Empathy and Human Rights: the Case of Religious Dress

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1. INTRODUCTION

In *To Kill a Mockingbird*, Harper Lee's classic 1960 novel about racism in the deep south of the USA, the lawyer Atticus Finch explains to his six year old daughter the benefits of adopting the perspectives of other people:

> '… if you can learn a simple trick Scout, you'll get on better with all kinds of folks. You never really understand a person until you consider things from his point of view – … – until you climb into his skin and walk around in it.'[1]

A more eloquent yet simple encapsulation of the concept of empathy is hard to find. Just as empathy – or the process of ''feeling with' another'[2] – was seen by Harper Lee as a way of challenging racial prejudice in a conservative US town, so too will it be argued here that the principle of empathy offers significant opportunities for a better understanding of difference in a socially fragmented Europe.

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[1] Lee, *To Kill a Mockingbird* (Vintage, 2004) at 31.

[2] This definition of empathy is offered by Eisenberg and Strayer, 'Critical issues in the study of empathy' in Eisenberg and Strayer (eds) *Empathy and its Development* (Cambridge University Press,1990) 5.

The concept of empathy has 'a long and checkered history',[3] and in recent decades it has been of particular interest to scholars from across a range of academic disciplines[4] − such as those working in the fields of neuroscience,[5] evolutionary biology,[6] psychology,[7] ethics,[8] philosophy[9] and history.[10] This recent focus on empathy has even been so striking that one leading commentator has referred to it as an 'empathy craze'.[11] However, in spite of the seemingly near ubiquitous infiltration of empathy studies across academic and popular discourses, there has, perhaps surprisingly, been little utilization of this concept in the area of European human rights law. Although some notable philosophers and legal scholars have argued that empathy may offer assistance in providing an understanding of why human rights are worthy of protection, and there has been debate about the role of empathy in the

[3] Moore, 'The origins and development of empathy' (1990) 14(2) *Motivation and Emotion* 75.

[4] For a range of disciplinary perspectives see Coplan and Goldie (eds) *Empathy* (Oxford University Press, 2011). A general overview of 'empathy' is also to be found in Howe, *Empathy: what it is and why it matters* (Palgrave Macmillan 2013).

[5] See e.g. Iacoboni, *Mirroring People: the science of empathy and how we connect with others* (Picador, 2008); and Decety and Ickes, *The Social Neuroscience of Empathy* (Massachusetts Institute of Technology Press, 2011).

[6] See e.g. de Waal, *The Age of Empathy* (Souvenir Press, 2009); and Sober and Wilson, *Unto Others: the Evolution and Psychology of Unselfish Behaviour* (Harvard University Press, 1998).

[7] See e.g. Pinker, *The Better Angels of Our Nature: a History of Violence and Humanity* (Penguin, 2012); Baron-Cohen, *Zero Degrees of Empathy: A New Theory of Human Cruelty* (Allen Lane, 2011); Trout, *Why Empathy Matters: The Science and Psychology of Better Judgment* (Penguin, 2010); and Perry and Salavitz, *Born for Love: Why Empathy is Essential (and Endangered)* (Harper Collins, 2010); Krznaric, *Empathy: why it matters and how to get it* (Rider, 2014).

[8] See e.g. Kitcher, *The Ethical Project* (Harvard University Press, 2011); and Armstrong, *Twelve Steps to a Compassionate Life* (Vintage, 2010).

[9] See e.g. Nakao and Itakura, 'An integrated view of empathy: psychology, philosophy, and neuroscience' (2009) 43(1) *Integrative Psychological and Behavioral Science*, 42-52.

[10] See e.g. Moyn, 'Empathy in history, empathizing with humanity' (2006) 45(3) *History and Theory* 397-415 and Glover, *Humanity: A Moral History of the Twentieth Century* (Jonathan Cape, 1999).

[11] Pinker, supra n 7, at 695.

context of US constitutional rights,[12] there has been little exploration as to how an empathic approach might work in the actual practice of human rights adjudication.

In this article we seek to address this situation by investigating the possibility that empathy might offer more to the adjudication of human rights disputes than has hitherto been recognised. With this aim in mind we propose to explore empathy through the prism of the jurisprudence of the European Court of Human Rights (the Court or ECtHR) in its application of the qualified rights contained in the European Convention on Human Rights (ECHR). We shall focus specifically on the Article 9 case law concerning the right to manifest one's faith or beliefs through religious dress or related symbols, though our arguments may well have applicability in relation to other issues of contemporary controversy.[13] The Court's jurisprudence in the area of religious dress/symbols has been the subject of widespread academic criticism, particularly on account of the very weak protection that it has provided to Muslim women and girls wishing to manifest their beliefs through the wearing of the headscarf or face veil. As such this topic provides a valuable case study as to how the

[12] See e.g. Rorty, 'Human Rights, Rationality and Sentimentality' reprinted in Savic (ed), *The Politics of Human Rights* (Verso, 1999) 67; Gearty, *The Hamlyn Lectures 2005: Can Human Rights Survive?* (Cambridge University Press, 2006) ch 2; Gearty, 'Human rights: the necessary quest for foundations' in Douzinas and Gearty, *The Meanings of Rights: The philosophy and social theory of human rights* (Cambridge University Press, 2014), 21; and Ignatieff, 'Human Rights as Idolatry' in Gutman (ed), *Michael Ignatieff – Human Rights as Politics and Idolatry* (Princeton University Press, 2003) 53 at 88-9. For explorations of empathy in the context of US constitutional law and rights see e.g. Henderson, 'Legality and Empathy' (1987) 85 *Michigan Law Review*, 1574; Hoffman, 'Empathy Justice and Law' in Coplan and Goldie, supra n 4; Bandes, 'Moral Imagination in Judging' (2011) *Washburn Law Journal* 1; Corso, 'Should Empathy Play any Role in the Interpretation of Constitutional Rights' (2014) 27(1) *Ratio Juris* 94.

[13] The concept of empathy might provide valuable insights in areas that range, for example, from workplace disputes whereby conservative faith and LGBT rights are pitted against each other, to the contentious issue of 'blasphemy' and the public vilification of sacred religious images, figures or doctrines.

promotion of empathy might assist in the determination of increasingly frequent, acrimonious and socially damaging disputes.

The essence of our argument is that the Court has failed meaningfully to acknowledge the deep commitments that manifestations of religion/belief may represent from the perspective of believers themselves. This has had the effect, through the margin of appreciation doctrine, of less onerous standards being imposed on states in terms of the reasons they must adduce to justify imposing curbs on the right to freedom of religion/belief. In short, when the Court has struck the balance between the individual's right to manifest their religion/belief as against the competing interests claimed by the state, more weight has consistently been added to the 'restrictions-side' than to the 'rights side' of the scales, with a consequent tilting in the state's favour.

It will be argued that this impoverished protection matters because human rights depend for their legitimacy on the claim that they afford equal protection to all. The routine failure of applicants who wish to manifest their faith through how they dress may lead to the disillusionment of certain religious minorities with the Strasbourg human rights system. Moreover, it means that religious believers risk being marginalized when a human rights Convention that grandly 'talks the talk' of offering equal protection to all conspicuously fails to do so − thereby prompting consternation in some quarters of a striking contrast between the worthy rhetoric of human rights protection in theory, and its paltry implementation in practice. Such a state of affairs is obviously problematic, especially at a time when differences relating to religion evidently lie at the very heart of strained community relations in parts of Europe. To date, instead of working to alleviate the sense of alienation felt by some people of faith, it would seem that, in relation to its jurisprudence in the area of

religious dress, the ECtHR risks being accused of actually compounding it. However, this need not necessarily be so, and in this article we investigate a possible 'way back' for the Court. This is for the ECtHR to rely less on the margin of appreciation, and to interrogate the relevant issues more vigorously by displaying a fresh willingness to 'stand in the shoes' of those who wish to manifest their faith through the religious attire of their choice. It is our contention that were the Court to espouse an approach in its reasoning based on the universal value of empathy, progress could be made in helping to resolve problems in this most emotive and contentious of areas.

This article adopts the following structure. In Part 2 we provide a short introduction to the concept of empathy. In Part 3, we briefly set out the relevant aspects of the balancing methodology employed by the ECtHR when adjudicating on qualified rights, with particular reference to Article 9 of the ECHR and its case law on religious dress/symbols.[14] Then, in Part 4 we return to concept of empathy, with analysis of the potential benefits of relying on such a commonly shared value in a continent that is deeply divided on questions of religion/belief. In Part 5 we provide suggestions as to how the ECtHR might actually go about taking an empathic turn in its case law on religious dress. Finally, in the conclusion, the key arguments are summarized and the case for empathy is briefly restated.

2. EMPATHY: AN INTRODUCTION

[14] Given the wealth of existing scholarship on religious dress and Article 9, our coverage of this area will be brief. See e.g. McGoldrick, *Human Rights and Religion: the Islamic Headscarf Debate in Europe* (Hart, 2006); Vakulenko, *Islamic Veiling in Legal Discourse* (Routledge, 2012); and Howard, *Law and the Wearing of Religious Symbols: European bans on the wearing of symbols in education* (Routledge, 2012).

A. Perspective Taking: Empathy, Sympathy, Compassion[15]

A number of arguments have been advanced in recent years about the centrality of empathy to human behaviour.[16] Claims have, for example, been made that the ability of people to identify with the pleasures and pains of others has contributed significantly to the growth of the civilizing process.[17] Similarly, evolutionary biologists and psychologists have observed that the traits and skills of communal living have increased our ability to see the world from other people's perspectives, while the laws of nature demonstrate that it is an invaluable skill for both the hunter and hunted to be able put themselves in the minds of (respectively) prey or predator, so as to more effectively predict the other's actions.[18] What is more, recent developments in neuroscience have revealed evidence of so called 'mirror neurons' in the brain, which, it has been argued, provide a physical, biological basis for empathic behavior.[19] Thus, the ability of humans to empathize with each other is an important component of social existence. What, then, is actually meant by this concept of 'empathy'?

