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**A BLACK VEIL OVER EUROPE: ARE LEGISLATIVE
PROHIBITIONS ON ISLAMIC DRESS (“BURQA BANS”)
JUSTIFIED?**

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Abstract

Recently in Europe there has been an increase in legislative prohibitions on Islamic dress. These prohibitions, which primarily target headscarves and full-face veils, are colloquially referred to as “burqa bans”. Although “burqa bans” exist in many European countries, this paper specifically looks at examples from Switzerland, Turkey and France, and three resulting European Court of Human Rights cases, *Dahlab v Switzerland*, *Şahin v Turkey*, and *S.A.S v France*. This paper also considers the justifications used to support the respective “burqa bans”, namely secularism, coercion and gender equality, and attempts to ascertain their veracity. This paper concludes that the justifications given do not satisfy the goals they claim to achieve, therefore, the bans are not justifiable.

Key words

Muslim women, headscarf ban, European Court of Human Rights

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I Introduction

Articles 9 and 10 of the European Convention of Human Rights (ECHR) guarantee individuals the right to freedom of thought, conscience and religion,¹ and the right to freedom of expression.² These rights theoretically allow individuals identities to be visible in the public sphere, although this is limited and qualified by the rights and freedoms of others.³ Problems with enforcement of these rights arise where peoples’ identities are not seen as the “norm” in the society to which they belong. One of the most current and prominent examples of this problem arising in Europe is the banning of headscarves and full-face veils.

This paper will explore legislative prohibitions on headscarves or full-face veils and resulting European Court of Human Rights (ECtHR) decisions from three different European countries; Switzerland, Turkey and France. The purpose of this paper is to determine whether these legislative prohibitions are justified by comparing and ascertaining the veracity of the three main justifications given in the ECtHR, which are secularism, coercion and gender equality. Ultimately this paper seeks to demonstrate that whilst legislative bans are hailed as a solution to a number of problems, they are not justifiable.

This paper has five parts. Part II provides a brief introduction to the concepts of Islamic dress discussed in this paper. This firstly entails addressing what the terms “full-face veil” and “headscarf” encompass in this paper. Secondly, this part will consider whether wearing a full-face veil or headscarf is obligatory or not, although it is acknowledged that there is no single reason for wearing either.⁴

¹ United Nations Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 9.

² ECHR, above n 1, art 10.

³ Jill Marshall “S.A.S. v. France: burqa bans and the control or empowerment of identities” (2015) 15(2) *Human Rights Law Review* 377 at 377.

⁴ Dominic McGoldrick *Human rights and religion: the Islamic headscarf debate in Europe* (1st, Hart Publishing, Portland (Oregon), 2006) at 6.

Having addressed this, Part III explores cantonal and federal law on headscarves and full-face veils in Switzerland. This part first addresses the organisational structure of Switzerland, and how this affects how secularism is reflected in their laws. Secondly, this part discusses Muslim integration in Switzerland. This entails discussing how integration has historically occurred in Switzerland, and providing some examples of issues that have arisen from the clash of Swiss and Islamic culture. It also addresses the laws prohibiting headscarves and full-face veils at a cantonal level, before discussing the decision of the ECtHR in *Dahlab v Switzerland*,⁵ which concerned a headscarf ban on teachers at State schools. Lastly, this part addresses recent attempts to establish a nationwide ban on full-face veils in public.

Part IV focuses on Turkey, firstly discussing secularism and Muslims in Turkey. This part then describes Turkey’s ban on headscarves in public institutions, addressing the legal basis of the headscarf ban in universities. Unusually, it was not rooted in statute law, but based on various Government regulations and interpretations of decisions of the Turkish Constitutional Court.⁶ This part then considers the decisions of the ECtHR regarding *Şahin v Turkey*.⁷ Lastly, this part discusses the gradual removal of the headscarf ban that has taken place from 2008 to 2017. This largely focuses on the reform efforts of Recep Tayyip Erdoğan, the leader and co-founder of the Turkish political party, the Justice and Development party (AKP),⁸ as well as looking at the difficulties and fierce opposition Erdoğan encountered in his endeavours to overturn the ban.

Part V discusses two significant laws regulating Islamic dress in France. Firstly, the ban which preceded the infamous ban on full-face veils in France, the ban on religious symbols in schools. This law was significant because it paved the way for the more contentious ban on full-face veils in public. This section then discusses France’s ban on

⁵ *Dahlab v Switzerland* (42393/98) Section V, ECHR 15 February 2001.

⁶ Hera Hashmi “Too Much to Bare - A Comparative Analysis of the Headscarf in France, Turkey, and the United States” 10 U. Md. L.J. Race, Religion, Gender & Class 409 at 428-9.

⁷ *Leyla Şahin v. Turkey* (44774/98) Section IV, ECHR 29 June 2004; and *Leyla Şahin v. Turkey* (44774/98) Grand Chamber, ECHR 10 November 2005.

⁸ Meltem Muftuler-Bac “The New Face of Turkey: The Domestic and Foreign Policy Implications of November 2002 Elections” (2003) 37(4) East European Quarterly 421 at 424.

head coverings in the public sphere.⁹ This will entail firstly looking at the inquiry undertaken by the Parliamentary Commission to Study the Wearing of the Full Face Veil in France, formed to establish whether full-face veils posed a threat in France.¹⁰ It explains the bills’ progression through the French legislative process, as well as discussing the bills’ hearing before the Constitutional Council. This section will also consider the decision of the ECtHR on the validity of the law banning full-face veils, *S.A.S v France*.¹¹ Lastly, this part discusses the law regulating “burkini bans” in a number of French towns.

Part VI undertakes a comparative analysis of the three common justifications used to justify headscarf or full-face veil bans, namely secularism, coercion and gender equality, and attempts to ascertain their credibility. Ultimately, this section concludes that a headscarf or full-face veils ban is unlikely to achieve the goals of protecting secularism, preventing coercion and promoting gender equality, therefore, they do not justify a ban.¹²

⁹ Loi 2004-228 du 15 mars 2004 [Law 2004-228 of March 15, 2004], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190, available at <www.legifrance.gouv.fr>.

¹⁰ Lina Ragep Powell “The constitutionality of France’s ban on the burqa in light of the European Convention’s *Arslan v. Turkey* decision on religious freedom” (2013) 31(1) *Wisconsin International Law Journal* 118 at 127.

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

¹² Fatima Osman “Legislative Prohibitions on wearing a headscarf: Are they justified?” (2014) (17(4) *Potchefstroom Electronic Law Journal* 1317 at 1340.

II Introduction to Islamic Dress

A Terms Used in This Paper

The terms used to describe Islamic dress vary between countries and often are not very precise.¹³ In this paper, I use the term “headscarf” to describe the most common form of Islamic veiling in Europe, where a women’s hair, ears and neck are covered. Headscarves do not cover the face of the wearer,¹⁴ and are typically worn by younger Muslim women. The Arabic term “hijab” is another commonly used term to describe this form of veiling, although it is not an exact translation.¹⁵

The term “full-face veil” captures more extensive forms of Islamic veiling, where the head, face, and some parts of the body are covered.¹⁶ This term covers the most extreme form of veiling, the burqa, which is a loose fitting garment that completely covers the entire body, including the face and eyes.¹⁷ In France and Switzerland, full-face veil bans have colloquially been referred to as “burqa bans”. The term also encapsulates a lesser form of veiling, the niqab and the sitar. A niqab is a veil that covers the head and face, although the wearers’ eyes are visible. The sitar is an additional veil which covers the eyes.¹⁸

Where other terms have been used in this paper to describe Islamic dress, such as head coverings, face-covering head gear, or clothing intended to hide the face, this is the language used by the law-makers of the relevant country.

¹³ McGoldrick, above n 4, at 4.

¹⁴ Geoffrey W.G Leane “Rights of Ethnic Minorities in Liberal Democracies: Has France Gone Too Far in Banning Muslim Women from Wearing the Burka?” (2011) 33(4) Human Rights Quarterly 1032 at 1038.

¹⁵ McGoldrick, above n 4, at 4.

¹⁶ McGoldrick, above n 4, at 5.

¹⁷ Assemblée Nationale, Rapport d’information au nom de la mission d’information sur la pratique du port du voile intégral sur le territoire national [Commission’s report], 26 January 2010, available at <www.assemblee-nationale.fr/13/pdf/rap-info/i2262.pdf>.

¹⁸ Commission’s report, above n 17.

B Are Head Coverings a Religious Obligation?

There is no consensus on whether wearing a headscarf or a full-face veil is obligatory for Muslim women in Islam. Some believe they are strictly required, for example, the four main schools of Islamic jurisprudence believe that Muslim women should cover their heads in public upon reaching puberty. This obligation is typically derived from an interpretation of a verse in the Qur’an, which states:¹⁹

And say to the believing women that they should lower their gaze and guard their modesty, that they should not display their beauty and ornaments except that what must ordinarily appear thereof; that they should draw their veils over their bosoms and that they should not display their beauty except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex and that they should not stroke their feet in order to draw attention to their hidden ornaments.

Others believe they are non-obligatory.²⁰ For example, Muslim countries Morocco and Tunisia do not think head coverings are required under Islamic law. Similarly, despite a strong Islamic tradition, women in Uzbekistan do not wear headscarves or full-face veils.²¹

¹⁹ Surah 24, Verse 31, reproduced in Ali Meaning of the Holy Qur'an 873-874; see Osman, above n 12, at 1319.

²⁰ McGoldrick, above n 4, at 8.

²¹ McGoldrick, above n 4, at 11.

III Switzerland

This section has three parts. Part A describes the cantonal organisational structure of Switzerland and how this affects secularism. Part B discusses Muslim integration in Switzerland and some examples of issues that have arisen from the clash of Swiss and Islamic culture. This part also considers the decision of the ECtHR in *Dahlab v Switzerland*,²² which concerned a headscarf ban on teachers at State schools. Lastly, part C addresses recent attempts in Switzerland to establish a nationwide ban on full-face veils in public.

A Secularism in Switzerland

Switzerland does not have a general separation of State and religion. This is largely due to the way that Switzerland is organised.²³ Switzerland is a federal State made up of 26 cantons.²⁴ At a federal level, Switzerland is a secular State in which State and religion are separated.²⁵ This is despite the fact that the Swiss Federal Constitution starts with the words “In the name of God Almighty!”²⁶ Secularism itself is not explicitly referenced in the Swiss Federal Constitution, but it is derived from Article 15, which guarantees the freedom of religion and conscience.²⁷

At a cantonal level, each canton, independent from both the Swiss Federal Government and other cantons,²⁸ governs the relationship between the State and

²² *Dahlab*, above n 5.

²³ Swiss Federal Constitution, art 3.

²⁴ Cantons are federal or “mini-states” that enjoy a large amount of independence from the Swiss federal government, which sits at the centre; see Tim Bale, *European Politics: A Comparative Introduction* (3rd ed, Palgrave MacMillan, New York, 2013) at 58 and 152; and Denis Müller “Open “Laicity” and Secularity versus Ideological Secularism: Lessons from Switzerland” (2009) 15(1) *Christian Bioethics* 74 at 78.

²⁵ René Pahud De Mortanges “Religion and the Secular State in Switzerland” in Javier Martinez-Torron and W. Cole Durham, Jr. (eds) *Religion and the Secular State: Interim National Reports* (The International Center for Law and Religion Studies, Brigham Young University, Provo, Utah, 2010) 687 at 687.

²⁶ Swiss Federal Constitution, Preamble; see De Mortanges, above n 25, at 689.

²⁷ Swiss Federal Constitution, art 15.

²⁸ Bale, above n 24, at 152.

churches.²⁹ This means there are “26 different systems of state church law”,³⁰ creating great variation in the levels of separation between church and State from canton to canton.³¹ Secularism has traditionally been strongest in cantons like Geneva and Neuchâtel,³² places that clearly have a strict separation between the State and religion.³³ However, secularism is on the rise in Switzerland.³⁴ Cantons that have previously had strong State-church relationships have produced more secular-based regulations,³⁵ influenced by the rising move away from churches.³⁶

B Switzerland and Islamic Dress

1 Muslims in Switzerland

Since the late 1960s, Switzerland has received increasing numbers of Muslim immigrants. The first and second waves of Muslim immigration were comprised of businessmen and their families. The third wave, which continues today, primarily consists of politically driven asylum-seekers.³⁷ There are an estimated 350,000 Muslims in Switzerland, making up four per cent of the total population.³⁸

Muslim integration in Switzerland has proved to be problematic.³⁹ Instead of incorporating Muslims into Swiss society, the Swiss public often refuses to accommodate

²⁹ Swiss Federal Constitution, art 72.

³⁰ De Mortanges, above n 25, at 689.

³¹ Savannah D. Dodd “The Structure of Islam in Switzerland and the Effects of the Swiss Minaret Ban” (2015) 35(1) *Journal of Muslim Minority Affairs* 43 at 46.

³² Müller, above n 24, at 78.

³³ Neither Geneva nor Neuchâtel recognise a state religion; see Dodd, above n 31, at 46; and McGoldrick, above n 4, at 120.

³⁴ Müller, above n 24, at 78.

³⁵ Müller, above n 24, at 78-9.

³⁶ De Mortanges, above n 25, at 688.

³⁷ Dodd, above n 31, at 47.

³⁸ An estimated 350,000 Muslims in Switzerland’s total population of eight million; see Agence France-Presse “Swiss halt Muslim family’s citizenship process after refusal to shake hands” *The Guardian* (online ed, 19 April 2016).

³⁹ Dodd, above n 31, at 28; and “Hostility towards Muslims on the rise in Switzerland” (12 September 2017) *The Local* <www.thelocal.ch>.

the Islamic way of life.⁴⁰ A prominent example of this is the minaret ban.⁴¹ In 2007, a citizens’ initiative was filed to prohibit the building of minarets in Switzerland.⁴² Despite the Swiss Federal Government condemning the proposed ban, the ban was put to a vote in 2009. It passed with a 57.7 per cent majority.⁴³

An increase in hostility towards Muslims has resulted in an increase in the number of high-profile disputes relating to Muslim integration in Switzerland.⁴⁴ In 2016, two teenage Muslim brothers refused to shake their female teachers’ hands. This refusal was based on their belief that physical contact with women that were not family members would violate their Islamic faith. The incident sparked a national debate over freedom of religion and resulted in the family’s citizen process being suspended.⁴⁵ A similar dispute arose in 2008 when Aziz Osmanoglu and Sehabat Kocabas were fined for refusing to send their two young Muslim daughters to a co-ed swimming class. The parents sued on the basis of religious freedom, and the case eventually ended up before the ECtHR. In 2017, the ECtHR ruled that the girls must attend co-ed swim classes.⁴⁶

2 *Cantonal ban on full-face veils*

Despite difficulties with Muslim integration, there is no nationwide ban on Islamic dress in Switzerland.⁴⁷ However, a ban on face-covering headgear in public does exist in Ticino, an Italian-speaking Swiss canton located in the south of Switzerland.⁴⁸ The majority of the population in Ticino are Roman Catholic.⁴⁹

⁴⁰ Dodd, above n 31, at 57.

