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RESEARCH ARTICLE

# Citizenship, Identity, and Veiling: Interrogating the Limits of Article 8 of the European Convention on Human Rights in Cases Involving the Religious Dress of Muslim Women

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## Abstract

In 2021, the debate about the spaces in which Europe's Muslim citizens should be permitted to wear religious veils was reanimated by the introduction of new prohibitions introduced in Switzerland and France, and the decision of the Court of Justice of the European Union in joined cases C-804/18 and C-341/19. This article examines the jurisprudence of the European Court of Human Rights concerning veiling. We argue that veil bans reduce the ability of Muslim women to actualize themselves as citizens by limiting their capacity to develop their identity through autonomous action. As such, we argue, the right ultimately at stake—which should protect rights in respect of veiling—is the right to a private life under Article 8 of the European Convention on Human Rights, and judicial and popular conceptions of veiling should be reoriented to accommodate this view. Doing so, we argue, highlights the full range of functions that veiling implicates—including religious but also secular identarian concerns and exposes how a usually expansive right has been curtailed in cases involving veiling.

**Keywords:** private and family life; personal identity; public spaces; Islamic dress

## Introduction

Legal prohibitions on wearing head and face coverings in public have become increasingly prevalent in European jurisdictions since the early 2000s, beginning with bans in France and Belgium.[1] These bans have been, variously, directly and indirectly oriented toward the

[1] Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2020-1192 of October 11, 2010, for Prohibiting the Concealment of the Face in Public Space], Journal Officiel de law République Française [J.O.] [Official Gazette of France], Oct. 12, 2010, https://www.legifrance.gouv.fr/jorf/jo/2010/10/12/0237; Loi du 1 juin 2011 Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage [Law to Prohibit the Wearing of Any Clothing Which Mainly or Totally Conceals the Face] (Belg.), M.B., July 13, 2011, p. 41724, arts. 1–3. See the outlining of the law in Eva Brems, *Equality Problems in Multicultural Human Rights Claims: The Example of the Belgian "Burqa Ban,"* 38 Netherlands Institute of Human Rights (Special Issue) 67 (2015), https://www.uu.nl/media/24659. For a discussion of the timeline and content of these bans, see Neville Cox, Behind the Veil: A Critical Analysis of European Veiling Laws 3–5 (2019). On the position in the United Kingdom see Anastasia Vakulenko, *Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends*, 7 Human Rights Law Review 717 (2007); and in Belgium, see Eva Brems et al., *Head-Covering Bans in Belgian Courtrooms and Beyond: Headscarf Persecution and the Complicity of Supranational Courts*, 39 Human Rights Quarterly 882 (2017).

prohibition of Islamic veils[2] in public spaces. For example, Switzerland's 2021 plebiscite was specifically concerned with the prohibition of the burqa and niqab in public spaces[3] while French legislation passed in the same year included both direct and indirect prohibitions.[4] Neville Cox has argued that the consistent factor that unites the various prohibitions on veiling in European states is the presence of a strong political motivation that underlies their passage and that symbolically targets the veil and its wearers as a gesture of support for "traditional" European values in a context characterized by significant concerns over migration and the rise of populist rhetoric.[5] More broadly, the rationales behind these bans are largely characterized by claims concerning national security, integration, and tolerance.[6] The 2021 French law, popularly referred to as the Loi Contre le Séparatisme,[7] has retrenched these themes. The discourse surrounding the passage of the law was marked by narratives that emphasized the fundamental incompatibility of veiling with the basic tenets of equality, tolerance, and integration upon which European society is founded. Officially framed as seeking to ensure "Respect des principes de la République" the legislation was presented as a remedy for the threat of a radical "Islamist takeover" and prohibits minors from wearing visible religious symbols, concealing their face, or wearing clothing or symbols that signify the inferiority of women in public spaces.[8] The result is a text that explicitly links female inferiority with Islamic dress, and positions such visual symbols of personal identity as contrary to membership of the French Republic and indicative of a subversive, and extremist, political allegiance. This connection is not unusual: similar narratives of justification have been echoed, and upheld, by the European Court of Human Rights (ECtHR) in its decisions dealing with prohibitions on veiling.

Previous scholarship in this area has emphasized the absence of the voices of Muslim women in debates about the compatibility of Islamic veiling practices and European citizenship,[9] the impacts of veiling laws on religious freedom, and the radicalization and the securitization of female identities.[10] We draw on these studies[11] to argue that veil bans act as a fundamental impediment to the capacity of Muslim women to actualize themselves

[2] In using the terms *veils* and *veil bans* we employ a broad reading of those terms inclusive of both veils covering the face and veils that cover only the hair or head and neck.

[3] *Switzerland Referendum: Voters Support Ban on Face Coverings in Public*, BBC News (Mar. 7, 2021), https://www.bbc.com/news/world-europe-56314173.

[4] *Le Parlement adopt dèfinitivement le projet de loi contre le séparatisme* [Parliament Formally Adopts the Text of the Anti-Separatism Law], Le Monde (July 23, 2021) (Fr.), https://www.lemonde.fr/politique/article/2021/07/23/le-parlement-adopte-definitivement-le-projet-de-loi-contre-le-separatisme_6089357_823448.html.

[5] Cox, *supra* 1, at 5.

[6] See similar decisions regarding Sikhs in Mann Singh v. France, App. No. 24479/07 (Nov. 27, 2008), https://hudoc.echr.coe.int/eng?i=002-1856; Phull v. France, 2005-I Eur. Ct. H.R. 409; and in relation to Islamic veiling in El Morsli v. France, App. No. 15585/06 (Mar. 4, 2008), https://hudoc.echr.coe.int/eng?i=001-117860. See the discussion in Cox, *supra* 1, at 8–9. See the discussion of such justifications in early veil bans in France in Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 Columbia Journal of Gender and Law 199 (2007).

[7] Loi 2021-1109 du 24 août 2021 confortant le respect des principes de la République [Law 2021-1109 of August 24, 2021, for Confirming Respect for the Principles of the Republic], Journal Officiel de law République Française [J.O.] [Official Gazette of France], Aug. 25, 2021, p. 9.

[8] *Le Parlement adopt dèfinitivement le projet de loi contre le séparatisme*, *supra* 4 (our translation).

[9] *See* Rachel Anderson Droogsma, *Redefining Hijab: American Muslim Women's Standpoints on Veiling*, 35 Journal of Applied Communication Research 294 (2007); Brems, *Equality Problems*, *supra* 1.

[10] See Ronan McCrea on the likely application of such arguments to *SAS*: Ronan McCrea, *The Ban on the Veil and European Law*, 13 Human Rights Law Review 57 (2013).

[11] In addition, although we refer to the experiences of Muslim women generally, we acknowledge the diversity of experiences and identities within the Muslim community. Without denying the heterogeneity of experience, capacity, and identity within the population of women who are Muslim, we use the general term to refer to a broad, legally averred classification of those individuals affected by the jurisprudence examined.

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as citizens by limiting their capacity to develop their identity through autonomous action. As such, we argue, the right at stake in cases involving veil bans is the right to a private life, encompassing the identity-forming functions that veiling contributes to. As such, we argue that veiling should be thought of not as a matter predominantly triggering Article 9 but rather the protection of private life under Article 8 of the European Convention on Human Rights (ECHR). In doing so, we note that while the ECtHR has accepted Article 8 as being implicated in veiling cases, the Court also interpreted the usually expansive right in an unusually conservative manner, in particular in respect of the application of limitations to the right under Article 8(2). The result is a discrete area in which the jurisprudence of Article 8 is constrained in a manner that is not reflected in the Court's decisions on private life more broadly.

Understanding the interests involved in veiling in this way and analyzing the ECtHR's decisions on veiling within the broader landscape of its Article 8 decisions is important in two ways. The first, we argue, is that it highlights the true range of personality and identity-forming functions of veiling and in doing so reorientates not only public but also political perceptions of veiled citizens and their rights. The second is that it exposes the reasoning of the ECtHR in upholding veil bans as both directly and indirectly positioning Muslim women as a group subversive of a European identity and Republican ideals of citizenship.

In what follows, we analyze the decisions of the ECtHR on veiling to draw out the relationship between individual identity, citizenship, and the veil, which is located in the ECtHR's jurisprudence. In light of this analysis, we examine the impacts of the Court's understanding of veiling on the capacity of Muslim women to constitute themselves as citizens and engage in social interaction as part of a socially integrated community. We draw on both the testimonies and accounts of applicants in the cases considered by the ECtHR and those included in studies conducted by Leila Ahmed and others.[12] Finally, we argue that both the ECtHR's own jurisprudence and the connections between individual autonomy, identity, and veiling justify the recognition of veiling as a choice protected by the right to private and family life and the application of a stricter scrutiny of the justifications offered by states under Article 8(2) ECHR.

## Assessing Veil Bans before the ECtHR

The ECtHR has had occasion to consider prohibitions on veiling on numerous occasions since its first judgment in 2001. Despite more than twenty years of decisions, the jurisprudence of the ECtHR in respect of veiling remains characterized by largely unquestioning deference to state motivation and a more general failure to inquire into the substantive harms occasioned by prohibitions on veiling for the identity and citizenship interests of those involved.

### *Positioning Veiling in Opposition to Pluralist Society*

The ECtHR first considered veil bans in the 2001 admissibility decision *Dahlab v. Switzerland.*[13] The applicant in *Dahlab*, a primary-school teacher who had been prohibited from wearing a headscarf while teaching in a state-funded school,[14] alleged the prohibition violated her rights under Articles 9 and Article 14 ECHR.[15] The Swiss government argued that the applicant had chosen to pursue her profession at a state school that was required to observe

[12] *See infra* the section titled "Recovering the Relationship between Veiling, Identity and Citizenship."
[13] Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447.
[14] *Id.* at 449.
[15] *Id.* at 457.

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the principle of secularism[16] and that the prohibition was necessary in a democratic society as part of the state's duty to ensure the preservation of individual freedom of conscience in a pluralistic society.[17] Noting that the freedom enshrined in Article 9 represents "one of the most vital elements that go to make up the identity of believers" the Court also remarked that "[t]he pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[18] In seeking to ensure that pluralism, the Court noted, restraints on one minority might be necessary,[19] and it accepted that the headscarf could have a "proselytizing effect" on children in the applicant's care.[20] The Court further noted that it was difficult to reconcile the garment itself with "the message of tolerance, respect for others, and, above all, equality and nondiscrimination that all teachers in a democratic society must convey to their pupils."[21] The ECtHR thus found that the prohibition was justified and proportionate to the stated aim of protecting the rights and freedoms of others, public order and public safety necessary in a democratic society.[22]

While the decision in *Dahlab* related only to admissibility, it offers the first indications of three trends that would later solidify in the ECtHR's jurisprudence concerning veiling. The first is a general acceptance that the rights of others, and public order and safety are implicated by the presence of veiling in social contexts—even in circumstances where the precise identity, content, and location of the harms and risks are not precisely identified. The second is an apparently uninterrogated view of the veil as a symbol of female subordination and Islamic proselytization, which not only oppresses the wearer but also threatens the political and social values of the observer. Finally, the Court's decision included the first *dicta* regarding the interdependence of veil bans, pluralism, and democratic values. Other, less evident, patterns that would emerge in the Court's subsequent decisions are also hinted at in *Dahlab*—the Court skirted the issue of whether Article 8 ECHR might be implicated by the applicant's case—though it noted that the freedom enshrined in Article 9 implicates matters of identity and self-conception.

