The Post-9/11 Securitisation of the Hijab and International Human Rights Law: the Strasbourg Court, Article 9 and Hijab Restrictions

Aymen Ati*

Abstract

Following 9/11, there has been an increasing global trend of state restrictions on the freedom of Muslim women to wear the hijab. Despite freedom of religion or belief being enshrined within numerous provisions in international human rights law, hijab restrictions have been upheld by supranational courts. Using case law of the European Court of Human Rights (ECtHR), pertaining to Article 9 of the European Convention, this paper will argue that this deferential phenomenon stems from a judicial securitisation of the hijab and Muslim women. It will do so by identifying five problematic patterns that are evident in the ECtHR case law, and demonstrating that they are best understood using securitisation theory. The wider implications of this securitisation, both on the global context of human rights and the legitimisation of 'headscarf persecution', will then briefly be explored, and a 'de-securitisation' will be recommended.

Keywords

Article 9 ECHR - European Court of Human Rights - Muslim women - Hijab Restrictions - Securitisation - Headscarf.

1. Introduction: Hijab Bans and Hate Crimes

Following the terrorist attacks of 11 September 2001 (9/11) in the United States of America (US), three phenomena have emerged in the 'West' that require exposition in order to contextualise the research topic of this paper.

First, minority Muslim populations residing in Western democracies have been securitised.[1] Edmunds aptly describes this phenomenon as a 'hyper-legalisation' of settled Muslim populations in Western Europe, spawned by micro-surveillance

* Bachelor of Civil Law Candidate at Christ Church, University of Oxford (aymenati@gmail.com).
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[1] This term will be defined in Section Five.

measures, which has resulted in a curtailment of their human rights.[2] Although many examples typify this trend, one need not look further than the government's counter-terrorism strategy in the United Kingdom: a 'Prevent Strategy' was created to combat extremism, defined as 'vocal or active opposition to fundamental British values',[3] which led to a statutory duty being placed on schools to 'have due regard to the need to prevent people from being drawn into terrorism'.[4] The anti-radicalisation programme has been criticised as disproportionately targeting Muslims,[5] inherently Islamophobic, essentially a 'spying programme'[6] and pejorative to freedom of speech.[7]

It is within this broader context of the hyper-legalisation of Muslims that securitisation has been extended to the dress of visibly Muslim women. The relationship between hijab bans and securitisation theory will be fully explored in Section Five, but it is imperative at this stage to highlight that post-9/11, restrictions on the freedom of Muslim women to wear the hijab have sharply increased and been normalised. Starting in France, Law 2004-228[8] was enacted in 2004 to ban conspicuous religious symbols from public primary and secondary schools. Although the law did not expressly identify a particular religious symbol, many felt its main purpose was to ban the hijab in public schools.[9] This was followed by a 2010 French ban on the wearing of face-covering headgear in public, which included niqabs and burqas,[10] making France the first European country to ban full-face Islamic veils in public spaces.[11]

Many other European countries have followed the trend initiated by France by also placing restrictions on the hijab.[12] Starting with national legislation, similar *total* bans on Islamic full-face coverings in public spaces, commonly referred to as 'burqa bans' despite including a prohibition on niqabs as well, have been imposed in Belgium

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[2] June Edmunds, 'The 'new' barbarians: governmentality, securitization and Islam in Western Europe' (2012) 6 Contemporary Islam 67.
[3] Home Office, *Prevent Strategy* (Cm 8092, 2011) 107.
[4] Counter-Terrorism and Security Act 2015, s 26.
[5] Miqdaad Versi, 'The latest Prevent figures show why the strategy needs an independent review' *The Guardian* (10 November 2017) <www.theguardian.com/commentisfree/2017/nov/10/prevent-strategy-statistics-independent-review-home-office-muslims> accessed 30 March 2018.
[6] Joe Watts, 'Muslims see anti-extremism scheme Prevent as a 'spying programme', admits terror law watchdog' *The Independent* (6 October 2016) <www.independent.co.uk/news/uk/politics/muslims-prevent-scheme-seen-as-spying-says-terrorism-law-watchdog-a7347751.html> accessed 30 March 2018.
[7] UNHRC, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his follow-up mission to the United Kingdom of Great Britain and Northern Ireland' (2017) UN Doc A/HRC/35/28/Add.1.
[8] *Loi no. 2004-228 du 15 Mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* [Law No. 2004-228 of 15 March 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools]: Journal Officiel de la République Française (no. 65, 17 March 2004, p. 5190).
[9] Mohamed Abdelaal, 'Extreme Secularism vs. Religious Radicalism: The Case of the French Burkini' (2017) 23(3) ILSA Journal of International and Comparative Law 443-467, 451.
[10] *Loi no. 2010-1192 du 11 Octobre 2010 interdisant la dissimulation du visage dans l'espace public* [Law 2010-1192 of 11 October 2010 Act Prohibiting Concealment of the Face in Public Places], Journal Officiel de la République Française (no. 0273, 12 October 2010, p. 18344).
[11] 'The Islamic veil across Europe' *BBC* (31 January 2017) <www.bbc.co.uk/news/world-europe-13038095> accessed 22 March 2018.
[12] For a comprehensive outline of hijab restrictions in Member States of the European Union, 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' (Open Society Foundations, Briefing Paper, 2018) overview on page 9.

(2011),[13] Bulgaria (2016),[14] Austria (2017)[15] and Denmark (2018).[16] *Partial* burqa bans, meaning the same prohibition but in *some* public spaces, such as schools or public transport, or in *some* scenarios on certain individuals, have been approved nationally in the Netherlands (2016)[17], Germany (2017)[18] and Norway (2018).[19] There have also been legislative plans to impose a 'burqa ban' in Latvia.[20]

Non-nationwide hijab restrictions have also been imposed in the localities of European countries. In Russia, headscarf-hijabs are banned in schools and universities in two regions, the Stavropol territory (2013) and the Republic of Mordovia (2014), and both bans have been upheld by the Russian Supreme Court.[21] Several municipalities in the Catalonian region of Spain, including Barcelona, had imposed forms of 'burqa bans' in 2010, but these were overturned by the Supreme Court of Spain in 2013.[22] 'Burqa bans' were also introduced in the Lombardy (2015)[23] and Liguria (2017)[24] regions of Italy. In Switzerland, Ticino was the first Swiss canton to approve a total burqa ban in 2013,[25] and St Gallen introduced a partial burqa ban in 2017.[26]

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[13] 'Belgian ban on full veils comes into force' *BBC* (23 July 2011) <www.bbc.co.uk/news/world-europe-14261921> accessed 30 March 2018.
[14] Siobhan Fenton, 'Bulgaria imposes burqa ban – and will cut benefits of women who defy it' *The Independent* (1 October 2016) <www.independent.co.uk/news/world/europe/bulgaria-burka-ban-benefits-cut-burkini-niqab-a7340601.html> accessed 30 March 2018.
[15] Lizzie Dearden, 'Austrian parliament passes burqa ban seeing Muslim women face £130 fines for wearing full-face veils' *The Independent* (18 May 2017) <www.independent.co.uk/news/world/europe/austria-burqa-ban-parliament-fines-150-full-face-veils-muslim-islam-niqabs-public-transport-a7742981.html> accessed 30 March 2018.
[16] Staff Reporter, 'Denmark becomes latest European country to ban burqas and niqabs' *The Independent* (31 May 2018) <https://www.independent.co.uk/news/world/europe/denmark-burqa-ban-europe-muslim-women-face-veil-niqab-islam-a8377586.html> accessed 10 November 2018.
[17] Harriet Agerholm, 'Dutch parliament approves partial burqa ban in public places' *The Independent* (29 November 2016) <www.independent.co.uk/news/world/europe/dutch-burqa-veil-ban-holland-votes-for-partial-restrictions-some-public-places-a7445656.html> accessed 30 March 2018.
[18] Justin Huggler, 'Limited burka ban approved by German parliament' *The Telegraph* (28 April 2017) <www.telegraph.co.uk/news/2017/04/28/limited-burka-ban-approved-german-parliament> accessed 30 March 2018.
[19] Jon Sharman, 'Norway's parliament votes to ban burqa in schools and universities' *The Independent* (7 June 2018) <www.independent.co.uk/news/world/europe/denmark-burqa-ban-europe-muslim-women-face-veil-niqab-islam-a8377586.html> accessed 3 May 2019.
[20] Rachael Pells, 'Islamic face veil to be banned in Latvia despite being worn by just three women in entire country' *The Independent* (21 April 2016) <www.independent.co.uk/news/islamic-muslim-face-veil-niqab-burqa-banned-latvia-despite-being-worn-by-just-three-women-entire-a6993991.html> accessed 3 May 2019.
[21] Yekaterina Chulkovskaya, 'Can you wear a hijab in Russia? And if so, where – and where not?' (*Russia Beyond the Headlines*, 19 October 2016) <www.rbth.com/politics_and_society/2016/10/19/can-you-wear-a-hijab-in-russia-and-if-so-where-and-where-not_640217> accessed 30 March 2018.
[22] Fiona Govan, 'Spain overturns Islamic face veil ban' *The Telegraph* (1 March 2013) <www.telegraph.co.uk/news/worldnews/europe/spain/9902827/Spain-overturns-Islamic-face-veil-ban.html> accessed 30 March 2018.
[23] Ashitha Nagesh, 'Italian region introduces ban on Islamic burqa and niqab veils' *Metro* (13 December 2015) <www.metro.co.uk/2015/12/13/italian-region-introduces-ban-on-islamic-burqa-and-niqab-veils-5563157> accessed 30 March 2018.
[24] Catherine Edwards, 'Italian region bans women in face veils from entering hospitals' *The Local* (8 March 2017) <www.thelocal.it/20170308/italian-region-bans-veiled-women-from-entering-hospitals> accessed 30 March 2018.
[25] Gerhard Lob, 'Burka ban approved in Italian-speaking Switzerland' *Swissinfo* (22 September 2013) <www.swissinfo.ch/eng/veiled-vote_burka-ban-approved-in-italian-speaking-switzerland/36951992> accessed 30 March 2018.
[26] 'St Gallen approves conditional ban on face coverings' *The Local* (29 November 2017) <www.thelocal.ch/20171129/st-gallen-approves-conditional-ban-on-face-coverings-burqa> accessed 30 March 2018.

The above description is by no means an exhaustive list of hijab restrictions around the world. Other arguably European countries such as Turkey famously had many headscarf-hijabs restrictions until the majority of them were removed in 2008 and 2013.[27] This post-9/11 phenomenon is also not limited to Europe. Following suicide bombings and the spread of Boko Haram, African countries have imposed 'burqa bans': Chad (2015), Cameroon (2015), Congo-Brazzaville (2015) and Niger (2016).[28] A 'burqa ban' was also imposed in Syrian universities in 2010, although this was then relaxed the following year,[29] and most recently in Sri Lanka (2019) following terrorist attacks.[30]

It is clear then that post-9/11 there has been a global trend of increasing hijab restrictions, and that on the current trajectory this trend is likely to continue. Either states with hijab bans already in place will increase their severity, by extending restrictions to other public spaces and more popular forms of hijab, or states currently without bans will adopt them.

