The Veil of Ignorance: A Critical Analysis of the French Ban on Religious Symbols in the Context of the Application of Article 9 of the ECHR

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Abstract

This paper provides a critical analysis of the French law introduced in 2003, which prohibits religious symbols being worn in public schools. It is shown that, although the law appears to be neutral, the practical reality is that Muslim women, who wear the Hijab, are targeted by this law significantly more than any other religious group.

It is shown that the prohibition on religious symbols in France is disproportionate to the aims which France claims the measure seeks to achieve. Moreover, it is argued that France has failed to establish convincingly that such an intrusive interference is necessary in a democratic society, and also that it was the least intrusive measure available to the state.

In accordance with the arguments summarised above, it will be shown that, France has breached Article 9 of the European Convention on Human Rights and Fundamental Freedoms, to which it is a High Contracting Party.

To support this assertion, the paper centres on an evaluation of two previous ECtHR rulings (Dahlab v Switzerland and Sahin v Turkey): in both cases the applicants, who were Muslim women, had been prohibited from wearing their Hijabs in public schools. These cases are evaluated as in both cases High Contracting Parties to the European Convention on Human Rights also restricted the Hijab in public schools; these restrictions were also
justified on the same grounds as the French ban, such as secularism and gender equality.

This paper is critical of the approach taken by the European Court of Human Rights in its highly deferential approach in favour of the High Contracting Party. It is argued that the margin of appreciation doctrine, which the European Court used in allowing such discretion to the High Contracting Party, was misapplied as the doctrine requires effective European supervision, which was lacking in the European Court rulings.

This paper goes on to examine the notion of secularism used by France in justifying the prohibition, to conclude that France employs a fundamentalist version of secularism, which is incompatible with the European Convention as the wearing of religious symbols is compatible with the liberal, democratic and pluralist values which underpin the Convention.

**Introduction**

In 2003, France introduced a law\(^1\) which prohibited the wearing of all ostentatious religious symbols inside public schools. Following this, other states have followed suit, or at least relied upon the French approach to support a similar stance or even to extend the scope of the prohibition to all public areas.\(^2\) In anticipation of a ruling by the European Court of Human Rights (ECtHR), the aim of this paper is to assess the compatibility of the law with Article 9 (Freedom of Thought Conscience and Religion) of the European Convention on Human Rights (ECHR), to which France is a High Contracting Party (HCP). In particular it will be investigated whether the measure contravenes the principle of proportionality, inherent throughout the ECHR, which requires that measures which interfere with a fundamental freedom or right are proportional to the legitimate aims, which the HCP claim the measure seeks to achieve.

To help determine and understand how the ECtHR may address an application under Article 9, by an applicant claiming to have his or her rights to manifest their religion violated without justification, this paper will centre on the evaluation of two similar previous cases of *Dahlab*\(^3\) and

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2. One such state is Belgium.
In both cases, the applicants were Muslim women, who were prohibited from wearing the Islamic headscarf/veil (hereafter referred to as the Hijab) inside public schools. The relevance of these cases is that in both the principle of secularism was relied upon by the HCPs to justify the restrictions. The ECtHR’s ruling in favour of the HCP in both cases, and the wide margin of appreciation it allowed, was also largely based on the principle of secularism. It is also the main principle on which France bases its prohibition on religious symbols.

By examining the key elements of reasoning relied upon by the HCPs and the ECtHR in the similar cases of Dahlab and Sahin, the author aims to show that the margin of appreciation afforded was too wide and inappropriate to safeguard the rights and interests of the applicants; and that, in the event of an application against the French law, the ECtHR must undertake a proper scrutiny of the arguments put forward by the state, to provide a clear and authoritative ruling. The implications of how the ECtHR addresses these issues are significant, as it will determine the scope of religious rights to be enjoyed by millions of people.

The paper will argue that, whilst the aim was legitimate, the measures taken by France in pursuit of those aims were disproportionate, therefore failing to meet the requirement of proportionality.

Part 1 introduces the Hijab debate in Europe, briefly considering the ECHR and the scope of protection afforded by Article 9. It then goes on to consider the causes of the debate, being the clash of values between an increasingly secular Europe with the emergence of a Muslim population, who are more assertive and expressive of their religion. Having assessed the two main forms of secularism and their compatibility with the values underpinning the ECHR, the approach adopted by France and Turkey, two secular HCPs, is examined to evaluate how they have interpreted the scope of the freedom to manifest one’s religion, within a democratic secular society.

In part 3 the jurisprudence of the ECtHR under Article 9, with particular reference to the previous cases of Dahlab and Sahin, is critically analysed, to understand how and why the Court ruled in favour of the state, to draw inferences for a possible case in similar circumstances against France.

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4 Leyla Sahin v Turkey, No 44774/98, para 34 (Eur Ct H R June 29, 2004).
5 Sikhs, Christians and Jews are all amongst the religions adversely affected by the French law, which introduced the prohibition of religious symbols in public schools. Furthermore any decision by the Court will also have an effect on all High Contracting Parties, as well as judges in national courts around the world; Anne-Marie Slaughter, “A Typology of Transjudicial Communications”, 29 U. Rich L Rev 99; Eyal Benvenisti, “National Courts and the International Law on Minority Rights”, 2 Austrian Rev Int’l & Eur L 1.
Part 4 will subject the interpretation and application of the principle of secularism in France to careful examination, to conclude which form of secularism required an absolute ban on all ostentatious religious symbols in public schools, and how such a ban was necessary to maintain that form of secularism.

Part 5 will summarise the conclusions and observations made during the whole paper, following the critical analysis of the key cases, to conclude whether the prohibition imposed in France was proportional and necessary.

1. Freedom of Religion in Europe

1.1 European Convention on Human Rights and Fundamental Freedoms

The proposal to create a system guaranteeing the human rights of everyone within the jurisdictions of a united Europe was born out of the aftermath of the Second World War. Following that gruesome war which consumed most of Europe, there was a strong desire to create a collective safeguard to prevent isolated and exhausted states becoming corrupted through McCarthyism, communism or fascism. While fascism had disfigured most of Europe, the threat of communism from the east and McCarthyism from the west had to be addressed. A regional system of human rights protection was thought to be the ideal solution, to prevent the recurrence of atrocious human rights violations witnessed during the Second World War.

The European movement that followed promptly focused on establishing a European Union, based fundamentally on the principles of Human Rights; to secure liberty, peace, unity and economic prosperity. Soon after the formation of the Council of Europe in 1949, the Committee of Ministers of the Council authorised the Consultative Assembly to include on its agenda as a matter of priority, the maintenance and further realisation of human rights. This was in furtherance of the Council of Europe's aims which were to:

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7 As well as most of the rest of the world.
9 Now known as the Parliamentary Assembly.
Achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.10

Following a report which it had commissioned, the Consultative Assembly recommended that the Committee of Ministers should undertake the drafting of a Convention to protect ten basic human rights. The Committee of Ministers in turn appointed a committee of government experts to initiate the drafting process of a human rights Convention. Following the drafting process, a final text was approved and The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed by the Committee of Ministers at Rome on the 4th of November 1950.11

The ECHR 12 was the step after the Universal Declaration of Human Rights by the United Nations General Assembly.13 The creation of the legally binding treaty can be seen as the ‘natural progression’14 towards the collective enforcement of the rights stated in the Universal Declaration. Although inspired by the UDHR,15 the ECHR differs from the Declaration by focusing specifically on the protection and advancement of civil and political rights,16 through its implementation machinery.17 The ECHR provides an effective complaints procedure under which inter-state18 and individual complaints19 can be made, referring alleged breaches of the Convention to the ECtHR.

The preamble of the ECHR provides an in-depth insight into the vision and intention of those who drafted and signed it: it states that the prerequisite to justice and peace is the common understanding and

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10 First Session of the Consultative Assembly held At Strasbourg 10th August to 8th September 1949. Settings Held from 16th August to 8th September 1949; Collected Edition of the “Travaux Préparatoires” Volume I Martinus, Nijhoff, The Hague, 1975
11 Coming into force on the 3rd of September 1953, Upon foundation on there were ten members: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and United Kingdom
12 Opened for signature 4 November 1950, 213 UNTS 221 (came into force 3 September 1953). The Convention has been amended through 12 additional protocols.
15 The Universal Declaration is referred to in the preamble of the ECHR.
16 Unlike the Universal Declaration which also considers social, economic and cultural rights.
17 Since Protocol 11 came into force on 1 November 1998, a permanent and full-time Court of Human Rights now decides on the admissibility and merits of applications. Previously, it was the Commission that decided issues of admissibility.
18 ECHR Article 33.
19 ECHR Article 34.
observance of human rights, best maintained through an effective political democracy.20

1.1.1 Article 9 - Freedom of Thought, Conscience and Religion

Among other substantive rights, one of the fundamental freedoms protected in the ECHR, is the freedom of thought conscience and religion. One of the main reasons why the freedom of religion was deemed to be a 'fundamental, undisputed freedom'21 was because of the vulnerability of religious minority groups, to having their human rights violated, evident in the persecution of the Jews. Through the 20th century the totalitarian Nazi regime led by Adolf Hitler, subjected the Jews who were both a religious and ethnic group, to unspeakable persecution. This initially manifested in discriminatory practices carried out towards the Jews that led to the 'final solution', which involved 'the Holocaust', in which approximately six million Jews were killed in extermination camps.22

Thus, it was clear early in the drafting process that freedom of religion was to be included in the rights and freedoms protected in the ECHR. The final text prepared by the Consultative Assembly included a right to freedom of religion, which was largely based on Article 18 of the UDHR, which the delegates considered an appropriate model for the protection of freedom of religion.23

Article 9 ECHR provides:

1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety,

20 Preamble to the ECHR.
22 Niewyk, Donald L. The Columbia Guide to the Holocaust (Columbia University Press, 2000), p45: “The Nazis also killed millions of people belonging to other groups: Gypsies, the physically and mentally handicapped, Soviet prisoners of war, Polish and Soviet civilians, political prisoners, religious dissenters, and homosexuals.”
for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 9(1) encompasses the positive scope of the Article; it expressly includes the right to manifest one's religion or belief in both private and public spheres.