These patterns emerged again in the decision in *Şahin v. Turkey*.[23] In *Şahin* the applicant was refused admission to university lectures and exams because she wore an Islamic headscarf. By her own admission, the applicant viewed the wearing of the Islamic headscarf as an expression of obedience to a religious rule.[24] The Court focused its decision on the legal basis of the ban[25] and reiterated its position and, indeed, the wording of *Dahlab*, noting that Article 9 is fundamental to democratic society and pluralism[26] but may nevertheless be subject to restriction to "reconcile the interests of the various groups and ensure everyone's beliefs are respected" within a state's margin of appreciation.[27] The Court concluded, once more, that the prohibition constituted an interference with the applicant's rights under Article 9, but was justified. In reaching this decision the Court focused in particular on the

[16] *Id.* at 458. On this point, the applicant noted that this was functionally impossible as the non-state schools within the canton were religious, and as a result of such ethos and as a practicing Muslim such alternative employment options were thus not open to her. *See id.* at 460.

[17] *Id.* at 459.

[18] *Id.* at 461.

[19] *Id.*

[20] *Id.* at 463.

[21] *Id.*

[22] *Id.*

[23] Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173.

[24] *Id.* ¶¶ 76, 79–82.

[25] *Id.* ¶¶ 86–166.

[26] *Id.* ¶ 104; *but see id.* ¶¶ 3–5 (recognizing inconsistencies generally), 8–10 (on secularism), 11–13 (on equality) (Tulkens, J., dissenting).

[27] *Id.* ¶¶ 106, 109 (majority opinion).

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lack of consensus on the regulation of veils within the European legal order and in those circumstances deferred to the state's margin of appreciation, stating that national measures that provided for secular public spaces constituted "[t]he defining feature of the Republican ideal" that sought to ensure "the presence of women in public life and their active participation in society" and that women should be "freed from religious constraints and that society should be modernized."[28] Against this historical context, the Court found that veiling was viewed by those not wearing a veil as a symbol of "political Islam"[29] even where those who wore the veil did so on the basis of their religious identity.[30] Despite this acknowledgment of the relationship between identity and veiling, the Court found no violation of the applicant's rights under Article 8.[31]

*Şahin* demonstrates a retrenchment of the trends that emerged in *Dahlab* regarding the positioning of the veil and, by implication, the veiled subject, in opposition to Republican ideals as part of a narrative of female oppression in which it is the state's duty to intervene to uphold Republican values and protect the applicant from the "oppressive" forces of her religion.[32] And yet this reasoning hardly accords with the Court's own admission concerning the lack of consensus on the regulation of veils within the European order. This internal conflict is also present in the Court's refusal to find an infringement of Article 8 while simultaneously acknowledging that the applicant's identity was implicated in the choice to veil. In the absence of evidence beyond the testimony of the applicant, the Court was unwilling to accept that the motivations and importance of the veil to the applicant might diverge from the narrative of oppression and opposition the court identified.

A year after *Şahin*, the decision on admissibility in *Kurtulmuş v. Turkey* presented similar facts,[33] with the applicant alleging a breach of her Article 8, 9, 10, and 14 rights.[34] The Court reiterated, verbatim, its assertion regarding the connection between personal identity, free expression of religion, pluralism, and democratic society[35] and deferred to the state's margin of appreciation in declining to find a breach of Article 9.[36] As in *Şahin*, the Court found no violation of Article 8 and declared the application inadmissible.[37]

### *Veiling as a Public Threat*

Subsequently, in *Dogru v. France*[38] the applicant refused to remove her headscarf during physical education classes and was subsequently expelled from her school for "breaching the duty of assiduity by failing to participate actively in physical education and sports

[28] *Id.* ¶ 32.

[29] For a full discussion of what constitutes "political Islam" (also called "Islamism") see Emin Poljarevic, *Islamism*, *in* The Oxford Encyclopaedia of Islam and Politics (Emad El-Din Shahin ed., 2014), https://www.academia.edu/6916999/Islamism_definition_history_and_the_development_of_the_term_The_Oxford_Encyclopedia_of_Islam_and_Politics. *See generally* Andrew F. March, *Political Islam: Theory*, 18 Annual Review of Political Science 103 (2015).

[30] *Şahin*, *supra* 23, ¶ 35.

[31] *Id.* ¶¶ 163–66.

[32] On the interaction of veil bans and Republican ideals in the case of *Şahin v. Turkey*, see Benjamin Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey*, 91 Cornell Law Review 129 (2005).

[33] Kurtulmuş v. Turkey, 2006-II Eur. Ct. H.R. 297.

[34] *Id.* at 303–04.

[35] *Id.* at 305. On pluralism-based justifications, see Natalie Alkiviadou, *Freedom of Religion: Lifting the Veils of Power and Prejudice*, 24 International Journal of Human Rights 509.

[36] *Id.* at 305–06.

[37] *Id.* at 309–10. *See also Köse and Others v Turkey*, 2006-II Eur. Ct. H.R. 339.

[38] Dogru v. France, App. No. 27058/05 (Dec 4, 2009), https://hudoc.echr.coe.int/eng?i=001-90039.

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classes."[39] Contextualizing the decision by reference to France's tradition of secularism,[40] the Court characterized veiling as harmful to equality between the sexes.[41] While the Court accepted there was a *prima facie* infringement of the right protected in Article 9,[42] it found the prohibition was based on the legitimate aim of protecting the rights and freedoms of others, reiterating, once more, the connection between proportionate restrictions, pluralism, and democratic society.[43]

The Court in *Dogru* also accepted the existence of a legitimate restriction on the basis of the need to protect public order and safety as it was articulated in *Şahin.* Yet the comparison made by the Court in this respect is less than robust—comparing the example of a requirement that members of the Sikh community wear a helmet when riding a motorcycle or the need to compel removal of veils or turbans in an airport for security checks to veil bans in educational settings.[44] However, neither the immediate and real danger to personal and public safety in the first example nor the more diffuse concern in the second present a comparator to the public value (if indeed such a value can be located) threatened by veiling. What is implicit in this line of reasoning, of course, is a belief that the act of veiling itself constitutes a threat to a broadly defined conception of public safety. Largely identical facts were present in *Kervanci v. France*,[45] where the Court, once more, found no breach of Article 9 in circumstances in which the prohibition resulted from a concern for health and safety. In the joined cases of *Aktas v. France*,[46] *Bayrak v. France*,[47] *Gamaleddyn v. France*,[48] and *Ghazal v. France*,[49] the Court again recognized that a veil ban breached Article 9 but found it pursued the legitimate and proportionate aim of protecting the rights and freedoms of others and public order.

A more nuanced view of veiling briefly emerged in the subsequent decision in *SAS v. France*,[50] in which the applicant challenged a French law that prohibited (on pain of criminal penalty in the form of a €150 fine and/or a requirement to complete a citizenship course) any individual from concealing their face in public, including through veiling.[51] The applicant, by her own account, veiled in different manners or not at all according to her inclination, or social context. At times she noted that she felt obliged to wear the niqab in public "in order to express her religious, personal and cultural faith"[52] but went without any face or head covering at other times.[53] The applicant had no objection to showing her face for identity or security checks, did not feel external pressure to wear a veil, and did not aim to aggravate others by veiling but noted, to the contrary, that any choice she made to veil was to "feel at inner peace with herself."[54] She asserted the ban imposed by French law interfered with her capacity to choose and constituted a violation of her rights under

[39] *Id.* ¶ 8.
[40] *Id.* ¶ 18.
[41] *Id.* ¶ 21.
[42] *Id.* ¶ 48.
[43] *Id.* ¶¶ 62–63.
[44] *Id.* ¶ 64.
[45] Kervanci v. France, App. No. 31645/04 (Dec. 4, 2009) (French), https://hudoc.echr.coe.int/eng?i=001-90048.
[46] Aktas v. France, App. No. 43563/08 (June 30, 2009) (French), https://hudoc.echr.coe.int/eng?i=001-93697.
[47] Bayrak v. France, App. No. 14308/08 (June 30, 2009) (French), https://hudoc.echr.coe.int/eng?i=001-93698.
[48] Gamaleddyn v. France, App. No. 18527/08 (June 30, 2009) (French), https://hudoc.echr.coe.int/eng?i=001-93699.
[49] Ghazal v. France, App. No. 29134/08 (June 30, 2009) (French), https://hudoc.echr.coe.int/eng?i=001-93700.
[50] SAS v. France, 2014-III Eur. Ct. H.R. 341.
[51] Loi 2010-1192, *supra* 1
[52] *SAS*, *supra* 50, ¶ 11–12.
[53] *Id.* ¶ 12.
[54] *Id.* ¶¶ 10–12.

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Articles 3, 8, 9, 10 and 11. In respect of Article 9, the Court acknowledged the applicant's contention that neither a public safety basis for the ban nor a necessity for it[55] was in evidence and that veiling might equally be considered as indicating emancipation, self-assertion, and participation in society. Equally, the Court acknowledged that in the applicant's own case "it was not a question of pleasing men but of satisfying herself and her conscience" and that it did not follow, as the government asserted, that veiling denied a woman the right to exist in public when the veil was, largely, worn voluntarily.[56]

This analysis was initially promising in respect of Article 8 where the applicant argued that the veil ban curtailed her ability to express her social and cultural identity, noting that subsequent to *Von Hannover v. Germany*[57] Article 8 allowed for the vindication of this right in public spaces, and that the prohibition in effect required her to refrain from entering public spaces or risk encountering hostility where she did veil in public.[58] However, while the Court broadly accepted that Articles 8 and 9 were engaged and that an individual's personal choices as to their appearance, in public or private, concerned their capacity to express their personality and thus implicated their private life,[59] it found that the particular complaint raised by the applicant was fundamentally one engaging rights under Article 9 and not Article 8.[60]

In assessing the legitimacy of the restriction of the rights implicated, the Court accepted that ensuring public safety was a legitimate aim in view of the danger that concealing an individual's face could pose but noted that a blanket ban was not necessary to serve this objective and that as such the admittedly minimal public safety argument advanced by the government provided no justification on which the law could rely.[61] The Court ultimately agreed with the government's argument that the ban was necessary to ensure respect for the values of an open and democratic society as part of the need to respect "the rights and freedoms of others," as the possibility of "open interpersonal relationships" and "socialization" were recognized elements of French community life, necessary to ensure the principle of *vivre ensemble.* In that context, veiling was understood by the Court as affecting the rights and freedoms of others that grounded a permissible limitation of Articles 8 and 9.[62]

While the broad beats of the judgment in *SAS* mirror those of the preceding decisions, the judgment presented contradictory findings. There was, first, a welcome departure from the simplified narrative presented in the ECtHR's prior jurisprudence of veiling as a threat to public safety, and of veiled women as oppressed and in need of saving. Yet the treatment of the applicant's case illustrated that the commitment to views of veiling as contrary to a cohesive social order continued to underwrite the Court's jurisprudence. There was, for example, a ready recognition that the rights of the applicant under Articles 8 and 9 were infringed and that little justification has been provided for such infringement—not least given its "significant negative impact."[63] Yet despite this, and despite the Court's own

[55] *Id.* ¶ 78.

[56] *Id.* ¶ 77.

[57] Von Hannover v. Germany (No. 2.), 2012-I Eur. Ct. H.R. 399 (2012).

[58] *SAS*, *supra* 50, ¶ 79. *See also id.* ¶¶ 5–6 ( Nussberger, J., and Jäderblom, J., dissenting) (alluding to the majority having sacrificed "individual rights to abstract principles" despite the lack of clarity as to the meaning of this provision, and the particular threat posed by veiling in the case presented).

[59] *Id.* ¶ 107.

[60] *Id.* ¶ 108.

[61] *Id.* ¶¶ 115, 117. It should also be noted that the Court itself seemed skeptical of the degree to which public safety was in fact a motivation for the passage of the law on the basis of the information in case file. *See id.* ¶ 115.

[62] *Id.* ¶¶ 122, 141–42.

[63] *Id.* ¶ 146.