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[15] Whilst use is made here of the term 'empathy', it is acknowledged that there are debates amongst philosophers and psychologists as to the precise meaning of, and relationship between, empathy and related concepts such as 'compassion', 'sympathy', 'theory of the mind' and 'perspective taking'. See Coplan and Goldie supra n 4.

[16] See references at supra n 4-10.

[17] See Pinker supra n 7. The classic work in this context is Singer, *The Expanding Circle: Ethics, Evolution and Moral Progress* (1981) (Princeton University Press, 2011).

[18] There is a debate about the extent to which other species can exhibit empathy. See de Waal, supra n 6.

[19] See Iacoboni, supra n 5. These claims have, however, been subject to criticism. See e.g. Hickok, 'Eight problems for the mirror neuron theory of action understanding in monkeys and humans' (2009) 21 *Journal of Cognitive Neuroscience* 1229.

The noun empathy has its roots in the German *einfuhlung* or 'feeling into', and was only coined in English in the early twentieth century. Its etymology lies in the Greek *empatheia*, meaning to enter feelings from the outside or to be with a person's feelings.[20] It originally had a very mechanistic sense – projection − but the term in modern English has taken on a spectrum of meanings.[21] These range from 'cognitive empathy' or an *awareness* of another person's feelings, through to 'affective empathy' − not only seeing the world from another's perspective, but also *feeling what they feel*.[22] A helpful analysis is provided by Martha Nussbaum, who likens empathic skill to that employed by the Method actor, for it involves a participatory enactment of the situation of the sufferer being combined with awareness that one is not actually the sufferer. For empathy one must thus be aware 'both of the bad lot of the sufferer and of the fact that it is, right now, not one's own' because 'if one really had the experience of feeling the pain in one's own body then one would precisely have failed to comprehend the pain of another *as other*'.[23] However, Nussbaum points out that one *can* feel empathy *without* having an emotional response. In other words, one may have the ability to empathize with one's enemy, and use it as a way of predicting their moves or manipulating them. Equally, one may empathize with another to whom one refuses compassion on the grounds of fault – so, for example, a juror may *understand* the experience of a criminal defendant without having compassion for the person's plight, if one believes them to be both responsible and

[20] See Coplan and Goldie, supra n 4 at xii; and Howe, supra n 4 at 9.

[21] See Battaly, 'Is Empathy a Virtue?' in Coplan and Goldie, supra n 4 at 277; and Howe, supra n 4 at 8-19.

[22] Hoffman, 'Empathy Justice and Law' in Coplan and Goldie, supra n 4 at 231. See also Nussbaum, *Upheavals of thought: the intelligence of emotions'* (Cambridge University Press, 2001) at 301; and Corso, supra n 12 at 95-100.

[23] Nussbaum ibid. at 329.

guilty.[24] The core idea that *we* wish to capture and develop in the discussion to follow is the capacity of human beings to *take the perspective of others* – and for the sake of concision we shall use the term 'empathy' to this end.

B. Empathy and the Scottish Enlightenment: Hume and Smith

Whilst the term 'empathy' may be of relatively recent origin, the concept and its importance have been recognized for centuries. The philosophers of the eighteenth century Scottish Enlightenment, David Hume and Adam Smith (using the term 'sympathy') both stressed its importance in human affairs. Hume, for example, argued that because people are constituted similarly and often have common life experiences, imagining oneself in another's place converts the other's situation into mental images that evoke the same feelings in oneself.[25] Accordingly, Hume maintained that:

> No quality of human nature is more remarkable, both in itself and in its consequences, than that propensity we have to sympathize with others, and to receive by communication their inclinations and sentiments, however different from, or even contrary to our own.[26]

Adam Smith, in his 1759 *Theory of Moral Sentiments*, explored the concept more deeply:

[24] Nussbaum ibid.

[25] Hume, *An Inquiry Concerning the Principles of Morals* (1751) (Liberal Arts Press, 1957).

[26] Hume, *A Treatise on Human Nature* (1793) (Digireads.com Publishing, 2010) at 178.

> As we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected but by conceiving what we ourselves should feel in the like situation. Though our brother is upon the rack, as long as we ourselves are at our ease, our senses will never inform us of what he suffers… By the imagination we place ourselves in his situation, we conceive ourselves enduring all the same torments, we enter as it were into his body, and become in some measure the same person with him and thence form some idea of his sensations, and even feel something which, though weaker in degree, is not altogether unlike them.[27]

These insights of Hume and Smith represent an early recognition of the fact that empathy enables us to open the door to acknowledge the humanity and dignity of other human beings. As such they provide a glimpse at how the taking of another's perspective, and the sense of why harmful things ought not to be done to that other, are connected at a deep, intuitive level.

C. Empathy and the origins of the human rights

The historian Lynn Hunt has argued that the recognition of contemporary human rights norms can be traced back to an extension of the circle of empathy over the course of the eighteenth century.[28] Although it is often assumed that modern human

[27] Smith, *The Theory of Moral Sentiment* (1759) (Haakonssen ed.) (Cambridge University Press, 2002) at 11. Compare this explanation – where one actually thinks oneself *to be* the suffer – with the 'Method actor' analogy used by Nussbaum, supra n 23, where one is always aware that one is *not* the sufferer.

[28] Hunt, *Inventing Human Rights* (Norton, 2008). For critique see Moyn, 'On the Genealogy of Morals' in Moyn, *Human Rights and the Uses of History* (Verso, 2014) 1.

rights originated in the *philosophy* of the Enlightenment, Hunt maintains that the acceptance of human rights, and its gathering of momentum as a force for change, depended equally upon *emotions*.[29] In other words, for autonomous individuals to become members of a political community based on their independent moral judgments, they had to be able to empathize with others and, as Hunt explains, all people could have rights only if *everyone* could be seen as being in 'some fundamental way alike'.[30] In this context Hunt argues that an especially important element in the growth of human rights in the eighteenth century was the rise of the epistolary novel − a novel in the form of a letter − since, with this genre, the story is told in the character's own words and it exposes the character's thoughts and feelings as they are read by the reader, rather than at a distance as is the case with a narrator. Reading such novels developed readers' faculties to put themselves imaginatively in the position of people very different from themselves in terms of social status, race and gender. As a result the capacity of readers to empathize across traditional boundaries was developed and, as Hunt puts it, they 'came to see others − people they did not know personally − as [being] like them [with] the same kinds of inner emotions'.[31]

This ability of people to empathize with even complete strangers has been enhanced in recent decades by the advent of a multi-media culture. For example, the psychologist Steven Pinker has argued that, in the course of the last century, the

[29] Hunt, ibid. at 26.

[30] Ibid. at 27.

[31] Ibid. at 39-40. Subsequent centuries provide many examples of novels or memoirs revealing the plight of oppressed groups, and leading to widespread opposition to oppressive practices. Famously in the nineteenth century novels such as Harriet Beecher Stowe's *Uncle Tom's Cabin* helped to mobilize the abolitionist movement in the United States, see: Pinker, supra n 7 at 213; Hoffman, supra n 22 at 246.

growth of television, cinema and the world-wide-web has been responsible for 'expanding empathy … by getting people into the habit of straying from their parochial vantage points'.[32] This, he argues, has been one of the crucial factors in the 'civilizing process'[33] and the 'rights revolutions' of the modern age.[34] After all, one need only think of the profound social and political consequences of well publicized images of conflict, such as the shocking recent pictures of a three year old boy (Aylan Kurdi) who drowned in the attempt to reach Europe from war torn Syria[35] – an image that reportedly left the British Prime Minister feeling 'deeply moved',[36] had a significant effect on immigration policy in Germany,[37] and 'dragged the Syrian exodus out of anonymity'.[38]

As scholars such as Lynn Hunt and Steven Pinker demonstrate, it may well be that the widening of the circle of empathy has played a significant role in the origins and historical growth of human rights. But the question remains, to what extent can the notion of empathy contribute to the resolution of contemporary human rights

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[32] Pinker, supra n 7 at 213.

[33] Pinker, supra n 7 at ch 3.

[34] Pinker, supra n 7 at ch 7.

[35] See Smith, 'Shocking images of Syrian boy show tragic plight of refugees' *The Guardian*, 2 September 2015 available at http://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic-plight-of-refugees [last accessed 14 December 2017]. Such images also include the famous photograph of a naked girl, taken during the Vietnam war, screaming in agony from napalm burns. See Hariman and Lucaites, 'Public Identity and Collective Memory in US Iconic Photography: The Image of 'Accidental Napalm'' (2003) 20(1) *Critical Studies in Media Communication* 35.

[36] See 'Cameron: Deeply moved by photos of drowned Syrian boy Aylan Kurdi', ITV News, 3 September 2015 http://www.itv.com/news/update/2015-09-03/cameron-britain-will-fulfil-its-moral-responsibilities/ [last accessed 14 December 2017].

[37] Holmes and Castaneda, 'Representing the "European refugee crisis" in Germany and beyond: Deservingness and difference, life and death' (2016) 43(1) *American Ethnologist* 12.

[38] de-Andres, Nos-Aldas, and García-Matilla, 'The Transformative Image. The Power of a Photograph for Social Change: The Death of Aylan' (2016) 47 *Comunicar* 29.

claims? It is to this issue that we now turn, focusing on the Article 9 religious dress case law of the ECtHR.

3. THE RELIGIONS DRESS CASES, BALANCING AND THE MARGIN OF APPRECIATION

Few issues in contemporary Europe are as controversial as that of the public display of certain forms of religious attire. For those who find themselves subject to curbs on what they can wear, redress is often sought before the ECtHR. Yet whilst the Court is charged with interpreting Article 9 of the ECHR which guarantees the 'right to freedom of thought, conscience and religion', and the 'right to manifest religion or belief', the protection accorded by the ECtHR to those claiming violations of this 'right to manifest' has often been weak.[39] This paucity of protection has been especially evident in cases where Muslim women and girls have faced restrictions on wearing the headscarf or face veil. Despite multiple applications to the ECtHR over the last two decades, not a single such claimant has been successful. Moreover, in this context the contrast with other ECHR rights – such as political and journalistic expression (under Article 10), and sexual privacy (under Article 8), where claimants have enjoyed far greater levels of success – is striking.