⁴¹ A minaret is a tower built alongside a mosque. It is traditionally where the call to prayer comes from; see Dodd, above n 31, at 49-50.

⁴² The initiative proposed that the ban would be instituted by adding a third paragraph to Article 72 of the Swiss Federal Constitution; see Dodd, above n 31, at 50.

⁴³ Dodd, above n 31, at 52.

⁴⁴ “Hostility towards Muslims on the rise in Switzerland”, above n 39; and “Swiss lawmakers approve step towards face-veil ban” (28 September 2016) Aljazeera <www.aljazeera.com>.

⁴⁵ France-Presse, above n 38.

⁴⁶ Dan Bilefsky “Muslim Girls in Switzerland Must Attend Swim Classes With Boys, Court Says” *The New York Times* (online ed, 10 January 2017).

⁴⁷ De Mortanges, above n 25, at 695.

⁴⁸ “MPs in Swiss canton of Ticino back burqa ban” (24 November 2015) The Local <www.thelocal.ch>.

In 2011, inspired by the French “burqa ban”, Giorgio Ghiringelli filed a citizen’s initiative to prohibit face-covering headgear in public in Ticino. The initiative received 11,767 valid signatures;⁵⁰ consequently, the issue was taken to a referendum. The referendum question does not single out full-face veils nor specifically target Muslim women, stating:⁵¹

No one may mask or hide their face on the public highway, or in places open to the public, except places of worship, nor in places offering a public service.

The broad wording in the referendum question includes all forms of face-covering headgear, including masks and balaclavas. However, it is clear that in practice, it was intended to target full-face veils worn by female Muslims.⁵² The proposed ban was referred to as a “burqa ban”, and the referendum question subsequently added that “no one may require another person to cover their face for reasons of gender”.⁵³

Results from the referendum showed that the majority of voters in Ticino approved the proposed ban.⁵⁴ Ghiringelli stated that this result would send a message to “militant Islam” and stop “the inevitable spread of niqabs and burkas”,⁵⁵ despite Muslims representing just two per cent of the population in Ticino.⁵⁶

⁴⁹ Harriet Agerholm “Muslims face fines up to £8,000 for wearing burkas in Switzerland” (7 July 2016) *The Independent* <www.independent.co.uk>.

⁵⁰ Gerhard Lob “Veiled vote: Burqa ban approved in Italian-speaking Switzerland” (22 September 2013) *Swiss Info* <www.swissinfo.ch>.

⁵¹ Jonathan Fowler “Ticino voters back ban on wearing face veils” (22 September 2013) *The Local* <www.thelocal.ch>.

⁵² Lob, above n 50.

⁵³ Fowler, above n 51.

⁵⁴ 65 per cent; see Fowler, above n 51.

⁵⁵ Nick Squires “Burkas and niqabs banned from Swiss canton” *The Telegraph* (online ed, 23 September 2013).

⁵⁶ Fowler, above n 51.

In response to the referendum, the Ticino Government presented a counterproposal.⁵⁷ The ban proposed by the Government prohibits face-covering headgear, but lists exceptions, such as helmets or carnival masks. This counterproposal was approved by 60 per cent of voters.⁵⁸ However, MPs ultimately voted for a ban that only prohibits full-face veils; specifically, the burqa and niqab. The reasoning for explicitly targeting full-face veils alone was to ensure that Muslim women were not put “on the same level as hooligans and masked demonstrators.”⁵⁹

In November 2015, the Swiss Parliament ruled that the proposed ban did not contradict Swiss federal law.⁶⁰ The ban subsequently entered into force on 1 July 2016. The ban, provided for in Article 9a of the Cantonal Constitution of Ticino, states that no person is allowed to wear a veil in public, except in places of public worship. It also prohibits forcing a person to wear a veil because of their gender.⁶¹ Any person found violating the ban faces a fine of up to 10,000 Swiss Francs.⁶² Tourists are not exempt from the law, despite a growing tourism market in Ticino.⁶³

Ticino is the first canton to successfully implement a regional ban on full-face veils in public spaces. The cantons of Aargau, Basel City, Bern, Fribourg, Schwyz and Solothurn were all unsuccessful in their attempts to bring in similar “burqa bans”.⁶⁴ As recently as May 2017, a motion to impose a ban on covering faces in public was rejected in the canton of Glarus.⁶⁵

⁵⁷ Similar to the power of the Federal Assembly; see the Swiss Federal Constitution, art 139(5).

⁵⁸ Lob, above n 50.

⁵⁹ “MPs in Swiss canton of Ticino back burqa ban”, above n 48.

⁶⁰ “MPs in Swiss canton of Ticino back burqa ban”, above n 48.

⁶¹ Jenny Gesley “Switzerland: Upper House of Parliament Rejects Burqa and Niqab Ban” (15 March 2017) Global Legal Monitor, Library of Congress <www.loc.gov>.

⁶² Legge sull’ordine pubblico [Public Order Act], Nov. 23, 2015, BU 2016, 194, § 5; see Gesley, above n 61.

⁶³ “MPs in Swiss canton of Ticino back burqa ban”, above n 48.

⁶⁴ Lob, above n 50; “Federal Court rejects school headscarf ban” (11 December 2015) Swiss Info <www.swissinfo.ch>; “Initiative targets religious headgear in schools” (20 February 2015) Swiss Info <www.swissinfo.ch>; and “Burka ban proposal thrown out by parliament” (28 September 2012) Swiss Info <www.swissinfo.ch>.

⁶⁵ “Swiss canton rejects call to ban the burqa” (8 May 2017) The Local <www.thelocal.ch>.

Cantons have similarly been unsuccessful at banning students from wearing headscarves in schools.⁶⁶ In the canton of St Gallen, the commune St Margrethen prohibited students from wearing religious garments to school. This prevented a Muslim student who wore the hijab from attending class. The Swiss Federal Court rejected the ban, stating that it was “not a prerequisite for effective teaching”.⁶⁷ In the canton of Valais, the Swiss People’s Party (SVP) have been moderately more successful. They launched an initiative in 2015 to ban children from wearing headscarves in public schools.⁶⁸ The initiative received 4,385 signatures. If Valais does not amend or replace the current law by 2019, the issue will be put to a referendum.⁶⁹

3 *European Court of Human Rights: Dahlab v Switzerland*

The leading international authority on the regulation of Islamic dress was *Dahlab v Switzerland*.⁷⁰ The decision was significant because the legal reasoning in *Dahlab* was used time and time again in future cases.⁷¹

(a) Procedural history

At the material time, the applicant Lucia Dahlab was a primary school teacher and a Swiss national residing in Geneva,⁷² a Swiss canton with a long history of secularism.⁷³ Dahlab, previously a Catholic, converted to Islam in 1991 and began to wear an Islamic headscarf whilst teaching in order to observe text from the Qur’an that requires women to

⁶⁶ “Initiative targets religious headgear in schools”, above n 64; and “Burka ban proposal thrown out by parliament”, above n 64.

⁶⁷ “Federal Court rejects school headscarf ban”, above n 64; and “Thousands demand headscarf ban in Valais” (22 February 2016) Swiss Info <www.swissinfo.ch>.

⁶⁸ “Initiative targets religious headgear in schools”, above n 64.

⁶⁹ “Thousands demand headscarf ban in Valais”, above n 67.

⁷⁰ *Dahlab*, above n 5.

⁷¹ Hilal Elver *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford University Press, New York, 2012) at 75.

⁷² *Dahlab*, above n 5, at 1.

⁷³ Müller, above n 24, at 78.

veil themselves in the presence of males.⁷⁴ Despite no complaints from parents or students, in June 1996, the Director General of Primary Education asked Dahlab to stop wearing the headscarf while teaching, on the basis that it was a breach of s 6 of the Public Education Act. Section 6 of the Act provides: “The public education system shall ensure that the political and religious beliefs of pupils and parents are respected”.⁷⁵

Dahlab appealed the Director General’s decision to the Geneva cantonal Government. The cantonal Government upheld the Director General’s decision, reasoning that:⁷⁶

Teachers...must endorse both the objectives of the State school system and the obligations incumbent on the education authorities, including the strict obligation of denominational neutrality...

The clothing in issue ... represents ..., regardless even of the appellant’s intention, a means of conveying a religious message in a manner which in her case is sufficiently strong ... to extend beyond her purely personal sphere and to have repercussions for the institution she represents, namely the State school system.

Dahlab next appealed to the Federal Court, alleging that the headscarf ban was in violation of Article 9 of the ECHR, as it interfered with the “inviolable core of her freedom of religion”.⁷⁷ The Federal Court upheld the cantonal Government’s decision. In its judgment, the Federal Court firstly examined Dahlab’s argument that the headscarf should be treated as regular piece of clothing, and therefore the ban is tantamount to prohibiting teachers from dressing as they please.⁷⁸ The Federal Court held there is no doubt that Dahlab wears the headscarf for religious purposes. It is therefore not an ordinary piece of clothing, but a “powerful religious symbol”.⁷⁹ They further determined

⁷⁴ Excluding immediate family and husbands; see McGoldrick, above n 4, at 5; and *Dahlab*, above n 5, at 1.

⁷⁵ McGoldrick, above n 4, at 124.

⁷⁶ *Dahlab*, above n 5, at 2.

⁷⁷ *Dahlab*, above n 5, at 2.

⁷⁸ *Dahlab*, above n 5, at 2; and McGoldrick, above n 4, at 122.

⁷⁹ *Dahlab*, above n 5, at 2.

that the headscarf is “not part of the inviolable core of freedom of religion”, even if “it is particularly important to the appellant”.⁸⁰

The Federal Court secondly considered the alleged breach of Article 9. Dahlab argued that the ban did not meet the requirement of being “prescribed by law”.⁸¹ In considering whether the ban had a sufficient basis in law, the Federal Court distinguished between serious and minor interferences with constitutional freedoms. Whilst serious interferences “must be clearly and unequivocally provided for” in law, minor offences do not require a precise basis in law. As the ban was of minor importance to the average person, “it is sufficient for the rule of conduct to derive from a more general obligation laid down by the law in the strict sense.”⁸² Furthermore, as civil servants “are bound by a special relationship of subordination to the public authorities”, the Federal Court held that their rights can be subject to greater limitations.⁸³

Dahlab further argued that there were no public-interest justifications for prohibiting her from wearing a headscarf. The Federal Court disagreed, and held that there were public-interest grounds for the headscarf ban. Most significantly, the potential interference with the religious beliefs of Dahlab’s students and their parents, and the principle of denominational neutrality in schools.⁸⁴ They also found that the ban was a proportional response. Whilst it forces Dahlab to make a difficult choice between her religion and her career, the headscarf is a “manifest religious attribute” and Dahlab’s students are young impressionable children. The Federal Court emphasised the secular nature of the State education system in Geneva, commenting that the image of the headscarf is difficult to reconcile with “the principle of non-identification with a particular faith”⁸⁵ and “the principle of gender equality”.⁸⁶ Lastly, the Federal Court

⁸⁰ *Dahlab*, above n 5, at 3.

⁸¹ ECHR, above n 1, art 9(2).

⁸² *Dahlab*, above n 5, at 3.

⁸³ *Dahlab*, above n 5, at 3; and McGoldrick, above n 4, at 124-5.

⁸⁴ *Dahlab*, above n 5, at 4-5.

⁸⁵ *Dahlab*, above n 5, at 6.

⁸⁶ *Dahlab*, above n 5, at 7.

discussed the floodgates principle. If they allowed headscarves to be worn, this would result in the acceptance of other powerful symbols of faith.⁸⁷

As her appeals were denied at cantonal and federal levels, Dahlab took her case to the ECtHR.

(b) Submissions

In her submission to the ECtHR, Dahlab argued that the headscarf ban was in breach of Article 9 of the ECHR (freedom of thought, conscience and religion),⁸⁸ because it violated her right to manifest her religion. Dahlab submitted that this infringement was not justified because it had no basis in law and did not pursue legitimate aims.⁸⁹ She believed the Federal Court “had erred in accepting that the measure had a sufficient basis in law”,⁹⁰ as s 6 of the Public Education Act did not specifically refer to teachers.⁹¹

Dahlab further argued the Federal Court had erred in finding that “there was a threat to public safety and to the protection of public order.”⁹² In support of this argument, Dahlab submitted that since March 1991, she had worn a headscarf whilst teaching without complaint from pupils, parents, or education authorities. The fact that no complaints had been made showed that there was no disruption to religious harmony and that all religious beliefs had been respected.⁹³

Dahlab further complained that the headscarf ban infringed her rights under Article 14 of the ECHR (prohibition of discrimination) taken together with Article 9. The headscarf

⁸⁷ *Dahlab*, above n 5, at 7.

⁸⁸ ECHR, above n 1.

⁸⁹ *Dahlab*, above n 5, at 10.

⁹⁰ *Dahlab*, above n 5, at 7.

⁹¹ Also submitted that s 120(2) of the Public Education Act did not clarify the situation; see *Dahlab*, above n 5, at 10.

⁹² *Dahlab*, above n 5, at 7.

⁹³ *Dahlab*, above n 5, at 11.

ban was discriminatory towards women because Muslim men were not subject to the same restrictions.⁹⁴

In response, the Swiss Government argued that the headscarf ban did not amount to an interference with her right to freedom to manifest her religion.⁹⁵ They submitted that Dahlab could teach “infant classes at private schools” because they were not bound by the secularism requirement.⁹⁶ Dahlab contradicted this statement. She claimed private schools were not accessible to her and that “State schools had a virtual monopoly on infant classes.”⁹⁷

In the event that the headscarf ban did amount to an interference with Dahlab’s right to freedom to manifest her religion, the Government maintained that it was justified. Firstly, because it had a basis in law.⁹⁸ Article 27(3) of the Swiss Federal Constitution reads: “[i]t shall be possible for members of all faiths to attend State schools without being affected in any way their freedom of conscience or belief.”⁹⁹ This secular principle applies to every State school in Switzerland. The Government also relied on a Federal Court judgment concerning Article 27(3), in which the Federal Court held that the presence of crucifixes in classrooms did not comply with denominational neutrality.¹⁰⁰

Secondly, the Government argued that the ban pursued two legitimate aims: denominational neutrality in schools and religious harmony.¹⁰¹

Thirdly, it was submitted by the Government that the ban was necessary in a democratic society. As a civil servant, Dahlab was representative of the State. As such,

⁹⁴ *Dahlab*, above n 5, at 8.