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expressed intention to engage with the matter in depth,[64] the consideration actually afforded to the matter was largely superficial, and often contradicted by other findings. The Court at once found that the ban did not target religion expressly, despite it being clearly, albeit indirectly, intended to remove the veil from public spaces and resulting from a legislative debate marked by Islamophobic remarks.[65] The Court also found that the sanctions imposed were not significant despite the fact that they were criminal in nature, and that they imposed citizenship education—thus implying those individuals breaching the law were not, in fact, "good" citizens.[66] Finally, the Court found that expressions of cultural identity such as that at issue in the applicant's case contributed to the pluralism inherent in democracy but were incompatible with the requirements of *vivre ensemble* required by a pluralistic society to protect the rights and freedoms of others—that is, the majority population who did not wear the veil.[67] *SAS* was thus a decision in which the broader themes of the political incompatibility of veiling with the values of the state and a view of veiling as contrary to an ambiguous conception of the public good endured.

Subsequently, in *Belcacemi and Oussar v. Belgium*,[68] the Court reiterated the same points in respect of *vivre ensemble*,[69] with the Court deferring to the respondent State to determine the needs and context of the restriction and finding the ban was proportionate in circumstances where the imposition of a prison sentence for violating the ban was confined to "repeat offenders" as part of a "hybrid" criminal and administrative offense.[70]

### *The Retreat to Deference*

In the same year as *Belcacemi*, the Court's decision in *Dakir v. Belgium*[71] retrenched this deference to respondent states, disregarding evidence from an intervening organization that the overriding aim of the impugned law was ensuring gender equality and not, as the government alleged, public safety and *vivre ensemble.*[72] The Court deferred to the margin of appreciation[73] and found that in the absence of consensus among the members of the Council of Europe a "very wide margin of appreciation" was appropriate.[74] Most recently, in the case of *Lachiri v. Belgium*[75] the applicant was successful in challenging a veil ban in circumstances where she was prevented from testifying in Court while wearing a veil[76] and where the same provision was not enforced as against men and women of other faiths.[77] It is tempting to read *Lachiri* as heralding a new willingness to engage with not only the pretexts presented by respondent states but also the contexts in which veil bans are instituted. It is more realistic, however, to read the decision in favor of the applicant as one which was inevitable where no justification based on secularism or an attendant objective aim was

[64] *Id.* ¶ 114.
[65] *Id.* ¶¶ 37, 149.
[66] *Id.* ¶ 152 (justifying the criminalization of veiling).
[67] *Id.* ¶¶ 120, 122.
[68] Belcacemi and Oussar v. Belgium, App. No. 37798/13 (Dec. 11, 2017) (French), https://hudoc.echr.coe.int/eng?i=001-175141.
[69] *Id.* ¶¶ 27, 40, 49–50.
[70] *Id.* ¶¶ 36–37.
[71] Dakir v. Belgium, App. No. 4619/12 (Dec. 11, 2017), https://hudoc.echr.coe.int/eng?i=001-175660.
[72] *Id.* ¶¶ 49–51.
[73] *Id.* ¶¶ 54, 61.
[74] *Id.* ¶ 59.
[75] Lachiri v. Belgique, App. No. 3413/09 (Dec. 18, 2018) (French), https://hudoc.echr.coe.int/eng?i=001-186245.
[76] *Id.* ¶¶ 12–14.
[77] *Id.* ¶¶ 25–27.

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offered and there was, ultimately, no credible basis for deference which might have permitted the Court to accede to the ban's enforcement.

What endures throughout the Court's decisions is a recurrent deference to the state and a repeated endorsement in doing so of the trends that first emerged in *Dahlab*—the veil seen as indicative of a threat to European conceptions of the state and of belonging within the state; a lingering marginalization of the views of the applicants themselves regarding the importance of the veil in identity formation and its relationship to gender; and a continuing failure to interrogate government objectives for restrictions on veiling in circumstances where contradictory motivations are in evidence, or where little evidence for the claimed objective is presented.

### *The Treatment of Veiling before the Court of Justice of the European Union and the International Convention on Civil and Political Rights*

Hints of a more consistent engagement with the evidence presented by respondents (albeit as part of a decision still heavily influenced by the ECtHR's reading of Article 9) is present in the recent decision of the Court of Justice of the European Union (CJEU) in joined cases C-804/18 and C-341/19 *WABE.* In that decision, the CJEU agreed that a policy of neutrality that prohibited veiling in the context of employment in an educational setting was permissible where it pursued an objective end and thus struck an appropriate balance between the principle of nondiscrimination enshrined in Articles 21 and 10 of the Charter of Fundamental Rights, and the rights protected in Articles 14 and 16 of the Charter of Fundamental Rights.[78] This decision built on the previous judgments handed down by the CJEU. In Case C-188/15 *Bougnaoui*[79] and Case C-157/15 *Achbita*,[80] in which the Court variously found that the claimant in *Bougnaoui* had been discriminated against as she was dismissed when she declined not to wear a headscarf following complaints from customers, while in *Achbita* it found that the creation of a neutrality policy only after the complainant expressed a wish to wear a headscarf in the workplace was acceptable.

Despite finding against the applicants in *WABE* on much the same basis as in *Bougnaoui*, the Court appears to have acknowledged (in principle at least) that a more contextual reading is necessary in determining whether indirect discrimination on the basis of religious identity is indeed present. Drawing on the observations made by the European Commission, the CJEU noted that unequal treatment resulting from a rule or practice based on a criterion that is inextricably linked to a protected ground, in the present case religion or belief, must be regarded as being directly based on that ground.[81] As such, the Court acknowledged that "an internal rule of an undertaking which, like that at issue in that case, prohibits only the wearing of conspicuous, large-sized signs is liable to have a greater effect on people with religious, philosophical or non-denominational beliefs that require the wearing of a large-sized sign, such as a head covering."[82]

While the Court nevertheless found that the respondents in the referred cases had discharged the requirements for establishing that the differential treatment experienced by the appellants was permissible in law, it is, nevertheless, encouraging to note a more substantive engagement with context and the impacts of veil bans (albeit such compounded impacts were apparently not taken into consideration by the Court as part of its rights-balancing exercise in the cases themselves). In this respect, there are hints in the recent

[78] Joined Cases C-804/18 & C-341/19, Ix v. WABE, ECLI:EU:C:2021:594 EU:C:2021:594, ¶ 84 (July 15 2021).
[79] Case C-188/15, Bougnaoui v. Micropole SA, EU:C:2017:204, ¶¶ 2, 13 (Mar. 14, 2017).
[80] Case C-157/15, Achbita v. G4S Secure Solutions NV, ECLI:EU:C:2017:203, ¶ 5 (Mar. 14, 2017).
[81] *WABE*, *supra* 78, ¶¶ 52, 73.
[82] *Id.* ¶ 72.

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CJEU decisions of *Bougnaoui*[83] and *Achbita*,[84] of an allegiance to the analytical approach of the ICCPR Committee in *Osmanoğlu and Kocabaş v. Switzerland*[85] in which a Swiss prohibition on veiling was found to have violated the rights to freedom of religion and equality before the law provided in Articles 18 and 26 of the International Convention on Civil and Political Rights (ICCPR) and was not justified by reference to public safety—the committee interpreting the term *necessary* as requiring that the least restrictive means possible to achieve the desired end be adopted.

More fundamentally, the committee found that the prohibition constituted a form of intersectional discrimination as the prohibition—despite being drafted in general terms—included exceptions for most contexts of face covering in public, thus limiting the applicability of the ban to little more than the full-face Islamic veil.[86] While the ICCPR Committee's initial approach to veiling bans was cautious,[87] the decision in *Osmanoğlu* builds on the previous decision in *Hudoyberganova v. Uzbekistan*[88] in which the ICCPR Committee found that a ban on veiling violated the applicant's expression of religion or belief not only on a *forum externum* (or manifestation) basis but also on the *forum internum* (or identity development) basis.[89] This is in stark contrast to the decisions of the ECtHR that have repeatedly minimized or dismissed the identity-development components of veiling, while restricting the capacity of Muslim women to veil and engage in an external manifestation of faith, all while equally refusing to acknowledge the link between these expressive capacities or the motivations that might drive them (as the following section examines).[90] These decisions and the approach employed by both the CJEU and the ICCPR Committee, in combination with the contradictory and often superficial justifications offered by the ECtHR, expose the significant shortcomings of the latter Court's reasoning in cases involving veil bans—and the Court's reliance on a received narrative that bears little relationship to the experiences of the applicant's appearing before it.

## Recovering the Relationship between Veiling, Identity, and Citizenship

The ECtHR, in its jurisprudence on Islamic veiling, has repeatedly pointed to the lack of consensus at a European level in relation to the practice as one of the primary justifications for a states' entitlement to a heightened margin of appreciation. The controversial employment of the margin of appreciation generally, and in respect of veiling specifically, has been ably addressed elsewhere.[91] Regardless of the legitimacy of deploying the margin of

[83] Bougnaoui, *supra* note 79 v. Micropole SA, EU:C:2017:204, ¶¶ 2, 13 2017).

[84] Bougnaoui, *supra* note 79, ¶¶ 2, 13.

[85] Achbita, *supra* note 80, ¶ 5.

[86] Judgment 1, ¶ 10; judgment 2, ¶ 9. An intersectional analysis has been applied to the ECHR's jurisprudence by Vakulenko. *See* Anastasia Vakulenko, *Islamic Headscarves and the European Convention on Human Rights: An Intersectional Perspective*, 16 Social & Legal Studies 183 (2007).

[87] *See* Karnel Singh Bhinder v. Canada, Communication No. 208/1986, CCPR/C/37/D/208/1986, United Nations Human Rights Committee (UNHRC), views of 9 November 1989, ¶ 6.2.

[88] Hudoyberganova v. Uzbekistan, Communication No. 931/2000, CCPR/C/82/D/931/2000, United Nations Human Rights Committee (UNHRC), views of 5 November 2004.

[89] *Id.* ¶ 6.2. On the other views in the case see individual opinion by committee member Ms. Ruth Wedgwood; individual opinion (dissenting) of member Mr. Hipolito Solari-Yrigoyen; and individual opinion by committee member Sir Nigel Rodley.

[90] For a comparator on assessments of proportionality, see also the decision in Bikramjit Singh v. France, Communication No. 1852/2008, CCPR/C/106/D/1852/2008, United Nations Human Rights Committee (UNHRC), views of 1 November 2012, ¶ 2.3.

[91] On the margin of appreciation, see generally Fiona de Londras & Kanstantsin Dzehtsiarou, *Accounting for Difference: Proportionality and the Margin of Appreciation*, *in* Great Debates on the European Convention on Human Rights (Fiona de Londras and Kanstantsin Dzehtsiarou eds. 2018). On the use of the margin of appreciation in veiling cases

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appreciation in such cases, the concern of this article is that in employing the margin of appreciation liberally, the Court has failed to substantively consider the underlying justifications for veil bans offered by respondent states, and the marginalizing impact of such bans—which have relegated the perspectives of Muslim women themselves to the sidelines of the debate over veiling and its place within European society. Indeed, as Cox and others have argued, the restrictions placed on veils cannot, and have not, been justified satisfactorily by ordinary considerations.[92] Rather, they note, such bans have successfully relied on invoking one or more "pathologies of reason."[93] Such pathologies are based, in Mattias Kumm's account, on an instinctive or unreflective recourse to "tradition, convention or preference,"[94] which views Muslim women as oppressed unless they conform to visual representations of self that communicate uncompromised European identities and which characterizes visually Muslim identities as performative acts of opposition that manifest a deliberate departure from the norms and standards of democratic and Republican citizenship. This is not to say that the ECtHR has spontaneously generated these pathologies of its own accord. Rather, by agreeing with respondent parties that seek to construct visible signs of Islamic faith as indicative of a subversive ideology and an affront to public safety and the "European values" of *vivre ensemble*, the Court has been led by abstract and majoritarian justifications. In a manner that has lacked the critical reflection necessary for the generation of coherent and accurate accounts of the impact of veil bans on the human rights of Muslim women.