A. Article 9 ECHR

[39] Lorenzo Zucca comments that the 'status of [the right to freedom of religion] among other human rights is limited as a matter of practice': Zucca, 'Freedom of Religion in a Secular World' in Cruft, Liao and Renzo, *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 388 at 402.

Along with Articles 8 (private and family life), 10 (expression) and 11 (assembly and association), Article 9 of the Convention is a qualified right. Whilst Article 9(1) provides that the internal sphere of privately held 'thought, conscience and religion' has absolute protection from intrusion, manifestations of 'religion or belief' may be legitimately subject to restrictions under Article 9(2).[40] Any restrictions that are imposed under Article 9(2) must satisfy three criteria. They must be: 'prescribed by law'; in pursuance of one of the listed legitimate aims (i.e. in the interests of public safety, for the protection of public order, health or morals etc); and 'necessary in a democratic society',[41] which means that any restriction must be 'proportionate' to the particular aim being pursued.[42]

The structure of Article 9 requires that the ECtHR perform a balancing exercise, weighing the exercise of the right on one side of the metaphorical scales against the public interest reasons for restriction on the other. The Court has often said that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's human rights'.[43] This notion of balancing fundamental

[40] Article 9 of the ECHR provides: 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[41] This is in common with ECHR Articles 8, 10 and 11.

[42] See *Manoussakis and Others v Greece* Application No 18748/91, Merits and Just Satisfaction, 26 September 1996 at para 44.

[43] See e.g. *Soering v UK* Application No 14038/88, Merits and Just Satisfaction, 7 July 1989 at para 89; *Hatton v UK* Application No 36022/97 Merits and Just Satisfaction, 8 July 2003 at para 98; and *Chassagnou and Others v France* Application No 25988/94, Merits and Just Satisfaction, 29 April 1999 at para 113.

rights against competing interests is controversial, not least because of the incommensurable nature of the things being 'weighed', and the risk of arbitrariness, with judges allocating values to differing interests which might simply reflect their own moral and political views.[44] We do not here take sides in this controversy. Rather our stance is that, as a matter of practical legal reality and under the text of the ECHR, most human rights (and certainly the right to manifest religion or belief) *have* to be 'balanced' against competing considerations. Balancing is expressly part of the adjudicative process and, as such, requires weight to be placed on alternate sides of the metaphorical scales.

The margin of appreciation (MoA) has come to be a crucial aspect of that point of analysis at which the ECtHR weighs, in the balance, the exercise of the right against competing interests. The MoA is a doctrine of judicial self-restraint that vests a certain amount of discretion (subject to European supervision) in the actions and policies of the state in regard to Convention rights.[45] The Court's jurisdiction is thus 'supervisory' in nature, with the primary task of protecting human rights, as well as deciding what restrictions on the exercise of a Convention right are justified, remaining with domestic authorities.[46]

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[44] For a full range of commentary on the arguments for and against balancing, see the essays in Huscroft, Miller and Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014).

[45] For criticism of the MoA see e.g. Arai-Takehashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002) at 1; Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2010) at 80; and Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff, 2001) at 357.

[46] See *Handyside v UK* Application No 5493/72, Merits, 7 December 1976 at para 48, in which the Court points out that the machinery of protection established by the Convention is *subsidiary* to the national systems safeguarding human rights, and the responsibility of 'securing' Convention rights and of making the assessment of what restrictions are necessary is primarily for states. Article 1 of the ECHR requires states to 'secure' the rights and freedoms set forth in the Convention.

The MoA has been utilised particularly in cases involving difficult and sensitive issues where the ECtHR considers that it is appropriate to defer to the domestic authorities.[47] The most prevalent use of the doctrine has been under Articles 8, 9, 10 and 11, at the point at which the Court assesses whether the interference with the protected right under paragraph 2 is proportionate to the legitimate aim being pursued. The doctrine means that the state is given a degree of leeway as to how this balance should be struck. To return to the balancing metaphor, the MoA essentially leads to less weight being placed on the rights-side, and more being placed on the limitations-side of the balance.

The width of the MoA accorded by the ECtHR varies considerably because it depends on the subject matter of the right claimed and the asserted reasons for the state's restriction of it. In areas where a pan-European consensus exists, derived from a clear conceptualization of the reasons for protecting the right, the MoA is typically very narrow.[48] For example, the margin granted to states where forms of free expression that serve the public interest risk being curbed has tended to be limited.[49] The importance to democracy of these kinds of expression is clearly understood, and it is generally accepted that, say, freedom of political and journalistic expression is

[47] For example a 'wide' MoA has commonly been accorded in situations where states have issued derogations from their human rights obligations on occasions such as a 'public emergency threatening the life of the nation' under Article 15 of the ECHR.

[48] The method by which the existence of a European consensus is ascertained is itself a highly disputed matter. See e.g. the partly dissenting opinion of Judges Nussberger and Jäderblom in *SAS v France* Application No 43835/11, Merits and Just Satisfaction, 1 July 2014, at para 19. See further, Wildhaber, Hjartason and Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 33 *Human Rights Law Journal* 248.

[49] See e.g. *The Sunday Times v United Kingdom* Application No 6538/74, Merits, 26 April 1975.

vital to the democratic process.[50] The strong and oft-repeated view of the ECtHR is thus that the free exercise of political and journalistic expression is a *sine qua non* of democracy, and that 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention'.[51] These are the clear foundations upon which a European consensus can be identified and the latitude granted to states in such areas as to how they strike the balance between an individual's right under Article 10(1), and the countervailing interest in Article 10(2), has consequently been limited. This approach has meant that, for example, bans on demonstrators wearing the Communist five-pointed red star at a political meeting,[52] and curbs on minority religious groups securing official recognition,[53] have been successfully challenged on account of their connection to core democratic values such as the right to freedom of political expression and freedom of association.

To revisit the balancing metaphor, there is ample and readily available *weight* to be placed on the 'rights-side' of the scales in such cases, for there are clear benefits to be derived from the strong protection of the 'right' – i.e. the maintenance of political democracy upon which the very protection of human rights is contingent. This means that when it comes to the state seeking to impose curbs on certain rights, its actions are justified by reference to clear and specific criteria – and that in relation to certain fundamental rights or constitutional principles, there is effectively more of a

[50] The ECHR preamble states that 'fundamental freedoms ... are best maintained on the one hand by effective political democracy and on the other by a common understanding and observance of the human rights on which they depend'.

[51] *Lingens v Austria* Application No 9815/82, Merits and Just Satisfaction, 8 July 1986 at para 42. See Mowbray, 'Contemporary Aspects of the Promotion of democracy by the European Court of Human Rights' (2014) 20(3) *European Public Law* 469.

[52] See *Vajnai v Hungary* Application No 33629/06, Merits and Just Satisfaction, 8 July 2008 at para 51.

[53] See e.g. *Moscow Branch of the Salvation Army v Russia* Application No 72881/01, Merits and Just Satisfaction, 24 June 2004 at para 61; *Magyar Keresztény Mennonita Egyház v Hungary* Application No 70945/11, Merits and Just Satisfaction, 8 April 2014 at paras 77-80.

'thumb on the scales' in terms of weighing the value of that right against the possible harms to which the unfettered exercise might give rise.[54]

B. No 'Thumb on the Scales' in Religious Dress Cases

When it comes to the manifestation of religion or belief under Article 9 of the ECHR (and the expression of religious 'information and ideas' under Article 10), the ECtHR has tended to grant states a *wide* MoA.[55] The Court's rationale for this has been the great diversity of views across Europe as to the value of religious manifestation, and disagreement about the *extent* to which it should be protected as a fundamental human right:

> Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance … *It is not possible to discern throughout Europe a uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to time and context.*[56]

[54] The phrase 'thumb on the scales' is based on a similar phrase used by Andrew Geddis to convey the notion of extra weight being placed in the balance on behalf of a particular interest, as against competing interests. See Geddis, 'Don't say God on the Radio' (2004) 9(2) *European Human Rights Law Review* 181 at 189.

[55] See e.g. *Murphy v Ireland* Application No 44179/98, Merits, 10 July 2003.

[56] *Leyla Şahin v Turkey* Application No 44774/98, Merits and Just Satisfaction, 10 November 2005 at para 109 (emphasis added).

The width of the margin of appreciation is connected to the lack of a common European understanding of *why* the right to manifest religion/belief is valued. After all, the challenge of providing answers to this question is compounded by the fact that religious settlements across Europe, tortuously reached over the last half-millennium, reflect vastly different historical, legal and constitutional compromises. Thus, when it comes to explaining why legal recognition is accorded to the principle of freedom of religion/belief in contemporary Europe there is an absence of consensus, as illustrated by the range of very different constitutional models that are to be found across the continent.[57]

Today, in multi-faith Europe, it is striking that states have been granted a wide margin of appreciation in applications brought by minorities (often Muslim women) seeking to challenge legal impairments on the right to manifest their faith through how they dress. In a long litany of cases the ECtHR has steadfastly refused to find violations. They include, amongst many others, cases of primary school teachers and university lecturers,[58] university students,[59] school pupils,[60] hospital workers, [61] and

[57] On the many different constitutional arrangements in Europe that exist for the protection of religious freedom see Cumper and Lewis (eds), *Religion, Rights and Secular Society* (Edward Elgar, 2011).

[58] *Dahlab v Switzerland* Application No 42393/98, Admissibility, 15 February 2001; *Kurtulmuş v Turkey* Application No 65500/01, Admissibility, 24 January 2006.

[59] *Leyla Şahin v Turkey* supra n 56.