The second phenomenon is that, after 9/11, there has been a sharp rise in Islamophobia and anti-Muslim hate crimes. This is evident from the hate crime data in the US that is annually tabulated by the FBI. In 2001, 481 anti-Muslim hate crimes were reported, in comparison to 28 the year before. In 2015, a 67% increase from the previous year was recorded with 257, and in 2016, this increased further to 307 anti-Muslim hate crimes.[31] A similar trend is illustrated by the statistics of the Metropolitan Police Service: in comparison to a figure of 318 in 2011, 1660 Islamophobic hate crimes were recorded in London during 2017 (a 422% increase), with annually increasing rates in between.[32]

A poignant layer of nuance is added to this phenomenon by the UK-based anti-Muslim reporting agency, Tell MAMA, who highlight that anti-Muslim hatred is 'evidently gendered'.[33] Not only are the majority of victims female,[34] but anti-Muslim incidents 'disproportionately target visible Muslim women (i.e. wearing Islamic clothing such as a headscarf, face veil, abaya, etc)'.[35] For example, in anti-Muslim hate incidents reported to Tell MAMA during 2015, 75% of all female victims were visibly Muslim.[36] Thus, not only are visibly Muslim women, who are the topic of this paper,

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[27] BBC 2017 (n 11).
[28] Radhika Sanghani, 'Burka bans: The countries where Muslim women can't wear veils' *The Telegraph* (17 Aug 2017) <www.telegraph.co.uk/women/life/burka-bans-the-countries-where-muslim-women-cant-wear-veils> accessed 30 March 2018.
[29] Associated Press in Cairo, 'Syria relaxes veil ban for teachers' *The Guardian* (6 April 2011) <www.theguardian.com/world/2011/apr/06/syria-relax-veil-ban-teacher> accessed 30 March 2018.
[30] 'Sri Lanka attacks: Face coverings banned after Easter bloodshed' *BBC* (29 April 2019) <www.bbc.co.uk/news/world-asia-48088834> accessed 4 May 2019.
[31] Brian Levin, 'Explaining the rise in hate crimes against Muslims in the US' (*The Conversation*, 20 July 2017) <www.theconversation.com/explaining-the-rise-in-hate-crimes-against-muslims-in-the-us-80304> accessed 1 April 2018; For FBI hate crime statistics since 1995, see 'Hate Crime' (*Federal Bureau of Investigation: Uniform Crime Reporting*) <https://ucr.fbi.gov/hate-crime> accessed 4 May 2019.
[32] See 'Islamophobic' in drop-down menu, select 'List' view, adjust start/end dates, e.g. Jan–Dec 2011 or 2017, and highlight all Borough Figures to attain 'SUM(Count)', on 'Hate crime or special crime dashboard' (*Metropolitan Police Service*) <www.met.police.uk/stats-and-data/hate-crime-dashboard> accessed 1 April 2018.
[33] Tell MAMA, 'Tell MAMA Annual Report 2016 – A Constructed Threat: Identity, Intolerance and the Impact of Anti-Muslim Hatred' (Faith Matters, London, 2017) 7.
[34] ibid.
[35] ibid 11.
[36] Tell MAMA, 'Tell MAMA Annual Report 2015 – The geography of anti-Muslim hatred' (Faith Matters, London, 2016) 10, see also 6.

susceptible to the global increase in Islamophobia, but they are rendered particularly vulnerable due to their Islamic visibility.

The third phenomenon, which will be discussed in Section Three, is that the European Court of Human Rights (ECtHR) has largely upheld these post-9/11 hijab restrictions, despite the legal protections outlined in Section Two and the vulnerability of this group of people. This is an indictment of international human rights law for its failure to protect the rights of visibly Muslim women. It also places a pressing duty on academics to interrogate the decisions of the supranational court, and to unearth the hidden and underlying reason for their outcomes, especially since such decisions have legitimised the oppression of a particularly vulnerable group of people, and potentially encouraged 'headscarf persecution' (see Section Six). The decisions of the ECtHR will be focused on in this paper because, thus far, most of the case law on hijab restrictions at the supranational court level has been generated in the Strasbourg Court. This is attributable to, inter alia, recent hijab restrictions being concentrated in the European continent, as outlined above. Nonetheless, the spill-over effect of ECtHR case law on other jurisdictions and international human rights law as a whole will be discussed briefly in Section Six.

How then is the third phenomenon, the failure of international human rights law, attributable to securitisation? This paper will argue that the problematic patterns evident in the case law of the ECtHR, pertaining to hijab restrictions, stem from the Court's securitisation of the hijab and Muslim women, and that this has serious implications for international human rights law globally and Muslim women personally. In order to make this argument, the paper will be structured into five substantive sections. Section Two will outline some key concepts relevant to the discussion, and then explain the legal international human rights provisions that protect the right of Muslim women to wear the hijab, with a focus on the right to freedom of religion or belief. Section Three will embark on a critical analysis of the case law, and Section Four will identify five problematic patterns that call for an alternative and unifying theoretical framework of securitisation. Section Five will elucidate securitisation theory, and the expansive concepts of the 'politics of exception' and the 'politics of unease'. It will then apply this theoretical framework to the five problematic patterns, demonstrating that the counter-productive trends stem from the Court's securitisation of the hijab and Muslim women. Section Six will explain the implications of this securitisation, both on the global context of human rights, and for how it has legitimised the oppression of Muslim women. Finally, some concluding remarks will be made, and a 'de-securitisation' will be recommended.

2. The Hijab and International Human Rights

A. Key Concepts and Definitions

In order to discuss the post-9/11 securitisation of the hijab in international human rights law, the meaning of *hijab* itself must first be elucidated. When discussing the dress of Muslim women, inconsistent terminology and imprecise language permeates academic literature, as well as political and media discourse. McGoldrick suggests that commonly used terms in English (headscarf and veil), French (*foulard*, *voile* and

chador), and even the Arabic term hijab, lack precision.[37] In its literal sense, hijab is an Arabic word meaning barrier, partition or curtain, though in Islam it adopts a broader meaning that incorporates the principle of modesty, behavioural norms and dress codes.[38] These obligations are often argued to also be imposed upon Muslim men, in addition to women, albeit differently.[39] This understanding of hijab is distinguishable from its narrow use in the English-speaking world, as a term simply denoting the head-covering of Muslim women.[40]

Added to this semantic difficulty is the disagreement within the Muslim community over what constitutes *correct* hijab, and whether it is even mandated by Islam.[41] This is reflected in the diversity of how different Muslim women express their hijab. In addition to covering their body to varying degrees, some Muslim women observe a headscarf that covers their hair, ears and neck, but not their face, whilst others may leave their neck exposed. McGoldrick's term of 'headscarf-hijab'[42] will be used to describe this specific form of veiling in this paper. Those who wear the *niqab* veil their whole body and face, leaving a slit for their eyes. The *burqa* on the other hand omits this slit and covers the whole face. Some Muslims criticise several forms of these face-veil hijabs as being cultural as opposed to religious, and even oppressive, whilst others may argue that the hijab is limited to behavioural modesty.[43]

The validity of the competing claims over what is the *true* hijab prescribed by Islam is outside the focus of this paper. It is submitted that as different Muslim women choose to identify their varied forms of Islamic dress as hijab and an expression of their Islamic faith, the different forms of dress should all be treated as such.[44] For this reason, and for simplicity, *hijab* will be used in this paper as a general umbrella term that incorporates all of the aforementioned forms of Islamic dress that Muslim *women* wear, which make them visibly and identifiably Muslim. Where possible, however, distinctive forms of the hijab, such as the niqab or burqa, will be identified for accuracy as they raise different factual and legal issues.

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[37] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 4.
[38] 'Hijab' *BBC* (3 Sep 2009) <www.bbc.co.uk/religion/religions/islam/beliefs/hijab_1.shtml> accessed 22 March 2018.
[39] Qasim Rashid, 'Muslim men need to understand that the Quran says they should observe hijab first, not women' *The Independent* (29 March 2017) <www.independent.co.uk/voices/muslim-men-hijab-forcing-women-islam-teaching-mohammed-quran-modesty-a7655191.html> accessed 22 March 2018; Arsalan Rizvi, 'The Hijab of Men' (*Islamic Insights*, 6 Oct 2009) <www.islamicinsights.com/religion/the-hijab-of-men.html> accessed 22 March 2018.
[40] BBC (n 38).
[41] McGoldrick (n 37) 8.
[42] ibid 4.
[43] For an overview of some contrasting perspectives, see Chouki El Hamel, 'Muslim Diaspora in Western Europe: The Islamic Headscarf (Hijab), the Media and Muslims' Integration in France' (2002) 6(3) Citizenship Studies 293, 301-304.
[44] This is not an uncontroversial stance to take. For example, in *HJH Halimatussaadiah BTE HJ Kamaruddin v Public Services Commission, Malaysia and Anor* [1994] 3 MLJ 61, the Malaysian Supreme Court upheld a 'purdah' (face-veil) prohibition, partly on the basis that it was not required by Islam and therefore not protected under the nation's constitutional right of freedom of religion. Such arguments, however, are not typically relied upon in the context of the ECtHR, and are thus outside the focus of this paper.

B. Legal Context

(i) Freedom of Religion or Belief

The right of Muslim women to wear the hijab is typically viewed within the context of freedom of religion or belief, which is a human right protected under different international and regional legal instruments.

In regard to the universal legal instruments, freedom of religion or belief was alluded to in the founding Charter of the United Nations (UN), in the sense of promoting human rights without discriminating against religion.[45] Freedom of religion or belief found its more particular and recognised form in Article 18 of the Universal Declaration of Human Rights (UDHR).[46]

Article 18 of the International Covenant on Civil and Political Rights (ICCPR)[47] expanded on this, and is the most widely accepted of the texts, with 170 state parties and six additional signatories without ratification.[48] Article 18 provides that:

> 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.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 18 of the ICCPR importantly distinguishes between the 'freedom of thought, conscience, religion or belief' and the 'freedom to manifest religion or belief', as highlighted by General Comment 22 of the UN Human Rights Committee.[49] The former, enshrined in Article 18(2), is an absolute and inalienable right that is 'protected unconditionally' and 'does not permit any limitations whatsoever'.[50] This is usually referred to as *forum internum*. The latter, on the other hand, as outlined in Article 18(3),

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[45] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, arts 1(3), 55(c).
[46] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).
[47] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[48] 'Status of Treaties: International Covenant on Civil and Political Rights' (*United Nations: Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND> accessed 1 April 2018.
[49] UN Human Rights Committee, 'CCPR General Comment No. 22: Article 18 Freedom of Thought, Conscience or Religion' (1993) CCPR/C/21/Rev.1/Add.4, para 3.
[50] ibid.

is a qualified right that is subject to 'limitations' (interferences by the state) that are 'prescribed by law' and 'necessary' for the 'legitimate aims' identified, of protecting 'public safety, order, health, or morals or the fundamental rights and freedoms of others'.[51] This is referred to as *forum externum*.

A Muslim woman's right to wear the hijab falls under the 'freedom to manifest' category of freedom of religion or belief, because it concerns the external manifestation of a religion (*forum externum*) as opposed to a person's inner thoughts and beliefs (*forum internum*). As such, it is protected by Article 18(3) ICCPR. This is again evident from General Comment 22, which states that the 'freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts', and that 'observance' and 'practice' may include 'the wearing of distinctive clothing or headcoverings'.[52] It is therefore a qualified right subject to limitations by the state.

