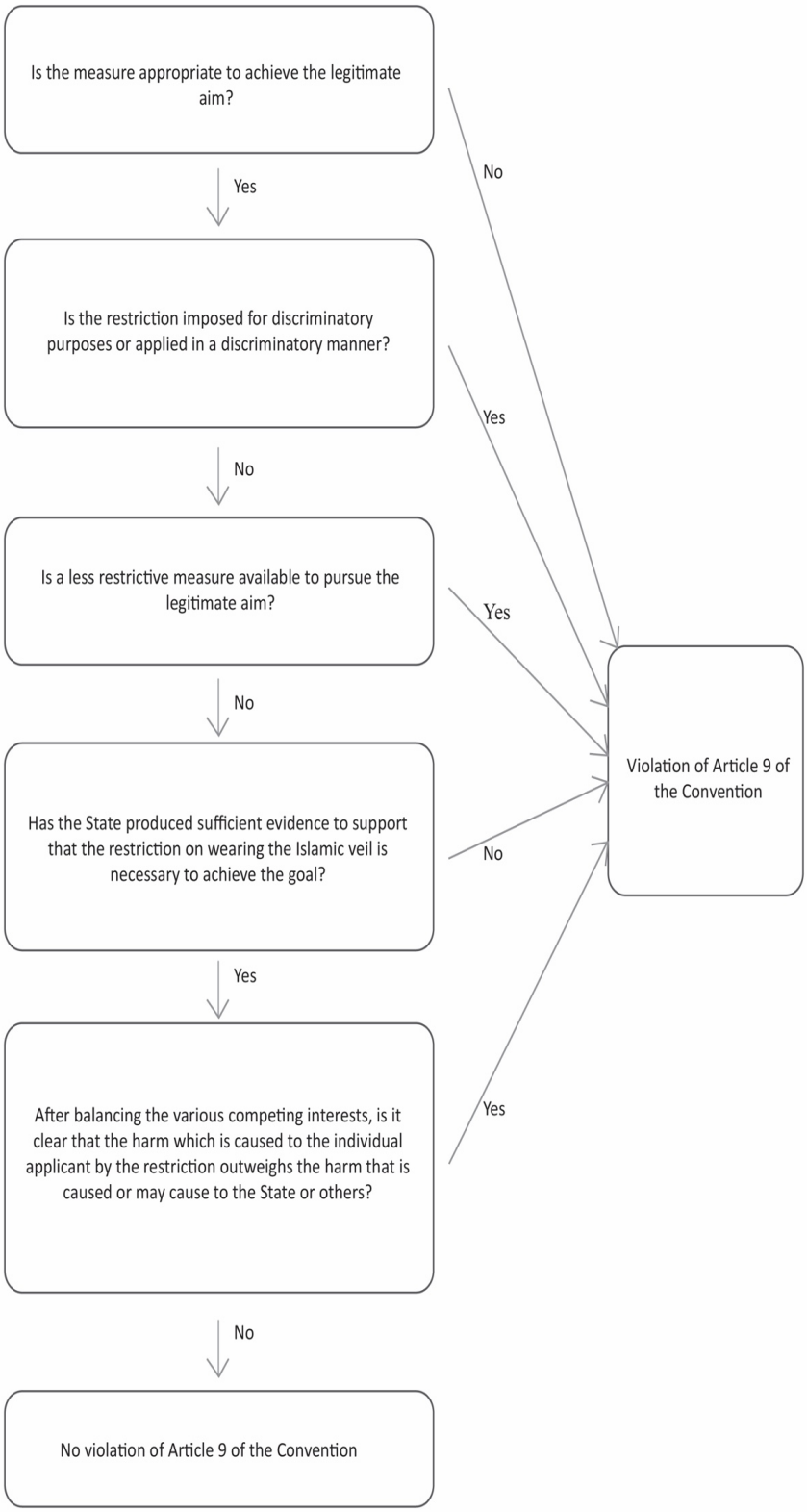

Figure 8: Series of questions

6.3.3. Reversing the Burden of Proof from the Individual to the State

In examining whether a limitation on wearing the Islamic veil is proportionate under Article 9(2), the ECtHR, similar to the HRC, must be satisfied that there is 'compelling' evidence which reveals that the practice of veiling is a threat to public safety, order, health or morals or the rights and freedoms of others. The burden of proof must rest on the respondent State contesting the practice of veiling or wishing to restrict Muslim women's right to don the veil. To this end, the State needs to demonstrate that limitation on the right to religious manifestation is justifiable and proportionate under the Convention. Put differently, the applicant who is defending his right to wear the veil does not need to prove that the interference is *unnecessary* in a democratic society. If a State fails to discharge its burden of proof, then the religious freedom of the individual wearer will prevail over the interests of others or of the society. Like the UN bodies, the ECtHR should uphold a ban on wearing Islamic veils 'only in *very* exceptional cases'[128] and as a matter of 'last resort'[129] after giving a higher level of scrutiny in its proportionality analysis.

Shifting the burden from the individual applicants on to the State would surely enhance the spirit of human rights law because one of the reasons why human rights law exists is to protect those who are most vulnerable to rights violations, namely, women belonging to religious minorities. An autonomy-based approach will require the ECtHR to protect an individual's voluntary choice unless the other party, who wants a restriction on the exercise of that choice, shows that the choice in question is harmful. Likewise, practically thinking, it is much easier for a State,

[128] UN Doc. A/60/399 (30 September 2005) para 62 (emphasis given).

[129] UN Doc. A/70/286 (5 August 2015) para 52.

compared to an individual applicant, to produce any evidence of harm that Islamic veils may have caused on others, because, by reason of the direct contact with various authorities, the State may have more information about the harm and may have easy access to all other relevant information about the decision-making process.

The idea that the burden of justifying a limitation on individual liberty falls on the party who argues in favour of the limitation aligns with the ideal of liberalism. Many liberal thinkers, such as, Gerald Dworkin state that to justify intrusions on individual liberty 'there must be a heavy and clear burden of proof on the authorities to demonstrate the exact nature of the harmful acts (or beneficial consequences) to be avoided (or achieved) and the probability of their occurrence.'[130] Likewise, Mill writes:

> [I]n practical matters, the burthen of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition; either any limitation of the general freedom of human action, or any disqualification or disparity of privilege affecting one person or kind of persons, as compared with others.[131]

6.3.4. Application of the Least Restrictive Means-test: A Pragmatic Approach

The Sikh man who was forced to remove his turban for a security check in the airport (*Phull*), the woman who was required to remove her veil while queuing for a visa application in a consulate (*EL Morsli*) and, the girl who was expelled from a publicly-run school for her insistence on wearing the Islamic headscarf (*Dogru*),

[130] Gerald Dworkin, 'Paternalism' (1972) 56(1) The Monist 64, 83.

[131] John Stuart Mill, *The Subjection of Women* (London: Gutenberg, 2008) 4.

have something in common: the domestic authorities did not employ the *least* invasive option to pursue the aims despite the existence of such options, the Strasbourg Court did not enquire whether the national authorities had included a consideration of the least restrictive alternative in their decision-making process, the Court did not consider the suitability of alternatives proposed by the applicants to evaluate the proportionate character of the interferences, and they all left Strasbourg sadly without success. As discussed previously, in these cases the ECtHR should have thoroughly examined whether the State could achieve the intended results by choosing an alternative measure which was *less* harmful to the applicants' Convention right.[132] Likewise, in its proportionality review, the ECtHR should have considered the relevance of possible alternatives suggested by the applicants, because, as Chaib argues, a failure to take into account the relevance or adequacy of possible alternatives proposed by the applicant is 'troublesome' from a procedural justice perspective and 'disrespectful towards the applicant.'[133]

This thesis suggests that in similar fashion to the HRC, the ECtHR should apply the least restrictive means-test strictly in assessing whether an anti-veiling law is proportionate within the meaning of Article 9 of the Convention. In its Islamic veil cases, the ECtHR, in future, should emphasise that any limitation on the right to religious manifestation *must* always be limited to the minimum degree of the interference that is necessary to pursue a legitimate aim. If it is clear that domestic authorities have not chosen the least intrusive measure despite its existence, then

[132] See Section 6.2.9 above.

[133] Saila Ouald Chaib, 'Suku Phull v. France Rewritten from a Procedural Justice Perspective: Taking Religious Minorities Seriously' in Eva Brems (ed), *Diversity and European Human Rights* (Cambridge: CUP, 2012) 227.

the ECtHR should find a violation of Article 9, unless the adoption of that least intrusive measure is burdensome or inconvenient for the State or causes harm to others. If the ECtHR cannot make its own assessment of the possibility and/or effectiveness of less restrictive measures for a good reason, such as that it does not have the expertise, then it still has an obligation, as a supervisory body, to carefully examine whether the national authorities had duly considered in decision-making processes, whether there was a less restrictive measure. The doctrine of MoA does not relieve the ECtHR from fulfilling this obligation.

It is submitted that if an applicant proposes a viable less restrictive alternative, a State can only justify the non-adoption of that alternative by proving in a satisfactory manner that applying this alternative would not be effective for the legitimate aim pursued or would entail an excessive burden.[134] Put differently, if a veil-wearing Muslim woman suggests an alternative which is less onerous on her fundamental right, and which can meet the objective that the ban intends to achieve, then a State must justify the rejection of the proposed alternative. In *Jasper v UK*, Judge Hedigan asserted that 'where the applicant can establish on a *prima facie* basis that such an alternative way exists, the onus shifts to the respondent to show why it cannot use or adapt such a way.'[135]

[134] ibid 234.

[135] *Jasper v The United Kingdom* App no. 27052/95 (ECHR, 16 February 2000) Dissenting Opinion of Judge Hedigan. See also Jenneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466, 487.

Based on the above analysis in relation to the least restrictive means-test, it is suggested that to examine the proportionality of a ban on wearing the Islamic veil under Article 9, the ECtHR should exhaustively consider the following factors.

(a) Whether there is any viable less restrictive option for achieving the legitimate aim that the disputed measure intends to serve;
(b) whether the applicant has suggested any possible less restrictive alternative; and
(c) whether the national authorities had included a consideration of these alternatives (i.e. mentioned in (a) *and* (b) above) in their decision-making process.

For reasons of clarity it is worth noting that the interests of the State as an accommodator should not be completely ignored. If the accommodation of the applicant's request involves a heavy administrative burden on domestic authorities, then the accommodation can be legitimately refused.[136] Likewise, if a less intrusive alternative is found but is less suited or less effective to achieving the objective, then it can be lawfully rejected.

6.3.5. A Reduced Margin of Appreciation

The comparative analysis in Section two above clearly demonstrates that the ECtHR's willingness to give a very wide MoA to the States concerning the right to manifest religion by wearing religious dress is the primary, if not the only, reason why the Convention organs were unable to give a very effective protection to the

[136] See Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77(2) Modern Law Review 223, 228-231. See also *Tagore v United States*, No. 12–20214 [2013] para 71.

religious freedoms of veil-wearing Muslim women. Whereas the HRC did not recognise that the State Parties had a MoA and gave a higher level of scrutiny in its proportionally analysis, the ECtHR, in contrast, accorded the States a *very* wide MoA, and, consequently, did not scrutinise the justifications invoked by States for the bans on wearing Islamic veils in a more rigorous way. Undoubtedly, a very wide MoA leads to less rigorous proportionality assessment, because, as argued by Howard, 'the level of scrutiny by the ECtHR depends on how wide a margin of appreciation is given to the states.'[137] It is understandable that the ECtHR grants States a MoA on the basis of the idea that each Member State is primarily responsible for its own survival and stability, and that they are better placed to make a decision about a situation because they have direct and continuous contact with important authorities of their country.[138] However, it must not be forgotten that the margin 'cannot be indefinitely stretched',[139] and that the ECtHR, a supervisory body, must examine whether the State concerned has overstepped the margin afforded to them. On the question of State regulation of religious dress, what is evident from the ECtHR's jurisprudence on the Islamic veil is that it consistently recognised that States had a wide MoA: 'the extent and form [of] such regulation … must inevitably be left up to … the State concerned'.[140] After recognising that the States had a MoA to regulate the wearing of Islamic veils, the ECtHR either totally refrained from examining the proportionality of the interference (e.g. *El Morsli*) or did not carry out a meaningful, rigorous

[137] Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (1st edn, Abingdon- New York: Routledge, 2012) 112.

[138] See Section 1.4.2, Chapter One.

[139] Francois-Xavier Millet, 'When the European Court of Human Rights Encounters the Face' (2015) 11 European Constitutional Law Review 408, 419.

[140] *Sahin* (n 17) para 109; *S.A.S.* (n 36) para 130; *Ebrahimian* (n 71) para 56.

proportionality test (e.g. *Sahin*). However, such recognition does not release the ECtHR, from fulfilling its 'task', that is, 'to determine whether the measures taken at the national level [are] justified in principle and proportionate'.[141] In *Hatton and Others v The United Kingdom*, the ECtHR stated that even though a broad MoA is accorded to the domestic authorities, 'their decision remains subject to review by the Court for conformity with the requirements of the Convention.'[142] This implies that the ECtHR cannot, and should not, discharge its supervisory function by the mere reference to the doctrine of MoA or by merely deferring to the State's MoA on a disputed matter, but rather, it must continue examining whether the State has overstepped the discretion or used it in an arbitrary manner. Therefore, in *Ebrahimian*, Judge O'Leary stated that the European 'supervision cannot be sidestepped simply by invoking the margin of appreciation, however wide.'[143]

As far as women's right to manifest religion by wearing the Islamic veil is concerned, over the years, the doctrine of MoA has become more and more an arbitrary instrument of the ECtHR. A critical analysis of the ECtHR rulings in various cases such as *Sahin*, *Dahlab*, *S.A.S.*, *El Morsli*, and *Dakir* shows that had the ECtHR given greater scrutiny to the limitation of the applicants' rights, these cases could have been decided differently, resulting in a satisfactory outcome for the individual applicants. As the HRC, in direct contrast to the ECtHR, has given stronger protection to the religious freedoms of Muslim women without recognising that the State Parties to the ICCPR have a MoA, this thesis submits that the ECtHR should

[141] *Eweida and Others v The United Kingdom* Apps nos. 48420/10, 59842/10, 51671/10 & 36516/10 (ECHR, 27 May 2013) para 84.

[142] App no. 36022/97 (ECHR, 8 July 2003) para 101.

[143] *Ebrahimian* (n 71) Partly concurring and partly dissenting opinion of Judge O'leary.

make reference to the doctrine of MoA as little as possible in cases concerning Islamic veils. If the ECtHR decides to rely on this doctrine, then it should do so cautiously and in a systematic and organised manner.[144] A less frequent and more systematic use of the MoA would strengthen the ECtHR's proportionality requirements, and this will ultimately result in a more rigorous proportionality test and decision making process. A detailed scrutiny of the limitations placed on the right to wear the Islamic veil will lead the ECtHR to examine various procedural matters (e.g. burden of proof) more closely and strictly. A detailed scrutiny would also contribute to the effective protection of religious freedom of Muslim women.

More importantly, this thesis submits that the ECtHR should accord a 'narrow' MoA to the Member States in matters relating to legal bans or restrictions on wearing Islamic veils. There are two rationales behind this argument. These are mentioned in the following two paragraphs.

The ECtHR's case law has established that where the impugned measure curtails the 'personal autonomy' of the individual applicant, the width of the MoA available to State is 'narrow', and, therefore, the ECtHR would give a greater scrutiny in determining the necessity and proportionality of the restriction on the applicant's fundamental right. For instance, in *Lashin v Russia*, in affording Russia a 'narrow' (as opposed to a wide) MoA, the ECtHR stated that 'where the measure under examination has a drastic effect on the applicant's personal autonomy … the Court is prepared to subject the reasoning of the domestic authorities to a somewhat stricter scrutiny.'[145] Likewise, in *Jehovah's Witnesses of Moscow &*

[144] The ECtHR may set out an enforcement criterion.

[145] App no 33117/02 (22 January 2013) para 81.

Others v Russia, the ECtHR took the view that 'the State has a narrow margin of appreciation and must advance serious and compelling reasons for an interference with the choices that people may make in pursuance of the religious standard of behaviour within the sphere of their personal autonomy.'[146] Assuming that the individual wearer is not coerced, her choice to follow a specific religious path and manifest it publicly through the wearing of distinctive clothing or symbols reflects her autonomous choice. As a ban on Muslim women to wear the Islamic veil offends their personal autonomy, it is argued that in cases where Muslim women are prohibited from wearing Islamic veils, the ECtHR should afford a 'narrow' MoA to the State.

The second reason why the ECtHR should not afford States a wide margin is that there is a European consensus that the dress code of Muslim women should not be regulated. It is true that an increasing number of the CoE countries have enacted legislation that have the effect of prohibiting Muslim women from wearing the Islamic veil. However, majority of the CoE countries do *not* regulate the Islamic veil, and this fact has been explicitly acknowledged by the ECtHR. In a 2015 case concerning the ban on the wearing of the Islmaic headscarf at workplace, the ECtHR admitted that 'a majority of the Council of Europe Member States do not regulate the wearing of religious clothing or symbols'.[147] This point was previously highlighted by the dissenting judges in *Eweida*: 'a large number of Contracting States' do not regulate the religious clothing.[148] It is therefore possible to argue that

[146] App no. 302/02 (ECHR, 10 June 2010) para 119.

[147] *Ebrahimian* (n 71) para 65.

148 (n 141) Joint partly dissenting opinion of Judges Bratza and David Thór Björgvinsson, para 3.

a consensus does indeed exist amongst a substantial majority of the Contracting States of the CoE towards allowing Muslim women to wear the Islamic veil. The 'level' of consensus concerning the matter at hand may be disputed, but it is difficult to argue that there is a complete lack of consensus. Kristin Henrard argues, 'when a firm common European standard on a particular issue is identified, the ECtHR grants states only a narrow margin of appreciation [and] this leads to close scrutiny'[149] in the proportionality analysis. Given that there seems to exist a European consensus that the religious dress code should not be regulated, the ECtHR should afford a 'narrow' MoA to the State on the question of banning Islamic veils.

Since the CoE's foundation in 1949, *Lachiri v Belgium*[150] is the *only* case where the ECtHR found that a ban on wearing the Islamic veil contravened Article 9 of the ECHR. This case stemmed from the fact that Mrs Lachiri, an ordinary citizen, was excluded from the courtroom because she insisted on wearing a *hijab* and refused to remove it. In this case, the ECtHR, by six votes to one, held that there had been a violation of Mrs Lachiri's right to freedom to manifest her religion. The ECtHR's reasoning in this case is remarkable, not only because this is the first Islamic veil case where a violation of Article 9 was established, but also because the ECtHR did not apply or even make reference to the doctrine of MoA in its proportionality analysis. Dissenting Judge, Mourou-Vikstrom, took a different opinion and found a violation of Article 9, because in her view, Belgium had 'a wide margin of

[149] Kristin Henrard, 'How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate' in Panos Kapotas and Vassilis P. Tzevelkos (eds), *Building Consensus on European Consensus: Judicial Interpretations of Human Rights in Europe and Beyond* (Cambridge: CUP, 2019) 149.

[150] App no. 3413/09 (ECHR, 18 September 2018).

appreciation' regarding whether the *hijab* should be accepted in the courtroom.[151] In providing a critique of the ECtHR's reasoning in *Lachiri*, I have argued elsewhere[152] that the non-application of the MoA doctrine by the majority led the ECtHR to produce a balanced judgment in this case following a detailed scrutiny of the limitations placed on Mrs Lachiri's right. The ECtHR's reasoning in *Lachiri* suggests that it is gradually moving towards a rigorous proportionality test to determine whether the ban on wearing the Islamic veil is necessary. It is hoped that, after *Lachiri*, the ECtHR's most recent case on the Islamic veil, it will carry out a meaningful proportionality analysis by refraining from affording a wide MoA to the States and be more prepared to find an infringement of Article 9 if and when a State prohibits the wearing of the Islamic veil without compelling reasons.

Finally, it is noteworthy that the ECtHR's 'over-reliance'[153] on the doctrine of MoA in cases concerning bans on Islamic veils has been criticised by many academic scholars. Effie Fokas, for instance, argues that the application of the MoA doctrine on Islamic veiling ban cases 'imperils [the Court's] ability to exercise supervisory functions and limits diversity and the possibility of viable democracy.'[154] Likewise, Leigh and Hambler note, '[i]f states are permitted a wide margin of appreciation, both in determining the means of protecting Convention rights and in balancing them the net result … will be that the minimum protection guaranteed by the

[151] ibid, Dissenting opinion of Judge Mourou-Vikstrom, para 37.

[152] Kaushik Paul, '*Lachiri v Belgium* and Bans on Wearing Islamic Dress in the Courtroom: An Emerging Trend' 21(1) Ecclesiastical Law Review 48.

[153] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford-Portland: Hart Publishing 2008) 96.

[154] Effie Fokas, 'The European Court of Human Rights and Minority Religions: Messages Generated and Messages Received' (2017) 45 Religion, State and Society 166, 168.

Convention to persons claiming conflicting rights will be severely diminished and the ECtHR will be failing in its task of ensuing minimal supervision.'[155] Another difficulty of using the MoA doctrine is that, as Gross and Aolain argue, it 'runs contrary to any notion of universal human rights.'[156] Therefore, in an UN report concerning religious symbols, the Special Rapporteur Asma Jahangir implied that the doctrine of MoA has the potential to undermine 'the international consensus that all human rights are universal, indivisible and interdependent and interrelated, as proclaimed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993.'[157]

6.4. Concluding Remarks

Despite the textual similarities between Article 18 of the ICCPR and Article 9 of the ECHR, the HRC's jurisprudence on religious freedom has consistently diverged from that of the ECtHR in relation to the right to religious manifestation through the wearing of religious dress and, whether a limitation on that right satisfies the requirements of Article 18(3) of the ICCPR and Article 9(2) of the ECHR. In directly analogous cases (e.g. *Hebbadj*, *S.A.S.*), while the HRC found that restrictions on wearing religious garments, justified by reference to either living together or secularism infringed Article 18 of the Covenant, the ECtHR deferred to the State's

[155] Ian Leigh and Andrew Hambler, 'Religious Symbols, Conscience, and the Rights of Others' (2014) 3(1) Oxford Journal of Law and Religion 2, 20. See also Rafaella Nigro, 'The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil' (2010) 11 Human Rights Review 531, 536-543.

[156] Oren Gross and Fionnuala Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23(3) Human Rights Quarterly 625, 627-628.

[157] (n 125) para 59.

MoA and declined to find an infringement under Article 9 of the Convention. Both human rights bodies made contradictory decisions despite the same applicant (i.e. Mr Mann Singh) appearing before them with a similar claim.

The ECtHR seems to be more willing to afford a wide MoA to States and less willing to employ a higher level of scrutiny in the proportionality analysis. Whereas the UN has given special emphasis to respect the free choice of veil-wearing Muslim women, the ECtHR has felt that the wishes of the majority or choices of mainstream society should be protected at the expense of Muslim women's religious freedom. Thus, the personal autonomy of veil-wearing Muslim women has been eroded by the ECtHR's rulings, especially in its rulings in relation to Islamic full-face veil bans in France and Belgium.[158] In these cases, the ECtHR upheld nation-wide, blanket bans and implied that, as the ECtHR Judge Angelika Nussberger has written extrajudicially, bans on Islamic full-face veils are "justifiable as a 'choice of society'."[159] The HRC has balanced the interests of the individual applicants and of the States much better than the ECtHR, in a way that manages to protect the religious freedoms of veil-wearing Muslim women. Therefore, as Lavinia Iusan notes, 'the legal reasoning' of the HRC, in cases concerning bans on Islamic veils, is 'stronger' than the ECtHR.[160]

---

[158] See Section 3.7, Chapter Three.

[159] Angelika Nussberger, 'Procedural Review by the ECHR: View from the Court' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge: CUP, 2017) 163.

[160] Lavinia Iusan, 'Comparative Human Rights Law and the Muslim Headscarf: The Position of the UN Human Rights Committee and the European Court of Human Rights (*Lawyr.it*, 15 July 2016) <https://www.lawyr.it/index.php/articles/international-focus/759-comparative-human-rights-law-and-the-muslim-headscarf-the-position-of-the-un-human-rights-committee-and-the-european-court-of-humans-rights> accessed 4 March 2018.

This chapter has suggested that the ECtHR can and should take some lessons from the UN and strengthen its proportionality analysis to give stronger protection to Muslim woman's religious freedom. In a similar fashion to the HRC, the ECtHR should: interpret the permissible grounds of limitation strictly; impose the burden of proof on the State as opposed to the individual applicant; and, closely examine whether the State has adopted the least intrusive means in achieving the legitimate objective(s). In addition, it should resort to the doctrine of MoA more cautiously. It should also respect the personal autonomy of Muslim women who freely choose to wear Islamic veils in accordance with their deeply-rooted religious convictions. If the ECtHR continues to prevail the choice of society over the choice of individual, then human rights law will become an empty shell. When dealing with cases involving Islamic veils, the ECtHR must remember that a ban on wearing Islamic veils based on the majority's worries and fears does not meet international human rights standards. The 'general criteria' of the UN Special Rapporteur regarding the regulation of religious symbols and the 'guiding principles' of the Board of Experts of the International Religious Liberty Association make it clear that restrictions on the wearing of Islamic veils 'based on mere speculation or presumption rather than on demonstrable facts' will contravene the principles of international human rights law.[161] It has been suggested that by using the doctrine of MoA cautiously and in a more systematic way, and by giving States a narrow MoA in cases concerning limitations on wearing Islamic veils, the ECtHR can strengthen its proportionality requirements and carry out a more rigorous proportionally test -- this will, in turn, contribute to the effective protection of the religious freedoms of veil-wearing Muslim women.

[161] (n 125) para 53; 'Guiding Principles Regarding Student Rights to Wear or Display Religious Symbols' (2005) <https://www.irla.org/symbols> accessed 10 July 2020.

CHAPTER SEVEN: FORCED VEILING

> 'It is ultimately up to the individual to decide whether he or she wishes to manifest his or her right to freedom of religion or belief at all, and if so, whether these manifestations take place in private or in public.'
>
> - Ahmed Shaheed, UN Special Rapporteur on FoRB[1]

7.1. Introduction

In recent years, forced veiling has attracted a great deal of international attention, and has been at the forefront of human rights conversations. Forced veiling is incompatible with the principles of international human rights law. The enforcement of the compulsory Islamic dress code on Muslim women, as will be argued below, infringes, *inter alia*: their right to personal autonomy and free choice; their right to respect for private life; and their religious freedom. Forced veiling is entirely different from voluntary veiling in the sense that forced veiling in the absence of free consent of the wearer, and consequently, duress- either physical or psychological- is the determining factor. From the perspective of international human rights law, forced veiling raises questions about the appropriate role of the State in the matters of religion, personal autonomy, and women's rights. As discussed in more detail below,[2] in the contemporary world, a growing number of Muslim women do not have the free choice not to wear a veil, unless it is approved by their male family members. Sometimes, by enacting legislation, States directly coerce women into wearing traditional Islamic dress. The

[1] UN Doc. A/HRC/34/50 (17 January 2017) para 25.

[2] See Section 7.2.

pressure to wear the Islamic veil occasionally comes from local religious groups or religious leaders. Over the past few years, a number of countries such as Indonesia, Bangladesh, Pakistan and even the UK have seen a marked increase in veiling by Muslim women -- this is partly because of the fact that some of these women are forced, to a varying degree, to wear Islamic dress. To this end, forced veiling has become the subject of widespread public and political debate all over the world. However, this topic is very much under-researched in the current literature. The purpose of this chapter is to investigate the different ways in which (Muslim) women are forced against their will to wear Islamic dress. This chapter also aims to examine the impact of compulsory veiling on the right to respect for private life (Article 8 of the Convection) and on the FoRB (Article 9 of the Convention and Article 18 of the ICCPR).

7.2. Source of Force

The pressure to wear the Islamic veil primarily comes from three different sources: government policies and legislation; family members; and, radical Islamic groups. These sources are discussed in detail in the sub-sections below.

7.2.1. Government Policies and Legislation

In some countries (or regions within countries), women's choice not to wear religious dress is restricted to some degrees by various government policies, regulations, and laws. For instance, authorities in the Russian republic of Chechnya enforced a compulsory Islamic dress code for women under the 'virtue campaign'

initiated by Chechen President Ramzan Kadyrov in 2006.[3] As part of the campaign, local authorities prohibited women from working in government sectors if they did not comply with the compulsory dress code, and education authorities introduced compulsory wearing of headscarves for female students in Chechen schools and universities. Gradually, throughout 2009 and 2010, the law enforcing authorities broadened and tightened the enforcement of the compulsory dress code on women. Law enforcement agents shot pellets from paintball guns at Chechen women who appeared in public without wearing the headscarves. Furthermore, women who did not adhere to the compulsory dress code during Ramadan were publicly shamed for infringing the 'Islamic modesty laws' and harassed for not adhering to the Islamic dress code.[4] The Russian Federation, despite being a party to the ECHR, took no measure to respond to the unlawful policies regarding the enforcement of the compulsory dress code on women in Chechnya. A recent report of the Committee on Legal Affairs and Human Rights of the CoE states:

[3] Pew Research Centre, 'Restrictions on Women's Religious Attire' (2016) <http://www.pewforum.org/2016/04/05/restrictions-on-womens-religious-attire/> accessed 13 February 2018.

[4] Human Rights Watch, 'You Dress According to Their Rules: Enforcement of an Islamic Dress Code for Women in Chechnya' (2011) pp.19-25 <https://www.hrw.org/sites/default/files/reports/chechnya0311webwcover.pdf> accessed 23 November 2019.

> Organised attacks on women without headscarves by members of the Chechen law-enforcement bodies have now ceased … however, female employees of State institutions can still only go to work wearing strict, long dresses and a head covering. The same applies to University students. In practice, an "Islamic" dress code is also introduced in schools in the guise of mandatory school uniforms. Girls have to wear headscarves as from elementary school.[5]

Iran has enacted the 'compulsory hijab law' to regulate women's dress. Shortly after the Islamic Revolution, Ayatollah Khomeini declared a strict dress code for women. The *hijab* was subsequently made mandatory in government and public offices in the summer of 1980.[6] By 1983, the *hijab* was mandated throughout the republic, aimed at 'creating and protecting an Islamic social space'.[7] The compulsory hijab law remains in place today. Therefore, it is officially mandatory for *all* women, regardless of their religious beliefs, to wear the *hijab* in public. Enforcement of the compulsory hijab law is carried out by police and para-military police who regulate the moral conduct in public spaces by looking for women who

[5] Committee on Legal Affairs and Human Rights, 'Human rights in the North Caucasus: what follow-up to Resolution 1738 (2010)?' (Doc. 14083) (8 June 2016).

[6] Farzaneh Milani, *Veils and Words: The Emerging Voices of Iranian Women Writers* (New York: Syracuse University Press, 1992) 37-38. Hoddfar notes, because to the enforcement of Islamic dress code in Iran, many educated middle-class women, who were potentially or actually active in the labour market, left their jobs (and a significant number of them left the country) voluntarily. (Homa Hoddfar, 'The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women' (1993) 22(3) Resources for Feminist Research 5, 12).

[7] Elizabeth Bucar, *Pious Fashion: How Muslim Women Dress* (Cambridge- Oxford: Harvard University Press, 2017) 28.

wear a 'bad hijab'.[8] A failure to comply with the compulsory hijab law amounts to a criminal offence which is punishable by prison sentence or fine. According to the Islamic Penal Code of Iran, '[w]omen, who appear in public places and roads without wearing an Islamic *hijab*, shall be sentenced to ten days to two months' imprisonment or a fine of fifty thousand to five hundred Rials.'[9]

According to a 2014 report from the Human Rights Watch, there were seventy nine bylaws in Indonesia in 2013 requiring women to wear the *hijab*.[10] Furthermore, in Gaza, Hamas officials initiated their own 'virtue campaign' in 2009 and the schools reportedly turned away girls for not wearing Islamic veils, on the basis of orders from Hamas authorities.[11] Similarly, the Sudanese Criminal Act 1991 made infringements of compulsory dress code punishable by whipping, a punishment to which thousands of women had been subjected.[12] Likewise, in Algeria, women had

[8] Shirazi notes, in Iran, the "'bad hijab' refers to any garment, adornment, or appearance that, intentionally or unintentionally, might have the potential to draw the male gaze." (Faegheh Shirazi, *The Hijab in Modern Culture* (Gainesville: University Press of Florida, 2001) 94). Regarding 'bad hijab' and the enforcement of the compulsory hijab law in Iran, see also Bucar (n 7) 50-61.