### *Discounting Female Experience: Narratives of Gendered Oppression before the ECtHR*

Cox is perhaps most concise in his articulation of the perception of veiling in the decisions of the ECtHR, observing that the arguments presented before the Court—while disparate in terms of the justifications they offer—are characterized by a common assumption that the veil carries an inherent and singular identifiable meaning.[95] Certainly, as the case law discussed above illustrates, the veil has been presented as, variously, a badge of female oppression;[96] a symbol of political Islam; and a token of resistance toward the standards of modern, democratic, and secular society.[97] These characterizations, however, are made without recourse to the women involved—indeed they are notable for frequently disregarding the articulated justifications and experiences of the applicants themselves.[98] Instead, they identify the applicants' views as examples of instances of "false consciousness" premised on a mistaken belief on the part of the applicants that they are unoppressed,

see Raffaella Nigro, *The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil*, 11 Human Rights Review 531 (2010).

[92] Cox, *supra* 1, at 16.

[93] Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality*, 4 Review of Law and Ethics of Human Rights 142, 143 (2010). They might equally be considered a part of the paradox of rights argument advanced by Wendy Brown. *See* Wendy Brown, *Suffering Rights as Paradoxes*, 7 Constellations 230 (2000).

[94] Kumm, *supra* 93, at 163.

[95] Cox, *supra* 1, at 16.

[96] Particularly, McCrea refers to the veil as constituting a "gender apartheid" by erasing women from public spaces. *See* McCrea, *supra* 10, at 86.

[97] Alia Al-Saji, *The Racialisation of Muslim Veils: A Philosophical Analysis*, 36 Philosophy and Social Criticism 875 (2010).

[98] *See generally* Erica Howard, *Islamic Veil Bans: The Gender Equality Justification and Empirical Evidence*, *in* The Experiences of Face Veil Wearers in Europe and the Law (Eva Brems ed., 2014); Eva Brems et al., *Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium Concerning the Islamic Full-Face Veil and the Belgian Ban on Face Covering*, Human Rights Centre, Ghent University (2012), https://www.hrc.ugent.be/wp-content/uploads/2015/10/face-veil-report-hrc.pdf; Annelies Moors, *The Dutch and the Face-Veil: The Politics of Discomfort*, 17 Social Anthropology 393 (2009).

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rather than representing the views of truly liberated, autonomous actors.[99] Rachel Droogsma is one of many who have commented on the misleading nature of narratives that proceed on this basis, noting that while dominant conceptions of veiling assume the hijab functions to oppress women, women who wear veils possess qualitatively different understandings of how the hijab actually functions in their lives.[100] Indeed, the diverse material, spatial, communicative, and religious aspects of the veil noted by Fadwa El Guindi[101] are reflected in the diversity of views and motivations expressed by Muslim women concerning the choice whether to wear religious clothing or not. Views collected by scholars from numerous jurisdictions display a broad range of motivations for veiling including physical comfort, preservation of modesty, a desire to communicate a message about the self whether or not connected with religion, ethnic or geographic identity or origin, a sense of empowerment,[102] a deliberate attempt to counter objectification,[103] to satisfy familial or societal values, a sense of piety,[104] or to communicate solidarity with a particular view or group.[105] This diversity of motivation is borne out in the applicants who appeared before the ECtHR. The applicant in *Dahlab*, a convert from Catholicism to Islam, presented herself as being motivated largely by piety and a desire to live in accordance with her reading of the Qur'an,[106] while the applicant in *Şahin* came from a traditional family of practicing Muslims and similarly considered it her duty to wear a veil.[107] In contrast, however, the applicant in *SAS* considered herself a devout Muslim and expressly noted that she experienced no familial influences in her choice to wear a veil and chose not to wear the veil in certain social settings or to remove it where requested.[108]

Beyond the diversity of motivation even within this small sample of applicants, ethnographic scholarship on Muslim women's experiences in various jurisdictions exposes the complex and varied ways in which women critically engage with and negotiate the meanings of veiling.[109] Leila Ahmed has interrogated the understanding of veiling and individual identity among college-aged American women who, when asked what wearing the hijab meant to them, variously noted that they did not believe veiling was required by the Qur'an and that it was a "choice not an obligation"; that it was an expression of solidarity; and that they wore a hijab "for the same reason that one of my Jewish friends wears a yarmulke: as a way of openly identifying with a group that people have prejudices about and as a way of saying yes we're here and we have the right to be here and to be treated equally."[110]

Another of Ahmed's interviewees noted that when she wore a hijab on public transport "I find myself thinking that, if there's just one woman out there who begins to wonder when

[99] *See* Brems, *Equality Problems*, *supra* 1; Al-Saji, *supra* 97, at 891. On the construction of the monolithic "third-world woman," see Sonia Kruks, *Simone de Beauvoir and the Politics of Privilege*, 20 Hypatia 178, 179 (2005).

[100] Droogsma, *supra* 9, at 12–13. *See also* Ralph Grillo & Prakash Shah, *Reasons to Ban? The Anti-Burqa Movement in Western Europe*, 12–13 (Max Planck Institute for the Study of Religious and Ethnic Diversity, Working Paper No. 12-05, 2012); Howard, *Islamic Veil Bans*, *supra* 98, at 206–17.

[101] *See generally* Fadwa El Guindi, Veil: Modesty, Privacy and Resistance (1999).

[102] Sahar Amer, What Is Veiling? 146 (2014); Lama Abu Odeh, *Post-Colonial Feminism and the Veil: Thinking the Difference*, 43 Feminist Review 26–37 (1993).

[103] John Borneman, *Veiling and Women's Intelligibility*, 30 Cardozo Law Review 2745, 2750 (2009).

[104] El Guindi, *supra* 101, at 71.

[105] On the divergent and diverse motivations for wearing the veil, see Nancy Venel, *Musulmanes Francaises* [French Muslims] *in* Nadine Weibel, Par-Delà Le Voile [Beyond the Veil] 34–69 (1999).

[106] *Dahlab*, *supra* 13, ¶¶ 3–4.

[107] *Şahin*, *supra* 23, ¶ 14.

[108] *SAS*, *supra* 50, ¶¶ 11–14.

[109] Mayanthi L. Fernando, *Reconfiguring Freedom: Muslim Piety and the Limits of Secular Law and Public Discourse in France*, 37 American Ethnologist 20 (2010). *See also* H. A. Hellyer, Muslims of Europe: The "Other" Europeans 20 (2009). For an overview of empirical research in the area, see Howard, *Islamic Veil Bans*, *supra* 98, at 209–11.

[110] Leila Ahmed, *The Veil Debate—Again*, *in* Feminist Theory Reader 233 (2020).

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she looks at me why she dresses the way she does and begins to notice the sexism of our society—if I've raised just one person's consciousness, that's good enough for me."[111] Elsewhere, Christine Jacobsen reports that Muslim women in Norway participating in youth and student organizations saw wearing the *hijab* as a deeply personal choice—in contrast with the external view that it signified "social conformity or pressure."[112] Similarly, critical appraisals of veiling are found in Jeanette Jouili's study of German and French Muslim women who were dismissive of public narratives that identified them as submissive and unfree when veiled.[113] In a study of the views of French Muslims of various ages, Stephen Croucher found a similar view but also noted that some interviewees viewed the hijab specifically as a bridge between their French, North African, and Muslim identities[114] and as a means of integrating their faith with French values by expressing the religion and culture of their communities.[115] The view communicated in the interviews conducted by Croucher is of veiling both as an anchor, by reference to which Muslim women in French society reduced internal uncertainty about how to reconcile their multiple identities and as a mechanism through which they entered into dialogue with the requirements of public citizenship and enhanced their self-esteem through the security they felt veiling offered them in public spaces.[116]

More generally, many of the women interviewed by Croucher expressed that they had a feeling of ease and comfort when wearing the hijab in public, noting that it afforded them a space in which to be themselves—as one interviewee noted, "I can be me."[117] The interviewees did also express specifically religious motivations and some described how donning the veil was a symbolic aspect of "becoming Muhammad's wife"[118] and a mother within their community.[119] Others expressed a view that wearing a veil or *hijab* allowed them to live with a greater connection to their faith.[120] Yet Croucher also found that, following the 2004 ban on the veil in France, their subjects increasingly reported that wearing the veil had taken on a supplementary character—assuming a role in expressing solidarity and protest.[121] One interviewee reported wearing a hijab made of the French flag to emphasize the connectedness of her religious and national identities[122] while others reported that the ban made them feel less French[123] or, conversely, more a part of a female, Muslim collective, in a way that was not previously the case.[124] What is evident from the array of experiences, views and motivations demonstrated by the applicants in the cases examined, and in the studies outlined here, is the impossibility of assigning the *hijab* a singular meaning. As Amina Wadud notes, "the hijab of coercion and the hijab of choice look the same. The hijab of oppression

[111] *Id.*

[112] Christine M. Jacobsen, *Troublesome Threesome: Feminism, Anthropology and Muslim Women's Piety*, 98 Feminist Review 65, 98 (2011); Dolores Morondo Taramundi, *Women's Oppression and Face-Veil Bans: A Feminist Assessment*, *in* The Experiences of Face Veil Wearers in Europe and the Law (Eva Brems ed., 2014).

[113] Jeanette S. Jouili, *Beyond Emancipation: Subjectivities and Ethics among Women in Europe's Islamic Revival Communities*, 98 Feminist Review 47, 49 (2011).

[114] Stephen M. Croucher, *French-Muslims and the Hijab: An Analysis of Identity and the Islamic Veil in France*, 37 Journal of Intercultural Communication Research 199 (2009).

[115] *Id.* at 204.

[116] *Id.* at 205.

[117] *Id.* at 206.

[118] *Id.* at 206–10.

[119] *Id.* at 207.

[120] *Id.* at 208.

[121] *Id.* at 207.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 207–08.

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and hijab of liberation look the same. The hijab of deception and the hijab of integrity look the same. You can no more tell the extent of a Muslim woman's sense of personal bodily integrity or piety from 45 inches of cloth than you can spot a fly on the wall at two thousand feet."[125]

Indeed, the common thread that appears to unite the diverse accounts of Muslim women is that far from restricting their choices or movement the veil supports a sense of personal freedom and autonomy and that their choice to, or not to, veil forms a central aspect of their personal identity. Sahar Amer goes so far as to assert that those who believe otherwise are indulging in a neo-orientalism, a reiteration of nineteenth-century Euro-American rhetoric that lauds the civilizing mission of Western European values.[126] Whether or not the position can be cast in quite such stark terms is not a matter for this article. What is crucial, however, is that the ECtHR has repeatedly endorsed narratives that dismiss the diversity, and complexity of views regarding veiling among Muslim women, illustrating that it considers the capacity of equality to subsist while the veil is present to be fundamentally suspect.[127]

Joan Scott has noted that this view of uncovered bodies as more a guarantee of equality than covered ones[128] is highly suspect, and both Amer and Cox have wondered, separately, whether the source of discomfort with veiling is, in fact, that it evades the trap of Western materialism that commodifies and measures personal worth based on physical appearance.[129] It may be that, in this respect, Christian Jopke is correct that the veil acts as a mirror of identity, showing European society what it might otherwise wish to ignore.[130] Certainly, what the Court's decisions show, in the context of this article, is a jurisprudence (perhaps unconsciously) premised on received, Western narratives of veiling[131] as contrary to equality and oppressive of women—but also a conception of European citizenship that remains deeply interwoven with Judeo-Christian understandings of faith, religious expression, and the State and suspect of manifestations of allegiance to divergent religious or socio-ethnic indicators in the public spaces of the state.[132]

### *Against the Republic: Exclusionary Accounts of Female Citizenship*

In addition to the issues of gender and gendered oppression that the veil raises in the view of the ECtHR, there is a more basic claim inherent within the Court's jurisprudence—namely that the veil in and of itself is repugnant to the national values of European state and that it represents a view of citizenship that is in tension with the model of constitutional identity integral to European society. Indeed, in the decisions of the ECtHR, there is a generalized endorsement of the idea that the act of veiling is counter to Republican ideas of citizenship[133] and embodies a societal model that rejects the claims both of multiculturalism and of

[125] Amina Wadud, Inside the Gender Jihad 219–20 (2006).