Moreover, freedom of religion or belief is also protected under the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981)[53], the first international legal treaty devoted exclusively to the freedom of religion, and to a lesser extent under the International Covenant on Economic, Social and Cultural Rights (1966),[54] as well as the Universal Islamic Declaration on Human Rights (1981).[55]

Moving onto the regional legal texts, freedom of religion or belief is a recognised right under the American Convention on Human Rights (ACHR) (1969)[56] of the Organization of American States, the African Charter on Human and Peoples' Rights (ACHPR) (1981)[57] of the African Union, and the revised Arab Charter on Human Rights (Arab Charter) (2004)[58] of the League of Arab States. In the European context, freedom of religion or belief is protected under the Charter of Fundamental Rights of the European Union (EUCFR),[59] however, the principal text for the purpose of the analysis in this paper is the European Convention of Human Rights (ECHR) (1950),[60] and more specifically, Article 9, which provides:

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

[51] ICCPR (n 47) Article 18(3).
[52] ibid para 4.
[53] Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (adopted 25 November 1981) A/RES/36/55.
[54] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3, arts 2, 13.
[55] Universal Islamic Declaration on Human Rights (adopted 19 September 1981, *Islamic Council*) arts 10, 12, 13. Available at: Salem Azzam Secretary General, 'Universal Islamic declaration of human rights' (1998) 2(3) The International Journal of Human Rights 102-112.
[56] American Convention on Human Rights "Pact of San José", Costa Rica (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143, art 12.
[57] African Charter on Human and Peoples' Rights "Banjul Charter" (adopted 27 June 1981, entered into force 21 October 1986) Organization of African Unity Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) art 8.
[58] Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) arts 25, 30.
[59] arts 10, 14(3), 21, 22; Freedom of religion is interpreted by reference to the standards in the ECHR, see EUCFR, arts 52(3), 53.
[60] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

> 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.

Despite some controversies, there is a consensus around the core of freedom of religion or belief, and the universal and regional texts are largely similar.[61] All of the regional texts, like Article 18(3) ICCPR, place limitations on the *forum externum* dimension of freedom of religion or belief, highlighting a consensus around the qualified nature of the right: Article 9(2) ECHR, Article 12(3) ACHR, Article 8 ACHPR and Article 30(2) Arab Charter.

Article 9 ECHR operates in the same way as Article 18 ICCPR, and this is evident from their almost identical wording. To assert that a limitation is not in breach of Article 9(2) ECHR, the interfering State will have to satisfy three requirements that are imposed by the provision, as outlined in the decision of *S.A.S. v France.* (*S.A.S.).*[62] First, the limitation or interference must be '*prescribed by law*' by the national authorities, as stipulated by Article 9(2) of the ECHR. Second, the limitation must pursue one or more of the legitimate aims set out in Article 9(2) ECHR, which are the protection of 'public safety', 'public order, health or morals', and 'the rights and freedoms of others'.[63] According to *S.A.S.*, this list is 'exhaustive', 'their definition is restrictive', and the limitation must pursue an aim that 'can be linked to one of those listed'.[64] Third, according to Article 9(2), the limitation must be 'necessary in a democratic society' to achieve the aim or aims concerned. Murdoch succinctly summarises this third requirement as 'the interference complained of must: correspond to a pressing need, be proportionate to the legitimate aim pursued, and be justified by relevant and sufficient reasons'.[65] Thus, a proportionality test is an inherent part of this assessment. The third requirement will necessitate a balancing between conflicting rights and interests, or more specifically, between freedom of religion or belief and the legitimate aims. The ECtHR has acknowledged that in such cases, a 'fair balance … must be struck between the various interests at stake'.[66]

To analyse ECtHR decisions pertaining to the hijab effectively, it is imperative to also briefly elucidate the reasons given by the Court for this balancing act, as well as the Court's approach towards it. Limitations on Article 9(2) and a 'fair balance' are needed as democracies are pluralistic societies where 'several religions coexist within one and the same population', and it therefore 'may be necessary to place restrictions

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[61] McGoldrick (n 37) 26; though there are some subtle and important differences, as outlined in the comparative study of PM Taylor, *Freedom of Religion – UN and European Human Rights Law and Practice* (CUP 2005).
[62] (2014) ECHR 695, para 111.
[63] ibid.
[64] *S.A.S.* (n 62) para 113.
[65] Jim Murdoch, 'Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Court of Human Rights' (Human Rights Handbooks, No. 9, Strasbourg: Council of Europe, 2007) 30.
[66] *Leyla Sahin v Turkey* (2004) ECHR 299 (Fourth Section), para 101; see also *Leyla Sahin v Turkey* (2005) ECHR 819, para 108.

on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.[67]

The role of the Court, however, is a supervisory one, and the 'role of the Convention machinery is essentially subsidiary'.[68] It is for 'the national authorities to make the initial assessment of the 'necessity' for an interference', and their decision will be 'subject to review by the Court for conformity with the requirements of the Convention'.[69] Absolute uniformity between states is not required.[70] In this way, states are afforded a 'margin of appreciation', or a margin of state discretion. This doctrine is justified on the basis that 'national authorities are in principle better placed than an international court to evaluate local needs and conditions'.[71] In determining the scope of the margin of appreciation afforded to states, and thus the concurrent level of scrutiny applied by the ECtHR, the Court in *Leyla Sahin* identified four pertinent guiding factors: the importance of the Convention right in question, the nature of the restricted activities, the aim of the restriction, and whether 'the relationship between State and religions are at stake'.[72] If the latter relationship is concerned, a wide margin of appreciation is given because 'opinion in a democratic society may reasonably differ widely' on such questions.[73]

To summarise then, a Muslim woman's freedom to wear the hijab is protected by a human rights provision that is recognised by several international and regional legal instruments. However, it is a qualified right that may be interfered with by states. In the context of the ECHR, Member States will be afforded a wide discretion to strike their own balance between competing interests, and the ECtHR will only exercise a supervisory role over such decisions.

(ii) Other Rights

Freedom of religion or belief intersects with many other rights, such as the rights to life, liberty, fair trial, private and family life, education, work and freedom of expression and the right to not be discriminated against. It is thus why in the ECtHR case law pertaining to hijab restrictions, in addition to a complaint as to a violation of Article 9 ECHR, other Convention rights are often invoked.

Despite this, Article 9 ECHR and the Court's approach towards it will be the focus of this paper for three reasons. First, most of the cases pertaining to hijab restrictions are raised on the basis of Article 9 violations, and Article 9 is put forward as the central right at issue in such cases. Second, the rationales provided by the Court for allowing limitations on Article 9, and their judicial analysis in regard to it, provide the most interesting basis for a discussion of securitisation theory. Third, the world limit of this paper does not permit a detailed exegesis of the other rights at stake.

Framing hijab cases through freedom of religion or belief is not, however, without controversy. Vakulenko for example criticises the use of Article 9 ECHR as the primary legal referent for Islamic dress issues, contending that it produces several

[67] *Kokkinakis v Greece* App No 14307/88 (ECtHR, 25 May 1993) para 33.
[68] *Sahin* 2004 (n 66) para 100.
[69] ibid.
[70] *The Sunday Times v United Kingdom (No. 1)* (1979) 2 EHRR 245 (Commission Decision), para 61.
[71] *Sahin* 2004 (n 66) para 100.
[72] ibid para 101.
[73] ibid.

counterproductive trends in its judicial reasoning and public discourse.[74] Although Vakulenko correctly identifies counterproductive trends that are evident in the case law, several of which will be discussed in this paper, she attributes them to the Article 9 framing itself, whereas it is submitted in Sections Four and Five that these problems stem from an underlying securitisation of the hijab, irrespective of the Article 9 framing. Further, although Vakulenko raises the question of alternatives to Article 9, she leaves it unanswered.[75] Thus, the primacy of Article 9 as a legal referent for hijab cases remains a reality, and this paper must treat it as such.

Although practical constraints do not permit an analysis of rights other than freedom of religion or belief, it is worth noting that the right to not be discriminated against is commonly invoked in conjunction with freedom of religion or belief, and brief attention will be paid to it in this paper.

Religious discrimination has two important dimensions that must be distinguished. Direct religious discrimination occurs when one receives less favourable treatment because of one's religion or belief.[76] Indirect religious discrimination, on the other hand, takes place where an apparently neutral provision, criterion or practice would put those of a particular religion or belief, or lack of, at a disadvantage. An apposite example of this would be a law prohibiting the wearing of anything on top of the head. *Prima facie* this would be neutral, as it applies to everyone in the same way and does not single any group out. However, on closer inspection, such a ban would place Muslim, Jewish and Sikh people at a particular disadvantage, because they could not wear the head covering that their religion mandates (e.g. headscarf-hijab, skull caps and turbans, respectively).[77]

This right is protected under Article 14 of the ECHR, as the 'Prohibition of discrimination', which provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The right is parasitic, meaning it must be pleaded in relation to some other substantive right.[78] It is thus why the ECtHR typically avoids an analysis of Article 14 in hijab restriction cases, because it is reliant on first finding a violation of Article 9, or some other right. Article 14 has been interpreted to prohibit *both* direct and indirect discrimination.[79]

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[74] Anastasia Vakulenko, 'Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends' (2007) 7(4) Human Rights Law Review 717, 739.
[75] ibid 738, 739.
[76] Erica Howard, *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education* (Routledge 2012) 26.
[77] ibid.
[78] 'Article 14: Anti-discrimination' (*UK Human Rights Blog*) <www.ukhumanrightsblog.com/incorporated-rights/articles-index/article-14> accessed 3 April 2018.
[79] *Thlimmenos v Greece* (2000) ECHR 162, para 38; confirmed in *Jordan v United Kingdom* (2001) ECHR 327, para 154.

Non-discrimination is also guaranteed by European Union (EU) law,[80] and the Court of Justice of the European Union (CJEU) has recently, for the first time, decided on cases involving religious discrimination.[81] The more recent Treaty of the European Union (TEU)[82] and Treaty on the Functioning of the European Union (TFEU)[83] both have anti-discrimination provisions.

3. Justifying Hijab Restrictions: Legitimate Aims of the European Court of Human Rights

This section will critically discuss the ECtHR case law, drawing out the problematic rationales of the Court. It will be organised based on the legitimate aims that are relied upon for Article 9(2) ECHR limitations, namely the protection of: public order, public safety and the rights and freedom of others. Based on this critical analysis, five problematic patterns will then be identified in Section Four, and it will be argued that these patterns call for an alternative and unifying theoretical framework to better understand the approach adopted by the ECtHR. By doing so, it will seek to build a foundation for, and justify the necessity of, the application of securitisation theory in Section Five.