[9] Article 638, Islamic Penal Code of the Islamic Republic of Iran (1991).

[10] Human Rights Watch, 'World Report 2014: Indonesia' (2014) <https://www.hrw.org/world-report/2014/country-chapters/indonesia> accessed 17 February 2020.

[11] See Judith Sunderland, 'Damned If You Do, Damned If You Don't: Religious Dress and Women's Rights' in Minky Worden (ed), *The Unfinished Revolution: Voices from the Global Fight for Women's Rights* (Bristol: The Polity Press, 2012) 298-299.

[12] Article 152. See also Human Rights Watch, 'Sudan: End Lashing, Reform Public Order Rules' (2010) <https://www.hrw.org/news/2010/12/15/sudan-end-lashing-reform-public-order-rules> accessed 10 May 2017. The public order law, which regulated the dress code, was repealed in November 2019. For these recent developments, see 'Sudan crisis: Women praise end of strict public order law' (*BBC*, 29 November 2010) <https://www.bbc.co.uk/news/world-africa-50596805> accessed 20 August 2020.

been attacked in the streets or even killed after being threatened for failing to comply with the mandatory dress code.[13] Until recently, Saudi Arabian authorities officially regulated women's attire, requiring all women to wear the *abaya* in public[14] and the compulsory dress code was enforced by religious police.[15]

7.2.2. Family Members

As indicated in Chapter Five, although the vast majority of Muslim women who wear the Islamic veil do so voluntarily as part of their personal religious journey,[16] some women are forced to wear Islamic veils by their male family members. In many Muslim countries such as Bangladesh, Pakistan, and even in the Western countries such as the UK, a growing number of Muslim girls and women are forced by their fundamentalist fathers, husbands, and brothers to wear Islamic dress.[17] Due to the concerns that some Muslim women and girls in France are pressured into wearing Islamic dress by their male family members, the aforementioned

---

[13] See Heiner Bielefeldt et al., *Freedom of Religion or Belief: An International Law Commentary* (Oxford: OUP, 2016) 158.

[14] See 'Restrictions on Women's Religious Attire' (n 3). See also 'Saudi Arabia's dress code for women' (*The Economist*, 28 January 2015) <https://www.economist.com/blogs/economist-explains/2015/01/economist-explains-20> accessed 20 February 2018.

[15] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford- Portland: Hart Publishing, 2006) 233. For recent developments, see "Coverings for women 'not mandatory', says Saudi crown prince ahead of US charm offensive" (*The New Arab*, 20 March 2018) <https://english.alaraby.co.uk/english/news/2018/3/20/abayas-not-mandatory-for-women-says-saudi-crown-prince> accessed 2 February 2020.

[16] Section 5.2.

[17] See Pnina Werbner, 'Honor, Shame and the Politics of Sexual Embodiment among South Asian Muslims in Britain and Beyond: An Analysis of Debates in the Public Sphere' (2005) 6(1) International Social Science Review 25.

Islamic full-face veil ban in France created a punishable offence of a male forcing a female relative to wear full-face veils.[18] The report of the Stasi Commission in France stated that some girls were coerced into veiling by their families.[19] Commentators have admitted that there is a 'family pressure' on many Muslim women to wear a veil.[20] Michael Ipgrave writes, '[i]n some cases, it is pointed out, Muslim women may wear veils which cover their faces because they are compelled, or coerced, into so doing by others, for example, their husbands, fathers or brothers.'[21] Likewise, empirical evidence reveals that an increasing number of women are coerced into veiling by their family members. For example, 28% of the ninety-three women interviewed by Haniqiz Nurmamat in Kashgar (China) stated that, they adopted Islamic veils 'in order to appease their new husbands and in-laws or due to peer pressure'.[22] Similarly, the Open Society Foundation's empirical research entitled 'Behind the veil: why 122 women choose to wear the full face veil in Britain' suggests that, some British Muslim women may have been forced to wear

[18] Section 4 of Law no. 2010-1192 inserted a provision (Article 225-4-10) into the Criminal Code prescribing a fine and imprisonment for forcing women and underaged girls to wear full-face veils. With regard to this offence under French law, see Anastasia Vakulenko, *Islamic Veiling in Legal Discourse* (Abingdon- New York: Routledge, 2012) 22.

[19] Vakulenko (n 18) 61.

[20] Nick Hopkins, 'Hijab, Visibility and the Performance of Identity' (2013) 43 European Journal of Social Psychology 438, 439; Clair Dwyer, 'Veiled Meanings: Young British Muslim Women and the Negotiation of Differences' (1999) 6(1) Gender, Place and Culture 5; Katha Pollitt, 'Whose Culture' in Susan Moller Okin (ed), *Is Multiculturalism Bad for Women?* (New Jersey: Princeton University Press, 1999) 29-30.

[21] Michael Ipgrave, 'Crosses, Veils, and Other People: Faith as Identity and Manifestation' (2007) 2 Religion and Human Rights 163, 169.

[22] Cited in James Leibold and Tomothy Grose, 'Islamic Veiling in Xinjiang: The Political and Social Struggle to Define Uyghur Female Adornment' (2016) 76 The China Journal 78, 98.

veils by their husbands.[23] In *R (on the Application of Shakeel) v Secretary of State for the Home Department*, a UK case concerning asylum claim, the court found that:

> [T]he applicant was only allowed out wearing a full niqab. One day [she and her family members] all went to the park and it was very hot so the appellant had to remove her veil for a few minutes to get some air to let her breathe. Her husband took a photo. When the photos were developed, he kicked up a fuss as she was not wearing the veil. He beat the appellant.[24]

Begum can also be used as an example to demonstrate that some Muslim girls are pressured into wearing Islamic veils by their male family members. It was widely reported in the media that the applicant, Ms Begum, was coerced into wearing the *jilbab* by her older brother, a known Islamic activist, who also acted as her litigation friend in this case.[25] To make a decision in this case, Lord Scott took into account the fact that when Mr Moore, the assistant head teacher, 'telephoned to ask why Shabina was not at school, he was told by Shabina's brother that he, the brother, was not prepared to let her attend school unless she was allowed to wear a jilbab.'[26] In this case, Baroness Hale admitted that 'strict dress codes may be imposed upon women, not for their own sake but to serve the ends of others.'[27]

---

[23] Open Society Foundations, 'Behind the veil: why 122 women choose to wear full face veil in Britain' (2015) p.52 <https://www.opensocietyfoundations.org/uploads/f3d788ba-d494-4161-ac01-96ed39883fdd/behind-veil-20150401.pdf> accessed 9 July 2018.

[24] [2012] EWHC 1169 (Admin) para 9.

[25] Vakulenko (n 18) 57.

[26] *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, para 81.

[27] ibid, para 95. It is, however, worth noting that the facts in *Begum* remains unclear because Ms Begum in a television interview emphasised that her brother did not 'force' her to wear the *jilbab*, stating that 'I have a mind of my own'. The whole interview can be watched at this url: https://www.youtube.com/watch?v=9hN-vAb4dQg

7.2.3. Radical Islamic Groups

Sometimes women are forced by Islamic militant groups and local religious leaders to wear traditional Islamic dress. Recent years have witnessed that fundamentalist groups force many women, irrespective of religion and age, to wear Islamic veils. For instance, jihadist group, the Islamic State, enforced a compulsory Islamic dress code on women in the areas it controlled in Syria and Iraq, with punishments of fines or beatings for those who did not comply with the dress code. The women were compelled to wear double-layered veils.[28] Furthermore, in Mosul, one of Iraq's largest cities, the Islamic State provided specific guidelines on how women should dress: 'the hands and feet must be covered. Wear shapeless clothes that don't hug the body. No perfume.' The Islamic State stated that the dress code would prevent women from 'falling into humiliation and vulgarity'.[29] Additionally, in areas of Somalia controlled by Islamist militant group Al-Shahaab, its religious leaders and militants ordered women to wear the *abaya* made of particularly thick cloth that touches the grounds and hides all physical contours. Women, who failed to comply with the religious dress code, were severely punished.[30] Likewise, in

[28] See Rafia Zakaria, *Veil* (New York: Bloomsbury, 2017) 97; Mona Mahmood, 'Double-lavered veils and despair…women describe life under Isis' (*The Guardian*, 17 February 2015) <https://www.theguardian.com/world/2015/feb/17/isis-orders-women-iraq-syria-veils-gloves> accessed 03 March 2018.

[29] See "Islamic State orders women to wear full-face veil or risk 'serious punishment'" (*The Telegraph*, 25 July 2014) <https://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10990997/Islamic-State-orders-women-to-wear-full-face-veil-or-risk-serious-punishment.html> accessed 20 February 2018.

[30] See Human Rights Watch, 'Harsh War, Harsh Peace: Abuses by Al-Shabaab, the Transitional Federal Government, and AMISOM in Somalia' (2010) <https://www.hrw.org/report/2010/04/19/harsh-war-harsh-peace/abuses-al-shabaab-

Afghanistan, the former Taliban regime imposed extremely strict Islamic dress code for women, requiring them to wear the *burqa*.[31] According to a UN report on the situation of human rights in Afghanistan, 'women were obliged to wear veils covering them from head to toe, including the face,'[32] and '[m]obile Taliban units were reportedly patrolling the streets to control the observance of the prescribed dress code.'[33] In his annual report submitted to the Commission on Human Rights, the UN Special Rapporteur, Abdelfattah Amor, stated that the Taliban's anti-feminine policy in Afghanistan, namely, the 'obligation for women to wear the burqa in public' was 'tantamount to veritable apartheid against women, as women, and on the basis of specious interpretations of Islam.'[34]

In a recent report concerning fundamentalism and extremism, the UN Special Rapporteur in the field of cultural rights, Karima Bennoune, expressed her concerns regarding a specific fatwa issued by the European Council of Fatwas and Research (consisting of male Islamic clerics and scholars) on 'the duty of Muslim women and

---

transitional-federal-government-and-amisom> accessed 16 May 2018. See also Serena Timmoneri, 'New Perspectives for Mass Atrocities' Prevention: Reducing Gender Inequality as A Means To Reduce The Risk of Genocide' <https://www.sisp.it/docs/convegno2015/214_sisp2015_genere-politica-politiche.pdf> accessed 1 April 2019.

[31] For a more discussion about compulsory veiling in Afghanistan under the Taliban regime, see Anastasia Telesetsky, 'In the Shadows and Behind the Veil: Women in Afghanistan Under Taliban Rule' (1998) 13(1) Berkeley Women's Law Journal 293.

[32] 'Final report on the situation of human rights in Afghanistan submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/75', UN Doc. E/CN.4/1997/59 (20 February 1997) para 26.

[33] ibid, para 84.

[34] UN Doc. E/CN.4/1999/58 (11 January 1999) para 26 & 111. See also UN Doc. A/53/279 (24 August 1998) para 40.

girls in Europe to cover their heads': 'by her dress, she presents herself as a serious and honest woman who is neither a seductress nor a temptress, who does no wrong … by any movement of her body.'[35]

Based on the above discussion, it can be deduced that in many contemporary societies, Muslim women do not have the choice *not* to wear religious dress. It is true that, at least at the European level, the number of countries that require women to wear Islamic veils is far less than that of the countries which require women to remove Islamic veils. However, under any consideration, it cannot be denied that some women are forced, against their will, to don the veil. Both forcible removal of veils and forcible imposition of a dress code are problematic and undesirable from the human rights point of view. Before embarking on a discussion of the human rights implications of forced veiling, it is important to briefly outline why the enforcement of a compulsory dress code impedes the exercise of personal autonomy of Muslim women who do not want to wear a veil.

7.3. The Wrongfulness of Forced Veiling: The Context of Personal Autonomy and Millian Liberalism

As discussed in Chapter Two, personal autonomy requires, *inter alia*, the freedom of choice and the absence of coercion.[36] An individual who is coerced to act in accordance with their coercer's instructions is put in a position of domination where they effectively have no choice but to do that which they have been instructed to do. Thus, an individual's action, which is the product of coercion,

[35] UN Doc. A/72/155 (17 July 2017) para 75.

[36] See Section 2.4.2.

cannot be regarded as truly autonomous. Personal autonomy seeks to secure the freedom to be oneself and the conditions under which this is achieved. It seeks too, to prevent outside influences. When one is coerced, against their will, to carry out an action which is chosen by another person or by the State, then one loses the freedom to be themself. Therefore, the coercion offends the personal autonomy of the coerced.

Liberalism typically holds that every individual is free to make their lifestyle choices in accordance with their own tastes, values, beliefs and preferences. Mill maintains that everyone 'should be free to act upon their own opinions'.[37] If a Muslim woman chooses *not* to wear the Islamic veil, she may have her own reason to do so. It is not for others, including the State, to interfere with her choice. By forcing Muslim women to wear the Islamic veil, the coercer -- be it the State, their husband, or a fundamentalist group -- imposes a set of religious standards and effectively overrides the standards that these women would prefer. It is therefore arguable that when a Muslim woman, who either considers veiling as unnecessary or as contrary to her conviction, is forced to don the veil against her will, then the practice of veiling cannot be regarded as a 'voluntary' or 'freely-chosen' religious activity. Put differently, when a Muslim woman is forcibly compelled to wear a religious dress, then it cannot be said that she is acting for her own purpose -- but, in effect, she is merely complying with the family, societal or the State's demands. It is therefore submitted that forcible imposition of the Islamic dress code prevents a Muslim woman from acting in accordance with her own preferences, precludes

[37] John Stuart Mill, *On Liberty* (Kitchener: Batoche Books, 2001) 52.

her from freely directing and governing the course of her life, and as a consequence, constitutes a profound violation of personal autonomy.

As indicated previously, in a liberal democratic democracy, an adult woman must have the right to determine, through her *own* choices, what lifestyle behaviour she will adopt. Other individuals, and even the State itself, should not unreasonably intrude on her decision. If Muslim women feel compelled to wear the Islamic veil in public places in order to please 'fundamentalist' men, who are in favour of traditional and religious orthodoxy, then the ability of Muslim women to exercise their personal choices about their body and clothing will be at the mercy of men. As Gulik argues, '[w]omen's rights are about autonomy. And real autonomy means freedom to make choices whether others like these or not.'[38] With regard to the wearing of the Islamic veil, in *Begum*, Baroness Hale stated that 'it must be the woman's choice, not something imposed upon her by others.'[39]

The *Advocate Salahuddin Dolon v Bangladesh*[40] case, considered by the Supreme Court of Bangladesh, is central to the discussion of forcible imposition of the Islamic dress code on Muslim women and its impact on the exercise of individual autonomy and free choice. In this case, in an official meeting, an Education Officer directed all female teachers working under him to attend the school wearing the Islamic headscarf. Fifty female teachers present in the meeting opposed this and, in the course of events, the Education Officer called the headmistress of a primary school a 'prostitute' for not covering her head with a veil. In protest at the objectionable

[38] Gauri van Gulik, 'Headscarves: The Wrong Battle' (2009) <https://www.hrw.org/news/2009/03/14/headscarves-wrong-battle> accessed 4 September 2016.

[39] (n 26) para 95.

[40] Writ petition no. 4495 of 2009 (8 March 2010).

remarks, all teachers left the meeting. This incident caught huge media attention and eventually came before the Supreme Court of Bangladesh. The Supreme Court, in this case, cited both the constitutional law of Bangladesh and international human rights standards. The Court based its decision on the premise of 'personal choice'. It ruled that '[i]t is a personal choice of a woman to wear veil or to cover her head' and any attempt to coerce or forcibly impose a dress code on woman 'is clearly a violation of her right to personal liberty'. The Court went on to say that '[s]ubjecting a woman to harassment due on account of her failure to cover her head, is a discriminatory act, which is a violation of … the Constitution and inconsistent with international standards.' The Supreme Court ordered the Ministry of Education to 'ensure that the women working in educational institutions under it both in public or private sectors are not subjected to wearing veil or covering their head against their will and that it is their choice to do or not to do so.'[41]

Consent is a 'very powerful' human rights norm based on personal autonomy.[42] The key reason why compulsory veiling is arguably objectionable is that a woman is required or obliged to manifest her religious affiliation publicly through the wearing of Islamic dress against her consent. When considering other forms of required attire, such as requiring a motorcycle rider to wear protective helmet, a hunter to wear brightly colored jacket, a sailor to wear life-saving jacket, or a Covid-19 patient to wear a face mask, there is a notable difference with requiring Muslim women to wear the Islamic veil. These examples amount to ensuring protection and reducing harm, whereas the same cannot be said of requiring Muslim women to wear the Islamic veil. It is very likely that the person who is required to wear something for

[41] ibid.

[42] McGoldrick (n 15) 271.

their own health and safety will give their consent immediately without objection because the coercer has no or very little personal interest. However, when a Muslim woman is coerced into wearing a traditional Muslim garment, then the coercer is motivated by their own belief or conviction and the coerced is obliged to confirm the belief of the coercer. In addition, the non-wearing of the veil will not pose a threat to the health and safety of the coerced. Therefore, in relation to the forcible imposition of the Islamic dress code, it is difficult to argue that the consent of the coerced is truly 'spontaneous'.

Millian liberalism holds that as long as there is no actual wrongdoing to others, an individual must be allowed to direct and govern the course of their life as they see fit and society cannot justifiably restrict their self-determination. Mill believed that an individual whose 'desires' are shaped by their 'own culture', is an autonomous person. Mill says, '[a] person whose desires and impulses are his own - are the expression of his own nature, as it has been developed and modified by his own culture - is said to have a character. One whose desires and impulses are not his own, has no character, no more than a steam-engine has a character.[43] Assuming that it does not harm others, a woman's deliberate, well-informed decision not to don the veil is purely a self-regarding behaviour and thus, by virtue of the harm principle, it would be wrong for a society to interfere with her voluntary decision. A careful inspection of *On Liberty* indicates that a society has no legitimate authority to forcefully impose a religious practice on individuals even though the society is of the opinion that what these individuals are doing is 'religiously wrong'.[44] Mill admitted that '[t]he notion that it is one man's duty that another

[43] Mill (n 37).

[44] ibid, 83.

should be religious, was the foundation of all the religious persecutions ever perpetrated'.[45] Mill provided arguments for concluding that the Sabbatarian legislation, which *forces* all workers to take the same day off on *religious grounds*, was not expedient. He regarded the 'Sabbatarian legislation' as an 'illegitimate interference with the rightful liberty of the individual'.[46] Thus, Mill argued against a 'moral police' in religious matters.[47] Mill's commitment to individuality and self-sovereignty implies that a Muslim woman must have the right to freely decide how she would present herself in public and whether she would wear a religious dress. As Mill stated, 'over himself, over his own body and mind, the individual is sovereign.'[48]

Based on the above, it can be deduced that it would be wrong for an individual or a group of individuals or legislators to use their religious conviction as a reason to limit another person's choice about clothing or personal appearance. If a Muslim woman, for whatever reason, makes a choice not to manifest religion through the wearing of religious dress, then a very strong interest would be needed to override her choice. As long as a woman's personal choice as to her desired appearance does not harm or threaten others, no interference with that choice is justified.

The following discussion in this chapter will focus on the human rights implications of forced or involuntary veiling.

[45] ibid, 84.

[46] ibid, 83.

[47] ibid, 78.

[48] ibid, 13.

7.4. Forced Veiling: A Human Rights Perspective

Forced veiling is a human rights abuse, infringing a wide range of human rights of an individual wearer. The HRC, in its General Comment, has stressed that:

> [A]ny specific regulation of clothing to be worn by women in public … may involve a violation of a number of rights guaranteed by the Covenant, such as: article 26, on non-discrimination; article 7, if corporal punishment is imposed in order to enforce such a regulation; article 9, when failure to comply with the regulation is punished by arrest; article 12, if liberty of movement is subject to such a constraint; article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly, article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim.[49]

Putting aside the potential infringements of civil and political rights, the enforcement of the Islamic dress code on Muslim women may adversely affect the enjoyment of their socio-economic rights, such as, right to social security, right to work, right to education, and right to health, especially when it prevents them from going outside of their home. In addition, as indicated above, forced veiling is often associated with domestic violence, harassment, unjustified criminalisation and sexual abuse.[50] One can therefore persuasively argue that the imposition of a compulsory dress code and enforcing it in an arbitrary manner may have a profound impact on Muslim women's enjoyment of human rights. For reasons of

[49] HRC, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)* UN Doc. CCPR/C/21/Rev.1/Add.10 (29 March 2000) para 13.

[50] Section 7.2.

manageability, this chapter will not address all possible types of violations of human rights that may flow from compulsory veiling. It will focus only on how forced veiling violates the right to respect for one's private life and the FoRB. Before moving on to a more substantive discussion about the human rights implications of compulsory veiling, the 'viewpoints' of Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, is worth mentioning:

> Two rights in the Convention are particularly relevant to [the] debate about [Islamic] clothing. One is the right to respect for one's private life and personal identity (Article 8). The other is the freedom to manifest one's religion or belief "in worship, teaching, practice and observance" (Article 9).[51]

7.4.1. The Right to Respect for Private Life

This sub-section investigates the implications of compulsory veiling for the enjoyment of the right to respect for one's 'private life' as guaranteed in Article 8 of the Convention.

Before moving on to a detailed discussion about Article 8 of the Convention, some remarks on Article 17 of the ICCPR are necessary.[52] Article 17 guarantees the right

[51] Thomas Hammarberg, *Human Rights in Europe: No Grounds for Complacency* (Strasbourg: Council of Europe Publishing, 2011) 39.

[52] Article 17 states:

> '1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

to privacy. Privacy is an 'umbrella term'.[53] As far as the Covenant is concerned, the meaning of privacy for the purposes of Article 17 has not been thoroughly defined in either the HRC's General Comment or the case law. In *Coeriel and Aurik v The Netherlands*, Committee member Kurt Herndl admitted that '[t]he Committee itself has not really clarified the notion of privacy … in its General Comment on article 17 where it actually refrains from defining that notion.'[54] Some Commentators, however, have made an attempt to define the concept of privacy under the ICCPR. For instance, in their commentary on the Covenant, Sarah Joseph et al have stated that 'the right to privacy comprises freedom from unwarranted and unreasonable intrusions into activities that society recognises as belonging to the realm of personal autonomy.'[55] Privacy has also been defined as 'the right to be left alone'.[56] Article 17 prohibits interferences with privacy which are 'unlawful' and 'arbitrary'. In its General Comment no. 16 on the right to privacy, the HRC has stated that "the term 'unlawful' means that no interference can take place except in cases

2. Everyone has the right to the protection of the law against such interference or attacks.'

[53] Oliver Diggelmann and Maria Nicole Cleis, 'How the Right to Privacy Became a Human Right' (2014) 14 Human Rights Law Review 441, 442.

[54] Communication No. 453/1991, UN Doc. CCPR/C/52/D/453/1991 (1994).

[55] Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford- New York: OUP, 2004) 476-477 citing S.E. Wilborn 'Revising the Public/Private Distinction: Employee Monitoring in the Workplace' (1998) 23 Georgia Law Review 825, 833.

[56] Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1890) 4(5) Harvard Law Review 193, 195.

envisaged by the law."[57] The prohibition on 'arbitrary' interferences with privacy incorporates the concept of 'reasonableness' into Article 17.[58] In *Toonen v Australia*, the HRC stated that '[t]he Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.'[59]

Unlike Article 8 of the ECHR, Article 17 of the Covenant does not include the term 'private life'. However, after analysing the *Travaux Preparatoires* of both the ICCPR and the ECHR, commentators have argued that the term 'private life' under Article 8 was used as a synonym for 'privacy'.[60] In *X v Iceland*, the EComHR stated that "the right to respect for 'private life' is the right to privacy….".[61] As the ICCPR does not explicitly use the expression 'respect for private life', legal analysis in this sub-section will primarily highlight on Article 8 of the Convention. However, the analysis of this sub-section about 'private life' may equally be applied in relation to the 'right to privacy' within the meaning of Article 17 of the ICCPR. For reasons of clarity, it is worth noting that Article 8 of the Convention does *not* apply to non-European countries like Afghanistan, Iran, and Somalia because these countries have not signed up to the ECHR.[62] For non-European countries, Article 17 of the ICCPR would

[57] HRC, *General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, UN Doc. HRI/GEN/1/Rev.9 (Vol.1) (8 April 1988) para 3.

[58] Sarah Joseph et al (n 55) 483.

[59] Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994) para 8.3.

[60] Diggelmann and Cleis (n 53) 457. See also M.J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht- Boston-Lancaster: Martinus Nijhoff, 1987) 339-347.

[61] App no. 6825/74 (ECHR, 18 May 1976).

[62] The ECHR applies to 47 CoE Member States only.

apply provided that they have ratified the Covenant. The following discussion of this section will only focus on Article 8 of the ECHR.

The protection of 'private life' under the Convention operates within the framework of Article 8, which states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 protects against unjustified interferences into people's lives in sense of guarding an individual's private space. It is considered to be one of the most open-ended provisions of the Convention because none of its terms are precisely defined. In *Wright v Secretary of State for Health*, Justice Stanley Burton commented that Article 8 is the 'least defined and most unruly of the rights enshrined in the Convention.'[63] Similarly, Paul Johnson writes, Article 8 is subject to criticism because 'it lacks clarity and discipline.'[64]

[63] [2006] EWHC 2886 (Admin) para 66.

[64] Paul Johnson, *Homosexuality and the European Court of Human Rights* (Abingdon- New York, 2013) 94.

What is the definition of 'private life'? The notion of 'private life', as the ECtHR itself states, 'is a broad term not susceptible to exhaustive definition.'[65] However, through the case-law, the Convention organs have provided some guideline as to the meaning and ambit of 'private life' within the meaning of Article 8. In a recent case, *Paradiso and Campanelli v Italy*, the ECtHR stated that:

> [T]he notion of 'private life' within the meaning of Article 8 of the Convention is a broad concept which does not lend itself to exhaustive definition. It covers the physical and psychological integrity of a person and, to a certain degree, the right to establish and develop relationships with other human beings. It can sometimes embrace aspects of an individual's physical and social identity. The concept of private life also encompasses the right to 'personal development' or the right to self-determination.[66]

The ECtHR has emphasised that the 'notion of personal autonomy is an important principle underlying the interpretation of the guarantee afforded by Article 8.'[67] In *Bruggemann & Scheuten v Germany*, the EComHR stated that the 'right of respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality.'[68] Commentators have argued that the Convention organs interpret Article 8 as providing the right to personal autonomy, identity and integrity, together with imposing positive obligations on the state, even for actions for private individuals.[69]

---

[65] *Pretty v The United Kingdom* App no. 2346/02 (ECHR, 29 April 2002) para 61.

[66] App no. 25358/12 (ECHR, 24 January 2017) para 159.

[67] *Gillan and Quinton v The United Kingdom* App no. 4158/05 (ECHR, 12 January 2010) para 61; *Gough v The United Kingdom* App no. 49327/11 (ECHR, 28 October 2014) para 183.

[68] App no. 6959/75 (ECHR, 12 July 1977) para 55. See also *Shtukaturov v Russia* App no. 44009/05 (ECHR, 27 March 2008) para 83.

[69] N.A. Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-Examination' (2008) 1 European Human Rights Law Review 44, 44-79; Jill Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and*

Similarly the UN has stated that 'the right to privacy … extends to the right to personal autonomy/self-determination'.[70]

It is noteworthy that, Article 8 ECHR imposes both negative and positive obligations on States. In *Evans v The United Kingdom*, the ECtHR stated:

> Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life.[71]

The remaining discussion of this section examines how forced veiling infringes the right to respect for one's private life.[72]

7.4.1.1. A Woman's Choice as to Her Desired Appearance: An Expression of Personality and Individual Identity

Personal choices as to an individual's desired appearance, whether in public or private, relate to an expression of personality and an exercise of autonomy, and thus fall within the ambit of 'private life' under Article 8. A great deal of the ECtHR

Integrity under the European Convention on Human Rights (Leiden: Martinus Nijhoff Publishers, 2009); Alexia Sabbe et al., 'Forced Marriage: An Analysis of Legislation and Political Measures in Europe' (2014) 62 Criminal Law Soc Change 171, 181.

[70] 'The Human Right to Privacy: A Gender Perspective', UN Doc. A/HRC/40/63 (2019) para 40.

[71] App no. 6339/05 (ECHR, 10 April 2007) para 75. See also *Odievre v France* App no. 42326/98 (ECHR, 13 February 2003) para 40.

[72] It is worth noting that the discussion in this Chapter regarding Article 8 applies to forced unveiling also. (On this point, see Section 5.6, Chapter Five).

cases demonstrate that Article 8 is frequently invoked where an individual's choice concerning their appearance is forcefully overridden by a private individual or by the State. In these cases, the ECtHR has found an interference with the right to respect for private life under Article 8. An overview of the ECtHR's Article 8 jurisprudence on the desired appearance is given in the next two paragraphs.

In *Sutter v Switzerland*,[73] Mr Peter Sutter was given ten days imprisonment for refusing to comply with military service regulations relating to haircuts. He kept his hair longer than authorised and refused to comply with the officer's order to have it cut. Mr Sutter complained that his right to respect for private life, as guaranteed in Article 8 of the Convention, was infringed because the regulations on haircuts prevented him from wearing his hair as he chose. In its admissibility decision, the EComHR acknowledged that the application of the regulations 'undoubtedly … might make it impossible for the applicant … to have his hair cut according to his own tastes and thus adversely affect the way in which he expresses his personality.'[74] Another important, recent ECtHR case concerning the freedom to determine one's personal appearance is *Birzietis v Lithuania*,[75] where it gave a remarkable judgement in relation to an individual's personal choices as to their desired appearance. In this case, the applicant, who was serving a prison sentence at the Marijampole Correctional Facility, was prohibited from growing a beard by the internal rules of the Facility. Relying on Article 8, the applicant complained that the prohibition on growing a beard constituted a violation of his right under the Convention. In finding a violation of Article 8 by Lithuania, the ECtHR concluded

[73] App no. 8209/78 (ECHR, 1 March 1979).

[74] ibid, para 1. See also *Popa v Romania* App no. 4233/09 (ECHR, 18 June 2013).

[75] App no. 49304/09 (ECHR, 14 June 2016).

that 'the applicant's decision on whether or not to grow a beard was related to the expression of his personality and individual identity, protected by Article 8 of the Convention.'[76] Furthermore, in *Tig v Turkey*,[77] a case concerning the prohibition on wearing a beard by a university student at Kocaeli University, the applicant, relying on Article 8, complained of an infringement of his right to respect for private life, attributable to the university authorities. In its admissibility decision, the ECtHR took the view that private life, within the meaning of Article 8, covers the physical integrity of the person. The Court admitted that the wearing of the beard was an aspect of the applicant's physical appearance which was part of his private life, and the prohibition on carrying a beard could have the effect of impairing physical integrity as an interference with the exercise of the right to respect for private life. Similarly, in an UN case, *Clement Boodoo v Trinidad and Tobago*, the HRC found that the forced shaving off of the author's beard constituted 'an attack on his privacy' and, as a consequence, it amounted to a violation of Article 17 of the ICCPR.[78]

An individual's choice of clothing, is an expression of their personality and thus falls under the concept of the private life. Although in *S.A.S.*, France submitted that Article 8 was not applicable,[79] the ECtHR stated that 'personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life.' The Court further stated that restrictions on her 'choice of clothing' amounted to 'an interference with the right to respect for private life within the meaning of

[76] ibid, para 58.