Whilst the 'sphere of personal beliefs and religious creeds',24 or the forum internum, is free from restrictions,25 Article 9(2) provides five broad grounds under which the freedom to manifest one's religion (forum externum), may be legitimately restricted.

In regards to the freedom to manifest one's religion or belief in practice, the ECtHR has held that the term 'practice' used in Article 9(1) is not absolute, and does not cover 'each act... motivated or influenced by a religion or belief'.26 The manifestation will only fall under the scope of Article 9(1), if the applicant can establish sufficient evidence of his or her beliefs,27 and that the manifestation is required by those beliefs,28 or that there is a sufficient link between the manifestation and the beliefs held.29

1.1.2 Freedom of Religion in an increasingly Secular Europe30

Throughout the HCPs of the ECHR different approaches can be seen regarding the relationship between religion and state. While some states such as France,31 Germany,32 Turkey33 and Ukraine34 advocate a secular role, committed to the separation of church and the state, other states, such

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25 Privately held beliefs under the Convention are free from state interference; it is only once the beliefs are manifested that the state is entitled to impose restrictions (subject to the conditions set out in Article 9.2); Tom Lewis, ‘What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation’ (2007) ICLQ at 400.
26 Arrowsmith v the United Kingdom (1978) 19 Eur Comm HR 5, 19.
27 X v Germany (App No 4445/70) decision of April 1, 1970
28 Arrowsmith v United Kingdom (App No7050/75), 19 DR 5, where the Commission suggested that for an action to be considered a practice under Article 9, a very direct link is needed between the belief and the action.
29 Knudsen v Norway (App No 11045/84), 42 DR 247. In this case, in contrast to Arrowsmith the Commission held that the question is whether the actions of the applicant "give expression" to his or her religion or belief.
32 The German Basic Law (1949) incorporated into from Article 137 of the Weimar Constitution 1919, provides that there "shall be no state church".
33 Described in its Constitution as a "democratic, secular and social state"; Article 2 of the Constitution of the Republic of Turkey.
34 The Constitution of Ukraine was referring to 'responsibility before God' also states that the state and school must be separate from the church and religions; Article 35 Constitution of Ukraine 1996.
as Greece, maintain a strong relationship between the state and a church or religion.

In regard to human rights standards, both approaches may be compatible with the ECHR as well as the International Covenant on Civil and Political Rights (ICCPR) as stated by the Human Rights Committee:

The fact that a religion is recognised as a state religion..., shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 (Freedom of Thought, Conscience or Religion) and 27, nor in any discrimination against adherence to other religions or non-believers.

Similarly, it has been argued that `secularism guarantees freedom of conscience...It is the neutrality of the public arena which permits the various religions to coexist, harmoniously'.

The threat posed to human rights, by states dominated by religious fundamentalists, is widely acknowledged and recognised. One dominant religion may have significant influence over political institutions or decision-making and other religions may be restricted or prohibited from exercising their freedom of religion.

However, various forms of secularism also exist, not all of which are compatible with human rights. The two main forms of secularism have been identified as `fundamentalist secularism’ and `liberal secularism’. While both view religion as a `private issue’, the distinction between them lies in the definition of the public and private sphere.

Liberal secularism implies that religious groups should not have power over political institutions or interfere with decision-making in a manner which restricts the rights and freedoms of others. Nonetheless, it

35 The Constitution of Greece (1975/1986) provides that the "prevailing religion in Greece is that of the Eastern Orthodox Church of Jesus Christ, acknowledging our Lord Jesus Christ as its head" (Article 3).
38 General Comment 22 (20 July 1993) UN Doc CCPR/C/21/Rev 1/Add 4.
41 For example the Constitution of the Republic of Iran 1980, which describes Iran as an Islamic State. Officials of Iranian government have to be educated in Muslim law and practices and only three other religions are permitted (Christian, Jewish and Zoroastrian).
43 Ibid, p 1.
does not prohibit manifestations of religion or belief within the public sphere; including public institutions.\textsuperscript{44} Fundamentalist secularism however, implies that as a private issue, all religious manifestations must be confined to the realm of private areas such as homes and places of worship.\textsuperscript{45} Manifestations must not enter the public sphere, especially public institutions. The fundamentalist aspect of this approach is that only this ‘one truth’ or secularist way must prevail over all individuals who enter the public domain.

Thus, it is submitted that both religion and secularism can pose a threat to human rights. As Europe is becoming more culturally diverse,\textsuperscript{46} the balancing act of contrasting ideologies which HCPs must undertake to comply with the Convention is becoming increasingly complicated and difficult.

1.2 The Emergence of Cultural Diversity in Europe

However great the foresight of the visionaries who drafted the ECHR, it is not conceivable that in attempting to guarantee the essential rights of all those within the jurisdiction of HCP, all scenarios could have been contemplated.

From the end of the last world war to the present day, Europe has undergone drastic social transformation, following, \textit{inter alia}, the massive surge of immigrants, to satisfy labour demands in various European states. The migration trends across the European states between the late 1940s and early 1970s varied, and depended upon the geographic location and post-colonial or imperialist history of the European states in regard to the migrant countries. Thus, while Germany received large numbers of migrants from Turkey, and the United Kingdom from South Asia and the Caribbean, France received workers mainly from Africa.\textsuperscript{47} The millions of migrants not only contributed to the economic growth and prosperity of modern Europe, providing much-needed flexibility to the labour force,\textsuperscript{48} but also to its cultural, ethnic and religious diversity.

Owing to their cultural and traditional histories, many of the immigrants came with different political, religious and moral opinions and

\textsuperscript{44}\textit{Ibid}, p2. This is in accordance with Article 9 ECHR, which guarantees the right to manifest one's religion or belief in public or private.
\textsuperscript{45}\textit{Ibid}, p3.
\textsuperscript{46}Per Lord Walker in \textit{R (Williamson) v. Secretary of State for Education and Employment [2005] 2 AC 246}, at paragraph 54.
\textsuperscript{48}\textit{Ibid}, p 34.
beliefs. Nonetheless, perhaps unknown to them, having arrived in certain European states, they entered, not only into European territory, but the jurisdiction of the European Convention, which expressly provides that: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.’

The ECHR, however, had little relevance and effect early on. Initially, in the absence of a declaration by the HCP, only inter-State applications could be made, and these were rarely used and unpopular. However, as of 1 November 1998 when Protocol 11 came fully into force, the individual complaints procedure became an automatic and compulsory procedure for all HCPs, which has been used vastly more than inter-state applications.

Nonetheless, the fundamental need of the newly forming minority groups was not establishing religious expression or identity, but security, including employment, housing, language and family issues. The first immigrant generation may also have readily adopted a foreign culture and embraced the mission to appear non-threatening and invisible, possibly due to fears of discrimination, intolerance or hostility. Once these essential needs were met, attention was turned to securing rights of religious expression and identity.

However, when the manifestations of beliefs of the minority immigrant groups are perceived to contradict with the liberal ideals of the majority of the democratic, secular, pluralist European population, a conflict of opinions and beliefs is created. This conflict, created by a ‘clash of civilisations’, needs to be balanced carefully under the Convention: it is important to reconcile the interests of all concerned to ensure everyone’s beliefs are respected.

Real difficulties arise when there are numerous religions with separate and unique beliefs and different cultures, whose adherents reside in a host country not of their origin, which enjoys its own distinct culture,

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49 By the end of 1970, along with the original 10 contracting parties, 11 more had joined: Greece, Turkey, Iceland, Germany, Austria, Cyprus, Switzerland, Malta, Portugal, Spain and Liechtenstein (order of date joined).
50 Article 1 to the ECHR.
52 Article 34 ECHR.
55 M Fitzgerald, Christians and Muslims in Europe: Perspectives for Dialogue at www.sedos.org
57 Dahlab v Switzerland, Application No 42393/98, ECHR 2001-V, para 83.
and may follow a different religion, or even have no state religion in place. This political and social scenario can be seen in Europe, where the visible emergence of a part of the population who are more self-righteous and proud of their religious heritage and culture has concerned some, who see Europe ‘becoming a land of Islam’.

1.3 Islamic Debate in Europe

Unlike the immigrant families they descend from, who tried to blend in, a small but growing proportion of the later generation are more assertive of their Islamic identity and wish to be recognised as such. They benefit both from being born into the country and, as nationals, do not feel the need to be invisible; they also benefit from the modern international commitment to human rights and freedom from discrimination, which champions their cause.

Critics point out that Islam is repressive, irrational, sexist and incompatible with liberal democracy. Furthermore, unlike ‘moderate’ Muslims, those who are strict adherents are often suspected to be part of the increasing Islamic fundamentalism, a movement which is allegedly threatening secularism, aiming to defy the separation between church and state.

This has fuelled a debate about multiculturalism and Human Rights in various European states. Within this broad debate is the controversial

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60 For example, an increasing number of Muslim women across Europe are beginning to wear the Hijab (especially France); White Muslim Women Who Wear the Hijab in Britain Today', 23(5) Ethnic and Racial Studies, 917-29; C Killian, op cit., 567-90; MD Brown, 'Multiple Meanings of the Hijab in Contemporary France' in WJ Keenan (ed), Dressed to Impress: Looking the Part (Oxford, Berg, 2001) 105-21; F Gaspard and F Khosrokhavvar, Le foulard et la republique (Paris, La Decouverte, 1995).
62 Tom Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation', (2007) ICLQ at 395. The ECtHR has also held that Islamic law or the Shari'a is incompatible with the fundamental principles of democracy, as set forth in the convention: Rehah Partisi (the Welfare Party) v Turkey 2003 EHRR I at para 123.
63 "One who identifies himself strongly with the idea of a liberal Islam and also advocates moderation in the manifestation and expression of Islamic politics," Muqtedar Khan, PhD; http://www.islamfortoday.com/khan08.htm
65 "To re-establish a degree of clerical authority over private life and public policy that Christian churches… have not enjoyed for a long time"; J Smith, 'Religion Must Be Kept in Its Place,' The Times, 18th of March 2004.
debate on the Hijab, which epitomises the broader debate, as it ties in issues such as secularism, fundamentalism and gender inequality.