As previously mentioned in Section Two, states can interfere with the right of Muslim women to wear the hijab as it is typically framed through freedom of religion or belief, which is a qualified right under international human rights law, including the ECHR. When cases pertaining to hijab restrictions have been argued before the ECtHR, they have largely been upheld on the basis that the limitations pursue legitimate aims in a proportionate manner. In regards to the ECtHR decisions concerning bans on religious symbols worn by individuals, the Court has held them to be within the state's margin of appreciation in the majority of cases.[84] Only in two cases has the ECtHR found a violation of Article 9 ECHR,[85] which concerned in one case the prohibition of wearing a turban and distinctive male dress of a minority Islamic sect on the streets of Turkey,[86] and in the other a Christian cross necklace by a British Airways female employee whilst at work in the UK.[87] With respect to the types of bans on religious head-coverings that occur most frequently across Europe, however, the ECtHR has never found a violation of Convention rights.[88] It is these cases that involve

[80] See two anti-discrimination directives: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Race Directive); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Framework Directive). Also see proposal for a new directive that is still before the Council at the time of writing this paper: Commission (EC), 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM (2008) 0426 final, 2 July 2008.
[81] See Section Six, part A in this article for discussion.
[82] Consolidated Version of the Treaty on European Union [2012] OJ C326/13 arts 2, 3(3).
[83] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 arts 10, 19(1).
[84] Eva Brems et al, 'Head-Covering Bans in Belgian Courtrooms and Beyond: Headscarf Persecution and the Complicity of Supranational Courts' (2017) 39(4) Human Rights Quarterly 882, 900.
[85] ibid.
[86] *Ahmet Arslan and Others v Turkey* (2010) ECHR 2260.
[87] *Eweida and Others v UK* (2013) ECHR 37.
[88] Brems (n 84) 900.

hijab restrictions that will be focused on below. As will be evident from the discussion, many of the legitimate aims overlap theoretically, and they are invoked alongside each other in the case law.

A. Public Order

Of the legitimate aims listed in Article 9(2) ECHR, the 'protection of public order' and the 'protection of the rights and freedoms of others' are the most commonly invoked when justifying hijab restrictions.[89] However, public order is an amorphous legitimate aim, and it is usually invoked by states alongside the protection of the rights and freedoms of others[90] and public safety. In *Dahlab v Switzerland* for example, the hijab restriction was deemed proportionate to all three aims.[91] Thus, it is difficult to distinguish between the legitimate aims on a practical or even conceptual level, especially since the ECtHR has in many of its judgments avoided delineating between them in its proportionality analysis. The muddled approach in *Dahlab,*[92] for example, can be contrasted to the more structured approach of *S.A.S.*, where public safety and the protection of the rights and freedoms of others are distinguished.[93] The ambiguity of public order and its dangers has not gone unnoticed, as Evans highlights, it 'has the potential to be interpreted widely to allow states to intervene in religious practices at any time that they become inconvenient or annoying to those in power'.[94] It is likely that because public order is rarely relied upon as a singular and distinct legitimate aim, that McGoldrick groups it together with protection of the rights and freedoms of others,[95] and Howard categorises it jointly with public safety.[96] For these reasons, it is more useful to discuss public safety and the protection of the rights and freedoms of others in more depth as distinct legitimate aims.

B. Public Safety

Public safety is explicitly recognised as a legitimate aim under Article 9(2) ECHR. What is particularly questionable, however, is not the aim itself, but the ECtHR's proportionality assessments of what is 'necessary in a democratic society' to realise this aim.

In *El Morsli v France,*[97] a Muslim woman who visited the French Consulate in Marrakesh, to request an entry visa into France, was denied entry into the consulate premises as she refused to remove her 'veil' for the purposes of identification. The ECtHR relied upon what it deemed to be an analogous case, of *Phull v France,*[98] to find that the interference with Article 9 was necessary in a democratic society to ensure

[89] McGoldrick (n 37) 247, 250; Howard 2012 (n 76) 109.
[90] See for example *Sahin* 2005 (n 66) para 99.
[91] (2001) ECHR 899, 'THE LAW' para 1.
[92] ibid.
[93] *S.A.S.* (n 62) para 137-143.
[94] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 150.
[95] McGoldrick (n 37) 250.
[96] Howard 2012 (n 76) 108.
[97] App No 15585/06 (ECtHR, 4 Mar 2008).
[98] App No 35753/03 (ECtHR, 11 Jan 2005).

the legitimate aim of public safety. The Court's proportionality assessment, or lack thereof, is problematic on three fronts.

First, the Court used the ambiguous term of 'veil' throughout the judgment, and it is not made clear whether the applicant wore a headscarf-hijab or face-veil. If the former, this would raise obvious questions as to why the Court would find identification impossible, and the measures proportionate, if the face was not concealed. Second, by placing emphasis on the obligation to remove her veil being 'necessarily very limited in terms of time'[99] as a justification for its decision, the Court demonstrated ignorance towards the applicant's beliefs. It is not the duration of having the veil removed, but the act itself, as a matter of principle, which perturbed the applicant's religious beliefs.

Third, the Court's dismissal of the applicant being prepared to remove her veil in the presence of a female officer exemplifies its shallow judicial reasoning. The Court stated that the consular authorities not assigning a female officer to carry out the identification 'does not exceed the State's margin of appreciation in these matters',[100] but does not explain why. If the duration of identification was a pertinent factor for the Court's proportionality assessment, it is unclear why the French Consulate's ability to assign an officer of female gender does not warrant the same weight and is instead instantly dismissed as within the State's margin of appreciation. As a caveat, although it was not clear from the facts of the case that the consular authorities were actually asked for a female officer, it is irrelevant for our purposes as the Court assumed that they were in its judgment.[101]

As mentioned in Section Two, the level of scrutiny that the ECtHR applies will depend on the margin of appreciation afforded to states.[102] This explains the lack of rigorous scrutiny applied in this case – the Court implicitly deemed the state warranted a wide margin of appreciation, but it does not explain why such width was granted. Evans outlines several factors identified by the ECtHR as being relevant to the width of the margin: 'the level of consensus on the issue among Contracting States, the extent to which the matter interferes with the core of an applicant's private life, the importance of the right to democratic and pluralistic society and the circumstances and the background of the particular case'.[103] None of these factors were explicitly relied upon by the ECtHR in *El Morsli* to justify the wide margin of appreciation.

This deference is endemic in the other cases involving the removal of religious clothing, albeit non-hijab, whereby public safety has been invoked as a legitimate aim for limitations on Article 9. By deploying a similar lack of scrutiny, the Court has found no violations of Article 9 in any of these cases. In the aforementioned case of *Phull v France*[104] for example, where a Sikh man was obliged to remove his turban at airport security, the Court relied upon applying *X v UK*[105] for its proportionality assessment of public safety in order to reach 'a like conclusion'.[106] This is despite *X v UK* being a Commission decision decided on in 1978, a one-page judgment, with neither a proportionality assessment nor any explanations for the conclusions it reached, and a

[99] *El Morsli* (n 97) para 1.
[100] ibid.
[101] ibid.
[102] Murdoch (n 65) 30.
[103] Evans 2001 (n 94) 143.
[104] *Phull* (n 98).
[105] App No 7992/77 (Commission decision, 12 Jul 1978).
[106] *Phull* (n 98).

case where 'public health' was accepted as a legitimate aim, instead of public safety, and therefore not analogous to *Phull*. As in *El Morsli*, other less intrusive means to achieve the legitimate aim of public safety were not explored in *Phull*, and instead the Court deferred to the State's margin of appreciation, without explaining why. It is thus why Howard questions the proportionality assessment of the Court in these public safety cases and highlights that Mr Phull had 'already walked through a security scanner and had been checked over with a hand-held security detector'.[107]

Moreover, in *Mann Singh v France,*[108] where a Sikh man was refused a duplicate of his driver's license for refusing to provide a photograph 'bareheaded' and without his turban, the ECtHR found no violation of Article 9(2) ECHR. This runs in contradiction to a decision of the UN Human Rights Committee (UNHRC), five years later, regarding the same applicant but concerning a turban prohibition on his passport photograph.[109] The UNHRC found the measure to be disproportionate for the aim of public safety as, inter alia, less intrusive means were not sought, and thus a violation of Article 18(3) ICCPR. The divergence between the two human rights bodies, despite almost identical legal provisions and facts, leads one to question why the ECtHR seems incapable of asking basic questions in its proportionality assessments as the UNHRC was able to do,[110] and whether invoking the doctrine of margin of appreciation without justification is a sufficient answer.

The above approach is further problematised by the ECtHR's application of a 'less restrictive means' reasoning in the more recent decision of *S.A.S.*. The Court found the French blanket ban on full-face-veils to be disproportionate for the aim of public safety, as such an objective 'could be attained by a mere obligation to show their face and to identify themselves' when safety or fraud detection required it.[111] Such a proportionality assessment, involving more intense scrutiny, runs in contradiction to the previous case law identified above. The precedent set by *S.A.S.*, as Brems highlights, creates the possibility for a 'less restrictive means' test to be applied in future cases involving public safety and other legitimate aims.[112] Nonetheless, the inconsistency in the case law supports criticisms of the Court's earlier approach.

C. Protection of the Rights and Freedoms of Others

Protection of the rights and freedoms of others was accepted as a legitimate aim in the hijab restriction cases, in chronological order, of *Dahlab,*[113] *Leyla Sahin,*[114] *Dogru v France*[115] and *S.A.S.*[116] In pursuing this overarching aim of the protection of the rights and freedoms of others, three 'subordinate' aims have been successfully linked to it by the Court. These (henceforth 'linked aims') are those of pursuing: gender equality, state neutrality or protection from proselytism, and 'living together'. Each of these linked aims will be discussed in turn.

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[107] Howard 2012 (n 76) 107.
[108] (2008) ECHR 1906.
[109] *Singh v France* (HRC, 26 September 2013) CCPR/C/108/D/1928/2010.
[110] ibid para 7.3.
[111] *S.A.S.* (n 62) para 139.
[112] Brems (n 84) 902.
[113] *Dahlab* (n 91).
[114] *Sahin* 2005 (n 66) para 99.
[115] (2008) ECHR 1579, para 60.
[116] *S.A.S.* (n 62) paras 117, 140, 157.

(i) Gender Equality

The ECtHR has previously relied on the viewpoint that the hijab is contrary to gender equality, and thus hijab restrictions would increase or maintain equality between the sexes and improve women's rights. In *Dahlab*, the headscarf-hijab of a Swiss Muslim primary-school teacher, of children aged between four and eight, was viewed as 'hard to square with the principle of gender equality', and 'difficult to reconcile … with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils'.[117] For this reason, inter alia, the Court found the national authorities' prohibition on the applicant wearing her hijab during the performance of her professional duties to be 'justified in principle and proportionate' to the stated aims.[118] Similarly, both the Chamber[119] and the majority in the Grand Chamber[120] in *Sahin* accepted that the headscarf-hijab was contrary to the principle of gender equality and the protection of the rights of women, also citing *Dahlab* with approval,[121] when justifying that the hijab restriction in question was linked to the rights and freedoms of others.

