The Position of the Islamic Veil in Europe: Analysing How the European Court of Human Rights Interprets Article 9 of the European Convention on Human Rights

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1. Introduction

In recent times, the wearing of the Islamic face-veiling garment, the *burqa*,[1] has become a controversial issue, sparking much debate around the world – particularly in Europe. Is it acceptable for women to wear the *burqa* in public and, if not, is this a violation of human rights law? Proponents of this religious garment argue that it should be permissible for women to wear veils as an expression of their religion, since this right is protected by international human rights law, and any restrictions imposed are a violation of basic human rights. On the other hand, opponents of the face-veiling garments assert that the practice does not relate to the Islamic religion, rather it derives from outdated culture and heritage. While the Holy Quran, they argue, instructs both men and women to cover and be modest, the implications of this are open to interpretation and do not explicitly point to face-veiling. Moreover, they claim that the practice itself represents a form of discrimination against women, and should thus be prohibited by law. This article attempts to analyse the main arguments on each side, and to evaluate the grounds for either criminalising or decriminalising the use of the *burqa*.

Some countries have enacted laws against the *burqa*, most notably France and Belgium, while others, including Italy and Spain, are considering implementing a ban. This article investigates the rationales behind enacting laws that criminalise the wearing of the *burqa* in public, with particular reference to the case in France. It will look at the legitimate aims sought by the French government in enacting a law that prohibits the *burqa* in public places. This will be discussed alongside an examination of the Turkish model, which prohibits wearing headscarves (*hijab*) in public schools. Furthermore, the article will consider the European Convention of Human Rights and the decisions made by the European Court of Human Rights (ECHR).

The article will first look at how Islamic law deals with its religious garments and to what extent Muslim women are obliged to wear them. It will then explore the right to religion in international human rights law, and provide a background for the laws enacted by the French government to

[1] The '*burqa*' will be used as a general term, to include all face-veiling garments, including the popular '*niqab*'.

ban Islamic veils. We will then consider how the ECHR treats cases where the right of freedom of religion is involved, in order to establish a set of criteria by which the ECHR can rule on the issue in future. After viewing these cases, we will assess the connections between them, and subsequently what conclusions we can draw from the ECHR's perspective. We will also examine whether there are inconsistencies in the reasoning of the ECHR regarding the application of article 9 of the convention.

2. The Significance of the Veil in Islamic Law

Before discussing the role of the veil in Islam, it is important to differentiate between the three most famous forms of Islamic veiling. First is the *hijab*, which refers to headscarves worn by Muslim women to cover their heads and necks, while leaving the face exposed. Second is the *niqab*, which covers the entire body, with the exception of the area around the eyes. Finally the *burqa*, which refers to the veil that covers the entire body and the whole face, with a mesh window for the eyes.[2]

The topic of veiling is highly controversial in Islam, since there are no decisive rulings in the Holy Quran that either condone or condemn the veiling garment. Instead, the Holy Quran asserts that women should dress modestly,[3] and there are three main Quranic provisions regarding women's dress:

1. And women of post-menstrual age who have no desire for marriage – there is no blame upon them for putting aside their outer garments [but] not displaying adornment. But to modestly refrain [from that] is better for them.[4]

2. O Prophet, tell your wives and your daughters and the women of the believers to bring down over themselves [part] of their outer garments. That is more suitable that they will be known and not be abused.[5]

[2] Abdul-Mutaal Al-Jabry, *The Woman from the Islamic Perspective* (Sixth Edition, Wahbah Library 1983) 24-25.
[3] Shaira Nanwani, 'The Burqa Ban: An Unreasonable Limitation On Religious Freedom or a Justifiable Restriction?' (2011) 25 Emory International Law Review 1431, 1435-1437.
[4] The Holy Quran, 24:60.
[5] ibid 33:59.

3. And tell the believing women to reduce [some] of their vision and guard their private parts and not expose their adornment except that which [necessarily] appears thereof and to wrap [a portion of] their head covers over their chests and not expose their adornment except to their husbands, their fathers (...)[6]

From these Quranic rulings, it is observed that indeed, there is no explicit mandate on veiling per se; instead, the rulings are based on the concept of not showing an explicit beauty and dressing modestly.[7] The fact that the word 'modesty' is a relative one makes the argument more complicated. What type of clothing represents modesty? And how exactly do we define modesty in the first instance? Which parts of a woman's body should be covered and which parts can reasonably be exposed to the public?[8] Consequently, different types of veiling (as described above) have emerged, and each garment represents an attempt to interpret 'modesty'. Women who opt for the *hijab* consider the exposure of the face to be acceptable – necessary even – while women who opt for the *burqa* consider the face to be part of that 'beauty' which must be concealed from the public.[9]

It is important to point out that whatever practice a Muslim woman follows, it is an attempt to interpret the Quranic provisions. In other words, she wears a certain type of veil to comply with what she believes the Islamic religion dictates. Thus all types of veiling are considered as a form of religious practice and consequently relate to the right of freedom of religion and conscience, guaranteed under international human rights law.[10] However, Muslim women may well opt for a religious garment for reasons unrelated to religion, and in these instances protection under international law is useless. That is to say that the practice is only protected on the grounds that it is motivated by purely religious ideals. Other cultural reasons why women might opt to wear the *burqa* will be explored later.