1.3.1 The Islamic Headscarf Debate

[The] Islamic dress, especially the Hijab, has played a pivotal symbolic, ritual and political role in the Islamic movement. The word ‘veil’ has a range of different meanings:

1. From a sense of communication: hiding, disguised, concealment and deception.
2. A material dimension, this covers the clothing aspect: in the sense of covering their heads, shoulders or face.
3. A spatial or temporal sense: this is a reference to a screen or invisibility, specifying the veil as a screen which creates a physical barrier.
4. The last description is of religious vesture: providing seclusion from worldly life and a symbol of chastity or celibacy.

The word 'Hijab' is found in the Quran and can be argued to be an amalgamation of the third and fourth definition:

And say to believing women
That they should lower
They gaze and guard
Their modesty; that they
Should not display their
Beauty and ornaments except
What (must) ordinarily appear
Thereof; that they should
Draw their veils over
Their bosoms and not display
Their beauty except,
To their husbands, to their fathers...
Their sons... their brothers...
Or their women...

67 Formulated from different definitions provided in F El Gundi, Veil, Modesty, Privacy and Resistance (Oxford, Berg, 1999), pp 6-7.
From this religious prescription, it can be asserted that the Hijab is merely a practical tool to achieve and preserve piety, modesty and chastity. However, many different interpretations and understandings exist for this specific text. Indeed, the Hijab can be seen to represent and symbolise many different meanings: ‘Emancipation can be expressed by wearing the veil or by removing it. It can be secular or religious. It can represent tradition or resistance’.69

The wearing of a Hijab can be an active political symbol, such as resistance to colonialism70 or political opposition.71 The most comprehensive study dealing with the views of young French Muslim women to the veil, found wearing the Hijab as an empowering symbol of their identity.72

There are many different theories and reasons given for why the Hijab is worn, but what is beyond dispute is the fact that it has been very controversial: the debate it has created has been considered by some as a ‘showdown between democratic values and fundamentalism’.73 Within such a debate, a HCP to the ECHR must, in maintaining public order, balance numerous vital interests, including the rights and freedoms of others as well as the demands of pluralism.74 The European Court of Human Rights has acknowledged75 that in such fragile circumstances, where necessary, restrictions may have to be placed on the freedom of religion, to strike the ‘fair balance’,76 a balance which ‘ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position’.77

We shall now consider law and practice in two selected HCPs; to see how the balance between secularism and the freedom to manifest one’s religion has been struck in different democratic societies.

71 M Tavokili-Targhi, ‘Women of the West Imagined: The Farangi Other and the Emergence of the Women Question in Iran’ in Moghadam.
74 Leyla Sahin v Turkey, Fourth Section, Application No 44774/98, Judgment of 29th of June 2004, para 100.
75 Duflah v Switzerland, Application No 42393/98, ECHR 2001-V, paragraph 83.
76 Leyla Sahin v Turkey, Fourth Section, Application No 44774/98, Judgment of 29th of June 2004, para 100.
2. Current Approach Adopted by Selected HCPs

Having considered the various factors in the Islamic Hijab debate in Europe, in particular freedom of religion and secularism, both of which can pose a threat to democracy, we shall now review the practice in Turkey and France; HCPs who are committed to the democratic values underpinning the ECHR. This is to analyse how these two different secularist European states, which both have a strong historical religious tradition, have attempted to strike a balance between the two contrasting concepts.

2.1 Modern 'Secular' Turkey

Mustafa Kemal Atatürk became the founding father of modern Turkey, after liberating the country from foreign occupiers, who had invaded after the demise of the Ottoman Empire. In an attempt to modernise Turkey, he brought in radical reforms to destroy the Islamic culture and influence in society, which he felt was imposed by the Ottoman Empire, in a process he called ‘secularism’, later known as ‘Kemalism’.

Subsequently, in 1921, the Turkish Grand National Assembly drafted the first Constitution of the Turkish Republic, establishing a national identity, rather than a religious one; this can be seen as the Constitutional foundations of the principle of secularism in Turkey, which were expressly manifested later.

After his death in 1946 a multi-party system was introduced, with each party having its own policies and definitions of secularism. Amid social and economic distress, which prompted two military coups.

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78 However for the purposes of this dissertation, which is set in the context of the French ban 2004, more emphasis will be given to the French debate. For an in-depth review of the dispute in Turkey between secularism and Islam, including the Hijab debate see; Benjamin D Bleiberg, Unveiling the Real Issue: “Evaluating the European Court Of Human Rights’ Decision To Enforce The Turkish Headscarf Ban In Leyla Sahin v Turkey”, (2005) 1(129) Cornell Law Review.
83 The principle of secularism was first established in the Turkish Constitution in a 1937 amendment; Leyla Sahin v. Turkey, No 44774/98, para 27 (Eur CHR June 29, 2004).
84 One in 1960 and the other in 1971.
political Islam was born. The NSP\textsuperscript{85} began to advocate a fundamentalist view of Islam, and openly campaigned against Kemalist secularism. In 1980 the military seized control of the government for the third time, following terrorism and religiously motivated violence. The National Security Council was established, which amended the Constitution to grant itself greater power and legal immunity.\textsuperscript{86}

The military's 1982 Constitution marked the return to the 'nationalism of Atatürk', declaring the country a 'democratic, secular and social state governed by the rule of law'.\textsuperscript{87} It is clear that the Constitution was formulated to preserve the integrity of Turkey,\textsuperscript{88} with the drafters claiming to have 'built an armoured wall against those who want to split our country'.\textsuperscript{89}

### 2.1.1 Hijab Debate in Turkey

The NSC began an immediate assault on the Hijab, bringing an end to the 'liberalisation of the dress regulations',\textsuperscript{90} which had been enjoyed following Atatürk's death. In 1981, the Regulation concerning the Dress of Students and Staff in Schools banned any type of head covering in public organisations. A year later the Hijab was banned from lecture rooms;\textsuperscript{91} this ban was later upheld by the Supreme and Administrative Court, finding the Hijab incompatible with secularism and women's equality.\textsuperscript{92}

Following the ruling of the Grand Chamber of ECtHR in \textit{Leyla Sahin v. Turkey}\textsuperscript{93} which upheld the prohibition on Hijabs in universities, similar applications have been declared inadmissible, with the ECtHR following its reasoning in \textit{Sahin}.\textsuperscript{94}

\textsuperscript{85} National Salvation Party. 
\textsuperscript{86} Ergun Ozbudun, \textit{Constitutional Law, Introduction To Turkish Law} (Tugrul Ansay & Don Wallace, Jr. eds, 1996),24-5 . 
\textsuperscript{87} 1982 Türkiye Cumhuriyeti Anayasasi [Turkish Constitution] Article 2. 
\textsuperscript{89} Nicole Pope & Hugh Pope, \textit{Turkey Unveiled: Atatürk and After} (1997) 150. 
\textsuperscript{91} Leyla Sahin v. Turkey, No 44774/98, para. 34 (Eur Ct HR, June 29, 2004). 
\textsuperscript{92} Leyla Sahin v. Turkey, No. 44774/98, para 34 (Eur Ct HR, June 29, 2004). 
\textsuperscript{93} Leyla Sahin v. Turkey, No 44774/98, para. (Eur Ct HR, June 29, 2004) Grand Chamber 
\textsuperscript{94} In 2006 and 2007, the Court declared applications in 6 cases inadmissible: Kurtulmuş v. Turkey (App No 65500/01); Kışla v. Turkey (App No 26625/02); Çaklayan v. Turkey (App No 1638/04); Fatma Karaduman v. Turkey (App No 41296/04); Tandogan v. Turkey (App No 41298/04); Yılmaz v. Turkey (App No 37829/05).
2.2 France

While the Hijab debate is prevalent in most European states, France has arguably created the greatest opposition to the Hijab, with the exception of Turkey. There are numerous factors which have contributed to the French debate on the Hijab, and why specifically in France it has been so controversial.

2.2.1 Constitutional History of France

One of the most fundamental principles of the Constitution of the fifth French Republic is the principle of Laïcité, a system of public order which ensures the separation of state and church; ‘through which religion gradually loses its influence on the individual and society’. The principle of Laïcité is deeply rooted in French Republican philosophy, and is the product of bitter State-Church conflict, which has marred French history for centuries. France has a tradition of religious hostility, which derives from the enormous influence the Catholic Church once had over public and political matters.

Consequently, French republicanism has adopted a strong, arguably militant, secularist attitude, ensuring that personal religious beliefs do not extend past the private realm into the ‘laique republic’. Under the constitution, the current Republic is ‘one and indivisible’. As a matter of official policy citizens are encouraged to belong to the French national community, rather than a particular racial, ethnic or religious community. The population must be unified to

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95 Polls have shown that 86 percent of the French population supported the education minister’s decree which effectively banned Hijabs from classrooms; http://www.themoderreligion.com/woman/Hijab-world.htm, whilst approximately 70% supported the eventual law introduced by President Chirac in 2004 (considered later in this paper); W Cederwell, ‘What They Said about... The French Ban on Hijabs’, The Guardian, 6 February 2004.
97 The French adaptation of secularism described as; “the French understanding of the proper place and function of religion within the state”, O Dord, Laïcité: le modèle français sous influence européenne (Paris, Fondation Robert Schuman, 2004), 14-35.
99 AH Galton, Church and State in France 1300-1870 (London, Edward Arnold, 1907)
102 Article I of the Constitution of 1946 (fourth French Republic).
harmonise and conform with the state, both legally and socially. A consequence of such a philosophy is that there is no ‘right to be different’, thus France does not recognise minority groups. Therefore, France employs a ‘strongly integrationist and assimilationist’ approach to minorities, in stark contrast with the British tradition of recognising cultural and religious differences. Multiculturalism, is ‘un-French’, and the French commitment to its assimilationist approach is evidenced by its refusal to become a party to various international treaties, which recognise minority rights.