The gender equality justification is, however, based on a false premise – that wearing the hijab is necessarily forced and oppressive – with no empirical evidence to support such a claim. Judge Tulkens rightly criticises this assumption in his dissenting opinion in *Sahin*, stating that there are a 'variety of reasons' why women wear the headscarf-hijab, and that 'it can even be a means of emancipating women' in some cases.[122] Tulkens' assertion is supported by academic scholarship[123] and several empirical studies conducted in Europe. Based on this research, Lister summarises the different motivations for wearing headscarf-hijab as: conveying a religious and ethnic signal; affirming identity; responding to familial pressure; being a political act, or a symbol of interpreting their faith in a new way.[124] Even in regards to what would have been viewed as more 'oppressive' forms of hijab, such as the burqa and niqab, the reality is very different to the image presented by the majority in *Dahlab* and *Sahin*. In a qualitative study investigating the motivations of niqabi women in Denmark, for example, based on interviews with eight former and current niqabi women, all said that wearing the niqab was 'a personal, voluntary choice motivated by personal piety in the relationship with God', and these findings correlate with those in other European countries.[125] Although this may seem like a small sample size, one should bear in mind that the estimate for total niqabi women in Demark at the time, arrived at in the quantitative part of the study, was 150.[126] Ironically, some research demonstrates that there may be a greater number of women who desire to wear face veils but are

[117] *Dahlab* (n 91) 'THE LAW' para 1.
[118] ibid.
[119] *Sahin* 2004 (n 66) para 107.
[120] *Sahin* 2005 (n 66) para 115-116.
[121] ibid para 111.
[122] ibid para 11 (Dissenting Opinion of Judge Tulkens, henceforth 'Tulkens').
[123] Maleiha Malik, '*Complex Equality*: Muslim Women and the 'Headscarf'' (2008) 68 Droit et Société 127, 145.
[124] Ruth Lister et al, *Gendered Citizenship in Western Europe: New Challenges for Citizenship Research in a Cross-National Context* (Policy Press 2007) 99-100.
[125] Kate Østergaard, Margit Warburg and Birgitte Schepelern Johansen, 'Niqabis in Denmark: when politicians ask for a qualitative and quantitative profile of a very small and elusive subculture' in Eva Brems (eds), *The Experiences of Face Veil Wearers in Europe and the Law* (CUP 2014) 71.
[126] ibid.

prevented from doing so due to familial pressure or worry over the reactions from their environment.[127] Despite these findings, as Lyon and Spini point out, there is no real attempt by the Court 'to engage with the debate on what it means to wear the headscarf' in *Dahlab*, and the analysis instead appears 'very superficial'.[128]

Further, even if one were to accept a connection between hijab restrictions and the promotion of gender equality in principle, the Court's proportionality assessments of that purported linked aim in these cases are dubious. Firstly, the Court does not take into consideration that, in both *Dahlab* and *Sahin*, the women wore their hijab of their own free will. Nor do they take into account, as Evans points out, that both applicants were 'strong-minded and intelligent women who refused to be oppressed by what they considered to be illegitimate regulation of their clothing'.[129] Both were professional women, who were 'prepared to litigate in domestic and international courts to protect their rights'; Ms Dahlab was a working mother, and Ms Sahin attended student protests against the Turkish hijab restrictions.[130] Neither appeared to be subordinated. By not adducing this evidence or attaching any weight to it in their judgments, one can only conclude that the Court accuses the applicants of false consciousness. Evans characterises this logic of the Court as: 'whatever evidence the women in the cases gave (and indeed whatever they may genuinely but mistakenly believe about their own motivation), those who wear the veil demonstrate their own acceptance of gender inequality'.[131] The Court thus engages in paternalism, criticised not least by Judge Tulkens,[132] which robs these women of their agency, prescribing imagined gender oppression with forced liberation as the antidote.

Second, if the aim was gender equality, it is questionable whether the hijab restrictions would have actually achieved it. The assumption that women subjected to these restrictions will unveil themselves in order to continue their work or studies, and embrace the Court's conception of gender equality untainted by the hijab, is not borne out in reality. Both the applicants in question persisted with their hijab but suffered severe consequences: Ms Dahlab, as a matter of practice, could not work in any Swiss public school; and Ms Sahin was forced to complete her medical training in Vienna.[133] Even the group that such bans aim to help, those who have been pressured into veiling, may suffer the most, as such restrictions would 'stop them from going out, from gaining more emancipation through education and work'.[134]

Although the gender equality rationale was subsequently rejected by the ECtHR in *S.A.S.*, in the context of invoking gender quality 'to ban a practice that is defended by women – such as the applicant',[135] thus vindicating some of the above criticisms, it still begs the question of why the Court adopted such peculiar positions and assessments in the past. Moreover, the notable absence of an explanation for why the

[127] Erica Howard, 'Islamic veil bans: the gender equality justification and empirical evidence' in *Brems* (n 125) 212.
[128] Dawn Lyon and Debora Spini, 'Unveiling The Headscarf Debate' (2004) 12(3) Feminist Legal Studies 333, 338.
[129] Carolyn Evans, 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7(1) Melbourne Journal of International Law 52, 66.
[130] ibid.
[131] ibid.
[132] *Sahin* 2005 (n 66) para 12 (Tulkens).
[133] Howard 2012 (n 76) 111.
[134] Howard 2014 (n 127) 215.
[135] *S.A.S.* (n 62) para 119.

Court adopted this new reasoning, and the inclusion of the vague proviso of 'unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms',[136] leaves open the possibility for gender equality to be invoked in future hijab cases.

(ii) State Neutrality and Proselytism

Preserving the secular, and therefore, neutral and tolerant nature of the state is another linked aim that has been accepted as a necessary element for the protection of the rights and freedoms of others, or public order. Although some academics have categorised proselytism separately from state neutrality,[137] it is useful to consider both jointly due to their overlapping themes and common pursuit of 'tolerance'.

In *Dahlab*, the 'powerful external symbol' of the teacher wearing a headscarf-hijab was viewed to have a 'proselytising effect' on the children, and ran contrary to the 'message of tolerance, respect of others … and non-discrimination that all teachers in a democratic society must convey to their pupils'.[138] This reasoning is problematic on two main fronts.

First, the assertion of proselytism by the Court was at best, baseless, and at worst, deliberately imagined. There was no evidence of *direct* proselytism. The facts make clear that Ms Dahlab's teaching was secular in nature, and that she had received no complaints from pupils or their parents. As Evans points out, the evidence of *indirect* proselytism was also tenuous, and based entirely upon the mere wearing of the headscarf-hijab.[139] The Court itself conceded this in its judgment, admitting that it is 'very difficult to assess the impact' of the children being exposed to the sight of their teacher's headscarf-hijab,[140] but then proceeded to disguise the absence of evidence for such an impact through the use of oblique wording, such as 'it cannot be denied outright' and it 'might have some kind' of effect.[141] An impression of potential and unknowable effects is created and embraced by the Court in lieu of the material facts.

The problematic nature of the indifference towards evidence in *Dahlab* is accentuated when it is juxtaposed with the subsequent decision of *Lautsi and Others v Italy,*[142] where the Court held that Christian crucifixes fixed to the classroom walls of a school in Italy did not violate the Convention rights of a secular mother and her two children. There, the Court interpreted the crucifix as 'an essentially passive symbol', which could not be deemed to 'have an influence on pupils comparable to that of didactic speech or participation in religious activities'.[143] It was above all a 'religious symbol', and there was 'no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils', such that 'it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed'.[144] This begs the question of why Ms Dahlab's headscarf was viewed as an 'active' religious symbol, and why evidence

[136] ibid.
[137] Evans 2006 (n 129) 62; Brems (n 84) 902.
[138] *Dahlab* (n 91) 'THE LAW' para 1.
[139] Evans 2006 (n 129) 63.
[140] *Dahlab* (n 91).
[141] ibid.
[142] (2011) ECHR 2412.
[143] ibid para 72.
[144] ibid para 66.

of proselytism was demanded in *Lautsi* but not in *Dahlab*. The applicants in *Lautsi* highlighted the significance of *Dahlab,*[145] and the lower Chamber had already acknowledged that the crucifixes fell within the *Dahlab* meaning of 'powerful external symbols',[146] but the Grand Chamber distinguished the two cases because the facts 'are entirely different' without explaining how so – it merely describes *Dahlab* without explaining the purported lack of analogy.[147] As Zucca highlights, the inconsistency between the two cases suggests 'a differential treatment between different faiths' and 'that some symbols are more neutral than others'.[148] Second, the Court is parochial in limiting the possible impacts of headscarf-hijab, on 'curious' and 'vulnerable' children, to proselytism. As Ovey and White highlight, 'positive messages about the equality of different religious and cultural groups' are not explored,[149] which is strange considering how much emphasis the Court places on the diversity of Europe and importance of pluralism. Nor does the Court consider the negative messages that may be sent by the teacher's dismissal: to the Muslim children at the school who also wore traditional clothing; or to children 'already inclined towards mistrust, religious hatred or racial discrimination', that their fears and stereotypes were justified.[150]

In regards to the subsequent case of *Sahin*, the Court found it 'understandable' that Turkey 'should wish to preserve the secular nature' of universities by banning religious attire, including the headscarf-hijab, from being worn.[151] The decisions of both *Sahin* and *Dahlab* are susceptible to five broad criticisms, drawing on Evans' arguments.[152] First, the implication of promoting intolerance is not substantiated by evidence. As in Ms Dahlab's case, there was no evidence of Ms Sahin promoting intolerance directly. Both applicants were only guilty of observing the hijab. The position of the Court seems to be that 'anyone who is sufficiently serious about advertising the fact that they are Muslim must be, by definition, intolerant'.[153]

This leads onto the second criticism, that the Court equates Islam, and the hijab, with intolerance. The lower Chamber in *Sahin*, later cited with approval by the Grand Chamber,[154] finds it necessary, when discussing the protection of the rights and freedoms of others, to stress that 'the majority of the population' in Turkey 'adhere to the Islamic faith', presenting this fact as a sort of risk factor making the country more prone to intolerance.[155] Despite this population 'professing … a secular way of life', it does not suffice as a bulwark.[156] Their secularism is presented as disingenuous by virtue of their subscription to Islam. It is thus why the Court viewed the hijab restrictions as necessary to remedy the 'pressing social need' of intolerance that is created by their religion.[157] Perhaps even more controversial in *Sahin* was the emphasis on two factors

[145] ibid para 42.
[146] *Lautsi v Italy* (2009) ECHR 1901 (Second Section), para 54.
[147] *Lautsi* 2011 (n 142) para 73.
[148] Lorenzo Zucca, 'Lautsi: *A Commentary on a decision by the ECtHR Grand Chamber*' (2013) 11(1) International Journal of Constitutional Law 218, 220-21.
[149] Clare Ovey and Robin White, *Jacobs and White: The European Convention on Human Rights* (4th edn, OUP 2006) 310.
[150] Evans 2006 (n 129) 64-65.
[151] *Sahin* 2005 (n 66) para 116.
[152] Evans 2006 (n 129) 69-73.
[153] ibid 69.
[154] *Sahin* 2005 (n 66) para 115.
[155] *Sahin* 2004 (n 66) para 108.
[156] ibid.
[157] ibid.

in the 'Turkish context': the headscarf-hijab had 'taken on political significance in Turkey in recent years;' and 'there are 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'.[158] By stressing these two factors, the Court essentially politicised the hijab and implicitly linked it to fundamentalism.

Third, the Court placed emphasis on the 'State's role as the neutral and impartial organiser' of different beliefs,[159] however, as Brems points out, the neutrality principle can be done in an 'inclusive manner, by equally allowing the wearing of religious signs to all'.[160] Neutral dress codes of both users and officers of public service, in the sense of restricting all forms of religious dress, need not automatically stem from such an objective. This insight is notably overlooked by the Court in its proportionality assessments of both *Sahin* and *Dahlab*.

