THE NEED TO RECALIBRATE THE SCALES: BALANCING SECULARISM AND THE RIGHT TO WEAR A HIJAB IN EUROPE

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The European Convention on Human Rights protects the fundamental right to manifest one's religious beliefs, including protecting a Muslim woman's right to wear a hijab. Nevertheless, some member states have prohibited Muslim women from wearing a hijab in certain contexts to safeguard the principle of secularism, and the European Court of Human Rights (ECtHR) has upheld these restrictions in four key cases. This article argues that the Court's decisions in these cases are not justifiable as the Court has conducted an inadequate analysis of the necessity and proportionality of the restrictive measures and applied an unduly wide margin of appreciation. It also argues that some member states may be relying upon abstract aims like "secularism" and "living together" as a façade to disguise hostility toward Islam and that the Court has been unwilling to address this concern. This article concludes with three recommendations for reform that aim to address the flaws in the Court's analysis and allow the Court to strike a more appropriate balance between state autonomy and the protection of fundamental individual rights. These reforms are necessary to promote tolerance in Europe and prevent states from relying on abstract principles to unduly restrict individual rights.

I INTRODUCTION

Throughout history, religion has played a fundamental role in the fabric of society. Due to globalisation and migration, the different strands of religious beliefs existing in Europe have proliferated to create a complex tapestry. Concurrently, many European states have endorsed a sharp divide between the state and religion, with some adopting secularism as a constitutional principle. Tension has therefore increased between a state's desire to promote secularism and an individual's right to manifest their religious beliefs, as protected under art 9 of the European Convention on Human

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Rights (ECHR). This clash is epitomised in cases which have come before the European Court of Human Rights (ECtHR) involving a Muslim woman's right to wear a hijab and a member state's desire to prohibit women from wearing a hijab to protect the principle of secularism. The ECtHR has consistently held in favour of member states in these cases.

This article scrutinises the ECtHR's approach to these cases, as the right to manifest one's religious beliefs is a cornerstone individual right that should not be eroded by the overreach of the state. The ECtHR has gradually accepted more significant prohibitions on hijabs/full-face veils, ranging from bans in primary schools, to universities, to the public service, to the entire public sphere, illustrating a concerning trend of curtailing individual rights. Additionally, as Muslim women who wish to wear a hijab or full-face veil are a minority in most member states of the Council of Europe, the ECtHR is failing to uphold its duty to protect minorities, thus distinguishing these cases from those which do not concern minority rights. States are also able to define the importance of principles like secularism, which opens the door for states to rely on a variety of principles that are not enshrined in the ECHR to restrict freedom of religion and render art 9 increasingly ineffective for Muslim women.

This article begins by outlining the relevant legal test and defining some key concepts in Parts II and III. Part IV outlines four key cases where the ECtHR has upheld prohibitive measures on wearing a hijab. Part V then identifies several flaws in the Court's approach, centring on the Court's inadequate analysis of necessity and proportionality, and its application of an unduly wide margin of appreciation. Part VI then argues that some member states may be using abstract aims like "secularism" and "living together" as a façade to disguise hostility toward Islam, and the ECtHR has ignored this intolerant behaviour. Finally, Part VII recommends three practical reforms that would assist the Court in addressing the identified issues and strike a more appropriate balance between state autonomy and the protection of fundamental individual rights.

II THE LEGAL TEST

Article 9(1) of the ECHR stipulates that everyone has the "right to freedom of thought, conscience and religion" including the right "to manifest his religion or belief, in worship, teaching, practice and observance".[1] A hijab, a scarf covering the hair and neck but leaving the face exposed, is one element of the Muslim code of morality and decent conduct.[2] Although not all Muslim women wear a hijab, it is viewed by many as "fundamentally part of their religious identity and their culture".[3] The right to wear a hijab is therefore protected under art 9. As a hijab is an integral element of one's sense of self, not merely a means of expressing one's religious affiliation, the threshold to curtail this individual

1 European Convention on Human Rights ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953), art 9.

2 Sanam Noor "Hijab Controversy in Europe" (2007) 60 Pakistan Horizon 27 at 29–30.

3 Article 19 *Legal Comment: Bans on the Full Face Veil and Human Rights: A Freedom of Expression Perspective* (December 2010) at [3].

right must be set to a high standard.[4] The ECHR recognises the value of protecting religious manifestations, as art 9(2) states that the right to manifest one's religious belief is only subject to:

> … such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The legal test arising from art 9 is that religious manifestations can be curtailed only where the limitation is provided by law; where the law strives to achieve one of the legitimate aims stipulated under art 9(2); and where the curtailment of the religious expression/manifestation is reasonably necessary in a democratic society and proportionate to the realisation of the legitimate aim.[5] Although art 9(2) sets out many legitimate aims which member states can rely on to justify restrictions, the ground which has been relied on in the cases analysed in this article is "for the protection of the rights and freedoms of others". Member states have argued that wearing a hijab interferes with the secular rights and freedoms of others and that it is justifiable to restrict the ability to wear a hijab to protect the principle of secularism. This argument turns upon the broadest of the legitimate aims under art 9(2). It encourages member states to compare core rights and freedoms in an attempt to determine which rights and freedoms the state believes are more significant. It also allows member states to determine the point at which the rights and freedoms of others are perceived to be under threat, meaning there is no defined standard across member states.

III KEY CONCEPTS

The centrality of the principle of secularism means that some scrutiny of the term "secularism" is required. Defined simply, secularism is the belief that religion should not be involved in the organisation of ordinary social or political activities.[6] Similarly, most scholars accept a minimal definition of secularism which turns on the fact that "political authority does not rest on religious authority and the latter does not dominate political authority".[7]

However, when secularism is employed as a principle of a state, the basic definition becomes more complex.[8] Scholars have conceptualised a binary distinction between two contrasting

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4 See for example, Turan Kayaoglu "Trying Islam: Muslims before the European Court of Human Rights" (2014) 34 J Muslim Minor Aff 345 at 348: the "privatization of religion to individual's mind and heart ignores religion-as-identity and religion-as-a-way-of-life".