⁹⁵ *Dahlab*, above n 5, at 8.

⁹⁶ *Dahlab*, above n 5, at 9.

⁹⁷ *Dahlab*, above n 5, at 10.

⁹⁸ Also discussed s 6 and s 120(2) of the Public Education Act, the latter which establishes civil servants have to be laypersons; see *Dahlab*, above n 5, at 9.

⁹⁹ *Dahlab*, above n 5, at 7.

¹⁰⁰ *Dahlab*, above n 5, at 9.

¹⁰¹ *Dahlab*, above n 5, at 9.

“her conduct should not suggest that the State identified itself with one religion or another.”¹⁰² The principle of State neutrality was important because “it made it possible to preserve individual freedom of conscience in a pluralistic democratic society.”¹⁰³ The Government also focused on Dahlab’s role as a teacher, emphasizing that she was an important role model for her young pupils.

(c) Judgement

The ECtHR firstly discussed the alleged violation of Article 9. After noting that statutes do not have to be precisely worded in order to avoid excessive rigidity, the ECtHR found that ss 6 and 120(2) of the Public Education Act were “formulated with sufficient precision to enable the citizen to regulate his conduct”.¹⁰⁴ The ban therefore had a sufficient basis in law.¹⁰⁵ The ECtHR also found that the aims pursued by the ban were legitimate within the meaning of Article 9(2).¹⁰⁶

Regarding Article 9, the ECtHR assessed whether the ban was necessary in a democratic society. The ECtHR weighed Dahlab’s right “to manifest her religion against the need to protect pupils by preserving religious harmony”,¹⁰⁷ and held that the ban was a proportionate and justified response. Whilst the ECtHR accepted that it was difficult to assess the impact that Dahlab’s “headscarf may have on the freedom of conscience and religion of very young children”, they concluded that it could have a “proselytising effect”.¹⁰⁸ Further, the ECtHR believed that the headscarf has connotations of gender inequality. These connotations are difficult to reconcile with the principles of equality and non-discrimination that teachers in State schools are expected to convey to their students.¹⁰⁹

¹⁰² *Dahlab*, above n 5, at 9.

¹⁰³ *Dahlab*, above n 5, at 9.

¹⁰⁴ *Dahlab*, above n 5, at 11.

¹⁰⁵ *Dahlab*, above n 5, at 12.

¹⁰⁶ *Dahlab*, above n 5, at 12.

¹⁰⁷ The Federal Court undertook a similar balancing exercise, weighing the right to freedom to manifest religion against protecting the principle of State neutrality; see *Dahlab*, above n 5, at 13.

¹⁰⁸ *Dahlab*, above n 5, at 13.

¹⁰⁹ *Dahlab*, above n 5, at 13.

The ECtHR also considered Dahlab’s submission that the ban “amounted to discrimination on the ground of sex within the meaning of Article 14”.¹¹⁰ Under Article 14, the ECtHR held that a difference in treatment will be discriminatory if it does not pursue any legitimate aims or it is not a proportionate response.¹¹¹ Based on the facts and earlier reasoning, the ECtHR held that the ban was aimed at Dahlab in order to protect the principle of State neutrality, not because she was female. The ban would equally apply to men in similar circumstances. The ECtHR therefore held there was no discrimination on the ground of sex.¹¹²

As the ECtHR concluded that Dahlab’s claims under Article 9 and Article 14 were ill-founded,¹¹³ her application was deemed inadmissible under Article 35(4).¹¹⁴

4 *A nationwide ban on full-face veils?*

After the success of the cantonal ban on full-face veils in public in Ticino, a nationwide ban was proposed at a federal level by Walter Wobmann, a member of the SVP.¹¹⁵ Wobmann believed a nationwide ban would “maintain public order and respect for the dignity of women.”¹¹⁶ A draft bill, composed by Wobmann, was presented to Parliament in September 2016. The draft bill was similar to the measure proposed in the Ticino 2013 referendum; it proposed to ban the burqa and niqab in public areas and to amend the Swiss Constitution accordingly.¹¹⁷ The bill narrowly passed in Switzerland’s

¹¹⁰ *Dahlab*, above n 5, at 14.

¹¹¹ *Dahlab*, above n 5, at 14.

¹¹² *Dahlab*, above n 5, at 14.

¹¹³ *Dahlab*, above n 5, at 13.

¹¹⁴ Under Article 35(4), the Court can reject any application it considers inadmissible; see *Dahlab*, above n 5, at 14-15.

¹¹⁵ Wobmann was responsible for the campaign to outlaw building new minarets in 2009; see “Switzerland moves a step closer to voting on nationwide burqa ban” (13 September 2017) The Local <www.thelocal.ch>; and Michael Shields and John Miller “Ban on face veils advances in Swiss parliament” (28 September 2016) Reuters <www.reuters.com>.

¹¹⁶ “Switzerland edges towards nationwide burqa ban” (28 September 2016) The Local <www.thelocal.ch>.

¹¹⁷ Gesley, above n 61.

lower house.¹¹⁸ It then went before Switzerland’s upper house, the Swiss Council of States in March 2017.¹¹⁹ The bill was definitively rejected by 26 votes in favour and nine against, with four abstentions.¹²⁰ The Swiss Council of States was acting on the advice of a commission on the subject, who advised that a nationwide ban was unnecessary since so few people wear veils in Switzerland.¹²¹ Many agreed with the commission, saying veiling was not a widespread issue. Andrea Caroni, a senator from Appenzell Ausserrhoden, commented that “[t]here are probably more people who hike naked than wear the burqa”.¹²² Furthermore, the competence to make these kinds of laws should lie with the individual cantons.¹²³

In March 2016, the Egerkingen committee, led by Wobmann, launched an initiative to collect signatures for a referendum on the issue of a nationwide “burqa ban”.¹²⁴ After the bill’s failure, the committee had until September 2017 to gather minimum number of signatures needed to launch a popular vote in Switzerland, which was 100,000 signatures. Despite apparent wide spread support, the committee initially struggled to gather signatures. They eventually did reach the 100,000 signature threshold, but only two days before deadline.¹²⁵

The committees’ success means that their initiative can be lodged with the Swiss Federal Government and a public vote will be held.¹²⁶ Notwithstanding this success, a nationwide “burqa ban” in Switzerland is by no means certain. The public still need to

¹¹⁸ 88 votes in favour and 87 votes against; see “Switzerland edges towards nationwide burqa ban”, above n 116.

¹¹⁹ The Swiss Council of States is a commission composed of representatives from all 26 cantons; see “Switzerland moves toward nationwide burqa ban” *The Independent* (London, England, 29 September 2016) at 29.

¹²⁰ “Nationwide burka ban rejected by Swiss government” (9 March 2017) *Le News* <lenews.ch>.

¹²¹ “Swiss senate refuses nationwide burqa ban” (9 March 2017) *The Local* <www.thelocal.ch>.

¹²² Naked hiking is banned in Appenzell Ausserrhoden; see “Swiss senate refuses nationwide burqa ban”, above n 121.

¹²³ Gesley, above n 61.

¹²⁴ “Switzerland moves a step closer to voting on nationwide burqa ban”, above n 115.

¹²⁵ “Switzerland moves a step closer to voting on nationwide burqa ban”, above n 115.

¹²⁶ If all is found to be in order; see “Switzerland moves a step closer to voting on nationwide burqa ban”, above n 115.

vote yes in a referendum. The ban is likely to be successful in a public vote, as a poll taken in August 2016 showed 71 per cent of Swiss voters support a nationwide burqa ban.¹²⁷ However, the Swiss Federal Government would still need to draft a proposal, which will only be made into law after approval from Parliament.¹²⁸

¹²⁷ Shields and Miller, above n 115; and “Nationwide burka ban rejected by Swiss government”, above n 120.

¹²⁸ See Swiss Federal Constitution, art 139(4): “If the Federal Assembly rejects the initiative, it shall submit it to a vote of the People; the People shall decide whether the initiative should be adopted. If they vote in favour, the Federal Assembly shall draft the corresponding bill.”; and “Swiss parliament approves draft bill on national burqa ban” DW <www.dw.com>.

IV Turkey

This section has three parts. Part A firstly discusses the secular foundations of the Turkish Republic. This secularism forms the basis of Turkey’s ban on headscarves in public institutions. Part B addresses the legal basis of this ban, and the decisions made by the Chamber¹²⁹ and the Grand Chamber¹³⁰ on appeal in *Şahin v Turkey*. Part C lastly discusses the gradual removal of the headscarf ban that has taken place in Turkey from 2008 to 2017.

A Secularism and Muslims in Turkey

In order to understand Turkey’s ban on headscarves in public institutions, it is important to understand secularism in Turkey. The Turkish Republic was founded by Mustafa Kemal Atatürk in 1923 after the collapse of the Ottoman Empire.¹³¹ Atatürk served as the first president of Turkey until his death in 1938. During his time as president, Atatürk instituted revolutionary reforms that were intended to modernise Turkey. Influenced by the French principle of *laïcité*,¹³² many of Atatürk’s reforms were aimed at separating the State from religion.¹³³ For example, in 1926, the existing legal system, a codified variant of Islamic law, was replaced with a secular one.¹³⁴ Secularism, or *laiklik*,¹³⁵ was explicitly incorporated into the Turkish Constitution in 1937.¹³⁶

¹²⁹ *Şahin* (Section IV), above n 7.

¹³⁰ *Şahin* (Grand Chamber), above n 7.

¹³¹ Muftuler-Bac, above n 8, at 423.

¹³² Ali Ulusoy “The Islamic Headscarf Problem before Secular Legal Systems: Factual and Legal Developments in Turkish, French and European Human Rights Laws” (2007) 9 *European Journal of Migration and Law* 419 at 420.

¹³³ The Sultanate (1922) and caliphate (1924) were abolished, religious orders were prohibited (1925), and the article that deemed Islam the official state religion was annulled (1928); see Gulce Tarhan “Roots of the Headscarf Debate: Laicism and Secularism in France and Turkey” (2011) 4 *Journal of Political Inquiry* 1 at 12-13.

¹³⁴ Robert Hefner “Islam and Plurality, Old and New” (2014) 51(6) *Soc* 636 at 641.

¹³⁵ The separation between state and religion; see Tarhan, above n 133, at 10.

¹³⁶ Secularism explicitly upheld in the second article of the Constitution of the Republic of Turkey; see Tarhan, above n 133, at 13.

Secularism is therefore a founding principle of Turkey.¹³⁷ Today, it still defines the relationship between the State and religion. Article 2 of the current Turkish Constitution defines the Republic of Turkey as “a democratic, secular (*laik*) and social State”.¹³⁸

Despite being a secular State since 1923, the population of Turkey is overwhelmingly Muslim.¹³⁹ A recent survey found that 60 per cent of Turkish women wear a headscarf.¹⁴⁰

B Turkey and Islamic Dress

1 Ban on headscarves in public institutions

Dress reforms were an important feature of Atatürk’s modernisation of Turkey. For example, the fez, a type of hat traditionally worn by men in Turkey, was banned by the Headgear Act in 1925.¹⁴¹ However, Atatürk did not aim dress reforms at women. Despite making an effort to distance Turkey from veiling,¹⁴² there was no explicit ban against the headscarf under Atatürk.¹⁴³ It was not until the late 1970s and early 1980s that regulations banning the headscarf began to appear.¹⁴⁴

The first headscarf ban in Turkey was initiated by a Government “circular on the dress code for governmental employees” in 1978, in which female employees were asked to not cover their hair.¹⁴⁵ The first piece of legislation prohibiting headscarves was a set

¹³⁷ *Şahin* (Section IV), above n 7, at [30].

¹³⁸ Turkish Constitution, art 2.

¹³⁹ McGoldrick, above n 4, at 132.

¹⁴⁰ “Turkish people’s profile revealed in new survey” (5 January 2015) Hurriyet Daily News <www.hurriyetdailynews.com>.

¹⁴¹ Law no 671; see Hashmi, above n 6, at 427.

¹⁴² Banning the Islamic veil in the 1930s; see McGoldrick, above n 4, at 133; and Hashmi, above n 6, at 427.

¹⁴³ Ulusoy, above n 132, at 423.

¹⁴⁴ *Şahin* (Section IV), above n 7, at [35].

¹⁴⁵ There was no law explicitly prohibiting wearing headscarves in education institutions, although it was usually considered inappropriate by many. See Tarhan, above n 133, at 23; and Zeynep Akbulut “Veiling as self-disciplining: Muslim women, Islamic discourses, and the headscarf ban in Turkey” (2015) 9(3) *Contemporary Islam* 433 at 433.

of dress and appearance regulations issued by the Cabinet in 1981, following a military coup in 1980.¹⁴⁶ These regulations required students and staff at public organisations to dress in ordinary and modern dress. They also prohibited veils in State education institutions.¹⁴⁷ preventing female students and staff of universities from wearing headscarves at public universities.¹⁴⁸ In 1982, the Higher Education Authority issued a circular banning headscarves from lecture theatres.¹⁴⁹ This extended the headscarf ban to all universities, both public and private.¹⁵⁰ Despite this extension, application of the ban was inconsistent; implementation varied between one university to another.¹⁵¹

The headscarf became a political issue in the 1990s. This was partially due to the increase in the number of students wearing headscarves, but it was also attributed to the rising influence of Islam in politics.¹⁵² In an attempt to overturn the headscarf ban in universities, the Turkish Government enacted s 16 of the Higher-Education Act in 1988.¹⁵³ The Act required “modern dress” but permitted the headscarf in higher-education institutions on the basis of freedom of religion.¹⁵⁴ However, in 1989, the Constitutional Court ruled that the law was unconstitutional. This was primarily because the law violated the principle of secularism.¹⁵⁵ In the judgment, the judges explained that secularism had acquired constitutional status and was an essential condition for democracy, freedom of religion, and equality before the law. Furthermore, they noted that freedom of religion does not guarantee any one person the right to wear any particular

¹⁴⁶ The Turkish Army took control of the government and prepared a new constitution, the 1982 Constitution, which was designed to promote *laiklik*. Article 2 of the 1982 Constitution announced secularism as a founding principle of Turkey; see Tarhan, above n 133, at 24.

¹⁴⁷ *Şahin* (Section IV), above n 7, at [34].

¹⁴⁸ 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* (Briefing Paper, 29 June 2004) at 27.

¹⁴⁹ *Şahin* (Section IV), above n 7, at [34].

¹⁵⁰ Tarhan, above n 133, at 24.

¹⁵¹ “Veiling in Turkey” ReOrienting the Veil <veil.unc.edu>.

¹⁵² Ulusoy, above n 132, at 421.

¹⁵³ Higher-Education Act (Law no 2547).