[77] App no. 8165/03 (ECHR, 24 May 2005).

[78] Communication No. 721/1996, U.N. Doc. CCPR/C/74/D/721/1996 (2002) para 6.7.

[79] App no. 43835/11 (ECHR, 1 July 2014) para 84.

Article 8 of the Convention.'[80] Furthermore, in *Paul KARA v The United Kingdom,*[81] the applicant was a bisexual male transvestite and used to wear female clothing. The reason for dressing in this way was to give expression to his identity and sexuality which he regarded as 'the innate feminine aspects of his personality'. His employer, the Hackney Council, instructed him not to wear female clothing at work. He argued that the Council's dress code policy prevented him from wearing a chosen dress at work and this constituted an arbitrary interference with his private life under Article 8. The EComHR, in its admissible decision, stated that 'constraints imposed on a person's choice of mode of dress constitute an interference with the private life as ensured by Article 8 para. 1 of the Convention'.[82]

Based on the above case law, it can be strongly argued that a Muslim woman's choice as to her desired appearance relates to the expression of her personality and individual identity and thus fall within the notion of 'private life'. Loucaides notes, to interpret the right to respect for private live as guaranteed in Article 8 of the Convention, the Strasbourg Court has 'gone beyond the established traditional meaning of private life and ha[s] extended this meaning to cover a wide range of elements and manifestations of the individual's personality, supporting the view that private life should be considered as co-extensive with the needs of the personality.'[83] It is therefore argued that the right to respect for one's private life under Article 8 secures to the individual a sphere within which they can freely pursue the development and fulfilment of their personality. Wearing (or not

[80] ibid, para 107.

[81] App no. 36528/97 (ECHR, 22 October 1998).

[82] ibid, para 2.

[83] L.G. Loucaides, 'Personality and Privacy under the European Convention on Human Rights' (1990) 61(1) British Yearbook of International Law 175, 197.

wearing) a specific type of dress is an individual's mode of personal presentation. Coercing a Muslim woman into wearing Islamic dress or forcing her not to present herself in public by wearing the western-style dress substantially limits the possibility of expressing her personality and individual identity through the choice of clothes. As Marshall argues, legally regulating what a Muslim woman can or cannot wear 'misrecognises her and disrespects her identity or personality … as an individual person capable of subjectively interpreting her own identity or personality as she sees fit.'[84] Thus, one can conclude that forcing a Muslim woman, against her will, to present herself by wearing religious clothing is an oppression on her personal appearance, and it adversely affects the way in which she expresses her personality and individual identity. It is therefore submitted that the enforcement of the Islamic dress code on Muslim women, who prefer not to wear traditional Islamic clothing, may constitute an infringement of their right to respect for private life under Article 8 of the Convention.

One specific matter merits some discussion. It must be noted that not all personal choices as to an individual's desired appearance in public deserve protection within the meaning of Article 8. In this context, *Gough v The United Kingdom*,[85] a case concerning the 'firmly held belief in the inoffensiveness of the human body', is worth noting. In this case, the ECtHR established that 'Article 8 cannot be taken to protect every conceivable personal choice … [T]here must presumably be a *de minimis* level of seriousness as to the choice of desired appearance in question.'[86]

[84] Jill Marshall, *Human Rights Law and Personal Identity* (London- New York: Routledge, 2014) 206; Jill Marshall, 'The Legal Recognition of Personality: Full-face Veils and Permissible Choices' (2014) 10 International Journal of Law in Context 64, 64-65.

[85] *Gough* (n 67).

[86] ibid, para 184.

The Court held that to determine whether the requisite level of seriousness has been reached with regard to the personal choice in question, it would take into account the presence or absence of support for such choices in other democratic societies in the world.[87] Applying the ECtHR's reasoning in *Gough* as to the *de minimis* level of seriousness to the Muslim women's choice of 'not' to wear the Islamic veil, it can be reasonably argued that there is a widespread support in most liberal democratic societies that a woman must not be coerced into wearing the Islamic veil or other religious symbols against her will. In other words, there exists a *de minimis* level of seriousness as to the choice of *not* to wear a veil, and therefore, the choice not to don the veil, which is a mode of personal appearance, deserves protection within the meaning of Article 8.

7.4.1.2. Personal Autonomy and a Woman's Choice Not to Wear the Veil: The Context of Private Life

According to the ECtHR's well-established case law, '[u]nder Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual'.[88] In *Jehovah's Witness of Moscow and Others v Russia*, the ECtHR explicitly admitted that "'private life' is a broad term encompassing the sphere of personal autonomy".[89] Therefore, it is safe to argue that the right to respect for private life under Article 8 encompasses the right to have an autonomous sphere of life. 'The right to private life', as Jaunius Gumbil et

[87] ibid.

[88] *Christine Goodwin v The United Kingdom* App no. 28957/95 (ECHR, 11 July 2002) para 90.

[89] App no. 302/02 (ECHR, 10 June 2010) para 117.

al. argue, 'can be described using different terms, for example, a right to choose'.[90] It is therefore submitted that the right to personal autonomy and to free choice is guaranteed by Article 8 of the Convention within the meaning of the 'the right to respect for private life'.

A woman's ability to exercise a conscious and considered choice regarding the way of dressing is an intimate aspect of her personal life and accordingly, relates to her right to self-determination. In *Parrillo v Italy*, a case concerning the Article 8 right, Judge Sajo stated that a woman's 'right to self-determination reflects her right to personal autonomy and freedom of choice.'[91] When an adult woman chooses to wear a specific dress -- be it the bikini or the burkini -- she has her own personal reason for her preference. The wearing or not wearing a clothing of 'religious' affiliation by an individual is fundamentally a personal, intimate choice about their religion, body and life, and as a consequence, falls under the ambit of their 'private life'.[92] It is therefore argued that with regard to a Muslim woman's choice of clothing, State actors or non-State actors should not prevent her from doing what she would like to do or require her to do something she would rather not do. McBeath, Nolan and Rice have argued that the requirement to wear a specific item of clothing is 'an unjustified incursion into the private sphere' within the meaning of the right to respect for private life.[93] The forcible imposition of the Islamic dress

[90] Jaunius Gumbis et al., 'Do Human Rights Guarantee Autonomy?'(2008) Cuadernos constitucionales de la Catedra fabrique Furio ceriol 77, 78.

[91] *Parrillo v Italy* App no. 46470/11 (ECHR, 27 August 2015) Dissenting Opinion of Judge Sajo.

[92] In *Evans*, cited above, the ECtHR stated that the right to respect for private life under Article 8 'incorporates the right to respect for both the decisions to become and not to become a parent.' ((n 71) para 71).

[93] Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford: OUP, 2017) 94.

code without the consent of an adult Muslim woman and the enforcement of the dress code in an arbitrary and abusive manner may prevent a Muslim woman from making a personal, private decision about her body and clothing free from external interference, undermine her freedom of choice, and violate her 'real right to personal autonomy'[94] contrary to the right to respect for private life as guaranteed in Article 8 of the Convention. Therefore, this thesis submits that coercing an adult woman into wearing the Islamic veil may constitute a serious violation of the right to respect for her private life under Article 8.

7.4.1.3. Private Social Life and Developing Relationships with Other Human Beings

The concept of 'private life' under Article 8 is not limited to an 'inner circle' in which a person may live their own personal life as they desire and to exclude the outside world: 'respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.'[95] The ECtHR, through its case-law, has established that Article 8 encompasses the right for each person to approach others in order to establish and develop relationships with them and with the outside world, that is, the right to a 'private social life'. In *Barbulescu v Romania*, the ECtHR took the view that "Article 8 guarantees a right to 'private life' in the broad sense, including the right to lead a 'private social life', that is, the possibility for the individual to develop his or her social identity. In that respect, the right in question enshrines the possibility of approaching others in

[94] See *Leyla Sahin v Turkey* App no. 44774/98 (ECHR, 29 June 2004) Dissenting opinion of Judge Tulkens, para 12.

[95] *Niemietz v Germany* App no. 13710/88 (ECHR, 16 December 1992) para 29.

order to establish and develop relationships with them."[96] The protection of 'private life' under Article 8 therefore, as the ECTHR has stated in *Von Hannover v Germany*, 'extends beyond the private family circle and also includes a social dimension.'[97] In *Uzan v Germany*, the ECtHR confirmed that there is "a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'."[98]

To fully examine the human rights implications of mandatory veiling, it is important to evaluate the impact of the enforcement of a compulsory Islamic dress code on the 'private social life' of Muslim women who are obliged against their will to comply with the prescribed dress code. It is submitted that the use of coercive power to force women to wear the Islamic veil may adversely affect an unveiled, modern, educated Muslim woman's ability to establish and develop meaningful, autonomous relationships with other human beings. A law or regulation that coerces women, on pain of sanctions, into manifesting their religious affiliation publicly through the wearing of the religious dress may have the effect of generating *self-imposed* pressure on unveiled women to stay at home. To this end, women, who consider veils as unessential or even contrary to their convictions, may be segregated from the wider society or the outside world if they stop going to educational institutions for study, or stop going to workplaces[99] to work, and stay

[96] App no. 61496/08 (ECHR, 5 September 2017) para 70. See also *Bigaeva v Greece* App no. 26713/05 (ECHR, 28 May 2009) para 22; *Botta v Italy* App no. 153/1996/772/973 (ECHR, 24 February 1998) para 32.

[97] App no. 59320/00 (ECHR, 24 June 2004) para 69.

[98] App no. 35623/05 (ECHR, 02 September 2010) para 43. See also *Peck v The United Kingdom* App no. 44647/98 (ECHR, 28 January 2003) para 57.

[99] The ECtHR, in relation to 'private social life', has repeatedly stated that 'it is in the course of their working lives that the majority of people have a significant, if not the greatest,

away from the public places in order to preserve their liberty of not to be the subject of unjustified coercion. As discussed in Chapter Three based on empirical findings, Muslim women who habitually wear a veil in public places at their daily life state that they will live a *less* social life if they are prohibited form wearing the veils, because they will not feel at ease without a veil in certain circumstances.[100] The same conclusion can be drawn in relation to women who are not habituated to wearing religious attire in their daily life. Presumably, women who do not habitually wear the Islamic veil or who have just started donning the veil against their wishes in order to comply with the Islamic dress code will not feel at ease in public spaces with a veil. So, forced veiling may adversely pressurise these women to stay at home, leading to their exclusion from the social sphere of society and cut off contact with other human beings. It is therefore safe to argue that the enforcement of a compulsory Islamic dress code may have profound effects on some Muslim women's ability to develop autonomous human relationships. One can therefore strongly argue that State or family imposed pressure on Muslim women to wear Islamic veils may infringe a woman's right to respect for her private life under Article 8 by preventing her from making or developing relationships with other human beings and the outside world.

To summarise the above discussion regarding the impact of forced veiling on the 'right to respect for private life', the enforcement of a compulsory Islamic dress code on a Muslim woman, who does not want to wear a veil, impairs her physical integrity, limits her ability to dress in a manner which she perceives as expressing

---

opportunity to develop relationships with the outside world.' (*Barbulescu* (n 96) para 71; *Niemietz* (n 95) para 29).

[100] See Section 3.5.

her personality and identity, curtails her personal autonomy, impedes her ability to establish and develop relationships with other human beings and the outside world, and as a consequence, constitute an interference with her right to respect for her private life under Article 8 of the Convention. Therefore, this thesis submits that coercing a Muslim woman into wearing the Islamic veil may amount to a violation of her right to respect for her private life under Article 8. To date, the Strasbourg Court has not decided any case where an applicant complained that she had been coerced into wearing a veil by her family member or State actors or non-State actors. However, one can reasonably presume that if the ECtHR considers any such case in future, it will surely find a violation of the right to respect for private life under Article 8 of the Convention as a result of restrictions concerning appearance unless the respondent State shows that the strict requirement to wear a veil is justified on permissible grounds of interference (e.g. the protection of health). With regard to policies requiring Muslim women to wear Islamic veils, Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, states that '[w]omen should be free to choose how to dress, without interferences neither from their communities nor from state authorities.' He further states:

> Rightly, we react strongly against any regime ruling that women must wear these garments … This would be an ill-advised invasion of individual privacy and would raise serious questions about its compatibility with international human rights standards.[101]

[101] See "'Rulings anywhere that women must wear the burqa should be condemned - but banning such dresses here would be wrong' says Commissioner Hammarberg" <https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/-rulings-anywhere-that-women-must-wear-the-burqa-should-be-condemned-but-banning-such-dresses-here-would-be-wrong-says-commissioner-hammarberg?redirect=%2Fsk%2Fweb%2Fcommissioner%2Fblog%3Fp_p_id%3D101_INST

The following sub-section provides a legal analysis of how forced veiling infringes the FoRB guaranteed in Article 9 of the Convention and Article 18 of the ICCPR.

7.4.2. The Right to Freedom of Religion or Belief

7.4.2.1. Prohibition of Coercion

Religious freedom embraces the absence of coercion. Article 18(2) of the ICCPR states that '[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.'[102] In its General Comment, the HRC has stated that Article 18(2) 'bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert.'[103] The UN Special Rapporteur, Asma Jahangir, gives further explanation: "the term 'coercion' [under Article 18(2)] is to be broadly interpreted and includes the use of threat of physical force or penal sanctions by a State to compel believers or non-believers to adhere to their religious beliefs … as well as policies and practices having the same intention or effect."[104] While Article 9 of the ECHR does not explicitly include a

---

ANCE_xZ32OPEoxOkq%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D1%26_101_INSTANCE_xZ32OPEoxOkq_delta%3D5%26_101_INSTANCE_xZ32OPEoxOkq_keywords%3D%26_101_INSTANCE_xZ32OPEoxOkq_advancedSearch%3Dfalse%26_101_INSTANCE_xZ32OPEoxOkq_andOperator%3Dtrue%26p_r_p_564233524_resetCur%3Dfalse%26_101_INSTANCE_xZ32OPEoxOkq_cur%3D28&inheritRedirect=true&desktop=true> accessed 4 March 2018.

[102] See also Section 1(2) of the 1981 Declaration.

[103] HRC, *Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion*) UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) para 5.

[104] UN Doc. A/HRC/6//5 (20 July 2007) para 9.

provision equivalent to Article 18(2) of the Covenant, the ECtHR in its Article 9 jurisprudence has established that an individual must not be subject to coercion that would impair their right to hold or change a belief of their choice. For instance, in a recent case, *Mockute v Lithuania*, the ECtHR held that 'a State cannot … take coercive steps to make [an individual] change his beliefs.'[105] Thus, it can be deduced that private individuals, State actors, and non-State actors cannot coerce an individual to act in a manner contrary to their religious conviction or compel them to carry out a religious activity against their will. Otherwise, it may constitute an unjustified interference with their religious liberties.

7.4.2.2. The Negative Aspect of Freedom to Manifest One's Religious Beliefs

As elucidated in Chapter One, Article 18 ICCPR and Article 9 ECHR both encompass the right *not* to manifest one's religion or belief.[106] The negative aspect of the right to manifest religion needs to be elaborated here. Religious freedom includes a negative right, that is to say the freedom not to have a religion and not to practice it.[107] Article 9 prevents a State from forcibly imposing obligations on an individual to act in a manner which offends their religious beliefs, unless these obligations are necessary in a democratic society. An important ECtHR case in relation to the freedom *not* to manifest the religion is *Sinan Isik v Turkey* where the Court recognised 'the principle of freedom not to manifest one's religion or belief'.[108] In this case, the applicant stated that he was a member of the Alevi religious community. He complained that he had to carry a government issued identity card

[105] App no. 66490/09 (ECHR, 27 February 2018) para 119.

[106] See Section 1.4.1.

[107] *Alexandridis v Greece* App no. 19516/06 (ECHR, 21 February 2008) para 32.

[108] App no. 21924/05 (ECHR, 2 February 2010).

on which his religion was indicated as Islam despite that he was not a follower of this religion. Relying on, *inter alia*, Article 9, he also complained that he was obliged to disclose his beliefs on his identity card, a public document that was used frequently in daily life. The ECtHR stated, '[t]he Court will examine this case from the angle of the negative aspect of freedom of religion and conscience, namely the right of an individual not to be obliged to manifest his or her beliefs.'[109] It held that 'the right to manifest one's religion or beliefs also has a negative aspect, namely an individual's right not to be obliged to disclose his or her religion or beliefs and not to be obliged to act in such a way that it is possible to conclude that he or she holds – or does not hold – such beliefs.'[110] The ECtHR went on to say that 'requiring the applicant to disclose his religious beliefs against his will every time he uses [the identity card] … is undoubtedly at odds with the principle of freedom not to manifest one's religion or belief.'[111] Consequently, it found a violation of Article 9 by Turkey. On the question of forced veiling, the 'right not to manifest religion or belief' implies that a Muslim woman cannot be forced to manifest her religion through the wearing of the Islamic veil. If a Muslim woman does not want to manifest her religious affiliation publicly by wearing religious dress, then forcing her to do so contravenes 'the principle of freedom not to manifest one's religion or belief', and this may in turn constitute a violation of her FoRB under human rights law.

[109] ibid, para 41.

[110] ibid, para 41.

[111] ibid, paras 50 & 52. On the 'negative' aspect of the freedom to manifest one's religious beliefs, see also *Buscarini and Others v San Marino* App no. 24645/94 (ECHR, 18 February 1994).

7.4.2.3. The Enforcement of a Compulsory Islamic Dress Code on Women: A Serious Violation of the Right to Freedom of Religion

As indicated in Chapter Two under the heading of 'Religious Freedom and Personal Autonomy', the notion of personal autonomy justifies the protection of religious freedom.[112] As Vickers writes, 'the case for protecting religious interests [is] based on the notion of autonomy'.[113] Personal autonomy goes to the very heart of the FoRB. The international, regional and domestic courts have identified the concept personal autonomy as one of the central questions for religious freedom.[114]

Indeed, the FoRB imposes an obligation on States to ensure that no pressure is exerted upon an individual to perform religious or belief activities against their will. An obligation on an individual to act contrary to their belief prevents them from exercising autonomy over their religious affairs. The ECtHR holds that the FoRB, as guaranteed in Article 9 of the ECHR, 'primarily protects the sphere of personal beliefs'.[115] In *Jehovah's Witnesses of Moscow*, cited above, the ECtHR held that a State 'must advance serious and compelling reasons for an interference with the choices that people may make in pursuance of the religious standard of behaviour within the sphere of their personal autonomy.'[116]

---

[112] Section 2.5.

[113] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford-Portland: Hart Publishing 2008) 39. See also Benjamin L. Berger, 'Law's Religion: Rendering Culture' (2007) 45(2) Osgoode Hall Law Journal 277, 294.

[114] See Section 2.6, Chapter Two.

[115] *Van Den Dungen v the Netherlands* App no. 22838/93 (ECHR, 22 February 1995).

[116] (n 89) para 119.

Compelling an individual to carry out a religious activity against their will is equivalent to forcing them to act in a manner contrary to their religious conviction. As far as religious rights are concerned, if an individual is compelled to a particular course of action or inaction which they would not otherwise have chosen, they are not acting of their own volition and they cannot be said to be truly free and autonomous in their religious affairs.[117] To discuss the prohibition of coercion in one's religious affairs, Nihal Jayawickrama argues, 'coercion includes not only … blatant forms of compulsion as direct commands to act or to refrain from acting on pain of sanction, but also indirect forms of control which determine or limit alternative courses of conduct available to others.'[118] If a Muslim woman is pressured into wearing the Islamic veil, then she is not only prevented from exercising control over her own body, but also compelled to act in a manner contrary to her conscience. This may constitute a violation of her religious freedom. It is widely accepted that no one should be forced to act against one's conscience or penalised for refusing to act against one's conscience; and, in this context, the HRC's rich jurisprudence on conscientious objection to perform 'compulsory' military service on religious grounds is worth noting. In a large number of cases concerning compulsory military service, the HRC has stated that 'repression of the refusal to be drafted for compulsory military service, exercised against person whose conscience or religion prohibits the use of arms' contravenes Article 18 of the ICCPR. In these cases, the HRC has recognised that religious freedoms 'must not be impaired by coercion.'[119] Based on the HRC's reasoning, one can reasonably

[117] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, para 95.

[118] Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge: CUP, 2002) 656.

[119] *Dovran Bahramovich Matyakubog v Turkmenistan,* Communication no. 2224/2012, UN Doc. CCPR/C/117/D/2224/702 (2012) para 7.7; *Eu-min Jung et al. v The Republic of Korea*,

argue that forcing a Muslim woman to comply with the compulsory Islamic dress code may constitute a violation of her religious freedom because she is forced to engage in a course of action (i.e. donning the veil) which cannot be reconciled with her conscience due to the fact that she either does not believe in Islamic standards of modesty or does not want to adhere to the Islamic standards of modesty in dress.

The liberal conception of personal autonomy, as Emily Jackson argues, 'is not necessarily limited to a right to be free from unwanted intrusion, but instead is rooted in the idea that individuals should be able to pursue their own goals according to their own values, believes and desires.'[120] As an autonomous person, every adult woman should have the right to determine whether she would manifest her religious affiliation publicly, and if so, then in what manner. Unless her choice harms others, the State has no authority whatsoever to intrude on her choice in religious affairs. In the landmark case of *Kokkinakis v Greece*, in relation to Article 9 of the ECHR, Judge Martens stated that 'the State is bound to accept that in principle everybody is capable of determining his fate in the way that he deems best'.[121] Forcible imposition of a religious dress code prevents a woman from acting in accordance with her own preferences and beliefs, precludes her from freely direct and govern the course of her (religious) life, and thereby harms her personal autonomy. Therefore, it is submitted that coercing a Muslim woman into wearing

---

Communications nos. 1593 to 1603/2007, U.N. Doc. CCPR/C/98/D/1593-1603/2007 (2010) para 7.4; *Matkarim Aminov v Turkmenistan,* Communication no. 2220/2012, UN Doc. CCPR/C/117/D/2220/2012 (2016) para 9.7; *Young-kwan Kim et al. v The Republic of Korea*, Communication no. 2179/2012, UN Doc. CCPR/C/112/D/2179/2012 (2014) para 7.4.

[120] Emily Jackson, 'Abortion, Autonomy and Prenatal Diagnosis' (2000) 9 Social & Legal Studies 464, 468-469.

[121] App no. 14307/88 (ECHR, 25 May 1993) Partly dissenting opinion of Judge Martens, para 15.

the Islamic veil diminishes her autonomy and, as a consequence, it may constitute an unjustifiable interference with her FoRB.

It is also arguable that the enforcement of a compulsory Islamic dress code on Muslim women imposes a substantial burden on the religious practice of many Muslim women, especially those who do not wear a veil for various reasons. A substantial burden on religious practice is one which, as the US Supreme Court states, puts 'substantial pressure on an adherent to modify his behaviour.'[122] A practical consequence of a mandatory veiling law is that those Muslim woman, who practice their religion Islam but do not wear a veil or do not believe that veiling is mandated by Islam, are compelled to wear a veil. Thus, the enforcement of the Islamic dress code imposes disproportionate burden on many Muslim women who may be confronted with a dilemma of either living with their convictions or risking sanctions. It is therefore argued that the requirement of wearing a veil creates a direct or indirect burden on the free exercise of many Muslim women's religious freedom, and this may in turn constitute a violation of religious liberty under human rights framework.

By enacting legislation a State cannot legitimately compel Muslim women to wear traditional Islamic dress on pain of criminal sanctions. If a State enacts such a law, it will highly likely contravene the FoRB since individuals have the freedom from compulsory religious practice. With regard to State-imposed obligations to wear the Islamic veil and the use of power by the police to enforce such a dress code, Lazreg asserts, '[t]he state supervision and control of women's dress and bodies is

[122] *Thomas v Review Board* [1981] 450 U.S.707, 716.

not only humiliating but also inhumane. … This is the most blatant abuse of power.'[123] In *Robertson and Rosetanni v The Queen*, a case from the Supreme Court of Canada, Judge Cartwright stated that '[i]n my opinion a law which compels a course of conduct, whether positive or negative, for a purely religious purpose infringes the freedom of religion'.[124] This follows that States, through legislation, should not compel the observance of religious duty by means of penalties. There is a parallel here to the treatment of the mandatory swearing of religious oaths. In *Buscarini and Others v San Marino*,[125] the ECtHR found that requiring the applicants to take an oath on the Gospels under the Elections Act (Law no. 36 of 1958) amounted to an unjustified limitation of their religious freedom because it required them to swear allegiance to a particular religion on pain of forfeiting their parliamentary seats. By stating that the freedom under Article 9 'entails, *inter alia*, freedom … not to practise a religion'[126], the ECtHR concluded that the obligation 'to take the oath on the Gospels had been tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion, a requirement which was not compatible with Article 9 of the Convention'.[127] Sunday observance laws have also been treated as a form of impermissible form of State-imposed, coerced religious practice as the well-known decision of the Supreme Court of Canada in *R v Big M Drug Mart Ltd* shows. The facts of this case arose because the respondent was charged with unlawfully carrying on the sale of goods on a Sunday contrary to the Lord's Day Act. The Supreme Court found that the

[123] Marina Lazreg, *Questioning the Veil: Open Letters to Muslim Women* (New Jersey: Princeton University Press, 2009) 74.

[124] [1963] SCR 651, 660.

[125] (n 111).

[126] ibid, para 34.

[127] ibid, para 39.

Lord's Day Act infringed the freedom of religion by enforcing mandatory religious observance. It held that the 'definition of freedom of conscience and religion' under the Canadian Charter 'incorporate[d] freedom from compulsory religious observance.[128] Arguably, the reasoning of the courts in the cases above can equally be applied to legislation or national policies which compel Muslim women to wear traditional Islamic dress and thus impose a serious and unnecessary burden on the observance of religious practice. It is therefore argued that any law, purely religious in purpose, which compels Muslim women to wear Islamic veils may constitute an infringement of their religious freedom under human rights law.

Similarly, family members and religious leaders cannot legitimately coerce an individual to affirm a specific religious belief or to manifest that belief publicly by wearing religious attire. According to the HRC, religious freedom, 'protected by article 18, … must not be constrained by, *inter alia*, rules requiring permission from third parties, or by interference from fathers, husbands, brothers or others'.[129] Therefore, it is safe to argue that forcible imposition of the Islamic dress code on Muslim women by male family members or religious leaders infringes FoRB of these women since such mandatory religious observance put undue hardship upon the free exercise of their religion and harms their personal autonomy. One other matter requires some attention here. Islamic religious leaders may be offended by the sight of an uncovered Muslim woman in Western dress, nevertheless the forcible imposition of the Islamic dress code on Muslim women to protect the 'religious sensibilities' of the religious leaders is unjustified. In this context, the ECtHR's Gay Pride jurisprudence is worth exploring. The Court has correctly stated that public

[128] (n 117) para 128.

[129] *General Comment No. 28* (n 49) para 21.

officials could not rely on 'religious feelings' of others to prohibit Gay Pride marches. For instance, in *Alekseyev v Russia*, the Russian authorities prohibited the Gay Pride marches in Moscow due to the opposition of 'three major religious faiths – the Church, the Mosque and the Synagogue'. In this case, the ECtHR held that bans on the Gay Pride marches on account of 'negative attitudes towards homosexuality' of the majority people arising from 'religious or moral beliefs' was not a legitimate interest that the State could invoke to prohibit the marches. Therefore, the ECtHR unanimously held that there had been a violation of the Convention by Russia under Article 11.[130] It is also arguable that, as discussed previously, if an action does not cause another person's perceptible damage apart from generating mere emotional disturbance or feeling of offensiveness, then a society cannot justifiably use its coercive power to constrain individual liberty under Mill's harm principle.[131]

What emerges from the above is that coercion to force Muslim women to adhere to a compulsory Islamic dress code offends their personal autonomy. Furthermore, the enforcement of such a strict dress code may impose disproportionate burden on the exercise of their religious freedom freely. It is therefore argued that the imposition and enforcement of a compulsory Islamic dress code on Muslim women seriously conflicts with freedom of religion, and as a consequence, may constitute a serious violation of the FoRB under human rights law. The following three fictitious examples will bolster this argument.

[130] App nos. 4916/07, 25924/08 and 14599/09 (ECHR, 21 October 2010). See also *Genderdoc-M v Moldova* App no. 9106/06 (ECHR, 12 June 2012).

[131] See Section 3.6, Chapter Three.

Example 1: Ashley is an adult *Christian* woman who works in an industry as an engineer. Ashley has recently married to a Muslim man without converting to Islam. She still actively practices her own religion and does not intend to practice her husband's religion. Ashley is forced by her Muslim husband to wear the *burqa* while she goes to work. This intervention may amount to a violation of her religious freedom because- (a) the wearing of the *burqa* has nothing to do with her religion Christianity, and (b) her husband forcefully commands a purely religious course of conduct that she does not want to engage with. A real case can be used to further elaborate this example. In *Ojunye v Adegbudu*, a Nigerian widow, who had adopted Christianity after having married under Idoma native law and custom, submitted that she could not be forced to offer a goat demanded of her by custom for burial sacrifice on the death of her husband because as a Christian she could not be a party to the sacrifice. The High Court stated that '[w]e wish to explain for the guidance of lower courts that no court, authority or person has the power to compel anybody to practise what is not recognized or allowed by his religion'.[132] In this context it is noteworthy that, as the HRC states, it constitutes a violation of the FoRB under the ICCPR 'when women are subjected to clothing requirements that are not in keeping with their religion'.[133]

Example 2: Salma, a practising *Muslim* woman, is a film star. However, she does not reveal the fact to the outsiders that she is a Muslim as she feels that the disclosure of her religious convictions to others may adversely

[132] (1983) 4 N.C.L.R. 492.

[133] *General Comment No. 28* (n 49) para13.

affect her career in the film industry. She never manifests her religious beliefs publicly through the wearing of religious symbols or in any other way. Local religious leaders force her, against her will, to wear the *hijab* in public places. This interference may amount to a violation of her religious freedom since the wearing of the *hijab* in public spaces, in effect, will expose her religious convictions. In *Dimitras and Others v Greece*, the ECtHR found that the obligation to reveal one's religious convictions when taking the oath in the court as a witness, complainant or suspect during criminal proceedings constituted a violation of Article 9. It was held that the 'freedom to manifest one's religious beliefs included an individual's right not to reveal his faith or his religious beliefs and not to be obliged to act or refrain from acting in such a way that it was possible to conclude that he did or did not have such beliefs'.[134]

Example 3: Athena is an *atheist*. She is a teacher in a primary school which is funded by the government. Athena starts wearing the *hijab* against her wishes because her country has recently enacted legislation which compels all female teachers and pupils, regardless of their personal convictions and religious beliefs, to wear the *hijab* in the classroom. The governmental intervention to compel religious manifestation through the wearing of the *hijab* may constitute a violation of Athena's religious freedom under the human rights framework, because the law forces her to comply with a purely 'religious' course of action which she would not otherwise have done. It does not matter that her personal conviction is atheism. The FoRB

[134] *Dimitras and Others v Greece* App nos. 42837/06, 3269/07 and 6099/08 (ECHR, 3 June 2010) para 78. See also *Alexandridis* (n 107).

> under international human rights law protects the believers and non-believers alike.[135] It is the nature of the freedom, not the status of the individual, that is the determinative factor. The ECtHR has acknowledged that the FoRB under Article 9 of the Convention is 'a precious asset for atheists, agnostics, sceptics and the unconcerned.'[136] Similarly, the HRC states, 'Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.'[137]

Based on the above legal analysis and examples, one may come to the conclusion that forced or involuntary veiling, where the absence of free consent of the wearer is the key matter of concern, may constitute a serious violation of the FoRB under Article 9 of the Convention or Article 18 of the ICCPR. It is also arguable that the enforcement of the Islamic dress code against Muslim women clearly runs counter to the liberal view that competent individuals are autonomous agents who should be allowed to choose their own life paths and to govern their (religious) lives in accordance with their own values, beliefs and preferences.