5 Article 19, above n 3, at [1].

6 Cambridge Dictionary "secularism" <www.dictionary.cambridge.org>.

7 Andrew Copson "Conceptions of secularism" in *Secularism: A Very Short Introduction* (Oxford University Press, Oxford, 2019) 78 at 81.

8 Ian Leigh and Rex Ahdar "Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away" (2012) 75 MLR 1064 at 1069.

approaches to secularism, described as a "liberal" versus "fundamentalist" approach,[9] a "benevolent" versus "hostile" approach,[10] or a "soft" versus "hard" approach.[11] This article uses the terms "liberal" and "fundamentalist", but it pertains to the literature relating to all of these sets of interchangeable terms. The "liberal" approach refers to a state that refrains from adopting or imposing any religious or non-religious beliefs upon its citizens and permits the expression of religious beliefs in the public sphere.[12] The "fundamentalist" approach refers to a state that takes an active role in excluding religious beliefs from the public sphere.[13] Whilst this latter approach is "not to be conflated with atheism", the exclusion of religious beliefs from the public sphere effectively promotes a stance against the existence of the divine.[14] Two countries discussed in this article, France and Turkey, have explicitly taken a fundamentalist approach to secularism that confines religious beliefs to the private sphere, as expressed through the constitutional principles *laïcité* (in France) and *laiklik* (in Turkey).[15]

Evidently, the liberal versus fundamentalist approaches to secularism represent two ends of a spectrum, and member states of the Council of Europe can move along this spectrum depending on political governance and societal attitudes. As the ECtHR is a regional body, it cannot impose one view of secularism upon member states, so the margin of appreciation is used by the ECtHR to accommodate the views of member states where the Court finds it appropriate.[16] The margin of appreciation refers to "the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations" under the ECHR.[17] Despite not appearing in the text of the Convention itself, it has become a "well-entrenched" judicial construct[18] that provides the

9 Ingvill Thorson Plesner "The European Court on Human Rights between fundamentalist and liberal secularism" (paper presented at the seminar 'The Islamic Head Scarf Controversy and the Future of Freedom of Religion or Belief', Strasbourg, 28–30 July 2005) at 1.

10 Leigh and Ahdar, above n 8, at 1068.

11 Alicia Cebada Romero "The European Court of Human Rights and Religion: Between Christian Neutrality and the Fear of Islam" (2013) 11 NZJPIL 75 at 79.

12 Leigh and Ahdar, above n 8, at 1069–1070.

13 At 1071.

14 At 1071.

15 Rossella Botton "The Constitutional Principle of Secularism in the Member States of the Council of Europe" in Md Jahid Hossain Bhuiyan and Ann Black (eds) *Religious Freedom in Secular States: A 21st Century Perspective* (Koninklijke Brill NV, Leiden, 2022) 147 at 150.

16 Romero, above n 11, at 76.

17 Steven Greer *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing, Strasbourg, 2000) at 5.

18 Stephanie E Berry "Avoiding Scrutiny? The Margin of Appreciation and Religious Freedom" in Jeroen Temperman, T Jeremy Gunn and Malcolm D Evans (eds) The European Court of Human Rights and the

necessary flexibility to enforce the Convention fairly.[19] However, it has also been described as "slippery and elusive" and "a substitute for coherent legal analysis of the legal issues at stake".[20] Ordinarily, the Court operates from the presumption that a narrow margin of appreciation should be employed to protect the rights contained in the ECHR.[21] It then relies on three reasons why the margin of appreciation should be employed more widely when circumstances require it. These three reasons include where there is a clash of rights under the Convention, where there is no European consensus on the issue or where national authorities are better placed to evaluate the dilemma.[22]

IV THE ECTHR JURISPRUDENCE

This part analyses four key cases involving measures prohibiting individuals from wearing a hijab and a member state's reliance on secularism to justify the restrictive measures. In all four cases, the Court undertook a similar analysis to determine that there was no violation of art 9.

The first such case to arise before the Court was *Dahlab v Switzerland*.[23] The applicant, Mrs Dahlab, was a primary school teacher in Geneva who converted to Islam and began to wear a hijab to school.[24] The Director General of Primary Education subsequently issued a notice to Mrs Dahlab prohibiting her from wearing a hijab to school as it contravened the Canton of Geneva Public Education Act 1940, which set out the non-denominational nature of public schools.[25] Mrs Dahlab applied to the ECtHR, alleging that the Act violated art 9. The Court stated that despite the absence of any complaints from parents or staff, Mrs Dahlab's act of wearing a hijab may "have some kind of proselytising effect" on the convictions of the young children in Mrs Dahlab's class, aged four to eight years old.[26] Therefore, the Court held that Switzerland did not exceed its margin of appreciation in

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Freedom of Religion or Belief: The 25 Years since Kokkinakis (Koninklijke Brill NV, Leiden, 2019) 103 at 104.

19 Aduku Abdul Ainoko "The Margin of Appreciation Doctrine and the European Court of Human Rights: The Inconsistent Application in the Interpretation of the Right to Freedom of Expression and the Right to Freedom of Thought, Conscience and Religion" (2022) 5 Strathclyde Law Review 91 at 107.

20 At 105 and 106.

21 Mónika Ambrus "The European Court of Human Rights and Standards of Proof in Religion Cases" (2013) 8 Relig Hum Rights 107 at 112.

22 Berry, above n 18, at 104.

23 *Dahlab v Switzerland* ECHR 42393/98, 15 February 2001 (Grand Chamber) at 8.