Thus, along with its political traditions, and having the largest Muslim population among Western European states, the noticeable emergence of a minority group openly expressing their religious identity was arguably bound to be considered conflicting and controversial in France, and more so than in other European states.

2.2.2 Hijab Debate in Criel

In France, the wearing of the Hijab had been the cause of a heated public debate for more than fifteen years since, in 1989, three pupils were excluded from a public middle school for wearing the Hijab. Although the situation was resolved, the events at the Collège Gabriel Havez in Criel attracted much publicity and sparked a national debate. The debate considered a wide range of factors other than religious rights,
such as secularism, equality of women, difference, immigration and the fear of Islamic fundamentalism.\textsuperscript{114}

It is submitted that at best this debate was misdirected, and at worse prejudiced. From looking at the cause of the debate, the key issues to be addressed were the compatibility of the principle of Laïcité with the religious rights of Muslim women. However, although one of the factors considered was the equality of women, this is seen by some as a great contradiction, as the debate was 'monopolised by men'.\textsuperscript{115} Furthermore, there were strong factors which were inappropriate and irrelevant to the debate, which however proved very influential.

For example, although the wearing of the Hijab by Muslim women in France had caused no concern of militant Islamic fundamentalism, it is clear that many opinions were influenced with the increase in Islamic fundamentalism in a number of non-European states in the 1980s, particularly in Iran.\textsuperscript{116} Indeed, events in 1989 prior to the expulsion of the three girls were clearly influential, even before the national debate. In 1989 political Islam entered the international stage: Ayatollah Khomeini's much-publicised fatwa against Salman Rushdie, the civil war in Lebanon and the political movement of the FIS (Front Islamique du Salut) was born in Algiers.

The reference to International Islamic fundamentalism and especially to the Salman Rushdie affair\textsuperscript{117} should not have been relevant to the Criel debate. Previous to these international events, many veiled girls had been attending the same school as well as other schools, without any objections.\textsuperscript{118} However, through the media coverage of the international events, which illustrated 'political Islam' in the form of Iranian women in Islamic dress, the Hijab was given a new dimension.\textsuperscript{119}

Thus, it can be seen that many of the factors which led up to the debate were part of a different and wider debate, but nonetheless influential. Also, many of the issues referred to in the public debate, such as Islamic fundamentalism in Middle Eastern states, were irrelevant to the central issue, and could have negatively influenced public opinion.

\textsuperscript{114} Ibid, p 67
\textsuperscript{115} C Killian, 2003, \textit{op. cit}, 568.
\textsuperscript{116} Dominic McGoldrick, \textit{Human rights and religion, The Islamic headscarf debate in Europe} (Hart, 2006), p 65. Iran, as a result of the Islamic revolution of 1979, is under a strict Islamic regime: the rights of women are severely restricted and it is compulsory by law for all females above the age of six, regardless of religion, to wear the Hijab: H Omid, \textit{Islam and the Post-Revolutionary State} (London, Macmillan, 1994), p 178-204.
\textsuperscript{117} A British Muslim whose book called \textit{The Satanic Verses} which created a furore amongst Muslims worldwide, and the reason why he became the subject of a fatwa calling for his death.
\textsuperscript{118} \textit{Témoignage Chrétien}, October 30-November 5, 1989.
However, referring to acts of terrorism or militant Islamic ideology within the same debate could have had the impact of stigmatising the plight of the Muslim women in the debate, by implying that they or the Muslim veil were connected to radical Islamic Ideology.

The majority of public opinion subsequently opposed the wearing of the veil and generally supported the principle of secularism. Nonetheless, the French Minister of Education at that time chose a controversial but tolerant solution. It was based on a more forgiving interpretation of Laïcité. He believed that students who wore the veil should be permitted to attend school, as denying them this would rule out any possible integration and limit their social mobility.

To support his assertion, which attracted fierce criticism, he sought the opinion from the Conseil d’Etat, the highest state administrative authority, regarding the compatibility of wearing religious symbols with the principle of Laïcité. The Conseil d’Etat not only considered the Law of Separation and Article I of the 1958 Constitution (in which the principle of Laïcité is enshrined) but also relevant international human rights treaties, including the ECHR and the ICCPR to which France is a party, and is thus bound by them. The Conseil d’Etat was of the opinion that:

The wearing of signs by which they intend to demonstrate their belonging to a religion is not in itself incompatible with the principle of secularism, in so far as it constitutes the exercise of that freedom of expression and a demonstration of religious belief.

However it also advocated what the limitations on the exercise of these rights ought to be:

...that freedom does not permit students to display signs of religious belonging which ...by the conditions in which they are worn...would constitute an act of pressure, provocation, proselytism or propaganda.

A careful analysis of this significant declaration shows that the Conseil d’Etat was of the opinion that, where a member of a religious community wears a religious symbol purely as a sign or symbol to demonstrate their belonging to a religion, in the exercise or manifestation of a belief, in the absence of any improper intention or purpose such as provocation or coercion, this will be compatible not only with secularism but also with the principle of Laïcité.126

There is also a strong correlation between the limitations thought necessary by the Conseil d’Etat on religious freedoms, and those provided by Article 9 (2) of the ECHR and Article 18 (3) of the ICCPR, namely public safety, public order, health or morals, and for the protection of the rights and freedoms of others.127 This seems to suggest that not only did the Conseil d’Etat feel satisfied with the amount of religious freedom afforded by the ECHR and the ICCPR but also with the grounds of limitations. This provides support to the argument that a law or measure providing an absolute prohibition on the wearing of religious symbols is disproportionate, as effective protection is already provided by the treaties. In any event, the Conseil d’Etat was advancing a contemporary reading of Laïcité.128

Accordingly, a large majority of school decisions to exclude or suspend pupils were reversed by the Conseil d’Etat (41 school decisions were reversed out of 49). It is clear from the cases129 that regulations which enforced a general blanket ban on the wearing of Hijabs were annulled, having been found to breach the students’ rights of expression and the principles of neutrality and secularism in public education. This again appears to illustrate the opinion of the Conseil d’Etat, that the wearing of religious symbols in a context which did not include provocation or any other improper conduct was permissible in a public school in a secular state.130

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126 It has been argued that the common English translation of secularism only partly reflects the meaning of Laïcité; M Troper, French Secularism, or Laïcité (2000) 21 Cardozo Law Review 1267-84.
127 The Convention (Article 9.2) provides a near identical list of limitations to the Covenant, with the only difference being that the Convention states as a limitation the protection of the rights and freedoms of others as opposed to the fundamental rights and freedoms of others, as provided by the Covenant (Article 18.3).
130 The cases of Moussaoui et al (Conseil d’Etat, 27 November 1996, No 170207), and Aoukili (Conseil d’Etat, 10 March 1995, No 159.981), illustrate this point where the Conseil d’Etat upheld restrictions where the Hijab has worn with the intention of creating provocation, proselytism or disruption to public order.
2.2.3 French Ban on Religious Symbols in 2003

The public perception of foreign people and culture can be heavily dependent on the modern mass media, which, through the repetition of carefully selected pictures and words such as Islamic fundamentalism, and the omission of appropriate and proper information, can help create and distribute stereotypical images.\textsuperscript{131}

In France, following the debate in Criel in 1989, an analysis of media coverage shows that the mass media was biased and misleading in how it reported articles which were related to the debate. The media attempted to link incidents such as the Rushdie affair to the expulsion of the three girls. It also - in its selection of images - would associate fundamentalism and fanaticism with religious apparel. On October 5\textsuperscript{th} the Le Nouvel Observateur ran a cover story entitled ‘Fanaticism: The Religious Menace’ with the image of a girl in a full, black chador,\textsuperscript{132} an exaggeration of what the three girls expelled had been wearing.\textsuperscript{133} This symbolism given of the Hijab permits only one perception: that it is a symbol of militant fanaticism and fundamentalism, an oppressive prescription imposed onto women, who adopt it involuntarily.

Although through mediation and negotiation the number of disputes was reduced, the media focus and attention did not follow suit.\textsuperscript{134} This focus intensified when, on September 11\textsuperscript{th} 2001, nineteen members of a radical Islamic terrorist organisation, Al Qaeda, carried out a suicide attack using hijacked planes on the World Trade Center in New York and the Pentagon. It was the largest terrorist attack ever recorded, with over 3,000 fatalities, more than 10 times the number of fatalities caused from any previous terrorist attack.\textsuperscript{135}

Although Muslim leaders, scholars, royalty, Imams and supreme spiritual leaders (Ayatollahs) worldwide united to condemn the attacks,\textsuperscript{136} the irreparable damage had been done to the perception of Muslims. As

\textsuperscript{131} "Media Stereotyping: Images of the Foreigner" In Gary Gumpert and Robert Cathcart, \textit{Mass Communications and Cultural Identity}, Conference of the International Association for Media and Communication Research, 1998, 500-520.

\textsuperscript{132} A long black cloak worn commonly by Iranian women in public, which covers from head to ankle.

\textsuperscript{133} Other feature stories from \textit{L'Express} include 'The Secular School in Danger: the Strategy of Fundamentalists' (26th of October 1989) and 'Foulard (veil), the Plot: How the Islamist Infiltrate Us' (17th of November 1994).

\textsuperscript{134} In the 10-year period following the initial public debate in France, over 1500 press articles were written on religion in schools, in the UK and France, with the majority of these based on the headscarves: 'Lina Liederman, Pluralism In Education: The Display of Islamic Affiliation in French and British Schools', (2000) \textit{Islam and Christian Muslim Relations}, 110-12.