Fourth, state secularity is assumed to be unquestionably neutral, and what Evans terms, a 'non-controversial guarantor of minority rights'.[161] On the contrary, secularism is closer to what Denli describes as a 'normatively prescriptive model', favouring certain forms of religions over others.[162] The Court fails to appreciate not only that ostensibly neutral bans on religious dress are being imposed primarily to curb Islamic dress, but that such measures will discriminate against Muslim women more than other religious and non-religious groups. The Court seems to concentrate its concern for 'those who choose not to wear' the headscarf-hijab,[163] over those who do.

Fifth, the Court presents two contradictory stereotypes of Muslim women, without recognition of the ironic conflict between them. Ms Sahin and Ms Dahlab are simultaneously victims of gender inequality, oppressed by their own internalised misogyny, and aggressors, with 'such personal force that their mere presence is enough to amount to problematic proselytising'.[164] The oxymoronic nature of the Court's approach is summarised best by Evans, who highlights that '[i]n the course of a single sentence', Ms Dahlab is transformed 'from a woman who needs rescuing from Islam to an Islamic woman from whom everyone else needs rescuing'.[165]

The precedent set by these cases has been reproduced in subsequent case law. In *Dogru,*[166] the Court also relied upon the principle of secularism to hold that a secondary school, which expelled a Muslim girl for refusing to take her headscarf off during physical education and sports classes, did not violate Article 9. Other subsequent cases include *Kurtulmus v Turkey,*[167] *Fatma Karaduman v Turkey*[168] and *Tandogan v Turkey,*[169] and *Melek Sima Yilmaz v Turkey.*[170] It is for these and other reasons that numerous academic commentators have criticised *Sahin* for its lack of

[158] ibid 108-109.
[159] *Sahin* 2005 (n 66) para 107.
[160] Brems (n 84) 899.
[161] Evans 2006 (n 129) 70.
[162] Özlem Denli, 'Between Laicist State Ideology and Modern Public Religion: The Head-Cover Controversy in Contemporary Turkey' in W. Cole Durham and others (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Springer 2004) 497, 511.
[163] *Sahin* 2004 (n 66) para 108.
[164] Evans 2006 (n 129) 72.
[165] ibid 73.
[166] *Dogru* (n 115) para 62.
[167] (2006) ECHR 1169.
[168] App No 41296/04 (ECtHR, 3 June 2008).
[169] App No 41298/04 (ECtHR, 3 June 2008).
[170] App No 37829/05 (ECtHR, 3 September 2008).

objective or rigorous examination of the facts and linked aims used to justify the hijab restrictions.[171] Judge Tulkens' statement in *Sahin*, that 'European supervision seems quite simply to be absent',[172] seems like an apt summary of the case law in its entirety, which has afforded States extraordinary and seemingly inexplicable deference. This deference cannot be attributed to the doctrine of margin of appreciation alone, because *Sahin* raised 'not merely a "local" issue, but one of importance to all the member States',[173] as did the other cases. The next logical question to ask then is: what can this deference be attributed to? This question will be answered in Section Four.

(iii) 'Living together'

As noted previously, the ECtHR in *S.A.S.* rejected the linked aims of public safety and gender equality: the former on a proportionality assessment,[174] the latter in principle.[175] The Court also rejected a proposed linked aim of human dignity.[176] Instead, the French ban on face covering[177] was upheld by the Court on the basis that it pursued an aim linked to the rights and freedoms of others, namely the 'respect for the minimum requirements of life in society', or guaranteeing the conditions of 'living together', and in a proportionate manner.[178] However, both the accepted linked aim of living together, and the Court's proportionality assessment of it, are highly problematic.

The living together aim utilised by the Court is susceptible to two overarching criticisms. First, the aim presupposes that the 'practice' or 'attitude' exhibited by wearing the face-veil would 'fundamentally call into question the possibility of open interpersonal relationships', which is contended to be an 'indispensable element of community life' within society.[179] But it is unclear why 'interpersonal relationships' cannot be forged by, or with people who wear the face-veil. Only the theoretical assertions of the French Government are relied upon, that 'the face plays a significant role in human interaction', and the effect of concealing it would 'break social ties' and 'manifest a refusal' of the living together principle.[180] However, no empirical evidence is adduced to support such a claim. Facial expressions are by no means the only method of human interaction, as Judges Nussberger and Jäderblom highlighted in their dissenting opinion: '[p]eople can socialise without necessarily looking into each other's eyes'.[181] Oral communication and body language would still be possible.

If one were to extend the Court's logic, those who close other significant forms of communication channels in the public space would also violate the 'living together' principle. Commuters on the train who use earphones to listen to music, thus blocking others from verbally communicating with them, would also be susceptible to a justifiable state ban. Such a position, however, would be dismissed as egregious. In reality then, it cannot be seriously contended that the loss of one form of non-verbal

[171] For list of case comments, see Howard 2012 (n 76) 62.
[172] *Sahin* 2005 (n 66) para 3 (Tulkens).
[173] ibid.
[174] *S.A.S.* (n 62) para 139.
[175] ibid para 118-119.
[176] ibid para 120.
[177] Law 2010-1192 (n 10).
[178] *S.A.S.* (n 62) paras 121, 142.
[179] ibid (n 62) para 122.
[180] ibid para 82.
[181] ibid para 9 (Dissenting Opinion of Judges Nussberger and Jäderblom).

communication endangers living together. The real danger to social cohesion then must lie in the minds of those who do not wish to communicate with a veiled woman, for reasons of fear or prejudice. The Court's solution to this tension is to permit the forcible unveiling of Muslim women, violating a crucial part of their Article 9 Convention right, so as to mollify the prejudicial angst of the majority population or the State. In this way, the burden and responsibility of social cohesion is placed brutishly on the veiled Muslim woman. This runs in contradiction to the Court's reasoning for rejecting the human dignity argument. In the very same judgment, the majority underscored that despite being 'perceived as strange' to many observers, cultural identity expressed through the face-veil 'contributes to the pluralism that is inherent in democracy'.[182]

Second, the link between the protection of the rights and freedoms of others and 'living together' is highly tenuous. The Court fails to explain the required connection to the protection of the rights and freedoms of others in the same way it did for the other linked aims. Instead, it invents a new legal right to plug the hole, 'the right of others to live in a space of socialisation which makes living together easier',[183] but this is problematic for several reasons. Such a right has no legal basis in any Strasbourg precedent, which is evidenced by the Court not referring to any of its case law. The Court effectively, as Adenitire puts it, recognised a 'legal right for people to see each other's smiles and frowns' in public spaces, enforced through criminal sanctions, as well as a corresponding legal duty on people 'to socialise with one another'.[184] This was 'incompatible with the spirit of the Convention' because, as the minority outlined, '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'.[185]

Furthermore, even if 'living together' were a legitimate *linked* aim, the Court's proportionality assessment of it was inadequate. This is despite the Court acknowledging that 'careful examination' was required, because of the 'flexibility of the notion' and 'the resulting risk of abuse'.[186] There is no analysis of whether the French ban would actually achieve its aim of social cohesion. The third-party intervener had adduced weighty evidence demonstrating that the ban does not achieve its stated purpose, and instead 'the women concerned [avoid] going out, leading to their isolation and the deterioration of their social life and autonomy'.[187] The French government doubted the scientific merits of the study relied upon,[188] but the Court does not consider either claim. Neither is there a contemplation over the type of social interaction that would result from coerced unveiling, as the women are 'unlikely to greet their coercers with friendly smiles', but with 'spite and bitterness'.[189] The Court expresses concern that 'certain Islamophobic remarks marked the debate' which preceded the adoption of the legislation,[190] but there is no acknowledgement of the increase in Islamophobia and anti-Muslim hate crimes in society post-9/11, and how that interplays with whether the ban would really facilitate 'living together'.

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[182] ibid para 120.
[183] ibid para 122.
[184] John Adenitire, 'Has the European Court of Human Rights recognised a legal right to glance at a smile?' (2015) 131(Jan) Law Quarterly Review 43, 46.
[185] *S.A.S.* (n 62) para 8 (Dissenting Opinion).
[186] ibid para 122.
[187] ibid para 96.
[188] ibid para 82.
[189] Adenitire (n 184) 48.
[190] *S.A.S.* (n 62) para 149.

The lack of scrutiny is perhaps rooted in the majority finding that a wide margin of appreciation was warranted as 'there is no European consensus against a ban',[191] but this is difficult to accept considering that at the time, 'forty-five out of forty-seven member States of the Council of Europe, and thus an overwhelming majority, have not deemed it necessary to legislate in this area'.[192] It is telling that even when the majority selectively applies rigorous scrutiny to counter certain proportionality arguments made against the ban, dismissing the criminal sanctions as 'the lightest that could be envisaged',[193] they are also based on assumptions and do not take into account 'the multiple effect of successive penalties'.[194]

It is also worth noting that the 'living together' justification of *S.A.S.* was subsequently approved, and heavily relied upon by, the ECtHR in *Belcacemi and Oussar v Belgium*[195] and *Dakir v Belgium*[196] to uphold the Belgian burqa ban, thus cementing its place in the Court's jurisprudence.

4. Understanding the Problematic Patterns

Based on the aforementioned review of the ECtHR case law pertaining to hijab restrictions, five seemingly interlinked patterns emerge which suggest the need for an alternative and unifying theoretical framework.

i. **Pattern One:** the Court relies upon stereotypes and assumptions as central justificatory rationales. In the linked aims of gender equality, state neutrality and protection from proselytism, for example, contradictory caricatures of Muslim women are deployed, that of the victim and the aggressor. Islam is equated to intolerance, juxtaposed with the supposedly neutral and secular order. The hijab is politicised, linked to fundamentalism, and treated as a threat to 'living together'.
ii. **Pattern Two:** the legitimate aims overlap at a conceptual and practical level. Public order, public safety and the protection of the rights and freedoms of others are typically invoked alongside each other, and the ECtHR does not always clearly delineate between which aim is being relied upon in its judgments. This immediately suggests a common and underlying rationale.
iii. **Pattern Three:** evidence is given little weight. Assertions and stereotypes are maintained without evidence, and sometimes even in the face of contrary evidence that is adduced before the Court.
iv. **Pattern Four:** as a general observation, the Court goes to great lengths, partly by relying on the above, to justify that hijab restrictions do not violate Article 9 ECHR. Even when other legitimate and linked aims fall through, the Court relies upon a novel concept of 'living together' by inventing a new and precarious legal right to see other people's facial expressions in public.

[191] ibid para 156.
[192] ibid para 19 (Dissenting Opinion).
[193] ibid para 152.
[194] ibid para 22 (Dissenting Opinion).
[195] (2017) ECHR 655.
[196] (2017) ECHR 656.

v. **Pattern Five:** the Court applies a low level of scrutiny in its proportionality assessments and an unjustifiably wide margin of appreciation is granted to States. A 'less restrictive means' test is rarely applied, and often there is little assessment of whether the restrictions actually achieve their purported aims.

Academics have highlighted many of the above trends, but have stopped short of identifying the connections between them, which this article argues uncovers the underlying and common cause for the Court's approach. Brems contends that the ECtHR has failed to see through 'window dressing' justifications of hijab restrictions, and is 'unable or unwilling to seriously uncover and address headscarf persecution'.[197] The question of why the Court fails in this endeavour, however, remains unanswered by the vast majority of scholarship. Vakulenko applies post-colonial feminism to posit that the 'counterproductive trends' stem from 'the very construction of hijab issues as those of "religious identity"', using Article 9 ECHR as the primary legal referent.[198] Yet this absolves the Court of its contribution to these trends despite the Article 9 framing. Relying on stereotypes, ignoring factual evidence, applying a low standard of scrutiny and adopting novel concepts such as 'living together' are not inescapable features of Article 9 adjudication. As Brems points out, *S.A.S.* demonstrates that the Court is 'capable of critically deconstructing the invoked aim of a ban'.[199] It did so for the linked aims of gender equality and human dignity, but not for 'living together'. The cause then must stem from something more insidious than the legal referent relied upon.