24 At 8–9.

25 At 1–2.

26 At 13.

deciding that Mrs Dahlab's right to manifest her religion could be curtailed to preserve religious harmony at the school and there was no violation of art 9.[27]

The second case was *Leyla Şahin v Turkey*.[28] Leyla Şahin was a fifth-year medicine student enrolled at Istanbul University who had worn a hijab for her entire university studies.[29] The Vice-Chancellor issued a circular in February 1998 prohibiting students from wearing hijabs at the university.[30] Şahin was then denied entry to her exams due to her hijab and subsequently brought a claim to the ECtHR alleging a violation of art 9.[31] The ECtHR considered at length whether the circular could be considered a "law" within the meaning of art 9(2).[32] It concluded that as the statutory framework afforded vice-chancellors considerable autonomy to create regulations and the 1998 circular was "precise" and "accessible", the circular was to be considered a law.[33]

The Grand Chamber then endorsed the Chamber's view that although a majority of the Turkish population is Muslim, placing limitations on freedom of religion was necessary to meet "a pressing social need" to maintain the secular Turkish state, especially as "this religious symbol has taken on political significance in Turkey".[34] The Court then afforded Turkey a wide margin of appreciation to avoid rendering the university's internal rules "devoid of purpose" and to respect Turkey's approach to the principle of secularism.[35] It also noted that a wide margin of deference was appropriate due to the lack of European consensus on the wearing of religious clothing at educational institutions[36] and that "the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course".[37] The Court thus concluded that there was no violation of art 9.[38]

It should be noted that Turkey has since repealed its hijab ban at universities, largely due to the election of Recep Tayyip Erdoğan in 2014 who has shown support for Muslim concerns and has

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27 At 13.

28 *Leyla Şahin v Turkey* ECHR 44774/98, 29 June 2004 (Grand Chamber).

29 At [15].

30 At [16].

31 At [17].

32 Full discussion at [79]–[98].

33 At [98].

34 At [115].

35 At [121].

36 Berry, above n 18, at 112; and *Leyla Şahin v Turkey*, above n 29, at [109].

37 At [121].

38 At [123].

subsequently been accused of eroding the secular nature of the Turkish state.[39] Despite the repeal of the ban, the *Şahin* decision remains a key case concerning a secular justification for prohibiting women from wearing a hijab in Europe, so it remains of significance to the ECtHR jurisprudence.

The next such case to come before the ECtHR was *Dogru v France*.[40] That case concerned an eleven-year-old Muslim girl who wore a hijab at a French state school. The school then imposed a prohibition on wearing a hijab during physical education classes, and when the girl continued to wear a hijab during these classes, the school expelled the pupil.[41] An application was then brought to the ECtHR alleging a violation of her right to religious expression.[42]

As to whether the interference was prescribed by law, the Court noted that the *Conseil d'Etat* had issued an opinion in 1989 which provided that pupils were free to wear religious items at school, although the "conditions in which they should be worn" must be "in conformity with the principle of secularism" and that they must not interfere with teaching.[43] The Court held that the 1989 opinion permitted schools to restrict freedom of religion and that it had been relied upon in the relevant case law of the domestic courts.[44] Therefore, it constituted a restriction which was prescribed by law.

Echoing the reasoning of *Şahin,* the Court then afforded France a wide margin of appreciation on the basis that opinions regarding the state and religion differ greatly throughout Europe and thus the view of the "national decision-making body must be given special importance".[45] The Court also noted that due to the "prime importance" of the constitutional principle of secularism, it was reasonable in the French context to restrict religious freedoms to preserve the secular nature of state schools, illustrating clear acceptance of France's fundamentalist approach to secularism.[46] The Court concluded that the decision to curtail the applicant's right to manifest her religious beliefs in order to protect the principle of secularism was "not unreasonable",[47] especially as the applicant could attend correspondence classes.[48] Therefore, there was no violation of art 9.

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39 Paul Kirby "Erdogan: Turkey's all-powerful leader of 20 years" (22 May 2023) BBC News <www.bbc.com>.

40 *Dogru v France* (2009) 49 EHRR 8 (Section I, ECHR).

41 At [6]–[8].

42 At [3].

43 At [56].

44 At [58]–[59].

45 At [63].

46 At [72].

47 At [73].

48 At [76].

Finally, the most recent of these cases was *Ebrahimian v France*.[49] Mrs Ebrahimian, a French national, worked as a social worker at a public Parisian hospital on a fixed-term contract.[50] The Director of Human Resources issued a notice to Mrs Ebrahimian notifying her that her contract would not be renewed, because she refused to remove her hijab at work following complaints from some patients.[51] Mrs Ebrahimian applied to the ECtHR and argued that the refusal to renew her contract violated art 9.[52]

As to whether the measure was prescribed by law, the Court referred to the *Conseil d'État* opinion of 3 May 2000 which set out that the "principle of state secularism and the neutrality of public services applied to the public service as a whole".[53] The Court noted that this opinion was shown to Mrs Ebrahimian by the hospital administration and that it was foreseeable that Mrs Ebrahimian would need to remove her hijab.[54] Therefore, the opinion constituted a "law" within the meaning of art 9(2).[55]

The Court held it was necessary in a democratic society for Mrs Ebrahimian to remove her hijab during working hours in order to protect the rights of others, namely to provide "equal treatment for patients and the proper functioning of the service" by strictly enforcing the principle of secularism.[56] The Court acknowledged that France had chosen to elevate the secular rights of others over the individual right to manifest one's beliefs whilst working as a public servant.[57] It held that it was appropriate to respect France's determination that the interference was necessary and proportionate, noting that "the domestic authorities must be allowed a wide margin of appreciation, as hospital managers are better placed to take decisions in their establishments than a court".[58] Therefore, the Court concluded that there was no violation of art 9.

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49 *Ebrahimian v France* ECHR 64846/11, 26 November 2015 (Grand Chamber).

50 European Employment Law Cases "ECtHR 26 November 2015, application 64846/11. (Ebrahimian), Religious Discrimination" (2015) European Employment Lawyers Association <www.eela.eelc-updates.com>.

51 *Ebrahimian v France*, above n 49, at [7].