¹⁵⁴ “A veil or headscarf covering the neck and hair may be worn out of religious conviction”, see Higher-Education Act (Law no 2547), s 16; and Tarhan, above n 133, at 25.

¹⁵⁵ Ulusoy, above n 132, at 421; and Hashmi, above n 6, at 428.

religious attire. Once in the public sphere, freedom of religion could be constrained to defend secularism. The Constitutional Court also expressed concern that “when a particular dress code was imposed on individuals in reference to a religion”, it could potentially result in discrimination between Muslims who choose to wear the headscarf, and Muslims who choose not to wear it. This point was of particular concern to the judges, as the majority of the population in Turkey are Muslim.¹⁵⁶

In October 1990, the Turkish Government once again attempted to remove the headscarf ban by enacting s 17 of the Higher-Education Act.¹⁵⁷ This law held that “[c]hoice of dress shall be free in higher-education institutions”, provided that the particular dress was not forbidden by any laws currently in force.¹⁵⁸ In a judgment given in April 1991, the Constitutional Court did not overrule the law. The judges deemed that the law was consistent with the Turkish Constitution because it did not allow headscarves to be worn in universities, as headscarves were prohibited by current laws.¹⁵⁹

Following military intervention in 1997 and subsequent policy recommendations from the military members of the National Security Council, the headscarf ban was strictly implemented at all universities.¹⁶⁰ Any woman wearing a headscarf was unable to register for or teach at university. It was also more widely enforced in other public institutions.¹⁶¹

Unlike France, there is no national law directly prohibiting women from wearing the headscarf in Turkey. The headscarf ban has instead been accomplished by the various regulations mentioned and interpretations of the decisions of the Constitutional Court, which upheld the headscarf ban on the basis of secularism. For example, both decisions

¹⁵⁶ *Şahin* (Section IV), above n 7, at [36].

¹⁵⁷ Higher-Education Act (Law no 2547), s 17.

¹⁵⁸ Tarhan, above n 133, at 25.

¹⁵⁹ Ulusoy, above n 132, at 421; and Hashmi, above n 6, at 428.

¹⁶⁰ Sema Akboga “Turkish civil society divided by the headscarf ban” (2014) 21(4) *Democratization* 610 at 612; and Akbulut, above n 145, at 433-4.

¹⁶¹ Human Rights Watch, above n 148.

of the Constitutional Court have been used by educational institutions as a statutory basis for the headscarf ban.¹⁶²

2 *European Court of Human Rights: Şahin v Turkey*

The headscarf ban was solidified by the decision of the ECtHR in *Şahin v Turkey*.¹⁶³

(a) Procedural history

In 1998, an application against Turkey was lodged with the European Commission by Leyla Şahin. Şahin, a young Muslim woman who “considers it her religious duty to wear the Islamic headscarf”,¹⁶⁴ was a student at the University of Istanbul’s Medical School. In February 1998, the university issued a circular prohibiting students who wear the Islamic headscarf from attending lectures, courses or tutorials. As a result of this circular, Şahin was subsequently denied access to two exams and a lecture because she was wearing a headscarf.¹⁶⁵ Disciplinary proceedings were brought against Şahin in May 1998 and she was issued with a warning for contravening the dress code.¹⁶⁶

In July 1998, Şahin lodged an application with the Istanbul Administrative Court to have the circular set aside on the grounds that there was no statutory basis for the ban. The Administrative Court dismissed the application, holding that the university had the power to regulate students’ dress as long as it was exercised in accordance with relevant law and judgments of the Constitutional Court.¹⁶⁷ Şahin appealed this decision to the Supreme Administrative Court, but her appeal was dismissed.¹⁶⁸

¹⁶² Hashmi, above n 6, at 428-9.

¹⁶³ *Şahin* (Section IV), above n 7; and Hashmi, above n 6, at 429.

¹⁶⁴ *Şahin* (Section IV), above n 7, at [14].

¹⁶⁵ *Şahin* (Section IV), above n 7, at [17].

¹⁶⁶ *Şahin* (Section IV), above n 7, at [17]–[18].

¹⁶⁷ *Şahin* (Section IV), above n 7, at [14]–[15].

¹⁶⁸ *Şahin* (Section IV), above n 7, at [16].

Due to the fact that Şahin continued to wear the headscarf, she was suspended from the university for a semester in April 1999.¹⁶⁹ In June 1999, Şahin lodged another application with the Istanbul Administrative Court, requesting that the Administrative Court quash the suspension decision. Her application was dismissed.¹⁷⁰ Şahin appealed this decision, but as all disciplinary penalties against Şahin had since been revoked under an amnesty law,¹⁷¹ the Supreme Administrative Court held it was unnecessary to examine her appeal.¹⁷²

(b) Submissions

Şahin’s application was transmitted to the ECtHR in November 1998.¹⁷³ Relying on Article 9 of the ECHR (freedom of thought, conscience and religion),¹⁷⁴ Şahin alleged that the headscarf ban in universities was an unjustified breach of her right to freedom of religion. In particular, she felt the ban breached her right to manifest her religion.¹⁷⁵

Rights guaranteed by Article 9 can only be subject to limitations which are prescribed by law and that pursue a legitimate aim and are necessary in a democratic society.¹⁷⁶ In her submission, Şahin firstly argued that the headscarf ban was not prescribed by law. She explained that the ban had no statutory basis because the university had based it on an incorrect interpretation of case law from the Constitutional Court.¹⁷⁷

Secondly, whilst Şahin accepted that the ban on headscarves could pursue one of the legitimate aims listed in Article 9,¹⁷⁸ she did not believe it was necessary in a

¹⁶⁹ *Şahin* (Section IV), above n 7, at [22] and [24].

¹⁷⁰ *Şahin* (Section IV), above n 7, at [23].

¹⁷¹ Law no 4584 (28 June 2000) provided for students to be given amnesty for penalties imposed for disciplinary offences and for any resulting disability to be annulled; see *Şahin* (Grand Chamber), above n 7, at [26].

¹⁷² *Şahin* (Section IV), above n 7, at [24].

¹⁷³ *Şahin* (Section IV), above n 7, at [3].

¹⁷⁴ ECHR, above n 1.

¹⁷⁵ *Şahin* (Section IV), above n 7, at [64].

¹⁷⁶ ECHR, above n 1, art 9.

¹⁷⁷ *Şahin* (Section IV), above n 7, at [72].

¹⁷⁸ *Şahin* (Section IV), above n 7, at [83].

democratic society.¹⁷⁹ In support of this argument, Şahin submitted that she wore the headscarf in order to comply with a religious obligation. It was neither ostentatious nor in protest of secularism.¹⁸⁰ Furthermore, the principles of secularism and neutrality in education were not inherently incompatible with the Islamic headscarf. Şahin spent four years studying at the University of Bursa whilst wearing a headscarf, and she stated that it had not been shown how “wearing a headscarf had caused any disruption, disturbance or threat to the public order”.¹⁸¹ A ban on headscarves in all universities to maintain secularism and neutrality was therefore not a proportionate response. Lastly, Şahin argued that the ban was discriminatory towards Muslim women and not applied uniformly by universities. For example, Jewish and Christian students were not prohibited from wearing, respectively, skullcaps or crucifixes.¹⁸²

Şahin further alleged that the ban infringed her rights under Article 2 of Protocol No. 1 (the right to education), Article 14 (prohibition of discrimination) taken together with Article 9 (freedom of thought, conscience and religion), and Articles 8 (right to respect for private and family life) and 10 (freedom of expression) of the ECHR.¹⁸³

In response, the Turkish Government denied Şahin’s allegations. They firstly argued that there had been an interference with Şahin’s right to freedom to manifest her religion.¹⁸⁴ In the alternative that the headscarf ban was found to be an interference, the Turkish Government submitted that it was prescribed by law,¹⁸⁵ that it pursued several legitimate aims,¹⁸⁶ and that it was necessary in a democratic society. Regarding the latter, the Government firstly emphasized that the rights guaranteed in Article 9 are not

¹⁷⁹ Şahin (Section IV), above n 7, at [89].

¹⁸⁰ Şahin (Section IV), above n 7, at [85].

¹⁸¹ Şahin (Section IV), above n 7, at [86].

¹⁸² Şahin (Section IV), above n 7, at [89].

¹⁸³ Şahin (Section IV), above n 7, at [116].

¹⁸⁴ Şahin (Section IV), above n 7, at [69].

¹⁸⁵ Şahin (Section IV), above n 7, at [73].

¹⁸⁶ The limitation helped to maintain public order, uphold the principle of secularism and protect the rights and freedoms of persons; see Şahin (Section IV), above n 7, at [82].

absolute.¹⁸⁷ Secondly, they emphasized the importance of secularism in Turkey in comparison to other democracies.¹⁸⁸ Thirdly, the Government described all the different forms of Muslim dress and stated how it was difficult to reconcile these with the principle of neutrality and secularism in State education.¹⁸⁹ They also noted that students were free to wear the headscarf outside of schools,¹⁹⁰ and that religious duty was not the same as religious freedom.¹⁹¹ Lastly, if the right to wear headscarves were judicially recognised, the Government feared that this would open the door to other provisions of Sharia that were “wholly incompatible with the principle of secularism”.¹⁹²

(c) Judgment

On the facts, the ECtHR firstly found that the headscarf ban was a limitation of Şahin’s right to manifest her religion, as it placed restrictions on where and how she could wear the Islamic headscarf.¹⁹³

Secondly, the ECtHR determined that the headscarf ban was prescribed by Turkish law. Section 17 of the Higher-Education Act constituted a legal basis for the circular prohibiting headscarves that was issued at the University of Istanbul. The ECtHR also relied on the well-settled case law of the Supreme Administrative Court and the Constitutional Court, which is considered a valid source of law in Turkey.¹⁹⁴ Furthermore, the ECtHR determined that the law was accessible.¹⁹⁵ Despite Şahin’s claim that universities did not follow a uniform practice, the ECtHR also held it was foreseeable,¹⁹⁶ as the regulation existed well before Şahin enrolled at the University.

¹⁸⁷ *Şahin* (Section IV), above n 7, at [90].

¹⁸⁸ *Şahin* (Section IV), above n 7, at [91].

¹⁸⁹ *Şahin* (Section IV), above n 7, at [92].

¹⁹⁰ *Şahin* (Section IV), above n 7, at [93].

¹⁹¹ *Şahin* (Section IV), above n 7, at [92].

¹⁹² The Turkish government listed the status of women and torture as punishment for crime as examples of Sharia law that were not compatible with the Turkish Convention; see *Şahin* (Section IV), above n 7, at [94].

¹⁹³ Prescribed by Article 9; see *Şahin* (Section IV), above n 7, at [74].

¹⁹⁴ *Şahin* (Section IV), above n 7, at [77]–[78].

¹⁹⁵ *Şahin* (Section IV), above n 7, at [81].

¹⁹⁶ *Şahin* (Section IV), above n 7, at [72].

Şahin would have known upon enrolment that she would be subject to regulations on wearing her headscarf.¹⁹⁷

Thirdly, whilst it was accepted by both parties that the headscarf ban could have a legitimate aim, the ECtHR held that the ban primarily pursued two legitimate aims: protecting public order and the rights and freedoms of others.¹⁹⁸

Lastly, the ECtHR assessed the regulations imposed by the University of Istanbul prohibiting headscarves as “justified in principle and proportionate to the aims pursued”, and therefore, necessary in a democratic society.¹⁹⁹ The ban was found to be justified by the ECtHR firstly because it was based on existing legislation and case law regulating the wearing of headscarves,²⁰⁰ and secondly, because it was intended to protect pluralism in Turkish society. Based on the dual principles of secularism and equality, the ECtHR reasoned that the ban protected citizens from external pressures,²⁰¹ for example, the potential proselytising effect of wearing a headscarf on those who have chosen not to wear it. The ECtHR also noted that the ban was a tool in the fight against religious fundamentalism.²⁰²

Since the limitation on Şahin’s right to manifest her religion was prescribed by law, pursued legitimate aims, and was necessary in a democratic society, there was no violation of Article 9 of the Convention.²⁰³

The ECtHR did not address the three additional complaints under Article 2 of Protocol No. 1, Article 14 taken together with Article 9, and Articles 8 and 10 of the ECHR, as

¹⁹⁷ *Şahin* (Section IV), above n 7, at [79].

¹⁹⁸ *Şahin* (Section IV), above n 7, at [84].

¹⁹⁹ *Şahin* (Section IV), above n 7, at [114].

²⁰⁰ *Şahin* (Section IV), above n 7, at [112].

²⁰¹ *Şahin* (Section IV), above n 7, at [105].

²⁰² Elisabeth Johnson “The Headscarf Ban in Turkish Universities is a Safeguard or Violation?: Analysis of the ECHR Judgment in *Leyla Şahin v. Turkey*” (Master of Arts Thesis, American University (Washington, DC), 2008) at 55.

²⁰³ *Şahin* (Section IV), above n 7, at [115].

they found that no separate question arose. “[T]he relevant circumstances are the same as those examined in relation to Article 9, in respect of which the ECtHR has found no violation.”²⁰⁴

In September 2004, in accordance with Article 43 of the ECHR,²⁰⁵ Şahin asked for the case to be referred to the Grand Chamber. Her request was accepted. The Grand Chamber held a hearing in May 2005 and released their judgment in November 2005.

In its judgment, the Grand Chamber similarly held that there had been no violation of Article 9.²⁰⁶ However, contrary to the Chamber, the Grand Chamber held that the complaint under Article 2 of Protocol No. 1 should be considered separately from the complaint under Article 9.²⁰⁷

Şahin alleged that her right to education had been violated.²⁰⁸ The headscarf ban prevented her from attending examinations and a lecture,²⁰⁹ and from pursuing her education in Turkey in a way that was consistent with her religious beliefs.²¹⁰ Şahin argued that she had previously pursued her university studies for over four years whilst wearing a headscarf and encountered no difficulties, so her headscarf was clearly not a threat to public order.²¹¹

In response, the Turkish Government submitted that there had been no violation of Article 2 of Protocol No. 1.²¹² Despite no specific reference being made to higher

²⁰⁴ Şahin (Section IV), above n 7, at [117].

²⁰⁵ “Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber”; see Article 43 ECHR.

²⁰⁶ By 16 votes to 1, with Judge Tulkens dissenting; see Şahin (Grand Chamber), above n 7, at [123] and [166].

²⁰⁷ Şahin (Grand Chamber), above n 7, at [129]–[130].

²⁰⁸ Şahin (Grand Chamber), above n 7, at [131].

²⁰⁹ Şahin (Grand Chamber), above n 7, at [143].

²¹⁰ Johnson, above n 202, at 58.

²¹¹ Şahin (Grand Chamber), above n 7, at [145].

