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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
# Contents

I  Introduction .................................................................................................................... 4  

II  Introduction To Islamic Dress ........................................................................................ 7  
    A  Terms Used in This Paper .......................................................................................... 7  
    B  Are Head Coverings a Religious Obligation? ............................................................ 8  

III  Switzerland .................................................................................................................... 9  
    A  Secularism in Switzerland ...................................................................................... 9  
    B  Switzerland and Islamic Dress ................................................................................. 10  
       1  Muslims in Switzerland .................................................................................. 10  
       2  Cantonal ban on full-face veils ................................................................... 11  
       3  European Court of Human Rights: Dahlab v Switzerland .................................. 14  
       4  A nationwide ban on full-face veils? .............................................................. 20  

IV  Turkey .......................................................................................................................... 23  
    A  Secularism and Muslims in Turkey ........................................................................... 23  
    B  Turkey and Islamic Dress ........................................................................................ 24  
       1  Ban on headscarves in public institutions ...................................................... 24  
       2  European Court of Human Rights: Şahin v Turkey ........................................... 27  
       3  2008 and onwards: lifting the "headscarf ban" .............................................. 34  

V  France ............................................................................................................................ 37  
    A  Secularism in France .................................................................................................. 37  
    B  France’s Ban on Religious Symbols in Schools ..................................................... 38  
       1  The Stasi Commission .................................................................................... 38  
       2  The 2004 law .................................................................................................. 38  
       3  European Court of Human Rights: Dogru v France ........................................ 39  
    C  France’s Ban on Head Coverings in Public Spaces .............................................. 40  
       1  Parliamentary Commission ............................................................................ 41  
       2  The 2011 law .................................................................................................. 43  
       3  European Court of Human Rights: S.A.S v France ......................................... 45  
    D  France’s "Burkini Bans" .......................................................................................... 50  

VI  Comparative Analysis .................................................................................................. 53  
    A  Secularism ................................................................................................................. 53  
    B  Coercion .................................................................................................................... 56  
    C  Gender Equality ....................................................................................................... 58  

VII Conclusion .................................................................................................................... 61
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, and the right to freedom of expression. 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. 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.

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2 ECHR, above n 1, art 10.
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

\(^7\) *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.
head coverings in the public sphere.\textsuperscript{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.\textsuperscript{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, \textit{S.A.S v France}.\textsuperscript{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 quality, 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.\textsuperscript{12}

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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. 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, 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.

The term “full-face veil” captures more extensive forms of Islamic veiling, where the head, face, and some parts of the body are covered. 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. 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.

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.
15 McGoldrick, above n 4, at 4.
16 McGoldrick, above n 4, at 5.
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.\(^{21}\)

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\(^{19}\) 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*, 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. Switzerland is a federal State made up of 26 cantons. At a federal level, Switzerland is a secular State in which State and religion are separated. This is despite the fact that the Swiss Federal Constitution starts with the words “In the name of God Almighty!” 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.

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

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

\section*{B Switzerland and Islamic Dress}

\subsection*{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.\textsuperscript{37} There are an estimated 350,000 Muslims in Switzerland, making up four per cent of the total population.\textsuperscript{38}

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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{29} Swiss Federal Constitution, art 72.
\item \textsuperscript{30} De Mortanges, above n 25, at 689.
\item \textsuperscript{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.
\item \textsuperscript{32} Müller, above n 24, at 78.
\item \textsuperscript{33} Neither Geneva nor Neuchâtel recognise a state religion; see Dodd, above n 31, at 46; and McGoldrick, above n 4, at 120.
\item \textsuperscript{34} Müller, above n 24, at 78.
\item \textsuperscript{35} Müller, above n 24, at 78-9.
\item \textsuperscript{36} De Mortanges, above n 25, at 688.
\item \textsuperscript{37} Dodd, above n 31, at 47.
\item \textsuperscript{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” \textit{The Guardian} (online ed, 19 April 2016).
\item \textsuperscript{39} Dodd, above n 31, at 28; and “Hostility towards Muslims on the rise in Switzerland” (12 September 2017) The Local <www.thelocal.ch>.
\end{enumerate}
\end{footnotesize}
the Islamic way of life. A prominent example of this is the minaret ban. In 2007, a citizens’ initiative was filed to prohibit the building of minarets in Switzerland. 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.