3. The Practice of Wearing the *Burqa* in Light of International Human Rights Law

Since wearing the *burqa* represents a way of implementing a religious ruling, the act is categorised as an attempt to manifest a religious practice. The international law of human rights

[6] ibid 24:31.
[7] Javaid Rehman, *International Human Rights Law* (Second Edition, Pearson Education Limited 2010) 358-360.
[8] Nanwani (n 3) 1435-1437.
[9] Sebastian Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 Oxford Journal of Legal Studies 43, 45-46.
[10] Rehman (n 7) 358- 360.

guarantees the preservation and protection of this right.[11] As article 18 of the Universal Declaration of Human Rights reads:

> 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 teaching, practice, worship and observance.

The following articles also guarantee the right to freedom of religion and expression: Article 18(1) of the International Covenant on Civil and Political Rights,[12] article 9(1) of the European Convention of Human Rights,[13] and article 1(1) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[14]

It is clear that the international law of human rights emphasises the importance of the right of freedom of thought, expression and religion, since this right is inherent and personal to each individual.[15] However, it must be admitted that this right is not absolute. In other words, there are circumstances in which the right may be restricted, such as the protection of democracy, public order and the freedom of others. So the issue here is to determine whether the *burqa* warrants restriction under any of these circumstances. Each will be analysed in order to evaluate whether there is any basis for establishing a ban on the *burqa*.[16]

It is argued that international human rights law upholds the rights to freedom of religion and expression. This implies not only the freedom to adopt a religion or belief, but also the freedom to manifest it. A practice that derives from one's religious background, such as wearing a veil, is supported by international human rights law, so long as it does not harm other people. But how

[11] Kelly D. Askin and Dorean M. Koenig, *Women and International Human Rights Law* (Volume 3, Transnational Publishers Inc. 2001) 382-390.

[12] 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.'

[13] '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.'

[14] 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.'

[15] Poulter (n 9) 52-53.

[16] Jennifer Heider, 'Unveiling the Truth Behind the French *Burqa* Ban: The Unwarranted Restriction of the Right to Freedom of Religion and The European Court of Human Rights' (2012) 22 (1) Indiana International and Comparative Law Review 93, 103-104.

do we define 'harm', and who decides what does and does not 'harm' other people? Of course, when beliefs are restricted to personal thought and reflection, they do not spark controversy; it is when such beliefs translate into acts that the matter becomes more complicated.

For many Muslim women, the Islamic veil is an appropriate way of applying God's order for women to dress modestly, but what about the impact this practice has on others? This will be discussed in due course. In any event, it is important to look at why international human rights law accords such significance to the rights of freedom of religion and expression. There are, it seems, four main grounds for their justification.

First, the inherent dignity of all human beings entails respect for the convictions and opinions of all individuals. Undoubtedly, religion shapes many of one's opinions and thoughts regarding morality, as Carl Wellman argues, 'In a community genuinely committed to the goal of human dignity, one paramount policy should be to honor and defend the freedom of the individual to choose a fundamental orientation toward the world.'[17]

Second, the fact that international human rights law protects the right of liberty means that each individual is free to decide how he/she wishes to live. As article 18(2) reads, 'No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.'

As Carl Wellman asserts:

> By attempting to interfere coercively with one's freedom to have or adopt a religion or belief, society alienates the coerced individual and thus weakens his or her loyalty as a citizen. And when a state denies or restricts this religious liberty of any large number of citizens, it sows discontent and the seeds of social conflict.[18]

This leads us to the third justification, which concerns the preservation of social stability. The proposition of developing social progress, as expressed in the preamble of the UN Charter,[19] can take place if each individual in the community treats the other as a rational agent. This indicates

[17] Myres S. McDougal et al, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980) 661.
[18] Carl Wellman 'Religious Human Rights and Peace' (2012) 11 Routledge: Journal of Human Rights 2010, 214-215.
[19] 'To promote social progress and better standards of life in larger freedom.'

the importance of respecting the thoughts of others, including the religious ones. As Carl Wellman articulates:

> The object of the duty of respect, what is to be respected, is the rational agency of others, not their social status or achievements or even their moral virtue. And what is required by this duty is that one show or manifest this respect (…) by deferring to their choices and yielding to their actions.[20]

Finally, an essential reason why international law should protect the right to freedom of religion and expression is to safeguard other fundamental rights. That is to say that restrictions on religion may form a basis for depriving people from other civil and fundamental rights. The case in Turkey, in which a student was deprived of her right to education for wearing the Islamic veil at school, illustrates this point, and will be addressed in due course. This proposition is also emphasised by McDougal, who argues that history demonstrates that 'discrimination based upon religious beliefs and expressions forms the basis for some of the most serious deprivations of civil and political rights.'[21]

4. Broad Policy Issue and the Ban on the *Burqa* in France

When a minority wishes to observe a practice that is not common in that place – as in the case of wearing the *burqa* in Western society – the state may respond in two different ways. The first is assimilation – the minority is expected to abandon its culture and adhere to the prevailing customs. In this instance, the majority is concerned that the new practice represents a violation of acceptable standards of behaviour, and thus force the 'foreign' cultures to adopt the mainstream way of life.[22] The second potential response from the state is to adopt cultural pluralism. Here, the society welcomes any kind of new practice or culture. This response is based on the concepts of personal freedom and religious tolerance; the new practice should be preserved and there is no need to abandon certain principles or enforce mainstream values.[23]