²¹² Şahin (Grand Chamber), above n 7, at [126].

education, the ECtHR determined that higher education institutions came within the scope of Article 2 of Protocol No. 1.²¹³

In addressing the complaint, the ECtHR held that Şahin’s right to education had been restricted.²¹⁴ However, by applying similar reasoning that was used in reference to the Article 9 complaint,²¹⁵ the ECtHR found that the restriction was prescribed by law, pursued the legitimate aims of maintaining public order and protecting the rights and freedoms of others,²¹⁶ and was necessary in a democratic society. The State was entitled to regulate the right to education in order to ensure public order and the freedom of others.²¹⁷

The ban was regarded as proportional by the ECtHR because it did not prevent students from “performing the duties imposed by the habitual forms of religious observance”, the interests of the various parties had been weighed up, and the ban was accompanied by safeguards that satisfactorily protected students’ interests.²¹⁸ The ECtHR further noted that Şahin was aware of the headscarf ban and could have reasonably foreseen the risks that this posed.²¹⁹

In conclusion, the ECtHR found there was no violation of Article 2 of Protocol No. 1.²²⁰ The ECtHR additionally determined there was no violation of Articles 8, 10 and 14.²²¹

²¹³ *Şahin* (Grand Chamber), above n 7, at [141-2].

²¹⁴ *Şahin* (Grand Chamber), above n 7, at [157].

²¹⁵ Johnson, above n 202, at 58.

²¹⁶ *Şahin* (Grand Chamber), above n 7, at [158].

²¹⁷ *Şahin* (Grand Chamber), above n 7, at [152]–[162].

²¹⁸ *Şahin* (Grand Chamber), above n 7, at [159].

²¹⁹ *Şahin* (Grand Chamber), above n 7, at [160].

²²⁰ *Şahin* (Grand Chamber), above n 7, at [162].

²²¹ *Şahin* (Grand Chamber), above n 7, at [166].

3 2008 and onwards: lifting the “headscarf ban”

Since *Şahin v Turkey*, numerous attempts have been made to lift the headscarf ban. These reforms were largely orchestrated by Erdoğan, the leader and co-founder of the pro-Islamic²²² AKP.

AKP won the November 2002 elections by a landslide, receiving 34.2 per cent of the vote and nearly two-thirds of parliamentary seats.²²³ Erdoğan was initially barred from taking political office,²²⁴ which prevented him from holding elected office as Prime Minister.²²⁵ Erdoğan was eventually elected to Turkish Parliament as Prime Minister after his party amended the Turkish Constitution in February 2003, allowing him to stand.²²⁶

In February 2008, the AKP proposed constitutional amendments in order to lift the headscarf ban in universities. This would involve changing two articles of the Turkish Constitution relating to access to education and amend existing legislation governing dress codes at universities.²²⁷ The suggested amendments were passed in Parliament with a super-majority. However, the Constitutional Court annulled the amendments,²²⁸ ruling that Parliament had violated the principle of secularism, which is constitutionally enshrined.²²⁹

²²² Muftuler-Bac, above n 8, at 424.

²²³ AKP won 363 seats out of a 550 seat assembly; see Soner Cagaptay “The November 2002 Elections and Turkey’s New Political Era” (2002) 6(4) Middle East Review of International Affairs 42 at 42.

²²⁴ Erdoğan initially was barred from standing in parliament due to a previous conviction for inciting religious hatred, which he received for reciting a poem in public in 1998; see Jonny Dymon “Turkey’s leader finally gets into parliament” *The Guardian* (online ed, 10 March 2003); and Muftuler-Bac, above n 8 at 424.

²²⁵ Article 109 of the Turkish Constitution requires the Prime Minister to be a Member of Parliament; see Cagaptay, above n 223, at 44.

²²⁶ Dymon, above n 224; and Muftuler-Bac, above n 8, at 424.

²²⁷ Articles 10 and 42 of the Turkish Constitution; see Andrew Arato “The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition” (2010) 17(2) *Constellations* 345 at 345.

²²⁸ Akbulut, above n 145, at 434.

²²⁹ “Turkey: Constitutional Court Ruling Upholds Headscarf Ban” (5 June 2008) Human Rights Watch <www.hrw.org>.

As a result of AKP’s attempt to lift the university ban on headscarves, in March 2008 chief prosecutor Aburrahman Yalcinkaya asked the Constitutional Court to close down the AKP for violating the principle of secularism.²³⁰ The Constitutional Court agreed to hear the case. In July 2008, the judges voted by six to five to shut down AKP and ban its leading figures from politics. However, seven votes are needed in order to dissolve a political party. The Constitutional Court instead cut off State funding to AKP, ruling that its’ attempt to lift the headscarf ban at universities was anti-secular.²³¹ Erdoğan was particularly criticised.²³²

In 2010, the AKP prepared a constitutional reform package consisting of 27 articles amending the 1982 Constitution.²³³ The amendments were described as democratisation measures. Some were widely accepted, but others were contested, for example, the amendment making it harder to close down political parties.²³⁴ In Parliament, the AKP majority voted in favour of the amendments and the three parliamentary opposition parties voted against them. This result, less than a two-thirds majority, was not enough for the text to be adopted definitively. Consequently, in accordance with Article 175 of the Constitution, a referendum was called.²³⁵ The referendum was set for 12 September 2010, the 30th anniversary of the 1980 military coup. The results showed 58 per cent majority of voters accepted the constitutional reform package.²³⁶

²³⁰ Transcript of the discussion with Mark Parris, Cagri Erhan, Ibrahim Kalin, and Murat Yetkin “The Implications of Turkey’s Constitutional Court Decision on the Justice and Development Party (AKP)” (Brookings Institution, Washington, D.C., 6 August 2008) at 3; and Robert Tait “Turkey’s governing party avoids being shut down for anti-secularism” *The Guardian* (online ed, 31 July 2008).

²³¹ AKP’s activities violated article 68 of the Constitution; see Matthew Weaver “Turkish prime minister’s attempt to lift ban on headscarves ruled anti-secular” *The Guardian* (online ed, 24 October 2008).

²³² Weaver, above n 231.

²³³ Ersin Kalaycıoğlu “Kulturkampf in Turkey: The Constitutional Referendum of 12 September 2010” (2012) 17(1) *South European Society and Politics* 1 at 5.

²³⁴ Robert Tait “Turkish constitutional reform plans anger judges” *The Guardian* (online ed, 22 March 2010).

²³⁵ Kalaycıoğlu, above n 233, at 6.

²³⁶ Kalaycıoğlu, above n 233, at 1.

In October 2010, the Higher Education Board took the first step towards lifting the headscarf ban in universities. Following a complaint from a student, the Board ordered Istanbul University to stop teachers from expelling students that did not comply with the headscarf ban.²³⁷ However, whilst this decision loosened the strict application of the ban across Turkey, it did not abolish it.²³⁸

After winning the September 12 referendum, Erdoğan had strongly suggested that he would once more attempt to lift the headscarf ban after the 2011 elections.²³⁹ AKP won the 2011 Turkish general election in a landslide victory,²⁴⁰ guaranteeing the party its third consecutive term in Parliament. True to his word, Erdoğan repealed the legislation dealing with dress codes in universities.

Over the following three years, the headscarf ban was lifted for State institutions, including “parliamentarians, lawyers, teachers, some other public employees, and students.”²⁴¹ The judiciary, military, and police were initially excluded from these reforms.²⁴² However, in 2015, Turkey’s Supreme Board of Judges and Prosecutors lifted the headscarf ban for female judges and prosecutors.²⁴³ The headscarf ban was also lifted for female officers in the police in August 2016²⁴⁴ and for female officers in the Turkish military in February 2017. The military was described as the last “Turkish institution where women were prohibited from wearing the headscarf”.²⁴⁵

²³⁷ Hashmi, above n 6, at 431; and Akbulut, above n 145, at 434.

²³⁸ Hashmi, above n 6, at 431.

²³⁹ Ece Toksabay “Turkey hints at lifting headscarf ban for women” *Edmonton Journal* (Edmonton, Alta, 30 September 2010) at 13.

²⁴⁰ AKP won 49.9 per cent of all votes, giving itself 325 seats in parliament; see Constanze Letsch “Recep Erdogan wins by landslide in Turkey’s general election” *The Guardian* (online ed, 13 June 2011).

²⁴¹ Akbulut, above n 145, at 434; Agence France-Presse “Turkey lifts military ban on Islamic headscarf” *The Guardian* (online ed, 22 February 2017); and “Turkey’s female MPs wear headscarves in parliament for the first time” *The Guardian* (online ed, 31 October 2013).

²⁴² “Turkey allows policewomen to wear Muslim headscarf” (27 August 2016) BBC <www.bbc.com>.

²⁴³ “In first, headscarf-wearing judge conducts trial in Turkey” (4 November 2015) *The Express Tribune* <tribune.com.pk>.

²⁴⁴ “Turkey allows policewomen to wear Muslim headscarf”, above n 242; and France-Presse, above n 241.

²⁴⁵ France-Presse, above n 241.

V France

This section has four parts. Part A outlines the principle of secularism in France. Part B describes the French 2004 law which preceded the ban on head coverings, the ban on religious symbols in schools.²⁴⁶ Part C discusses France’s 2011 ban on head coverings in the public sphere²⁴⁷ and the decision of the ECtHR in *S.A.S v France*.²⁴⁸ Part D lastly discusses the recent development of “burkini bans” in towns across France.

A Secularism in France

States have often used the principle of secularism to justify limitations on the freedom of religion guaranteed in Article 9 of the ECHR. Secularism is the notion that the State must be separated from religion. This requires the State to be neutral and to not promote a religious or non-religious point of view.²⁴⁹ Religion is a private issue.²⁵⁰

The principle of secularism, or *laïcité* in French, is deeply entrenched in France. It has its origins in Article 10 of the Declaration of the Rights of Man and of the Citizen 1789,²⁵¹ but the real keystone is the Law on the Separation between Church and State Act of 9 December 1905. Section 1 guarantees “free participation in religious worship”. The principle of secularism is affirmed in s 2 of the Act: “the Republic may not recognise, pay stipends to or subsidise any religious denomination”. Read together, these sections imply “an acknowledgment of pluralism and State neutrality towards religions.”²⁵²

²⁴⁶ Law 2004-228 of March 15, 2004, above n 9.

²⁴⁷ Loi 2010-1192 du 11 octobre 2010 [Law 2010-1192 of October 11, 2010], *Officiel de la République Française* [J.O.] [official gazette of france], Oct. 12, 2010, p. 18344, available at <www.legifrance.gouv.fr>.

²⁴⁸ *S.A.S*, above n 11.

²⁴⁹ *Osman*, above n 12, at 1326.

²⁵⁰ Claudia Morini “Secularism And Freedom of Religion: The Approach of the European Court of Human Rights” (2010) 43(3) *Israel Law Review* 611 at 617.

²⁵¹ *Dogru v France* (27058/05) Section V, ECHR 4 December 2008.

²⁵² *Dogru*, above n 251, at [18].

Laïcité acquired constitutional status in Article 1 of the Constitution of 4 October 1958, which states that “France shall be an indivisible, secular, democratic and social Republic.”²⁵³

B France’s Ban on Religious Symbols in Schools

1 The Stasi Commission

In 2003, the French Government appointed the Stasi Commission (the Commission) to review the principle of *laïcité*. The resulting report produced by the Commission (the Stasi Report) issued a recommendation to ban ostentatious religious clothing and symbols from public schools, on the basis that they violate the principle of *laïcité*.²⁵⁴ The Commission reasoned that, in France, the right of individuals to express religious values must bow to *laïcité*. The Stasi Report also specifically addressed the issue of headscarves and their place in public schools. Although the Commission recognised that wearing a headscarf is a personal choice, it also noted that the choice created external pressures, in that failing to wear a headscarf might stigmatize Muslim girls.²⁵⁵

2 The 2004 law

In response to the Commission’s recommendation, the French Government proposed a law in 2004 prohibiting the wearing of ostentatious religious symbols in public primary, intermediate, and high schools.²⁵⁶ Symbols regarded to be ostentatious and therefore prohibited by the law included Islamic headscarves, large and/or overt Christian crosses, Jewish yarmulke (skullcaps) and Sikh turbans. A concession was granted for discrete or small symbols, which were permitted under the proposed law.²⁵⁷ Whilst the proposed law

²⁵³ French Constitution, art 1 (available from <www.conseil-constitutionnel.fr>).

²⁵⁴ Leane, above n 14, at 1039.

²⁵⁵ Leane, above n 14, at 1039.

²⁵⁶ Law 2004-228 of March 15, 2004, above n 9.

²⁵⁷ Leane, above n 14, at 1040.

did not specifically target Muslim symbols or clothing alone, it was clear that this was primarily what it intended to remove from public schools.²⁵⁸

The law passed in the National Assembly by an overwhelmingly majority.²⁵⁹ The vote was 494 to 36, with 31 abstentions. In the Senate, it passed by a similarly large majority of 276 to 20.²⁶⁰ On 15 March 2004, the French President Jacques Chirac signed the legislation into law.²⁶¹

3 *European Court of Human Rights: Dogru v France*

The ECtHR upheld France’s ban on religious symbols in public schools in *Dogru v France*. The applicant was an 11-year-old Muslim girl named Belgin Dogru. She wore her headscarf to physical education class numerous times and refused to remove it, despite repeated requests from her teacher to do so.²⁶² Dogru was then expelled for failing to participate actively in the class.²⁶³

Dogru’s parents, acting as Dogru’s legal guardians, appealed against the decision to the appeal panel, which upheld the school’s decision of expulsion.²⁶⁴ They then applied to the Caen Administrative Court to have the decision set aside, but their application was rejected.²⁶⁵ Dogru’s parents appealed this judgment in the Nantes Administrative Court of Appeal, but their appeal was dismissed.²⁶⁶ Finally, they lodged an appeal with the French Council of State (*Conseil d’Etat*), who declared the appeal inadmissible.²⁶⁷

²⁵⁸ Leane, above n 14, at 1040.

²⁵⁹ Elaine Sciolino “French Assembly Votes to Ban Religious Symbols in Schools” *The New York Times* (online ed, 11 February 2004).

²⁶⁰ Leane, above n 14, at 1040.

²⁶¹ Powell, above n 10, at 126.

²⁶² *Dogru*, above n 251, at [7].

²⁶³ *Dogru*, above n 251, at [8].

²⁶⁴ *Dogru*, above n 251, at [9]–[10].

²⁶⁵ *Dogru*, above n 251, at [12].

²⁶⁶ *Dogru*, above n 251, at [14].