\textsuperscript{135} Ariel Merari, “Social, Organisational and Psychological Factors in Suicide Terrorism”, p1, published in \textit{Root Causes of Terrorism}, edited by Tore Bjørgo (Routledge, 2005), p 70-3.

before, the actions of a few alleged Muslims brought shame to the international Islamic community, and a heightened sense of fear of the religion. The world reacted in panic and fear, which then transformed into paranoia and contempt.

Regardless of the fact that the majority of Muslims worldwide condemned the attacks, to be associated with Islam came under assault. A consequence of this was increased focus on the veil dispute, which was now viewed in an even-more negative light. Following the attacks, stories which portrayed the topic of the Islamic threat began to be regularly cycled repetitively across the covers of L’Express, Le Point, or Le Nouvel Observateur, to attract readers who were already alarmed.

The Hijab debate arose again in France, and reached its pinnacle when in December 2003, Jacques Chirac, the French president, proposed a law banning Hijabs from public schools. Although he primarily claimed that this was necessary for the defence of the republic’s ‘secular values’, it is clear that other factors were influential.

Chirac’s concern about ‘obscurantism and fanaticism...gaining ground in the world’ hinted that he was not only aware of recent terrorist incidents such as 9/11, but also found them relevant and possibly influential in formulating his proposals. Furthermore, political critics have suggested that the real motivation of President Chirac’s speech could have been his government’s declining popularity, and the increasing popularity of both left and right extremism, who both view Islam as a threat to Christian France or its secular traditions.

The President’s speech followed the publication of a report he commissioned, from the Commission de Reflexion sur l’application du principe de la Laïcité dans la Republique de the French Assembly on 11th

137 A huge survey of the world’s Muslims released conducted over six years and three continents, of a sample equivalent to 90 percent of the world’s Muslims found that the overwhelming majority of Muslims condemned the 9/11 terrorist attacks; http://afp.google.com/article/ALeqM5iZisZRGzHmgwjd6KpA7PR5F5Fsw.
139 Summary Report on Islamophobia In the EU after 11 September 2001. European Monitoring Centre on Racism and Xenophobia (EUMC). May 2002; The report’s findings show that Islamic communities and other vulnerable groups became targets of increased hostility since 11 September in many European Member States.
141 It is interesting to note that the editorial writer for Le Point, Claude Imbert, has openly admitting being "an Islamaphobe"; ICI, 24 October 2003, Acrimed.samizdat.net.
143 Ibid.
144 A Taheri, Chirac Has Lost His Political Head over Schoolgirls in Scarves, The Times, 3rd February 2004.
145 http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf
December 2003 (commonly known as the Stasi Commission). Following its extensive consultations, one of the Stasi Commission's most prominent recommendations was a prohibition of ostentatious religious symbols in schools. This was following its finding that a clear majority of Muslim girls did not want to wear the Hijab. 

However, it is submitted that the accuracy and credibility of the report is questionable. For example, out of the 140 people invited to give evidence to the Commission only one was invited who wore the Hijab; interestingly some members of the Commission were angered by the fact that she brought another veiled woman with her. The failure to consult the views of more Muslim women (especially veiled), who would be the most affected by a ban on the Hijab, is irresponsible and heavily criticised, and the exclusion of Muslim women from the debate is reminiscent of the previous debate in the 1980s.

Nevertheless, the measure received huge support in the French National Assembly, and the legislation was passed by the Senate, also by an overwhelming majority, and was promulgated on the 21st of March 2004. According to opinion polls the new law received 70 percent of the support of French people. However, the law received harsh criticism from significant commentators, such as the Pope and three of the leading international human rights non-governmental organisations: Human Rights Watch, the Minority Rights Group and the International Helsinki Federation for Human Rights.

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146 The commission in producing the report held four months of public hearings, and a public discussion with over 400 students from various countries and heard from a broad range of groups and individuals, such as religious committees, religious representatives, State agencies, non-governmental organisations, trade unionists, company executives, doctors, higher education institutions, teachers and schools; P Weil (member of the Stasi Commission), 'A Nation in Diversity: France, Muslims and the Headscarf'; http://www.opendemocracy.net.

147 P Weil (member of the Stasi Commission), A Nation in Diversity: France, Muslims and the Headscarf; http://www.opendemocracy.net.

148 The impartiality of some of the members of the Stasi Commission can also be questioned, with some members having expressly declared their support of an absolute prohibition on all religious symbols, before joining the Commission, and maintaining that position throughout the commissioning of the report; Bowen, John R Princeton, 2007 op. cit. Page 258.


151 C Killian, 2003 op cit, p 68.

152 For the legislative dossier see: http://www.senat.fr/dossierlg/pj103-209.html


155 http://hrw.org/english/docs/2004/02/26/france7666.htm

156 http://www.minorityrights.org/?id=1673

2.2.4 Persuasive Influence on other States

Nonetheless, and more disturbingly, the measures taken in France, which human rights advocates have described as ‘an unwanted infringement,’\(^{158}\) have influenced other states: whilst Turkey and Uzbekistan are using the French ban to support their secular approach,\(^{159}\) Belgium attempted to adopt a similar law,\(^{160}\) which would ban the wearing of all religious symbols in all public places, including public hospitals.\(^{161}\) The draft resolution considered by the Belgian Senate can be seen as an extension of the French law as the scope of its application went further than the school gates.

Furthermore, other European states,\(^{162}\) especially after the attacks on the World Trade Centre, are having the same debate regarding the acceptability of the Hijab (and Islam) in their societies, and it is possible that they will also look towards France, as a model for human rights protection,\(^{163}\) when considering their options.\(^{164}\) For example, it has given support to the argument made that the current UK commitment to multiculturalism is unwise.\(^{165}\) Thus, there are wider implications of the French law on human rights, and specifically on religious freedoms.

2.2.5 Possible Relief from the ECtHR

Those who feel aggrieved by such measures, or that their rights as guaranteed under the Convention have been violated, may look to the ECtHR for relief. Although, the vice president of the ECtHR was reported

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158 Kenneth Roth, executive director of Human Rights Watch;\[\text{http://www.religiousfreedom.com/nws/hr/hr/hr/\}]


163 "France has been a model to the rest of the world, the land of the rights of man...of individual liberty, a nation destined to spread the benefits of civilisation across its national borders and beyond... to... the wider world"; J. Jennings, 'Citizenship, Republicanism and Multiculturalism in Contemporary France', (2000) 30 British Journal of Political Science, 575-98, 578.

164 For example, commentators in Macedonia have expressed interest in adopting the French model for dealing with interfaith relations, religious freedom and non-discrimination; M Najcevska, E Simoska and N Gaber, 'Muslims, State and Society in the Republic of Macedonia: The View From Within' in G Nonneman, T Niblock and B Szajkowki (eds), Muslim Communities in the new Europe (Reading, PA, Ithaca, 1997), 75-97.

165 Tom Lewis, 'What not to wear: religious rights, the European Court, and the margin of appreciation' ICLQ, 2007.
to have suggested that a law prohibiting religious signs in schools would not breach the European Convention on Human Rights, the actual response and application of the ECHR to the current scenario is uncertain. This is because, as the law was only recently introduced, those aggrieved by it are still working through the hierarchy of national courts, exhausting domestic remedies, before they can apply to the ECtHR.

For example, UNITED SIKHS lawyers announced on the 11th of June 2007 that they filed a legal challenge to the French law before the ECtHR, which it claims will be the first such case against France since it passed the law banning the wearing of religious symbols, including the Sikh turban, in public schools.

The author aims to contend that the basis for the legislation in France is unfounded, and is disproportionate in any event to the alleged aims relied upon. Therefore, it is argued that, in an application before the European Court of Human Rights, the ECtHR should find the French law constitutes a breach of the ECHR.

Before we analyse the key elements of reasoning which make up the purported aims of the legislation, which France would use to justify such a prohibition, we must consider the relevant cases which have raised similar issues. By doing so one can assess the scope of protection afforded to the applicants under the ECHR, and equally what limitations a respondent State would try to invoke.

The assessment of the facts and findings of these cases will help to predict the ECtHR’s likely approach to an application made such as UNITED SIKHS; as we can see how the ECtHR interpreted the scope of the freedoms set out, as well as under which circumstances the ECtHR found it necessary to introduce measures to restrict these freedoms, and on what grounds it judged the proportionality of these measures.

3. Jurisprudence of the ECtHR under Article 9

3.1 The Court’s Interpretation of Article 9

Once an application falls within the positive formulation of a right or freedom, the burden passes to the HCP to prove that the interference was valid. Under Article 9(2), a restriction or limitation of the rights to

166 During the public hearings of the Stasi commission; Stasi Report, para 2.1.
168 UNITED SIKHS is an international non-profit, non-governmental, humanitarian relief, human development and advocacy organization; http://www.unitedsikhs.org/.
freedom of thought, conscience and religion will only be compatible with the ECHR, if they are: (1) prescribed by law,\textsuperscript{170} (2) in pursuance of a legitimate aim;\textsuperscript{171} and (3) necessary in a democratic society.

The test of necessity has been found to imply a high burden on the state, to prevent arbitrary interferences in a fundamental freedom or right. Necessity is ‘not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”.\textsuperscript{172}

It has been held that any interference must be to satisfy a ‘pressing social need’\textsuperscript{173} and be ‘proportionate’ to the grounds of restrictions, which are to be interpreted narrowly.\textsuperscript{174} Furthermore, another condition was laid out in \textit{Litwa v Poland};\textsuperscript{175} it must not only be a proportionate response to a matter of urgent social need, but the state must show that, in seeking to achieve the legitimate aim, the measure implemented exerted the least interference with the applicant’s rights. Thus, the doctrine of proportionality and necessity are vital in maintaining that the rights and freedoms afforded by the ECHR are only restricted in appropriate circumstances.

Another jurisprudential doctrine of the ECtHR, the margin of appreciation,\textsuperscript{176} gives the ECHR a degree of flexibility to allow efficient operation throughout the HCPs, in the absence of a ”uniform European conception” on delicate and subjective issues such as morals and religion.\textsuperscript{177} The ECtHR uses the doctrine in ‘searching for a fair balance\textsuperscript{178} between the demands of the general interest of the community and the protection of the individual’s fundamental rights’\textsuperscript{179}.