Evans perhaps comes closest to identifying the common cause, as he asserts that the underlying link between the two contradictory stereotypes presented in *Dahlab* and *Sahin*, that of the victim and aggressor, is the 'idea of threat'.[200] However, his analysis is limited to some of the aims linked to the protection of the rights and freedoms of others, and the idea is not comprehensively explored. In actuality, the 'idea of threat' can be applied to the other legitimate aims if it is underpinned by an expansive conception of securitisation theory. Brems mentions the idea of 'unease' with the Islamic other,[201] but unlike Evans, she uses such terms to describe the drivers behind the hijab restrictions, and not the Court's approach. Howard goes further, stating that the 'fear of this threat has obviously penetrated the ECtHR as well'.[202] Nonetheless, all have only scratched the surface of ideas associated with securitisation that can help explain the Court's approach, and scholarship would greatly benefit from a fleshing out and application of securitisation theory, which this paper turns to in the next section.

5. Applying the Lens of Securitisation

This section will elucidate securitisation theory and its concepts, and then apply it to the five problematic patterns identified in the previous section. By doing this, it will demonstrate that the hijab and Muslim women have been securitised by the ECtHR, and the counter-productive patterns stem from this securitisation. Having already identified the five problematic patterns will avoid the need for repeating the analysis

[197] Brems (n 84) 900, 904.
[198] Vakulenko (n 74) 717.
[199] Brems (n 84) 902.
[200] Evans 2006 (n 129) 73.
[201] Brems (n 84) 899, 903.
[202] Howard 2012 (n 76) 63.

of the case law when applying securitisation, but cross-references will be made where appropriate.

A. Securitisation Theory

Securitisation, drawn from International Relations theory, can serve as a useful theoretical framework to help better understand the patterns that emerge from the ECtHR case law pertaining to hijab restrictions. In order to apply it to the case law, the theory itself and its concepts must first be elucidated.

Although its definition is widely contested, securitisation can be broadly understood as a 'move' that transforms issues, framing them either as a 'special kind of politics or as above politics'; it can thus be seen as a 'more extreme version of politicization'.[203] Public issues can be located on a spectrum ranging from non-politicised, through politicised, to securitised, with the latter requiring and 'justifying actions outside the normal bounds of political procedure'.[204] For Buzan, a securitising move, a 'discourse that takes the form of presenting something as an existential threat to a referent object', should be distinguished from when the object actually becomes securitised, which is 'if and when the audience accepts it as such'.[205] The theory therefore facilitates an appreciation that such securitising moves along the aforementioned spectrum are not a natural phenomenon to be taken for granted, but carefully constructed by a 'securitising actor': 'securitisation is not a neutral act but a political one'.[206] A securitising actor has 'the social and institutional power to move the issue "beyond politics"', by attributing labels to it such as '"dangerous", "menacing", "threatening", "alarming" and so on'.[207]

Before applying the theory to the case law, two more concepts of securitisation need to be outlined to allow for a more expansive framework: the politics of exception and unease.

(i) Broadening Securitisation: Politics of Exception and Unease

In the context of migration, Bigo contended that it had been securitised as a result of a 'creation of a continuum of threats and general unease in which many different actors exchange their fears and beliefs in the process of making a risky and dangerous society'.[208] This idea of 'unease' was later expanded upon by Huysmans and Buonfino to pioneer two novel concepts of securitisation that are useful for our purposes: the politics of exception and unease.[209]

After analysing parliamentary debates to see how British political elites had securitised migration and asylum post-9/11, Huysmans and Buonfino noticed a

[203] Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers 1998) 23.
[204] ibid 23-24.
[205] ibid 25.
[206] Stephen McGlinchey, Rosie Walters and Christian Scheinpflug, *International Relations Theory* (E-International Relations 2017) 109.
[207] ibid 104.
[208] Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) 27(1) Alternatives 63.
[209] Jef Huysmans and Alessandra Buonfino, 'Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK' (2008) 56(4) Political Studies 766.

'considerable reluctance … to introduce or especially sustain the connection between migration and terrorism too intensely in public debate'.[210] In other words, there was a 'relative absence of explicit securitising moves in the name of counterterrorism'.[211] However, this did not mean that migration had not been securitised, rather it suggested a more nuanced 'format' of securitisation was at play, which mainstream security framing was not equipped to explain.[212]

From this observation, Huysmans and Buonfino were able to characterise two processes of securitisation. The *politics of exception* focuses on 'the state of threat to the life of the nation' and 'the legitimacy of exceptional policies justified by this threat', central to counter-terrorism debates.[213] It is dependent on 'particular crisis moments, such as 9/11 and the July bombings'.[214] The *politics of unease*, on the other hand, 'does not focus on existential threats',[215] or threats of 'radical violence to the sovereignty and functional integrity of the state'. It is primarily a 'question of protecting legal and social order in various sites within the state'.[216] Its central characteristic, as Bigo alluded to earlier, is the 'construction of a continuum of threats and unease' that facilitates 'the political exchange of fears and beliefs'.[217] These 'uneasy societal relations' are structured and contested by the politics of unease, which legitimates the need for governance over 'a wide range of societal questions', enforced through policing techniques.[218]

Although they were conceptualised in the context of migration, both of these distinctive strands of securitisation serve as useful theoretical tools for understanding the ECtHR case law on hijab restrictions. Whereas one may view the legitimate aim of public safety as more obviously connected to securitisation, as it relates to threats of terrorism that typify the politics of exception, the politics of unease uncovers securitisations in other legitimate and linked aims that are less obviously so. Using the dual concept in this way, as 'two discretely different framings of insecurity', cautions against a parochial view of securitisation that only recognises existential threats to the state[219] and provides a more expansive and nuanced theoretical framework.

B. Applying Securitisation to the Problematic Patterns

The applicability of the previously mentioned concepts of securitisation to the ECtHR's reasoning is evidenced by Bigo explicitly mentioning 'judges' as a securitising actor– in addition to politicians, a 'significant fraction of general public opinion' and many others.[220] He also notes that security actors exchange 'their fears and beliefs'.[221] This helps clarify the interplay of securitisation between States and the ECtHR. The logic of this interplay can be described as such: States (securitising actors) project fears of the hijab and Muslim women (the threats), in regards to gender equality, tolerance, state

[210] ibid 766.
[211] ibid 781.
[212] ibid 767.
[213] ibid.
[214] ibid 785.
[215] ibid 767.
[216] ibid 785.
[217] ibid 782.
[218] ibid 785.
[219] ibid 786.
[220] Bigo (n 208) 63.
[221] ibid.

neutrality or public order (the referent objects or ideals), through the legitimate aims they raise before the Court, and how they frame the issues relating to them. The Court, also a securitising actor due to its institutional power, co-opts these fears into its judgments. By doing so, it transforms the purported threats from being subject to *securitising moves* by States, into actually being *securitised*.

This section will first demonstrate that the stereotypes mentioned in Pattern One result from the Court's securitisation of the hijab and Muslim women, and secondly, that the rest of the patterns ultimately stem from this *a priori* securitisation.

(i) Pattern One: Securitisation of the Hijab and Muslim women

As mentioned before, Pattern One indicated that the Court relies upon stereotypes as central justificatory rationales for upholding hijab restrictions. These stereotypes are created through both processes of securitisation explained above. Starting with the politics of exception, this is most evidently done when hijab restrictions are justified on grounds of public safety. In *El Morsli,*[222] for example, the refusal to unveil for identification was treated as a public safety issue. Similarly in *S.A.S.*, the Court accepted the view of national authorities that concealing the face 'might be dangerous for public safety', though it found the measures to be disproportionate for that aim.[223] More controversially, the Court presented the hijab through the politics of exception in *Sahin* by implicitly linking it to 'extremist political movements' that pose a threat to the life of the nation.[224] In general, however, the Court has been reluctant to make such connections. It securitises the hijab through the politics of exception only in regards to face-veils and issues of identification, though in *El Morsli* it is not made clear whether the applicant wore a headscarf or face-veil.

More common, but less appreciated by scholars, is the Court's securitisation through the politics of unease in the aims linked to the protection of the rights and freedoms of others, which is achieved through constructing more subtle unease and fears that do not involve the life of the state being at risk. As mentioned previously, the Court presents two contradictory stereotypes of Muslim women, who are simultaneously victims and aggressors.[225] Evans observes that the idea of threat underlies both images. Not only is the 'woman who is too powerful, too intolerant, too aggressive', a threat, but 'the victim is a threat too'. A threat to: 'the liberal, egalitarian order'; 'control by the state and secular authorities because their coercion is less effective than that of the family and the subculture'.[226] In *Dahlab* and *Sahin*, the referent objects being threatened are either: individuals, such as vulnerable children, those who choose *not to* wear the headscarf-hijab, and even those who *do*, like the applicants; or ideals, such as gender equality, tolerance, non-discrimination, state neutrality and secularity, and pluralism. This runs in stark contradiction to *Lautsi*, where the Court resists securitising a Christian crucifix, which it instead views as a 'passive symbol'.[227]

[222] *El Morsli* (n 97).
[223] *S.A.S.* (n 62) para 115.
[224] *Sahin* 2004 (n 66) para 109; see Section 3(C)(ii) for discussion.
[225] See discussion in Section 3(C), especially (ii). The Muslim women in *Dahlab* and *Sahin* are simultaneously victims of their patriarchal religion and internalised misogyny, in need of rescuing, and proselytising aggressors, who threaten children, the secular order, tolerance etc. The Muslim woman in *S.A.S.* is an aggressor towards social cohesion.
[226] Evans 2006 (n 129) 73.
[227] See discussion of inconsistent approaches between *Dahlab* and *Lautsi* in Section 3(C)(ii).

The somewhat ironic implication is that the Christian symbols of the dominant group are passive and to be tolerated, whereas the Islamic symbols of the minority group are security threats, to be feared and in need of control.

Academic scholarship has lacked an application of securitisation theory. Nevertheless, it has nonetheless noted that the Court exhibits a continuum of fear and unease towards the hijab, Muslim women and Islam in general. For Skjeie, the decision in *Sahin* is 'strongly influenced by the court's general ambition to curb political Islam'[228] and Rorive also notes that it is 'driven by the fear of Islamic fundamentalism'.[229] In relation to *Dahlab*, Rorive observes that 'what comes out from this decision is a distrust of the European Court of Human Rights towards the Islamic headscarf itself'.[230]

Moreover, the Court in *S.A.S.* accepts the securitising move of the face-veil presented by France. The referent ideals being threatened are 'living together' or social cohesion, and even communication. As previously demonstrated, this is not rooted in empirical evidence, or plausible logic regarding communication channels, but in a fear and prejudice towards the face-veil.[231] The Court completes the securitisation by co-opting this angst instead of challenging it.