²⁶⁷ The Council of State is a body of the French government that provides advice to the executive branch and answers government queries on legal affairs. It is the highest administrative jurisdiction, “the final arbiter of cases relating to executive power, local authorities, independent public authorities, public

After rejection in the domestic courts, Dogru applied to the ECtHR, claiming that her rights had been violated. Specifically, Dogru alleged a violation of her right to religious freedom and her right to education.²⁶⁸ In the ECtHR the French Government argued that the restrictions on Dogru’s right to manifest her religion satisfied the requirements of legality, legitimacy and proportionality stipulated in Article 9 of the ECHR. In support of this argument, they referred to the analogous case of *Şahin v Turkey*.²⁶⁹ They also referred to the principle of *laïcité* in their submission; wearing ostentatious religious symbols in public schools is incompatible with secularism. They further noted that the right to religious freedom is capable of being subject to restrictions;²⁷⁰ the ECHR does not allow individuals to do or say whatever they want in the name of religion.

The ECtHR agreed with the French Government, holding there was no violation of rights.²⁷¹ Secularism is a constitutional principle in France, and protecting this principle in public schools is of prime importance.²⁷²

C France’s Ban on Head Coverings in Public Spaces

Six years later, a similar controversy emerged in France over full-face veils. On 22 June 2009, then President of France Nicolas Sarkozy attacked the burqa in his first state of the nation speech,²⁷³ addressed to a special sitting of both houses of Parliament.²⁷⁴ Sarkozy described full-face veils as a symbol of enslavement and repression. He alleged

administration agencies, or any other agency invested with public authority.” See “The Conseil d’État” <english.conseil-etat.fr>; and *Dogru*, above n 251, at [15]–[16].

²⁶⁸ *Dogru*, above n 251, at [3].

²⁶⁹ *Dogru*, above n 251, at [34].

²⁷⁰ *Dogru*, above n 251, at [37].

²⁷¹ *Dogru*, above n 251, at [78] and [84].

²⁷² Son Güncelleme “European court confirms headscarf ban in school no violation to rights” (4 December 2008) *Hürriyet* <www.hurriyet.com.tr>.

²⁷³ Angelique Chrisafis “Nicolas Sarkozy says Islamic veils are not welcome in France” *The Guardian* (online ed, 22 June 2009).

²⁷⁴ Angelique Chrisafis “Sarkozy to break century-old French tradition with ‘state of the union’ address” *The Guardian* (online ed, 22 June 2009).

that the burqa is “a sign of the subservience and debasement”,²⁷⁵ and as such, “is not welcome in France.”²⁷⁶ This criticism targets a different group and space in comparison to the 2004 ban on religious symbols in schools: Muslim women in public spaces,²⁷⁷ as opposed to Muslim girls in public schools.

1 Parliamentary Commission

In mid-June 2009, 65 members of the French Parliament called for a parliamentary commission to examine whether full-face veils posed a threat to secularism and gender equality in France.²⁷⁸

In his state of the nation speech, Sarkozy backed the proposition for a parliamentary commission on the issue of full-face veils.²⁷⁹ The Parliamentary Commission to Study the Wearing of the Full Face Veil in France was established on 23 June 2009.²⁸⁰ The Commission was comprised of members from all parliamentary groups in the National Assembly, and an estimated 180 experts were consulted over the course of investigations.²⁸¹

Six months later, on 26 January 2010, the Commission released a report. Firstly, they explained that the term full-face veil includes three categories of Islamic dress: the niqab, sitar and burqa.²⁸²

²⁷⁵ Peter Morey and Amina Yaqin *Framing Muslims* (Harvard University Press, Cambridge (Mass), 2011) at 177.

²⁷⁶ Doreen Carvajal “Sarkozy Backs Drive to Eliminate the Burqa” *The New York Times* (online ed, 22 June 2009).

²⁷⁷ Leane, above n 14, at 1041.

²⁷⁸ Powell, above n 10, at 127.

²⁷⁹ Chrisafis, above n 274.

²⁸⁰ Commission’s report, above n 17.

²⁸¹ Kyle James “French commission recommends banning the burqa” (26 January 2010) Deutsche Welle <www.dw.com/en>.

²⁸² Commission’s report, above n 17.

Secondly, the Commission assessed the wearing of full-face veils under Islam in France. A study carried out in 2009 demonstrated that of Frances’ estimated 5 to 6 million Muslims, the practice of veiling was undertaken by a minority.²⁸³ The Commission also reviewed how the issue of full-face veils was handled in other countries. It noted that, in many countries, the practice of veiling did not cause any issues. This could be attributed to two reasons. Firstly, countries that have a near nonexistence of the practice, for example the Czech Republic and Bulgaria, tend to have no issues with the full-face veil.²⁸⁴ Secondly, there are fewer issues where countries have provided for better accommodation of religious practices. For example, in the UK some employers and schools have incorporated elements Muslim dress into their uniform.²⁸⁵ However, the report also found that in countries more akin to France, where the issue of full-face veils gave rise to public debate, a ban on face coverings in public places had been proposed. Countries who had implemented some form of ban at the time of the Commissions’ report included Belgium and the Netherlands.²⁸⁶

Thirdly, the Commission discussed how the practice of veiling is contrary to French values. The full-face veil was described as “an infringement of the principle of freedom”, a “symbol of subservience”,²⁸⁷ and contrary to the principle of gender equality²⁸⁸ and fraternity.²⁸⁹ As such, wearing a full-face veil was determined to be contrary to the values of France.

²⁸³ Lizzy Davies “French government prepares total ban on full Islamic veils” *The Guardian* (online ed, 21 April 2010).

²⁸⁴ Commission’s report, above n 17.

²⁸⁵ Commission’s report, above n 17, at 84; see “Hijab approved as uniform option by Scotland Police” *The Telegraph* (online ed, 24 August 2016) and “UK School Offers Uniform Hijabs For Muslim Pupils” (June 2017) Republic <www.republicworld.com>.

²⁸⁶ Commission’s report, above n 17.

²⁸⁷ Commission’s report, above n 17, at 107.

²⁸⁸ Commission’s report, above n 17, at 107-113.

²⁸⁹ Commission’s report, above n 17, at 116-122.

Ultimately, the Commission recommended that full-face veils be banned in public buildings and services, such as schools, hospitals, trains and buses.²⁹⁰ They did not go so far as to recommend that Parliament ban full-face veils from the streets.²⁹¹

2 *The 2011 law*

In 2010, the French Government proposed a law that banned the wearing of full-face veils in public spaces, colloquially described as a “burqa ban”.²⁹² This total ban was put forward despite the Commissions’ narrower recommendation.²⁹³

The law purports to prohibit persons from wearing clothing intended to hide the face in the public space.²⁹⁴ Persons wearing a full-face veil in public can be required by police to show their face.²⁹⁵ If they refuse, they can face a fine of up to 150 Euros and/or be required to attend a citizenship course.²⁹⁶

For the purposes of the ban, public space is defined as “public roads and places open to the public or used for a public service.”²⁹⁷ Exceptions to the proposed law include private homes and worshipping in a religious place or travelling in a private car.²⁹⁸ Clothing intended to hide the face includes but is not limited to masks, helmets, balaclavas and full-face veils such as the burqa and niqab.

²⁹⁰ Eleanor Beardsley “French Panel: Ban Burqas In Public Buildings” (26 January 2010) NPR <www.npr.org>; and Davies, above n 283.

²⁹¹ Powell, above n 10, at 128.

²⁹² Adam Scott Kunz “Public Exposure: of Burqas, Secularism, and France’s Violation of European Law” (2012) 44(1) *The George Washington International Law Review* 79 at 79.

²⁹³ Davies, above n 283.

²⁹⁴ Law 2010-1192 of October 11, 2010, above n 247.

²⁹⁵ Megan McKee “France constitutional court approves burqa ban” (7 October 2010) *Jurist* <www.jurist.org>.

²⁹⁶ Angelique Chrisafis “Full-face veils outlawed as France spells out controversial niqab ban” *The Guardian* (online ed, 3 March 2011).

²⁹⁷ Powell, above n 10, at 126.

²⁹⁸ Chrisafis, above n 296.

Due to the fact that clothing intended to hide the face is an incredibly broad category, the proposed law does allow for several exceptions.²⁹⁹ There are three noteworthy derogations to the ban. Firstly, the ban will not apply if the clothing is authorised by primary or secondary legislation. The Road-Traffic Code requires drivers of motorcycles to wear helmets, therefore motorcycle helmets are an exception to the ban. Secondly, clothing “justified for health or occupational reasons” is permitted. Thirdly, the ban will not apply to clothing “worn in the context of sports, festivities or artistic or traditional events”.³⁰⁰

The proposed law also outlaws the forcing of a person to wear the full-face veil.³⁰¹ Anyone found guilty of forcing another person to conceal their face on the basis of gender with threats of violence, coercion, or by use of improper authority faces a fine of 30,000 Euros and a year in prison.³⁰² In the case of force being applied to a minor, persons face a fine of 60,000 Euros and two years in prison.³⁰³

The religion of Islam and Muslim women are purposefully not mentioned in the bill; it is a bill against “covering one’s face in public places”.³⁰⁴ This title change was intended to get around accusations that the ban was prejudicial against French Muslim women.³⁰⁵

In July 2010, the bill passed 336 to one in the National Assembly,³⁰⁶ with 241 abstentions. In September 2010, the Senate similarly comfortably passed the law 246 to one, with 100 abstentions. Those who declined to vote were largely left-leaning

²⁹⁹ Powell, above n 10, at 127.

³⁰⁰ S.A.S, above n 11.

³⁰¹ “French face veil ban comes into force” (12 April 2011) Aljazeera <www.aljazeera.com>.

³⁰² Chrisafis, above n 296; and Kunz, above n 292, at 79.

³⁰³ Kunz, above n 292, at 97.

³⁰⁴ Steven Erlanger “France Enforces Ban on Full-Face Veils in Public” *The New York Times* (online ed, 11 April 2011).

³⁰⁵ Chrisafis, above n 296.

³⁰⁶ Powell, above n 10, at 126.

politicians.³⁰⁷ The high rate of abstentions demonstrate that support for the law was not as widespread in comparison to the 2004 law banning religious symbols in schools.

The ban then went before its final hurdle, the French Constitutional Council (*Conseil Constitutionnel*).³⁰⁸ In October 2010, the Council held that the Act prohibiting the concealing of the face in public is constitutional.³⁰⁹ This is largely due to two reasons. Firstly, the punishment for breaching the ban was not disproportionate.³¹⁰ Secondly, the ban did not prevent the free exercise of religion in a place of worship.³¹¹ The Council noted that “prohibiting the concealing of the face in public cannot...result in restricting the exercising of religious freedom in places of worship open to the public.”³¹²

A few days later, on 11 October 2010, Sarkozy signed the legislation into law.³¹³ The law came into effect the following year, on 11 April 2011.³¹⁴

3 *European Court of Human Rights: S.A.S v France*

Despite the ban being supported by 82 per cent of the French population,³¹⁵ there were many individuals and groups that opposed the legislation. Critics of the ban argued that despite the law only affecting a small minority, the effect it had on the Muslim community in France was disproportionately large. Namely, it increased tensions and

³⁰⁷ “French Senate approves burqa ban” (15 September 2010) CNN <edition.cnn.com>.

³⁰⁸ The Council is a body that has the power to review the constitutionality of bills ex ante and ex post promulgation. Bills before by parliament may be referred to the Council, which rules on their conformity with the Constitution. Once a bill has been declared constitutional, the bill can then be promulgated. The Council also has the power to have legislative provisions that infringe on the rights guaranteed by the Constitution repealed; see French Constitution, arts 61, 61-1, and 62; Kunz, above n 292, at 79; and Powell, above n 10, at 125.

³⁰⁹ “Act prohibiting the concealing of the face in public” [Council’s decision], Decision n° 2010-613 DC (7 October 2010), available at <www.conseil-constitutionnel.fr>, at 2.

³¹⁰ Council’s decision, above n 309, at 2; and Kunz, above n 292, at 79-80.

³¹¹ “French burqa ban clears last legal obstacle” (7 October 2010) CNN <edition.cnn.com>.

³¹² Council’s decision, above n 309, at 2.

³¹³ Powell, above n 10, at 127.

³¹⁴ Powell, above n 10, at 127.

³¹⁵ Kunz, above n 292, at 80.

marginalisation of the country’s 5 to 6 million Muslims.³¹⁶ Several critics, including human rights organisation Amnesty International, further warned France that the law was a violation of European human rights law,³¹⁷ and therefore was liable to challenge in the ECtHR.³¹⁸ This criticism proved to be accurate.

(a) Application

On the day the law came into effect, an application was lodged with the ECtHR against France, challenging the burqa ban. The applicant, known only by her initials S.A.S, was a French national of Pakistani origin. Described as a “perfect French citizen”,³¹⁹ the applicant was a devout Muslim and, of her own free will, chooses to wear both the burqa and niqab in public and in private, although not systematically.³²⁰ The applicants’ complaint alleged that the ban prevented her from wearing the full-face veil in public. This violated her rights under the ECHR. Specifically, Articles 8 (right to respect for private and family life) and 9 (freedom of thought, conscience and religion).³²¹

(b) Submissions

In her submission, the applicant firstly addressed Article 9 of the Convention, freedom of thought, conscience and religion. Article 9 states that freedom of thought, conscience and religion can only be subject to limitations which are prescribed by law and that are necessary in a democratic society.³²² The applicant argued that, although the ban was prescribed by law, it was not necessary in a democratic society and it does not pursue any of the legitimate aims listed in Article 9, namely public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others.³²³

³¹⁶ Lizzy Davies “France: Senate votes for Muslim face veil ban” *The Guardian* (online ed, 14 September 2010).

³¹⁷ “French burqa ban clears last legal obstacle”, above n 311.

³¹⁸ Chrisafis, above n 296; and Davies, above n 316.

³¹⁹ Kim Willsher “France’s burqa ban upheld by human rights court” *The Guardian* (online ed, 1 July 2014).

³²⁰ S.A.S, above n 11, at [11]–[12].

³²¹ ECHR, above n 1.

³²² ECHR, above n 1, art 9.

³²³ S.A.S, above n 11, at [76].