[126] Sahar Amer, What Is Veiling? 134 (2014).

[127] On the historical imposition of the Western gaze to the contents and substantive coherence of Islamic women's liberation see Amer, *supra* 126, at 135–40; *see* Cox, *supra* 1, at 141.

[128] On the equation of uncovering with liberation and covering with suppression, see Joan W. Scott, *Symptomatic Politics: The Banning of Islamic Headscarves in French Public Schools*, 23 French Politics, Culture and Society 106, 155–56 (2005).

[129] Amer, *supra* 126, at 3, 77–79; Cox, *supra* 1, at 46–47.

[130] Christian Joppke, Veil: Mirror of Identity 109 (2009).

[131] On such narratives, see Susan S. M. Edwards, *Proscribing Unveiling-Law: A Chimera and an Instrument in the Political Agenda*, *in* Brems, The Experiences of Face Veil Wearers in Europe and the Law, *supra* 112, 278.

[132] Aristide R. Zolberg & Long Litt Woon, *Why Islam Is Like Spanish: Cultural Incorporation in Europe and the United States*, 27 Politics & Society 5, 7 (1999).

[133] See, for example, the framing of the applicant's cases in *Kervanci*, *supra* 45, at ¶¶ 66, 72; *Aktas*, *supra* 46, at 4, 8 (paginated PDF); *Bayrak*, *supra* 47, at 3, 7 (paginated PDF); *Köse*, *supra* 37, at 354–55; and the decision of the Court in *Dogru*, *supra* 38, ¶¶ 18, 21, 66, 72; *Şahin*, *supra* 23, ¶¶ 30, 32, 35, 56, 93; *SAS*, *supra* 50, ¶¶ 17–18.

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liberalism.[134] In this understanding, the constitutional identity of citizen is composed of an abstract and, in some respects, idealized understanding of how national constitutional values are integrated within collective identity as part of a process of "interpretive and political activity occurring in courts, legislatures, and other public and private domains."[135] Crucially this identity can be assembled through both positive constructive efforts and negative, deconstructive ones that define what behaviors and characteristics are compatible with citizenship.[136] While the contents of citizenship—and its constitutional identity—vary from one jurisdiction to another, modern citizenship in liberal democratic, and particularly European states, is commonly allied to equality[137]and commitment to the separation of church and state.[138] Within this schema, the loyal citizen is one who Michel Rosenfeld has argued, "is constructed on the basis of a combination of two elements that remain in tension with one another: an abstract identification with the universal prescriptions and projected images of an equal citizenship encapsulated in a bundle of civil and political rights fit to extend to humanity as a whole; and a concrete identification that amounts to a full and whole-hearted adhesion to the collectively projected image that endows the nation with its own particular national identity."[139]

In this understanding of modern citizenship, individuality assumes an identity that cannot be completely fused with that of the nation if it diverges from the majoritarian construction and projection of citizenship—such identities thus becoming "othered" from the citizenship espoused by the state. This is the challenge that veiled citizens face in Europe. As individuals and productive members of society, veiled Muslim women ought to enjoy the same civil and political rights as any other citizen. However, the veil is seen as excepting them from neat categorization as so-called normal citizens. The veil, however, is often viewed as constituting a deliberate rejection of European conceptions of citizenship and indicating a refusal to participate in the common collective identity of the nation that eschews symbols of counter-majoritarian, individualized identities. As a consequence, veiled women are seen as lacking the attributes of allegiance necessary for full membership in the relevant political community and are problematized as reluctant or oppositional minorities within the constitutional project of the State.[140]

As an expression of this dynamic, Kristin Henrard has argued that the citizenship lens reveals the magnitude of the problem with ECtHR reasoning in the veil cases[141] exposing a narrative in which the veil is inextricably linked with a fundamentalist and parallel political community that deliberately refuses the principles of equality and separation of church and state on which modern European governments are premised, such that it is fundamentally

[134] On this point, see also Cox, *supra* 1, at 184.

[135] Gary Jeffrey Jacobsohn, *Constitutional Identity*, 68 Review of Politics 361, 370 (2006); Michel Rosenfeld, *Constitutional Identity*, *in* Oxford Handbook of Comparative Constitutional Law (Michel Rosenfeld & Andras Sajd eds. 2012); Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18 German Law Journal 1585, 1599 (2017).

[136] Michel Rosenfeld, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community (2010); Kristin Henrard, *Integration Reasoning at the ECtHR: Challenging the Boundaries of Minorities'Citizenship*, 38 Netherlands Quarertly Human Rights 55, 57 (2020).

[137] Christopher Pierson, The Modern State 144 (1996). In contrast to pre-modern citizenship based on hierarchy and differentiated rights, see Peter N. Riesenberg, Citizenship in the Western tradition: Plato to Rousseau (1992).

[138] Rogers Brubaker, Citizenship and Nationhood in France and Germany 35 (Harvard University Press, 1992); Jürgen Habermas, *Citoyenneté et Identité Nationale* [Citizenship and national identity], *in* L'Europe au Soir du Siècle: Identité et Démocratie [Europe at the twilight of the century], 20–21 (Jacques Lenoble & Nicole Dewandre eds. 1992).

[139] Rosenfeld, *supra* 136, 214.

[140] *See generally id.* ch. 7, 7.1 (on such dichotomies of citizenship).

[141] *See generally* Kristin Henrard, *Integration Reasoning at the ECtHR: Challenging the Boundaries of Minorities' Citizenship*, 38 Netherlands Quarterly of Human Rights 55 (2020); Neil Chakraborti & Irene Zempi, *Criminalising Oppression or Reinforcing Oppression: The Implications of Veil Ban Laws for Muslim Women in the West*, 64 Northern Ireland Legal Quarterly 63, 64–67 (2013).

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incompatible with citizenship.[142] Cox has similarly argued that veiling is regarded as repugnant to the foundational social values of the European order because it is seen as signaling an overt message by the wearer that the demands of her religious faith trump those of civic society save to the extent that they congrue with her own identity.[143] In this sense the point made by Rosenfeld and others that citizenship is not only positively but negatively constructed becomes significant as part of a view, articulated through the principle *vivre ensemble* as endorsed by the ECtHR that constructs a broadly European constitutional identity and model of citizenship exclusive of Islam as it is practiced by women who choose to veil. And yet, the interviews with subjects detailed in the previous section specifically emphasize that for many, veiling operates as a mechanism for reconciling otherwise divergent understandings of belonging, origin, and identity; of integrating belief and citizenship; and of manifesting a commitment to a European conception of citizenship despite the demands of religious faith. It is thus clear not only that the view of constitutional identity adopted in the cases before the ECtHR is not only positively defined in ways that exclude the participation of veiled women but also negatively constructed through the concept of *vivre ensemble.*

The concept of *vivre ensemble* can be traced to the writings of the French philosopher Emmanuel Lévinas and, in turn, the Belgian political philosopher Guy Haarscher, who applied it specifically to the wearing of the full-face veil.[144] In the view of both authors, the ability to see individuals' faces prevented the creation of a disruptive asymmetry between those who show themselves and those who do not in a society in which the *rapport de face à face* is a minimal precondition for building mutual trust, and ensuring peaceful cohabitation through ethical behavior.[145]

Drawing on this context, Tania Pagotto has highlighted that veil bans in France and Belgium (both states having invoked the principle of *vivre ensemble* before the ECtHR) specifically associate veiling with a systematic betrayal of the fundamental values of democracy by diminishing social interaction between individuals.[146] And yet, on a substantive analysis of the function of the veil as part of an individual's personal identity and the role of that identity in facilitating social interaction, the justifications on which the principle of *vivre ensemble* rest begin to break down.

In both Belgian and French sociopolitical thinking, the concept of *vivre ensemble* comprises two aspects. The first relates to the need for face-to-face personal communication between individuals within society, and the second to the need to build the mutual trust necessary for the enjoyment of rights and liberties by all the members of that society.[147] And yet, in the cases before the ECtHR the precise manner in which the practice of *vivre ensemble* is assisted by the veil bans is hardly substantiated, with both the respondents and Court deferring to a superficial analysis of the meaning of face to face communication and viewing this alone as sufficient to promote mutual trust. Cox argues that, as a result, the label *vivre ensemble* is being used to refer not to concrete social patterns, but rather to an amorphous and undefined abstraction used by secular Western European states as a euphemism for their societal status quo that justifies the enactment of anti-veiling laws.[148] In this respect,

[142] Ernest Gellner, Muslim Society 9 (1981). *See also* Cox, *supra* 1, at 10; McCrea, *supra* 10.

[143] Cox, *supra* 1, at 212–13.

[144] See the description given in Tania Pagotto, *The "Living Together" Argument in the European Court of Human Rights Case-Law*, 9 Studia z Prawa Wyznaniowego 9–11 (2017).

[145] *Id.* at 14.

[146] *Id.* at 15.

[147] *Id.* at 13.

[148] Cox, *supra* 1, at 212–13; Gwyneth Pitt, *Religion or Belief: Aiming at the Right Target?*, *in* Equality Law in an Enlarged European Union: Understanding the Article 13 Directives 203 (Helen Meenan ed., 2007).

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the invocation of *vivre ensemble* is a shorthand for adherence to a view of society defined by exclusionary, majoritarian preferences.[149] Anastasia Vakulenko has similarly observed that the visions of national ordering that accompany justifications for veil bans based on *vivre ensemble* are shot through with highly Christianized visions of what religion and the absence of religion should entail within the state.[150]

Certainly, Christianity and its overwhelming influence on Europe's legal progression has been recognized as tinging the ECHR's framing of human rights[151] notably in the Court's understanding of religion itself which distinguishes belief (internal expressions of religion, *forum internum*) from practice (external expressions of religion, *forum externum*) on the basis of a Christian (and specifically Protestant) view of faith and its manifestations.[152] It is this dichotomy that, Marcel Zwamborn writes, renders Muslim interests suspect before the ECtHR as part of an institutional framing of human rights in which populations who "practice and promote their religion in a more prominent and public fashion, against the general trend among the Christian denominations which is to see one's religion as a private, publicly less prominent issue" are pushing against the status quo for protection.[153] The result of this framing is a balance between personal religious belief and the demands of citizenship, that succeeds in accommodating the beliefs and practices of Christians (including Christian women) who can internalize their faith without compromising its practice[154] but marginalizes Muslim women's experience of citizenship and religious belief that are externalized more constituently as an aspect of their faith. The result, as Cox notes, is that in practice even a highly conservative Christian woman can live comfortably while adhering to her understanding of the moral minimum of what should be made public while a Muslim woman cannot.[155]

More fundamentally, however, a critical engagement with the jurisprudence of the ECtHR on veils demonstrates two significant shortcomings. The first, is the Court's superficial reading of the requirements of "face-to-face" communication that presumes unveiled Muslim women can, and would wish to, portray an authentic "social face" in circumstances in which they are forced, by law, to present a version of their identity that is neither accurate nor complete.[156] In Goffman's influential account of the construction of individual identity he argues that we create our personal identity through the information we present, and the information we solicit from others in social contexts.[157] In this context, many sources of information become accessible and many carriers ("sign vehicles" in Goffman's account) become available for conveying information whether through verbal symbols or their substitutes when we interact with others and present ourselves to them in particular ways.[158] This exchange and perception of identity-marking cues is part of the fundamental

[149] Cox, *supra* 1.

[150] Anastasia Vakulenko, Islamic Veiling in Legal Discourse 132 (2012).