An increase in hostility towards Muslims has resulted in an increase in the number of high-profile disputes relating to Muslim integration in Switzerland. 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. 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.

2 Cantonal ban on full-face veils

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

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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.
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.
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;\(^\text{50}\) consequently, the issue was taken to a referendum. The referendum question does not single out full-face veils nor specifically target Muslim women, stating:\(^\text{51}\)

> 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.\(^\text{52}\) 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”.\(^\text{53}\)

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

\(^{49}\) 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.
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.
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

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\(^{66}\) “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.


\(^{72}\) Dahlab, above n 5, at 1.

\(^{73}\) Müller, above n 24, at 78.
veil themselves in the presence of males.\textsuperscript{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”.\textsuperscript{75}

Dahlab appealed the Director General’s decision to the Geneva cantonal Government. The cantonal Government upheld the Director General’s decision, reasoning that:\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{79} They further determined

\textsuperscript{74} Excluding immediate family and husbands; see McGoldrick, above n 4, at 5; and Dahlab, above n 5, at 1.
\textsuperscript{75} McGoldrick, above n 4, at 124.
\textsuperscript{76} Dahlab, above n 5, at 2.
\textsuperscript{77} Dahlab, above n 5, at 2.
\textsuperscript{78} Dahlab, above n 5, at 2; and McGoldrick, above n 4, at 122.
\textsuperscript{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

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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,
“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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{112}

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

4 \textit{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.\textsuperscript{115} Wobmann believed a nationwide ban would “maintain public order and respect for the dignity of women.”\textsuperscript{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.\textsuperscript{117} The bill narrowly passed in Switzerland’s

\textsuperscript{110}\textit{Dahlab}, above n 5, at 14.
\textsuperscript{111}\textit{Dahlab}, above n 5, at 14.
\textsuperscript{112}\textit{Dahlab}, above n 5, at 14.
\textsuperscript{113}\textit{Dahlab}, above n 5, at 13.
\textsuperscript{114} Under Article 35(4), the Court can reject any application it considers admissible; see \textit{Dahlab}, above n 5, at 14-15.
\textsuperscript{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 \texttt{<www.thelocal.ch>}; and Michael Shields and John Miller “Ban on face veils advances in Swiss parliament” (28 September 2016) Reuters \texttt{<www.reuters.com>.
\textsuperscript{116} “Switzerland edges towards nationwide burqa ban” (28 September 2016) The Local \texttt{<www.thelocal.ch>.
\textsuperscript{117} Gesley, above n 61.
lower house.\textsuperscript{118} It then went before Switzerland’s upper house, the Swiss Council of States in March 2017.\textsuperscript{119} The bill was definitively rejected by 26 votes in favour and nine against, with four abstentions.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{122} Furthermore, the competence to make these kinds of laws should lie with the individual cantons.\textsuperscript{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”.\textsuperscript{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 widespread support, the committee initially struggled to gather signatures. They eventually did reach the 100,000 signature threshold, but only two days before deadline.\textsuperscript{125}