However, new practices must not pose a threat to fundamental human rights. And here lies the heart of the matter. We need to address whether the practice of full face-covering poses a genuine threat to Western society. Is it the case, as the French ban of the *burqa* would suggest, that the

[20] Carl Wellman, *Medical Law and Moral Rights* (Springer 2005) 66.
[21] McDougal and others (n 17) 653.
[22] Poulter (n 9) 46-47.
[23] Ademola Abass, *Complete International Law: Texts, Cases, and Materials* (Oxford University Press 2012) 681-682.

practice disrupts social cohesion and national unity?[24] If so, does this constitute a strong enough reason to put restrictions on face-veiling, and thus to compromise certain other human rights?

Before considering the 2011 *burqa* ban, we should first look at the 2004 ban. This law prohibits the wearing of symbols or clothing that express a religious affiliation in public primary and secondary schools. The aim of this law was to protect the concept of secularism in France and to guarantee neutral secular education in French public schools. Although this applies to any manifestation of any religion, some argue that the law was enacted primarily to prevent Muslim women from wearing any kind of veiling,[25] since the legislation solely aims to prohibit ostentatious religious symbols. While a woman can hide a crucifix under her clothes, the headscarf is visible by nature, and therefore more conspicuous.[26]

One of the main reasons that led the French legislators to enact this law, and the 2011 law later on, was the presumption that Muslim women were forced to wear such garments by their family or culture. Further problems arise, as we will see later, when applying such laws leads to increased suffering for women. That is to say that even if this presumption is true, the coerced woman is likely to be relocated to a private school where the law does not apply, or else she will be confined to the home. In either case, the 2004 law would be void of purpose.[27]

In 2010, France enacted a law against full-face covering. It was passed overwhelmingly through the French parliament. This law creates two sets of punishments. First, the act of concealing one's face is punishable by either a maximum of a 150 euro fine or by requiring the woman who violates the law to attend classes on citizenship, or both. Second, forcing a woman to wear full-face covering garments is punishable by one year of imprisonment or a 30000 euro fine.[28] The main reason for such ruling was the proposition that the face-covering act is a discrimination against women and that it denies women's rights and dignity. The French Parliamentary Commission, which was assembled to assess the wearing of the full veil in France, concludes that 'The full veil is the symbol of subservience, the ambulatory expression of a denial of liberty that touches a specific category of the population; women. In this it also constitutes a negation of the

[24] Poulter (n 9) 46-47.
[25] Nanwani (n 3) 1445-1446.
[26] Reuven (Ruvi) Ziegler, 'The French "Headscarves Ban": Intolerance or Necessity?' (2006-2007) 40 The John Marshall Law Review 235, 245-247.
[27] Liu Xiaoping, 'French Muslim Headscarf Ban Under the Context of International Law' (2013) 1 (1) Peking University School of Transnational Law 45, 82-83
[28] Nanwani (n 3) 1431-1432

principle of equality'.[29] Moreover, proponents of this law argue that wearing the *burqa* represents a kind of social isolation which should not exist in French society, and it also affects the identity of France as a secular nation where state and religion are separated. The principles of secularity and national identity should be upheld by banning any practice which might oppose those principles. Whether the protection of such principles justifies a comprehensive *burqa* ban will be explored later.

5. ECHR Case Law

It is crucial to consider how the ECHR treats cases where the right of freedom of religion is involved, in order to establish the mechanism by which the ECHR can rule upon the issue. The cases in France are important examples to address, since the French courts are obliged to apply French national laws in a way that gives effect to France's obligations under the European Convention, and to act in compliance with the rights entrenched in it.[30]

In the European Convention, article 9 guarantees the right of freedom of religion. However, it is agreed that not all expressions of religion may be permissible, and there may be restrictions, as article 9(2) confirms:

> 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.

So, a limitation may be imposed on the right of freedom of religion if it protects the public safety necessary in a democratic society, or any of the other grounds mentioned in the article.[31]

In order to understand how such an article is applied in practice, we need to consider the ECHR ruling and how the judges interpret the article. We will first examine cases where article 9 is invoked, either to justify or limit an act of religious expression. We will then look at cases involving Islamic garments, how the court dealt with them and whether they justified the ban.

[29] Report of the Commission on the Practice of Wearing the Full Veil in France, Assemblée Nationale Rapport No. 2262, 107.
[30] Heider (16) 105-106.
[31] Ziegler (n 26) 242-243.