[60] *Dogru v France* Application No 27058/05, Merits, 4 December 2008; *Bayrak v France* Application No 14308/08, Admissibility, 26 June 2009; *Aktas v France* Application no 43563/08; *Gamaleddyn v France* Application No 18527/08; *Ghazal v France* Application No 29134/08; *Jasvir Singh* v *France* Application No 25463/08; and *Ranjit Singh v France* Application No 27561/08. The law in question is Loi 2004-228 of 15 March 2004. See also *Kose and 93 others v Turkey*, Application No 26625/02 Admissibility, 24 January 2006. This last case was dealt with primarily as a right to education matter under Article 2 Protocol 1. The part of the decision dealing with Article 9 referred back to its earlier Article 1 Protocol 2 reasoning.

[61] *Ebrahimian v France* Application No 64846/11, Merits and Just Satisfaction, 26 November 2015.

women wearing the face veil in public.[62] All have failed in their attempts before the ECtHR to challenge restrictions on their dress.[63]

The determining factor in all of these cases has been the application of the MoA at the point where the balance between the right and the public interest was being struck.[64] The doctrine has had the effect of blunting the ECtHR's proportionality analysis in the following ways. First, there has been a repeated lack of explanation by the Court as to how the legitimate aim advanced by the state in its justification(s) for placing curbs on certain forms of religious attire, has been furthered by the measure in question.[65] Thus, claims by states about the risks posed by certain 'harms' caused by religious dress have been accepted by the ECtHR at face value with very little, if any, corroborative evidence.[66]

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[62] *SAS v France* Application No 43835/11, Merits and Just Satisfaction, 1 July 2014; *Belcacemi and Oussar v Belgium* Application No 37798/13, Merits and Just Satisfaction, 11 July 2017; *Dakir v Belgium* Application No 4619/12, Merits and Just Satisfaction, 11 July 2017.

[63] There have been only a few cases where those claiming the right to wear religious dress or display symbols under Article 9 have been successful. In these cases, however, the penalties were either so disproportionate (e.g. the criminalization of merely wearing forms of religious attire in public, *Arslan v Turkey* Application No 41135/98, Merits and Just Satisfaction, 23 February 2010; the conviction of a witness in a criminal trial for contempt of court for refusing to remove an Islamic skull cap, *Hamidović v Bosnia Herzegovina* Application No 57792/15, Merits and Just Satisfaction, 5 December 2017), or the legitimate aim put forward to justify the restriction was so weak (the corporate image of the employer, a multi-national airline corporation, *Eweida v UK* Application No 51671/10, Merits and Just Satisfaction, 15 January 2013) that any other result would have arguably rendered the right to manifest one's religion or belief under Article 9 a virtual dead letter.

[64] *Dahlab*, supra n 58 at 13; *Şahin,* supra n 56 at para 108-9; *Dogru*, supra n 60 at paras 63 and 75; *Bayrak*, supra n 60 at para 13; *Kose*, supra n 60 at para 10; *SAS*, supra n 62 at paras 129-130, 154-7; and *Ebrahimian*, supra n 61 at paras 65-6 and 70; *Belcacemi and Oussar*, supra n 62 at paras 51 and 54-5. The admissibility decisions are less fully reasoned than the judgments of the Court on the merits.

[65] See Leigh, 'The European Court of Human Rights and religious neutrality' in d'Costa, Evans, Modood, Rivers (eds), *Religion in a Liberal State* (2013) 38 at 57, commenting on *Dogru v France.*

[66] See, for example, *SAS v France* n 62 supra and *Şahin v Turkey* n 56 supra. The dissentient judges in these cases made this point: in *SAS* see the dissent of Judges Nussberger and Jäderblom, at paras 13 and 14; and in *Şahin* see the dissent of Judge Tulkens, at para 10.

Secondly, the Court has repeatedly displayed a distinct propensity to accept the proportionality of blanket curbs on forms of dress, without evidence of any actual wrongdoing by applicants themselves. Thus, for example, despite the fact that in *Şahin v Turkey*, which concerned the ban on headscarves in Turkish universities on the grounds that it was necessary to prevent the spread of extremism and the pressurizing of women, there was no evidence to suggest that the applicant had *herself* been disorderly, violent, or subversive in terms of seeking to undermine gender equality or promote extremist Islamist movements. Nevertheless she was caught by the Turkish ban whose justification was upheld on these very grounds. As Judge Tulkens (dissenting) pointed out in a comment that could apply, *mutatis mutandis*, to almost any of the Article 9 religious dress cases:

> Only indisputable facts and reasons whose legitimacy is beyond doubt − not mere worries or fears − are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Moreover, where there has been interference with a fundamental right ... mere affirmations do not suffice: they must be supported by concrete examples [which] do not appear to have been forthcoming in the present case.[67]

The third and, for the purposes of this article, most interesting aspect to these cases is that the judicial analysis within them focuses almost entirely on the paragraph 2 'limitations-side' of the scales. Strikingly, there is a marked absence of anything in the ECtHR's judgments that meaningfully captures the importance of the particular

[67] *Şahin*, dissent of Judge Tulkens, at para 5.

manifestations of religion or belief to the individuals concerned.[68] It is as if the right to manifest one's religion or belief through clothing is *just* enough to nudge the rights-side of the scales downwards, in the sense that it engages Article 9. But there is no *extra* weight added to the rights-side to account for the right-holder's firm belief in the importance of the manifestation through the clothing s/he wears, irrespective of whether it is for his/her spiritual well-being, existential comfort, or sense of identity.[69] Consequently, as soon as weight − any weight − is placed in the limitations-side, it easily tips the scales towards restriction.

To develop this point further, the fact that forms of religious dress and related symbols are mandated (or so regarded) by articles of faith or holy texts,[70] has often seemed, in the eyes of the Court, to count against those claiming the right to manifest their beliefs in these ways.[71] For example, in *Dahlab* and *Şahin*, the Court stated that the headscarf 'appears to be *imposed on women by a precept which is laid down in the Koran*',[72] and that 'it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a *compulsory religious duty, may have on those*

[68] The ECtHR merely repeats, in every case, its stock phrase about why the content of Article 9 is valued: 'freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it'. This phrase was first used by the Court in *Kokkinakis v Greece* Application No 14307/88, Merits and Just Satisfaction, 25 May 1993 at para 31.

[69] Moores, 'Face veiling in the Netherlands: Public debates and women's narratives' in Brems (ed) *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press, 2014) 19 at 30.

[70] See e.g. *The Quran* 24:31, which provides: 'Tell the believing woman to cast down their eyes, guard their chastity, and not to show off their beauty except what is permitted by the law'.

[71] The Court in *SAS* did, admittedly, show some signs of rowing back from its earlier position on autonomy and dignity: n 62 at para 146.

[72] *Dahlab*, supra n 58 at 13; and *Şahin*, supra n 59 at para 111 (emphasis added).

who choose not to wear it'.[73] Autonomy may be one of human rights' underpinning explanatory principles,[74] but it adds very little to the rights-side of the balance due to the fact that the mode of dress is, in some quarters, perceived as being less a matter of free choice, and more as one of religious obligation.[75]

In view of the ECtHR's restrictive approach, those who have been prevented from publicly wearing the religious attire of their choice are likely to have a rather jaundiced impression of the Strasbourg human rights model. After all, in the current climate of global and regional religious tension,[76] the Court's reluctance to uphold the religious dress applications of what are, in essence, mainly Muslim applicants, will be seen in some quarters as supporting claims that '[t]here is an anti-Muslim wind blowing across the European continent',[77] and adding to negative perceptions that Muslims are 'making politically exceptional, culturally unreasonable or theologically alien demands upon European states.'[78] With the social fabric of Europe changing, and the continent now home to a numerically significant population of 'European Muslims'[79] – people who are typically more likely to practice their faith and have a

[73] *Şahin,* supra n 59 at para 115 (emphasis added).

[74] For a prominent recent example of how autonomy might be said to provide a key part in the underpinning of human rights doctrine see Griffin, 'First Steps in an Account of Human Rights' (2001) 9(3) *European Journal of Philosophy* 306 at 311; and Griffin, *On Human Rights* (Oxford University Press, 2008) at 31.

[75] Clearly there *are* instances of women, say in theocratic states such Iran and Saudi Arabia, being required by law to wear certain forms of religious dress. Such compulsion appears incompatible with the prohibition of coercion under Article 18(2) of the International Covenant on Civil and Political Rights (1966).

[76] See e.g. Leiken, *Europe's angry Muslims: The revolt of the second generation* (Oxford University Press, 2011).

[77] Modood, 'Muslims and the Politics of Difference' (2004) 74(1) *The Political Quarterly* 100 at 100.

[78] Ibid. at 115.

[79] See Ramadan, *To Be a European Muslim* (The Islamic Foundation, 2013), who argues that the presence of large numbers of Muslims in Europe will lead to the establishment of a new Western form of Islam.

stronger religious identity than their 'Christian' neighbours[80] – the effect of the ECtHR's jurisprudence on Muslims (and other religious minorities) should not be ignored.[81] As Europe's (if not the world's) foremost human rights court, the ECtHR's rulings have profound legal and moral significance. Yet instead of sending a positive message about the value of religious diversity and equal citizenship in a pluralistic multi-faith continent, the ECtHR's jurisprudence on religious dress is problematic, for it appears to endorse (albeit indirectly) harsh restrictions on religious dress that have a disproportionate impact on Muslim women.[82]

In the foreseeable future it is perhaps difficult to see the ECtHR departing radically from its current approach and scrutinizing the policies of states in religious dress cases more intensively.[83] However, if it were to do so, how might additional weight be placed on the 'rights-side' of the scales, so as to require more from states in terms of their justifications of curbs on religious dress? It is to these matters that we now turn.

4. EMPATHY – AN INSIGHT INTO THE PERSPECTIVE OF OTHERS

A. Why Empathy?

[80] See Mustafa, *Identity and Political Participation Among Young British Muslims: Believing and Belonging* (Springer, 2015) at x-xi.

[81] In assessing this impact it should be borne in mind that there are significant differences within Muslims communities. On this see Radeljić, 'How do European Young Muslims View European Identity?' (2016) *Issues in Ethnology and Anthropology* 6(4) 871, who distinguishes between three categories of young Muslim in Europe: traditionalists; neo-traditionalists; and liberals (the smallest group).