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

\begin{itemize}
\item \textsuperscript{118} 88 votes in favour and 87 votes against; see “Switzerland edges towards nationwide burqa ban”, above n 116.
\item \textsuperscript{119} The Swiss Council of States is a commission composed of representatives from all 26 cantons; see “Switzerland moves toward nationwide burqa ban” \textit{The Independent} (London, England, 29 September 2016) at 29.
\item \textsuperscript{120} “Nationwide burqa ban rejected by Swiss government” (9 March 2017) Le News <lenews.ch>.
\item \textsuperscript{121} “Swiss senate refuses nationwide burqa ban” (9 March 2017) The Local <www.thelocal.ch>.
\item \textsuperscript{122} Naked hiking is banned in Appenzell Ausserrhoden; see “Swiss senate refuses nationwide burqa ban”, above n 121.
\item \textsuperscript{123} Gesley, above n 61.
\item \textsuperscript{124} “Switzerland moves a step closer to voting on nationwide burqa ban”, above n 115.
\item \textsuperscript{125} “Switzerland moves a step closer to voting on nationwide burqa ban”, above n 115.
\item \textsuperscript{126} If all is found to be in order; see “Switzerland moves a step closer to voting on nationwide burqa ban”, above n 115.
\end{itemize}
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. 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 Chamber and the Grand Chamber 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. 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, many of Atatürk’s reforms were aimed at separating the State from religion. For example, in 1926, the existing legal system, a codified variant of Islamic law, was replaced with a secular one. Secularism, or laiklik, was explicitly incorporated into the Turkish Constitution in 1937.

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129 Şahin (Section IV), above n 7.
130 Şahin (Grand Chamber), above n 7.
131 Muftuler-Bac, above n 8, at 423.
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.
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. 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”.

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

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. However, Atatürk did not aim dress reforms at women. Despite making an effort to distance Turkey from veiling, there was no explicit ban against the headscarf under Atatürk. It was not until the late 1970s and early 1980s that regulations banning the headscarf began to appear.

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. The first piece of legislation prohibiting headscarves was a set

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137 Şahin (Section IV), above n 7, at [30].
138 Turkish Constitution, art 2.
139 McGoldrick, above n 4, at 132.
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. These regulations required students and staff at public organisations to dress in ordinary and modern dress. They also prohibited veils in State education institutions preventing female students and staff of universities from wearing headscarves at public universities. In 1982, the Higher Education Authority issued a circular banning headscarves from lecture theatres. This extended the headscarf ban to all universities, both public and private. Despite this extension, application of the ban was inconsistent; implementation varied between one university to another.

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. In an attempt to overturn the headscarf ban in universities, the Turkish Government enacted s 16 of the Higher-Education Act in 1988. The Act required “modern dress” but permitted the headscarf in higher-education institutions on the basis of freedom of religion. However, in 1989, the Constitutional Court ruled that the law was unconstitutional. This was primarily because the law violated the principle of secularism. 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

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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].


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.  

In October 1990, the Turkish Government once again attempted to remove the headscarf ban by enacting s 17 of the Higher-Education Act. 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. 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.

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. Any woman wearing a headscarf was unable to register for or teach at university. It was also more widely enforced in other public institutions.

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

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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. 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. Şahin appealed this decision, but as all disciplinary penalties against Şahin had since been revoked under an amnesty law, the Supreme Administrative Court held it was unnecessary to examine her appeal.

(b) Submissions

Şahin’s application was transmitted to the ECtHR in November 1998. Relying on Article 9 of the ECHR (freedom of thought, conscience and religion), 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.

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. 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.

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

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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].
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. 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”. 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.

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.

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. In the alternative that the headscarf ban was found to be an interference, the Turkish Government submitted that it was prescribed by law, that it pursued several legitimate aims, 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

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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].
Secondly, they emphasized the importance of secularism in Turkey in comparison to other democracies. 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. They also noted that students were free to wear the headscarf outside of schools, and that religious duty was not the same as religious freedom. 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”.

(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.

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. Furthermore, the ECtHR determined that the law was accessible. Despite Şahin’s claim that universities did not follow a uniform practice, the ECtHR also held it was foreseeable, as the regulation existed well before Şahin enrolled at the University.

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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

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\(^{197}\) 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.”

In September 2004, in accordance with Article 43 of the ECHR, 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. 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.

Şahin alleged that her right to education had been violated. The headscarf ban prevented her from attending examinations and a lecture, and from pursuing her education in Turkey in a way that was consistent with her religious beliefs. 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.