7.4.2.4. Religious Freedom and the Positive Obligations of the State

As far as the FoRB is concerned, a positive obligation is incumbent on domestic authorities to protect an individual so that they can peacefully manifest their religion without unjustified outside interference. This has been confirmed by the ECtHR in a number of cases including *Papavasilakis v Greece*[138] and *Vartic v*

[135] *Buscarini* (n 111) para 34.

[136] *Kokkinakis* (n 121) para 31.

[137] *General Comment No. 22* (n 103) para 2.

[138] App no. 66899/14 (ECHR, 15 September 2016) para 66.

Romania (no. 2).[139] On the question of the 'negative' aspect of the right to manifest one's religion, the 'positive obligation' of the State implies that the government must not unjustifiably coerce an individual to perform acts against their will because of the religious significance of those acts to the State or others. In other words, States have a positive obligation not to compel people the observance of religious practice. The State authorities are required to respect one's right (not) to manifest one's religion by refraining from intruding into the exercise of this right, and if necessary, adopt affirmative actions to facilitate the free exercise of this right. The government must fulfil these positive obligations even where the interference is committed by private individuals (e.g. religious leaders) or religious organisations (e.g. extremist groups) and thus is not directly attributable to the respondent State. In *Begheluri and Others v Georgia*, the ECtHR stated that '[w]here the acts complained of [are] carried out by private individuals and [are] not therefore directly attributable to the respondent State, the Court must consider the issues in terms of the positive obligation on the State authorities to secure the rights under Article 9 to those within their jurisdiction.'[140]

Similarly, the UN Special Rapporteur, Asma Jahangir, has emphasised that a State 'has the positive obligation of ensuring the freedom of religion or belief of the persons on its territory and under its jurisdiction.' She further states that Article 18 of the ICCPR entails a positive obligation for the State to protect religious freedoms

[139] App no. 14150/08 (ECHR, 17 March 2014).

[140] App no. 28490/02 (ECHR, 7 October 2014) para 160. See also *Siebenhaar v Germany* App no. 18136/02 (ECHR, 3 February 2011).

for members of religious minorities so that they 'can practice the religion or belief of their choice free from coercion and fear.'[141]

Based on the above discussion, it is argued that that States have a positive obligation to ensure that women, one of the most vulnerable segments of the society, are able to effectively enjoy their religious freedom. According to the HRC's General Comment, '[t]he State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.'[142] If a woman is forced, against her will, by a public authority or private individual or religious group to adhere to the compulsory Islamic dress code then the State must step forward to protect her against physical and psychological coercion and take effective actions to ensure that her religious freedom is safeguarded in practice. Therefore, one can conclude that various forms of positive obligations are automatically imposed upon government when women are compelled to wear veils against their will. The question is: what steps should be taken by a State to ensure that Muslim women are not coerced into wearing Islamic veils? This will be explored in Chapter Eight.

7.5. What Do The UN and the CoE Say about Forced Veiling?

It must be noted that both the UN and the CoE have taken the view that the use of coercive power to compel girls and women to wear traditional Islamic dress to comply with the Islamic values is unacceptable and undesirable. Both institutions

[141] UN Doc. A/60/399 (30 September 2005) paras 52-53. See also UN Doc. A/HRC/6//5 (20 July 2007) para 9.

[142] *General Comment No. 28* (n 49) para 3.

have equally emphasised that the enforcement of a compulsory Islamic dress code on women violates the principles of international human rights law.

In his 1998 report, the UN Special Rapporteur on FoRB, Abdelfattah Amor, expressed his concerns as to the imposition of the religious dress code by the Taliban regime in Afghanistan. He observed that women were among those who suffered most from the extremism of the Taliban Government due to 'the obligation to wear what is described as Islamic dresses.'[143] It should be noted that the Taliban planned to issue a decree whereby, based on their interpretation of the Sharia law, non-Muslims would be required to wear a distinctive emblem on their clothing. Amor sent an urgent appeal to the supreme chief of the Taliban, asking him not to issue the decree 'because of its discriminatory nature'.[144]

With regard to the societal pressure on Muslim women to wear the Islamic veil, the UN Special Rapporteur Asma Jahangir reported that some women in Gaza 'felt coerced into covering their heads not out of religious conviction but out of fear'. In this context, she stressed on the importance of securing the negative freedom from being coerced into wearing or displaying religious symbols.[145] Angelo Vidal d'Almeida Ribeiro, the former Special Rapporteur of the Commission on Human Rights, expressed his concerns in his 1993 report as to the forced veiling in Sudan because Christian women were reportedly forced to wear the *hijab* in public places.[146] More recently, the UN Special Rapporteur in the field of cultural rights,

[143] UN Doc. E/CN.4/1998/6 (22 January 1998) para 60.

[144] UN Doc. A/56/253 (31 July 2011) para 30.

[145] UN Doc. A/HRC/10/8/Add.2 (12 January 2009) para 64.

[146] UN Doc. E/CN.4/1993/62 (6 January 1993) para 57.

Karima Benneoune, has condemned the imposition of 'modest' dress code on women by fundamentalist groups.[147]

Furthermore, the UN Special Rapporteur Asma Jahangir emphasised the protection of 'the negative freedom from being forced to display religious symbols'. She stated that 'special attention should be paid to the protection of women's rights, in particular in the context of wearing the full head-to- toe veil.'[148] In a thematic report on 'religious symbols', Asma Jahangir stated that the '[u]se of coercive methods and sanctions applied to individuals who do not wish to wear a religious dress or a specific symbol seen as sanctioned by religion' indicates 'legislative and administrative actions which typically are incompatible with international human rights law'.[149]

In similar fashion to the UN, the organs of the CoE have taken the view that the enforcement of a compulsory Islamic dress code on women violates the principles of human rights law. Two rapporteurs of the CoE, Michael McNamara and Meritxell Mateu, have both condemned the 'modest dress-code'[150] or the 'imposition of religious rules on clothing for women and girls'[151] in the Chechen Republic because the leaders of the Chechen republic required them 'to dress according to Islamic rules'.[152] Furthermore, the Parliamentary Assembly of the CoE, in its resolution

[147] (n 35) para 73.

[148] UN Doc. A/65/207 (29 July 2010) para 34.

[149] UN Doc. E/CN.4/2006/5 (9 January 2006) para 55.

[150] (n 5) para 36.

[151] ibid, para 38.

[152] Committee on Legal Affairs and Human Rights, 'Compatibility of Sharia law with the European Convention on Human Rights: can States Parties to the Convention be signatories of the 'Cairo Declaration'?' Doc. 13965 (27 January 2016) para 56.

1464 (2005) on 'Women and religion in Europe', has called on Member States to 'ensure that the freedom of religion and the respect for culture and tradition are not accepted as a pretext to justify violations of women's rights, including when underage girls are forced to submit to religious codes (including dress codes).'[153] Likewise, in his 'viewpoints', the CoE Commissioner for Human Rights, Thomas Hammarberg, stated that any policy which requires women to wear Islamic veils 'is in clear contravention of the Convention … and is unacceptable'.[154]

7.6. Concluding Remarks

In conclusion, the compulsory wearing of Islamic veils has increasingly become a pressing legal issue. The Russian Republic of Chechnya's official policy requiring the adherence to a strict Islamic dress code for women, and the failure of the federal Government of Russia to outlaw this policy, demonstrates that the political and popular debate surrounding compulsory veiling is not confined to Islamic countries, but it has spread in European countries. However, this issue is very much under-researched in current academic literature. As discussed above, coercion to wear traditional Islamic garments can come from three different sources: male family members; fundamentalist religious groups; and, the State. Thus, there are a number of ways in which the pressure can be exercised. Forced or involuntary veiling is a human rights abuse, violating many human rights principles. Due to the scope of the thesis, this chapter has focused only on the right to respect for private life and on the FoRB.

[153] Doc. 10670 (16 September 2005) para 7.4.

[154] Hammarberg (n 51) 40.

As argued above, adopting an Islamic dress code targeted at Muslim women, and enforcing it in an arbitrary and abusive manner, deprives women who do not want to wear an Islamic veil of the possibility of styling themselves according to their own choices and preferences, undermines their way of expressing their personality, and limits their ability to create and develop relationships with other human beings and the outside world. Therefore, this chapter has concluded that the enforcement of a compulsory Islamic dress code on Muslim women may infringe the right to respect for private life under Article 8 of the Convention.

While the FoRB has a 'positive' aspect, i.e. the freedom to manifest one's religion without unjustified limitations, it also has the 'negative' aspect of the freedom not to be exposed to any pressure to carry out belief activities against one's will. The negative aspect of the FoRB becomes relevant in situations where religious dress codes are forcefully imposed on individuals by State or non-State actors.[155] With regard to religious freedom, as the Supreme Court of Canada has pointed out in *R v Big M Drug Mart Ltd*, what 'the United Nations Covenant and the European Convention have in common is a guarantee that no person shall be subjected to oppression or repression on religious grounds, or be compelled to conform to religious cult, doctrine or belief.'[156] This chapter has argued that coercion to force a Muslim woman to adhere to the compulsory dress code limits a Muslim woman's ability to carry out her religious activities freely without unwanted intrusion, curtails her personal autonomy in her religious affairs, and imposes a disproportionate burden to exercise religious freedom freely. Therefore, it is been concluded that coercing a

[155] (n 13) 158.

[156] (n 117) para 30.

Muslim woman to wear the Islamic veil against her will may violate her FoRB as guaranteed in Article 9 of the Convention and Article 18 of the ICCPR.

If one admits that the FoRB is 'one of the foundations of a democratic society'[157] then forcible imposition and enforcement of a strict compulsory religious dress code on women does not make any sense. The ability of each individual to make free and informed decisions in their own religious affairs is the key to religious freedom. Arguably, the best way in which a society can protect and promote a Muslim woman's right (not) to manifest her religion or belief is to do no harm, and leave it for her to decide whether, if at all, to wear the Islamic veil, and to honour her autonomous decisions about her values, preferences and beliefs. One must never forget that the value of respect for personal autonomy requires *respect*, at least in the sense of non-interference, which Barilan has characterised as 'the right to be left alone',[158] for every choice made by free, adequately informed, and mentally competent person.

[157] *Kokkinakis* (n 121) para 31.

[158] Y. Michael Barilan, 'Respect for Personal Autonomy, Human Dignity, and the Problems of Self-Directions and Botched Autonomy' (2011) 36 Journal of Medicine and Philosophy 496, 497.

CHAPTER EIGHT: CONCLUSION

> 'Respecting [an individual's] equal human dignity and equal human rights means giving them space to carry out their conscientious observances, even if we think that those are silly or even disgusting. Their human dignity gives them the right to be wrong.'
>
> - Martha Nussbaum[1]

This study has made a significant original contribution to the existing knowledge on the Islamic veiling debates in Europe. This chapter concludes the thesis, highlighting the originality and significance of this research.

The most distinguishing feature of this study is that it has centred on the concept of personal autonomy and Millian liberalism to analyse the debates on Islamic veiling. From the standpoint of Mill's harm principle, this thesis has examined whether social cohesion, public safety and security, and gender equality are valid arguments or legitimate grounds to ban the voluntary wearing of Islamic veils.[2] This research has offered an extensive comparative analysis on the different approaches the UN and the ECtHR have taken regarding legal bans on wearing the Islamic veil.[3]

---

[1] Martha Nussbaum, 'Beyond the Veil: A Response' (*The New York Times*, 15 July 2010) <http://opinionator.blogs.nytimes.com/2010/07/15/beyond-the-veil-a-response/?_r=0> accessed 19 May 2019.

[2] At the same time, it has examined whether, and if so, then to what extent and under what conditions, a legislative ban on Islamic veiling on these grounds may satisfy the Convention standards. See chapters Three to Six.

[3] See Section 6.2, Chapter Six.

Based on the findings of the comparative analysis, this thesis has analysed what lessons the Convention organs can take from the UN bodies to give effective protection to the right to religious manifestation of Muslim women who wish to manifest their religion through the wearing of Islamic veils.[4] This is therefore unique research as it is the first study of its kind and thus, demonstrates an original contribution to knowledge.

Although some human rights organisations have expressed their concerns about forced veiling, no endeavour had been made before to fully analyse the implications of forced veiling on human rights. This is problematic because, until forced veiling is thoroughly examined, popular and political debates concerning Muslim veiling will be largely uninformed or indeed, misinformed. This thesis has thoroughly analysed the impact of forced veiling on the right to respect for private life[5] and on religious freedom.[6] By analysing the veiling practices in different countries, this study has identified the different ways in which (Muslim) women in the contemporary world are coerced into wearing the Islamic veil.[7] Thus, this research is significant as it is factual and comprehensive, and therefore beneficial to wider conversations and debates relating to Islamic veiling.

As outlined in Chapter One, proponents of the Islamic veil bans commonly cite three justifications: the protection of social cohesion or living together; the protection of public safety and security; and, the advancement of gender equality.[8]

[4] See Section 6.3, Chapter Six.

[5] See Section 7.4.1, Chapter Seven.

[6] See Section 7.4.2, Chapter Seven.

[7] See Section 7.2, Chapter Seven.

[8] See Section 1.3.

These justifications have been critically examined in Chapters Three, Four and Five respectively from the viewpoint of Mill's harm principle, which stipulates that as long as an individual's actions do not harm or threaten to harm others, no interference with those actions is justified, and from the point of view of European human rights law. As indicated previously, the harm principle draws a dividing line between a self-regarding action and an other-regarding action: purely self-regarding actions are always exempted by the harm principle from potential interference by the society, however, liberty may legitimately be limited in relation to an other-regarding action if it is injurious to others.[9] Accordingly, it has been submitted that social cohesion and gender equality are *not* convincing arguments to ban the voluntary wearing of Islamic veils. In contrast, it has been argued that the protection of public safety and security may be a legitimate ground and valid argument to ban the wearing of full-face veils, namely, the *burqa* and *niqab*, because of the risk that some individuals may wear these garments to disguise their identity and to conceal explosives, and thus may cause significant harm to others by injuring their important interests or rights. It has been further argued that these findings mirror those when the social cohesion, public safety and security, and gender equality arguments are examined through the lens of European human rights law, in particular whether, veil bans can be justified under Article 9(2) of the Convention. Whereas bans on wearing the Islamic veil on the grounds of social cohesion or gender equality may *not* satisfy the ECHR standards, a different conclusion has been reached in relation to the public safety argument.

[9] See Section 2.2, Chapter Two.

That conclusion nonetheless requires qualification as has been pointed out in Chapter Four.[10] The 'interests of public safety' is enumerated as a permissible ground of limitation in the limitation clause of Article 9 of the Convention. However, to satisfy the proportionality criterion, there must be tangible evidence which suggests that allowing individuals to wear full-face veils endangers public safety. An abstract assumption, not based on sound evidence, is insufficient to ban Islamic veiling. This thesis noted that in the parliamentary debates leading up to the Islamic full-face veil bans in Belgium and France, the public safety argument was invoked not only as an argument of objective safety, but also as one of *subjective* safety. It was stated that the sight of a veiled Muslim women generates feelings of insecurity among members of the majority population.[11] Similar concerns were raised by some Dutch politicians who stated that the 'clothing that covers the face causes unacceptable feelings of insecurity among the general public.'[12] By reference to the ECtHR's case law and to Mill's harm principle, this thesis has submitted that the majority's subjective feeling of insecurity when encountering an individual wearing the Islamic veil or the majority's feeling of offensiveness by the sight of a Muslim woman in veil, in itself, is not sufficient to regulate the wearing of Islamic veils. In *Vajnai v Hungary*, the ECtHR concluded that 'a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognized

[10] See Section 4.4.2.

[11] Parliamentary Documents of the House of Representatives, Session 2010-2011, Plenary Assembly (CRIV 53 PLEN 030) 55; Eva Brems, '*SAS v France*: A Reality Check' (2016) 25 Nottingham Law Review 58, 66.

[12] See Natasha Bakht, 'Veiled Objections: Facing Public Opposition to the Niqab' in Lori G. Beaman (ed), *Reasonable Accommodation: Managing Religious Diversity* (Vancouver: UBC Press, 2012) 86.

in a democratic society, since the society must be reasonable in its judgment.'[13] As far as Millian liberalism is concerned, the harm principle denies society the authority to legally regulate those conduct which cause nothing more than mere emotional distress. As discussed previously, mere dislike, feelings of offensiveness or subjective feeling of insecurity do not constitute harm in itself because harm is never properly defined to include mere emotional distress without any evidence of other damage.[14] This thesis has submitted that if an individual's faith activities do not cause another person's perceptible damage apart from generating mere emotional disturbance, then a society cannot use its coercive power to intrude on their action under Mill's harm principle.

Moreover, this thesis has indicated that blanket, nation-wide criminal prohibitions on wearing Islamic veils, such as those currently enacted in France and Belgium, may not fulfil the proportionality test if a specific, tailor-made ban could achieve the objective(s) perused.[15] In other words, a *higher* level of scrutiny of the legitimacy of the restriction is needed to justify a 'blanket' ban. However, a pragmatic ban, which is limited to a specific situation or context, will highly be likely to satisfy the proportionality test if the restrictive measure is adopted to pursue a valid legitimate aim.

This thesis has submitted that any limitation on Muslim women's right to manifest their religion through the wearing of Islamic veils must be the exception and *not* the rule. As the right to manifest one's religion is a qualified right, as opposed to an

[13] App no. 33629/06 (ECHR, 8 July 2008) para 57.

[14] See Section 2.2, Chapter Two. See also Section 3.6, Chapter Three.

[15] See Section 4.4.2, Chapter Four.

absolute right, a State can legitimately limit this right in order to protect the interests of other individual(s) or for the general interests of the wider society.[16] In other words, a State can limit a Muslim woman's right to manifest her religion in order to prevent the 'harm' of others or of the society. However, limitations cannot be legitimate unless they satisfy all the criteria as set out in Article 9(2) of the Convention. They must serve a legitimate purpose from the 'exhaustive list' of permissible grounds as enumerated in the limitation clause. By virtue of the principle of proportionality, a State must adopt the least intrusive measure to pursue the legitimate objective. The limitation must be applied in a non-discriminatory manner and with a non-discriminatory purpose. The burden of proof is on the State to demonstrate convincingly that the limitation is absolutely necessary. This thesis has argued that regulating the wearing of the Islamic veil must be a *matter of last resort*.

This research has acknowledged that there are various negative stereotypical perceptions about Islamic veiling and Muslim women. As indicated in Chapter Five, the stereotypical idea that Islamic veiling is an oppressive practice which reflects the subordination of Muslim women to men, motivates opponents of the Islamic veil to argue that bans on wearing Islamic veils are necessary for the protection of gender equality.[17] This thesis has argued that Muslim women adopt veils for a diverse range of motives.[18] There are undoubtedly some Muslim women who are directly coerced into wearing the Islamic veil by their male family members or who

[16] Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 1997) 18.

[17] See Section 5.1, Chapter Five.

[18] See Section 5.2, Chapter Five.

feel tremendous pressure to wear a veil against their own convictions. However, as argued in Chapter Five, based on the empirical findings of a number of available sociological studies conducted in various European countries, in *most* cases, Muslim women who wear the veil do so willingly and voluntarily as part of their religious journey or as an expression of their adherence to the Muslim faith.[19] Therefore, this thesis has concluded that the popular, Western stereotypical supposition that all Muslim women who wear the veil are coerced into doing so is erroneous.[20] When a court deals with a complaint on the ban on wearing the Islamic veil it should duly take into account the views and experiences of the individual applicant applying an autonomy-based approach, rather than abstract assumptions about a religious practice. The spread of negative stereotypes about religion and religious practice damages the relationship between different communities and puts individuals belonging to minority communities in a vulnerable situation. By stating that the 'stereotypical perceptions can lead to a depersonalization of the human person' which 'goes against the spirit and the letter of human rights [that] empower human beings to express their convictions, views and interests freely', the UN Special Rapporteur, Heiner Bielelfeldt, has stated that States 'are obliged to develop effective strategies to eliminate stereotypes, including gender-related stereotypes and stereotypical images of persons based on their religion or belief.'[21]

This thesis has emphasised that legislative bans on wearing Islamic veils *harm* Muslim women. The use of criminal law in the enforcement of the ban against the Islamic veil may have a profound effect on an observant Muslim woman who holds

[19] ibid.

[20] ibid.

[21] UN Doc. A/68/290 (7 August 2013) para 43.

a genuine belief that her tenets of Islam require her to wear Islamic veils (or modest dress) in public. It may pressurise her to avoid public places and to stay at home, so leading to harm by exclusion from educational institutions, employment, and the public sphere of social life.[22] Does a ban help those Muslim women who are coerced into wearing the veils by their male family members? No. For women who are compelled to wear Islamic veils, wearing the veil is a pre-requisite for them to go out of their house.[23] A ban on veiling may further deteriorate these women's vulnerability because it may have some unwanted, unpleasant consequences over which they have little control, such as, loss of employment, and becoming financially dependent on the family members.[24] It is further arguable that it makes little sense to emancipate some oppressed victim women who are forced to wear veils by forbidding the vast 'majority' of Muslim women from donning the veil who voluntarily wear the veil. Prohibiting all Muslim women from wearing the veil in order to emancipate a few oppressed veil-wearing women would be analogous to prohibiting marriage altogether because some girls experience forced marriage.

One of the distinguishing features of this study is that it has critically analysed the 'divergent' approaches that the ECtHR and the UN bodies have taken as to legal bans on wearing Islamic veils.[25] This thesis has also explored the lessons the ECtHR can learn from the UN to give effective protection to the right to religious manifestation of veil-wearing Muslim women.[26] Chapter Six concluded that in directly analogous cases, while the HRC has found that restrictions on wearing the

[22] See Section 5.5, Chapter Five.

[23] See Section 3.5, Chapter Three.

[24] See Section 5.5, Chapter Five.

[25] See Section 6.2, Chapter Six.

[26] See Section 6.3, Chapter Six.

religious dress justified by reference to either living together or secularism contravene Article 18 of the ICCPR, the ECtHR, has deferred to the States' MoA declining to find an infringement under Article 9 of the Convention. Moreover, in its examination of proportionality of the bans on Islamic veiling, the UN and the Convention organs have taken divergent approaches on some procedural questions, such as the burden of proof, the consideration of the discriminatory effect of the anti-veil law, and the application of the least restrictive means test. Likewise, whereas the UN has given special emphasis on the free choice of the individual wearer, the ECtHR, in upholding blanket bans on wearing Islamic full-face veils in France and Belgium, has stated that these bans are justifiable as a 'choice of society'.[27] Thus, the ECtHR has given priority to the 'choice of society' over the choice of the individual applicant.

The ECtHR provides 'very weak protection … to Muslim women and girls wishing to manifest their religion thorough the wearing of the headscarf or face veil',[28] and this is clearly evident from the comparative analysis between the approaches of the ECtHR and the UN concerning legal bans on Islamic veiling. Based on the findings of comparative analysis, this thesis has submitted that the ECtHR can take some useful lessons from the UN to protect the religious freedoms of persons belonging to minority religions and to improve the quality of its rulings. This study has suggested that the ECtHR, in its Article 9 cases concerning bans on Islamic veils, should carry out a more rigorous proportionality test between the aim allegedly pursued (e.g. living together, public safety) and the infringement or harm caused to the individual

[27] See Section 3.7, Chapter Three.

[28] Peter Cumper and Tom Lewis, 'Empathy and Human Rights: The Case of Religious Dress' (2018) 18 Human Rights Law Review 61, 63.

applicant. This thesis has submitted that when considering complaints concerning bans on wearing the Islamic veil, the ECtHR should use the MoA doctrine in a systematic way. Most importantly, the ECtHR should accord a 'narrow' MoA, as opposed to a broad MoA, to Member States in examining whether the ban on wearing the Islamic veil is necessary in a democratic society. It has been argued that the rationale is two-fold for not giving the States a broader MoA in relation to legal regulations on wearing Islamic veils. Firstly, the ECtHR, in its case law has established that 'the State has a narrow margin of appreciation and must advance serious and compelling reasons for an interference with the choices that people may make in pursuance of the religious standard of behaviour within the sphere of their personal autonomy.'[29] Secondly, although an increasing number of European States have adopted legislative bans on wearing Islamic veils, the majority of CoE States do not prohibit the wearing of the Islamic veil. Thus, there exists a consensus that the wearing of Islamic veils by Muslim women should *not* be regulated, and as a result, the States should not be afforded a broad margin on the question of banning Islamic veils. This thesis has made specific suggestions as to how the ECtHR can improve its proportionality test to examine the proportionality of a ban on wearing Islamic veils and other religious symbols under Article 9(2) of the Convention,[30] thus demonstrating an addition contribution to knowledge.

As indicated in Chapter Three, the ECtHR jurisprudence has repeatedly stated that 'whether or not it should be permitted to wear the full-face veil constitutes a choice

[29] *Jehovah's Witnesses of Moscow & Others v Russia* App no. 302/02 (ECHR, 10 June 2010) para 119.

[30] See Section 6.3, Chapter Six.

of society'.[31] This is a worrying development because it indicates that the ECtHR has recognised that the *unease* of the majority when confronting with a veil-wearing woman takes priority over the religious freedoms and autonomous choices of the adherents of minority religions.[32] From the perspective of personal autonomy, the 'choice of society' criterion is problematic because it paves the way for the forcible imposition of majoritarian preferences on Muslim women about what to wear and how to behave in public. Moreover, it undermines the core ideal of the principles of pluralism and tolerance, which require that we tolerate the religious practices or faith activities of others even when we disapprove of them. Tolerating (and respecting) non-majority beliefs and unpopular religious groups are indispensable for pluralism in a democratic society. Parekh argues, at the heart of multicultural society lies the requirement of tolerance.[33] As the European societies continue to become increasingly multicultural, a free and democratic society must tolerate unpopular and non-dominant religious practices (provided that these do not harm others) even though they are perceived as strange or even shocking to the majority population. One of the central arguments of this thesis is that protection of Muslim women's right to manifest their religious affiliation publicly through the wearing of Islamic veils must occur -- if need be -- even against the beliefs of the followers of *mainstream* religions or against the *majority's* feeling of discomfort or emotional disturbances, which may allegedly be caused by the sight of a Muslim woman in the

[31] *S.A.S. v France* App no. 43835/11 (ECHR, 1 July 2014) para 153; *Belcacemi and Oussar v Belgium* App no. 37798/13 (ECHR, 11 July 2017) para 53; *Dakir v Belgium* App no. 4619/12 (ECHR, 11 July 2017) para 56.

[32] See Section 3.7, Chapter Three.

[33] Bikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Harvard University Press, 2000) 362.

Islamic veil. Otherwise, human rights protection for religious freedoms will become an empty shell, because minority rights will be at the mercy of the majority.

Liberals hold that the religious freedom 'is among the most important of the human freedoms and must be given a very strong degree of priority in the basic structure of a political regime.'[34] Religion is a tremendously important part of an individual's life. By carrying out the faith activities freely in accordance with one's own preferences, tastes and beliefs, an individual may find inner peace and happiness. This thesis has argued that wherever possible, a liberal democratic State should accommodate the manifestation of religious belief of persons belonging to religious minorities because the manifestation of their belief is an important aspect for their everyday life and identity. Understandably, it may not always be possible for the accommodating party to accommodate every request or religious need of an individual with regard to the outward manifestations their religious belief; but if it is possible to accommodate, then they should not unreasonably refuse accommodation. When is it possible to accommodate the beliefs of a person belonging to minority religion, and when is non-accommodation justifiable? As Robert Wintemute argues, if the particular manifestation of religious beliefs itself causes no harm to others, *and* the requested accommodation involves minimal cost, inconvenience or disruption to the accommodating party, *and* the requested accommodation will cause no harm to others, then it is possible to accommodate the religious beliefs of minorities and non-accommodation cannot be justified.[35]

[34] Martha C. Nussbaum, *Sex and Social Justice* (Oxford: OUP, 1999) 81.

[35] Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77(2) Modern Law Review 223, 228-229.

Therefore, it can be reasonably argued that if the disruption or administrative burden to accommodate a Muslim woman's request to manifest her religion through the wearing of the Islamic veil is too great which renders the accommodation 'impracticable', then the non-accommodation is justified. However, in the absence of 'harm' to others or 'undue hardship' to the accommodating party, her request to wear the Islamic veil should be granted and it would be difficult to justify non-accommodation. Mill's commitment to general welfare of the society suggests that he would argue that if there exists clear evidence which indicates that accommodating a Muslim woman's request to wear the Islamic veil (e.g. the request of a female Covid-19 patient to allow her to wear the *burqa* in the hospital instead of medical masks or other protective equipment) would cause harm to another individual who did not consent or to the wider society, then non-accommodation is justified.

As indicated previously, while the FoRB has a 'positive' component, i.e. freedom to manifest one's religion or belief freely without unjustified limitations, it also has the 'negative' component, which is, the freedom not to be coerced into carrying out religious or belief activities against one's own will.[36] The 'fundamental objective' of the State, as the UN Special Rapporteur Asma Jahangir points out, 'should be to safeguard both the positive freedom of religion or belief as manifested in observance and practice by voluntarily wearing or displaying religious [clothing and] symbols, and also the negative freedom from being forced to wear or display religious [clothing and] symbols.'[37]

[36] See Section 1.4.1, Chapter One.

[37] UN Doc. E/CN.4/2006/5 (9 January 2006) para 60.

One of the distinctive features of the current study is that it has explored, in greater detail, the implications of the hereinto under-explored question of the forced or involuntary veiling of Muslim women on their right to respect for private life and the FoRB. Coercing a Muslim woman into wearing the Islamic veil undoubtedly offends her right to personal autonomy and to free choice. As argued in Chapter Seven, enforced adherence to a compulsory Islamic dress code restricts a woman's ability to dress in a manner which she perceives as expressing her personality and identity, impairs her physical integrity and limits her ability to establish and develop meaningful, autonomous relationships with other human beings.[38] As a consequence, forced veiling may constitute a violation of her right to respect for her private life under Article 8 of the Convention. Chapter Seven has further argued that policies requiring Muslim women to wear Islamic veils may limit a Muslim woman's ability to carry out her faith activities freely without unwanted intrusion, undermine her personal autonomy in her religious affairs, and impose undue hardship on the exercise of her religious freedom freely, and as a consequence, may breach her FoRB under Article 9 of the Convention (or Article 18 of the ICCPR).[39] This study has identified that the coercion of (Muslim) women to wear Islamic dress may come from three different sources: family members; religious leaders and extremist groups; and, the State.[40] Based on Mill's harm principle, this thesis has argued that the 'feeling of offensiveness' of the religious leaders or the followers of fundamentalists groups, who believe that the Quran has mandated that Muslim women must wear Islamic veils or modest dress, by the sight of an uncovered

[38] See Section 7.4.1.

[39] See Section 7.4.2.

[40] See Section 7.2, Chapter Seven.

Muslim women in Western-style dress cannot be a justifiable ground to coerce them into abandoning the western-style dress and/or adopting Islamic veils. [41]

This thesis has submitted that the enforcement of the compulsory Islamic dress code on Muslim women is a serious wrong. In *Hebbadj*, the HRC stated that pressurising a Muslim woman into wearing the full-face veil is a 'serious offence'.[42] As indicated in Chapter Seven, a State has 'positive' obligations under international human rights law to safeguard religious freedom of those individuals living under its jurisdiction and to ensure that individuals are not compelled to carry out belief activities against their will.[43] The government must fulfil these positive obligations even where the interference is committed by private individuals or religious organisations and thus is not directly attributable to the respondent State. The ECtHR has asserted that States can justifiably take coercive measures if religious choices 'are imposed on the believers by force or coercion, against their will'.[44] What steps should be taken by the States to ensure that Muslim woman and girls are not coerced into wearing Islamic veils? In *Osmanoglu and kocabas v Switzerland*, a recent case concerning the objection to participate in mandatory swimming classes in Swiss public schools on religious grounds, the ECtHR stated that 'positive obligations [of the State] may involve the provision of an effective and accessible means of protecting the rights guaranteed under that provision, including both the provision of a regulatory framework of adjudicatory

[41] See Section 7.2.3, Chapter Seven.