A. Cases Related to Article 9 and Freedom of Religion and Conscience

In Kokkinakis v Greece**,** in 1993, a Jehovah's Witness couple was prosecuted and found guilty of violating a Greek law that prohibits proselytism. The Greek court claimed that the couple attempted to change the neighbour's religious beliefs by soliciting religious conversation.[32] Kokkinakis, on the other hand, argued that obtaining converts was a manifestation of his religion and must therefore be protected under article 9 of the European Convention. The ECHR ruled that the Greek law violated article 9 of the convention, on the grounds it was not proportionate to the legitimate aim of protecting the rights and freedoms of others. The court ensured that individuals should practise their religion in public and private to the extent that the convention allows for it, especially between those who share the same faith.[33] Moreover, the mere act of manifesting a religion should be permissible unless there is evidence that such practice might risk the public order or safety of the state. In other words, interference by the state should be justified by a legitimate aim; as the court emphasised, 'the right to freedom of religion as guaranteed under the convention excludes any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs are legitimate.'[34]

On the other hand, in the case of Ahmet Arslan v Turkey, members of a religious group in Turkey, the *Aczimendi Tarikaty*, appeared in public wearing religious garments such as turbans. The members were prosecuted for violating a Turkish legislation that bans wearing religious clothes in public places.[35] Turkish law aimed to preserve religious neutrality in public, to ensure that Turkey remained a secular society. Although the ECHR recognised the legitimate aim of the Turkish legislation – to maintain secularity – they found that this violated article 9 of the convention. Since the members were merely wearing certain clothes in public, with no intention to harm others or put public security at risk, the ECHR argued that the state should not interfere. The Turkish legislation that makes it illegal to wear certain clothes cannot constitute a legitimate reason for violating the article:

> [T]his case concerned punishment for the wearing of particular dress in public areas that were open to all, and not, as in other cases that it had had to judge, regulation of the

[32] Heider (n 16) 108-109.
[33] ibid, 108-110.
[34] Kokkinakis v Greece, App. No. 14307/88, 260 (ECHR, 1993).
[35] Heider (n 16) 109.

> wearing of religious symbols in public establishments, where religious neutrality might take precedence over the right to manifest one's religion.[36]

Thus, the court distinguished between public institutions and public places; preserving secularism may be a legitimate aim for the state in a situation where the religious manifestation takes place inside a public institution where religious neutrality should reign. Finally, the court found that the Turkish state did not present sufficient evidence to prove that the manifestation of religious beliefs would jeopardise public order or the secular foundation of the state.

Finally, in Lautsi and others v Italy, Mrs. Soile Lautsi filed a lawsuit against a state-sponsored school for displaying crucifixes in classrooms, arguing that it undermined the concept of the school's secularism and violated the right of freedom of religion guaranteed under the convention.[37] She also argued that the display of the crucifix might influence the convictions and values of children at their most impressionable age.[38] The ECHR ruled that the requirement in Italian law to display crucifixes in classes in public schools did not violate article 9 of the convention nor did it violate secular principles. The basis of this ruling was that although the crucifix is a Christian symbol, the display of them does not in itself amount to indoctrination or an activity that can seriously affect children's minds, as the court confirms:

> [A] crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality (...) It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.

Therefore, the court decided to give a wide margin of appreciation to the Italian state to decide whether or not the crucifix should be kept in public school classes.[39]

B. Cases that have dealt specifically with the Islamic Garments Issue under Article 9 of the Convention

In this section, we will view two cases that involved the wearing of the *hijab* in public schools, and one case that dealt with the wearing of the *burqa* (full-face covering) in a public place. We

[36] Ahmet Arslan v Turkey, App. No. 41135/98 (ECHR, 23 February 2010).
[37] Myriam Hunter-Henin, 'Why the French Don't Like the Burqa: Laicite, National Identity and Religious Freedom' (2012) 61 International and Comparative Law Quarterly 613, 619-620.
[38] Nanwani (n 3) 1453.
[39] Lautsi and others v Italy, App. No. 30814/06 (ECHR, 18 March 2011).

will see how the ECHR conceives the Muslim religious dress codes and whether they may be restricted under certain circumstances.

It is important to note that although some of the ECHR's rulings supported the *hijab* or *burqa* ban, the European stance generally still upholds the importance of the right of freedom of religion, and the freedom to express certain religious or even philosophical views. Furthermore, while article 9 suggests grounds on which the right of freedom of religion may be restricted, the same convention still ensures that this is not employed in an arbitrary way. In other words, the restrictive clause in article 9 should not constitute an excuse for passing rules that may contradict the real purpose of the convention, which is to uphold the freedom and liberty of individuals and the cohesion of society. As article 4 of the 2010 resolution adopted by the European parliament confirms:

> Article 9 of the Convention guarantees freedom of thought, conscience and religion, including the right to manifest one's religion or belief, either alone or in community with others, in public or in private, in worship, teaching, practice and observance. Article 10 of the Convention enshrines freedom of expression, including the right to express religious or philosophical views or oppose and criticise them. Both freedoms constitute the necessary requirements for a democratic society. [40]

In the Dahlab v Switzerland case,[41] the Swiss authorities prohibited a primary school teacher from wearing the Islamic headscarf, *hijab*, which covers the hair and neck, on the grounds of maintaining neutral education for schoolchildren.[42] The ECHR concluded that the restriction imposed on the teacher's right of freedom of religion was justifiable and proportionate to the cause of protecting others – the schoolchildren. The *hijab*, it was concluded, is an imposing symbol that could influence children's faiths and/or offend their parents. All civil servants, including public school teachers, are expected to adhere to a neutral appearance which supports no single ideology.[43] The court also concluded that the applicant's position as a teacher of young children (ranging from four to eight years) was one of considerable and crucial influence.[44]

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[40] Resolution no 1743 entitled 'Islam, Islamism and Islamophobia in Europe' of 23 June 2010 available at < http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1743.htm > accessed 20 July 2014.