[82] See Korteweg and Yurdakul, *The Headscarf Debates: Conflicts of National Belonging* (Stanford University Press, 2014) 1.

[83] See e.g. the recent cases brought by women challenging face cover bans in Belgium: *Belcacemi and Oussar v Belgium*, and *Dakir v Belgium* supra n 62.

The ECtHR's approach to religious dress has attracted criticism from a range of scholars.[84] Arguably, with religious (and more specifically Islamic) forms of attire continuing to generate controversy in many parts of Europe, a new approach is urgently needed to tackle this socially divisive issue. In seeking to balance the rights of the citizen and the interests of the state in the area of religious dress, we argue that the Court should vest the 'weight' to be put in the 'rights-side' of the balance in the principle of empathy.

By way of introduction to this proposal, there are at least four reasons why we focus on 'empathy'. First, there is general agreement today about the relevance and centrality of empathy to human behavior, and according to some neuroscience research it may even be hard-wired into our brain's neural networks.[85] Secondly, as we have seen, the ability of humans to empathize or identify with the pleasures and pains of others has been a central driver in the growth of the 'civilizing process' in recent centuries, especially with the advent of easily accessible forms of electronic communication (e.g. television, cinema and the world-wide-web).[86] Thirdly, the innate and universal nature of empathy means that it can assist in the promotion of an 'us' rather than 'them' narrative[87] − an evident necessity for a Europe that is currently

[84] See e.g. Howard, supra n 14 at 153-169; Vakulenko, supra n 14 at 80-111; Lewis, 'What not to wear: religious rights, the European Court, and the margin of appreciation' (2007) 56(2) *International and Comparative Law Quarterly* 395; Trispiotis, Two interpretations of "living together" in the European human rights law (2016) 75(3) *Cambridge Law Journal*, 580; and Marshall, '*SAS v France*: burqa bans and the control of empowerment of identities' (2015) 15(2) *Human Rights Law Review* 377.

[85] See Iacoboni, supra n 5; Decety and Ickes supra n 5.

[86] See Pinker, supra n 7 at 213.

[87] See e.g. Modood, supra note 77, at 115, who calls for a 'rethink' so 'that Muslims are not a `Them' but part of a plural `Us''.

home to some alienated and marginalized communities.[88] And finally, as we saw in Part 2 (above), empathy rests very easily with contemporary human rights norms – so the barriers to incorporate a degree of empathic reasoning into the adjudicative process might not be insurmountable.[89]

Our thesis is that the concept of empathy might supplement those values which underpin religious freedom (e.g. toleration and autonomy), and be potentially useful for the ECtHR in recalibrating the balance between the rights of the citizen and the interests of the state. In other words, an increased emphasis on empathy would enable the Strasbourg judges to appreciate more effectively the subjective value of applicants' manifestation of their beliefs and, concomitantly, require more by way of the state's justification of restrictions on matters such as religious dress. Just as the principle of empathy has influenced justice and moral judgment throughout human history,[90] so too is it capable of making a positive contribution to an issue of contemporary concern such as the permissibility of curbs on religious forms of attire.

B. Empathy and the Right to Freedom of Religion or Belief?

We have seen that the ability of human beings to appreciate life from the perspective of others has been integral to the historical emergence and recognition of human rights. Furthermore, philosophers such as Richard Rorty have argued that the key to

[88] See e.g. Gest, *Apart: Alienated and engaged Muslims in the West* (Hurst, 2010), and Pauly, *Islam in Europe: integration or marginalization?* (Routledge, 2016).

[89] See McFarland and Mathews, 'Who cares about human rights?' (2005) 26(3) *Political Psychology* at 365, who argue that empathy has long 'contributed to the endorsement of human rights ideals'. See also Wilson and Brown (eds), *Humanitarianism and suffering: The mobilization of empathy* (Cambridge University Press, 2009) and Corso, supra n 12.

[90] See Hoffman, 'The contribution of empathy to justice and moral judgment', in Eisenberg and Strayer, supra n 2 at 47.

improving contemporary human rights protection is to eschew rationalist foundationalism in favour of a 'progress of sentiments', and that this must consist in 'an increasing ability to see the similarities between ourselves and people very unlike us as outweighing the differences'.[91] In this regard Rorty makes reference to the 'long, sad, sentimental story which begins "Because this is what it is like to be in her situation – to be far from home, amongst strangers", … or "because her mother would grieve for her"'. [92]

However, notwithstanding the above, there remains a problem with using empathy as a basis for the protection of human rights generally, and for the right to freedom of religion/belief in particular: in short it is that people are usually more willing and able to empathize with those who are similar to themselves, rather than those who are different or far removed in terms of their location, culture or beliefs.[93] Our shared aversion to pain and suffering may make it relatively easy for us to appreciate the perspective of *anyone* who is enduring serious violations of their rights (e.g. murder, rape, torture, slavery, arbitrary detention) because we can imagine, no matter who they are, what it would be like to be in *their* situation. But when it comes to others exercising say the right to freedom of religion or belief, such matters tend to be much less straightforward.

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[91] Rorty, supra n 12 at 77.

[92] Rorty, supra n 12 at 80.

[93] A possible explanation for this state of affairs is that, as Conor Gearty points out, emotions are often seen to be simply too 'delicate and fragile' to provide a solid foundation for such purposes: Gearty, supra n 12 at 34. There is long standing suspicion of the role subjective 'feeling' in the supposedly rational and objective world of legal adjudication: see e.g. Henderson n 12 supra, 1575; and Corso, supra n 12, at 100-4. See also Nussbaum, supra n 22, for discussion of the classical Stoic argument against empathy/compassion as a moral sentiment unworthy of the dignity of both giver and recipient, based on false beliefs about external goods.

There are several reasons why the fostering of empathy in the area of religion/belief can be especially problematic. First, the religions and beliefs of others may be very different from our own,[94] and related practices (e.g. governing dress, diet, personal morality or worship etc) may well be non-comprehensible[95] or antithetical,[96] to non-members of the group. Secondly, adopting an empathic perspective when it comes to matters of religion is also difficult because the subject matter may be necessarily particular to that individual belief system,[97] and certain religious beliefs/practices are 'exclusive' in the sense of only being truly cognizable by co-religionists.[98] Thirdly, it is problematic that many religions clearly constrain what might be thought of as the circle of empathy by according preference in their doctrines to co-religionists,[99] or by endorsing holy texts which suggest that those who are not 'of the faith' will be destined to eternal punishment or damnation.[100] And finally, taking the perspective of the believer is made all the harder when, as is often the case, the religious belief in question appears to be at odds with some of the basic tenets of secular liberalism, most notably in relation to controversies whereby certain

[94] See Eisenberg and Strayer, supra n 2.

[95] Habermas, *Between Naturalism and Religion* (Polity, 2008) at 143. Indeed, by the same token, the beliefs of the atheist in the *absence* of a divine being/entity or God may be just as incredible to religious believers as religious faith is to atheists.

[96] See e.g. Dawkins, *The God Delusion* (Black Swan, 2006); Harris, *The End of Faith: Religion, Terror and the Future of Reason* (Free Press, 2006); and Hitchens, *God Is Not Great* (Atlantic Books, 2007).

[97] See Maclure and Taylor, *Secularism and Freedom of Conscience* (Harvard University Press, 2010) at 106.

[98] The exclusivity of some religious groups is demonstrated by the fact even many 'mainstream' Christian believers may struggle fully to comprehend all of the teachings and practices of a minority Christian sect such as the Exclusive Brethren. On this group see e.g. Bachelard, *Behind the Exclusive Brethren* (Scribe, 2008).

[99] Examples include: the Calvinist doctrine of predestination; the Orthodox Jewish doctrine of matrilineal descent; and the continued existence of the crime of apostasy within Islam.

[100] For example, there are several passages in the Bible which warn against the horrors of hell. See e.g. Matthew 13:50; Matthew 25:46; Mark 9:43; Jude 1:7; 2 Thessalonians 1:9; and Revelation 21:8.

people (e.g. unbelievers, apostates, women, gays, lesbians, transsexuals etc) are afforded fewer rights than others. After all, it is difficult to adopt the perspective of another person whose fundamental beliefs one regards as being fallacious, objectionable or deeply offensive.[101]

The challenge of resolving this problem, and of fostering empathy in matters pertaining to religion/belief, is obviously a daunting one. But the key to that challenge may lie in the express acknowledgment and recognition of the role that certain core beliefs, such as religious (or quasi-religious) ones, tend to play in helping us respond to our common human vulnerabilities.[102] This is perhaps most typically the case in times of crisis (e.g. illness, bereavement, divorce etc) when we are faced with the chasm of the unknown and the unknowable, yet it may also be true of matters that affect us in our daily lives, about *how* and *why* life should be lived.

The content of religious beliefs may be *particular*, but we all have the ability to understand what it is to have an ultimate ethical commitment of the kind represented by such beliefs. All rational autonomous individuals have the capacity to understand the universal need of human beings to make sense of their own existence, and will have to confront such questions (albeit to varying degrees) within their own lives. For a significant number of people it is religion, rather than secular reason, that provides the most compelling answers to these questions − and for some who wish 'to

[101] Taylor, 'How to define secularism' Stepan and Taylor (eds) *Boundaries of Toleration* (Columbia University Press, 2014), 70.

[102] On vulnerability and law generally see e.g. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008-2009) 20 *Yale Journal of Law and Feminism*, 1; and Turner, *Vulnerability and Human Rights* (Penn State Univeristy Press, 2006).

make sense of their own existence … religion is the only path to a meaning of life', because secular rationalism seems 'to provide only a dry existence of despair'.[103]

A valuable insight that might be used to address the challenge posed in attempting to adopt the perspective of those whose beliefs are radically at odds with our own may be found in the work of Timothy Macklem.[104] Macklem contends that *faith* − in the sense of a 'commitment to that which cannot be established by reason, or to that which can be established by reason, but is not believed for reason's sake' − can contribute to human well-being.[105] This is the argument that faith is useful when we have to confront those areas and situations in our lives where reason falls short 'because the information necessary for the evaluation of the options is not only unknown, but unknowable'.[106] For some people the 'nature of life and the content of morality are unknowable on the basis of reason alone' and '*for them* faith in the beliefs that form the content of religious doctrine is critical to the achievement of well-being'.[107] With the ability to come to terms with life's great questions (e.g. life's purpose, the possibility of life after death, the nature of the good) being vitally important in the achievement of human wellbeing for those who cannot accept rational answers to such matters, Macklem suggests, 'faith must step in'.[108]

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[103] Mahlmann, 'Freedom and Faith: Foundations of Freedom of Religion' (2009) *Cardozo Law Review* 2473.