[42] *Mariana Hebbadj v France*, Communication no. 2807/2016, UN Doc. CCPR/C/123/D/2807/2016 (17 July 2018) para 7.15.

[43] See Section 7.4.2.4.

[44] (n 29) para 119.

and enforcement machinery protecting individuals' rights'.[45] This thesis therefore argues that the States should enact criminal legislation to punish those who coerce Muslim women and girls into wearing the Islamic veil against their will.[46] In addition, States should provide an effective remedy by providing financial compensation to women who have been coerced into wearing veils and thus have suffered harm. Furthermore, States should develop and implement strategies, policies and programmes aimed at empowering vulnerable Muslim women who are at greater risk of being oppressed.

Finally, what are the practical solutions to resolve the disputes between the proponents and opponents of the ban on Islamic veiling? There is no single solution that can completely eliminate the tension between Muslim minorities and the pro-ban advocates. Perhaps, in order to create a level playing field, one of the most effective ways forward is consultation between the State representatives and the Islamic groups representing the interests of Muslim women who are usually mostly affected by the legislative bans on veiling. Through consultation or dialogue, an alternative, less restrictive measure may be found or the competing groups may reach a mutually acceptable compromise (e.g. wearing a veil in a different colour other than black, removing the face veils in high security zones for facial recognition). The consultation process may also help the competing groups to determine whether the ban is to be imposed completely, partially, conditionally or exceptionally for the interests of all. It should be stressed that this research is not

[45] App no. 290986/12 (ECHR, 10 January 2017) para 86.

[46] Some European States have already enacted such legislation. For instance, Section 4 of Law no. 2010-1192 has inserted a provision in French Criminal Code which stipulates that any person who coerces an adult women into wearing Islamic full-face veils shall be liable to imprisonment for one year and a fine.

suggesting that concessions must always be made on the part of the majorities or State representatives only. The compromise should also be made on behalf of the minority groups. In *Dogru v France*, the ECtHR emphasised that 'dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals' are necessary for pluralism and a democratic society.[47] One can argue that consultation is particularly important in the sense that religious minorities are usually underrepresented in the legislature.[48] It is also arguable that a dialogue between the State representatives and the Muslim community might help the veil-wearing women to feel that their views are genuinely considered, their autonomous choices are not disrespected, and their interests are taken into account by the decision makers throughout the decision-making process. Although the requirement to consult or maintain a dialogue with minority groups has not been explicitly laid down in the human rights provisions on religious freedom, it might be seen as part of the justification test, because any limitation on carrying out a faith activity must be proportionate. The decision of the House of Lords in *Begum* is worth noting in this context. In this case, 16-year-old Ms Shabina Begum had been excluded from Denbigh High School (79% students at this School categorised themselves as Muslim) because she insisted on wearing the *jilbab* although the School informed her to wear the correct school uniform which included the *shalwar kameez* and the *hijab.* In this case, the School's governing body devised the uniform policy after carrying out an intensive consultation process with parents, pupils, staff and the Imams of three local mosques. They all agreed

[47] App no. 27058/05 (ECHR, 4 December 2008) para 62.

[48] Margaret Levi et al., 'Conceptualizing Legitimacy: Measuring Legitimating Beliefs' (2009) 53 American Behavioral Scientist 354, 360. See also Saila Ouald Chaib and Eva Brems, 'Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe' (2013) 2 Journal of Muslims in Europe 1.

that the *shalwar kameez* and *hijab* were acceptable if the students did not wish to wear the traditional school uniform. In this case, Baroness Hale stated that the School's uniform policy was 'thoughtful and proportionate' because the school tried to devise the 'uniform policy to suit the social conditions in that school, in that town, and at that time'.[49] Commenting on *Begum*, Idriss writes, the fact that the School's uniform, which included the *shalwar kameez* and the *hijab*, was adopted after consultation with various groups 'demonstrates how willing the school was to accommodate religious and cultural diversity.'[50] It is further arguable that through consultation, sometimes pragmatic solution can be achieved to accommodate the specific religious needs of the individual wearer. For instance, in a Swedish case considered by the Equality Ombudsman, a Muslim student wanted to wear the *niqab* in the presence of male students while attending a training programme for pre-school teachers. Her request was accommodated in a pragmatic way: rather than being asked to withdraw from the training, she was allowed to sit at the front of the class where she could remove her *niqab*, and this practical solution prevented the male students from seeing her face.[51]

Much has been written about Islamic veils but the distinctive feature of this study is that it has analysed forced unveiling and forced veiling, two completely different

[49] [2006] UKHL 15, para 98.

[50] Mohammad Mazher Idriss, 'The House of Lords, Shabina Begum and proportionality' (2006) 11(3) Judicial Review 239, 245; Mohammad Mazher Idriss, 'The Defeat of Shabina Begum in the House of Lords' (2006) 27 Liverpool Law Review 429, 435.

[51] Equality Ombudsman, Case 2009/103, 30 November 2010 cited in Erica Howard, *Law and the Wearing of Religious Symbols*: European Bans on the Wearing of Religious Symbols in Education (1st edn, Abingdon- New York: Routledge, 2012) 122. See also David Landes, 'Wrong to ban student with niqab: ombudsman' (*The Local*, 1 December 2010) <https://www.thelocal.se/20101201/30530> accessed 27 July 2020.

stories, simultaneously and with equal importance by centring on the concept of 'personal autonomy'. Muslim women, like other women, should have the right to dress as they choose, and make decisions about their lives in accordance with their own preferences, beliefs and values. A Muslim woman must not be subject to unjustified external interferences, but must, rather, freely direct and govern the course of her life as she sees fit. If a Muslim woman does not want to wear the Islamic veil, she must not be forced to wear one, but if she voluntarily chooses to wear a veil then she should not be prohibited from wearing one. Denying Muslim women the right to wear traditional Islamic dress is as wrong as coercing them to do so. It has been emphasised that the concept of personal autonomy should be *a* central, if not *the* central, concept in relation to the Muslim women's right (not) to manifest religion through the wearing of Islamic veils. The autonomy-based approach advocated throughout the study is pithily expressed by Natasha Walter:

> [I]f we believe in women's self-determination, then we must also respect those choices that are not our own. … [W]e should take a stand against those who would force women to wear the headscarf – and those who force them not to wear it.[52]

[52] Natasha Walter, 'When the Veil Means Freedom – Respect Women's Choices that are Not Our Own, Even if they Include Wearing the Hijab' (*The Guardian*, 20 January 2004).

Appendices

Appendix A: Relevant Applications under the ECHR

Name of the Case	**Religious Symbol in Question**	**Application Inadmissible?**	**Violation of Article 9 ECHR?**	**No Violation of Article 9 ECHR?**
X v United Kingdom (1978)	Sikh turban	✓		
Karaduman v Turkey (1993)	Islamic Headscarf	✓		
Bulut v Turkey (1993)	Islamic Headscarf	✓		
Dahlab v Switzerland (2001)	Islamic Headscarf	✓		
Leyla Sahin v Turkey (2005)	Islamic Headscarf			✓
Phull v France (2005)	Sikh turban	✓		
Kose and Others v Turkey (2006)	Islamic headscarf	✓		
Kurtulmus v Turkey (2006)	Islamic headscarf	✓		

El Morsli v France (2008)	Islamic headscarf	✓		
Mann Singh v France (2008)	Sikh turban	✓		
Dogru v France (2008)	Islamic headscarf			✓
Kervanci v France (2008)	Islamic headscarf			✓
Aktas v France (2009)	Islamic Headscarf	✓		
Bayrak v France (2009)	Islamic Headscarf	✓		
Gamaleddyn v France (2009)	Islamic Headscarf	✓		
Ghazal v France (2009)	Islamic Headscarf	✓		
Jasvir Singh v France (2009)	Sikh Keski	✓		
Ranjit Singh v France (2009)	Sikh Keski	✓		
Ahmet Arslan and Others v Turkey (2010)	Sikh turban, salver (i.e. baggy harem			✓

	trouser), tunic, stick			
Lautsi & Others v Italy (2011)	Crucifix		✓	
Eweida & Chaplin v The UK (2013)	Christian Cross		✓	
S.A.S. v France (2014)	Islamic full-face veil			✓
Ebrahimian v France (2016)	Islamic headscarf			✓
Barik Edidi v Spain (2016)	Islamic headscarf	✓		
Dakir v Belgium (2017)	Islamic full-face veil			✓
Belcacemi and Oussar v Belgium (2017)	Islamic full-face veil			✓
Lachiri v Belgium (2018)	Islamic headscarf		✓	
Hamidovic v Bosnia and Herzegovina (2018)	Islamic skullcap		✓	

Appendix B: Relevant Applications under the UN Human Rights Treaties

Name of the Case	**Religious Symbol in Question**	**Application Inadmissible?**	**Violation of Article 18 ICCPR?**	**No Violation of Article 18 ICCPR?**
Karnel Singh Bhinder v Canada (1989)	Sikh turban			✓
Raihon Hudoyberganova v Uzbekistan (2004)	Islamic headscarf		✓	
Rahime Kayhan v Turkey (2005)[1]	Islamic headscarf	✓		
Shingara Mann Singh v France (2008)	Sikh turban		✓	
Ranjit Singh v France (2011)	Sikh turban		✓	
Bikramjit Singh v France (2013)	Sikh keski		✓	

[1] For reason of clarity it is worth noting, as already pointed out previously, this communication was brought before the CEDAW Committee (not the HRC) under the CEDAW. The author did not exhaust domestic remedies, and therefore, it was declared inadmissible.

F.A. v France (2018)	Islamic headscarf		✓	
Mariana Hebbadj v France (2018)	Islamic full-face veil		✓	
Seyma Turkan v Turkey (2018)	Wig substituting for Islamic headscarf		✓	
Sonia Yaker v France (2018)	Islamic full-face veil		✓	

Table of Cases

European Court of Human Rights/ European Commission of Human Rights

- *Affaire Association des Chevaliers du Lotus d'or v France* App no. 50615/07 (ECHR, 31 January 2013)
- *Ahmet Arslan and Others v Turkey* App no. 41135/98 (ECHR, 23 February 2010)
- *Aktas v France* App no. 43563/08 (ECHR, 30 June 2009)
- *Alekseyev v Russia* App nos. 4916/07, 25924/08 and 14599/09 (ECHR, 21 October 2010)
- *Alexandridis v Greece* App no. 19516/06 (ECHR, 21 February 2008)
- *Arrowsmith v The United Kingdom* App no. 7050/75 (ECHR, 5 December 1978)
- *Ásatrúarfélagið v Iceland* App no. 22897/08 (ECHR, 18 November 2012)
- *Barbulescu v Romania* App no. 61496/08 (ECHR, 5 September 2017)
- *Barik Edidi v Spain* App no. 21780/12 (ECHR, 19 May 2016)
- *Bayrak v France* App no. 14308/08 (ECHR, 30 June 2009)
- *Bayatyan v Armenia* App no. 23459/03 (ECHR, 7 July 2011)
- *Bigaeva v Greece* App no. 26713/05 (ECHR, 28 May 2009)
- *Begheluri and Others v Georgia* App no. 28490/02 (ECHR, 7 October 2014)
- *Belcacemi and Oussar v Belgium* App no. 37798/13 (ECHR, 11 July 2017)
- *Birzietis v Lithuania* App no. 49304/09 (ECHR, 14 June 2016)
- *Botta v Italy* App no. 153/1996/772/973 (ECHR, 24 February 1998)
- *Boyko v Russia* App no. 42259/07 (ECHR, 20 February 2018)
- *Bruggemann & Scheuten v Germany* App no. 6959/75 (ECHR, 12 July 1977)
- *Bulut v Turkey* App no. 18783/91 (ECHR, 3 May 1993)
- *Buscarini and Others v San Marino* App no. 24645/94 (ECHR, 18 February 1999)
- *Campbell and Cosans v The United Kingdom* App no. 7511/76; 7743/76 (ECHR, 25 February 1982)
- *Chassagnou and Others v France* App nos. 25088/94, 28331/95, 28443/95 (ECHR, 29 April 1999)

- *Christine Goodwin v The United Kingdom* App no. 28957/95 (ECHR, 11 July 2002)
- *Church of Scientology Moscow v Russia* App no. 18147/02 (ECHR, 5 April 2007)
- *Cossey v the UK* App no. 16/1989/176/232 (ECHR, 29 August 1990)
- *Dimitras and Others v Greece* App nos. 42837/06, 3269/07 and 6099/08 (ECHR, 3 June 2013)
- *Dahlab v Switzerland* App no. 42393/98 (ECHR, 15 February 2001)
- *Dakir v Belgium* App no. 4619/12 (ECHR, 11 July 2017)
- *D.H. & Others v The Czech Republic* App no. 57325/00 (ECHR, 13 November 2007)
- *Dogru v France* App no. 27058/05 (ECHR, 4 December 2008)
- *Dyagilev v Russia* App no. 49972/16 (ECHR, 10 March 2020)
- *Ebrahimian v France* App no. 64846/11 (ECHR, 26 February 2016)
- *El Morsli v France* App no. 15585/06 (ECHR, 4 March 2008)
- *Evans v The United Kingdom* App no. 6339/05 (ECHR, 10 April 2007)
- *Eweida and Others v The United Kingdom* Apps nos. 48420/10, 59842/10, 51671/10 & 36516/10) (ECHR, 27 May 2013)
- *Feldbrugge v The Netherlands* App no. 8562/79 (ECHR, 29 May 1986)
- *Gamaleddyn v France* App no. 18527/08) (ECHR, 30 June 2009)
- *Genderdoc-M v Moldova* App no. 9106/06 (ECHR, 12 June 2012)
- *Ghazal v France* App no. 29134/08) (ECHR, 30 June 2009)
- *Gillan and Quinton v The United Kingdom* App no. 4158/05 (ECHR, 12 January 2010)
- *Grzelak v Poland* App no. 7710/02 (ECHR, 15 June 2010)
- *Gough v The United Kingdom* App no. 49327/11 (ECHR, 28 October 2014)
- *Hamidovic v Bosnia and Herzegovina* App no. 57792/15 (ECHR, 5 March 2018)
- *Handyside v UK* App no. 5493/72 (ECHR, 7 December 1976)
- *Hashman and Harrup v the United Kingdom* App no. 25594/94 (ECHR, 25 November 1999)
- *Hoffman v Austria* App no. 12875/87 (ECHR, 23 June 1993)
- *Hugh Jordan v The UK* App no. 24746/94 (ECHR, 4 May 2001)

- *Ibragim Ibragimov and Others v Russia* App nos. 1413/08 and 28621/11 (ECHR, 28 August 2018)
- *Jasper v The United Kingdom* App no. 27052/95 (ECHR, 16 February 2000)
- *Jasvir Singh v France* App no. 25463/08 (ECHR, 30 June 2009)
- *Jehovah's Witnesses of Moscow & Others v Russia* App no. 302/02 (ECHR, 10 June 2010)
- *Karaduman v Turkey* App no. 16278/90 (ECHR, 3 May 1993)
- *Kervanci v France* App no. 31645/04 (ECHR, 4 December 2008)
- *Kjeldsen, Busk Madsen and Pedersen v Denmark* App no. 5095/71; 5920/72; 5926/72 (ECHR, 7 December 1976)
- *Kokkinakis v Greece* App no. 14307/88 (ECHR, 25 May 1993)
- *Kose and Others v Turkey* App no. 26625/02 (ECHR, 24 January 2006)
- *Kovalkovs v Latvia* App no. 35021/05 (ECHR, 31 January 2012)
- *Kurtulmus v Turkey* App no. 65500/01 (ECHR, 24 January 2006)
- *Lachiri v Belgium* App no. 3413/09 (ECHR, 18 September 2018)
- *Larrisis and Others v Greece* App no. 22372/94 (ECHR, 14 February 1998)
- *Lautsi and Others v Italy* App no. 30814/06 (ECHR, 18 March 2011)
- *Leyla Sahin v Turkey* App no. 44774/98 (ECHR, 29 June 2004)
- *Malone v United Kingdom* App no. 8691/79 (ECHR, 2 August1984)
- *Mann Singh v France*, App no. 24479/07 (ECHR, 13 November 2008)
- *Marckx v Belgium* App no. 6833/74 (ECHR, 13 June 1979)
- *Mockute v Lithuania* App no. 66490/09 (ECHR, 27 February 2018)
- *Moscow Branch of the Salvation Army v Russia* App no. 72881/01 (ECHR, 5 October 2006)
- *Nada v Switzerland* App no. 10593/08 (ECHR, 12 September 2012)
- *Niemitz* v *Germany* App no. 13710/88 (ECHR, 16 December 1992)
- *Nolan and K. v Russia* App no. 2512/04 (ECHR, 12 February 2009)
- *Odievre v France* App no. 42326/98 (ECHR, 13 February 2003)
- *Omkarananda and the Divine Light Zentrum v Switzerland* App no. 8118/77 (ECHR, 19 March 1981)
- *Osmanoğlu and Kocabaş v Switzerland* App no. 29086/12 (ECHR, 10 January 2017)
- *Papavasilakis v Greece* App no. 66899/14 (ECHR, 15 September 2016)
- *Paradiso and Campanelli v Italy* App no. 25358/12 (ECHR, 24 January 2017)

- *Parrillo v Italy* App no. 46470/11 (ECHR, 27 August 2015)
- *Paul KARA v The United Kingdom* App no. 36528/97 (ECHR, 22 October 1998)
- *Peck v The United Kingdom* App no. 44647/98 (ECHR, 28 January 2003)
- *Phull v France* App no. 35753/03 (ECHR, 11 January 2005)
- *Popa v Romania* App no. 4233/09 (ECHR, 18 June 2013)
- *Pretty v The UK* App no. 2346/02 (ECHR, 29 July 2002)
- *Ranjit Singh v France* App no. 27561/08 (ECHR, 30 June 2009)
- *Refah Partisi (the Welfare Party) and Others v Turkey* App nos. 41340/98, 41342/98, 41343/98 and 41344/98 (ECHR, 13 February 2003)
- *S.A.S. v France* App no. 43835/11 (ECHR, 1 July 2014)
- *Serif v Greece* App no. 38178/97 (ECHR, 14 December 1999)
- *Shtukaturov v Russia* App no. 44009/05 (ECHR, 27 March 2008)
- *Sidabars and Dziautas v Lithuania* App no. 55480/00 (1 July 2003)
- *Sidiropoulos and Others v Greece* App no. 57/1997/841/1047 (ECHR, 10 July 1998)
- *Siebenhaar v Germany* App no. 18136/02 (ECHR, 3 February 2011)
- *Sinan Isik v Turkey* App no. 21924/05 (ECHR, 2 February 2010)
- *Standard Verlags GmbH v Austria (no. 2)* App no. 21277/05 (ECHR, 4 June 2009)
- *Stedman v UK* App no. 29107/95 (ECHR, 9 April 1997)
- *Supreme Holy Council of the Muslim Community v Bulgaria* App no. 39023/97 (ECHR, 16 December 2004)
- *Sutter v Switzerland* App no. 8209/78 (ECHR, 1 March 1979)
- *Svyato-Mykhaylivska Parafiya v Ukraine* App no. 77703/01 (ECHR, 14 June 2007)
- *The Sunday Times v United Kingdom* App no. 6538/74 (ECHR, 26 April 1979)
- *The Sunday Times v United Kingdom (No. 2)* App no. 13166/87 (ECHR, 26 November 1991)
- *Tig v Turkey* App no. 8165/03 (ECHR, 24 May 2005)
- *United Communist Party of Turkey and Others v Turkey* App no. 133/1996/752/951 (ECHR, 30 January 1998)
- *Uzan v Germany* App no. 35623/05 (ECHR, 02 September 2010)
- *Vajnai v Hungary* App no. 33629/06 (ECHR, 8 July 2008)

- *Vartic v Romania (no. 2)* App no. 14150/08 (ECHR, 17 March 2014)
- *Van Den Dungen v the Netherlands* App no. 22838/93 (ECHR, 22 February 1995)
- *Vogt v Germany* App no. 17851/91 (ECHR, 26 September 1995)
- *Vojnity v Hungary* App no. 29617/07 (ECHR, 12 February 2013)
- *Von Hannover v Germany* App no. 59320/00 (ECHR, 24 June 2004)
- *Von Hannover v Germany (no. 2)* App nos. 40660/08 and 60641/08 (ECHR, 7 February 2012)
- *Winterwerp v The Netherlands* App no. 6301/73 (ECHR, 24 October 1979)
- *X v Austria* App no. 1747/62(ECHR, 13 December 1963)
- *X v Iceland* App no. 6825/74 (ECHR, 18 May 1976)
- *X v Italy* App no. 6741/74 (ECHR, 1976)
- *X v United Kingdom* App no. 8160/78 (ECHR, 12 March 1981)
- *X v United Kingdom* App no. 7992/77 (ECHR, 12 July 1978)
- *X v United Kingdom* App no. 8160/78 (ECHR, 12 March 1981)
- *Young, James and Webster v UK* App no. 7601/76; 7806/77 (ECHR, 13 August 1982)

United Nations Human Rights Committee

- *Ahmet Hudaybergenov v Turkmenistan,* Communication no. 2222/2012, UN Doc. CCPR/C/115/D/2222/2012 (2015)
- *Akmurad Nurjanov v Turkmenistan*, Communication no. 2225/2012, UN Doc. CCPR/C/117/D/2225/2012 (2016)
- *Arieh Hollis Waldman v Canada*, Communication no. 694/1996, UN Doc. CCPR/C/67/D/694/1996 (1999)
- *Bikramjit Singh v France*, Communication no. 1852/2008, UN Doc. CCPR/C/106/D/1852/2008 (2013)
- *Clement Boodoo v Trinidad and Tobago*, Communication no. 721/1996, U.N. Doc. CCPR/C/74/D/721/1996 (2002)
- *Coeriel and Aurik v The Netherlands*, Communication no. 453/1991, UN Doc. CCPR/C/52/D/453/1991 (1994)
- *Dovran Bahramovich Matyakubog v Turkmenistan,* Communication no. 2224/2012, UN Doc. CCPR/C/117/D/2224/702 (2012)

- *Eu-min Jung et al. v The Republic of Korea*, Communications nos. 1593 to 1603/2007, U.N. Doc. CCPR/C/98/D/1593-1603/2007 (2010)
- *F.A. v France*, Communication no. 2662/2015, UN Doc. CCPR/C/123/D/2662/2015 (2018)
- *Gareth Anver Prince v South Africa,* Communication no. 1474/2006, UN Doc. CCPR/C/91/D/1474/2006 (2007)
- *Karnel Singh Bhinder v Canada*, Communication no. 208/1986 (1989)
- *M.A.B., W.A.T. and J.A.Y.T. v Canada*, Communication no. 570/1993 UN Doc. CCPR/C/50/D/570/1993 (1994)
- *Mahmud Hudaybergenov v Turkmenistan*, Communication no. 2221/2012, UN Doc. CCPR/C/115/D/2221/2012 (2015)
- *Malcolm Ross v Canada*, Communication no. 736/1997, UN DOC. CCPR/C/70/D/736/1997 (2000)
- *Mariana Hebbadj v France*, Communication no. 2807/2016, UN Doc. CCPR/C/123/D/2807/2016 (2018)
- *Matkarim Aminov v Turkmenistan*, Communication no. 2220/2012, UN Doc. CCPR/C/117/D/2220/2012 (2016)
- *Min-Kyu Jeong et al v The Republic of Korea*, Communications no. 1642-1741/2007, UN Doc. CCPR/C/101/D/1642-1741/2007 (2011)
- *Raihon Hudoyberganova v Uzbekistan,* Communication no. 931/2000, UN Doc. CCPR/C/82/D/931/2000 (2004)
- *Ranjit Singh v France*, Communication no. 1876/2000, UN Doc. CCPR/C/102/D/1876/2009 (2011)
- *Seyma Turkan v Turkey*, Communication no. 2274/2013 UN Doc. CCPR/C/123/D/2274/2013/Rev.1 (2018)
- *Shadurdy Uchetov v Turkmenistan*, Communication no. 2226/2012, UN Doc. CCPR/C/117/D/2226/2012 (2016)
- *Shingara Mann Singh v France*, Communication no. 1928/2010, UN Doc. CCPR/C/108/D/1928/2010 (2013)
- *Silva and Others v Uruguay,* Communication no. 34/1978, UN Doc. CCPR/C12/D/34/1978 (1981)
- *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, Communication no. 1249/2004, UN Doc. CCPR/C/85/D/1249/2004 (2005)

- *Sonia Yaker v France*, Communication no. 2747/2016, UN Doc. CCPR/C/123/D/2747/2016 (2018)
- *Tatyana Yachnik v Belarus*, Communication no. 1990/2010, UN Doc. CCPR/C/111/D/1990/2010 (2014)
- *Toonen v Australia*, Communication no. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)
- *Vassilari, Maria et al v Greece*, Communication no. 1570/2007, UN Doc. CCPR/C/95/D/1570/2007 (2009)
- *Viktor Leven v Kazakhstan*, Communication no. 2131/2012, UN Doc. CCPR/C/112/D/2131/2012 (2015)
- *Young-kwan Kim et al. v Republic of Korea*, Communication no. 2179/2012, UN Doc. CCPR/C/112/D/2179/2012 (2014)
- *Zafar Abdullayev v Turkmenistan,* Communication no. 2218/2002, UN Doc. CCPR/C/113/D/2218/2012 (2015)

UN Committee on the Elimination of the Discrimination against Women

- *Rahime Kayhan v Turkey*, Communication no. 8/2005, UN Doc. CEDAW/C/34/D/8/2005 (2006)

Court of Justice of the European Union

- Case C-188/15 *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole SA*, ECLI:EU:C:2017:204
- Case C-24/90, C-25/90 and C-26/90, *Hauptzollamt Hamburg-Jonas v Werner Faust* [1991] ECLI:EU:C:1991:310
- Case C-68/17 *IR v JQ* [2018] ECR-II 696
- Case C-157/15 *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, ECLI:EU:C:2017:203
- Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* [2018] ECR II-257

National Courts

Bangladesh

- *Advocate Salahuddin Dolon v Bangladesh* Writ petition no. 4495 of 2009 (8 March 2010)

Belgium

- Judgement no. 145/2012 of 6 December 2012

Canada

- *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567
- *Ishaq v Canada (Citizenship and Immigration)* [2015] 4 FCR 297, 2015 FC 156
- *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] SSC 6
- *P(D) v S(C)* [1993] 4SCR 141
- *R v Big M Drug Mart Ltd.* [1985] 1 SCR 295
- *R v Edwards Books and Art Ltd.* [1986] 2 SCR 713
- *Rania El-Alloul v Attorney General of Quebec and Others* [2018] QCCA 1610
- *Robertson and Rosetanni v The Queen* [1963] SCR 651
- *Syndicat Northcrest v Amselem* [2004] 2 SCR 551
- *Young v Young* [1993] 4 SCR 3

France

- Avis no 346.893 du 27 November 1989
- CE, Ordonnance du 26 aout 2016, Nos. 402742, 402777
- Etude relative aux possibilities juridiques d'interdiction du port du voile integral (25 March 2010)
- *Mme M*. (No. 286798, Conseil d'Etat, séance du 26 mai 2008, lecture du 27 juin 2008

Germany

- BVerfG, Judgement of the Second Senate of 24 September 2003- 3 BvR 1436/02
- Docket no. 151 Ns 169/11 (7 May 2012)

- 1 BvQ 28/20 (10 April 2020)

Mauritius

- *Ramburn v Stock Exchange Commission [1981] LRC (Const) 272*

Netherlands

- *Commissie Gelike Behandeling*, Judgement, 2003-40

New Zealand

- *Re J (An Infant): B and B v Director General of Social Welfare* [1996] 2 NZLR 134
- *Re The Seven P Children*, unreported, Family Court, Levin, CYPF 031/122-8/91 (8 October 1991)

Nigeria

- *Ojunye v Adegbudu* (1983) 4 N.C.L.R. 492

South Africa

- *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15

Spain

- Judgment of 6 February 2013, App no 693/2013, Appeal no 4118/2011

Sweden

- Equality Ombudsman, Case 2009/103, 30 November 2010

United Kingdom

- *Airedale N.H.S. Trust v Bland* [1993] 1 AC 789
- *Azmi v Kirkless Metropolitan Borough Council* [2007] IRLR 484
- *Chaplin v Royal Deveon & Exeter NHS Foundation Trust* [2010] ET 1702886/2009
- *G v St. Gregory Catholic Science College (Rev 1)* [2011] EWHC 1452 (Admin)

- *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112
- *Mandla v Dowell Lee* [1983] 2 AC 548
- *Mr M Da Costa v Boots Management Services Ltd* [2018] UKET 3327712/2017
- *R v D(R)*, Unreported (16 September 2013)
- *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15
- *R (on the application of Playfoot) v Millais School* [2007] EWHC 1698 (Admin)
- *R (on the Application of Shakeel) v Secretary of State for the Home Department* [2012] EWHC 1169 (Admin)
- *R (on the application of Watkins-Singh) v Aberdare Girls' High School & Anor* [2008] EWHC 1865 (Admin)
- *R (On the application of X) v The Headteachers & Governors of Y School* [2006] EWHC 298 (Admin)
- *Re E (A Minor)* [1993] 1 FLR 386
- *Re H* [2000] 2 FLR 334
- *Re J (child's religious upbringing and circumcision)* [1999] 2 FCR 345
- *Re L (Medical Treatment: Gillick Competency)* [1998] 2 FLR 810
- *Re N (A Child: Religion: Jehovah's Witness)* [2011] EWHC B26(Fam) 85
- *Re ST (A Minor)*, unreported, Family Division (19 October 1995)
- *SS (Malaysia) v Secretary of State for the Home Department* [2013] EWCA Civ 888
- *Suryanda v The Welsh Ministers* [2007] EWCA Civ 893
- *Wright v Secretary of State for Health* [2006] EWHC 2886 (Admin)
- *X v Ofsted* [2016] EWHC 2813 (Admin)

USA

- *Armstrong v State*, No. 98-066 (26 October 1999)
- *Cheema v Thompson*, No. 04-16868 [1995]
- *Eisenstadt v Baird* 406 U.S. [1972]
- *Gonzales v Carhart* 18 U.S.C. 1531 [2006]
- *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 U.S. 833 [1992]

- *Roe v Wade* 410 U.S. 113 [1973]
- *State v Singh*, No. C-950777, 117 Ohio App.3d [1996]
- *Thomas v Review Board* [1981] 450 U.S.707
- *Thornburgh v American College of Obstetricians & Gynecologists* 476 U.S. 772 [1986]
- *United States v Board of Education for the School District of Philadelphia* 911 F 2d (3rd Cir) [1990]
- *Wisconsin v Yoder* 406 U.S. 205 [1972] 242

Zimbabwe

- *Re Munhummeso* [1994] 1 LRC 282

Table of Legislation

Belgium

- Law of 1 June 2011

Canada

- Lord's Day Act 1970
- The Constitution Act 1982

Germany

- Basic Law

France

- Act No. 2004-228 of 15 March 2004
- Law no. 2010-1192 of 11 October 2010

San Marino

- Elections Act (Law no. 36 of 1958)

Uzbekistan

- On the Liberty of Conscience and Religious Organisations 1998

USA

- Pennsylvania Abortion Control Act 1982

Iran

- Islamic Penal Code of the Islamic Republic of Iran 1991

Sudan

- Criminal Act 1

Bibliography

Treaties

- Arab Charter on Human Rights 2004
- African Charter on Human and Peoples' Rights 1981
- American Convention on Human Rights 1969
- ASEAN Human Rights Declaration 2012
- Charter of Fundamental Rights of the European Union 2000
- Convention on the Elimination of All Forms of Discrimination against Women 1979
- Convention for the Protection of Human Rights and Fundamental Freedoms 1950
- Convention on the Rights of the Child 1989
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992
- International Covenant on Civil and Political Rights 1966
- Universal Declaration of Human Rights 1948