[151] Ronan McCrea, Religion and the Public Order of the European Union (2010); Aaron Petty, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 George Washington International Law Review 807 (2016).

[152] Petty, *supra* 151, at 831; Peter Petkoff, Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights, 7 Religion & Human Rights 183 (2012).

[153] Marcel Zwamborn, The Netherlands, *in* The Implementation of European Anti-Discrimination Legislation: Work in Progress 144 (Janet Cormack & Jan Niessens eds., 2004).

[154] Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others*, 104 American Anthropologist 783, 783–90 (2002).

[155] Cox, *supra* 1, at 61.

[156] *See generally* Myron W. Lustig & Jolene Koester, Intercultural Competence: Interpersonal Communication across Cultures (2003).

[157] Erving Goffman, The Presentation of Self in Everyday Life 13 (1959).

[158] *Id.* at 14.

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dialectic underlying all social interaction: when one individual enters the presence of others he will want to discover the facts of the situation that, once he possess them, will permit him to know and make allowances for future events and the due of each individual.[159] This dialectic and the endurance of social interactions thus rely on the capacity of individuals to infuse their activity in social contexts with signs that dramatically highlight and portray confirmatory facts about their conception of self that might otherwise remain unapparent or obscure.[160] Read in this context, the wearing of a veil is a manifestation of individual identity that may, of course, include identities that are the result of oppression, securitization, or political opposition but may just as commonly be manifestations of a multifaceted, autonomously selected, cultural, social, religious, or political identity or a combination of all such identarian components as they contribute to the constitution of an individual's sense of self. By removing the capacity of individuals to express, and indeed develop, their identity through veiling, there is thus an attendant restriction of the expressive components on which the maintenance of social life and social interaction depend.[161] The claim that superficial face-to-face contact is required to ensure a principle of *vivre ensemble* thus begins to break down under a more substantive analysis, exposing the hollow nature of approaches that disregard the centrality of identity expression in sustainable and meaningful social interactions.

The second difficulty with the principle of *vivre ensemble* is that it is unclear in what way such prohibitions foster trust and cohesion in a social context that compels Muslim women (often under threat of criminal sanction as the cases before the ECtHR demonstrate) to move through society in a manner which accommodates a majoritarian preference premised on a mistrust of Muslim women's capacity to understand and articulate whether they are oppressed by veiling or of their commitment, as citizens, to the constitutional project of the state. Certainly, it may be easier for the majority to trust Muslim women when they are unveiled, but this says very little about the extent or quality of societal trust fostered in such circumstances. The principle of *vivre ensemble* thus carries within it not only a bias toward Judeo-Christian experiences[162] but also a fundamental belief that social cohesion can occur only where Muslim women participate in public life in a manner that compromises their personal conceptions of dignity and autonomy or remain outside public life in order to exercise those same interests. Indeed, the Council of Europe's Commissioner for Human Rights has noted that banning veiled women from public spaces, results in the same women avoiding such spaces altogether and creates a marginalized group, alienated from "mainstream society."[163]

The overall pattern observed in the jurisprudence of the Court, according to Koenig, is one of reflexive support for "secularism" in cases about Islam, in particular in claims involving Muslim women[164] and a projection of the idea of human rights as being designed to bring about women's liberation in light of the assumption that traditional culture is

[159] *Id.* at 241.

[160] *Id.* at 40.

[161] *Id.* at 241.

[162] Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil: Muslim Women, France and the Headscarf Ban*, 39 UC Davis Law Review 743, 747 (2006).

[163] Thomas Hammarberg, *Penalising Women Who Wear the Burqa Does Not Liberate Them*, Council of Europe (July 20, 2011), https://www.coe.int/en/web/commissioner/-/penalising-women-who-wear-the-burqa-does-not-liberate-th-2; Open Society Foundations, Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France (2011); Mari J. Matsuda, *When the First Quail Calls: Multiple Conciousness as Jurisprudential Method*, 14 Women's Rights Law Reporter 213, 289–99 (1992); Wing & Smith, *supra* 162, 747.

[164] Matthias Koenig, *The Governance of Religious Diversity at the European Court of Human Rights*, *in* International Approaches to Governing Ethnic Diversity 51 (Jane Boulden & Will Kymlicka eds., 2015).

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inherently regressive and a central obstacle to the realization of the universal right to gender equality. This tension between human rights and "otherness" has explicitly played out in ECHR jurisprudence concerning the veil, in which the Court has pitted a progressive secular ideal of pluralism, tolerance, and integration against a vision of Islam as an oppressive religious order. This binary obscures the majoritarianism that is advanced in and through the discourse of secularism that aggressively associates gender equality with the unveiled woman. Understanding the importance of veiling in constituting identity, and facilitating social interaction, coupled with the fundamentally personal motivations that undergird the choice to veil, exposes the central rights-claim at issue in veiling cases: namely, the autonomy of Muslim women and their right to develop their personality and identity and their social relationships in a manner that promotes their personal dignity. Acknowledging this leads to the conclusion that, despite the sidelining of Article 8 in the decisions of the ECtHR to date, the right to a private life is, in fact, the right primarily engaged in veiling cases. The relevance of Article 8 has not been entirely denied by the ECtHR, which has acknowledged, for example in *Şahin*,[165] *Kurtulmuş*,[166] *Köse*,[167] and *Dogru*,[168] the engagement of private life and identarian issues in veiling cases. Why then, should Article 8 be the primary lens through which such cases are examined, and why has Article 8 failed to vindicate the rights of the applicants in the cases to date?

## Privacy at the Margin: The Limits of Article 8

Given the multiple and diversely personal motivations for veiling outlined in section three, and given the demonstrable role of veiling choices in the identity formation that enables social participation as outlined by Goffman we argue that greater emphasis should be placed on veiling as an aspect of "private life" under Article 8 ECHR in both a popular or political understanding and in the ECtHR's own jurisprudence. Article 8 ECHR provides that every person has a right to respect for their private and family life, their home, and correspondence subject to the qualifications provided in Article 8(2). Article 8 has been described as one of the most "unruly" rights protected by the Convention[169] and has experienced a continual expansion of its boundaries. As "unruly" as Article 8 may be considered, however, it has long been interpreted by the ECtHR as centering on a relational understanding of privacy that privileges the individual's right to develop their personality and identity through individual choice and social interaction (including in an emotional context).[170] Of course, reorienting the Court's, and indeed the popular, perception of veiling as an identity-forming practice rather than a purely religious one cannot resolve the ECtHR's deference to the margin of appreciation and its consideration of appropriate limitations under paragraph 2 of Article 9, or, in the argued context, Article 8. However, such a reorientation does recenter the lived experiences of Muslim women in considerations of veiling and its function, and exposes the complexity and range of personality- and identity-forming functions that veiling plays and which extend beyond a religious context. More fundamentally, viewing veiling as an aspect of private life under Article 8 also exposes the manner in which the ECtHR has restricted the scope of one of its most expansive rights in an

[165] *Şahin*, *supra* 23ote 23, ¶ 105.
[166] *Kurtulmuş*, *supra* 33, at 309–10.
[167] *Köse*, *supra* 37, at 360.
[168] *Dogru*, *supra* 38, ¶ 16.
[169] Wright & Ors, R (on the application of) v. Secretary of State for Health [2006] EWHC 2886 (Admin) 66 (Lord Justice Stanley Burnton).
[170] Bernadette Rainey, Elizabeth Wicks & Clare Ovey, The European Convention on Human Rights 401 (7th ed. 2017); X v. Iceland, App. No. 6825/74 (May 18, 1976).

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unusually conservative manner in cases involving veiling—a manner that is at odds with the Court's broader jurisprudence on private life.

### *Personal Life and Identity Formation*

The case law of the ECtHR is characterized by a consistent emphasis of the connection between the protection of private life by means of permitting personal identity formation and the ability to form social relationships.[171] This is particularly notable in *X v. Iceland*,[172] where the Court found that Article 8's protections include the "right to establish and develop relationships with other human beings ... for [the] development and fulfilment of one's personality."[173] This articulation has subsequently been cited with approval in *Niemietz v. Germany*,[174] while the decisions in *Gaskin v. UK*,[175] *Stjerna v. Finland*,[176] *Ciubotaru v. Moldova*,[177] *Odievre v. France*,[178] and *Karassev v. Finland*[179] reflect a retrenchment of the Court's conviction that Article 8 privacy protections ensure the protection of the development and expression of personal identity. The decision of the Court in *X and Y v. The Netherlands*[180] in particular noted that the concept of private life protects not only the physical but also the moral integrity of the person.[181] A crucial function of the private life in this conception is autonomy—the capacity and control of the individual in matters that allow and contribute to the development of personality and identity, and permit them to direct the course of their own life and their social existence as it is defined through interaction with others.[182]

Within this Article 8 schema, the concept of a private life has thus been subject to a particularly expansive reading that affords a generous and contextual interpretation of those influences and activities that ought to be considered as crucial to individual self-development covered by the concept of private life under Article 8. Early cases in which the right to a private life was successfully invoked included cases that argued for recognition of a

[171] *See* Pretty v. United Kingdom, 2002-III Eur. Ct. H.R. 155 , ¶ 61 (July 29, 2002), https://hudoc.echr.coe.int/eng?i=001-60448; Haas v. Switzerland, App. No. 31322/07 (June 20, 2011), https://hudoc.echr.coe.int/eng?i=001-102940; CAS and CS v. Romania, App. No. 26692/05, ¶ 82 (Mar. 20, 2012), https://hudoc.echr.coe.int/eng?i=001-109741; A.-M. V. v. Finland, App. No. 53251/13, ¶ 90 (June 23, 2017), https://hudoc.echr.coe.int/eng?i=001-172134; Kučera v. Slovakia, App. No. 48666/99, ¶¶ 119, 122 (Oct. 17, 2007), https://hudoc.echr.coe.int/eng?i=001-81731; Rachwalski and Ferenc v. Poland, App. No. 47709/99, ¶ 73 (July 8, 2009), https://hudoc.echr.coe.int/eng?i=001-93690; Khadija Ismayilova v. Azerbaijan, App. No. 65286/13 and 57270/14, ¶ 117 (Jan. 10, 2019), https://hudoc.echr.coe.int/eng?i=001-188993; I. v. United Kingdom, App. No. 25680/94 (July 11, 2002), https://hudoc.echr.coe.int/eng?i=001-60595; Norris v. Ireland, App. No. 10581/83 (Oct. 26, 1988), https://hudoc.echr.coe.int/eng?i=001-57547.

[172] *X*, *supra* 170.

[173] *Id.* at 88.

[174] Niemietz v. Germany, App. No. 13710/88 (Dec. 16 1992), https://hudoc.echr.coe.int/eng?i=001-57887.

[175] Gaskin v. United Kingdom, App. No. 10454/83 (July 7, 1989), https://hudoc.echr.coe.int/eng?i=001-57491 (holding that the state's refusal to provide the applicant access to records it held regarding his time in care was a violation of Article 8).

[176] Stjerna v. Finland, App. No. 18131/91 (Nov. 25, 1994), https://hudoc.echr.coe.int/eng?i=001-57912 (analyzing the state's refusal to register the applicant's desired change of name as an Article 8 issue).

[177] Ciubotaru v. Moldova, App. No. 27138/04 (April 27, 2010), https://hudoc.echr.coe.int/eng?i=001-98445 (finding that, along with name, gender, religion and sexual orientation, an individual's ethnic identity constituted an essential aspect of their private life and identity).

[178] Odievre v. France, 2003-III Eur. Ct. H.R. 1, https://hudoc.echr.coe.int/eng?i=001-60935.

[179] Karassev v. Finland, App. No. 31414/96 (Jan. 12, 1999), https://hudoc.echr.coe.int/eng?i=001-4592.

[180] X and Y v. The Netherlands, App. No. 8978/80 (Mar. 26, 1985), https://hudoc.echr.coe.int/eng?i=001-57603.