In response, the Turkish Government submitted that there had been no violation of Article 2 of Protocol No. 1. Despite no specific reference being made to higher

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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

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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-Islamic\textsuperscript{222} 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.\textsuperscript{223} Erdoğan was initially barred from taking political office,\textsuperscript{224} which prevented him from holding elected office as Prime Minister.\textsuperscript{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.\textsuperscript{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.\textsuperscript{227} The suggested amendments were passed in Parliament with a super-majority. However, the Constitutional Court annulled the amendments,\textsuperscript{228} ruling that Parliament had violated the principle of secularism, which is constitutionally enshrined.\textsuperscript{229}

\footnotesize{\begin{itemize}
\item 222 Muftüler-Bac, above n 8, at 424.
\item 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.
\item 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 Muftüler-Bac, above n 8 at 424.
\item 225 Article 109 of the Turkish Constitution requires the Prime Minister to be a Member of Parliament; see Cagaptay, above n 223, at 44.
\item 226 Dymon, above n 224; and Muftüler-Bac, above n 8, at 424.
\item 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.
\item 228 Akbulut, above n 145, at 434.
\end{itemize}}
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. 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. Erdoğan was particularly criticised.

In 2010, the AKP prepared a constitutional reform package consisting of 27 articles amending the 1982 Constitution. 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. 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. 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.

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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).
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. Part C discusses France’s 2011 ban on head coverings in the public sphere and the decision of the ECtHR in *S.A.S v France*. 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. Religion is a private issue.

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, 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.”

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248 *S.A.S*, above n 11.
249 Osman, above n 12, at 1326.
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.”

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. 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.

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. 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. Whilst the proposed law

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254 Leane, above n 14, at 1039.
255 Leane, above n 14, at 1039.
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.
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. 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. 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; 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. Secularism is a constitutional principle in France, and protecting this principle in public schools is of prime importance.

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, addressed to a special sitting of both houses of Parliament. Sarkozy described full-face veils as a symbol of enslavement and repression. He alleged

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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].


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”,\textsuperscript{275} and as such, “is not welcome in France.”\textsuperscript{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,\textsuperscript{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.\textsuperscript{278}

In his state of the nation speech, Sarkozy backed the proposition for a parliamentary commission on the issue of full-face veils.\textsuperscript{279} The Parliamentary Commission to Study the Wearing of the Full Face Veil in France was established on 23 June 2009.\textsuperscript{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.\textsuperscript{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.\textsuperscript{282}

\textsuperscript{275} Peter Morey and Amina Yaqin \textit{Framing Muslims} (Harvard University Press, Cambridge (Mass), 2011) at 177.
\textsuperscript{276} Doreen Carvajal “Sarkozy Backs Drive to Eliminate the Burqa” \textit{The New York Times} (online ed, 22 June 2009).
\textsuperscript{277} Leane, above n 14, at 1041.
\textsuperscript{278} Powell, above n 10, at 127.
\textsuperscript{279} Chrisafis, above n 274.
\textsuperscript{280} Commission’s report, above n 17.
\textsuperscript{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 France’s estimated 5 to 6 million Muslims, the practice of veiling was undertaken by a minority. 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. 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. 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.

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”, and contrary to the principle of gender equality and fraternity. As such, wearing a full-face veil was determined to be contrary to the values of France.

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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.
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.\footnote{Eleanor Beardsley “French Panel: Ban Burqas In Public Buildings” (26 January 2010) NPR <www.npr.org>; and Davies, above n 283.} They did not go so far as to recommend that Parliament ban full-face veils from the streets.\footnote{Powell, above n 10, at 128.}

\section{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”.\footnote{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.} This total ban was put forward despite the Commissions’ narrower recommendation.\footnote{Davies, above n 283.}

The law purports to prohibit persons from wearing clothing intended to hide the face in the public space.\footnote{Law 2010-1192 of October 11, 2010, above n 247.} Persons wearing a full-face veil in public can be required by police to show their face.\footnote{Megan McKee “France constitutional court approves burqa ban” (7 October 2010) Jurist <www.jurist.org>.} If they refuse, they can face a fine of up to 150 Euros and/or be required to attend a citizenship course.\footnote{Angelique Chrisafis “Full-face veils outlawed as France spells out controversial niqab ban” The Guardian (online ed, 3 March 2011).}