[41] Dahlab v Switzerland, App. No. 42393/98 (ECHR, 2001).

[42] Heider (n 16) 110.

[43] Nanwani (n 3) 1450-1451.

[44] The court emphasises 'Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was

Ultimately the court ruled that wearing the *hijab* per se defies gender equality and opposes women's rights, that it is 'difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.'[45]

On the other hand, in Sahin v Turkey, a medical student appealed against a Turkish public university for preventing her from wearing the Islamic headscarf, *hijab*, inside classes and examination halls.[46] She claimed that this violated article 9 of the European Convention, on the grounds that she wore the *hijab* because her religion ordered her to do so.[47] The ECHR had to assess whether the restriction was necessary in a democratic society. The court had to ensure that the limitation imposed on the applicant was proportionate to the pursued aim, and entailed careful consideration of the different interests at stake in the case. Ultimately, the ECHR found that the Turkish educational authorities did not violate article 9 or any other article under the European Convention. The decision was made, in part, on account of Turkey's increasing efforts to establish greater secularism in the country. It was also argued that, since Turkey is a Muslim-majority state, there was a considerable chance that women who do not wear the *hijab* would be affected. That is to say that wearing the *hijab* might be used in a competitive way, as an indicator of greater devotion to Islam.

Finally in S.A.S v France, a French national Muslim challenged a law, enacted in 2010, that prohibits the full face-covering veils in public. The applicant argued that the garment is in accordance with her religion, culture and personal convictions. Moreover, she confirmed that she was wearing it of her own free will, in the embracement of the religion of Islam, and that she was prepared to uncover her face whenever necessary, for the purposes, for example, of identity checks or public security in airports or banks.[48] The French state presented three main reasons for banning the *burqa*: to ensure public safety, to protect gender equality and to preserve social harmony. The ECHR refused the first two and accepted the third.[49] The importance of 'living

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responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.'

[45] Ibid.

[46] Sahin v Turkey, App. No. 44774/98 (ECHR, 10 November 2005) para. 115.

[47] Heider (n 16) 110-111.

[48] S.A.S. v France, App. No. 43835/11 (ECHR, 2014)

[49] Regarding public safety, it is important to mention that the full veil is already prohibited under certain circumstances to protect public safety under French national law. Articles 78(1) and 78(2) of France's Code of Criminal Procedure state that women must submit to identity checks requested by proper authorities and indicate possible circumstances in which women wearing the full veil would be forced to

together' was considered a legitimate reason for imposing restrictions on the applicant's right to freedom of religion: 'The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.'[50]

6. Observations on ECHR Case Law

It is now possible to draw some conclusions regarding the ECHR's approach to the issue of Islamic garments, and the means by which it determines whether a restriction on the right of freedom of religion is justified.

A. The Significance of Context for the ECHR's Rulings on each Case Law

Cases concerning Islamic garments incite a wide range of reactions amongst the public. The cases Sahin v Turkey and Dahlab v Switzerland concerned restrictions on the right of freedom of religion in a public institution (a school), while the case S.A.S v France concerned placing restrictions in public spaces generally.[51] A distinction must be made between the two settings. The first represents a state-owned place where all participants should comply with the state's view on different issues. Consequently, the teachings and ethos on which the whole public system is based, namely secularism, should be upheld by both civil servants and the individuals who receive the services.[52] In the second setting – the public sphere – the focus shifts to society and the stability of social relations, as in the S.A.S v France case, where the court prioritised the harmony of society and the preservation of cohesive interaction between its members. Meanwhile, the focus in the other two cases, Sahin and Dahlab, was on the importance of the principle of secularism, since they took place inside state-funded schools.

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[50] S.A.S. v France, App. No. 43835/11 (ECHR, 2014) para. 122.

[51] Nanwani (n 3) 1460-1461.

[52] Edwin Shorts and Claire De Than, *Civil Liberties: Legal Principles of Individual Freedom* (Sweet and Maxwell Limited 1998) 9-14.

The approach within schools is a very particular case, given that children are involved. The Dahlab case arguably demanded more consideration from the court, since the applicant worked with children aged between four and eight, and may have been more easily influenced by religious symbols.[53]

It is also important to draw attention to the considerable political differences between Turkey and France. Secularism as a concept is firmly instilled in France, while in Turkey there has been resistance since its introduction into the Turkish constitution in 1924. As the court in Sahin v Turkey asserts, it 'does not lose sight of the fact that there are extremist political movements in Turkey[54] which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.'[55] Consequently, Turkey needs more support for its secular values than it gained from the ECHR in the Sahin case.[56]

B. The European Balancing Test and the Margin of Appreciation Doctrine

Although article 9 of the convention offers many grounds for imposing restrictions on the right of freedom of expression, it is argued that there is still uncertainty about the article's application. In order for the ECHR to assess whether a certain measure is necessary in a democratic society, the court will have to first evaluate whether the arguments against the *burqa* merit a ban. The court will then have to decide whether to widen or narrow the margin of appreciation given to the concerned state.[57]

It is argued that this balancing test is too vague, since the ECHR has failed to determine or adopt a standard for measuring whether proportionality is achieved. Therefore, there may be some inconsistencies in the decision-making process. For example, in the Ahmet Arslan v Turkey case, the ECHR found that since the concerned individuals were merely wearing certain clothes in public with no intention of harming others, the state should not interfere unless there are legal ramifications. Meanwhile, in the case of S.A.S v France, the court found the full *burqa* ban (in public) by French law was permissible under the convention. On the other hand, the doctrine of margin of appreciation is about giving the national legislation more authority in making the decision.