52 At [7].

53 At [51].

54 At [51].

55 At [51].

56 At [71].

57 At [71].

58 At [66].

V FLAWS IN THE ECTHR'S APPROACH

Prima facie, one may approve of the ECtHR's methodical reasoning in these cases. First, the ECtHR accepted that the restrictive measures were prescribed by law and that the measures were taken to achieve the legitimate aim of protecting the rights and freedoms of others, by protecting the principle of secularism. As to whether the measures were necessary in a democratic society under art 9(2), the ECtHR then afforded member states a wide margin of appreciation by determining that there was no European consensus on the issue and/or that the national authority was better placed to make the decision. It then concluded that the member state did not exceed its margin of appreciation and there was no violation of art 9.

Notwithstanding the ECtHR's consistency, there are several issues with the ECtHR's approach. This part broadly argues that the Court conducted an inadequate assessment of necessity and proportionality under art 9(2) and afforded states an unjustifiably wide margin of appreciation which reflects a fundamentalist approach to secularism.

A The Nature of Religious Beliefs

First, the Court's analysis operated upon the false assumption that private beliefs (*forum internum*) and the public manifestation of those beliefs (*forum externum*) can always be neatly divided.[59] On this premise, the Court maintained that it is possible and acceptable to sever a Muslim woman's *forum internum* and *forum externum*, as although she may not be able to manifest her beliefs, she still retains those beliefs internally. However, this view fails to recognise that restricting a woman's right to wear a hijab (*forum externum*) also fundamentally contradicts her *forum internum*, as she is unable to uphold her convictions of modesty.[60] The better view is that many religious practices, including wearing a hijab, "affect the entire life of individual believers, wherever they find themselves".[61] Therefore, the Court's flawed understanding of the nature of religious beliefs results in an inadequate proportionality test as the Court fails to understand the degree of internal unrest which is caused when a Muslim woman is prohibited from wearing a hijab.

B The Practical Consequences for the Applicants

Secondly, the wide margin of appreciation afforded to member states means that the ECtHR did not engage in a comprehensive proportionality test that weighed the practical consequences of the restrictive measure for the applicants against the impact on the rights and freedoms of others. There were many serious consequences for the applicants in the aforementioned cases that were not

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59 Kayaoglu, above n 4, at 348.

60 At 348.

61 Julie Ringelheim "Rights, religion and the public sphere: the European Court of Human Rights in search of a theory?" in Lorenzo Zucca and Camil Ungureanu (eds) *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press, Cambridge, 2012) 238 at 245.

discussed because the Court afforded the member state a wide margin of appreciation. For example, in *Ebrahimian*, the Court failed to consider that the number of jobs in the French public service is around 5.6 million, whilst the total number of jobs is estimated at 26 million.[62] Therefore, individuals wearing visible religious manifestations, like a hijab, would be excluded from approximately 21 per cent of employment opportunities.[63] Furthermore, in both *Şahin* and *Dogru*, Muslim women were unable to attend their desired educational institutions as a consequence of the ECtHR's decisions. The Court should have included these facts in its proportionality analysis and considered whether something less than a blanket ban was appropriate.

The importance of considering the consequences of the restrictive measures for the applicants has also been acknowledged by the ECtHR itself in *Eweida v United Kingdom*, where two of the applicants lost their jobs due to their religious manifestations.[64] In that case, the Court emphasised that the loss of employment was a serious consequence for both applicants and thus was a highly relevant consideration as to whether the interference with art 9 was proportionate.[65] Therefore, it seems inconsistent that the Court did not consider the seriousness of the consequences for the Muslim applicants.

C The Wider Implications for the Integration of Muslim Women

The failure of the Court to consider the consequences for the applicants also has wider implications for the integration of Muslim women into European countries. The Council of Europe was founded in 1949 and the ethnocultural nature of Europe has dramatically changed since then due to migration.[66] There has also been a rise in legislation in Europe aiming to regulate the public sphere, which proponents of minority rights argue can indirectly disadvantage minorities, as public institutions are shaped around the majority's culture, traditions and religion.[67] The ECtHR must therefore be cognisant of how its decisions affect the treatment of minorities in Europe. This is especially important when tolerance and the protection of minorities are two key values that the Council of Europe exists to protect and that state parties agreed to uphold when joining the Council.[68]

A spectrum of approaches exists regarding the integration of minorities, ranging from a pluralist approach to an assimilationist approach. In a pluralist state, "cultural differences of minority groups

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62 European Employment Law Cases, above n 50.

63 European Employment Law Cases, above n 50.

64 *Eweida v United Kingdom* ECHR 48420/10, 15 January 2013 (Grand Chamber).

65 At [83].

66 Council of Europe "About the Council of Europe – Overview" Council of Europe <www.coe.int>.

67 Ringelheim, above n 61, at 246.

68 Council of Europe "Values" Council of Europe <www.coe.int>.

are [recognised] and actively supported by the state".[69] In contrast, an assimilationist approach means that "cultural differences are explicitly disapproved by the state and relegated to the private sphere, so that 'integration' takes place by absorption or coerced suppression".[70] A middle ground exists where the state supports equal political rights but does not endorse group rights for different minorities.[71]

Dahlab, *Dogru* and *Ebrahimian* all illustrate an assimilationist approach, as the right to wear a hijab is being confined to the private sphere and women are being coerced to absorb the non-Muslim dominant culture of their country in order to participate in certain public contexts.[72] *Dogru* demonstrates that for a Muslim schoolgirl to benefit from attending a French state school, her desire to dress modestly in accordance with her religious beliefs must be suppressed during physical education classes, as otherwise, she cannot obtain a public education. *Ebrahimian* operates from a similar perspective. It requires that for a Muslim woman to work in the French public service, her desire to manifest her religious beliefs must be suppressed to fit within the French secular ideal.

An assimilationist approach has been justified on the basis that accepting diversity will inevitably result in an unstable and discordant society and that minorities must adapt to the dominant culture to gain socioeconomic benefits.[73] Some have even expressed concern that wearing a hijab or other Islamic veil is a sign that Muslim women have failed to integrate and thus will be marginalised unless they conform.[74]

States indeed have the autonomy to choose an assimilationist model. However, when member states are brought before the ECtHR, their autonomy should be subject to the Court's duty to ensure that states uphold the values of tolerance and the protection of minorities, values with which the assimilationist approach is squarely at odds. As measures restricting the right to wear a hijab promote the assimilation of Muslim women in non-Muslim majority countries, this is an important consequence which needs to be considered in the Court's proportionality analysis.