\textsuperscript{170} This standard requires that “the law in question must be both adequately accessible to the individual and formulated with sufficient precision to enable him to regulate his conduct”; \textit{Larissis and Others v. Greece}, judgment of 24 February 1998, 27 EHRR 329 at para 44.
\textsuperscript{171} The legitimate aims under Article 9.2 are in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
\textsuperscript{172} \textit{Handyside v United Kingdom} (1976) 24 Eur Court HR (ser A) 5, 22; 1 EHRR 737, 754.
\textsuperscript{173} \textit{Silver v United Kingdom} EHRR 347 (1983).
\textsuperscript{174} \textit{Klass v Germany} Series A No 28, (1979-80) 2 EHRR 214, ECtHR.
\textsuperscript{175} \textit{Witold Litwa v Poland} [2000] ECHR 141.
\textsuperscript{176} The first application of the doctrine was in \textit{Greece v United Kingdom} (1958-59), Y B Eur Conv on HR 174 (Commission), However, the phrase ‘discretion’ was used instead of margin of appreciation, which was first used in \textit{Lawless v. Ireland} (1979-80) 1 EHRR 1 (Commission).
\textsuperscript{177} “As in the case of ‘morals’ … it is not possible to discern throughout Europe a uniform conception of the significance of religion in society”; \textit{Otto-Preminger Institute v. Austria} (1995) 19 EHRR 34, 57-58.
\textsuperscript{178} The ECtHR has held that in this balance particular importance should be attached to the protection of fundamental human rights; \textit{Belgian Linguistic} judgement of 23rd July 1968, ECHR, Series A, no. 6, p.32, para 5.
\textsuperscript{179} Brogan and Others, judgement of 29 November 1988, ECHR, Series A, no. 145 b, pp. 44-45 (dissenting opinion of judge Evans).
The doctrine is consistent with the principle of subsidiarity: the recognition that the Strasbourg organs must remain complementary and subsidiary to the competent national authorities, who must be allowed a degree of discretion in pursuance of their obligations under the ECHR. The degree, however, varies greatly, and arguably undermines concepts such as necessity and proportionality, as a HCP may be given discretion itself to judge whether a restriction is necessary. Nonetheless, the margin is not ‘unchallengeable’ and ‘goes hand-in-hand with...European supervision’, empowering the ECtHR to review the aim and necessity of the measure challenged, to conclude if it is compatible with the ECHR.

The ECtHR in reviewing an application under Article 9 has a difficult task to undertake. Article 9 is arguably one of the vaguest Articles of the ECHR, with no clear consensus throughout Europe or in the jurisprudence of the ECtHR on what the actual freedom entails. Furthermore, as ‘throughout Europe a uniform conception of the significance of religion in society’ cannot be established, the ECtHR adopts a highly deferential approach. This is detrimental to individual applicants, who, owing to the lack of certainty and European supervision, are given far less protection than applicants who claim under the other personal freedom articles.

We will now look at the first of two cases regarding the provisions on Hijabs, to analyse how the ECtHR has interpreted and applied Article 9 of the ECHR, along with the margin of appreciation doctrine. This early case, one of few in the jurisprudence regarding Article 9 and religious clothing, illustrated the same biased and stereotypical views by the

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181 " By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’: Handyside v. United Kingdom, App No 5493/72, at para 48 (Dec 7, 1976).


188 Articles 8-11. See Tom Lewis, ICLQ (2007), op cit, at 395. Lewis argues that the court is “guilty of disparity of treatment”. 

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ECtHR, as the proponents of prohibitions against religious clothing in the public sphere.

3.2 Dahlab v Switzerland\textsuperscript{189}

In Dahlab, a primary school teacher began to wear the Hijab after converting to Islam. She was able to wear the Hijab for over five years without any complaints or concerns from her colleagues, her pupils or their parents. She conducted herself in a very professional manner throughout, ensuring that her private religious beliefs were not imposed on anyone.\textsuperscript{190} Unfortunately, following an inspection, the Director General of Public Education was informed that she was wearing a Hijab. The Director General, after attempted mediation, issued a direction prohibiting her from wearing the Hijab when teaching. Subsequently Ms Dahlab’s challenge to the decision failed in the Swiss courts.\textsuperscript{191}

Furthermore, the application to the European Court also failed, the ECtHR agreeing with Switzerland that the case was so manifestly ill-founded that it did not deserve to proceed to the merits phase.\textsuperscript{192} In Switzerland teachers are considered to be public servants and, thus, representatives of the state. There may be a stronger justification to prohibit civil or public servants from wearing religious symbols in a secular state, compared with students in public schools. It is arguable that, in attempting to keep the state neutral, they must not visibly express their allegiance to a particular religious belief, as they are embodied or envisaged as representatives of the state.\textsuperscript{193} Consequently, the European Court’s ruling in Dahlab will not be questioned or challenged herein.

However, the significance and relevance of the Dahlab case in this paper is the procedural requirements from which the ECtHR should arrive at such a decision. The respondent state based its argument on the principles of secularism, religious neutrality and gender equality: the wearing of the Hijab could harbour a proselytising effect, and indicated allegiance to a particular faith, in breach of the principle of denominational

\textsuperscript{189} Dahlab v Switzerland, ECHR 2001-V 449.
\textsuperscript{190} Going as far as answering pupils who asked, that the Hijab she wore to keep her ears warm; Dahlab v Switzerland, Application No 42393/98, ECHR 2001-V, 449 at 456.
\textsuperscript{192} Dahlab v Switzerland, ECHR 2001-V 449, 456-457.
\textsuperscript{193} However, Raja El Elhabti; (Director of Research of Karamah, The Muslim Women Lawyers for Human Rights Group) argues that the principle of neutrality in public schools applies only to teachers not students; http://pewforum.org/events/index.php?eventID=55.
neutrality, which sought to protect the religious beliefs of pupils and parents, and to ensure religious harmony.\textsuperscript{194}

One of the applicant's complaints was that the decision did not have a sufficient basis in law. This is significant in the case, as the applicant illustrated the extreme difficulty in continuing her profession, as within the Canton of Geneva the state schools had a virtual monopoly on infant classes,\textsuperscript{195} the few schools that remained were faith schools, governed by religious authorities other than her own.

The legislation which the Swiss Federal Court held as satisfying the requirement that the measure was prescribed by law was found in the Cantonal Public Education Act of 6th November 1940\textsuperscript{196} and Article 27 \& 3 of the Federal Constitution of 29th May 1874.\textsuperscript{197}

The applicant further contended that the measure failed to pursue a legitimate aim, an argument supported by the fact that the respondent state could not specify an appropriate legitimate aim under Article 9.2. Instead in the Federal Court, the principle of denominational neutrality in schools was cited\textsuperscript{198} as a sufficient ground of public interest for prohibiting the applicant from wearing the Hijab. Nonetheless, the respondent State failed to illustrate convincingly how the impugned measure was in the public interest. The ECtHR, however, noticing this important omission, decided themselves that the legitimate aims pursued were 'the protection of the rights and freedoms of others, public safety and public order'.\textsuperscript{199}

The last requirement, which needed to be satisfied before the ECtHR could find that the measure was a legitimate restriction, was whether the measure was 'necessary in a democratic society'. This is arguably one of the most important factors in distinguishing between a violation and legitimate interference. Notwithstanding that it is the last hurdle for a state to clear in claiming a valid interference; it is also one of the most subjective criteria which may be subjected to the greatest scrutiny.

However, whilst many measures will have legitimate aims with a basis in domestic law, it is more difficult\textsuperscript{200} to prove that they are

\textsuperscript{194} Dahlah v Switzerland, ECHR 2001, p 5.
\textsuperscript{195} The only age group the applicant was qualified to teach; Dahlah v Switzerland, ECHR 2001, p 11.
\textsuperscript{196} "The public education system shall ensure that the political and religious beliefs of pupils and parents are respected" (Section 6), and "Civil servants must be laypersons; derogations from this provision shall be permitted only in respect of university teaching staff" (120 (2)).
\textsuperscript{197} "It shall be possible for members of all faiths to attend state schools without being affected in any way in their freedom of conscience or belief".
\textsuperscript{198} Dahlah v Switzerland, ECHR 2001, 4-5.
\textsuperscript{199} Dahlah v Switzerland, ECHR 2001-V, Page 14.
\textsuperscript{200} "The Strasbourg organs have very rarely found a violation of Convention rights" by reference to the legitimate aim(s); Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, Intersentia, (2002), page 11.
proportionate rather than relevant: necessary not only in the State interest, but in a democratic society, to satisfy a ‘pressing social need’, rather than mere general public interest. The onus is on the state to justify an interference with a right guaranteed under the ECHR.

The respondent state had previously argued that, in wearing religious apparel, the applicant may have interfered with the religious beliefs of pupils at the school, or their parents, despite the absence of any complaint, of any kind from anyone, for over five years. Furthermore, they argued that the measure was proportionate, as the wearing of the Hijab was a breach of the principle of denominational neutrality in schools, insofar as state school teachers were representatives of the state and had to ensure the neutrality of the state education.

As aforementioned, the ruling itself is not questioned; however, it is the opinions and attitudes expressed by the ECtHR which are open to criticism. In particular, the ECtHR’s endorsement of the Federal Court’s views that the Hijab was a disparaging precept imposed solely on women, and was incompatible with the principles of gender equality, tolerance, respect for others and non-discrimination, was highly inappropriate and unconventional. It is respectfully submitted that the European Court should have condemned such discriminatory comments from the national court, rather than approve them.

Although various radical interpretations of Islam can result in ‘great cruelty and injustice,’ it was not the place of the ECtHR to consider such matters, neither were they relevant, as there was no evidence to suggest that the applicant wore the Hijab against her free will.