[53] Nanwani (n 3) 1460-1461.
[54] Xiaoping (n 27) 54-55.
[55] Sahin v Turkey, App. No. 44774/98 (ECHR, 10 November 2005) para. 115.
[56] Nanwani (n 3) 1469.
[57] ibid 1457.

Therefore, the ECHR can either widen the margin of appreciation – so that the relevant state can have more space in restricting rights – or the state can narrow it, so that there will be greater scrutiny regarding the restrictions on rights made by the national courts.[58] Therefore, the extent to which the ECHR control the margin of appreciation doctrine can heavily influence the final decision. If a wide margin of appreciation is given to a state, the EHCR would allow the state to interpret any principles without scrutiny. For example, the ECHR found the wearing of the *hijab* in the Sahin case to work against the principle of secularism, while the display of the crucifix in classrooms was compatible with secularism in the Lautsi and others v Italy case.

In any event, it must be noted that the ECHR tends to narrow the margin of appreciation for two main reasons. First, if there is a European consensus on a certain rule, it is more likely that the court would approve such consensus (in terms of Islamic garments, there is no consensus in the European domain). Second, if the case concerns a right that is deemed fundamental, the court is required to firmly establish the necessity for a restriction on that right.[59]

7. Analysing the Commonly Invoked Justifications by the ECHR for Banning Islamic Garments

As we have seen, the ECHR has found many legitimate reasons for justifying restrictions imposed on the right of freedom of religion and expression. However, it is important to consider whether these justifications are in fact legitimate, and if so, should we admit that the ECHR has given a wide margin of appreciation to the local states in restricting the individual's rights to freedom of religion? The common justifications, which were invoked by the ECHR and many European states, include promoting secularism, gender equality and the principle of enabling people to live harmoniously together. Each one of these justifications will be assessed individually in the following pages.

A. Promoting Secularism and Public Order

It is argued that the principle of secularism derives from the meaning of public order. In other words, the public order concept relates to the fundamental principles that create the basis of society. Therefore, secularism, as it is in the West, becomes a fundamental principle defended by

[58] ibid 1453.
[59] Heider (n 16) 106-107.

local constitutions and laws. As the UN document explains, 'The expression "public order (*ordre public*)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*).'[60] The issue arises when we attempt to determine the scope and content of the term 'public order'. That is to say that there is little guidance for determining the fundamental principles which supposedly create public order. Therefore, the term is vague enough that it can be applied differently from one state to another, and consequently, a right which may be restricted under certain jurisprudence might not be restricted under another jurisprudence. Such a situation may create a sense of injustice.[61]

Secularism relies on the separation of the state from religion. The state must be neutral and show no support for any religion. Furthermore, secularity is based on the notion of unifying individuals on grounds of national identity and ignoring the religious and ethical differences.[62]

When we apply the idea of secularism in the context of Islamic face-veiling, states are required to give freedom to each individual to express his or her religion in the public realm as they see fit, and the state should interfere with this only if there is a threat to another person's freedom.[63] As Jean-Paul Willaime confirms, secularism means 'a separation between church and state that protects the freedom of religion and of non-religion, whose intention is to avoid any discrimination against people on the basis of their religious affiliation or lack thereof.'[64]

However, the issue arises when the principle of secularism is exploited in an excessive way and becomes a radical one, promoting the idea that religion is a negative force, and the cause of various wars and violent conflicts around the world.[65] As Reuven Ziegler argues:

> Over the years, two contradicting interpretations of the principle of secularity have developed. The first is that secularity requires not only that the state refrain from interfering in the public sphere, but also would require religion to be a total outcast. The second is that secularity obliges the authorities to refrain from promoting one religion over the others, but would not influence the way individuals behave in the public sphere,

[60] United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985)
[61] Xiaoping (n 27) 50-52.
[62] Heider (n 16) 98-100.
[63] Nanwani (n 3) 1444.
[64] Jean-Paul Willaime, 'The Paradoxes of Laïeité in France (Allyn Hardyek trans.)' in *The Centrality of Religion in Social Life: Essays in Honor of James A. Beckford* 41, 41 (Eileen Barker ed., 2010).
[65] Nanwani (n 3) 1444-1445

since the fact that an individual expresses his or her religion in public does not hurt the state's self-declared secularity.[66]

Now, when the principle of secularism is applied by the ECHR, under article 9 of the convention, the right to freedom of religion may be restricted if there is a legitimate reason which justifies such restriction, or if such restriction is necessary in a democratic society. In this context, it should be noted that as much as secularism is a fundamental principle in democratic society, the right to freedom of religion is also considered a founding principle, required by democratic values. Therefore, the ECHR should cautiously ensure that an appropriate balance is reached between the two principles and that one is not favoured at the expense of the other.[67]