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69 Ellen Wiles "Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality" (2007) 41 Law & Soc'y Rev 699 at 712.

70 At 712.

71 At 712.

72 The same cannot be said of *Şahin,* as Turkey has a Muslim majority, so assimilation into a different majority culture was not an issue here.

73 Wiles, above n 69, at 713.

74 Erica Howard "Bans on the Wearing of Burqas, Niqabs and Hijabs, Religious Freedom and the Secular Nature of the State" in Md Jahid Hossain Bhuiyan and Ann Black (eds) *Religious Freedom in Secular States: A 21st Century Perspective* (Koninklijke Brill NV, Leiden, 2022) 73 at 81.

D The Notion of European Consensus

The notion that there was no European consensus regarding hijab regulations was a key reason that the Court employed a wide margin of appreciation in *Şahin* and *Ebrahimian*. In *Şahin,* the ECtHR noted that only one other country, France, had placed a restriction on wearing a hijab in educational institutions.[75] Nevertheless, the Court held that as schools in many other states had the freedom to make decisions about religious clothing policies, there was no European consensus on the issue.[76] In *Ebrahimian*, the Court did acknowledge that a majority of member states do not regulate religious clothing in the workplace and that only five out of 26 states had a complete ban on religious clothing for public servants.[77] Despite this, the Court held that "consideration must be given to the national context of State-Church relations, which evolve over time in line with changes in society" and that there was no clear consensus.[78] Therefore, in both *Şahin* and *Ebrahimian*, the Court relied on the existence of differing views on religion throughout Europe to negate the existence of a consensus against restrictions on wearing a hijab.[79]

The Court's approach suggests that if a few countries have placed restrictions on wearing a hijab in workplaces or tertiary institutions, whilst the remainder have not, this means that a consensus is *absent*. However, a "consensus" means a *general* agreement and it does not require complete unanimity.[80] This means that if only a few members of the Council of Europe have restrictions on wearing a hijab in workplaces or tertiary institutions, there is a general agreement that such a restriction is *not* necessary in a democratic society.[81] The Court therefore should not widen the margin of appreciation on the basis that there is no European consensus on the matter. It would nevertheless remain open to the Court to acknowledge that there are differing views on religion throughout Europe and that the national authority may be better placed to make the decision as a separate reason to increase the margin of appreciation. Making a clear distinction between whether there is a European consensus and whether the national authority may be better placed to make the decision would allow the Court to avoid conflating two of the grounds which may increase the margin of appreciation.

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75 Berry, above n 18, at 113; and *Leyla Şahin v Turkey*, above n 29, at [55]–[65].

76 Berry, above n 18, at 112; and *Leyla Şahin v Turkey*, above n 29, at [109].

77 *Ebrahimian v France*, above n 51, at [65].

78 At [65].

79 *Leyla Şahin v Turkey*, above n 29, at [55]–[65]; and *Ebrahimian v France*, above n 51, at [65].

80 Cambridge Dictionary "consensus" <www.dictionary.cambridge.org>.

81 Jeroen Temperman, T Jeremy Gunn, and Malcolm Evans "Introduction" in Jeroen Temperman, T Jeremy Gunn and Malcolm D Evans (eds) *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years since Kokkinakis* (Koninklijke Brill NV, Leiden, 2019) 1 at 7.

E The Necessity of the Restrictive Measures

Finally, the ECtHR acknowledged in *Dahlab* that even where a state is afforded a wide margin of appreciation, the Court must still engage in an analysis of whether the measure was necessary:[82]

> The Court's task is to determine whether the measures taken at national level were justified in principle – that is, whether the reasons adduced to justify them appear "relevant and sufficient" and are proportionate to the legitimate aim pursued …

In *Ebrahimian*, Judge O'Leary also emphasised the Court's duty to engage in a comprehensive necessity analysis, stating that the Court "cannot divest itself of its supervisory role" due to "reference to ever more abstract ideals and principles".[83] However, in practice, the Court has failed to conduct a proper analysis of whether the limitation on the applicant's freedom was necessary, as required under art 9(2).[84] This seems to be because the Court "does not question the elevated position of secularism," such that states can comfortably rely on secularism to widen the margin of appreciation and remove religion from the public sphere.[85]

Although a genuine threat to the principle of secularism could mean that some interference is necessary, there is insufficient evidence that the applicants in these cases were engaging in activities that made the restrictive measures necessary. In *Dahlab*, Switzerland conceded that Mrs Dahlab's teaching had remained secular in nature with no mention of her personal beliefs, she was not engaging in any proselytising activities and she had worn her hijab for three years without complaints from parents.[86] Therefore, the Court's claim that wearing a hijab may have a proselytising effect seems based upon hypothetical and subjective concerns about infringement on the rights of the children rather than any real interference with the rights and freedoms of others.[87] Although the national authority may have been generally well-placed to make decisions about the public education system, the Court should have considered whether prohibiting Mrs Dahlab from wearing a hijab was truly necessary to protect secularism in this instance.

In *Şahin*, there was also an inadequate analysis of whether the restrictive measure was necessary. The majority accepted that a hijab was associated with religious extremism, even though Şahin had

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82 *Dahlab v Switzerland*, above n 23, at 12.

83 *Ebrahimian v France*, above n 51, at 37 per Judge O'Leary dissenting.

84 Berry, above n 18, at 115.

85 Carolyn Evans "Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture" (2010) 26 JLR 321 at 336.

86 *Dahlab v Switzerland*, above n 23, at 6.