(ii) Patterns Two, Three, Four and Five: Consequences of Securitisation

The following patterns can be understood as a consequence of the securitisation discussed in Pattern One. Starting with Pattern Two, the overlap between the legitimate aims is likely the result of securitisation being the common denominator. In cases like *El Morsli*, the Court does not find the need to explicitly distinguish between public safety and public order in its proportionality analysis.[232] Similarly, in *Dahlab* the hijab restriction was not only accepted to pursue all three legitimate aims (of the protection of the rights and freedoms of others, public safety and public order), but the Court held that it was proportionate to all three aims without a separate analysis for each. The fluidity of the legitimate aim of public order particularly suggests a common rationale.[233] This is testimony to a common and underlying logic of security framing: the legitimate aims are mere interchangeable labels invoked to pursue a common aim of curbing the same security threat. Pattern Four can also be attributed to this reasoning. Even when the usual legitimate or linked aims could not be relied upon in *S.A.S.*, the Court relies upon a new concept of 'living together' and creates a new legal right to justify its link to the protection of the rights and freedoms of others. That is because the security threat persists and must be curbed, regardless of which 'window dressing' label is invoked.

Moving onto Pattern Three, the lack of weight given to evidence is also attributable to the initial securitisation.[234] As Huysman points out, '[i]nsecurity is a politically and socially constructed phenomenon' – it is not necessarily contingent upon evidence;

[228] Hege Skjeie, 'Headscarves in Schools: European Comparisons', in Titia Loenen and Jenny Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia 2007) 133.
[229] Isabelle Rorive, 'Religious Symbols in the Public Space: in Search for an European Answer' (2009) 30(6) Cardoza Law Review 2669, 2684.
[230] ibid 2680.
[231] See Section 3(C)(iii).
[232] See Section 3(B).
[233] See Section 3(A).
[234] This pattern permeates throughout Section Three.

and even if it is based on some evidential support, how one defines the situation or governs it is also a constructed phenomenon.[235] Neither are the fears and stereotypes the Court adopts through its securitisation reliant upon the material facts. This pattern is also linked to Pattern Five, because deference involves a low level of scrutiny over the facts and evidence submitted. But why does the Court continually invoke the margin of appreciation principle, as previously demonstrated, when it is unwarranted?[236] A clue may lie in Bigo's assertion that security actors not only exchange 'their fears and beliefs', but also the 'legitimacy they gain from struggles against terrorists, criminals, spies, and counterfeiters', which is transferred 'toward other targets'.[237] The legitimacy that states gain from their 'struggles' against security threats is respected by the Court, which exhibits deference and invokes the margin of appreciation principle to demonstrate an acknowledgement of this legitimacy. As outlined in Section Two, the principle is justified by local expertise, which supports the idea of transferred legitimacy.

In conclusion then, because the Court securitises the Hijab and Muslim women (Pattern One), it finds the need to apply a low level of scrutiny and a wide margin of appreciation (Patterns Three and Five), accepting new linked aims that justify the persisting security threat (Pattern Four). This threat underlies all of the legitimate aims, thus avoiding the need to delineate between them (Pattern Two).

6. Implications of Securitising the Hijab

The main focus of this paper has been to demonstrate that the ECtHR has securitised the hijab, and that this approach plays an important role in the Court's reasoning – this is a significant finding in its own right. The wider implications of this securitisation are complex enough to warrant their own respective studies.[238] Thus, this section will not attempt to explore these implications in any depth, but rather briefly draw attention to two wider implications that warrant particular concern. First, the securitisation within the ECtHR case law is likely to influence the approach of other supranational courts, when or if they are approached with issues of hijab restriction. Second, the ECtHR's securitising decisions have real life consequences, particularly on visibly Muslim women, as the Court, at the very least, could be perceived to legitimate their oppression within the post-9/11 climate. Both of these implications further compound the failure of international human rights law to protect the freedoms of visibly Muslim women.

A. Spill-over Effects of ECtHR Securitisation on the Global Context of International Human Rights Law

The influence of the ECtHR and the securitisation that pervades its case law should not be understated. It is the 'most active international court' and has issued over ten

[235] Jef Huysmans, *The Politics of Insecurity: Fear, migration and asylum in the EU* (Routledge 2006) 2.
[236] For discussion of unwarranted invocation of margin of appreciation, see the end of Section 3(C)(ii) and (iii).
[237] Bigo (n 208) 63.
[238] For example, exploring whether there is a relationship between judicial securitisation and hate crimes could constitute the subject of a detailed analysis.

thousand judgments over a 50-year period.[239] Not only will the domestic courts of the Council of Europe Member States be affected by its reasoning, but judicial borrowing between international courts is likely to be facilitated by, as outlined in Section Two, the international legal texts. They have very similar provisions in regards to freedom of religion or belief, all providing almost identical limitations. It is likely then that other supranational courts may find ECtHR case law persuasive and guiding when interpreting the similar provisions of their own regional human rights charters.

In the European context, the CJEU has already followed suit in securitising the hijab. When dealing with its first cases involving religious discrimination, the CJEU in *Achbita*[240] recently held that the dismissal of an employee who refused to remove her headscarf did not violate Anti-Discrimination Directive 2000/78/EC,[241] either on direct or indirect discrimination. The internal rule of the company did not directly discriminate against Muslim women.[242] And although it was 'not inconceivable' that it could indirectly discriminate against them, this was justified under the relevant provisions, since it pursued the legitimate aim of neutrality. Moreover, the means of achieving that aim were appropriate and necessary.[243] As was the case in the ECtHR, the hijab is treated as a threat to neutrality, and inclusive neutrality is not considered in the proportionality assessment of the Luxembourg Court.

B. Legitimising Oppression

As has been outlined already, the ECtHR has largely upheld hijab restrictions, finding they do not violate Article 9 ECHR. It has been submitted that this stems from the Court securitising the hijab and Muslim women, which produces a number of counter-productive patterns, including unwarranted judicial deference. Not only does this result in an exhaustion of the possible legal avenues available to the applicants, but it also serves as a final vindication that the interference with their rights is warranted, at the highest and most binding judicial level.

Many authors have thus criticised the case law for essentially legitimising the oppression of Muslim women. Evans poignantly summarises the pejorative effect of *Dahlab* and *Sahin*:

> When those who are not Christians but whose rights have been violated can gain no relief from the Court because the Court employs stereotypes and refuses to engage with the complexity of modem religious pluralism, then religious freedom and pluralism are undermined and the notion of human rights degraded.[244]

Brems views the Court in *S.A.S.* as having 'legitimized a dominant majority group's monopolizing of the entire public sphere and using the criminal law to force

[239] Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39(2) The Journal of Legal Studies 547, 557.
[240] Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV* [2018] ICR 102.
[241] Framework Directive (n 80).
[242] *Achbita* (n 240) para 30.
[243] ibid paras 35-43.
[244] Evans 2006 (n 129) 73.

expressions of minority identity to conform to majority preference'[245] and, based on all the case law, has turned a blind eye to 'headscarf persecution'.[246] Edwards echoes this sentiment, contending that *S.A.S.* 'sends out the message that matters of interest and habit that may characterise a minority, where disapproved of by the majority, will in fact not be tolerated but simply eradicated and erased and extinguished'.[247] Adenitire acknowledges that the outcome of the case has put an 'outstanding arrow in the bow of advocates' of burqa bans in other European countries, 'who will now be able to claim that it has been sanctioned by the court'.[248]

Supranational courts, with their institutional capacity and far reaching influence, have the power to complete securitisations and legitimise what is seen by many as cloaked Islamophobia and the persecution of minorities. In a rare occurrence, the ECtHR acknowledged in *S.A.S.* that the hijab restriction in question was characterised by Islamophobic debates during the legislative phase, and that this risked 'contributing to the consolidation of stereotypes' and 'encouraging the expression of intolerance'.[249] The Court, however, seems oblivious to how their own judgments and reasoning run the very same risks. The recent *Achbita* judgment, for example, was hailed by far-right leaders across Europe.[250] In light of this, it is worth listening to the voices of those affected by such judgments and their marginalising effect. When speaking on the face-veil ban, one French interviewee, Karima, said: 'They say that it's our husbands who are locking us away but it's actually they who are locking us away. Now my husband doesn't want me to go out alone as he saw how people were abusing me when he was with me'.[251]

7. Conclusion

This paper has argued that the problematic patterns evident in the case law of the ECtHR, pertaining to hijab restrictions, stem from the Court's securitisation of the hijab and Muslim women, and that this has serious implications for international human rights law globally and Muslim women personally. The failure of international human rights law to provide effective protection against hijab restrictions is thus inextricably linked to a judicial securitisation at the supranational court level. This finding of judicial securitisation correlates with the broader socio-political context mentioned in Section One, of increasing securitisation of Muslims following 9/11.

It does not follow from the hypothesis that securitisation is the only plausible reading of the case law. Indeed, many other readings of the case law, such as post-colonial feminism, are very plausible. Post-colonialism and feminism in particular have many overlaps with the broadened securitisation theory that has been relied upon, as is evidenced by the referencing of such academic perspectives throughout this paper.

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[245] Eva Brems, 'SAS v. France: A Reality Check' (2016) 25 Nottingham Law Journal 58, 71.
[246] Brems (n 84) 904.
[247] Susan S.M. Edwards, 'No Burqas We're French: The Wide Margin of Appreciation and the ECtHR Burqa Ruling Case Commentary' (2014) 26 Denning Law Journal 24, 255.
[248] Adenitire (n 184) 44.
[249] *S.A.S.* (n 62) para 149.
[250] Jennifer Rankin and Philip Oltermann, 'Europe's right hails EU court's workplace headscarf ban ruling' *The Guardian* (14 March 2017) <www.theguardian.com/law/2017/mar/14/employers-can-ban-staff-from-wearing-headscarves-european-court-rules> accessed 5 April 2018.
[251] Open Society Foundations, 'Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France' (Open Society Foundations, 2011) 74.

Instead, it is submitted that the *modus operandi* of the Court, which exhibits seemingly disconnected and counter-productive trends, can be convincingly and holistically understood through securitisation. It is hoped that this novel application of securitisation theory will inspire further scholarship into how Muslim women have been securitised by supranational courts, which is currently lacking. It is also hoped that this will inspire analysing the other rights mentioned in Section Two (relating to anti-discrimination, work, education, and private and family life, for example), or decisions pertaining to other minorities, such as Sikhs, through the lens of securitisation. It is through this new understanding that academia can begin to incisively critique the courts and hold them accountable to their own principles and human rights standards.

Finally, if the hijab has indeed been securitised, how can it be de-securitised? Understanding that securitisation has taken place is the first and crucial step. As Huysmans notes, a focus on security framing introduces a question to security actors: 'to securitize or not to securitize?'. Essentially, it 'opens up the option to develop security knowledge' that frames issues in a way that 'facilitates a political de-securitization'. De-securitisation is the 'process of unmaking the fabrication of domains of insecurity'.[252] Thus, the fears and unease that have been woven into hijab issues, by supranational courts, can be unwoven. Securitising moves put forward by states can and must be resisted by supranational courts if they are to deploy a more objective and rigorous scrutiny. Brems' idea of adding evidential requirements, to assess whether legitimate aims are actually at stake,[253] may help in this regard. But whether or not the hijab and Muslim women are de-securitised, the least that can be done is to acknowledge that they *have* been securitised.

[252] Huysmans 2006 (n 235) 125.
[253] Brems (n 84) 904.