It is observed that there is a level of inconsistency in the ECHR's decision-making process regarding the application of article 9 of the convention. This inconsistency can be summarised in three main points. First, since secularism implies religious neutrality in state-owned institutions, how can a display of crucifixes in the classrooms of a state-funded school in a secular state be permitted? The ECHR's reasoning in Lautsi and others v Italy acknowledged that the display of the crucifix is compatible with the ideals of secularism. This raises concerns since surely the display of the crucifix can be seen as imposing Christianity on others. Moreover, it may affect children at school who might be vulnerable to the influence of religious symbols of any kind.[68] Second, in Ahmet Arslan v Turkey, the ECHR ruled that secularism could not establish a strong ground for imposing a full ban on wearing religious garments in the public sphere,[69] especially if there was no evidence of a genuine threat to the tenets of secularism.[70] So, why can we not extend the same judgment to other cases, such as that of S.A.S v France, since both share the main elements: ordinary people, public places and no proven evidence of harm?[71] Third, it is argued that the scope of secularism should have more authority in state-owned places than both private places and public spheres (such as streets and parks), since secularism is mainly applied in public institutions where civil servants can represent the state's position. The French Council of State

[66] Ziegler (n 26) 262-263.
[67] As the ECHR in Kokkinakis v Greece, asserts: 'As enshrined in Article 9 [of the European Convention], freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It 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.' See Kokkinakis v Greece, App. No. 14307/88 (ECHR, 1993).
[68] Nanwani (n 3) 1470-1471.
[69] ibid 1472.
[70] Hunter-Henin (n 37) 635-636.
[71] ibid 636.

also endorses such contention by admitting that secularism 'mainly applies in relations between the public authorities and religions or persons who subscribe to them. It is directly binding on public institutions, thereby justifying the neutrality requirement imposed.'[72]

In this context, it should also be noted that civil servants who work in public institutions play a more important role in applying secularism than other people in the institution. As the ECHR ruled in Dahlab v Switzerland, the position of teacher in public schools is an influential one, represents the views of the state and is therefore required to be neutral. If the teacher endorses a certain ideology, it may imply that the state endorses it too.[73]

B. Promoting Gender Equality and Social Harmony (the Principle of Living Together)

One of the common justifications for imposing a ban on Islamic garments is that they violate women's rights and oppose the principle of gender equality, oppressing their personalities and denying them their dignity. As the president of the Parliamentary Commission's Report on the Wearing of the Full Veil, André Gerin, declares:

> [T]he wearing of the full veil infringes upon three principles that are included in the motto of the Republic: liberty, equality and fraternity. The full veil is an intolerable infringement on the freedom and the dignity of women. It is the denial of gender equality and of a mixed society. Finally, it is the will to exclude women from social life and the rejection of our common will to live together.[74]

Opponents of Islamic garments argue that concealing a woman's face is the first step towards demeaning her and denying her basic rights, since a woman who wears such garments must be forced to do so by a family member, culture or society. In other words, the understanding is that no woman would willingly choose to be excluded from society by hiding her identity in public.[75]

Undoubtedly, it is important to support women's rights and enhance the basic principles of gender equality. However, there is still no real evidence which connects the Islamic garments with violating the principles of gender equality. Judge Tulkens of the Sahin v Turkey case argued

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[72] Reports and Studies Sections, Conseil D'Etat, Study of Possible Legal Grounds for Banning The Full Veil: Report adopted by The Plenary General Assembly of The Conseil D'Etat, 20 (2010)
[73] Hunter-Henin (n 37) 619-620.
[74] Highlights of Parliamentary Report on the Wearing of the Full Veil (*burqa*), Library of Congress, available at http://www.loc.gov/law/help/france-veil.php
[75] Ziegler (n 26) 247.

that 'The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say.'[76] In a similar way, the court concluded in S.A.S. v France that the matter of women's dignity was not sufficient to necessitate a ban on the *burqa*: 'the Court takes the view that, however essential it may be, respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places.'[77]

In other words, the assumption that women's rights would be violated by the wearing of face-veils is based purely on speculation. There has been no real research investigating how many women are forced to wear the garments, and how many have freely chosen to do so.[78] Therefore, autonomy will have to be presumed until there is evidence to the contrary.[79] The ECHR asserts in S.A.S. v France that '(…) a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions (...)'[80]

As Human Rights Watch asserts, women should enjoy the freedom to determine their dress code and their choices, and this must be respected by state and society. It also criticises the 2004 Turkish law which bans the Islamic headscarf in public schools by contending that the Turkish government 'preferred to impose arbitrary restrictions on what they viewed as the daughters and wives of a rival political constituency.'[81]

Opponents of the Islamic garments also argue that even if a woman is not forced by an external factor, such as her family, she still feels pressured from within. That is to say that the compulsion to wear the garments is self-imposed since it may be believed that such practice would better serve the religion and, in turn, make the woman a better Muslim. However, there is still no clear evidence of this. Even if we approve such a contention for the sake of argument, this should not invalidate the decision made by the woman, since it is understood that there is a certain degree of external influence in all decision-making processes. Indeed, external influence is arguably part of

[76] Sahin v Turkey, App. No. 44774/98 (ECHR, 2005) para. 11.
[77] S.A.S. v France, App. No. 43835/11 (ECHR, 2014) para. 121.
[78] Nanwani (n 3) 1459.
[79] Hunter-Henin (n 37) 625.
[80] S.A.S. v France, App. No. 43835/11 (ECHR, 2014) para. 119.
[81] Human Rights Watch, Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf, 45, 2004 available at http://www.hrw.org/sites/default/files/related_material/headscarf_memo.pdf

the decision-making process, and does not deny the notion that the final decision is reached through free will.[82]

We can even go further in this argument and claim that women cannot obtain dignity unless they are permitted absolute autonomy, and this includes their choices regarding how they present themselves to the public. This, of course, includes dress code, and any restrictions or regulations on this would be a denial of someone's autonomy, and may affect his or her dignity.