87 Brett G Scharffs "*Kokkinakis* and the Narratives of Proper and Improper Proselytizing" in Jeroen Temperman, T Jeremy Gunn and Malcolm D Evans (eds) *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years since Kokkinakis* (Koninklijke Brill NV, Leiden, 2019) 153 at 170–171.

peacefully worn a hijab for four years at the university and was not personally aligned with any political movement.[88] It is therefore difficult to understand how the Court found the restrictive measure necessary to protect Turkey's secular values from religious extremism. In her dissenting opinion, Judge Tulkens criticised this approach as a conceptual leap, stating that:[89]

> Merely wearing the [hijab] cannot be associated with fundamentalism and it is vital to distinguish between those who wear the [hijab] and "extremists" who seek to impose the [hijab] as they do other religious symbols.

Finally, in *Ebrahimian*, France's claim that the restrictive measure was necessary to ensure equal treatment of patients makes a questionable leap from the fact of a staff member wearing a hijab to an inference about the quality of her treatment. Dissenting Judge De Gaetano noted the dubious nature of this assertion:[90]

> [It is a] false (and … very dangerous) premise … that the users of public services cannot be guaranteed an impartial service if the public official serving them manifests in the slightest way his or her religious affiliation …

Therefore, due to the absence of evidence that the interference was necessary in these cases, it can be concluded that the Court is taking a context-specific issue regarding one person wearing a hijab and extrapolating it "into a larger abstract justification based on the need to protect secularism *per se*".[91]

The Court's failure to scrutinise the necessity of the restrictions can perhaps be attributed to two of the Court's assumptions.[92] First, the ECtHR assumes that the principle of secularism is inherently consistent with the state's role as a "neutral and impartial organiser" of society.[93] Secondly, the Court assumes that secularism seeks to protect the rights and freedoms of all members of society.[94] However, the fundamentalist approach to secularism is primarily concerned with removing religion from the public sphere, rather than with protecting individual freedoms or ensuring that the state acts neutrally.[95] As restrictions on wearing a hijab indeed restrict Muslim rights, secularism does not

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88 Romero, above n 11, at 98–99.

89 *Leyla Şahin v Turkey,* above n 29, at 10 per Judge Tulkens dissenting.

90 *Ebrahimian v France*, above n 51, at 39 per Judge De Gaetano dissenting.

91 Ronan McCrea "Secularism before the Strasbourg Court: Abstract Constitutional Principles as a Basis for Limiting Rights" (2016) 79 MLR 691 at 700.

92 Berry, above n 18, at 115.

93 At 115.

94 At 115.

95 At 115.

protect the rights of all members of society and the Court's failure to fully assess the necessity of the measures cannot be justified.

VI SECULARISM AS A VEIL FOR HOSTILITY TOWARD ISLAM?

The flaws in the ECtHR's approach raise a more fundamental question as to whether member states have relied on "secularism" to disguise hostility toward Islam. The emergence of negative attitudes toward Islam at the ECtHR can be traced back to *Şahin* where the Grand Chamber endorsed the Chamber's comments that prohibiting wearing a hijab at universities could be seen as "a stance" against "extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts".[96] More recently, far-right political parties have received an increase in support in countries across Europe, including in France, Spain, the United Kingdom, Hungary and Germany.[97] These parties share a common desire to "rid Europe of its 'Muslim issue' which is perceived as a threat to Europe" often by construing Islam as "a political religion, an ideology which seeks to subject our free Western society to Islam".[98] For example, in 2014, around the time *Ebrahimian* was decided, the French far-right party the Front National (now known as the National Rally) advocated for "'enhanced protection of secularism in Europe' due to the threat of 'radical Islam' on Europe's Christian heritage".[99] The commitment to secularism as a means of minimising the visibility of Islam in French society supports the idea that secularism may be used as a tool to propel a conservative political agenda rather than promote harmony in society.

Political hostility toward Islam was explicitly discussed in *SAS v France*.[100] In that case, the applicant challenged France on the basis that the criminalisation of concealing the face in public spaces violated her right to wear a niqab (a full-face veil) that was protected by art 9.[101] The ECtHR accepted France's argument that the ban could be justified to protect the conditions of "living together" which can be linked to the protection of the rights and freedoms of others under art 9(2).[102] The Court noted the importance of the face during social interactions and accepted France's argument that a veil can be a "barrier" which breaches "the right of others to live in a space of socialisation which makes

96 *Leyla Şahin v Turkey*, above n 29, at [115].

97 Saira Khan "Institutionalised Islamophobia: The Rise of European Nationalism against Freedom of Religion for Muslims" in Javaid Rehman, Ayesha Shahid and Steve Foster (eds) *The Asian Yearbook of Human Rights and Humanitarian Law* (Koninklijke Brill NV, Leiden, 2020) 330 at 332–333.

98 At 332.

99 At 334 (footnote omitted).

100 *SAS v France* ECHR 43835/11, 1 July 2014 (Grand Chamber).

101 At [3].

102 At [121].

living together easier".[103] The Court concluded that the ban was proportionate so far as it guaranteed the conditions of "living together" and thus there was no violation of art 9.[104]

In coming to this conclusion, the Court set out the preliminary 2010 French parliamentary report that the Islamic full-face veil was "a practice at odds with the values of the Republic" and that it went "beyond mere incompatibility with secularism" as it represented a "form of subservience".[105] The Court acknowledged that third-party interveners had raised legitimate concerns that the debate contained Islamophobic comments and that although:[106]

> It is admittedly not for the Court to rule on whether legislation is desirable … It would, however, emphasise that a State which enters into a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance …

These remarks are unsatisfactory. The Court is conceding that it has a duty to ensure that states uphold their duty to promote tolerance – allowing everyone to live according to their beliefs without being unduly encumbered by others' beliefs[107] – yet simultaneously failing to intervene in the face of intolerance against Islam. As the parliamentary debates are set out in depth in the judgment, the Court should not have simply accepted that the prohibition on full-face veils sought to guarantee the conditions of "living together". The Court should instead have addressed that the ban amplified the division between Muslims and non-Muslims in France rather than encouraging integration.[108] The dissenting judges in *SAS* were alive to this reality, stating that the ban could be seen as a "sign of selective pluralism and restricted tolerance" that intended to eliminate an alleged cause of tension (Islam). They rightly pointed out that "the role of the authorities… is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other".[109]

The inadequacy of the majority's view in *SAS* is bolstered by *Yaker* and *Hebbadj*, two decisions of the United Nations Human Rights Committee (UNHRC) from 2018, which held that France's ban on full-face veils violated the applicants' right to freedom of religion.[110] Article 18(3) of the

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103 At [122].