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.”\footnote{Powell, above n 10, at 126.} Exceptions to the proposed law include private homes and worshipping in a religious place or travelling in a private car.\footnote{Chrisafis, above n 296.} 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.
Due to the fact that clothing intended to hide the face is an incredibly broad category, the proposed law does allow for several exceptions.\textsuperscript{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”\textsuperscript{300}

The proposed law also outlaws the forcing of a person to wear the full-face veil.\textsuperscript{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.\textsuperscript{302} In the case of force being applied to a minor, persons face a fine of 60,000 Euros and two years in prison.\textsuperscript{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”.\textsuperscript{304} This title change was intended to get around accusations that the ban was prejudicial against French Muslim women.\textsuperscript{305}

In July 2010, the bill passed 336 to one in the National Assembly,\textsuperscript{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

\textsuperscript{299} Powell, above n 10, at 127.
\textsuperscript{300} S.A.S, above n 11.
\textsuperscript{301} “French face veil ban comes into force” (12 April 2011) Aljazeera <www.aljazeera.com>.
\textsuperscript{302} Chrisafis, above n 296; and Kunz, above n 292, at 79.
\textsuperscript{303} Kunz, above n 292, at 97.
\textsuperscript{304} Steven Erlanger “France Enforces Ban on Full-Face Veils in Public” The New York Times (online ed, 11 April 2011).
\textsuperscript{305} Chrisafis, above n 296.
\textsuperscript{306} Powell, above n 10, at 126.
The ban then went before its final hurdle, the French Constitutional Council (Conseil Constitutionnel).\textsuperscript{308} In October 2010, the Council held that the Act prohibiting the concealing of the face in public is constitutional.\textsuperscript{309} This is largely due to two reasons. Firstly, the punishment for breaching the ban was not disproportionate.\textsuperscript{310} Secondly, the ban did not prevent the free exercise of religion in a place of worship.\textsuperscript{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.”\textsuperscript{312}

A few days later, on 11 October 2010, Sarkozy signed the legislation into law.\textsuperscript{313} The law came into effect the following year, on 11 April 2011.\textsuperscript{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,\textsuperscript{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

\[\textsuperscript{307}\text{“French Senate approves burqa ban” (15 September 2010) CNN <edition.cnn.com>.}\]
\[\textsuperscript{308}\text{The Council is a body that has the power to review the constitutionality of bills ex ante and ex post promulgation. Bills before by parliament may be referred to the Council, which rules on their conformity with the Constitution. Once a bill has been declared constitutional, the bill can then be promulgated. The Council also has the power to have legislative provisions that infringe on the rights guaranteed by the Constitution repealed; see French Constitution, arts 61, 61-1, and 62; Kunz, above n 292, at 79; and Powell, above n 10, at 125.}\]
\[\textsuperscript{309}\text{“Act prohibiting the concealing of the face in public” [Council’s decision], Decision n° 2010-613 DC (7 October 2010), available at <www.conseil-constitutionnel.fr>, at 2.}\]
\[\textsuperscript{310}\text{Council’s decision, above n 309, at 2; and Kunz, above n 292, at 79-80.}\]
\[\textsuperscript{311}\text{“French burqa ban clears last legal obstacle” (7 October 2010) CNN <edition.cnn.com>.}\]
\[\textsuperscript{312}\text{Council’s decision, above n 309, at 2.}\]
\[\textsuperscript{313}\text{Powell, above n 10, at 127.}\]
\[\textsuperscript{314}\text{Powell, above n 10, at 127.}\]
\[\textsuperscript{315}\text{Kunz, above n 292, at 80.}\]
marginalisation of the country’s 5 to 6 million Muslims. Several critics, including human rights organisation Amnesty International, further warned France that the law was a violation of European human rights law, and therefore was liable to challenge in the ECtHR. 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”, 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. 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).

(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. 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.