Books

- Ackerman BA, *Social Justice in the Liberal State* (New Haven- London: Yale University Press, 1980)
- Ahdar R and Leigh I, *Religious Freedom in the Liberal State* (2nd edn, Oxford: OUP, 2013)
- Ahmed L, *A Quiet Revolution: The Veil's Resurgence, from the Middle East to America* (New Haven: Yale University Press, 2011)
- Alexy R, *A Theory of Constitutional Rights* (translated by Julian Rivers) (Oxford: OUP, 2002)
- Alidadi K, *Religion Equality and Employment in Europe* (Oxford and Portland- Hart Publishing, 2017)
- Amer S, *What is Veiling?* (Chapel Hill: University of North Carolina Press, 2014)
- Appiah KA, *The Ethics of Identity* (New Jersey: Princeton University Press, 2007)
- *Arai-Takanashi Y, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Intersentia, 2002)
- Austin JL, *How to Do Things with Words* (Oxford: Clarendon Press, 1962)
- Baker DJ, *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* (London- New York: Routledge, 2011)
- Ball CA, *The Morality of Gay Rights: An Exploration in Political Philosophy* (New York- London: Routledge, 2003)
- Barry B, *Culture & Equality* (Cambridge- Oxford: Polity Press, 2001)
- Beaman LG, *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver: UBC Press, 2008)
- Beauchamp TL and Childress JF, *Principles of Biomedical Ethics* (New York- Oxford: OUP, 2012)
- Bielefeldt H, Ghanea N, and Wiener M, *Freedom of Religion or Belief: An International Law Commentary* (Oxford: OUP, 2016)
- Bossuyt MJ, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht- Boston- Lancaster: Martinus Nijhoff, 1987)

- Bowen JR, *Why the French Don't Like the Headscarves: Islam, the State and Public Space* (Princeton- Oxford: Princeton University Press, 2007)
- Brems E, *Human Rights: Universality and Diversity* (The Hague- Boston- London: Martinus Nijhoff Publishers, 2001)
- Brems E (ed), *The Experiences of Face Veil Wearers in Europe and the Veil* (Cambridge: CUP, 2014)
- Bucar E, *Pious Fashion: How Muslim Women Dress* (Cambridge- Oxford: Harvard University Press, 2017)
- Bucar E, *The Islamic Veil: A Beginner's Guide* (Oxford: Oneworld Publications, 2012)
- Bullock K, *Rethinking Muslim Women And the Veil: Challenging Historical and Modern Stereotypes* (Herndon – Surrey: IIIT, 2010)
- Cameron I, *National Security and the European Convention on Human Rights* (The Hague- London- Boston: Kluwer Law, 2000)
- Christoffersen J, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden- Boston: Martinus Nijhoff Publishers, 2009)
- Coons C and Weber M (eds), *Paternalism: Theory and Practice* (Cambridge, CUP: 2013)
- Cox N, *Behind the Veil: A Critical Analysis of European Veiling Laws* (Cheltenham- Northampton: Edward Elgar Publishing, 2019)
- Dickenson D, *Me Medicine vs. We Medicine: Reclaiming Biotechnology for the Common Good* (New York: Colombia University Press, 2003)
- Doe N, *Law and Religion in Europe: A Comparative Introduction* (Oxford: OUP, 2011)
- Dupre C, *Importing the Law in Post-Communist Traditions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford: Hart Publishing, 2003)
- Dworkin G, *The Theory and Practice of Autonomy* (Cambridge: CUP, 1988)
- Dworkin R, *A Matter of Principle* (Oxford: OUP, 1985)
- Edge PW, *Religion and Law* (Hampshire- Burlington: Ashgate, 2006)
- Eisgruber CL and Sager LG, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007)

- Elver H, *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford- New York: OUP, 2012)
- Evans C, *Freedom of Religion under the European Convention on Human Rights* (Oxford: OUP, 2001)
- Evans MD, *Manual on the Wearing of Religious Symbols in Public Areas* (Strasbourg: Council of Europe Publishing, 2009)
- Feinberg J, *Harm to Others: The Moral Limits of the Criminal Law (Volume 1)* (Oxford: OUP, 1984)
- Feinberg J, *The Moral Limits of the Criminal Law: Offense to Others (Volume 2)* (Oxford: OUP, 1988)
- Feinberg J, *The Moral Limits of the Criminal Law: Harm to Self (Volume 3)* (Oxford: OUP, 1989)
- Gaspard F and Khosrokhavar F, *Le Foulard et la République* (Paris: La Découverte, 1995)
- Gemie S, *French Muslims: New Voices in Contemporary France* (Cardiff: University of Wales Press, 2010)
- George RP, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993)
- Gereluk D, *Symbolic Clothing in Schools: What Should be Worn and Why* (London- New York: Continuum, 2008)
- Ghandhi PR, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Dartmouth: Ashgate, 1998)
- Goodwin J, *Price of Honor: Muslim Women Lift the Veil of Silence on the Islamic World* (New York: Plume, 1994)
- Gray J, *Mill On Liberty: A Defence* (New York: Routledge, 1996)
- Gray J, *Liberalisms: Essays in Political Philosophy* (London: New York: Routledge, 1989)
- Greer S, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 1997)
- Greer S, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2000)
- Grill K and Hanna J (eds), *The Routledge Handbook of the Philosophy of Paternalism* (Abingdon-New York: Routledge, 2018)

- Guindi FE, *Veil: Modesty, Privacy and Resistance* (Oxford- New York: Berg, 1999)
- Guiora AN, *Freedom from Religion: Rights and National Security* (Oxford: OUP, 2013)
- Hammarberg T, *Human Rights in Europe: No Grounds for Complacency* (Strasbourg: Council of Europe Publishing, 2011)
- Hanna J, *In Our Best Interest: A Defence of Paternalism* (Oxford: OUP, 2018)
- Hart HLA, *Law, Liberty and Morality* (California: Stanford University Press, 1963)
- Hill DJ and Whistler D, *The Right to Wear Religious Symbols* (London: Palgrave, 2013)
- Hill M, Sandberg R and Doe N, *Religion and Law in the United Kingdom* (The Netherlands: Kluwer, 2011)
- Himmelfarb G, *On Liberty and Liberalism: The Case of John Stuart Mill* (New York: Alfred A. Knopf, 1974)
- Howard E, *Freedom of Expression and Religious Hate Speech in Europe* (Oxfordshire- New York: Routledge, 2018)
- Howard E, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (1st edn, Abingdon- New York: Routledge, 2012)
- Hunter-Henin M (ed), *Law, Religious Freedoms and Education in Europe* (Surrey- Burlington: Ashgate, 2011)
- Husak DH, 'Legal Paternalism' in Hugh LaFollette (ed), *The Oxford Handbook of Practical Ethics* (Oxford: OUP, 2005)
- Inge A, *The Making of a Salafi Muslim Women: Paths to Conversion* (Oxford: OUP, 2017)
- Ingram D, *Law: Key Concepts in Philosophy* (London: Continuum, 2006)
- Jayawickrama N, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge: CUP, 2002)
- Johnson P, *Homosexuality and the European Court of Human Rights* (Abingdon- New York, 2013)
- Joppke C, *Veil: Mirror of Identity* (Cambridge- Malden: Polity Press, 2009)
- Joseph S et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford- New York: OUP, 2004)

- Kant I, *Grounding for the Metaphysics of Morals* (Cambridge: CUP, 1998)
- Kapur R, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Cheltenham- Northampton: Edward Elgar Publishing, 2018)
- Khan LA, *A Theory of Universal Democracy: Beyond the End of History* (The Hague: Kluwer Law Review 2003)
- Kleinig J, *Paternalism* (Manchester: Manchester University Press, 1983)
- Kukathas C, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: New York: OUP, 2003)
- Laborde C, *Liberalism's Religion* (Cambridge- London, Harvard University Press, 2017)
- Laborde C, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford- New York, 2008)
- Legg A, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: OUP, 2012)
- Leighton P and Reiman J, *Criminal Justice Ethics* (Upper Saddle River: Prentice Hall Publishing, 2006)
- Levinas E, *Totality and Infinity: An Essay on Exteriority* (The Hague- Boston-London: Martinus Nijhoff Publishers, 1979)
- Lister R et al., *Gendering Citizenship in Western Europe: New Challenges for Citizenship Research in A Cross-National Context* (Bristol: The Polity Press, 2007)
- MacKinnon CA, *Women's Lives: Men's Laws* (Cambridge- Massachusetts-London: The Belknap of Harvard University Press, 2005)
- Maclure J and Taylor C, *Secularism and Freedom of Conscience* (Cambridge- Massachusetts- London: Harvard University Press, 2011)
- Marshall J, *Human Rights Law and Personal Identity* (London- New York: Routledge, 2014)
- Marshall J, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Leiden- Boston: Martinus Nijhoff, 2009)
- McBeth A, Nolan J and Rice S, *The International Law of Human Rights* (Oxford: OUP, 2017)
- McGoldrick D, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford- Portland: Hart Publishing, 2006)

- Melden AI, *Rights and Persons* (Berkley- Los Angeles, University of California Press, 1980)
- Mele AR, *Autonomous Agents: From Self-Control to Autonomy* (New York-Oxford: OUP, 1995)
- Mendle J, & Reidy DA. (eds), *The Cambridge Rawls Lexicon* (Cambridge: CUP, 2015)
- Milani F, *Veils and Words: The Emerging Voices of Iranian Women Writers* (New York: Syracuse University Press, 1992)
- Mill JS, *On Liberty* (Kitchener: Batoche Books, 2001)
- Mill JS, *Utilitarianism* (Kitchener: Batoche Books, 2001)
- Mill JS, *The Subjection of Women* (London: Gutenberg, 2008)
- Morgan D, *Essential Islam: A Comprehensive Guide to Belief and Practice* (California: Praeger, 2010)
- Murphy K, *State Security Regimes and the Right to Freedom of Religion and Belief: Challenges in Europe since 2001* (Oxfordshire- New York: Routledge, 2013)
- Nilsson P, *Unveiling the French Republic: National Identity, Secularism, and Islam in Contemporary France* (Leiden-Boston: Brill, 2017)
- Nussbaum MC, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008)
- Nussbaum MC, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (Cambridge- Massachusetts- London: The Belknap Press of Harvard University Press, 2012)
- Nassbaum MC, *Hiding From Humanity: Disgust, Shame and the Law* (Princeton – Oxford: Princeton University Press, 2004)
- Nussbaum MC, *Sex and Social Justice* (Oxford: OUP, 1999)
- Okin SM, *Women in Western Political Thought* (London: Virago, 1980)
- Okin SM, *Justice, Gender and the Family* (New York: Basic Books, 1991)
- Okin SM et al. (eds), *Is Multiculturalism Bad for Women?* (Princeton- New Jersey: Princeton University Press, 1999)
- Oshana M, *Personal Autonomy in Society* (Aldershot- Burlington: Ashgate, 2006)
- Parekh B, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Hampshire: Palgrave Macmillan, 2006)

- Peace T (ed), *Muslims and Political Participation in Britain* (Oxon - New York: Routledge, 2015)
- Rae SB, *Moral Choices: An Introduction to Ethics* (Michigan: Zondervan, 2009)
- Rajan VGJ, *Women Suicide Bombers: Narratives of Violence* (Oxon- New York: Routledge, 2012)
- Rainey B et al., *The European Convention on Human Rights* (7th edn, Oxford: OUP, 2017)
- Rawls J, *A Theory of Justice* (Cambridge- Massachusetts: The Belknap Press of Harvard University Press, 1971)
- Raz J, *The Morality of Freedom* (Oxford: Clarendon Press, 1986)
- Raz J, *The Authority of Law* (Oxford: OUP, 1979)
- Reed ED and Dumper M (eds), *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical and Religious Perspectives* (Cambridge- New York: CUP, 2012)
- Reeves R, *John Stuart Mill: Victorian Firebrand* (London: Atlantic Books, 2008)
- Riley J, *Mill On Liberty* (London- New York: Routledge, 2011)
- Robinson N, *Universal Declaration of Human Rights: Its Origins, Significance, Application and Interpretation* (New York: Institute of Jewish Affairs, 1958)
- Sandberg R, *Law and religion* (Cambridge- New York: CUP, 2011)
- Sandberg R (ed), *Leading Works in Law and Religion* (Oxon- New York, Routledge, 2019)
- Saul B, 'Wearing Thin: Restrictions on Islamic Headscarves and Other Religious Symbols' in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Portland: Hart Publishing, 2008)
- Scanlon T, *The Difficulty of Tolerance* (New York: CUP, 2007)
- Scheinin M, 'Article 18', in Asbjorn Eide et al. (eds), *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992)
- Schyff GVD, *Judicial Review of Legislation: A Comparative Study of the United Kingdom, The Neterlands and South Africa* (London: Springer, 2010)

- Scott JW, *The Politics of the Veil* (Princeton- Oxford: Princeton University Press, 2007)
- Shirazi F, *The Hijab in Modern Culture* (Gainesville: University Press of Florida, 2001)
- Stephen JF, *Liberty, Equality, Fraternity* (Indianapolis: Liberty Fund, 1894)
- Susnjar D, *Proportionality, Fundamental Rights and Balance of Powers* (Leiden- Boston: Martinus Nijhoff Publishers, 2010)
- Tahzib BG, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (The Hague: Martinus Nijhoff Publishers, 1996)
- Tarlo E, *Visibly Muslim: Fashion, Politics, Faith* (Oxford- New York: Berg, 2010)
- Taylor PM, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: CUP, 2005)
- Temperman J, *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden- Boston: Martinus Nijhoff Publishers, 2012)
- Temperman J, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Government* (Leiden: Martinus Nijohff, 2010)
- Uthman IO, *Feminist Insiders-Outsiders: Muslim Women in Nigeria and the Contemporary Feminist Movement* (Newcastle: Cambridge Scholars Publishing, 2009)
- Vakulenko A, *Islamic Veiling in Legal Discourse* (Abingdon- New York: Routledge, 2012)
- Vandever D, *Paternalistic Intervention: The Moral Bounds on Benevolence* (Princeton: Princeton University Press, 1986)
- Vickers L, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford- Portland: Hart Publishing, 2008)
- Waldron J, *Liberal Rights: Collected Papers 1981-1989* (Cambridge- New York: CUP, 1993)
- Wali F, *Radicalised Unveiled* (Surrey- Burlington: Ashgate, 2013)
- Wall S, *Liberalism, Perfectionism and Restraint* (Cambridge, CUP: 1998)
- Welborne BC, *The Politics of the Headscarf in the United States* (New York: Cornell University Press, 2018)

- Winter B, *Hijab & The Republic: Uncovering The French Headscarf Debate* (New York: Syracuse University Press, 2008)
- Wolff RP, *In Defense of Anarchism* (New York: Harper & Row, 1979)
- Wood AW, *Kant's Ethical Thought* (CUP, 1999)
- Young R, *Personal Autonomy: Beyond Negative and Positive Liberty* (New York: St. Martin's Press, 1986)
- Zakaria R, *Veil* (New York: Bloomsbury, 2017)
- Zweigert K and Kotz H, *An Introduction to Comparative law* (Oxford- New York: OUP, 1998)

Contributions to Edited Books

- Adams M and Joshi KY, 'Religious Oppression Curriculum Design' in Maurianne Adams et al. (eds), *Teaching for Diversity and Social Justice* (New York-Abingdon: Routledge, 2007)
- Ahmed F, 'Religious Norms in Family Law: Implications for Group and Personal Autonomy' in Mavis Maclean and John Eekelaar (eds), *Managing Family Justice in Diverse Societies* (Oxford: Hart Publishing, 2013)
- Anderson J and Honneth A, 'Autonomy, Vulnerable, Recognition, and Justice' in J Christman and J Anderson (eds), *Autonomy and the Challenges in Liberalism: New Essays* (Cambridge- New York: CUP, 2015)
- Ask K and Tjomsland M, 'Introduction' in Karin Ask and Marit Tjomsland (eds), *Women and Islamization: Contemporary Dimensions of Discourse on Gender Relations* (Oxford: Berg, 1998)
- Bader V, 'Excluded, Included or Foundational? Religions in Liberal Democratic States' in Malcolm Evans et al. (eds), *Religion in a Liberal State* (Cambridge: CUP, 2013)
- Bakht N, 'Veiled Objections: Facing Public Opposition to the Niqab' in Lori G. Beaman (ed), *Reasonable Accommodation: Managing Religious Diversity* (Vancouver: UBC Press, 2012)
- Bognetti G, 'The Concept of Human Dignity in European and US Constitutionalism', in G Nolte (ed), *European and US Constitutionalism* (Cambridge- New York: CUP, 2005)
- Bomhoff J, 'The Rights and Freedoms of Others: The ECHR and its Peculiar Category of Conflicts between Fundamental Rights' in Eva Brems (ed), *Conflicts Between Fundamental Rights* (Antwerp- Oxford: Intersentia, 2008)
- Bosset P, 'Mainstreaming religious diversity in a secular and egalitarian State: the road(s) not taken in Leyla Şahin v. Turkey' in Eva Brems (ed), *Diversity and European Human Rights: Rewriting Judgements of the ECHR* (Cambridge: CUP, 2012)
- Boyle K, 'Freedom of Religion in International Law' in Javaid Rehman and Susan C. Breau (eds), *Religion, Human Rights and International Law: A*

Critical Examination of Islamic State practices (Leiden- Boston: Martinus Nijhoff Publishers, 2007)

- Brems E, 'Equality Problems in Multicultural Human Rights Claims: The Example of the Belgian 'Burqa Ban'' in Marjolein van den Brink et al. (eds), *Equality and Human Rights: Nothing but Trouble* (Utrecht University Publications, 2015)
- Brems E et al., "The Belgian 'Burqa Ban' Confronted with Insider Realities" in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, CUP: 2014)
- Bribosia E and Rorive I, 'Insider Perspectives and the Human Rights Debate on Face Veil Bans' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge: CUP, 2014)
- Brink DO, 'Mill's Liberal Principle and Freedom of Expression' in CL Ten (ed), *Mill's On Liberty: A Critical Guide* (Cambridge: CUP, 2008)
- Brownsword R, 'Freedom of Contract, Human Rights and Human Dignity' in Daniel Friedman and Daphne Barek-Erez (eds), *Human Rights in Private Law* (Oxford- Portland Oregon: Hart publishing, 2001)
- Chaib SO, 'Suku Phull v. France Rewritten from a Procedural Justice Perspective: Taking Religious Minorities Seriously' in E. Brems (ed), *Diversity and European Human Rights* (Cambridge: CUP, 2012)
- Chelini-Pont B, 'The French Model: Tensions Between Laic and Religious Allegiances in French State and Catholic Schools' in Myriam Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Surrey- Burlington: Ashgate, 2011)
- Donnelly J, 'Human Rights, Individual Rights and Collective Rights' in Jan Berting et al. (eds), *Human Rights in a Pluralistic World: Individuals and Collectives* (Meckler, 1990)
- Dowding K and Hees MV, 'Freedom of Choice' in Paul Anand et al. (eds), *The Handbook of Rational and Social Choice* (Oxford: OUP, 2009)
- Duff A et al., 'Introduction: The Boundaries of the Criminal Law' in RA Duff et al. (eds), *The Boundaries of the Criminal Law* (Oxford: OUP, 2010)
- Dworkin G, 'Preface' in G Dworkin (ed), *Mill's On Liberty: Critical Essays* (Plymouth: Rowman & Littlefield Publishers, 1997)

- Dworkin R, 'Liberalism' in Stuart Hampshire (ed), *Public and Private Morality* (Cambridge- New York, 1978)
- El-solh CF and Judy Marbo J, 'Introduction: Islam and Muslim Women' in Camillia Fawzi El-solh and Judy Marbo (eds), *Muslim Women's Choices: Religious Belief and Social Reality* (Oxford: Berg, 1994)
- Elshtain JB, 'Mill's Liberty and the Problem of Authority' in D Bromwich and G Kateb (eds), *On Liberty: John Stuart Mill* (New Haven: Yale University Press, 2003)
- Evans MD, 'From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and The Freedom of Expression before The European Court of Human Rights' in Esther D Reed & Michael Dumper (eds), *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical and Religious Perspectives* (Cambridge: CUP, 2012)
- Fadil N, 'Asserting State Sovereignty: The Face-veil Ban in Europe' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge: CUP, 2014)
- Friedman M, 'Autonomy and Male Dominance' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge: CUP, 2005)
- Gaus GF, 'The Place of Autonomy within Liberalism' in J Christman and J Anderson (eds), *Autonomy and the Challenges in Liberalism: New Essays* (Cambridge, New York: CUP, 2015)
- Green L, 'Pornographizing, Subordinating and Silencing' in RC Post (ed), *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles: Getty Publications, 1998)
- Hamburger J, 'How Liberal was John Stuart Mill' in WR Louis (ed), *Adventures with Britannia: Personalities, Politics, and Culture in Britain* (Austin: University of Texas Press, 1995)
- Henrard K, 'How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate' in Panos Kapotas and Vassilis P. Tzevelkos (eds), *Building Consensus on European Consensus: Judicial Interpretations of Human Rights in Europe and Beyond* (Cambridge: CUP, 2019)

- Hill M, 'Bracelets, Rings and Veils: The Accommodation of Religious Symbols in the Uniform Policies of English Schools' in Myriam Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Surrey- Burlington: Ashgate, 2011)
- Howard E, 'Islamic Veil Bans: The Gender Equality Justification and Empirical Evidence' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, CUP: 2014)
- Hunter-Henin M, 'Children's Religious Freedom in State Schools: Exemptions, Participation and Education' in JG. Dwyer (ed), *The Oxford Handbook of Children and the Law* (Oxford: OUP, 2019)
- Hunter-Henin M, 'Law, Religion and the School' in S. Ferrari (ed), *Routledge Handbook of Law and Religion* (Oxon- New York: Routledge, 2015)
- Hunter-Henin M, 'Religious Freedoms in European Schools: Contrasts and Convergence' in Myriam Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Surrey- Burlington: Ashgate, 2011)
- Hunter-Henin M, 'Believing in Negotiation: Reflection on Law's Regulation of Religious Symbols in State Schools' in Francois Guesnet et al. (eds), *Negotiating with Religion: Cross-Disciplinary Perspectives* (London: Routledge, 2017)
- Kilkelly U, 'The Child's Right to Religious Freedom in International Law: The Search for Meaning' in Martha Albertson Fineman and Karen Worthington (eds), *What is Right for Children? The Competing Paradigms of Religion and Human Rights* (Surrey- Burlington: Ashgate, 2009)
- Kiss AC, 'Permissible Limitations on Rights' in Louis Henkin (ed), *The International Bill of Rights* (New York: Colombia University Press, 1981)
- Khaliq U, 'Freedom of Religion and Belief in International Law: A Comparative Analysis' in Anver M Emon et al. (eds), *Islamic Law and International Human Rights Law: Searching for Common Ground* (Oxford: OUP, 2012)
- Kumm M,'The Turn to Justification: On the Structure and Domain of Human Rights' in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford: OUP, 2018)
- Lazreg M, *Questioning the Veil: Open Letters to Muslim Women* (New Jersey: Princeton University Press, 2009)

- Leigh I, 'National Security, Religious Liberty and Counterterrorism' in Jon Moran and Mark Phythian (eds), *Intelligence, Security and Policing Post-9/11* (London: Palgrave Macmillan, 2008)
- Leigh I, 'The European Court of Human Rights and Religious Neutrality' in Malcolm Evans et al. (eds), *Religion in a Liberal State* (Cambridge: CUP, 2013)
- Letsas G, 'Is There a Right Not to be Offended in One's religious Beliefs?' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge: CUP, 2012)
- Liebenberg S, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' in Aj van der Walt (ed), *Theories of Economic and Social Justice* (Stellenbosch: Sun Press, 2005)
- Lock T, 'Of Crucifixes and Headscarves: Religious Symbols in German Schools' in in M Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Surrey- Burlington: Ashgate, 2011)
- Loenen T, 'The Headscarf Debate: Approaching the Intersection of Sex, Religion and Race under the European Convention on Human Rights and EC Equality Law' in Dagmar Schiek & Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Abingdon: Routledge-Cavendish, 2008)
- Malik M, 'Regulating Religious Diversity in Liberal Societies' in Francois Guesnet et al. (eds), *Negotiating with Religion: Cross-Disciplinary Perspectives* (London: Routledge, 2017)
- McGoldrick D, 'Thought, Expression, Association, and Assembly' in Daniel Moeckli (eds), *International Human Rights Law* (3rd edn, Oxford: OUP, 2018)
- McGoldrick D, 'Religious Symbols and State Regulation: Assessing the Strategic Role of the European Court of Human Rights' in Jeron Temperman et al. (eds.) *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Leiden- Boston: Brill, 2019)
- McGoldrick D, 'Religious Rights and the Margin of Appreciation' in Petr Agha (ed), *Human Rights between Law and Politics: The Margin of Appreciation in Post-National Contexts* (Oxford- Portland, 2017)

- Mill JS, 'Autobiography' in John M. Robson and Jack Stillinger (eds), *Autobiography and Literary Essays (The Collected Works of John Stuart Mill, Vol 1)* (Toronto: University of Toronto Press, 1981)
- Moors A, 'Face Veiling in the Netherlands: Public Debates and Women's Narratives' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, CUP: 2014)
- Nussberger A, 'Procedural Review by the ECHR: View from the Court' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge: CUP, 2017)
- Oliva JG, 'Religious Dress Codes in the United Kingdom' in Silvio Ferrari and Sabrina Pastorelli (eds), *Religion in Public Spaces: A European Perspective* (London- New York: Routledge, 2016)
- Østergard K et al., 'Niqabis in Denmark: When Politicians Ask for a Qualitative and Quantitative Profile of a Very Small and Elusive Subculture' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, CUP: 2014)
- Parekh B, 'A Varied Moral World' in Susan Moller Okin (ed), *Is Multiculturalism Bad for Women?* (New Jersey: Princeton University Press, 1999)
- Parent WA., 'Constitutional Values and Human Dignity' in Michael J. Meyer & William A. Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press, 1992)
- Pastorelli S, 'Religious Dress Codes: The Bulgarian Case' in Silvio Ferrari and Sabrina Pastorelli (eds), *Religion in Public Spaces: A European Perspective* (London- New York: Routledge, 2016)
- Pitt G, 'Religion or Belief: Aiming at the Right Target?' in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge, CUP, 2007)
- Plant R, 'Religion in a Liberal State' in Malcolm Evans et al. (eds), *Religion in a Liberal State* (Cambridge: CUP, 2013)
- Pollitt K, 'Whose Culture' in Susan Moller Okin (ed), *Is Multiculturalism Bad for Women?* (New Jersey: Princeton University Press, 1999)
- Plant R, 'Religion in a Liberal State' in G D'Costa, M Evans, T Madood and J Rivers (eds), *Religion in a Liberal State* (Cambridge: CUP, 2013)

- Quinn CVA, 'Mill, Dignity and Homosexuality' in R Halwani et al. (eds), *Queer Philosophy: Presentations of the Society for Lesbian and Gay Philosophy* (Rodopi, 2012)
- Raz J, 'Autonomy, Toleration and the Harm Principle' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford: Clarendon Press, 1989)
- Riley J, 'Mill's Absolute Ban on Paternalism' in Kalle Grill and Jason Hanna (eds), *The Routledge Handbook of the Philosophy of Paternalism* (Abingdon- New York: Routledge, 2018)
- Roseberry L, 'Religion, Ethnicity and Gender in the Danish Headscarf Debate' in Dagmer Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Abingdon: Routledge- Cavendish, 2009)
- Sacksofsky U, 'Religion and Equality in Germany: The Headscarf Debate from a Constitutional Debate' in Dagmer Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Abingdon: Routledge- Cavendish, 2009)
- Sandberg R, 'A Uniform Approach to Religious Discrimination? The Position of Teachers and Other School Staff in the UK' in Myriam Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Surrey- Burlington: Ashgate, 2011)
- Silverstri S, 'Comparing Burqa Debates in Europe: Sartorial Styles, Religious Prescriptions and Political Ideologies' in Silvio Ferrari and Sabrina Pastorelli (eds), *Religion in Public Spaces: A European Perspective* (London- New York: Routledge, 2016)
- Saunders B, 'Minimum Pricing for Alcohol: A Millian Perspective' in T Brooks (ed), *Alcohol and Public Policy* (London- New York: Routledge, 2015)
- Sconnia D, 'The Right to Autonomy and the Justification of Hard Paternalism' in Christian Coons and Michael Weber (eds), *Paternalism: Theory and Practice* (Cambridge: CUP, 2013)
- Silva AB, 'Autonomy, Dignity and Integrity in Health Care Ethics – A Moral Philosophical Perspective' in HS Aasen (ed), *Human Rights, Dignity And Autonomy In Health Care And Social Services: Nordic Perspectives* (Antwerp: Intersentia, 2009)

- Sobhy H, 'Amr Khaled and Young Muslim Elite: Islamism and the Consolidation of Mainstream Piety in Egypt' in Diane Singerman (ed), *Cairo Contested: Governance, Urban Space, and Global Modernity* (Cairo- New York: The American University in Cairo Press, 2009)
- Smet S, 'Conflicts between Human Rights and the ECtHR: Towards a Structured Balancing Test' in S Smet and E Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford: OUP, 2017)
- Sunderland J, 'Damned If You Do, Damned If You Don't: Religious Dress and Women's Rights' in Minty Worden (ed), *The Unfinished Revolution: Voices from the Global Fight for Women's Rights* (Bristol: The Polity Press, 2012)
- Suber P, 'Paternalism' in CB Gray (ed), *Philosophy in Law: An Encyclopedia* (New York: Garland Pub., 1999)
- Uitz R, 'Rethinking Deschomets v. France: Reinforcing the Protection of Religious Liberty through Personal Autonomy in Custody Disputes' in Eva Brems (ed), *Diversity and European Human Rights Rewriting Judgments of the ECHR* (Cambridge- New York: CUP, 2013)
- Vakulenko A and Ahmed T, 'Minority Rights Six Decades after the UDHR: Limits on the Preservation of Identity' in Manisuli Ssenyonjo and Mashood Baderin (eds) *International Human Rights Law: Six Decades after the UDHR and Beyond* (Surrey: Ashgate, 2010)
- Vickers L, 'New Issues for Negotiation: Schools and Religious Freedom' in Francois Guesnet et al. (eds), *Negotiating with Religion: Cross-Disciplinary Perspectives* (London: Routledge, 2017)
- Waldron J, 'Mill on Liberty and on the Contagious Diseases Acts' in N Urbanati and A Zakaras (eds), *J.S. Mill's Political Thought: A Bicentennial Reassessment* (Cambridge: CUP, 2007)
- Weissman DM, 'Gender and Human Rights: Between Morals and Politics' in Linda C. McClain and Joanna L. Grossman (eds), *Gender Equality: Dimensions of Women's Equal Citizenship* (New York: CUP, 2009)
- Zeiler X, "Benevolent Bulls and Baleful Buffalos: Male Bovines versus the 'Holy Cow' in Hinduism" in Celia Deane-Drummond (eds), *Animals as Religious Subjects: Transdisciplinary Perspectives* (London: Bloomsbury, 2013)