104 At [157] and [159].

105 At [17].

106 At [149].

107 Lorenzo Zucca *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford University Press, Oxford, 2012) 3 at 13.

108 Howard, above n 74, at 88.

109 *SAS v France*, above n 100, at [14] per Judges Nußberger and Jäderblom dissenting.

110 *Yaker v France* CCPR/C/123/D/2747/2016 (17 July 2018); and *Hebbadj v France* CCPR/C/123/D/2807/2016 (17 July 2018).

International Covenant on Civil and Political Rights stipulates the circumstances under which the right to freedom of religion may be restricted.[111] It is analogous to art 9(2) of the ECHR, so the UNHRC's analysis is directly comparable. The UNHRC stated that the notion of "living together" is "vague and abstract" and that France failed to identify any "specific fundamental rights or freedoms of others that are affected" by full-face veils.[112] It also stated that there is no right not to be "disturbed" by others wearing a veil under the ECHR, so this idea cannot supersede the fundamental right to freedom of religion protected under art 18(3).[113] The UNHRC concluded that even if "living together" could be considered a legitimate objective for the purposes of art 18(3), France failed to demonstrate that the restrictive measure was proportionate to that aim or was the least restrictive measure.[114]

The UNHRC also noted that member states were failing to promote tolerance and pluralism and were instead promoting intolerance toward Islam. The UNHRC stated that the prohibition on full-face veils may have the "effect of increasing prejudice and intolerance towards this minority group"[115] and that France is:[116]

> … unclear on how respect for the rights of persons belonging to minorities, including religious minorities, are taken into account in this concept in order to safeguard the value of pluralism and avoid the abuse of a dominant position by the majority.

The UNHRC's decisions therefore recognise that the ECtHR is failing to address the lack of tolerance and pluralism implicit in France's arguments and that member states may be relying on abstract aims like secularism and "living together" as a façade for underlying hostility toward Islam.

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111 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 18(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.

112 *Yaker v France*, above n 110, at [8.10]; and *Hebbadj v France*, above n 111, at [7.10].

113 *Yaker v France*, above n 110, at [8.10]; and *Hebbadj v France*, above n 110, at [7.10].

114 *Yaker v France*, above n 110, at [8.11]; and *Hebbadj v France*, above n 110, at [7.11].

115 *Yaker v France*, above n 110, joint opinion of Committee members Ilze Brands Kehris and Sarah Cleveland (concurring), at [4]; and *Hebbadj v France*, above n 110, joint opinion of Committee members Ilze Brands Kehris and Sarah Cleveland (concurring), at [4].

116 *Yaker v France*, above n 111, joint opinion of Committee members Ilze Brands Kehris and Sarah Cleveland (concurring), at [2]; and *Hebbadj v France*, above n 110, joint opinion of Committee members Ilze Brands Kehris and Sarah Cleveland (concurring), at [2].

VII REFORMS

There has been a suggestion that instead of states engaging in a "sleight of hand",[117] to fit principles like secularism under art 9(2) via the rights and freedoms of others, the legitimate aims could be expanded to include principles like secularism directly.[118] However, art 9(2) is intentionally narrow due to the fundamental importance of protecting religious manifestations. It is not appropriate to extend the wording of art 9(2) to explicitly include principles like secularism, as this would give states too much latitude to erode individual freedoms, especially due to the ambiguity surrounding the application of the principle of secularism.

Instead, there are three recommendations that the ECtHR should consider that would allow it to strike a more appropriate balance between state autonomy and the protection of fundamental individual rights. First, the ECtHR can employ a narrower margin of appreciation by ceasing to rely on the idea that there is no European consensus. As stated above, there is a European consensus that restrictions on wearing a hijab or full-face veil are *not* necessary in the contexts which have arisen before the courts. The fact that a few member states have imposed restrictions can remain relevant to the Court's analysis of necessity and whether the national authority is better placed to make the decision. Nevertheless, the Court should refrain from increasing its margin of deference on the basis that there is no European consensus unless significantly more countries adopt restrictions. Due to the issues flowing from a wide margin of appreciation, narrowing this margin is crucial to protecting individual freedoms and ensuring that art 9 can be implemented effectively.

Secondly, the Court can carry out its supervisory role by engaging in a more comprehensive analysis of the necessity and proportionality of the restrictive measures in a democratic society. Its analysis should involve setting out the factors on a case-by-case basis in favour of each party and engaging in some scrutiny of the member state's position. In particular, a more comprehensive proportionality test should involve (1) placing greater significance on the consequences for the applicants and (2) prioritising concrete aims over abstract aims.

The Court should consider heeding its comments in *Eweida* that the consequences of the restrictive measure for the applicants are significant when considering the proportionality of the measure. Although harsh consequences can be proportionate – as illustrated in *Eweida*, where the Court held that loss of employment was proportionate for one applicant[119] – the Court must comprehensively weigh the consequences of the restriction with the legitimate aim. To gain a deeper understanding of the consequences, a critical legal pluralist approach would allow the Court to consider the "subjective beliefs of a legal subject" by looking at the issue from the applicant's

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117 McCrea, above n 91, at 700.

118 Ilias Trispiotis "Freedom of Religion, Equality and Discrimination in the European Convention on Rights" (PhD Thesis, University College London, 2016) 168–174.

119 *Eweida v United Kingdom*, above n 64, at [100] and [106].

perspective.[120] Consideration of a Muslim perspective would allow the Court to reject the false *forum internum* versus *forum externum* dichotomy, appreciate the importance of modesty for the applicants, and properly engage with the harsh consequences of the restrictive measures.