[181] *Id.* at 22.

[182] Aksu v. Turkey, App. Nos. 4149/04 and 41029/04 (Mar. 15, 2012), https://hudoc.echr.coe.int/eng?i=001-109577.

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parental right to have children educated in French (rather than Flemish),[183] and the right was subsequently explained by the Commission as not being limited to the protection of a narrow privacy interest, but was instead inclusive of a right to "establish and develop relationships with other human beings" in particular in the "emotional field for the development and fulfilment of one's own personality."[184] This approach of recognizing a private but social life under Article 8[185] was subsequently endorsed in *Niemietz v. Germany*,[186] where the Court stated that it would be "too restrictive to limit the notion [of private life] to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."[187]

This interpretation was reinforced by the Court's subsequent acknowledgment in *X and Y v. Netherlands* that the concept of private life extended to a still more fundamental level—covering within its scope the physical and moral integrity of the person.[188] This reading of the right to privacy, despite some initial reluctance, has been adopted by the Court more broadly in its subsequent decisions that have developed to include within the right to private life a recognition of the importance of, and the need to protect, an individual's physical and psychological integrity in a manner complementary to a more general protection of personal autonomy under Article 8.[189] Given that veiling plays a role through visible solidarity in both religious and secular identity formation by reconciling nationalities and ethnicities, as well as creating a sense of familial belonging, there is every reason to see it as a component of private life. In some respects, this is uncontroversial—the ECtHR has, of course, recognized the Article 8 interest as being triggered in some of its veiling jurisprudence. However, it has not considered the veil as a mechanism of nonreligious identity or as a component of identity necessary to an individual's formation of social relationships. This is unusual given the range of personal expressive and identarian components and measures that the Court has recognized as being protected by private life.

The Court has also omitted to consider whether a positive obligation to protect veiling as an identity-forming practice rather than a purely religious practice would attract the positive obligations identified in other Article 8 contexts, including those that trigger socially and politically controversial issues. The ECtHR recognized a positive obligation on States in just such a controversial context in *Goodwin v. United Kingdom.*[190] In that case, the Court noted that, in determining whether or not a positive obligation existed, they would have regard to the fair balance that was to be struck between the general interest of the community and the interests of the individual applicant.[191] Emphasizing its oft repeated

[183] Belgian Linguistic Case, App. Nos. 1474/62, 1677/62, 1691/62, 1994/63, and 2126/64 (July 23, 1968), https://hudoc.echr.coe.int/eng?i=001-55398.

[184] *X*, *supra* 170, at 88.

[185] On "private social life," see Altay v. Turkey (No. 2), App. No 11236/09, ¶ 49 (2019), https://hudoc.echr.coe.int/eng?i=001-192210.

[186] *Niemietz*, *supra* 174.

[187] *Id.* ¶ 29.

[188] *X and Y*, *supra* 180, at ¶ 22. *See also* Agnès De Féo, Derrière Le Niqab: 10 Ans D'enquête Sur Les Femmes Qui Ont Porté Et Enlevé Le Voile Intégral [Behind the niqab: 10 years of investigating women who wore and removed the full veil] (2020) (providing a sociological analysis of women who veil in France following the 2010 ban).

[189] *See* Costello-Roberts v. United Kingdom, App. No. 13134/87 (March 15, 1993), https://hudoc.echr.coe.int/eng?i=001-57804; Christine Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1. On the recognition of autonomy under Article 8, see Pretty, *supra* note 171, ¶ 61; Y.F. v. Turkey, 2003-IX Eur. Ct. H.R. 171; Burghartz v. Switzerland, App. No. 16213/90 (February 22, 1994), https://hudoc.echr.coe.int/eng?i=001-57865.

[190] *Goodwin*, *supra* note 189, at ¶ 74.

[191] *Id.* ¶ 72.

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dicta that the Convention is to be interpreted and applied "in a manner which renders its rights practical and effective, not theoretical and illusory" the Court noted that the serious problems facing trans people like the applicant who sought recognition of their new legal gender should be assessed "in the light of present-day conditions."[192] Having regard to the embarrassment and difficulties suffered by the applicant where her gender identity was not reflected in official records, the minimal administrative demands that such recognition would involve, the general international consensus on the need for such recognition, and the lack of any medical or scientific consensus that would militate against the recognition sought, the Court found that the respondent government could not claim that the matter fell within their margin of appreciation, and that the fair balance inherent in the Convention tilted "decisively in favor of the applicant." As such, the Court required the government to take positive steps to vindicate the Article 8 rights.[193]

The decision in *Goodwin* is an illustrative comparative example of how Article 8's otherwise expansive capacity—while sufficiently flexible to protect recognition of other so-called controversial aspects of individual identity (in that case gender recognition)—has restricted around Muslim women's identity cases involving veiling.[194] In veiling cases—as in *Goodwin*—the applicants are effectively arguing that they are subject to embarrassment in and barriers to their capacity to live as themselves as fully realized, Muslim, citizens, as a result of government action, and are forced to maintain what the applicant in *SAS* refers to as a "Jekyll and Hyde personality."[195] The decision in *Goodwin* supports a finding that where the physical and moral integrity of individuals is at stake and the positive obligation of states to vindicate that integrity is in question, a precisely articulated objective end justifying the limitation must be present. In *Goodwin*, the Court thus refused to accept the generally defined ends presented by the government. Despite this, in veiling cases—even those cases found to be admissible—the ECtHR has accepted objectives for bans that range from the broadly defined to those contradicted by objective evidence or by a contextual reading of the circumstances of the case.

Nor is this where the flaws in the reasoning highlighted by *Goodwin* end. In *Goodwin*, in its analysis of whether a fair balance was to be struck that might limit the applicant's rights under Article 8(2), the Court began from a position of presumptive validity in which the applicant was entitled to recognition of their new gender identity absent consensus among other member states that this should not be provided, medical or scientific evidence to the contrary, or a disproportionate burden on the state in facilitating recognition. This is in stark contrast to the position in veiling cases where the approach of the Courts first lacks the detailed consideration evidenced in *Goodwin* but more fundamentally presents veiling bans as, if not presumptively permissible, then certainly without the skepticism that attached in *Goodwin* to bars on registering changes to gender identity absent alternative evidence.[196]

The contrast between the approach in *Goodwin* and the veiling decisions of the Court is particularly troubling in respect of the attitude adopted to the relevance of international consensus on the impugned measure. In *Goodwin*, the Court considered, in some detail, the debate in member states, and more broadly at an international level, concerning the

[192] *Id.* ¶¶ 74–75.

[193] *Id.* ¶ 93.

[194] *See also* Saïla Ouald Chaib, Belief in Justice: Towards More Inclusivity in and through the Freedom of Religion Case Law of the European Court of Human Rights (July 9, 2015) (Ph.D. diss., Ghent University).

[195] *SAS*, *supra* 50, at ¶ 79.

[196] On bans on Islamic dress as the default option see, Eva Brems, Saïla Ouald Chaib & Katrijn Vanhees, *Burkini Bans in Belgian Municipal Swimming Pools: Banning as the Default Option*, 36 Netherlands Quarterly of Human Rights 270 (2018).

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recognition of transgender identities and, in particular, recognition of "new" gender identities in government documents and databases.[197] Yet the recognition of that right was not at the time of the decision, and is still not, as settled as the Court's treatment of it in *Goodwin* suggests. Even following subsequent recognition at the time of writing nineteen of the Council of Europe's forty seven member states provide no recognition of "new" genders, with twelve providing only limited or partial recognition.[198] And yet, on the basis of the evidence presented, in the form of a small number of decisions and a report by an Intervening Party[199] the Court found that there was sufficient consensus to support the applicant's claim. In comparison, while there is indeed a debate on veil bans among member states of the Council of Europe, there is evidence similar to that presented in *Goodwin* that veiling should not be banned from public spaces. Indeed, the majority of Council member states do not ban veiling[200] with only ten of the forty-seven members endorsing the institution of any ban on the veil. The inevitable conclusion is that the ECtHR has found that there is an absence of consensus on veiling only in as much as a minority of jurisdictions think veils should be banned. This is in stark contrast to *Goodwin*, where the recognition of a change in gender identity was, if anything, less amenable to a consensus but was nevertheless found to enjoy sufficient support as to justify refusal of the rights of the respondent to rely on the margin of appreciation.

In its assessment of the presence of consensus in *Goodwin* the ECtHR appears once again to have begun from a position of presumptive validity—discounting negative or discordant approaches where a low threshold of positive support for the applicant's position was present. In contrast, in the veiling cases, the ECtHR has displayed a marked tendency to treat the existence of prohibitions in a minority of other jurisdictions as indicative of a lack of consensus—without averring to the representative nature of such jurisdictions or the politicized and populist motivations where such bans have been present. The overall impression is one of a Court that is content to use the mere existence of veil bans in a minority of jurisdictions as a basis for preserving a desired status quo and deferring to the margin of appreciation where Article 8 is invoked in respect of the rights of Muslim women.

This is particularly surprising given that the ECtHR's privacy jurisprudence has previously demonstrated a clear recognition that contested identities may be particularly worthy of protection under the right to a private life in Article 8. In *Ciubotaru v. Moldova*,[201] the applicant successfully argued that an individual's ethnic identity constituted an essential aspect of his private life, in particular in circumstances in which ethnic identity had been the subject of social tension and debate within his home jurisdiction.[202] The Court considered

[197] *Goodwin*, *supra* 189, at ¶¶ 84–85.

[198] In 2018, fifteen Members of the Council of Europe made no provision for the recognition of "new" genders, while twelve provided for only partial recognition and fifteen provided such recognition. The number of jurisdictions recognizing such rights had fallen by 2020, with Belgium, Cyprus, and Latvia recoded by the EU as making no provision for recognizing the gender of a transgender person, see Directorate General for Justice and Consumers, Legal Gender Recognition in the EU: The Journeys of Trans People Towards Full Equality (European Union, 2020), and in respect of the Council of Europe, Measures to Combat Discrimination Based on Sexual Orientation (2018), https://rm.coe.int/combating-discrimination-on-grounds-of-sexual-orientation-and-gender-i/16809fb2b8.

[199] *Goodwin*, *supra* 189, at ¶¶ 55–56.

[200] Of the Council of Europe's forty-seven members, there are contextual or limited prohibitions on the wearing of the veil in place in ten jurisdictions, namely Austria, Bosnia and Herzegovina, Bulgaria, Belgium, France, Denmark, Latvia, Luxembourg, The Netherlands, and Switzerland. Turkey has not only ceased to enforce its own veil ban, but has even introduced measures prohibiting veil bans. A minority of municipalities in Spain and Italy ban veils covering the face, while in Germany, in September 2003 the Federal Constitutional Court upheld the right of a teacher to wear the veil during her employment in BVerwG, 1 BvR 471/10, 1 BvR 1181/10, Jan. 27, 2015, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/01/rs20150127_1bvr047110en.html.

[201] *Ciubotaru*, *supra* 177.

[202] *Id.* ¶¶ 36–42.

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that the respondent government's failure to enable the applicant to have his ethnic identity recognized in light of objectively verifiable evidence amounted to a violation of the state's positive obligations under Article 8.[203] In particular, the Court rejected the Government's argument that recognition of ethnic identity solely on the basis of an individual's declaration could lead to "serious administrative consequences and to possible tensions"—an apparent reference to the deleterious consequences of attempts to complicate formerly monolithic ethno-national identities and a claimed need to prevent unsubstantiated claims of ethno-nationality (though the respondent failed to articulate the particular harms which this might occasion).[204] While it is not a matter explicitly considered in the case, the facts of *Ciubotaru* and the content of the government's arguments are essentially centered on a claim of individual identity as weighted against public good—as in the veiling cases. And yet, in measuring the balance to be struck, the Court in *Ciubotaru*, no less than in *Goodwin*, appears to require little evidence of the applicant as to the particular manner in which his identity has been harmed, beginning from a presumption that the failure to recognize his identity constitutes such a harm, and placing its emphasis in the decision on the minimal administrative burden placed on the respondent in vindicating the applicant's rights, and the possibility of limiting such claims of recognition by reference to objective evidence. Once again, the comparison between the Courts' generous interpretative approach to the recognition of ethnic identity as an aspect of private life is striking. The Court in *Ciubotaru* rejects the general and broadly drawn arguments concerning tensions with other states and the historic tensions concerning recognition of ethnicity that characterize the case, foregrounding the applicant's particular claim—in contrast, in the veiling cases the historical context of secularism and the potential of the identity of Muslim women to disrupt social interaction is the primary concern.