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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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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”.\textsuperscript{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”.\textsuperscript{329} This aim involved three human rights arguments. Firstly, the ban upheld the minimum requirements of the French principle of \textit{vivre ensemble} (living together). The Government submitted that “the face plays a significant role in human interaction”,\textsuperscript{330} and that covering ones’ face “is to break social ties”.\textsuperscript{331} Secondly, the Government argued that the

\textsuperscript{324} \textit{S.A.S}, above n 11, at [78].
\textsuperscript{325} \textit{ECHR}, above n 1, art 8.
\textsuperscript{326} \textit{S.A.S}, above n 11, at [79].
\textsuperscript{327} \textit{S.A.S}, above n 11, at [81].
\textsuperscript{328} \textit{S.A.S}, above n 11, at [82].
\textsuperscript{329} \textit{S.A.S}, above n 11, at [82].
\textsuperscript{330} \textit{S.A.S}, above n 11, at [82].
\textsuperscript{331} \textit{S.A.S}, above n 11, at [82].
ban aimed to achieve gender equality. The 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.

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. 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.

(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. 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. The ECtHR firstly assessed the legitimate aims identified by the French Government. They did not accept that either gender equality or respect for human dignity could justify the ban. 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”.” This aim is

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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.\textsuperscript{347} Hence, there was no violation of Articles 8 or 9 of the Convention.\textsuperscript{348}

\textit{D France’s “Burkini Bans”}

In 2016, partially in reaction to recent terrorist attacks, around 30 French coastal resorts implemented “burkini bans”.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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”.\textsuperscript{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,\textsuperscript{353} requesting it be suspended. However, the Administrative Court denied this request. The judge upheld the ban based on existing French law

\textsuperscript{347} S.A.S, above n 11, at [151].
\textsuperscript{348} S.A.S, above n 11, at [159].
\textsuperscript{349} Angelique Chrisafis “French mayors refuse to lift burkini ban despite court ruling” \textit{The Guardian} (online ed, 28 August 2016).
\textsuperscript{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>.
\textsuperscript{351} Harry Cockburn “Burkinis banned on French Riviera – to make people safer” (12 August 2016) The Independent <www.independent.co.uk>.
\textsuperscript{352} Dearden, above n 350.
\textsuperscript{353} “French court upholds Cannes ‘burqini’ 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” \textit{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", 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.
360 Chrisafis, above n 349.
movement, the freedom of conscious, and personal freedom”.\textsuperscript{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.\textsuperscript{362} It remains to be seen how authorities will react to the existence of these bans, which are now seen as illegal.\textsuperscript{363}

\textsuperscript{361} Selina Cheng “France’s highest court ruled that the burkini ban is “clearly illegal” (26 August 2016) Quartz <qz.com>.
\textsuperscript{362} “French mayor reignites burkini row after banning Muslim swimwear at leisure park” (28 June 2017) The Local <www.thelocal.fr>.
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,\(^{375}\)

\(^{369}\) *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. The “perpetrators of coercion” may alternatively prevent them from attending school or university if headscarves are banned by the State in these institutions. A more appropriate solution would be to target the coercion itself. 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 difficulty to achieve, as coercion is “hard to identify, prove and sanction”, 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. 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, the ECtHR held that students of a young age were considered to be “particularly impressionable” and vulnerable to the views of a teacher. 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 it’s 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

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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.
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, and most religions treat men and women differently; for example, women cannot be ordained as priests according to the Catholic Church. 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. 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”. 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.”

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.” Similarly, the Parliamentary Assembly of the Council of Europe on Islam, Islamism and Islamophobia in Europe held

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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].
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. However, Turkey no longer has headscarf bans. 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.

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. It is more appropriate to target the coercion itself, despite the fact that it is difficult to identify and prove.

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

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421 Şahin (Section IV), above n 7, at [106].
422 France-Presse, 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.

426S.A.S, above n 11, at [118].
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French Constitution.

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Word count

The text of this paper (excluding abstract, key words, table of contents, footnotes, and bibliography) comprises approximately 14035 words.