[104] Macklem, 'Faith as a Secular Value' in Ghanea (ed) *Religion and Human Rights,* Vol 1 (Routledge, 2010) 202. See also Macklem, *Independence of Mind* (Oxford University Press, 2006).

[105] Ibid. 'Faith as a Secular Value' at 230. Compare the related concept of *trust*. According to Macklem trust requires reasons albeit, often, incomplete reasons, ibid. at 235-6.

[106] Ibid. at 237. See also Forst, *The Right to Justification* (Columbia University Press, 2012) 147-8.

[107] Ibid. at 242-3 (emphasis added).

[108] Ibid. at 247.

This notion, that there will be points in our lives where reason cannot help, is a perspective that it is possible for most, if not all, humans to understand.[109] We can all imagine being in the position of being unable to comprehend a matter of enormous significance that affects our well-being. This ability to recognize the predicament brought about by being in the 'zone' of the unknowable provides a doorway into thinking about religion and belief, both from the perspective of the other and from the universal perspective. Moreover, given that this universal human vulnerability is, and has been, recognized in numerous different religions, philosophies and systems of belief, it may be possible to conceive of freedom of religion/belief as an expression of patience with our fellow humans and their diverse ways of dealing with our common human frailties. As Matthias Mahlmann argues, given life's challenges and the need to make sense of one's existence, patience should be afforded to human attempts to grapple with such matters, and religious tolerance and freedom of religion/belief are 'central normative expressions of [this] necessary patience of humankind with its own existential predicament.'[110]

It is our imaginative capacity that enables us to see the world from the perspective of the other, and which enables us to understand why such deep

[109] The former Archbishop of Canterbury, Rowan Williams, touched on this theme when, commenting on the place of religion in contemporary Britain, he said: 'We are haunted, we need somewhere to put certain bits of our humanity and there's nowhere else except religious language and imagery … The piles of flowers that you see on the site of road accidents are the most potent symbols of a society haunted by religion and not clear on what to do about it.' Rowan Williams, 'Faith in the Public Square', Lecture at Leicester Cathedral, 22 March 2009: http://rowanwilliams.archbishopofcanterbury.org/articles.php/817/faith-in-the-public-square-lecture-at-leicester-cathedral [last accessed 14 December 2017].

[110] Mahlmann, 'Freedom and Faith: Foundations of Freedom of Religion' (2009) 30(6) *Cardozo Law Review* 2473 at 2492.

commitments ought to be protected.[111] It is this ability to empathize that allows us to understand that if we obstruct another person's method of dealing with matters pertaining to universal vulnerability, this constitutes a profound lack of patience and a basic interference with their rights.[112]

The suggestion sketched out above is hardly new. Several commentators have advocated the crucial importance of perspective taking when dealing with disputes involving fundamental rights. For example Carl Stychin, in the context of conflicts between LGBT and conservative religious groups, draws on the work of Jennifer Nedelsky and Hannah Arendt, and advocates the 'enlarged mentality' that enables us to approach such issues through 'our imaginative capacity to put ourselves in the position of another'.[113] Likewise, Martha Nussbaum recommends the cultivation of our 'inner eyes' and the 'participatory imagination', whereby we are able to cultivate a 'displacement of mind, a curious questioning and receptive demeanour' that enables us to imagine how another human being is thinking or feeling about a particular matter.[114] Perhaps most significantly, Nussbaum adds that '[b]y imagining other people's ways of life, we don't necessarily learn to agree with their goals, but we do see the reality of those goals for them'. In other words, we may still profoundly

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[111] See Nussbaum, *Liberty of Conscience: In Defence of America's Tradition of Religious Equality* (Basic Books, 2008) at 52.

[112] See Waldron, 'Theoretical Foundations of Liberalism' (1987) 37(147) *Philosophical Quarterly* 133 at 145, and Galston, *Liberal Pluralism* (Cambridge University Press, 2002) at 117.

[113] Stychin, *Faith in the Future: Sexuality, Religion and the Public Sphere* (2009) 29(4) *Oxford Journal of Legal Studies* 729; Nedelsky, 'Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives' in Bauman and Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006); and Arendt, *Lectures on Kant's Political Philosophy* (University of Chicago Press, 1982). See also Malik, 'Faith and the State of Jurisprudence' in Oliver, Douglas Scott and Tadros (eds), *Faith in Law: Essays in Legal Theory* (Hart, 2000) 129 at 145.

[114] Nussbaum, *The New Religious Intolerance* (Harvard University Press, 2012) at 140.

disagree with these other people, but by contemplating their situation it is made apparent to us that 'other worlds of thought and feeling exist'[115] – a potentially significant starting point in the process of empathizing with 'the other'.

C. The Advantages of Shallow Roots and the Principle of Reciprocity

The ideas put forward above concerning empathy, and adopting the perspectives of others, have the distinct advantage of not being rooted deeply in what John Rawls called exclusive 'comprehensive doctrines of the good'.[116] The philosophical roots are shallow. Concerns have been expressed that grounding human or constitutional rights in the deep philosophical soil of liberalism may alienate people of faith, and risks accusations of cultural imperialism and hyper-individualism.[117] Thus, the empathy approach has the advantage of being 'ground up'[118] and, because of its philosophical 'thinness', has the capacity to garner support from a broad range of philosophical and religious traditions.[119] Importantly, in the context of the current discussion, the concept of seeing the world from the perspective of the other is central to – or at least a significant part of – many of the world's major faiths and systems of belief. For

[115] Ibid. at 144.

[116] Rawls, '*Political Liberalism – with New Introduction and 'Reply to Habermas'* (Columbia University Press, 1996) at xxv-xxvi.

[117] See e.g. Wolterstorff,'On Religion, politics and the liberal state' in Audi and Wolterstorff, *Religion in the Public Square the place of religious conviction in political debate* (Rowman and Littlefield, 1997) 121; Appiah, 'Grounding Human Rights' in Gutman, supra n 12 at 105; and Sunstein, *Incompletely Theorized Agreements in Constitutional* Law, University of Chicago Public Law and Legal Theory, working paper 147, January 2007, 13.

[118] The phrase is used by Martha Nussbaum to describe the 'capabilities approach': Nussbaum, *Women and human development: the capabilities approach* (Cambridge University Press, 2001).

[119] There are parallels with John Rawls's concept of 'overlapping consensus', which he uses to explain the common ground that might be possible for those with incompatible, yet reasonable, 'comprehensive doctrines'. See Rawls supra n 116 at 1064.

example, the Parliament of World Religions, in its 1993 'Declaration Toward a Global Ethic', identified the 'Golden Rule' as an important common principle:

> A principle which is found and has persisted in many religions and ethical traditions of human kind for thousands of years: What you do not wish done to yourself, do not do to others. Or in more positive terms: What you wish to be done to yourself, do to others! This should be the irrevocable, unconditional norm for all areas of life, for families and communities, for races, nations and religions.[120]

One of the earliest codifications of this 'Golden Rule' was by Confucius in the 5th century BCE, who taught the importance of treating others in ways in which they themselves would wish to be treated – a principle known as *ren*.[121] Likewise, in the Judeo-Christian tradition, the injunction that 'thou shalt love thy neighbour as thyself' is found in the Old Testament of the Bible,[122] while in the New Testament Christ is recorded as instructing his followers to 'do to others as you would have them do to you'.[123] Similarly, the Golden Rule is demonstrated by its centrality to other world

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[120] Parliament of World Religions, *Declaration toward a Global Ethic* (4 September 1993), 7, at http://www.parliamentofreligions.org/_includes/FCKcontent/File/TowardsAGlobalEthic.pdf [accessed 14 December 2017]. See further Epps, *The Universal Golden Rule: A Philosopher's Perspective* (CreateSpace, 2012); and Neusner and Chilton (eds), *The Golden Rule: the Ethics of Reciprocity in World Religions* (Bloomsbury, 2008).

[121] *Analects*, 15:23. See Chan, 'A Confucian perspective on human rights' in Bauer and Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999) 212.

[122] Leviticus 19:17.

[123] Luke 6:31 (NIV).

faiths such as Buddhism,[124] Hindusim,[125] Islam,[126] Jainism,[127] and Sikhism,[128] while it evidently underpins influential non-religious forms of belief such as humanism.[129]

An important thread which runs through the 'Golden Rule' and much of the conception of empathy (outlined above) is reciprocity (i.e. I treat you as I would wish you to treat me). Indeed, the importance of reciprocity can be seen through Michael Ignatieff's claim that human rights depend on the ideal of moral reciprocity:

> that we judge human actions by the simple test of whether we would wish to be on the receiving end. And since we cannot conceive of any circumstances in which we or anyone we know would wish to be abused in mind or body, we have good reasons to believe that such practices should be outlawed.[130]

Thus, given that reciprocity is central to the common elements of major world religions and equivalent forms of belief (i.e. the 'Golden Rule'), in the sense that what one wishes to be done to oneself should also be done to others, it seems entirely legitimate to acknowledge the element of reciprocity in any model which attempts to bring an empathic approach into the balancing of religious rights against competing concerns. Accordingly, it is argued that 'reciprocal empathy' has the potential for providing a widely acceptable and universally understandable basis for affording

[124] See e.g. Sutta Nipata 705; Udana-Varga 5.18.

[125] See e.g. Mencius Vii.A.4; Mahabharata, Anusasana Parva, 13.8.