Furthermore, even if the aims pursued by the ban were legitimate, the applicant argued that they could be achieved by less restrictive means.³²⁴

Secondly, the applicant addressed Article 8 of the Convention, right to respect for private and family life. Similar to Article 9, Article 8 states that the right to respect for private and family life cannot be interfered with, unless it is in accordance with the law and the limitation is necessary in a democratic society.³²⁵ The applicant alleged the ban violated her right to respect for her private life because the full-face veil was an important part of her identity and she was obliged to remove it when she went out in public, otherwise exposing herself to hostility and criminal sanctions.³²⁶

Regarding Article 9 of the Convention, the French Government admitted that the ban could be seen as a limitation on the freedom to manifest ones’ religion or beliefs. However, it argued that the ban “pursued legitimate aims and that it was necessary, in a democratic society, for the fulfilment of those aims”.³²⁷

Two aims were submitted by the French Government. The first aim was to ensure public safety. The full-face veil enabled persons to obscure their identity. Being able to identify individuals would prevent identity fraud and “danger for the safety of persons and property”.³²⁸ The second aim was the protection of rights and freedoms of others and “respect for the minimum set of values of an open and democratic society”.³²⁹ This aim involved three human rights arguments. Firstly, the ban upheld the minimum requirements of the French principle of *vivre ensemble* (living together). The Government submitted that “the face plays a significant role in human interaction”,³³⁰ and that covering ones’ face “is to break social ties”.³³¹ Secondly, the Government argued that the

³²⁴ S.A.S, above n 11, at [78].

³²⁵ ECHR, above n 1, art 8.

³²⁶ S.A.S, above n 11, at [79].

³²⁷ S.A.S, above n 11, at [81].

³²⁸ S.A.S, above n 11, at [82].

³²⁹ S.A.S, above n 11, at [82].

³³⁰ S.A.S, above n 11, at [82].

³³¹ S.A.S, above n 11, at [82].

ban aimed to achieve gender equality.³³² Full-face veils deny women the right to exist as individuals, and are therefore not tolerable in a society where men and women are equal. Thirdly, the Government advanced an argument based on respect for human dignity.³³³

The French Government did not believe that Article 8 was applicable as the ban applied to public places only. They thought the applicants’ arguments were more relevant to Article 9, and they had already addressed this.³³⁴ Despite this argument, the ECtHR looked at the application in regards to both Articles 8 and 9 during its assessment. Contrary to what the Government argued, the ECtHR held that the ban falls under Article 8 of the Convention because personal choices as to an individuals’ desired appearance relate to the expression of their personality, and thus fall within the notion of private life.³³⁵

(c) Judgment

The ECtHR found that, on the facts, there was a limitation or interference of the exercise of the rights prescribed by Articles 8 and 9.³³⁶ For the limitation or interference to be compatible with the Convention, it must satisfy two requirements: pursue a legitimate aim and be necessary in a democratic society.³³⁷ The ECtHR firstly assessed the legitimate aims identified by the French Government. They did not accept that either gender equality³³⁸ or respect for human dignity could justify the ban.³³⁹ However, the ECtHR did uphold the aim of public safety, which is listed as a legitimate aim in Articles 8 and 9. They also found that the principle of *vivre ensemble* could “be linked to the legitimate aim of the “protection of the rights and freedoms of others”.”³⁴⁰ This aim is

³³² S.A.S, above n 11, at [82].

³³³ S.A.S, above n 11, at [82].

³³⁴ S.A.S, above n 11, at [84].

³³⁵ S.A.S, above n 11, at [107].

³³⁶ S.A.S, above n 11, at [110].

³³⁷ S.A.S, above n 11, at [111].

³³⁸ S.A.S, above n 11, at [118].

³³⁹ S.A.S, above n 11, at [120].

³⁴⁰ S.A.S, above n 11, at [121].

described as legitimate in the second paragraph of both Article 8 and 9 of the Convention.³⁴¹

Secondly, the ECtHR assessed whether the measure is necessary to have in a democratic society. Whilst Article 9 affords individuals the freedom to manifest ones' religion,³⁴² it does not give them the right to do or say whatever they want in the name of religion.³⁴³ Where necessary, the freedom to manifest ones' religion can be limited “in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected”.³⁴⁴ The ECtHR found that the blanket ban was not necessary in a democratic society for public safety, because it was not a proportionate response. The Governments' objective could be achieved by less restrictive and invasive means.³⁴⁵

However, the ECtHR held that the ban could be regarded as justified and necessary under the principle of *vivre ensemble*.³⁴⁶

The Court takes into account the respondent State's point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. 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.

In terms of proportionality, although the ECtHR noted that the scope of the ban was broad and it targeted a small minority of Muslim women that wear the full-face veil, it

³⁴¹ ECHR, above n 1, arts 8 and 9.

³⁴² ECHR, above n 1, art 9.

³⁴³ *S.A.S.*, above n 11, at [125].

³⁴⁴ *S.A.S.*, above n 11, at [126].

³⁴⁵ *S.A.S.*, above n 11, at [139].

³⁴⁶ *S.A.S.*, above n 11, at [122].

still a proportionate response.³⁴⁷ Hence, there was no violation of Articles 8 or 9 of the Convention.³⁴⁸

D France’s “Burkini Bans”

In 2016, partially in reaction to recent terrorist attacks, around 30 French coastal resorts implemented “burkini bans”.³⁴⁹ A burkini is a type of swimwear that covers the whole body except the wearer’s face. It is primarily designed to allow Muslim women to swim in public. Various reasons were given for the bans, although none specifically mentioned burkinis or Muslim women.³⁵⁰

Cannes was the first town to introduced a burkini ban. The ban was implemented by a by-law, which states “[a]ccess to beaches and for swimming is banned to anyone who does not have (swim wear) which respects good customs and secularism.”³⁵¹ The ban was justified on the basis of ensuring public safety. Then mayor of Cannes, David Lisnard, stated he wanted to prohibit “beachwear ostentatiously showing a religious affiliation while France and places of religious significance are the target of terror attacks”.³⁵²

The decision to ban the burkini in Cannes was challenged by the Collective Against Islamophobia in France (CCIF) and the League for Human Rights (LDH) in the Administrative Court in Nice,³⁵³ requesting it be suspended. However, the Administrative Court denied this request. The judge upheld the ban based on existing French law

³⁴⁷ S.A.S, above n 11, at [151].

³⁴⁸ S.A.S, above n 11, at [159].

³⁴⁹ Angelique Chrisafis “French mayors refuse to lift burkini ban despite court ruling” *The Guardian* (online ed, 28 August 2016).

³⁵⁰ Lizzie Dearden “Burkini ban: Why is France arresting Muslim women for wearing full-body swimwear and why are people so angry?” (24 August 2016) *The Independent* <www.independent.co.uk>.

³⁵¹ Harry Cockburn “Burkinis banned on French Riviera – to make people safer” (12 August 2016) *The Independent* <www.independent.co.uk>.

³⁵² Dearden, above n 350.

³⁵³ “French court upholds Cannes ‘burkini’ ban” (13 August 2016) *Middle East Eye* <www.middleeasteye.net>; and Ed Vulliamy “‘They want us to be invisible’: how the ban on burkinis is dividing the Côte d’Azur” *The Guardian* (online ed, 21 August 2016).

prohibiting persons from "invoking their religious beliefs to skirt common rules regulating relations between public authorities and private individuals",³⁵⁴ especially given the context of recent Islamist attacks.³⁵⁵

Villeneuve-Loubet was the second commune to follow suit and ban full-body swimwear. Like Cannes, the text of the ban references recent terrorist attacks and prohibits swimmers from wearing clothes that obviously show a religious affiliation.³⁵⁶ However, unlike Cannes, the justification for the ban was unspecified “hygiene reasons”.³⁵⁷ The ban in Villeneuve-Loubet was similarly upheld, on the basis that it was necessary and proportionate to prevent public disorder.³⁵⁸ The CCIF and LDH appealed this finding. On 25 August 2016, the Council of State, France’s highest administrative court, overturned the burkini ban; wearing religious clothing at the beach was no longer prohibited in Villeneuve-Loubet. A press statement released by the Council announced that:³⁵⁹

[T]here is no evidence that safeguarding peace and good order on the beaches had been jeopardized because some swimmers were wearing certain types of clothes. Without such evidence, the mayor couldn’t decide that such persons would not have access to the beaches...as such measures are justified neither by risks of breaches against peace and good order, nor by reasons of hygiene or decency.

The case was expected to set legal precedent, despite the fact that the Council were specifically examining the laws of Villeneuve-Loubet. However, three days after the ruling, over 20 burkini bans were still in place.³⁶⁰ This was despite the fact that the Council held burkini bans to be a breach of the “fundamental liberties of freedom of

³⁵⁴ “French court upholds Cannes ‘burqini’ ban”, above n 353.

³⁵⁵ Harriet Agerholm “Burkini ban: Court upholds Cannes decision to prohibit wearing of full-body swimsuits” (14 August 2016) *The Independent* <www.independent.co.uk>.

³⁵⁶ Vulliamy, above n 353.

³⁵⁷ Dearden, above n 350.

³⁵⁸ Dearden, above n 350.

³⁵⁹ “The Council of State orders a decision banning clothes demonstrating an obvious religious affiliation to be suspended” (26 August 2016) *The Conseil d’Etat* <english.conseil-etat.fr>.

³⁶⁰ Chrisafis, above n 349.

movement, the freedom of conscious, and personal freedom”.³⁶¹ As recently as June 2017, a burkini and full-face veil ban was introduced at an outdoor swimming area in Lorette, a French town to the south of Lyon in Central France.³⁶² It remains to be seen how authorities will react to the existence of these bans, which are now seen as illegal.³⁶³

³⁶¹ Selina Cheng “France’s highest court ruled that the burkini ban is “clearly illegal” (26 August 2016) Quartz <qz.com>.

³⁶² “French mayor reignites burkini row after banning Muslim swimwear at leisure park” (28 June 2017) The Local <www.thelocal.fr>.

³⁶³ Josh Lowe “French Muslims targeted by new swimwear ban” (28 June 2017) Newsweek <www.newsweek.com>.

VI Comparative Analysis

Although the reasons given for enacting a particular ban typically differed between towns, cantons and countries, there were several justifications that France, Turkey and Switzerland all had in common. These were secularism, coercion and gender quality. This section will discuss these justifications and ascertain their credibility. Ultimately, this section concludes that a headscarf or full-face veil ban is unlikely to achieve the goals of protecting secularism, preventing coercion and promoting gender equality. Therefore, the so-called justifications do not justify the bans.³⁶⁴

A Secularism

A popular justification used for banning headscarves or full-face veils is that they are incompatible with a secular society. Secularism separates religion and the State, relegating religion to the private sphere. This requires public institutions, including State education institutions, to remain neutral. The principle of State neutrality was emphasized by the Swiss Federal Court in Dahlab’s federal appeal: the headscarf could not be reconciled with the principle of non-identification with a particular faith.³⁶⁵ Before the ECtHR in *Dahlab*, the Swiss Government emphasized the State’s neutrality as a justification for the ban.³⁶⁶ It is questionable whether State neutrality can be imposed on State employees just because they work for the State.³⁶⁷ The conduct of State employees should not be automatically attributed to the State, nor should the conduct of students. Allowing State employees or students using State-provided education to wear religious symbols does not demonstrate support for any particular religion. Further, whilst the ECtHR in *Dahlab* acknowledged that it was difficult to reconcile wearing a headscarf with tolerance and non-discrimination, it focused more on its alleged proselytising effect.³⁶⁸ A lack of emphasis on State neutrality and the principle of secularism, implies that they were not considered to be a strong justification for the ban by the ECtHR.

³⁶⁴ Osman, above n 12, at 1340.

³⁶⁵ *Dahlab*, above n 5, at 8-9.

³⁶⁶ *Dahlab*, above n 5, at 9.

³⁶⁷ Osman, above n 12, at 1329.

³⁶⁸ *Dahlab*, above n 5, at 13.

The principle of *laïcité* has also been used to justify Islamic dress bans in France. In *Dogru*, the ECtHR upheld the French Government’s submission that wearing ostentatious religious symbols in public schools was incompatible with secularism.³⁶⁹ In 2010, the report released by the Parliamentary Commission to Study the Wearing of the Full Face Veil in France described the practice of wearing full-face veils as “going beyond mere incompatibility with secularism”.³⁷⁰ However, State policies preventing individuals from acting in accordance with their religious convictions entails State involvement with religion. This is not in keeping with secularism.³⁷¹ In France, *laïcité* is meant to be a system of public order under which religious freedom can flourish.³⁷² The current interpretation of *laïcité* arguably hinders the integration of Muslims.³⁷³ In *S.A.S*, the French Government did not use secularism as a justification for the ban on full-face veils in public. Instead, they relied on the principles of public safety, gender equality, respect for human dignity, and the principle of *vivre ensemble*. Again, like the ECtHR in *Dahlab*, this implies that France did not consider secularism to be a strong justification for banning full-face veils.

The cases *Dahlab* and *S.A.S* show a decline in reliance on secularism as a justification in the ECtHR, by both the parties and the Court itself. The approach taken in *Dahlab* and *S.A.S* can be contrasted with *Şahin*, where secularism was one of the two primary justifications for the ban on headscarves in public institutions. Similar to France, Turkey also views “secularism as an essential precondition for democracy.”³⁷⁴ The Turkish Government submitted that one of the legitimate aims pursued by the ban was upholding the principle of secularism in State institutions. They also argued that secularism in Turkey was unique and is distinguishable from other States.³⁷⁵ Unlike in *Dahlab*, the ECtHR emphasized the principle of secularism in holding the ban was justified,

³⁶⁹ *Dogru*, above n 251, at [37].

³⁷⁰ *S.A.S*, above n 11, at [17].

³⁷¹ *Osman*, above n 12, at 1330.

³⁷² McGoldrick, above n 4, at 39.

³⁷³ McGoldrick, above n 4, at 41.

³⁷⁴ McGoldrick, above n 4, at 137.

³⁷⁵ *Şahin* (Section IV), above n 7, at [91].

describing it as “one of the fundamental principles of the State”,³⁷⁶ and “necessary for the protection of the democratic system in Turkey.”³⁷⁷ However, there was no attempt by the ECtHR to provide any evidence that wearing headscarves would undermine secularism in State institutions.³⁷⁸

Although in *Şahin* secularism was successfully used as a justification and upheld by the ECtHR, the ban on headscarves has been removed in all Turkish State institutions since February 2017.³⁷⁹ This removal of restrictions could be attributed to a number of things, for example, increased support for Islamic headscarves or less support for the principles of State neutrality and secularism in Turkey. Whilst both are plausible, it is clear that the Government has been most influential in softening the stance on headscarves. Headscarf reforms were largely driven by Erdoğan’s Islamic-rooted Government, which has been criticised for eating away at the secular pillars of Turkey.³⁸⁰

Notwithstanding its decline in popularity as a justification for banning headscarves or full-face veils, secularism and State neutrality have also been critiqued due to a lack of consistency. Whilst this is most evident in regulations on religious dress which prohibit only certain kinds of religious dress and allow others, even prohibitions couched in neutral terms arguably target minority religions.³⁸¹ Examples of the latter include the 2011 law in France banning “clothing intended to hide the face”. Although Islamic dress is not specifically mentioned in the law, it is clear from preceding events and the articles of clothing excepted from the law that the ban was specifically crafted to target Muslim women wearing full-face veils.³⁸² Similarly, whilst the French 2004 law banning religious symbols in schools also targeted Jewish yarmulke and Sikh turbans, preventing

³⁷⁶ *Şahin* (Section IV), above n 7, at [99].