Although a legal ban on the *burqa* might aim to promote women's rights, it could still have the reverse effect, impacting negatively on women who freely choose to wear the clothing, and even women who are forced to wear it. The rights of women who freely choose to wear the Islamic garments would be violated because they will no longer be permitted to exercise this choice. As for women are forced to do so, they may well experience more violence from their enforcer, or simply be confined to their home. Both scenarios would undermine and exclude women from society, and consequently, the reasons for enacting the law in the first place would be counterproductive.[83] In essence, then, women would have been given more choice if the ban law did not exist. In other words, the ban narrowed choices for women.[84] As the ECHR made clear in the S.A.S v France case, 'the Court takes the view that, however essential it may be, respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places.'[85]

Finally it must be noted that, since the bottom line in international law is that no harm must be caused to others, the right to freedom of religion and expression will, to some extent, include forms of expression that might disturb or cause discomfort to other individuals living in the same society.[86] This poses the question: should law prohibit any action that disturbs others? The answer, especially in a democratic society, should be anything but yes. If we prohibit any action which might cause social dysfunction without mediating between the competing interests, the real meaning of pluralism and individualism, which supposedly underpin Western ideology, would be undermined.[87] Indeed, the ECHR confesses in the S.A.S v France case that:

> The Court is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural

[82] Hunter-Henin (n 37) 625-626.
[83] Nanwani (n 3) 1460.
[84] ibid 1463.
[85] S.A.S. v France, App. No. 43835/11 (ECHR, 2014) para. 120.
[86] Heider (n 16) 117.
[87] Hunter-Henin (n 37) 628.

identity which contributes to the pluralism that is inherent in democracy. It notes in this connection the variability of the notions of virtuousness and decency that are applied to the uncovering of the human body. Moreover, it does not have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others.[88]

8. Conclusion

In assessing cases where a state has imposed restrictions on religious expression, it is essential that the ECHR examines article 9 of the convention to establish if the individual's right to freedom of religion has been contravened. If such examination confirms a violation of rights, the next step must be to assess whether the restriction is justified and proportionate to the requirements of democratic society. However, according to an analysis of the ECHR's rulings, there is a degree of inconsistency at play. It would seem that article 9 of the convention is applied in a number of different ways.

For example, in the Ahmet Arslan v Turkey case, the ECHR decided that the state should not ban individuals from wearing certain clothes that express their religion if there is no evidence of intention to harm others. Meanwhile, in the case of S.A.S v France, the ECHR supported the French ban on the wearing of Islamic garments in public places. In doing so, the ECHR failed to provide sufficient evidence that the practice would have any significant impact on others. Furthermore, regarding the Lautsi and others v Italy case, the ECHR decided that the mere act of displaying crucifixes in classrooms did not contradict the principle of secularism, while in the Dahlab v Switzerland case, it insisted that teachers in public schools should remain neutral without supporting any particular religion. The ECHR also argued that children could be influenced by religious symbols like the teacher's *hijab*. With the use of what criteria did the ECHR conclude that while the *hijab* is a powerful religious symbol with the capacity to influence children, crucifixes are not so explicitly religious, and will not affect them in any significant way? The answer to this question was not provided.

This paper has argued that while a ban on headscarves in public schools may be reasonable, a full ban on the *burqa* in public places should be considered a violation of human rights, for two main reasons. First, as has been illustrated in the examples here presented, neutrality is less compelling

[88] S.A.S. v France, App. No. 43835/11 (ECHR, 2014) para. 120.

in the public sphere than in state-owned ones.[89] Second, such a ban would violate the very essence of women's right to freedom of religion, expression and the very basic right of autonomy, a right that should allow them not to interact with people in public, or at least not in the conventional Western sense.

Furthermore, the analysis of the commonly invoked justifications for banning the Islamic garments suggests that most claims made against the *burqa* cannot be qualified to support a full ban without infringing on the individual liberties of the women concerned. As Myriam Hunter-Henin concludes regarding the situation in France, 'While the 2010 law is indeed about promoting common values and fostering a way of "living together", "un vivre ensemble", in a legal system committed to human rights, this goal cannot be enforced at the cost of civil liberties.'[90] Therefore, the issues relating to Islamic garments cannot be solved merely by imposing a ban. Instead, it is essential that dialogue between all parties is opened, that each be invited to express its concerns and misunderstandings in an attempt to settle all arguments.[91] In this process, it is essential that fundamental human rights such as those to freedom of religion and expression and the right to autonomy are fully realised. If there is no option but to restrict such rights, complete transparency regarding the justifications for these restrictions is essential, as is consistency across all cases.

[89] Sally Pei, 'Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights' (2013) 122 The Yale Law Journal 1089, 1095-1096.
[90] Hunter-Henin (n 37) 639.
[91] Xiaoping (n 27) 84.