[126] See e.g. *The Quran*, Surah 24 'The Light', verse 22; *The Quran*, Surah 83 'The Dealers in Fraud', verses 1-4. Several hadiths (sayings of the Prophet Muhammad) also stress the principle of reciprocity.

[127] See e.g. Agamas Sutrakritanga 1.10.13 and 1.11.33.

[128] See e.g. Guru Aranj Devji 259, Guru Granth Sahib.

[129] For example, the British Humanist Association defines the word 'humanist' to include someone who 'makes their ethical decisions based on reason, empathy, and a concern for human beings and other sentient animals': See https://humanism.org.uk/humanism/ [accessed 14 December 2017].

[130] Ignatieff, supra n 12.

protection to the right of freedom of religion/belief, on the basis that it reflects a patience with our common human vulnerabilities vis-a-vis the unknowable. However, the extent to which such a principle could contribute, in practical terms, to the adjudication of human rights cases, specifically Article 9 manifestation cases, is a crucial question, and it is one that we now seek to address.

5. EMPATHY, THE EUROPEAN COURT OF HUMAN RIGHTS AND RELIGIOUS DRESS

If we return once more to the metaphor of the scales, an empathic approach would require a sincere attempt by the ECtHR to appreciate the importance of the particular manifestation of religion/belief to the individual or group in question.[131] Of course, the very fact that the manifestation of religion/belief is enshrined as a human right means that the subjective importance to the individual is acknowledged, at least prima facie. But without an obvious or demonstrable appreciation of *why* it is important from the perspective of the right(s) holder, it is easily outweighed by the state's arguments for restriction.

As a matter of practical adjudication we suggest that the ECtHR should adopt a twin track approach. First, it should acknowledge, to a much greater extent than has been the case hitherto, the importance of the particular manifestation of religion/belief to the individual concerned, and the impact of the restriction upon them. Secondly (and concomitantly) we suggest that the reasons given by the state to justify placing curbs on manifestations of religion/belief should be subject to detailed scrutiny – a proposal that would necessarily entail a diminution in the margin of appreciation accorded to states in such cases.

[131] See Brems, '*SAS v France*: A Reality Check' (2016) *Nottingham Law Journal* 58 at 61.

A. Acknowledging the Importance of Religion/Belief to the Individual Concerned

In relation to the first point (above), an obvious challenge relates to how it might be possible to acknowledge the subjective importance of another person's beliefs when, given the topic of this discussion, their freedom has been constrained by state sanctioned curbs on religious dress. This is obviously a difficult task, but useful guidance is to be had from the US where the 'legal storytelling' or 'legal narratives' model has been widely credited with increasing awareness about the perspective of 'the other'.[132] A particular characteristic of this model has been its association with empathy,[133] and it is an approach which has, for example, allowed the US Supreme Court to have made use of 'empathic narratives', which have included the 'descriptions of concrete human situations [and] the telling of stories of persons and human meanings, not [mere] abstractions.'[134] Thus, by way of illustration, in the ground breaking decision in *Brown v Board of Education*[135] − where racially discriminatory educational policies in the US were declared unconstitutional −empathic narratives played a significant role because the stories of African American school children, presented to the court by Thurgood Marshall, demonstrated how the South's school segregation policy 'stamped them with a badge

[132] See e.g. Scheppele, 'Foreword: telling stories' (1988) *Michigan Law Review* 87, 2099; Abrams, 'Hearing the call of stories' (1991) *California Law Review* 971; and Farber and Sherry, 'Telling stories out of school: An essay on legal narratives' (1993) *Stanford Law Review* 807.

[133] See e.g. Massaro, 'Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?' (1989) *Michigan Law Review* 87(8) 2099; Henderson, supra n 12; and Bandes, 'Empathy, narrative, and victim impact statements' (1996) 63(2) *The University of Chicago Law Review* 361.

[134] Henderson, supra n 12 at 1592.

[135] *Brown v Board of Education of Topeka* 347 U.S. 483 (1954).

of inferiority' and 'put up road blocks in their minds'.[136] Moreover, in that case, expert psychological evidence was adduced to the court which, *inter alia*, showed how black children often preferred to play with white dolls and frequently perceived black dolls in negative terms, thereby illustrating the humiliation and self-hatred caused by segregation.[137] Therefore, just as there have been claims that the legal narratives model has made a valuable contribution to public discourse in an area as contentious as that of race in the United States,[138] so too might such an approach have a positive effect on the controversial issue of religious dress in Europe.

Acknowledging the subjective importance of religious practices by listening to the stories of believers, and attempting to see the world through their eyes, would provide the ECtHR with a much clearer vision of the subjective importance of the beliefs being manifested by the person concerned, and of the gravity of the consequences of restriction on them. Perhaps the utilization of the findings of empirical academic research is an avenue through which the perspectives and motivations of believers could be better understood, as well as the impact on them of curbs on religious dress. For example, there have been several empirical studies into the reasons why women across Europe wish to cover their faces, and these have revealed various motivations, including ones relating to spiritual devotion, religious identity, and modesty.[139] Were the Court expressly to utilize such accounts in its

[136] Henderson, supra n 12 at 1597.

[137] Hoffman, supra n 22 at 246.

[138] See e.g. Delgado and Stefancic, 'Critical race theory: An annotated bibliography' (1993) *Virginia Law Review* 461; and Bell, 'Who's afraid of critical race theory' (1995) *University of Illinois Law Review*, 893.

[139] See e.g. Zempi, '"It's a part of me, I feel naked without it": choice, agency and identity for Muslim women who wear the niqab' (2016) *Ethnic and Racial Studies*, 1738. See also the range of studies that document women's experiences across Europe in Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press, 2014).

judgments, enabling it to glimpse the issues through the believer's eyes, this would almost certainly have the effect of adding weight to the rights-side of the scales.

B. Subjecting Curbs on Manifestations of Religion/Belief to Greater Scrutiny

In direct consequence of the aforementioned contentions, more compelling arguments from the state would then be required to outweigh the individual's right. As previously discussed, the ECtHR has hitherto afforded a wide margin of appreciation to states, and has been prepared to accept blanket bans on religious dress with little indication of either the general harm done by the collective manifestation of religion/belief, or proof of 'bad behavior' by the individual applicants themselves.[140] However, pursuance of an empathic approach would require that blanket bans on certain forms of religious dress, which take no account of the actual behavior or threats posed by applicants themselves, would necessarily be treated with caution when weighed in the balance against the subjective importance of the manifestation of the right.[141] Such an approach would mandate a renewed focus on the individual – and in relation to claims by the state of 'general' harms emanating from the collective manifestation in question, an empathy model would evidently require evidence of those alleged harms, rather than mere unsubstantiated assertions.[142]

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[140] See the discussion in Part 3 above. See also Brems, ibid. at 70.

[141] Chaib, '*SAS* v *France*: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil' Strasbourg Observers, 3 July 2014, at https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/ [last accessed 14 December 2017].

[142] It is acknowledged that a potential argument to the contrary is that such an approach would be 'too individualistic' since the most potent threat may not come 'from a single individual but from the combined effect of all the religious individuals involved'. See McGoldrick, 'A defence of the margin

In the recent religious manifestation case law of the ECtHR, the seeds of such an 'empathic' approach have already possibly been sown. In *SAS v France*, the Court took some steps towards acknowledging the perspective of those who are subject to the French face cover ban when it acknowledged that the 'women concerned are … obliged to give up completely an element of their identity that they consider important, together with their chosen manner of manifesting their religion or beliefs'.[143] Similarly, the *SAS* Court declined to accept the French Government's contention that the ban served the aim of protecting equality or dignity[144] – holding that the state was not entitled to invoke gender equality in order to ban a practice that is defended by women themselves, and that there was no evidence that the ban on the face veil would protect human dignity.[145] Furthermore, in an important passage, the Court was willing to acknowledge the 'significant negative impact' of the ban on women who had 'chosen to wear the full face veil':[146]

> [T]hey are presented with a complex dilemma, and the ban may have the effect of isolating them and *restricting their autonomy*, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for a private life. It is also understandable that the *women concerned may perceive it as a threat to their identity*.[147]

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of appreciation and an argument for its application by the Human Rights Committee' (2016) *International and Comparative Law Quarterly* 21 at 52.

[143] *SAS*, supra n 62 at para 139.

[144] Ibid. at 118-12.

[145] Ibid. at para 118-120.

[146] Ibid. at para 146.

[147] Ibid. (emphasis added).

Moreover, on the issue of the margin of appreciation the Court said that 'in delimiting [its] …extent … in a given case, the Court must … have regard to what is at stake therein', thereby implying a fresh willingness to look at the actual impact on the individual claimant of the measure in question.[148]

The ECtHR has also, on rare occasions, been prepared to take on board the absence of any actual evidence of possible harm(s). For example, when considering *Arslan v Turkey* – a case that concerned criminal sanctions for wearing religious dress in public in order to protect secularism and democracy – the Court referred to the fact that there had been 'no evidence to show that the manner in which the applicants had manifested their beliefs by wearing specific clothing … constituted or risked a threat to public order or a form of pressure on others', or that they 'had sought to exert inappropriate pressure on passers-by'.[149]

Admittedly, the aforementioned dicta fall short of any real acknowledgment of the subjective significance of religious dress to the people concerned.[150] Nevertheless they could potentially be used as a future judicial entry point into examination of the significance of the religious practice to the person concerned and the consequences for him/her of its denial, which might in turn enable a more fact sensitive and rigorous proportionality analysis.

If the ECtHR were to deviate from its current model, and choose to adopt a more fact-sensitive approach that reduces reliance on the MoA, there is guidance to

[148] Ibid. at 129.

[149] Cited in *SAS*, ibid. at para 135. See also *Eweida and others v UK*, supra n 63, at para 94-5, and the dissenting opinions of Judges Nussberger and Jäderblom in *SAS*, supra n 62, at paras 13, 17 and 21.