³⁷⁷ *Şahin* (Section IV), above n 7, at [106].

³⁷⁸ Morini, above n 250, at 623.

³⁷⁹ France-Presse, above n 241.

³⁸⁰ France-Presse, above n 241.

³⁸¹ Osman, above n 12, at 1328.

³⁸² Chrisafis, above n 296.

Muslim girls from wearing the headscarf to school was obviously the intended target of the ban.³⁸³

B Coercion

It is easy to refer to the bans discussed in this paper as “burqa bans”, and many do. However, it is not necessarily always the burqa that is being prohibited. In all three countries, the issue of the headscarf was raised and addressed, regardless of whether it was ultimately prohibited or the subject of a ban. Islamic headscarves are commonly considered less restrictive than full-face veils because they do not cover the face or eyes. The justification most often used to support banning them is therefore not communication or identity issues, which is the case with full-face veils, but rather coercion. Headscarves are considered to be powerful external symbols by the ECtHR, reflecting the “religious coercion of women”.³⁸⁴ Banning them prevents women from being forced to wear them, and it limits the pressure that wearing the headscarf has on others to wear it.³⁸⁵

In France, the Stasi Commission specifically addressed the issue of the headscarf in public schools when they reviewed the principle of *laïcité* in 2003.³⁸⁶ The Commission ultimately recommended banning the headscarf on the basis of coercion. They believed a ban would prevent Muslim girls from being forced to wear the headscarf and limiting the pressure this has on others to wear it.³⁸⁷ In *Şahin*, pressure on students who do not wear the headscarf was also a key consideration for the ECtHR, especially as the majority of the population in Turkey adhere to the Islamic faith. The ECtHR held that preventing students from wearing the headscarf at university protected other students from any external pressures.³⁸⁸

³⁸³ Osman, above n 12, at 1328.

³⁸⁴ Elver, above n 71, at 91-92.

³⁸⁵ Osman, above n 12, at 1330.

³⁸⁶ Leane, above n 14, at 1038-9.

³⁸⁷ Osman, above n 12, at 1330.

³⁸⁸ *Şahin* (Section IV), above n 7, at [105] and [108].

The prevalence of being coerced to wear a headscarf is alone questionable, but even if Muslim girls or women are being forced to wear headscarves, it is unclear how a ban would prevent this.³⁸⁹ The “perpetrators of coercion” may alternatively prevent them from attending school or university if headscarves are banned by the State in these institutions.³⁹⁰ A more appropriate solution would be to target the coercion itself.³⁹¹ For example, the French 2011 law banning full-face veils in public prohibits forcing a person to conceal their face on the basis of gender. Furthermore, the punishment for breaching this law doubles if the person being coerced is a minor. This measure appears to offer a real solution. Although the measure is practically difficult to achieve, as coercion is “hard to identify, prove and sanction”,³⁹² this does not justify a headscarf ban.

Coercion as a justification is more “persuasive in a school context where a teacher wears a headscarf while teaching” because students are often a captive and impressionable audience.³⁹³ In *Dahlab*, the ECtHR were concerned with the proselytising effect of wearing a headscarf. Despite the fact that Dahlab did not talk to her students about her beliefs,³⁹⁴ the ECtHR held that students of a young age were considered to be “particularly impressionable”³⁹⁵ and vulnerable to the views of a teacher.³⁹⁶ However, there was no empirical evidence to support the claim that a teacher wearing a headscarf has a “proselytising effect”. Beyond a mere assertion that it was harmful, the ECtHR did not provide any evidence on the effects of wearing a headscarf on young children. Whilst a headscarf or veil may convey that its wearer has particular religious beliefs, there is nothing to suggest that a teacher wearing a headscarf pressures students to imitate their beliefs. A more appropriate solution to prevent coercion in schools is to focus on coercion

³⁸⁹ Osman, above n 12, at 1330.

³⁹⁰ Osman, above n 12, at 1331.

³⁹¹ Osman, above n 12, at 1331.

³⁹² Osman, above n 12, at 1331.

³⁹³ Osman, above n 12, at 1332.

³⁹⁴ When asked about her headscarf, she cited “aesthetic considerations or sensitivity to the cold”; see *Dahlab*, above n 5, at 6.

³⁹⁵ *Dahlab*, above n 5, at 6.

³⁹⁶ The Court believed that eventually Dahlab would have to tell her students her beliefs; see *Dahlab*, above n 5, at 6; and Osman, above n 12, at 1332.

itself; preventing teachers from exploiting their position and influencing the religious beliefs of their students.³⁹⁷

C Gender Equality

Another popular argument used to justify bans on headscarves or full-face veils is that they are incompatible with gender equality. The ban is therefore necessary to protect the rights of women. This justification has been used for several of the bans discussed in this paper. In France, the Parliamentary Commission described full-face veils as contrary to gender equality.³⁹⁸ Based on this finding, the French Government submitted in *S.A.S* that one of the legitimate aims of the ban on full-face veils in public was to achieve gender equality.³⁹⁹ Similarly, in Dahlab’s appeal to the Swiss Federal Court, the Federal Court held that the image of the headscarf could not be reconciled with the principle of gender equality.⁴⁰⁰ The ECtHR upheld this reasoning in *Dahlab*. The ECtHR determined that wearing a headscarf is “hard to square” with gender equality.⁴⁰¹ The reasoning of the ECtHR in *Dahlab* was reproduced in *Şahin*: as the headscarf “appeared to be imposed on women by a precept laid down in the Koran”, it was difficult to reconcile with general equality.⁴⁰² On appeal, the Grand Chamber saw “no good reason to depart from the approach taken by the Chamber”.⁴⁰³

Gender equality is a serious issue. It is one of the key principles underlying the ECHR. As such, it should be treated with proper consideration. However, the ECtHR’s treatment of gender equality in *Dahlab* and *Şahin* leaves a lot to be desired. Whilst it determines that headscarves are incompatible with gender equality in both cases, the ECtHR does not explain why a headscarf is incompatible with gender equality or representative of gender inequality. In *Dahlab*, the ECtHR stated that the headscarf was

³⁹⁷ *Osman*, above n 12, at 1332.

³⁹⁸ Commission’s report, above n 17, at 107-113.

³⁹⁹ *S.A.S*, above n 11, at [82].

⁴⁰⁰ *Dahlab*, above n 5, at 13.

⁴⁰¹ *Dahlab*, above n 5, at 13.

⁴⁰² *Şahin* (Section IV), above n 7, at [98].

⁴⁰³ *Şahin* (Grand Chamber), above n 7, at [115].

imposed on women by the Qur’an. If this their sole reason for determining that the headscarf is incompatible with gender equality, then it is insufficient. Most religious obligations are imposed on their followers; for example, obeying the Ten Commandments or abstinence from pork or alcohol,⁴⁰⁴ and most religions treat men and women differently; for example, women cannot be ordained as priests according to the Catholic Church.⁴⁰⁵ More significantly, based on their own evidence, neither Şahin nor Dahlab wore the headscarf because it was imposed on them by the State or any other persons. They voluntarily wore it to comply with their own interpretation of the Qur’an.⁴⁰⁶ In a dissenting judgment in *Şahin*, Judge Tulkens criticised how the majority handled the issue of gender equality. Regarding the ECtHR’s determination that the headscarf could not be reconciled with gender equality, she commented that “[i]t is not the Court’s role to make an appraisal of this type”.⁴⁰⁷ Tulkens further argued that gender equality could not prohibit women from following a practice that they have freely adopted, as “[e]quality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them.”⁴⁰⁸

Furthermore, even if the ECtHR had demonstrated why headscarves are incompatible with gender inequality, it did not explain how a ban on headscarves or full-face veils would achieve gender equality. This is not sufficient, especially when there is a strong argument demonstrating that such bans have adverse effects on gender equality. The Commission for Human Rights of the Council of Europe held that “[p]rohibition of the burqa and the niqab will not liberate oppressed women, but might instead lead to their further exclusion and alienation in European societies.”⁴⁰⁹ Similarly, the Parliamentary Assembly of the Council of Europe on Islam, Islamism and Islamophobia in Europe held

⁴⁰⁴ Carolyn Evans "The 'Islamic Scarf' in the European Court of Human Rights" (2006) 7(1) Melbourne Journal of International Law 52 at 52.

⁴⁰⁵ Osman, above n 12, at 1333.

⁴⁰⁶ Evans, above n 404.

⁴⁰⁷ *Şahin* (Grand Chamber), above n 7, at [12].

⁴⁰⁸ *Şahin* (Grand Chamber), above n 7, at [12].

⁴⁰⁹ The Commissioner for Human Rights of the Council of Europe, published the following “Viewpoint” (see *Human rights in Europe: no grounds for complacency. Viewpoints by Thomas Hammarberg, Council of Europe Commissioner for Human Rights*, Council of Europe Publishing, 2011, pp. 39-43); see S.A.S, above n 11, at [37].

that whilst no women should be subject to coercion or oppression, “a general prohibition of wearing the burqa and the niqab would deny women who freely desire to do so their right to cover their face”. In order to uphold their religious beliefs, Muslim women would “leave educational institutions, stay away from public places and abandon work outside their communities”. This would confine Muslim women to the private sphere.⁴¹⁰

In *S.A.S.*, the ECtHR took a completely different approach to gender equality. The French Government submitted that the ban was intended to achieve gender equality.⁴¹¹ In response to this submission, the applicant described that the Government’s assertion that face coverings were incompatible with gender equality as simplistic. She pursued this argument further, claiming that imposing legal sanctions on wearing full-face veils “exacerbated the inequality that was supposed to be addressed.”⁴¹² The ECtHR did not accept that gender equality justified the ban.⁴¹³ In its judgment, the ECtHR firstly described how gender equality could justify an interference with the right to religious freedom. However, “a State Party cannot invoke gender equality in order to ban a practice that is defended by women”. This reasoning is more in line with Tulken’s dissenting judgment in *Şahin*.

⁴¹⁰ Resolution 1743 (2010) [16]–[17]; see *S.A.S.*, above n 11, at [35].

⁴¹¹ *S.A.S.*, above n 11, at [82].

⁴¹² *S.A.S.*, above n 11, at [77].

⁴¹³ *S.A.S.*, above n 11, at [118].

VII Conclusion

This paper sought to describe the legislative prohibitions on Islamic dress in Switzerland, Turkey and France, and ascertain whether the justifications given for headscarf or full-face veil bans in these countries were sufficient to justify the bans.

The first case before the ECtHR concerning restrictions on Islamic dress was *Dahlab* in 2001.⁴¹⁴ The Swiss Government defended the ban on the basis of State neutrality in schools and coercion.⁴¹⁵ The ECtHR upheld the ban, largely focusing on the potential proselytising effect that wearing a headscarf could have on students, and additionally commented that the headscarf had connotations of gender inequality.⁴¹⁶

The *Dahlab* case had significant effects on later cases before the ECtHR, particularly in *Şahin*. Şahin’s case was heard by the Grand Chamber in 2005.⁴¹⁷ The ECtHR upheld the ban largely due a dual emphasis on secularism and coercion. Influenced by the decision in *Dahlab*, the ECtHR referenced the potential coercive effect wearing a headscarf can have on those who have chosen not to wear it.⁴¹⁸

However, it is evident that the impact of the reasoning in *Dahlab* has lessened over time. Before the ECtHR, the French Government defended the 2011 on head coverings in the public sphere using the principles of public safety, gender equality, respect for human dignity, and *vivre ensemble*.⁴¹⁹ The ECtHR only upheld the latter principle as a sufficient justification for the ban.⁴²⁰

There are three common justifications that can be drawn from the ECtHR cases *Dahlab*, *Şahin* and *S.A.S*, as well as other examples of bans discussed throughout this

⁴¹⁴ *Dahlab*, above n 5.

⁴¹⁵ *Dahlab*, above n 5, at 9.

⁴¹⁶ *Dahlab*, above n 5, at 13.

⁴¹⁷ *Şahin* (Grand Chamber), above n 7.

⁴¹⁸ *Şahin* (Grand Chamber), above n 7, at [105].

⁴¹⁹ *S.A.S*, above n 11, at [82].

⁴²⁰ *S.A.S*, above n 11, at [121].

paper. These are secularism, coercion and gender equality. However, none of these alleged justifications sufficiently justify a ban on headscarf or full-face veils. Firstly, whilst secularism is described as a popular justification for headscarf or full-face veil bans, it is not typically relied on by either the Court or Government party in ECtHR cases. *Şahin* was an exception to this finding; secularism was a significant justification for the headscarf ban, and this was upheld by the ECtHR.⁴²¹ However, Turkey no longer has headscarf bans.⁴²² Furthermore, secularism as a justification has been criticised because it is not consistently applied. Although the bans discussed in the paper commonly did not refer to Muslim women or the religion of Islam, it is clear that they were often the exclusive targets of the prohibition.⁴²³

Secondly, the allegation that a ban prevents Muslim women from being forced to wear headscarves or full-face veils is similarly not a sufficient justification. Notwithstanding the fact that the ECtHR failed to produce evidence of coercion, it is unclear how a ban, for example, of headscarves in public schools would prevent “perpetrators of coercion” from acting.⁴²⁴ It is more appropriate to target the coercion itself, despite the fact that it is difficult to identify and prove.⁴²⁵

Lastly, although protecting gender equality is a serious issue, it is not a sufficient justification for prohibiting headscarves and full-face veils. This mainly due to the fact that the ECtHR in both *Dahlab* and *Şahin* neglected to explain why headscarves are incompatible with gender equality or representative of gender inequality. Conversely, dissenting Judge Tulkens in *Şahin* clearly explains why gender equality cannot prohibit women from following a practice that they have freely adopted. Furthermore, similar to coercion, the ECtHR did not explain how a ban would achieve gender equality. Most

⁴²¹ *Şahin* (Section IV), above n 7, at [106].

⁴²² France-Pressé, above n 241.

⁴²³ Osman, above n 12, at 1328.

⁴²⁴ Osman, above n 12, at 1331.

⁴²⁵ Osman, above n 12, at 1331.

significantly, in *S.A.S.*, the ECtHR explicitly stated that gender equality did not justify a bans on full-face veils in public.⁴²⁶

Based on the critique above, the goals of protecting secularism, preventing coercion and promoting gender equality will obviously not be achieved by a ban on headscarves or on full-face veils. Therefore, they cannot justify such a ban being implemented.

⁴²⁶ *S.A.S.*, above n 11, at [118].

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