Journal Articles

- Abu-Odeh L, 'Post-Colonial Feminism and the Veil: Considering the Differences (1991) 26 New England Law Review 1527
- Abu-Lughod L, 'Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others' (2002) 104(3) American Anthropologist 783
- Adenitire J, 'Has the European Court of Human Rights Recognised a Legal Right to Glance at a Smile' (2015) Law Quarterly Review 43
- Adenitire J, 'SAS v France: Fidelity to Law and Conscience' (2015) *European Human Rights Law Review* 78
- Adhar R, 'Is Secularism Neutral?' (2003) 26(3) Ratio Juries 404
- Ahmed F, 'The Autonomy Rational for Religious Freedom' (2017) 80(2) The Modern Law Review 238
- Ahmed F, 'How religious Arbitration Could Enhance Personal Autonomy' (2012) 1(2) Oxford Journal of Law and Religion 424
- Ahmed F, 'Personal Autonomy and the Option of Religious Law' (2010) 24(2) International Journal of Law, Policy and the Family 222
- Akhtar Z, 'Court Evidence, "Veils" and the Human Rights Defence' (2017) 181 JPN 830
- Altiparmak K and Karahanogullari O, 'European Court of Human Rights after S*ahin:* The Debate on Headscarves Is Not Over, *Leyla* s*ahin* v. *Turkey*, Grand Chamber Judgment of 10 November 2005, Application No. 44774/98' (2006) 2 European Constitutional Law Review 268
- Archard D, 'Disgust, Offensiveness and the Law' (2008) 25 (4) Journal of Applied Philosophy 314
- Arneson RJ, 'Mill versus Paternalism'(1979) 90(4) Ethics 470
- Arribas SC, 'Religious Symbols in Spain: A Legal Perspective' (2009) 11(2) Ecclesiastical Law Journal 181
- Ashfar H, 'Gender Roles and the 'Moral Economy of Kin' among Pakistani Women in West Yorkshire' (1989) 15(2) Journal of Ethnic and Migration Studies 211

- Baines CD, 'L'Affaire des Foulards - Discrimination, or the Price of a Secular Public Education System?' (1996) 29 Vanderbilt Journal of Transnational Law 303
- Baker M, 'Security and Sacred: Examining Canada's Legal Response to the Clash of Public Safety and Religious Freedom' (2010) 13 Touro International Law Review 1
- Barilan YM, 'Respect for Personal Autonomy, Human Dignity, and the Problems of Self-Directions and Botched Autonomy' (2011) 36 Journal of Medicine and Philosophy 496
- Barras A, 'Transnational Understandings of Secularisms and Their Impact on the Right to Religious Freedom – Exploring Religious Symbol Cases at the UN and ECHR' 11(2) Journal of Human Rights 263
- Baum B, 'Feminism, Liberalism and Cultural Pluralism: J.S. Mill on Mormon Polygamy' (1997) 5(3) Journal of Political Philosophy 230
- Beaman L, 'Living Together v. Living Well Together: A Normative Examination of the *SAS* Case' (2016) 4(2) Social Inclusion 3
- Beckwith G, "Uzbekistan: Islam, Communism, and Religious Liberty -- An Appraisal of Uzbekistan's 1998 Law 'On Freedom of Conscience and Religious Organizations'" 3 Brigham Young University Law Review 997
- Berger BL, 'Law's Religion: Rendering Culture' (2007) 45(2) Osgoode Hall Law Journal 277
- Bell M, 'Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace' (2017) 17 Human Rights Law Review 784
- Berry S, 'Aligning Interculturalism with International Human Rights Law: 'Living Together' without Assimilation' (2018) 18(3) Human Rights Law Review 441
- Berry S, 'Democracy and the Preservation of Minority Identity: Fragmentation within the European Human Rights Framework' (2017) 24 International Journal of Minority and Group Rights 205
- Berry S, 'The Continuing Relevance of the Copenhagen Document – Muslims in Western Europe and Security Dimension' (2016) 15(2) Journal of Ethnopolitics and Minority Issues in Europe 78

- Berry SE, 'A 'Good Faith' Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) Legal Studies 672
- Berry SE, 'Religious Freedom and the European Court of Human Rights' Two Margins of Appreciation' (2017) 12 Religion and Human Rights 198
- Beydoun KA, 'Beyond the Paris Attacks: Unveiling the War Within French Counterterror Policy' (2016) 65(6) American University Law Review 1273
- Bleiberg BD, 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Sahin v Turkey*' 91(129) Cornell Law Review 139
- Bloster C et al, 'Autonomy, Experience, and Reflection. On a Neglected Aspect of Personal Autonomy' (2010) 13 Ethic Theory Moral Prac 239
- Bock, GL, 'Jehovah's Witness and Autonomy: Honouring the Refusal of Blood Transfusions' (2012) 38 J Med Ethics 652
- Bouchard G, 'What is Interculturalism?' 56(2) McGill Law Journal 435
- Botting EH and Zlioba A, 'Religion and Women's Rights: Susan Moller Okin, Mary Wollstonecraft, and the Multiple Feminist Liberal Traditions' (2018) 44(8) History of European Ideas 1169
- Brataza N, "The 'Precious Asset': Freedom of Religion under the European Convention on Human Rights" 14(2) Ecclesiastical Law Journal 256
- Brems E, '*SAS v France*: A Reality Check' (2016) 25 Nottingham Law Review 58
- Brems E, 'Diversity in the Classroom: The Headscarf Controversy in European Schools' (2006) 31(1) Peace & Change 117
- Brems E, 'Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings' (2014) 22(2) Journal of Law and Policy 517
- Brems E et al., 'Uncovering French and Belgian Face Covering Bans' (2013) 2 Journal of Law, Religion & State 69
- Brems E et al., "'Burkini' Bans in Belgian Municipal Swimming Pools: Banning as a Default Option" (2018) 36(4) Netherlands Quarterly of Human Rights 270

- Brems E & Lavrysen L, 'Don't Use a Sledgehammer to Crack a Nut: Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139
- Brink DO, 'Millian Principles, Freedom of Expression, and Hate Speech' (2001) 7 Legal Theory 119, 120
- Brunig B, 'Understanding the Veiling of Muslim Women in the Netherlands' (2015) 54(1) Journal for the Scientific Study of Religion 20
- Buchanan A, 'Respect for Dignity and Forensic Psychiatry' (2015) 41 International Journal of Law and Psychiatry 12
- Buijsen M, 'Autonomy, Human Dignity, and the Right to Healthcare: A Dutch Perspective' (2010) 19 Cambridge Quarterly of Healthcare Ethics 321
- Bulak B & Zysset A, 'Personal Autonomy and Democratic Society at the European Court of Human Rights: friends or Foes' (2013) 2 UCL Journal of Law and Jurisprudence 230
- Chaib SO, 'Procedural Fairness as a vehicle for Inclusion in the Freedom of Religion Jurisprudence of the Strasbourg Court' (2016) 16 Human Rights Law Review 483
- Chaib SO and Brems E, 'Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe' (2013) 2 Journal of Muslims in Europe 1
- Cohen-Almagor R, 'Between Autonomy and State Regulation: J.S. Mill's Elastic Paternalism' (2012) 87 Philosophy 557
- Cumper P and Lewis T, 'Blanket Bans, Subsidiarity and the Procedural Turn of the European Court of Human Rights' (2019) 68 ICLQ 611
- Cumper P and Lewis T, 'Human Rights and Religious Litigation – Faith in the Law?' (2019) 8 Oxford Journal of Law and Religion 121
- Cumper P and Lewis T, 'Empathy and Human Rights: The Case of Religious Dress' 18(1) Human Rights Law Review 61
- Cumper P and Lewis T, "'Taking Religion Seriously'? Human Rights and *Hijab* in Europe- Some Problems of Adjudication" (2008-2009) 24(2) Journal of Law and Religion 599
- Daly F, 'Fraternalism as a Limitation on Religious Freedom: The Case of *S.A.S. v. France*' (2016) 11 Religion and Human Rights 140
- Dan-Cohen M, 'Conceptions of Choice and Conceptions of Autonomy' (1992) 102 Ethics 221

- DeHanas D and Shterin M, 'Religion and the Rise of Populism' (2018) 43(3) Religion, State & Society 177
- Diggelmann O and Cleis MN, 'How the Right to Privacy Became a Human Right' (2014) 14 Human Rights Law Review 441
- Doganer Y, 'The Law on Headdress and Regulations on Dressing in the Turkish Modernization' (2009) 51 Bilig: Journal of the Social Sciences of the Turkish World 33
- Donner W, 'John Stuart Mill's Liberal Feminism' (1993) 69 Philosophical Studies 155
- Doomen J, 'A Veiled Threat: Belcacemi and Oussar v Belgium' 20 Ecclesiastical Law Journal 190
- Downie RS & Telfer E, 'Autonomy' (1971) The Journal of the Royal Institute of Philosophy 293
- Dworkin G, 'Paternalism' (1972) 56(1) The Monist 64
- Dworkin G, 'Autonomy and Behaviour Control' (1976) 6 Hasting Centre Report 23
- Dwyer C, 'Veiled Meanings: Young British Muslim Women and the Negotiation of Differences' (1999) 6(1) Gender, Place and Culture 5
- Dyzenhaus D, 'John Stuart Mill and The Harm of Pornography' (1992) 102(3) Ethics 534
- Edge PW, 'The European Court of Human Rights and Religious Rights' (1998) International and Comparative Law Quarterly 680, 687
- Edge PW, 'Religious Rights and Choice under the European Convention on Human Rights' (2000) 2 Web JCLI 1
- Edwards S, 'No Burqas We're French: The Wide Margin of Appreciation and the ECtHR Burqa Ruling' 26 Denning Law Journal 246
- Elliot-Williams G, 'Protection of the Right to Manifest Religion or Belief Under the European Convention on Human Rights in SAS v France' (2016) 5(2) Oxford Journal of Law and Religion 344
- Erlings E, 'A Way Out of LaOcitE? The Child's Best Interests as Justification for Religious Manifestation' (2018) 20 Ecclesiastical Law Journal 200
- Erlings E, "'The Government Did Not Refer to It': *SAS v France* and *Ordre Public* at the European Court of Human Rights" (2015) 16(2) Melbourne Journal of International Law 587

- Evans C, "The 'Islamic Scarf' in the European Court of Human Rights" (2006) 7 Melbourne Journal of International Law 52
- Evans C, 'Individual and Group religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010-2011) 26(1) Journal of Law and Religion 321
- Everett J et al, 'Covered in Stigma? The Impact of Differing Levels of Islamic Head-covering on Explicit and Implicit Biases toward Muslim Women' (2014) Journal of Applied Social Psychology 1
- Ferrari S, 'Individual Religious Freedom and National Security in Europe After September 11' (2004) 2 BYU Law Review 357
- Feinberg J, 'Legal Paternalism' (1971) 1(1) Canadian Journal of Philosophy 105
- Fokas E, 'The European Court of Human Rights and Minority Religions: Messages Generated and Messages Received' (2017) 45 Religion, State and Society 166
- Formosa P, 'Kant's Conception of Personal Autonomy' (2013) 44(3) Journal of Social Philosophy 193
- Foster J, 'Is it a Breach of Religious Rights' (2006) Human Rights Research 1
- Franks M, 'Crossing the Border of Whiteness? White Muslim Women Who Wear the *Hijab* in Britain Today' (2000) 25 Ethnic and Racial Studies 917
- Fredette J, 'Becoming a threat: The Burqa and the Contestation Over Public Morality Law in France' (2015) 40(3) Law & Social Inquiry 585
- Freeland M and Vickers L, 'Religious Expression in the Workplace in the United Kingdom' (2009) 30 Comparative Labour Law and Policy Journal 597
- Gerards J, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466
- Gibson N, 'Faith in the Courts: Religious Dress and Human Rights' (2007) 66(3) Cambridge law Journal 657
- Giles L, 'What Not to Wear: Islamic Veils and School Uniforms' (2006) 14 Feminist Legal Studies 337
- Gohir S, 'The Veil Ban in Europe: Gender Equality or Gendered Islamophobia' (2015) Georgetown Journal of International Affairs 24

- Gokariksel B and Mitchell K, 'Veiling, Secularism and the Neoliberal Subject: National Narratives and Supranational Desires in Turkey and France' (2005) 5(2) Global Networks 147
- Gokariksel B and Secor A, 'The Veil, Desire, and the Gaze: Turning the Inside Out' (2014) 40(1) Signs 177
- Gole N, 'The Voluntary Adoption of Islamic Stigma Symbols' (2003) 70(3) Social Research 809
- Gordon D, 'Honderich on Morality-Dependent Harm' (1984) 32 Political Studies 288
- Gostin LO and Gostin KG, 'J.S. Mill, Paternalism and the Public's Health' (2009) 123(3) Public Health 214
- Greer S, 'Constitutionalizing Adjudication under the European Convention on Human rights' (2003) 23 Oxford Journal of Legal Studies 405
- Gross O and Aoláin FN, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23(3) Human Rights Quarterly 625
- Gumbis J et al, 'Do Human Rights Guarantee Autonomy?'(2008) Cuadernos constitucionales de la Catedra fabrique Furio ceriol 77
- Habermas J, 'The Concept of Dignity and the Realistic Utopia of Human Rights' (2010) 41(4) Metaphilosophy 464
- Hajji EO, 'Islamic Countries and the International Instruments on Human Rights' (1991) 3(1) Con & Lib 1
- Hakeem Y, 'S.A.S v France: Supporting 'Living Together' or Forced Assimilation?' (2014) 3(2) International Human Rights Law Review 277
- Hambler A, 'Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from *Achbita* and *Bougnaoui*' (2018) 47(1) Industrial Law Journal 149
- Hambler A, 'Managing Workplace Religious Expression with the legal Constraints' (2016) Employee Relations 406
- Hambler A, 'Establishing Sincerity in religion and belief Claims: A Question of Consistency' (2011) 13 Ecclesiastical Law Journal 146
- Hansson SO, 'Mill's Circle(s) of Liberty' (2015) 41(4) Social Theory and Practice 734

- Heider J, 'Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights' (2012) 22(1) Indiana Journal & Comparative Law Review 93
- Hekman S, 'John Stuart Mill's The Subjection of Women: A Foundations of Liberal Feminism' (1992) 15 History of European Ideas 681
- Hennette-Vauchez S, 'Equality and the Market: The Unhappy Fate of Religious Discrimination in Europe' (2017) 13 European Constitutional Law Review 744
- Henrard K, 'How European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of freedom of Religion' (2015) 4 Oxford Journal of Law and Religion 398
- Henrard K, 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?' 34(3) Nordic Journal of Human Rights 157
- Henry LM, 'The Jurisprudence of Dignity' (2011) 160 University of Pennsylvania Law Review 169
- Hill M, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgement in *Eweida and Others v United Kingdom*' (2013) Ecclesiastical Law Journal 191
- Hoodfar H, 'The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women' (1993) 22 Resources for Feminist Research 5
- Hopkins N, 'Hijab, Visibility and the Performance of Identity' (2013) 43 European Journal of Social Psychology 438
- Howard E, 'Freedom of Speech *versus* Freedom of Religion? The Case of Dutch Politician Greet Wilders' (2017) 17 Human Rights Law Review 313
- Howard E, 'Bans on the Wearing of Religious Symbols in British Schools: A Violation of the Right to Non-Discrimination?' (2011) 6 Religion & Human Rights 127
- Howard E, 'Banning Islamic Veils: Is Gender Equality a Valid Argument?' (2012) 12(3) International Journal of Discrimination and the Law 147

- Howard E, 'Headscarves Return to the CJEU: Unfinished Business' (2020) 27(1) Maastricht Journal of European and Comparative Law 10
- Howard E, 'Islamic headscarves and the CJEU: *Achbita and Bougnaoui*' (2017) 24(3) Maastricht Journal of European and Comparative Law 348
- Howard E, 'Protecting Freedom to Manifest One's Religion or Belief: Strasbourg or Luxemburg?' 32(2) (2014) Netherlands Quarterly of Human Rights 159
- Howard E, 'School Bans on the Wearing of Religious Symbols: Examining the Implications of Recent Case Law' (2009) 4 Religion and Human Rights 7
- Howard-Hassmann RE, 'Universal Women's Rights Since 1970: Centrality of Autonomy and Agency' (2011) 10(4) Journal of Human Rights 433
- Hunter-Henin M, 'English Schools with a Religious Ethos: For a Re-interpretation of Religious Autonomy' (2018) 12 Religion and Human Rights 3
- Hunter-Henin M, 'Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*' (2015) 4 Oxford Journal of Law and religion 94
- Hunter-Hennin M, 'Why the French Don't Like the Burqa: Laicite, National Identity and Religious Freedom' (2012) 61(3) The International and Comparative Law Quarterly 613
- Hunter-Henin M, 'Religion, Children and Employment: The Baby Loup Case' (2015) International & Comparative Law Quarterly 717
- Hurka T, 'Why Value Autonomy' (1987) 13(3) Social Theory and Practice 361
- Idriss MM, 'Criminalisation of the Burqa in the UK' (2016) 80 Journal of Criminal Law 124
- Idriss MM, 'Laïcité and The Banning of The 'hijab' in France' (2005) 25(2) Legal Issues 260
- Idriss MM, 'The Defeat of Shabina Begum in the House of Lords' (2006) 27 Liverpool Law Review 429
- Idriss MM, 'The House of Lords, Shabina Begum and proportionality' (2006) 11(3) Judicial Review 239
- Ipgrave M, 'Crosses, Veils and Other People: Faith as Identity and Manifestation' (2007) 2 Religion and Human Rights 163

- Jackson E, 'Abortion, Autonomy and parental Diagnosis' 9(4) Legal & Social Studies (2004) 467
- Joppke C, 'Double Standards? Veils and Crucifixes in the European Legal Order' (2013) 54 European Journal of Sociology 97
- Juss S, 'Burqa-bashing and the *Charlie Hebdo* Cartoons' (2015) 26(1) King's Law Journal 27
- Juss SS, 'Kirpans, Law, and Religious Symbols in Schools' (2012) 55(4) Journal of Church and State 758
- Juss SS, 'The Justiciability of Religion' (2017) 32(2) Journal of Law and Religion 285
- Juss SS, 'Sikh Cremations and the Re-Imagining of the Clash of Cultures' 35(5) Human Rights Quarterly 598
- Kamba WJ, 'Comparative Law: A Theoretical Framework' (1974) 23(3) The International and Comparative Law Quarterly 485
- Khan M, 'The Muslim Veiling: A Symbol of Oppression or a Tool of Liberation?' (2014) 32 UMASA Journal 1
- Killian C, 'The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair' (2003) 17(4) Gender & Society 567
- Laborde C, 'State Paternalism and Religious Dress Code' (2012) 10(2) I.Con 398
- Laborde C, 'Female Autonomy, Education and the *Hijab*' (2006) 9(3) Critical Review of International Social and Political Philosophy 351
- Laborde C, 'Secular Philosophy and Muslim Scarves in Schools' (2005) 13(3) The Journal of Political Philosophy 305
- Laselva SV, 'A Single Truth: Mill on Harm, Paternalism and Good Samaritanism' (1988) Political Studies 486
- Leibold J and Grose T, 'Islamic Veiling in Xinjiang: The Political and Social Struggle to Define Uyghur Female Adornment' (2016) 76 The China Journal 78
- Leigh I, 'New Trends in Religious Liberty and the European Court of Human Rights' (2010) 12 (3) Ecclesiastical Law Journal 266, 266
- Leigh I, 'Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack' (2011) 17 Res Republica 55

- Leigh I, 'Recent Developments in Religious Liberty' (2009) 11(9) Ecclesiastical Law Journal 65
- Leigh I and Hambler A, 'Religious Symbols, Conscience, and the Rights of Others' (2014) 3(1) Oxford Journal of Law and Religion 2
- Letsas G, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) Oxford Journal of Legal Studies 705
- Levi M et al., 'Conceptualizing Legitimacy: Measuring Legitimating Beliefs' (2009) 53 American Behavioral Scientist 354
- Lewis T, 'What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56(2) ICLQ 395
- Loenen T, 'In Search of an EU Approach to Headscarf Bans: Where to Go after *Achbita* and *Bougnaoui*?' (2017) 10(2) Review of European Administrative Law 47
- Loucaides LG, 'Personality and Privacy under the European Convention on Human Rights' (1990) 61(1) British Yearbook of International Law 175
- Lyon D & Spini D, 'Unveiling the Headscarf Debate' (2004) 12 Feminist Legal Studies 333
- Macklin R, 'Dignity is a Useless Concept: It Means No More Than Respect for Persons or Autonomy' (2003) 327 British Medical Journal 1419
- Mahlmann M, 'Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case' (2003) 4(11) German Law Journal 1099
- Mancini S, 'Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism' (2012) 10(2) I.Con 411
- Martinez-Torron J, 'Manifestation of Religion or Belief in the Case Law of the European Court of Human Rights' (2017) 12 Religion and Human Rights 112
- Martinez-Torron J and Navarro-Valls R, 'The Protection of Religious Freedom in the System of the European Convention on Human Rights' (1998) 3 Helsinki Monitor 25
- Marshall J, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities' (2015) 15(2) Human Rights Law Review 377
- Marshall J, 'Human Rights, Identity and the Legal Regulation of Dress' (2016) 25 Nottingham Law Journal 73

- Marshall J, 'The Legal Recognition of Personality: Full-face Veils and Permissible Choices' (2014) 10 International Journal of Law in Context 64
- Marshall J, 'Women's Right to Autonomy and Identity in European Human Rights Law: Manifesting One's Religion' (2008) 14 Res Publica 177, 189
- Marshall J, 'Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate' (2008) 30 Human Rights Quarterly 631
- Marshall J, 'Freedom of Expression and Gender Equality: Sahin v Turkey' (2006) 69(3) Modern Law Review 452
- McCrea R, 'Secularism before the Strasbourg Court: Abstract Constitutional Principles as a Basis for Limiting Rights' (2016) 79(4) The Modern Law review 691
- McGlynn C, 'John Stuart Mill on Prostitution: Radical Sentiments, Liberal Proscriptions' (2012) 8(2) Nineteenth-Century Gender Studies 8
- McGlynn C and Ward I, 'Would John Stuart Mill Have Regulated Pornography?' (2014) 41 Journal of Law and Society 500
- McGoldrick D, 'A Defence of the Margin of Appreciation and an Argument for its Applications by the Human Rights Committee' (2016) 65(1) International & Comparative Law Quarterly 21
- McGoldrick D, 'Religion in the European Public Square and in European Public Life - Crucifixes in the Classroom?' (2011) 11(3) Human Rights Law Review 451
- McGoldrick D, 'Religious Symbols and State Regulation' (2017) 12 Religion and Human Rights 128
- McIlroy DH, 'Locke and Rawls on Religious Toleration and Public Reason' (2013) 2(1) Oxford Journal of Law and Religion 1
- Millet F, 'When the European Court of Human Rights Encounters the Face' (2015) 11 European Constitutional Law Review 408
- Moreham NA, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-Examination' (2008) 1 European Human Rights Law Review 44
- Mullally S, 'Civic Integration, Migrant Women and the Veil: At the Limits of Rights?' (2011) 74(1) Modern Law Review 27, 39
- Muniz JR, 'Freedom of Expression from the Standpoint of J. S. Mill's On Liberty' 16(2) Revista Iberoamericana de Estudios Utilitaristas 75

- Nanwani S, 'The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?' (2011) 25(3) Emory International Law Review 1431
- Neill CO, 'Jehovah's Witnesses and Blood Transfusions: An Analysis of the Legal Protections Afforded to Adults and Children in European/English Human Rights Contexts' 24(4) European Journal of Health Law 368
- Nicholson M, 'Majority Rule and Human Rights: Identity and Non-identity in *SAS v France*' 67(2) Northern Ireland Legal Quarterly 115
- Nieuwenhuis A, 'European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Sahin v. Turkey*, Decision of 29 June 2004, Application Number 44774/98' (2005) 1 European Constitutional Law review 495
- Nigro R, 'The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic veil' (2010) 11 Human Rights Review 531
- Ogilvie MH, 'Niqabs in Canadian Courts: R v NS' (2013) 15(3) Ecclesiastical Law Journal 334
- Okin SM, 'Gender Inequality and Cultural Differences' (1994) 22 Political Theory 5
- Okin SM, 'Mistresses of Their Own Destiny: Group Rights, Gender and Realistic Rights of Exit' (2002) 112(2) Ethics 205
- Okin SM, 'Feminism and Multiculturalism' (1998) 108(4) Ethics 661
- O'Mahony C, 'There is no such Thing as a Right to Dignity' (2012) 10(2) I. Con 551, 556
- Oshana M, 'How Much Should We Value Autonomy' (2003) 20(2) Social Philosophy and Policy 99
- Paul K, '*Lachiri v Belgium* and Bans on Wearing Islamic Dress in the Courtroom: An Emerging Trend' 21(1) Ecclesiastical Law Review 48
- Peroni L, 'Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising' 10(2) International Journal of Law in Context 195
- Power-Forde A, "Freedom of religion and 'Reasonable Accommodation' in the Case law of the European Court of Human Rights" (2016) Oxford Journal of Law and religion 575

- Quante M, 'In Defence of Personal Autonomy '(2011) 37 J Med Ethics 597
- Radnay F, 'Culture, Religion and Gender' (2003) 1 International Journal of Constitutional Law 663Quante M, 'In Defence of Personal Autonomy '(2011) 37 J Med Ethics 597
- Roberts CK, "Is There a Right to Be 'Free From' Religion or Belief at Strasbourg" (2017) 19(1) Ecclesiastical Law Journal 35
- Roger S and Hambler A, 'Wearing the Turban: The 1967-69 Sikh Bus Drivers' Dispute in Wolverhampton' 27 Historical Studies in Industrial Relations 83
- Ronchi P, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber in *Lautsi v Italy*' 13(3) Ecclesiastical Law Journal 287
- Sabbe A et al., 'Forced Marriage: An Analysis of Legislation and Political Measures in Europe' (2014) 62 Criminal Law Soc Change 171
- Schiek D, 'Just a Piece of Cloth? German Courts and Employees with Headscarves' (2004) 33(1) Industrial Law Journal 68
- Schroeder D, 'Human Rights and Human Dignity: An Appeal to Separate the Conjoined Twins' (2012) 15(3) Ethical Theory and Moral Practice 323
- Schyff G and Overbeeke A, 'Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans' (2011) 7(3) European Constitutional Law Review 424
- Sen A, 'Welfare, Freedom and Social Choice: A Reply' (1990) 56 Louvain Economic Review 451
- Shultziner A & Rabonovici, 'Human Dignity, Self-Worth and Humiliation: A Comparative Legal-Philosophical Approach' (2012) 18(1) Psychology, Public Policy and law 105
- Skipper R, 'Mill and Pornography' (1993) 103 Ethics 726
- Song S, 'Religious Freedom vs. Sex Equality' (2006) 4(1) Theory and Research in Education 23
- Spohn U, 'Sisters in Disagreement: The Dispute Among French Feminists About the 'Burqa Ban' and the Causes of Their Disunity' (2013) 12 Journal of Human Rights 145
- Steinbach A, 'Burqas and Bans: The Wearing of Religious Symbols Under the European Convention of Human Rights' (2015) 4(1) Cambridge Journal of International and Comparative Law 29

- Stoker V, 'Zero Tolerance? Sikh Swords, School Safety, and Secularism in Quebec' (2007) 75(4) Journal of American Academy of Religion 814
- Stewart H, 'The Limits of the Harm Principle' (2010) 4 Crim Law and Philos 17
- Sullivan DJ, 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82(3) American Journal of International Law 487
- Syring T, 'Introductory Note to the European Court of Human Rights' Judgment on the Legality of a Ban on Wearing Full-Face Veils in Public (Case of S.A.S. V. France)' (2014) 53(6) International Legal Materials 1025
- Taramundi DM, 'Legal Pluralism and Reasonable Accommodation of Religious Diversity' (2017) 24(4) International Journal of Minority and Group Rights 467
- Telesetsky A, 'In the Shadows and Behind the Veil: Women in Afghanistan Under Taliban Rule' (1998) 13(1) Berkeley Women's Law Journal 293
- Thaler RH & Sunstein CR, 'Libertarian Paternalism' (2003) 93(2) Aea Papers and Proceedings 175
- Thayerz, DD, 'Religious Autonomy in Europe and the united States – Four recent Cases' (2012) 1(2) Oxford Journal of Law and religion 510
- Tomuschat T, 'Evolving Procedural Rules: The United Nations Human Rights Committee's First Two Years of Dealing with Individual Communications' (1980) 1 HRLJ 249
- Tonolo S, 'Islamic Symbols in Europe: the European Court of Human Rights and the European Institutions' (2014) Stato, Chiese e pluralismo confessionale 1
- Tourkochoriti I, 'Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.' (2012) 20(3) William & Mary Bill of Rights Journal 790
- Trispiotis I, 'Two Interpretations of 'Living Together' in European Human Rights Law' (2016) 75(3) Cambridge Law Journal 580
- Trotter S, ''Living together', 'Learning Together' and 'Swimming Together': *Osmanoğlu and Kocabaş v Switzerland* (2017) and the Construction of Collective Life' (2018) 18 Human Rights Law Review 157

- Tsevas C, 'Human Rights and Religions: 'Living Together' or 'Dying Apart'? A Critical Assessment of the Dissenting Opinion in *S.A.S. v France* and the Notion of 'Living Together' (2017) 45 Religion, State & Society 203
- Turner PN, "'Harm' and Mill's Harm Principle" (2014) 124 Ethics 299
- Vakulenko A, 'Islamic Headscarves' and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16(2) Social & Legal Studies 183
- Vakulenko A, 'Gender Equality as an Essential French Value: The Case of Mme M' (2009) 9(1) Human Rights Law Review 143
- Vakulenko A, 'Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends' (2007) 4(7) Human Rights Law Review 717
- Vauchez SH, 'Is French laicite Still Liberal? The Republican Project under Pressure (2004-15)' (2017) 17 Human Rights Law Review 285
- Veron R, 'John Stuart Mill and Pornography: Beyond the Harm Principle' (1996) 106 Ethics 534
- Vickers L, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8(3) European Labour Law Journal 232
- Vickers L, 'Religious Discrimination in the Workplace: An Emerging Hierarchy' (2010) 12 Ecclesiastical Law Journal 280
- Vickers L, 'Indirect Discrimination and Individual Belief: *Eweida v British Airways Plc*' (2009) 11(2) Ecclesiastical Law Journal 197
- Vickers L, ''Religious Freedom: Expressing Religion, Attire and Public Spaces' (2014) 22(2) Journal of Law and Policy 591
- Warren SD and Brandeis LD, 'The Right to Privacy' (1890) 4(5) Harvard Law Review 193
- Waldron J, 'Autonomy and Perfectionism in Raz's The Morality of Freedom' (1989) 62 South California Law Review 1097
- Ward I and McGlynn C, 'Women, Law and John Stuart Mill' (2016) 25(2) Women's History Review 227
- Wenden CW, 'Young Muslim Women in France: Cultural and Psychological Adjustments' (1998) 19(1) International Society of Political Psychology 133

- Werbner P, 'Honor, Shame and the Politics of Sexual Embodiment among South Asian Muslims in Britain and Beyond: An Analysis of Debates in the Public Sphere' (2005) 6(1) International Social Science Review 25
- Wiles E, 'Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality' (2007) 41(3) Law & Society Review 699
- Wing AK and Smith MN, 'Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban' (2006) 39 U.C. Davis Law Review 743
- Wintemute R, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77(2) Modern Law Review 223
- Weil P, 'Why the French Laicite is Liberal' (2009) 30(6) Cardozo Law Review 2699
- Weiler J, 'Lautsi: A Reply' (2013) 11(1) I.Con 230
- Weller A, 'The Future of 'Living Together': An Analysis of the European Court of Human Right's *S.A.S. v. France'* (2016) 41 North Carolina Journal of International Law 105
- Wiles E, 'Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality' (2007) 41(3) Law & Society Review 699
- Witte J, 'Life High the Cross? An American Perspective on *Lautsi v Italy*' (2011) 11(3) Ecclesiastical Law Journal 241
- Wormuth FD & Mirkin, HG 'The Doctrine of the Reasonable Alternative' (1964) 9 Utah. L. Rev. 254