The failure of both the National and European Courts to subject religious beliefs to scrutiny is evidenced from the fact that the precept from the Quran is expressly imposed for chastity not oppression, and the requirements of chastity and modesty apply equally to both men and women in Islam. While Muslim men do not wear a Hijab, they do have a

201 Silver v United Kingdom EHRR 347 (1983)
202 As identified by the Court of Appeal; R (on the application of Shahina Begum) v Headteacher and Governors of Denbigh High School [2005] EWCA Civ 199; [2005] 1 F.C.R. 530 at [76].
203 Including her colleagues, any pupils at the school or their parents.
204 Dahlab v Switzerland, ECHR 20[01] - V, P. 12.
207 The author is attempting to make the point that the precept from the Koran may be interpreted to be non-prejudiced, and although various radical interpretations and practices may exist, the Court only considered one possible interpretation.
208 “Tell the believing men to lower their gaze and be modest... and tell the believing women to lower their gaze and be modest...” [Quran verses 24:30-31 (abridged)]; “…the men and the women who guard their chastity.... Allaah has prepared for them forgiveness and a great reward.” [Soorah Al-Ahzab 33:35];
traditional dress which is also worn for modesty.\textsuperscript{209} Thus, it is difficult to reconcile the fact that the ECtHR felt they were not best placed to assess whether the measure in question was necessary, but felt it was proper to criticise the religious beliefs held by millions of people.

Furthermore, the ruling by the ECtHR illustrates the degree of discretion the ECtHR was prepared to give to a HCP, in cases which involved religion. It is an example of the ECtHR’s reluctance to give applicants under Article 9 sufficient protection afforded by the ECHR, which has been the basis for the criticism of subsequent cases.\textsuperscript{210} Allowing a wide margin of appreciation on the requirement of necessity, without the essential\textsuperscript{211} assessment of the arguments afforded by the state in support of a pressing social need, may undermine the doctrines of necessity, proportionality and even the margin of appreciation, which requires ‘European supervision’.

In a more recent case,\textsuperscript{212} the Court of Appeal in the UK have held that such an exercise of scrutiny should be undertaken, regardless of whether the same conclusion may justifiably be reached. This decision by a national court highlights the fundamental importance of the (correct) approach which a state must take in justifying interference. It is submitted that such a robust approach should be consistently taken by the ECtHR, even in straightforward cases. This is so, as failing to do so may jeopardise the chances of later applicants, whose application may be treated in a similar way, although the facts are greatly distinguishable. In terms of precedent, failing to take a strict approach in cases which involve religious clothing may imply to HCPs that the ECtHR interprets a lower scope of protection for Article 9 compared with the other personal freedom Articles,\textsuperscript{213} or even Article 9 cases which do not involve religious clothing.\textsuperscript{214}

This can create a more far-reaching impediment to personal freedoms and rights than (it) prima facie appears. This is as such decisions

\textsuperscript{209} http://www.bbc.co.uk/religion/religions/islam/beliefs/hijab_5.shtml
\textsuperscript{211} Samantha Knights, op cit, p 8.
\textsuperscript{212} R. (on the application of Shabina Begum) v Headteacher and Governors of Denbigh High School [2005] EWCA Civ 399; [2005] 1 FCR 530.
\textsuperscript{213} Tom Lewis, op cit, at 395.
\textsuperscript{214} The courts highly deferential approach in Dahlab contrasts with its previous ruling in Kokkinakis v Greece (1994) 17 ECHR 397. In that case, which raised similar issues such as proselytism, the Court acknowledged the certain margin of appreciation which HCPs had, nonetheless it ruled that the applicant's active proselytism was not only permitted but protected under Article 9.
may give the green light to other Contracting Parties under the ECHR to enact similar laws, which may appear to only restrict religious expression, but as a deeper consequence, 'discriminate against minority groups, deny equal opportunities to women and potentially limit access to education'.

The Dahlab case was one of the first cases concerning the suitability of the Hijab in public schools. However, the applicant in this case was a teacher. For the purposes of this paper, the most relevant and recent authority one must consider is the Turkish case of Leyla Sahin.

3.3 Leyla Sahin v. Turkey

In February 1998 a fifth-year medical student, Leyla Sahin, fell foul of a circular issued by the Vice-Chancellor of the University of Istanbul, to which she was admitted. The circular expressly prohibited the admittance of students with head coverings to lectures, courses or tutorials. Leyla Sahin considered wearing her Hijab a religious obligation and continued to defy the ban. As a result of this and of her participation in an unauthorised protest against the ban in February 1999, she was suspended. Her complaints to the Istanbul Administrative Court and the Supreme Administrative Court were unsuccessful.

Sahin then filed an application to the ECtHR under various Articles of the ECHR. She claimed that, in preventing her from manifesting her religion by wearing the Hijab, the measure violated the right her freedom of religion under Article 9. Furthermore, she claimed that the ban also violated Article 14, combined with Article 9, as the measure discriminated against students based on their religious beliefs, forcing them to choose between their religion and education.

In a similar vein, she argued that she was deprived of the right to education under Article 2 of Protocol No.1 of the Convention, as, being compelled to choose to remain committed to her religious beliefs, she had

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216 In compliance with section 13 of the Higher Education Act.
217 Leyla Sahin v. Turkey, No 44774/98, para. 12 (Eur Ct HR June 29, 2004).
218 Leyla Sahin v. Turkey, No 44774/98, para. 10 (Eur Ct HR June 29, 2004).
221 Article 14 of the Convention; "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
222 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, done Mar 20, 1952, Europ T S No 9; "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, and the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."
to sacrifice completing her studies. Finally, she claimed that her rights under Articles 8 and 10 were also violated, as she was prevented from expressing her beliefs.

The ECtHR at first instance, sitting as a chamber of seven judges, unanimously ruled in favour of Turkey in June 2004. Sahin’s request for a referral to the ECtHR's Grand Chamber was accepted, and a final decision was pronounced on the 10th of November 2005. The Grand Chamber of the ECtHR upheld the Court decision at first instance by 16 to 1, and found there was no violation of Article 9, Article 2 of Protocol 1, Article 8, Article 10 or Article 14. The Grand Chamber found, in relation to the margin of appreciation that HCPs have in Article 9 cases that the measure was proportionate to the legitimate aims that it pursued.

The ECtHR first addressed Leyla Sahin’s claim under Article 9, which she alleged was violated by the measure restricting her from manifesting her belief. Having accepted that the regulation interfered with her desire to practise her religion, the ECtHR then looked at whether the measure satisfied the requirements of a legitimate interference under the ECHR.

3.3.1 Was The Margin Afforded Too Wide?

The ECtHR gave particular consideration to the margin of appreciation in formulating its ruling. However, the degree of unsupervised deference has been heavily criticised. Whilst national authorities may be best suited in assessing the necessity of interference, the final decision should be that of the ECtHR, which should subject the reasoning of the national state to proper scrutiny to see if it is compatible with the ECHR. Although ‘the role of the national decision-making body must be given special importance’, the ECtHR appeared to grant unsupervised deference, allowing Turkey to conclude on its own what was necessary, without considering the merits of the decision.

223 Leyla Sahin v. Turkey, No 44774/98, para 116 (Eur Ct HR. June 29, 2004).
224 Article 8(1): “Everyone has the right to respect for his private and family life, his home and his correspondence.” Article 10(1): “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”
226 Leyla Sahin v. Turkey, No 44774/98, para. 71 (Eur Ct HR June 29, 2004)
228 Samantha Knights, op cit, p 8.
229 Leyla Sahin v. Turkey, No 44774/98, para 101 (Eur Ct HR. June 29, 2004).
Furthermore, one of the important factors which the ECtHR considered when affording a wide margin of appreciation was the absence in its opinion of a European consensus on the matter.231 However, in the Grand Chamber the sole dissenting judge, Judge Tulkens, disagreed with the majority. Judge Tulkens felt that, considering the practice throughout the HCPs as the ECtHR did, a contrary conclusion should have been reached. The ECtHR had observed that, apart from Turkey, only two European states,232 Azerbaijan and Albania, had placed restrictions on the Hijab at Universities. Thus, there was European consensus: that in the majority of universities in Europe no restrictions are necessary and, therefore, the ECtHR was wrong to allow such a wide margin of appreciation on that basis.233

Another reason in the ECtHR allowed a wide margin was because Turkey argued that the prohibition was necessary to protect the principle of secularism. This argument also failed to be thoroughly examined by the ECtHR, and will be considered in the following section.

3.3.2 Valid Interference?

On the basis of the Turkish Higher Education Act and the various national court rulings, the ECtHR easily established that the ban was indeed prescribed by law, owing to its accessible nature and sufficiently foreseeable effects.234 The ECtHR also found that the prohibition 'primarily pursued' legitimate aims: protecting the rights of others and public order.235

After considering the Hijab ban in the legal and social context of Turkey, the ECtHR found that the ban was based on principles of secularism and equality. It felt the ban was ‘necessary in a democratic society’236 and proportionate, as overturning the ban would restrict Turkey’s ability to preserve the principles of secularism, the rights and freedoms of others, maintenance of public order, state neutrality and gender equality.237 The ECtHR gave specific weight in its judgment to the principle of secularism in Turkey, which it found was ‘one of the

231 Leyla Sahin v. Turkey, No 44774/98, para 109 (Eur Ct HR June 29, 2004).
232 This was not only a review of HCPs but also member states.
233 Many academics are in agreement that the ECtHR should have ruled that there was a European consensus in accordance with the view of judge Tulkens; ‘Interview with Professor Kevin Boyle’, op cit; Nicholas Gibson, op cit, p 12; Jill Marshall, op cit, p 2.
234 Leyla Sahin v. Turkey, No 44774/98, para 81 (Eur Ct HR June 29, 2004).
235 Ibid, para 84.
237 Ibid, paras 104-10.
fundamental principles of the state, in harmony with the rule of law and respect for human rights'. \(^\text{238}\) In doing so, the ECtHR concluded that the Turkish interpretation of secularism was 'consistent with the values underpinning the Convention': thus, it was ‘necessary for the protection of a democratic system in Turkey’ \(^\text{239}\) to uphold secularism.