The ECtHR has previously excluded the application of Article 8 rights to private life in cases that concern interpersonal relations of "such broad and indeterminate scope" that there is no conceivable link between the individual applicant's actions and a private life, noting that the fact that an activity allows an individual to establish and develop relationships does not necessarily mean that activity falls within the scope of Article 8.[205] And yet, where and how this particular line is drawn is not clear. Indeed, if such a line is to be drawn, even on a conservative basis, it would be in contexts in which the activity involved was by measures less certain than the recognition of identity-based activities sought in *Goodwin* and *Ciubotaru.* Veiling would logically fall well within the scope of such a test—requiring only government restraint from actions that limit the ability of Muslim women to wear an item of dress and to do so only in those circumstances where an objectively substantiated public safety or public health concern is present, rather than on the basis of a "broad and indeterminate" interest such as *vivre ensemble.* Certainly, the Court's own approach to the interpretation and application of the right to a private life would make this the presumptively correct position.

### *Private Life in Public Spaces*

A distinctive aspect of prohibitions on veiling is their situation within public spaces—tendering a *prima facie* defense to claims of interference with private life. Certainly, in other

[203] *Id.* ¶ 59.

[204] *Id.* ¶¶ 56–57.

[205] Friend and Others v. United Kingdom, App. No. 16072/06 and 227809/08 (Nov. 24, 2009); Botta v. Italy, App. No. 21439/93 (Feb. 24, 1998), https://hudoc.echr.coe.int/eng?i=001-58140; Zehnalová and Zehnal v. Czech Republic, App. No. 38261/97 (May 14, 2002), https://hudoc.echr.coe.int/eng?i=001-23341; Molka v. Poland, App. No. 56550/00 (April 11, 2006).

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jurisdictions this qualification might prove successful, however, the jurisprudence of the ECtHR has recognized an intersection of private life and public spaces in which the protection of Article 8 can endure. The ECtHR's jurisprudence on private life is, in this respect, one which could be characterized as protecting a "social private life" in which an individual's right to private life—and the protection of that right— cannot be actualized solely through isolation or retreat from society but is, instead, constituted through their capacity to form and develop their identity and relationships in private *but also* in social settings. In this respect, we recall, once again, the dicta from *Niemietz v. Germany*[206] that private life cannot be limited to an "inner circle" from which the outside world is excluded but must also comprise a right to establish and develop relationships in social settings.[207] This position has been frequently reiterated by the Court including in the more recent decision in *Ribalda v. Spain*,[208] in which the Court noted that surveillance in an employment context within a public shopping area implicated Article 8 rights.

In this respect, the ECtHR's decisions share with Islamic constructions of space a view of the potential for public spaces to be converted into private ones. In Islamic thinking in particular this allows individuals to generate sacred spaces set apart from the events occurring around them in what Shirley Ardener refers to as "overlapping universes" or "spaces within spaces."[209] The veil plays a significant part within this schema, acting not unlike a "mobile home" that permits women to move between public and private spaces regardless of the social character of the context in which they find themselves.[210] In this respect, not only may a Muslim woman consider the right to veil to be crucial to shielding private parts of herself from public view but, more fundamentally, the right to manifest her identity through the choice to do so is in and of itself an aspect of her identity and thus part of her private life.[211] Fundamentally, these aspects of private life that may function as modes of religious expression also protected under Article 9 can also be motivated by more general identity forming desires or by motivations separate from religious faith and located entirely within an independent identity-forming desire.

The conception of privacy under Article 8 as accommodating the shifting boundaries and contexts of private spaces is now well established in the jurisprudence of the ECtHR. Beginning with the decision in *Niemietz*, the Court has recognized a series of extensions of the spaces in which a private life could be enjoyed. A significant, and perhaps dramatic, extension of the spaces in which a private life could be claimed to endure was heralded by the decision in *Von Hannover v. Germany*.[212] In that case the Court found that individuals are entitled to enjoy a zone of privacy, even where the individual themselves lives in the public eye or is in a public setting, noting, "Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life."[213]

[206] *Niemietz*, *supra* 174.

[207] *Id.* ¶¶ 28–30.

[208] López Ribalda v. Spain, App. No. 1874/13 and 8567/13 (Oct. 17, 2019), https://hudoc.echr.coe.int/eng?i=001-197098.

[209] Shirley Ardener, *Ground Rules and Social Maps for Women: An Introduction*, *in* Women and Space: Ground Rules and Social Maps 3 (1993).

[210] Abu-Lughod, *supra* 154, at 758.

[211] In as much as a "private part" is being shielded the physical privacy that is at stake is a matter that is additional to the identarian issue considered here. Our particular focus is thus on the moral and psychological privacy implicated in private life under Article 8 rather than the physical privacy that traditional readings of veiling prioritize.

[212] *Von Hannover*, *supra* 57.

[213] *Id.* ¶ 95.

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In general, the Court has noted that private life will be triggered in public spaces where the individual has a reasonable expectation of privacy in the setting at issue (though this is not a conclusive factor) and what data, if any, concerning a person is collected and used if they are undergoing monitoring in public settings.[214] The cases considering this issue have largely related to the collection of personal data and its subsequent publication, yet they establish that the right to private life includes a right to be in public spaces, to engage in social interaction within those spaces in order to develop one's identity and, crucially, to do so without surveillance of one's appearance or behavior absent specific grounds. This is supported by other decisions of the Court.[215] The limitations placed by the Court on when a right to private life may be invoked in a public setting take the form of those activities that are "essentially public in nature."[216] The distinction in this respect appears from the Court's case law to be that where an activity is carried on for personal fulfilment alone it will continue to benefit from the protection of private life.[217] In this respect, then, veiling as a means of fulfilling and developing personal identity and expressing personal autonomy falls within the scope of private life in public settings.

Significantly, restrictions of the right to private life in public settings are treated by the Court with a degree of skepticism equal to that characterizing purely "private" settings. Thus, in *Peck v. United Kingdom*,[218] the ECtHR noted that the claimed aim of detecting and deterring crime was insufficient to justify the disclosure of closed-circuit television footage of the applicant following a suicide attempt in a public area. The Court noted, in particular, that the aim forwarded by the respondent did not reflect the context of the applicant—that is, no crime was taking place in the footage and the detection and deterrence of crime could not justify the disclosure at issue. This consideration of the practical experience of the applicant and the interrogation of the factual basis for the respondent party's aims is at odds with the attitude adopted by the ECtHR in veiling cases.

This private space, that can exist even in public contexts, has been extended over time by the Court to include individuals whose public status is comparatively high and situations in which there may be considered to be a public interest in information about that person (such as in cases involving criminal allegations).[219] The result is a jurisprudence in which the private life of an individual can subsist in public and shared spaces or that "zone of interaction between a person and others which, even in a public context, may fall within the scope of private life."[220] The applicant in *SAS* sought specifically to rely on the decision in *Von Hannover* in her case, arguing that her Article 8 rights might still be infringed where the impugned law restricted her activity only in public spaces. In a further example of its exceptionalist attitude to the interpretation of Article 8 in veiling cases, however, the Court was skeptical of the capacity of Article 8 to vindicate the applicant's claim noting that in as much as the applicant was prohibited from veiling in public places the issue was a matter for Article 9 and not Article 8.[221]

This attitude runs contrary to the Court's own jurisprudence both in *Von Hannover* and in earlier cases such as *Niemietz* and its broad interpretation of the public spaces that might

[214] Uzun v. Germany, 2010-VI Eur. Ct. H.R. 1, 16.

[215] Peck v. United Kingdom, 2003-I Eur. Ct. H.R. 123, 143–44; *Uzun*, *supra* 214, at 16; *Altay*, *supra* 185, at ¶ 49.

[216] *Friend*, *supra* 205, at ¶ 42; Nicolae Virgiliu Tănase v. Romania, App. No. 41720/13 (June 25, 2019), https://hudoc.echr.coe.int/eng?i=001-194307.

[217] *Friend*, *supra* 205, at ¶ 42.

[218] *Peck*, *supra* 215, at 147–50.

[219] Sciacca v. Italy, 2005-I Eur. Ct. H.R. 59; *Peck*, *supra* 215; Mosley v. United Kingdom, App. No. 48009/08 (May 10, 2011), https://hudoc.echr.coe.int/eng?i=001-104712.

[220] Gillan & Quinton v. United Kingdom, App. No. 4158/05 (June 28, 2010), https://hudoc.echr.coe.int/eng?i=001-96585.

[221] *SAS*, *supra* 50, ¶ 108.

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nevertheless be classified as triggering private life in related Article 8 jurisprudence. The position also ignores the identity-forming, nonreligious or mixed religious and identity-forming functions of the veil, separating its use by the applicants involved from its use as perceived by non-Muslim viewers. While a veiled woman is Muslim, not all women veil because they are Muslim and not all Muslim women choose to veil. At present, the Court's jurisprudence fails to recognize this variation, with the presence of a veil viewed as indicative of a form of religious expression at odds with the model of citizenship and equality presented by Western states. More broadly, much of the jurisprudence of the ECtHR involves actions and recognitions —as in *Ciubotaru*, *Goodwin*, and other decisions—that are inherently situated within the public sphere, centering on the interaction of public services, servants, and institutions with citizens seeking to communicate and assert their identities within those public spaces, and through the public actors who control them. Indeed, the Court has found in these cases in particular that not only must the state refrain from interfering with citizens in their expression of national, ethnic, or gender identities, but they also must take positive action to accommodate the expression of such identities. That the Article 8 rights of Muslim women seeking to wear the veil may be expressed and located in both strictly private settings of the "inner circle" and a zone of interaction that is, to varying contextual degrees, public, is thus not a bar to the protective capacity of Article 8, if the Court's own logic is pursued to its natural conclusion.

## Conclusion

The jurisprudence of the ECtHR regarding veiling is notable for its failure to engage with the views of the applicants that appear before the Court, the broader views of the communities they represent, and the contexts in which those communities exist. This has led the Court to develop a line of decisions in which the identity- and personality-forming functions of veiling, the relationship of veiling to diverse experiences of gender and autonomy, and the role of veiling in social interaction have been marginalized. As part of this pattern of marginalization, the voices of Muslim women have been displaced by general and often reductive views of the function of veiling that portray it as oppressive to women and contrary to the values of equality, as well as subversive of the conception of citizenship at the heart of the European state. This compromises the capacity of Muslim women to actualize themselves as citizens and forces them to choose to be unveiled as "complete" citizens or position themselves as "other" where they seek to express those aspects of their identity that find form in a choice to veil.

The flattening of the diverse meanings of veiling and the acceptance of simplified narratives is evidenced by the poor, and often absent, objective evidence presented in support of veil bans by the respondents before the ECtHR and the subsequent decisions of the Court itself, which display a refusal to acknowledge, and a deliberate curtailment of, the otherwise broad scope of the right to privacy under Article 8. The Court has, in this respect, employed an exceptionalist interpretation of the right to a private life in cases involving veiling resulting in a restriction of the scope of Article 8 around the contours of female, Muslim identities that should, in a conventional reading of the Court's jurisprudence, be protected within the scope of Article 8.

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