Council of Europe Documents

- Committee on Legal Affairs and Human Rights, 'Human rights in the North Caucasus: what follow-up to Resolution' 1738 (2010)?' Doc. 14083 (08 June 2016)
- Committee on Legal Affairs and Human Rights, 'Compatibility of Sharia law with the European Convention on Human Rights: can States Parties to the Convention be signatories of the 'Cairo Declaration'?' Doc. 13965 (27 January 2016)
- Parliamentary Assembly, Resolution 1738 (2010), 'Legal remedies for human rights violations in the North Caucasus Region' (22 June 2010)
- Parliamentary Assembly, Resolution 1479 (2006), 'Human rights violations in the Chechen Republic: The Committee of Ministers' responsibility vis-à-vis the Assembly's concerns' (25 January 2006)
- Parliamentary Assembly, Resolution 2076 (2015), 'Freedom of religion and living together in a democratic society'
- Parliamentary Assembly, Resolution 1605, 'European Muslim Communities Confronted with Extremism' (2008)
- Parliamentary Assembly, Resolution 1743 (2010), 'Islam, Islamism and Islamophobia in Europe' (23 June 2010)
- Parliamentary Assembly, Recommendation 1720 (2005), 'Education and Religion'
- "'Rulings anywhere that women must wear the burqa should be condemned - but banning such dresses here would be wrong' says Commissioner Hammarberg" <https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/-rulings-anywhere-that-women-must-wear-the-burqa-should-be-condemned-but-banning-such-dresses-here-would-be-wrong-says-commissioner-hammarberg?redirect=%2Fsk%2Fweb%2Fcommissioner%2Fblog%3Fp_p_id%3D101_INSTANCE_xZ32OPEoxOkq%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D1%26_101_INSTANCE_xZ32OPEoxOkq_delta%3D5%26_101_INSTANCE_xZ32OPEoxOkq_keywords%3D%26_101_INSTANCE

_xZ32OPEoxOkq_advancedSearch%3Dfalse%26_101_INSTANCE_xZ32OPEoxOkq_andOperator%3Dtrue%26p_r_p_564233524_resetCur%3Dfalse%26_101_INSTANCE_xZ32OPEoxOkq_cur%3D28&inheritRedirect=true&desktop=true> accessed 4 March 2018

Press Releases of the European Court of Human Rights

- Press Release on *Belcacemi and Oussar and Belgium*, 'Ban on wearing face covering in public in Belgium did not violate Convention rights' (11 July 2017)
- <https://hudoc.echr.coe.int/eng#{"itemid":["003-2558814-2783003"]}> accessed 29 May 2019

Other Documents of the European Court of Human Rights

- 'Factsheet – Religious Symbols and Clothing' (December 2018)
- 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (30 April 2020)
- 'Guide on Article 9 of the European Convention on Human Rights: Freedom of thought, conscience and religion' (30 April 2020)

UN Documents

UN General Comments

- Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, UN Doc. HRI/GEN/1/Rev.9 (Vol.1) (8 April 1988)
- Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)* UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993)
- Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights between Men and Women)* UN Doc. CCPR/C/21/Rev.1/Add.10 (29 March 2000)

Resolutions of the Human Rights Council

- Human Rights Council, 'Freedom of religion or belief', UN Doc. A/HRC/RES/40/10 (2019)
- Human Rights Council, 'Freedom of religion or belief', UN Doc. A/HRC/RES/34/10 (2017)
- Human Rights Council, 'Freedom of religion or belief', UN Doc. A/HRC/RES/22/20 (2013)
- Human Rights Council, 'Freedom of religion or belief: Mandate of the Special Rapporteur on freedom of religion or belief', UN Doc. A/HRC/RES/14/11 (2010)
- Human Rights Council, 'Elimination of all forms of intolerance and of discrimination based on religion or belief', UN Doc. A/HRC/RES/6/37 (2007)

Reports of the UN Special Rapporteurs on Freedom of Religion or Belief

- UN Doc. A/HRC/43/48 (27 February 2020)
- UN Doc. A/74/358 (20 September 2019)
- UN Doc. A/HRC/40/58 (5 March 2019)
- UN Doc. A/73/362 (5 September 2018)
- UN Doc. A/HRC/37/49 (28 February 2018)
- UN Doc. A/72/365 (28 August 2017)

- UN Doc. A/HRC/34/50 (17 January 2017)
- UN Doc. A/71/269 (2 August 2016)
- UN Doc. A/HRC/31/18 (23 December 2015)
- UN Doc. A/70/286 (5 August 2015)
- UN Doc. A/HRC/28/66 (29 December 2014)
- UN Doc. A/79/261 (5 August 2014)
- UN Doc. A/HRC/25/58 (26 December 2013)
- UN Doc. A/68/290 (7 August 2013)
- UN Doc. A/HRC/22/51 (24 December 2012)
- UN Doc. A/67/303 (13 August 2012)
- UN Doc. A/HRC/19/60 (22 December 2011)
- UN Doc. A/66/156 (18 July 2011)
- UN Doc. A/HRC/16/53 (15 December 2010)
- UN Doc. A/65/207 (29 July 2010)
- UN Doc. A/HRC/13/40 (21 December 2009)
- UN Doc. A/64/159 (17 July 2009)
- UN Doc. A/HRC/10/8 (6 January 2009)
- UN Doc. A/63/161 (22 July 2008)
- UN Doc. A/62/280 (20 August 2007)
- UN Doc. A/HRC/6/5 (20 July 2007)
- UN Doc. A/HRC/4/21 (26 December 2006)
- UN Doc. A/HRC/2/3 (20 September 2006)
- UN Doc. A/61/340 (13 September 2006)
- UN Doc. E/CN.4/2006/5/Add.4 (8 March 2006)
- UN Doc. E/CN.4/2006/5 (9 January 2006)
- UN Doc. A/60/399 (30 September 2005)
- UN Doc. E/CN.4/2005/61 (20 December 2004)
- UN Doc. A/59/366 (16 September 2004)
- UN Doc. E/CN.4/2004/63 (16 January 2004)
- UN Doc. E/CN.4/2003/66 (15 January 2003)
- UN Doc. E/CN.4/2002/73 (14 March 2002)
- UN Doc. A/CONF.189PC.2/22 (3 May 2001)
- UN Doc. E/CN.4/2001/63 (13 February 2001)

Reports of the UN Special Rapporteurs on Cultural Rights

- UN Doc. A/72/55 (17 July 2017)

Concluding Observations

- 'Concluding observations on the fifth periodic report of France', UN Doc. CCPR/C/FRA/CO/5 (17 August 2015)
- Committee on the Rights of the Child, 'Concluding observations: France', UN Doc. CRC/C/15/Add.240 (30 June 2004)
- 'Concluding observations of the Human Rights Committee: France', UN Doc. CCPR/C/FRA/CO/4 (31 July 2008)

Other UN Documents

- Arcot Krishnaswami, 'Study of Discrimination in the Matter of Religious Rights and Practices', UN Doc. E/CN.4/Sub.2/200/Rev.1 (1960)
- Agenda Item 28, Part II, Annexes, UN Doc. A/ 2929 (1955)
- 'Final report on the situation of human rights in Afghanistan submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/75', UN Doc. E/CN.4/1997/59 (20 February 1997)
- General Assembly Resolution 60/288 'The United Nations Global-Terrorism Strategy' (8 September 2006)
- OHCHR, 'Press briefing notes on France and Bolivia' (30 August 2016) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20430&LangID=E> accessed 10 October 2019
- Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4 (1985)
- 'Summary Record of the 968th Meeting: France', UN Doc. CRC/C/SR.968 (14 June 2004)
- 'The Human Right to Privacy: A Gender Perspective', UN Doc. A/HRC/40/63 (2019)
- UN Doc. E/CN.4/2006/5/Add.4 (8 March 2006)
- UN Doc. A/HRC/4/21 (26 December 2006)

Reports

- All-Party Parliamentary Group for International Freedom of Religion or Belief, 'Article 18: From Rhetoric to Reality' (October 2017) <https://appgfreedomofreligionorbelief.org/media/Article-18-report-1710.pdf> accessed 9 March 2018
- Amnesty International, 'Choice and Prejudice: Discriminations against Muslims in Europe' (2012) <https://www.amnesty.org/download/Documents/20000/eur010012012en.pdf> accessed 4 May 2019
- Bayrakly E and Hafez F, 'European Islamophobia Report 2015' (2016) <https://www.islamophobiaeurope.com/reports/2015/en/EIR_2015.pdf> accessed 13 January 2019
- Clarke L, 'Women in Niqab Speak: A Study if the Niqab in Canada' (2014) <https://ccmw.com/women-in-niqab-speak-a-study-of-the-niqab-in-canada/> accessed 19 April 2017
- European Union Agency for Fundamental Rights, 'Second European Union Minorities and Discrimination Survey' (Luxemburg: Publications Office of the European Union, 2017)
- European Union Agency for Law Enforcement Cooperation, 'European Union Terrorism Situation and Trend Report 2019' (2019)
- Eva Brems et al.,'Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering' (2012) <http://www.hrc.ugent.be/wp-content/uploads/2015/10/face-veil-report-hrc.pdf> accessed 15 August 2016
- 'Guiding Principles Regarding Student Rights to Wear or Display Religious Symbols' (2005) <https://www.irla.org/symbols> accessed 10 July 2020
- Gulik GV, 'Headscarves: The Wrong Battle' (14 March 2009) <https://www.hrw.org/news/2009/03/14/headscarves-wrong-battle> accessed 4 September 2016
- Howard E, 'Religious Clothing and Symbols in Employment: A Legal Analysis of the Situation in the EU Member States' (2017)

<https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=608849> accessed 21 May 2020

- Human Rights Watch, 'Discrimination in the Name of Neutrality: Headscarf bans for Teachers and Civil Servants in Germany' (February 2009) <https://www.hrw.org/sites/default/files/reports/germany0209_webwcover.pdf> accessed 1 October 2017
- Human Rights Watch, 'World Report 2014: Canada' <https://www.hrw.org/world-report/2014/country-chapters/canada> accessed 26 October 2017
- Human Rights Watch, 'Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf' (2004) <https://www.hrw.org/legacy/backgrounder/eca/turkey/2004/headscarf_memo.pdf> accessed 17 July 2016
- Human Rights Watch, 'You Dress According to Their Rules: Enforcement of an Islamic Dress Code for Women in Chechnya' (2011) <https://www.hrw.org/sites/default/files/reports/chechnya0311webwcover.pdf> accessed 23 November 2019
- Human Rights Watch, 'Sudan: End Lashing, Reform Public Order Rules' (2010) <https://www.hrw.org/news/2010/12/15/sudan-end-lashing-reform-public-order-rules> accessed 10 May 2017
- Human Rights Watch, 'World Report 2014: Indonesia' (2014) <https://www.hrw.org/world-report/2014/country-chapters/indonesia> accessed 17 February 2020
- Human Rights Watch, 'Harsh War, Harsh Peace: Abuses by Al-Shabaab, the Transitional Federal Government, and AMISOM in Somalia' (2010) <https://www.hrw.org/report/2010/04/19/harsh-war-harsh-peace/abuses-al-shabaab-transitional-federal-government-and-amisom> accessed 16 May 2018
- Open Society Foundations, 'Restrictions on Muslim Women's Dress in the 28 EU Member States: Current Law, Recent Legal Developments and the State of Play' (2018)

<https://www.justiceinitiative.org/publications/restrictions-muslim-women-s-dress-28-eu-member-states-2> accessed 4 December 2019

- Open Society Foundations, 'Behind the veil: why 122 women choose to wear full face veil in Britain' (2015) <https://www.opensocietyfoundations.org/uploads/f3d788ba-d494-4161-ac01-96ed39883fdd/behind-veil-20150401.pdf> accessed 9 July 2018
- Open Society Foundations, 'Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France' (2011) <https://www.opensocietyfoundations.org/sites/default/files/a-unveiling-the-truth-20100510_0.pdf> accessed 20 September 2016
- Open Society Justice Initiative, 'After the Ban: The Experiences of 35 Women of the Full-Face Veil in France' (2013) <https://www.justiceinitiative.org/uploads/86f41710-a2a5-4ae0-a3e7-37cd66f9001d/after-the-ban-experience-full-face-veil-france-20140210.pdf> accessed 17 November 2018
- Pew Research Centre, 'Being Christians in Western Europe' (May 2018) <http://www.pewforum.org/wp-content/uploads/sites/7/2018/05/Being-Christian-in-Western-Europe-FOR-WEB1.pdf> accessed 3 December 2018
- Pew Research Centre, 'Restrictions on Women's Religious Attire' (2016) <http://www.pewforum.org/2016/04/05/restrictions-on-womens-religious-attire/> accessed 13 February 2018
- Report of the Committee on Homosexual Offences and Prostitution (1957)
- Report of the Committee on Obscenity and Film Censorship (1979)
- 'Religious Freedom Review: Report of the Expert Panel' (2018) <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf> accessed 10 January 2019

Blogs

- Berry S, 'The UN Human Rights Committee Disagrees with the European Court of Human Rights Again: The Right to Manifest Religious by Wearing a Burqa' (*EJIL:Talk,* 3 January 2019) <https://www.ejiltalk.org/the-un-human-rights-committee-disagrees-with-the-european-court-of-human-rights-again-the-right-to-manifest-religion-by-wearing-a-burqa/> accessed 15 October 2019
- Berry S, 'SAS v France: Does Anything Remain of the Right to Manifest Religion?' (*EJIL: Talk,* 2 July 2014) <https://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/> accessed 30 December 2015
- Berry S, 'Eroding Religious Freedom Step by Step: France and the baby Loup Case' (*EJIL: Talk,* 1 July 2014) <https://www.ejiltalk.org/eroding-religious-freedom-step-by-step-france-and-the-baby-loup-case/> accessed 18 October 2017
- Berry S, 'Freedom of Religion and Religious Symbols: Same Right – Different Interpretation' (*EJIL: Talk,* 10 October 2013) <https://www.ejiltalk.org/freedom-of-religion-and-religious-symbols-same-right-different-interpretation/> accessed 9 February 2018
- Brems E, 'Skullcap in the Courtroom: A rare case of mandatory accommodation of Islamic religious practice' (*Strasbourg Observers*, 11 December 2017) <https://strasbourgobservers.com/2017/12/11/skullcap-in-the-courtroom-a-rare-case-of-mandatory-accommodation-of-islamic-religious-practice/> accessed 20 September 2018
- Brems E, 'S.A.S. v. France as Problematic Precedent' (*Strasbourg Observers*, 9 July 2014) <https://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/> accessed 30 October 2015
- Chaib SO, 'Mann Singh wins turban case in Geneva after losing in Strasbourg' (*Strasbourg Observers*, 19 November 2013) <https://strasbourgobservers.com/2013/11/19/mann-singh-wins-in-geneva-after-losing-in-strasbourg/> accessed 10 May 2019
- Chaib SO, 'S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil' (*Strasbourg Observers*, 3 July 2014)

<https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/> accessed 25 September 2016

- Chaib SO, 'Belgian Constitutional Court says Ban on Face Coverings does not violate Human Rights' (*Strasbourg Observers*, 19 August 2018) <https://strasbourgobservers.com/2012/12/14/belgian-constitutional-court-ban-on-face-coverings-does-not-violate-human-rights/> accessed 3 March 2018
- Cranmer F, 'Lose in Strasbourg, Try Geneva: Mann Singh and the Right to Wear a Turban' (*Law and Religion UK*, 21 November 2013) <https://www.lawandreligionuk.com/2013/11/21/lose-in-strasbourg-try-geneva-mann-singh-and-the-right-to-wear-a-turban/> accessed 15 July 2019
- Dahmann K, 'The prospect of a burqa ban spreads across Europe' (*DW*, 21 May 2010) <https://www.dw.com/en/the-prospect-of-a-burqa-ban-spreads-across-europe/a-5594778> accessed 20 October 2017
- English R, 'UK court ducks position on circumcision' (*UK Human Rights Blog*, 20 July 2013) <https://ukhumanrightsblog.com/2013/07/20/uk-court-ducks-position-on-circumcision/> accessed 20 November 2017
- Ferri M, 'Belkacemi and Oussar v Belgium and Dakir v Belgium: The Court again addresses the full-face veil, but it does not move away from its restrictive approach' (*Strasbourg Observers*, 25 July 2017) <https://strasbourgobservers.com/2017/07/25/belkacemi-and-oussar-v-belgium-and-dakir-v-belgium-the-court-again-addresses-the-full-face-veil-but-it-does-not-move-away-from-its-restrictive-approach/> accessed 15 September 2018
- 'German court: Sikhs have to wear helmets on motorbikes' (*DW*, 4 July 2019) <https://www.dw.com/en/german-court-sikhs-have-to-wear-helmets-on-motorbikes/a-49475615> accessed 30 August 2019
- Howard E, 'S.A.S. v France: Living Together or Increased Social Division' (*EJIL: Talk*, 7 July 2014) <https://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/> accessed 4 March 2017

- Howard E, 'Banning Niqabs in Public Spaces' (*EJIL: Talk*, 6 December 2013) <https://www.ejiltalk.org/banning-niqabs-in-public-spaces/> accessed 20 December 2018
- Iusan S, 'Comparative Human Rights Law and the Muslim Headscarf: The Position of the UN Human Rights Committee and the European Court of Human Rights (*Lawyr.it*, 15 July 2016) <https://www.lawyr.it/index.php/articles/international-focus/759-comparative-human-rights-law-and-the-muslim-headscarf-the-position-of-the-un-human-rights-committee-and-the-european-court-of-humans-rights> accessed 4 March 2018
- Lavrysen L, On Sledgehammers and Nutcrackers: Recent Developments in the Court's Less Restrictive Doctrine' (*Strasbourg Observers*, 20 June 2018) <https://strasbourgobservers.com/2018/06/20/on-sledgehammers-and-nutcrackers-recent-developments-in-the-courts-less-restrictive-means-doctrine/> accessed 2 July 2019
- McCrea R, 'Strasbourg Judgement in Eweida and Others v United Kingdom', (*UK Const. L. Blog,* 16 January 2013) <https://ukconstitutionallaw.org/2013/01/16/ronan-mccrea-strasbourg-judgement-in-eweida-and-others-v-united-kingdom/> accessed 15 August 2018
- McCrea R, 'The French Ban on Public Face-Veiling: Enlarging the Margin of Appreciation' (*EU Law Analysis*, 2 July 2014) <http://eulawanalysis.blogspot.com/2014/07/the-french-ban-on-public-face-veiling.html> accessed 20 December 2017
- Movsesian M, 'European Human Rights Court to France: Do Whatever You Want' (*Law and Religion Forum*, 3 July 2014) <https://lawandreligionforum.org/2014/07/03/european-human-rights-court-to-france-do-whatever-you-want/> accessed 22 February 2016
- Raday F, 'Comments on SAS v France' (*Oxford Human Rights Hub*, 8 July 2014) <http://ohrh.law.ox.ac.uk/professor-frances-raday-comments-on-sas-v-france/> accessed 23 April 2018
- Sanader T, 'S.A.S. v France – the French principle of "living together" and the limits of individual human rights' (*LSE Human Rights Blog*, 14 July 2014)

<http://blogs.lse.ac.uk/humanrights/2014/07/14/s-a-s-v-france/> accessed 3 March 2016

- 'Sikh motorcyclists in Germany obliged to wear helmets' (*Law & Religion UK*, 10 July 2019) <https://www.lawandreligionuk.com/2019/07/10/sikh-motorcyclists-in-germany-obliged-to-wear-helmets/> accessed 6 December 2019)
- Tourkochoriti I, 'The Burqa Ban before the European Court of Human Rights: A Comment on S.A.S. v France' (*I.CONnect*, 9 July 2014) <http://www.iconnectblog.com/2014/07/the-burka-ban-before-the-european-court-of-human-rights-a-comment-on-s-a-s-v-france/> accessed 7 December 2016
- Vickers L, 'Conform or be Confined: S.A.S. v France' (*Oxford Human Rights Hub*, 8 July 2014) <http://ohrh.law.ox.ac.uk/conform-or-be-confined-s-a-s-v-france/> accessed 23 January 2017
- Wählisch M, 'ECHR Chamber Judgment Case of *SAS v France*: Banning of Burqas and Niqabs Legal?' (*Cambridge International Law Journal Blog,* 21 July 2014) <https://law.unimelb.edu.au/__data/assets/pdf_file/0011/1687790/Erlings.pdf> accessed 19 October 2016

Other Electronic Resources

- Agerholm H, 'Muslims face fines up to £8,000 for wearing burkas in Switzerland' (*The Independent*, 7 July 2016) <https://www.independent.co.uk/news/world/europe/muslims-fined-8000-wearing-burkas-niqab-switzerland-ticino-islamic-dress-a7124586.html> 20 June 2020
- Allen C et al., 'May be Ee are Hated: The Experience and Impact of Anti-Muslim Hate on British Muslim Women' <http://www.wluml.org/sites/wluml.org/files/maybewearehated.pdf> accessed 28 March 2019

- ‘Article 18: From Rhetoric to Reality’ (October 2017) <https://appgfreedomofreligionorbelief.org/media/Article-18-report-1710.pdf> accessed 8 September 2018
- Baroness H, ‘Religious Dress’ (20 February 2019) <https://www.supremecourt.uk/docs/speech-190228.pdf> accessed 28 March 2019
- Bentham M, ‘Top judge calls for rules which force women to take off veils when giving evidence in court’ (The *Evening Standard*, 12 December 2014) <https://www.standard.co.uk/news/uk/top-judge-calls-for-rules-which-force-women-to-take-off-veils-when-giving-evidence-in-court-9920224.html> accessed 4 March 2018
- ‘Burqa-Clad Hizbul Terrorists Rob Bank In Jammu And Kashmir, Escape With 5 Lakhs’ (*The NDTV*, 31 July 2017) <https://www.ndtv.com/india-news/burqa-clad-hizbul-terrorists-rob-bank-in-jammu-and-kashmir-escape-with-5-lakhs-1731516> accessed 10 May 2019
- ‘Chad bans Islamic face veil after suicide bombings’ (*BBC Online News*, 17 June 2015) <http://www.bbc.co.uk/news/world-africa-33166220> accessed 5 January 2017
- Clarke L, ‘Women in Niqab Speak: A Study if the Niqab in Canada’ (2014) <https://ccmw.com/women-in-niqab-speak-a-study-of-the-niqab-in-canada/> accessed 19 April 2017
- “Court shown July 21 suspect 'fleeing in burka'” (*The Guardian*, 20 February 2007) <https://www.theguardian.com/uk/2007/feb/20/terrorism.world1> accessed 18 June 2017
- Deliberation 4/2017, Veneto Regional Council <http://www.consiglioveneto.it/crvportal/dcr/2017/DCR_0004/1001_5Ftesto_20approvato_20da_20Consiglio.html> accessed 21 November 2019
- Duell M, ‘I feel more feminine with my beard': Teaching assistant who suffered taunts because of her excessive hair decides to stop trimming it after being baptised a Sikh’ (*The Daily Mail*, 17 February 2014) <http://www.dailymail.co.uk/news/article-2560795/Teaching-assistant-Harnaam-Kaur-condition-causing-excessive-hair-grows-beard.html#ixzz4rfUpmrHs> accessed 3 September 2017

- ‘Egypt considers banning the burqa as part of anti-extremism campaign’ <https://www.jpost.com/middle-east/egypt-considers-banning-the-burqa-as-part-of-anti-extremism-campaign-571157> accessed 1 March 2019
- Elgot J, ‘Ukip to campaign to ban burqa and sharia courts, says Paul Nuttall’ (*The Guardian*, 23 April 2017) <https://www.theguardian.com/politics/2017/apr/23/ukip-to-campaign-to-ban-burka-and-sharia-courts-says-paul-nuttall> accessed 10 November 2018
- Gilligan A, ‘Why banning the veil would only cover up the real problems for British Muslims’ (*The Telegraph*, 16 April 2011) < https://www.telegraph.co.uk/journalists/andrew-gilligan/8455884/Why-banning-the-veil-would-only-cover-up-the-real-problems-for-British-Muslims.html> accessed 10 March 2020
- ‘In graphics: Muslim veils and headscarves’ (BBC News) <http://news.bbc.co.uk/1/shared/spl/hi/pop_ups/05/europe_muslim_veils_and_headscarves/html/1.stm> accessed 25 December 2020.
- “Islamic State orders women to wear full-face veil or risk 'serious punishment'” (*The Telegraph*, 25 July 2014) <https://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10990997/Islamic-State-orders-women-to-wear-full-face-veil-or-risk-serious-punishment.html> accessed 20 February 2018
- ‘It’s about freedom: Ban boosts burkini sales by 200%’ (*BBC*, 24 August 2016) <http://www.bbc.co.uk/news/world-europe-37171749> accessed 1 September 2016
- ‘It’s not easy being different: Harnaam Kaur on overcoming bullying and embracing her natural beauty’ <http://www.stylist.co.uk/beauty/Harnaam-Kaur-bearded-lady-dame-model-beauty-image-polycystic-ovaries-women-feminism-tess-holliday> accessed 1 September 2017
- Johnson B, ‘Denmark has got it wrong. Yes, the burka is oppressive and ridiculous – but that's still no reason to ban it’ (*The Telegraph*, 5 August 2018) <https://www.telegraph.co.uk/news/2018/08/05/denmark-

has-got-wrong-yes-burka-oppressive-ridiculous-still/> accessed 9 June 2020

- Khan A, 'Burqa-clad Suicide Bomber Kills 45 in Pakistan' (*The Independent*, 25 December 2010) <http://www.independent.co.uk/news/world/asia/burqa-clad-suicide-bomber-kills-45-in-pakistan-2169050.html> accessed 23 September 2016
- Krasimirov A, 'Bulgaria bans full-face veils in public places' (*The Reuters*, 30 September 2016) <https://www.reuters.com/article/us-religion-burqa-bulgaria/bulgaria-bans-full-face-veils-in-public-places-idUSKCN1201FV> 1 May 2019
- Landes D, 'Wrong to ban student with niqab: ombudsman' (*The Local*, 1 December 2010) <https://www.thelocal.se/20101201/30530> accessed 27 July 2020
- 'Latvia Wants to Ban Face Veils, for All 3 Women Who Wear Them' (*The New York Times*, 19 April 2016) <https://www.nytimes.com/2016/04/20/world/europe/latvia-face-veils-muslims-immigration.html> accessed 15 June 2020
- Mahmood M, 'Double-lavered veils and despair…women describe life under Isis' (*The Guardian*, 17 February 2015) <https://www.theguardian.com/world/2015/feb/17/isis-orders-women-iraq-syria-veils-gloves> accessed 03 March 2018
- Mirdamadi M, 'How Iran uses a compulsory hijab law to control its citizens – and why they are protesting' (*The Conversation*, 8 February 2018) <https://theconversation.com/profiles/moujan-mirdamadi-442693> accessed 20 September 2018
- 'Nicolas Sarkozy says Islamic veils are not welcome in France' (*The Guardian*, 22 June 2009) <https://www.theguardian.com/world/2009/jun/22/islamic-veils-sarkozy-speech-france> accessed 30 November 2019
- Nussbaum M, 'Beyond the Veil: A Response' (*The New York Times*, 15 July 2010) <http://opinionator.blogs.nytimes.com/2010/07/15/beyond-the-veil-a-response/?_r=0> accessed 19 May 2019

- Oliveira JM, *Harm and Offence in Mill's Conception of Liberty* <http://www.trinitinture.com/documents/oliveira.pdf> accessed 16 August 2017
- Raj K, 'How Nativist Populism Is Going Mainstream in Europe' <https://www.hrw.org/news/2020/02/21/how-nativist-populism-going-mainstream-europe> accessed 19 May 2020
- Rojo F, 'General Prohibition of the Burka and Niqab in all Public Spaces: A Gender Equality Perspective to the Pending Case S.A.S. v France' <https://www.academia.edu/9757486/General_Prohibition_of_the_Burka_and_Niqab_in_all_Public_Spaces_A_Gender_Equality_Perspective_to_the_Pending_Case_S.A.S._v._France> accessed 17 September 2016
- 'Saudi Arabia's dress code for women' (*The Economist*, 28 January 2015) <https://www.economist.com/blogs/economist-explains/2015/01/economist-explains-20> accessed 20 February 2018
- 'Selfridges robbery: 'Men in burkas' in 'smash and grab' (*BBC Online News*, 7 June 2013) <https://www.bbc.co.uk/news/uk-england-london-22811466> 12 April 2020
- Sudan crisis: Women praise end of strict public order law' (*BBC*, 29 November 2010) <https://www.bbc.co.uk/news/world-africa-50596805> accessed 20 August 2020
- Straw J, 'I felt uneasy talking to someone I couldn't see' (*The Guardian*, 6 October 2006) <http://www.theguardian.com/commentisfree/2006/oct/06/politics.uk> accessed 3 March 2016
- Syed IB, 'Is Hijab Compulsory?' <http://www.irfi.org/articles/articles_1_50/is_hijab_compulsory.htm> accessed 28 August 2016
- Syed IB, 'The Qur'an Does Not Mandate Hijab' <http://www.irfi.org/articles/articles_351_400/quran_does_not_mandate_hijab.htm> accessed 28 August 2016
- Tariq I, 'The Personal Meanings of the Hijab' <http://www.asrarjournal.com/?_escaped_fragment_=the-personal-meanings-of-the-hijab/cu0t> accessed 13 February 2018

- ‘The Islamic veil across Europe’ (*The BBC*, 31 May 2018) <https://www.bbc.co.uk/news/world-europe-13038095> accessed 15 May 2020
- ‘Top judge calls for rules which force women to take off veils when giving evidence in court’ (*The Evening Standard*, 12 December 2014) <https://www.standard.co.uk/news/uk/top-judge-calls-for-rules-which-force-women-to-take-off-veils-when-giving-evidence-in-court-9920224.html> accessed 10 May 2019
- ‘Weighing Religious Beliefs on the Scale of Justice: The Judge as an Arbitrator of Trust’ (2018) <http://www.ejtn.eu/PageFiles/17296/WP%20-%20TH%202018%2004%20-TEAM%20GR.pdf> accessed 3 October 2018
- Willsher K, ‘France's burqa ban upheld by human rights court’ (*The Guardian*, 1 July 2014) <https://www.theguardian.com/world/2014/jul/01/france-burqa-ban-upheld-human-rights-court> accessed 26 November 2018
- Willsher K, ‘French Muslim women on burqa ban ruling: ‘All I want is to live in peace’’ (*The Guardian*, 1 July 2014) <https://www.theguardian.com/world/2014/jul/01/french-muslim-women-burqa-ban-ruling> accessed 30 January 2020
- <http://www.assemblee-nationale.fr/13/pdf/rap-info/i2262.pdf> 12 November 2018
- <https://dictionary.cambridge.org/dictionary/english/veil> accessed 10 October 2016
- <https://english.alaraby.co.uk/english/news/2018/3/20/abayas-not-mandatory-for-women-says-saudi-crown-prince> accessed 2 February 2020
- <https://www.ndtv.com/india-news/burqa-clad-hizbul-terrorists-rob-bank-in-jammu-and-kashmir-escape-with-5-lakhs-1731516> accessed 10 May 2019
- <http://qz.com/757070/citing-terrorism-the-french-mayor-of-cannes-has-banned-muslim-women-from-wearing-burkini-swimwear/> accessed 29 August 2016
- <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> accessed 20 May 2020

Others

- “Coverings for women 'not mandatory', says Saudi crown prince ahead of US charm offensive” (*The New Arab*, 20 March 2018)
- Grillo R & Shah P, ‘Reasons to Ban? The Anti-*Burqa* Movement in Western Europe’ (2012) MMG Working Paper <https://core.ac.uk/download/pdf/30696227.pdf> accessed 21 February 2018
- International Forum, *Guaranteeing Freedom of Choice in Matters of Reproduction, Sexuality and Lifestyles in Europe: Trends and Developments* (Strasbourg: Council of Europe Publishing, 1999)
- Mahdi H, *The Hijab in Nigeria, the Woman’s Body and the Feminist Private/ Public Discourse*, Working Paper No. 09-003 (2009)
- Ottawa Principles on Anti-terrorism and Human Rights (2006)
- Walter N, ‘When the Veil Means Freedom – Respect Women’s Choices that are Not Our Own, Even if they Include Wearing the Hijab’ (*The Guardian*, 20 January 2004