The Court should also consider prioritising concrete aims (like the perceived impact on those in immediate contact with the applicant) over abstract aims (like protecting the principle of secularism) when conducting the proportionality analysis.[121] For example, Judge O'Leary acknowledged in *Ebrahimian* that the concrete aim was to protect vulnerable psychiatric patients whereas the abstract aim was to protect the constitutional principle of secularism.[122] She argued that it was justifiable to conclude that the interference was proportionate to the concrete aim, but criticised reliance on the abstract aim as rendering the analysis too abstract.[123]

Regarding concrete aims, the Court should also consider focusing on "evidence of any real encroachment on the interests of others" when determining whether the interference is proportionate.[124] This consideration was raised in *Eweida*, where one of the applicants, an employee of British Airways, was sent home for wearing a visible Christian crucifix as it breached the airline's policy that any religious jewellery must not be visible.[125] The Court held that there was no evidence of real encroachment on the rights of others, so the earlier courts had given too much weight to the employer's aim of presenting a corporate image, and Ms Eweida's art 9 right had been breached.[126] Requiring evidence of real encroachment is useful as it can be distinguished from mere discomfort or offence, as there is no right to not be offended by someone else's religious manifestation.[127] This is particularly true as:[128]

> … exposure to other religious practices and symbols is simply a fact of life in modern pluralistic democracies. Some offence to at least some persons is an inevitable by-product of contemporary social life, where [there is] an increasing range of diverse cultures, religions and lifestyles …

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120 Amy Jackson "A Critical Legal Pluralist Analysis of the Begum Case" (Osgoode CLPE Research Paper 46/2010) at 2.

121 Broadly referring to the discussion in McCrea, above n 91, at 695–696.

122 *Ebrahimian v France*, above n 51, at 35–36, per Judge O'Leary dissenting.

123 *Ebrahimian v France*, above n 51, at 35 per Judge O'Leary dissenting; and McCrea, above n 91, at 696.

124 *Eweida v United Kingdom*, above n 64, at [95].

125 At [10] and [12].

126 At [94].

127 Leigh and Ahdar, above n 8, at 1090.

128 At 1090.

The distinction between discomfort and real encroachment on others' rights may seem somewhat elusive. However, if the Court considered whether the subjective views of others are reasonable and related to the actions of an individual, rather than based on preconceptions or mere discomfort, the Court could conclude that there is a real encroachment on others' rights.[129] If so, this points toward the restriction being more necessary and proportionate under art 9(2).

The UNHRC's decisions in *Yaker* and *Hebbadj* also illustrate the need for the ECtHR to focus on concrete aims and evidence of real encroachment on the rights and freedoms of others. The UNHRC acknowledged that France failed to provide evidence of any real encroachment on the rights and freedoms of others, as the discomfort some people experienced regarding full-face veils could not supersede a fundamental right in the ECHR. The assertion that one needs to see another's face to engage in meaningful social interactions is also distinctly a Western notion that disregards the fact that veil-wearers have public exchanges around the world.[130]

Drawing these ideas together, it is clear that the ECtHR can engage in a more comprehensive analysis of the necessity and proportionality of the restrictive measure by placing greater significance on the consequences for the applicant and prioritising concrete aims over abstract aims.

Finally, the ECtHR should refrain from ignoring the origins and broader context of restrictive measures. The Court should consider that if a restrictive measure arises due to negative attitudes toward Islam, the member state is not respecting the principles of tolerance and pluralism, and therefore, the Court may need to increase its scrutiny of the necessity of the measure.

In 2010, the Parliamentary Assembly of the Council of Europe raised concerns that Muslims in several member states were being subjected to stigma and exclusion, such that cultivating a more inclusive and tolerant Europe must be a priority.[131] As intolerance has increased since 2010 due to the absence of political will to undertake such changes, the ECtHR may face backlash if it prevents member states from implementing restrictive measures against wearing a hijab and other Islamic veils. However, it is firmly within the ECtHR's mandate to promote "pluralism, tolerance and broadmindedness" and protect minority rights,[132] so it would be regrettable if an institution created to protect these values did not do so. Article 9 is also rendered ineffective for Muslim women if the Court fails to address the origins of restrictive measures which target hijabs and other Islamic veils,

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129 At 1090.

130 *SAS v France*, above n 100, at [9] per Judges Nußberger and Jäderblom dissenting; and Sital Kalantry "The French Veil Ban: A Transnational Legal Feminist Approach" (2017) 46 U Balt L Rev 201 at 225.

131 Resolution 1743 (2010) on Islam, Islamism and Islamophobia in Europe at [1] and [8].

132 *SAS v France*, above n 100, at [128].

so there is a pressing need for the Court to reform its approach rather than "[legitimise] growing intolerance".[133]

VIII CONCLUDING REMARKS

The ECtHR has consistently favoured a member state's desire to protect the principle of secularism over a Muslim woman's desire to wear a hijab. This article has illustrated that there are several flaws in the Court's approach to these cases, centring on the Court's inadequate analysis of necessity and proportionality, and its application of an unduly wide margin of appreciation. This article has also pointed out that some member states may be using abstract principles like "secularism" and "living together" as a façade to disguise hostility toward Islam, and that the Court has chosen not to meaningfully address this concern.

In response to the deficiencies in the ECtHR's approach, this article has suggested that the Court can reform its approach in three ways. First, the Court can consider narrowing the margin of appreciation afforded to member states. Secondly, the Court can engage in a more comprehensive necessity and proportionality analysis. Finally, the Court can promote tolerance by scrutinising whether abstract aims like secularism are a façade for hostility toward Islam. These reforms would allow the Court to strike a more appropriate balance between state autonomy and individual rights and discourage states from relying on abstract principles to limit the protection afforded to Muslim women under art 9.

The main obstacle to the implementation of reforms is that change must arise through judicial initiative, as due to the Grand Chamber precedents already established, the ECtHR may be hesitant to stray from its established stance. Nevertheless, instead of assisting in the removal of the Islamic strand which is woven into the religious tapestry of Europe, the Court needs to use its position to rethread this strand and resist conflating one Muslim woman's desire to wear a veil with political extremism.

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133 Berry, above n 18, at 113.