[150] For example, in *SAS*, supra n 62, even having accepted that the applicants had been required to give up important elements of their identity and the chosen manner of manifesting their beliefs, the ECtHR proceeded to find that the ban was nevertheless within France's MoA as a way of protecting the 'right' of others to *vivre ensemble*.

be had from two other sources: the domestic constitutional arena, and the forum of international human rights law. In relation to the former, attention may be focused on the recent judgment of the German Federal Constitutional Court in the *Headscarf II case*, which concerned a law of Rhine Westphalia that prohibited political, religious and other forms of ideological expression by teachers in state schools where that expression had the potential to endanger or disturb state neutrality or peace at schools.[151] Two Muslim teachers who had been disciplined for their refusal to remove their headscarves brought claims under the constitutional right to freedom of faith and conscience.[152] The Federal Constitutional Court held that the mere abstract possibility that state neutrality or peace at school might be endangered could not justify a blanket ban on headscarves; only a concrete danger to the values that the state was aiming to protect could do so.[153] Thus the court, in noting the strong nature of the religious duty and associated shame of being required to go about bare-headed, held that the ban breached the teachers' rights to freedom of faith and conscience.[154]

A similar contextual approach, taking account of the actual level of risk posed by the individual's manifestation of belief in question, can be seen in the Canadian Supreme Court's majority judgment in *Multani v Commission scolaire Marguerite Bourgeoys*, which concerned the prohibition of a Sikh schoolboy from wearing his ceremonial dagger (kirpan) at school pursuant to a blanket ban on weapons in

[151] *Headscarf II*, 1 BvR 471/10; 1 BvR 1181/10, 27 January 2015. See Haupt, 'The "New" German Teacher Headscarf Decision, *International Journal of Constitutional Law Blog*, March 17 2015 available at: at http://www.iconnectblog.com/2015/03/the-new-german-teacher-headscarf-decision [last accessed 14 December 2017]. The decision was by a majority of 6:2.

[152] Article 4 of the German Basic Law.

[153] *Headscarf II* supra n 151 at para 46. In the *Headscarf I case*, 2 BvR 1436/02, 24 September 2003, the Federal Constitutional Court had 'dodged' the issue of the constitutionality of such prohibitions by holding that any such restrictions had to be provided for by law enacted by state legislatures, see Haupt, supra n 151.

[154] *Headscarf II* supra n 151 at para 44.

schools.[155] The prohibition was held to be disproportionate because, amongst other things, the risk of the boy himself using his kirpan for violent purposes or of it being so used by another pupil was very low.[156] The court held that it was vital to bear in mind the 'specific context' of the situation,[157] and concerns relating to safety had to be 'unequivocally established for the infringement of a constitutional right to be justified'.[158]

Finally, and most recently, in August 2016 the urgent applications judge of the Conseil d'État (France's highest administrative court) suspended a municipal order which had been used to prohibit Muslim women from wearing the burkini, because the order banned any item of clothing from being worn on the beach that demonstrated an obvious religious affiliation.[159] The judge held that in order to justify curbs on fundamental rights such as those pertaining to freedom of movement and freedom of religion or belief such municipal orders had to be adequate, necessary and proportionate, and thereby strictly necessary to maintain peace and good order on the beach. However, on the facts, because there had been no evidence to suggest that

[155] *Multani v Commission scolaire Marguerite Bourgeoys* [2006] 1 S.C.R. 256, 2006 SCC 6. See also *Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 008 (2) BCLR 99 (CC) (5 October 2007), where the Constitutional Court of South Africa recognised the right of a female student to wear a nose stud to school, on the basis that the prohibition of this practice had the potential for constituting indirect discrimination.

[156] *Multani*, ibid. at paras 57-59.

[157] Ibid. at para 63.

[158] Ibid. at para 67.

[159] Conseil D'etat, statuant au contentieux, Nos 402742,402777, *Ligue des droits de l'homme et autres - association de défense des droits de l'homme collectif contre l'islamophobie en France*, Ordonnance du 26 août 2016 http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-ordonnance-du-26-aout-2016-Ligue-des-droits-de-l-homme-et-autres-association-de-defense-des-droits-de-l-homme-collectif-contre-l-islamophobie-en-France [last accessed 14 December 2017].

peace and good order on the beaches had been jeopardized on account of what had been worn by some swimmers (i.e. burkinis), the order would be suspended.

It is of course arguable whether such cases should have any bearing on the way that the ECtHR conducts its business, for they are decisions of national constitutional courts which have more democratic legitimacy and institutional competence than the Strasbourg court to deal with sensitive 'local' matters upon which there is an absence of European consensus. Indeed, these are the very arguments that are used to justify the Strasbourg MoA.[160] That said, this kind of fact-sensitive approach, which places much less emphasis on the MoA, can be seen in the approach of the Human Rights Committee (HRC) – the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights (1966) – to the issue of religious dress. Thus, for example, in *Bikramjit Singh v France*, a seventeen year old Sikh pupil had been prevented from wearing a keski (mini turban) at school under a French law which, in accordance with the principle of secularism, had prohibited the wearing of religious clothes and symbols of religious affiliation in public schools and lycées.[161] Even though the HRC accepted that the relevant French Law 'served purposes related to protecting the rights and freedoms of others, public order and safety', it held that the state had '*not furnished compelling evidence* that, by wearing his keski, the author would have posed a threat to the rights and freedoms of other pupils or to order at the school'.[162] The HRC stated further that it was not convinced that the boy's expulsion from the school was necessary, or that

[160] See Lord Hoffmann, 'The Universality of Human Rights' (2009) 125 *Law Quarterly Review* 416 at 429-430, and Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34(4) *Oxford Journal of Legal Studies* 729.

[161] *Bikramjit Singh v France* Cmn No 1852/2008, UN Doc. CCPR/C/106/D/ (Dec 4, 2012).

[162] *Bikramjit Singh* ibid. at para 8.7 (emphasis added).

the dialogue between him and the school authorities 'truly took into consideration *his particular interests and circumstances*'.[163]

Significantly, in terms of the current discussion, the HRC went on to observe that the 'harmful sanction' was imposed on the pupil 'not because his personal conduct created any concrete risk, but solely because of his inclusion in a broad category of persons defined by their religious conduct.'[164] Thus, the HRC held that the state had failed to demonstrate how the imposition of curbs on Bikramjit Singh's rights had been either necessary or proportionate to the benefits the state wished to achieve.[165]

In these examples, whilst the aforementioned domestic and international bodies did not expressly try to step into the shoes of the believers, they recognized the sincerity and profundity of the religious belief that was at issue in each case, its significance to the claimants, and the drastic consequences of its restriction. Moreover, they subjected government arguments for restriction to a much more rigorous proportionality analysis than has hitherto been the case at the ECtHR, for

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[163] Ibid. (emphasis added).

[164] Ibid. One can also compare the restrictive approach of the ECtHR in *Mann Singh v France* Application No 24479/07, Admissibility, 11 June 2007, where the Strasbourg Court granted the state a wide margin of appreciation in holding that the state could deny the applicant (a male Sikh) a driving licence on account of his refusal to provide a photograph of himself for such purposes bareheaded and without a turban – with that of the HRC in *Ranjit Singh v France* Cmn No 1876/2009, UN. Doc. CCPR/C/102/D/1876/2009 (2011), where a rule requiring people to appear bareheaded on residence permit identity photographs was found contrary to Article 18 of the ICCPR (1966) in respect of a Sikh male who had refused to remove his turban.

[165] For a similar approach, albeit in a rather different context, see Advocate General's Opinion in *Bougnaoui and ADDH v Micropole SA* Case C-188/15, 13 July 2016, where Advocate General Sharpston ruled that a company policy requiring an employee to remove her Islamic headscarf when in contact with clients constituted unlawful direct discrimination. http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-07/cp160074en.pdf [last accessed 14 December 2017].

they required *evidence* of both the harm caused in the *particular cases* before them, coupled with a marked reluctance to accept generalized blanket prohibitions without evidence of the supposed harms caused by the practice in question. In essence, there was a more 'empathic' approach, with a clear acknowledgment of the profound importance frequently attached to items of religious dress (or related symbols) by people of faith.

6. CONCLUSION

Relatively little has, to date, been published on empathy, human rights and the right to freedom of religion or belief. This article, which makes the case for empathy in the field of human rights law, aims to rectify this anomaly. It argues that judges should adopt a more empathic approach, particularly when adjudicating in areas that are synonymous with conflict and division. By way of illustration, it focuses on the contentious and topical issue of religious dress, using it as a case-study to demonstrate the value and importance of empathy in a contemporary human rights context.

The ECtHR has shown a marked reluctant to 'stand in the shoes' or empathize with those who have submitted applications to it in the area of religious dress. The consequences of this in a Europe that is currently home to millions of people who wish to manifest their religious beliefs in public through the clothes they wear or symbols they display may be profound. After all, with divisive religious dress controversies showing little sign of abating, the risk is that unsuccessful applicants will be left feeling angry and bitter about their lack of redress in Strasbourg – a state of affairs that might, in a socially fragmented continent, potentially even undermine the Court's legitimacy within some (minority) faith communities. Accordingly, it is

our contention that the ECtHR needs to move in a new direction, make an empathic turn, and show that it takes religious dress seriously.

It is the universal quality of empathy which is perhaps its greatest asset. In a Europe that is increasingly religiously diverse yet ever more secular in nature, shared values are rare. Yet the commonly accepted concept of empathy transcends religious, ideological or sectarian boundaries. As a consequence, the notion of empathy offers judges (as well as law and policy makers more generally) rich insights into contemporary areas of controversy, such as those relating to religious dress.

There is of course no single definition of 'empathy', a term that is open to numerous different interpretations. But in seeking to summarise what is meant by the concept of empathy, it may be apposite to return to where we started – Harper Lee's, *To Kill a Mockingbird*. At one point in the book, the six year old Scout is in conversation with her elder brother Jem. Jem affirms boldly that '[t]here's four kinds of folks in the world', and proceeds to differentiate between each category. Scout responds by merely stating: 'Naw, Jem, I think there's just one kind of folks. Folks.'[166] For those who would seek guidance to understand what is meant by 'empathy', one need not look far beyond Scout's pithy and sage reply.

[166] Lee, supra n 1, at 247.