Whilst recognising the historical importance of secularism to Turkey, the ECtHR’s review of Turkey's historical and social history has been described as ‘incomplete and unsophisticated’. \(^\text{240}\)

The ECtHR did not adequately examine Turkey's interpretation of secularism, accepting immediately that it was ‘in harmony with the rule of law and human rights’. \(^\text{241}\) Following this concession, it essentially assumed that any measure taken allegedly in the interest of maintaining secularism must be in harmony with human rights. \(^\text{242}\) Such an approach is flawed as there is no one definition of secularism, \(^\text{243}\) as seen in Turkish history; furthermore, that definition is subject to change and differing interpretation.

However, the ECtHR examined or questioned neither the definition of secularism that Turkey employed nor how the Hijab was incompatible with such a definition. Such a consideration is particularly relevant as the founding father of Turkish secularism was not opposed to the Hijab, and did not find it incompatible with secularism. \(^\text{244}\) The ECtHR heavily relied upon Turkey's commitment to upholding the principle of secularism in the interests of human rights and democracy in its reasoning.

However, it can be argued that Turkey is neither secular nor a democracy, \(^\text{245}\) since the coup in 1980 the undemocratically elected military has been significantly involved in religious matters in the country. Islam in Turkey has been subject to great state control, and treated as if ‘it were a state affair’. \(^\text{246}\) The government imposes its own version or interpretation

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\(^{238}\) Ibid, para. 99.
\(^{239}\) Ibid, para. 106.
\(^{240}\) Benjamin D. Bleiberg, \textit{op cit.}, vol. 1:129, 149.
\(^{242}\) Benjamin D. Bleiberg, \textit{op cit.}, vol. 1:129, 152.
\(^{244}\) “Memorandum To The Turkish Government On Human Rights Watch’s Concerns With Regard To Academic Freedom In Higher Education, And Access To Higher Education For Women Who Wear The Headscarf” 26 (2004), \textit{Human Rights Watch}.
\(^{246}\) As concluded by the UN special rapporteur on the elimination of all forms of religious tolerance in his 2001 report on Turkey; Jonathan Sugden, “A Certain Lack of Empathy”, \textit{ZAMAN}, July 1, 2004; http://www.zaman.com/?bl~commentary&trh~20050908&hn~9995.
of Islam, ‘Kemalist Islam’, going as far as regulating religious teaching in schools and dictating the contents of the Imam’s sermons at Friday prayers.

Unfortunately, such theocratic practices, which are in breach of the principle of state neutrality, were overlooked by the ECtHR’s superficial review of Turkish social and political history. Furthermore, regarding the Hijab ban and democracy, the ECtHR seemed to ignore the fact that the democratically elected government attempted to lift the ban on Hijabs in universities in 1995 but the Prime Minister had to abandon his campaign as a result of an implied threat from the military, that “the possibility of military intervention still existed”, and that the government should be ‘sensitive’ to its secular desires.

3.3.3 Necessary or Useful?

The ECtHR also found it was necessary in the protection of the rights and freedoms of others to consider the effect of the Hijab, a symbol of compulsory religious duty, on those who did wish to wear it. However, Judge Tulkens felt this argument was unconvincing as the ECtHR "has never accepted that interference with the exercise of the rights to freedom of expression can be justified by the fact that the ideas or views concerned are not shared by everyone and may even offend some people". Judge Tulkens criticised the lesser scope of protection that was given to Sahin under Article 9 for peacefully manifesting her religion, while recently the ECtHR had held in, Gündüz v. Turkey, that there was a violation of Article 10 where a Muslim religious leader was convicted for violently criticising the secular regime and calling for the introduction of Sharia law.

The ECtHR also justified the ban on the principle of the protection of gender equality, noting that it was one of the ‘key principles underlying
The ECtHR was apparently hindered by its own bias and appeared to be of the opinion that the Hijab was forced onto women. This is evidenced as, even before it approached the principles of necessity and proportionality to decide whether the measure was necessary in a democratic society, it asserted that it believed the Hijab could not be reconciled with gender equality. Armed with this premise, it arguably undermined any exercise of scrutiny it was to embark on.

This appraisal was highly criticised as being inappropriate and incomplete by the dissenting judge in the Grand Chamber. Judge Tulkens felt that it was ‘vital to distinguish’ between those who wore the Hijab out of choice and those who were forced to wear it.

The majority of the ECtHR, however, seemed to ignore, or omit from its consideration, the fact that some women may wear the Hijab out of their free will. An obvious consequence of the ECtHR’s ruling is that a class of women in Turkey will be denied access to higher education. This will include not only those who wear the Hijab voluntarily, but also those who are forced to, as the prohibition applies to both private and public institutions. Thus, unlike in Dahlab, Sahin argued she really had no alternative choice. This was an important argument, and one prominent human rights scholar was disappointed that the ECtHR did not address this argument that Sahin raised. The fact that there was no other alternative should have been an important factor for the ECtHR in deciding the necessity and proportionality of an interference.

The ban will also not help those women who are forced to wear the Hijab, as it is unlikely that they will be allowed, by whoever is forcing them to wear it, to remove their Hijabs to go to university. Thus, an argument based on gender equality does not stand up to scrutiny as the ban will only prohibit the Hijab in universities, whilst the wearing of a

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257 Leyla Sahin v. Turkey, No 44774/98, para 98, 107, 110 (Eur Ct HR June 29, 2004).
258 See 258 Benjamin D. Bleiberg, op cit, vol. 1:129, who is of the opinion that the ECHR were motivated to uphold the ban by their own fears of fundamentalism, and could have been influenced by the 911 attacks. It should also be noted that the Grand Chamber gave its judgement (10 November 2005) whilst riot fires were burning across many areas of France, including Strasbourg.
259 Leyla Sahin v. Turkey, No. 44774/98, para 98 (Eur C. HR June 29, 2004).
260 Judge Tulkens felt that the majority had not ‘addressed the signification of wearing a headscarf’; Judge Tulkens’ dissent at paragraph 11. See also Katherine Bullock, “Rethinking Muslim Women and the Veil: Challenging Historical & Modern Stereotypes”, (2002) 32 Intl Inst of Islamic Thought, 85-115.
261 Judge Tulkens’ dissent, paragraph 12.
262 Katherine Bullock, op cit at 85-115.
263 ‘Interview with Professor Kevin Boyle’; http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=26768
264 As it was in Cha’are Shalom Ve Tsedek v France, Application No 27417/95, European Court of Human Rights. The
religious symbol, that is apparently contrary to the principles of secularism and gender equality, is permissible throughout Turkey.266

The ECtHR viewed the Hijab in the context of ‘extremist political movements in Turkey which seek to impose on society as a whole their religious symbols’,267 and considered that preventing coercive proselytism from religious fundamentalists was justified under the Convention.268 Religious fundamentalists had politicised the Hijab, and to prevent them from doing so was in furtherance of ‘a pressing social need’.266 However, it has been argued that political Islam is not a threat to modern secular policy, but is mistaken for fundamentalist Islam, with the consequence that the threat from the fundamentalists is overestimated.270

Judge Tulkens argued that, to justify an interference with a right guaranteed by the ECHR, only indisputable facts, not mere worries or fears, should satisfy the requirement of necessity, and that such concrete examples to establish a pressing social need in Turkey had not been produced.271 Turkey failed to provide any factual evidence that Sahin (or other veiled students) had been involved in any fundamentalist activity.272

Furthermore, although there are undeniable fundamentalist movements in Turkey, it does not reduce the protection afforded by Article 9, nor the Contracting Parties' mandatory obligation under the ECHR to maintain the rights and freedoms of all in its jurisdiction.273 Previous ECtHR precedent already shows that even in extreme situations274 the responsibility of the High Contracting Parties does not diminish. Professor Boyle, in line with this argument, asks, as there are also Kurdish terrorist organisations in Turkey, whether Turkey can ‘avoid its obligations in terms of human rights of Turkey’s citizens of Kurdish origin.275

As previously submitted, consistent with precedent, the ECtHR must assess whether restricting an individual's rights is proportionate and necessary in furtherance of a legitimate aim. In this assessment the ECtHR must strike a balance between the rights, and take into account the

266 Judge Tulkens’ dissent, paragraph 12.
268 Ibid, para. 99.
269 Leyla Sahin v. Turkey, No 44774/98, para 109 (Eur Ct HR June 29, 2004).
271 Judge Tulkens dissent paragraph 5.
272 Interview with Professor Kevin Boyle: http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=26768
273 A distinction must be made of times of war and other public emergencies, where a HCP may derogate from Article 9 (including others) to the ‘extent strictly required by the exigencies of the situation’; Article 15 ECHR.
274 McCann v. United Kingdom (1996) 21 EHRR 97; where it was held that even in counterterrorism operations against known terrorists, the HCP must safeguard citizens rights and freedoms under the Convention.
275 Interview with Professor Kevin Boyle: http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=26768

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context, when deciding whether one should prevail over another. However, the ECtHR never balanced the rights of Sahin, or other women who wished to manifest their religion, against the rights of other students not to be proselytised. Instead, it misapplied its own precedent: the ECtHR relied on its ruling in Dahlab, that the Hijab had violated the rights of others, to determine the same in Sahin.

In Dahlab, the ECtHR felt it was necessary to prohibit a school teacher from wearing the Hijab, owing to the alleged proselytising effect that the Hijab could have on schoolchildren. However, the facts of the case of Dahlab are greatly distinguishable from those in Sahin. The context in which the Hijab was worn and the witnesses to it were greatly different: it cannot reasonably be assumed that Sahin could have the same coercive or influential effect over university professors and students as Dahlab could have had over her much younger, impressionable pupils. Even if Sahin’s peers or professors felt coerced, it could be reasonably expected of them to have made an official complaint to the relevant authorities, which could not be expected of the young children in Dahlab.

Furthermore, the Turkish government could not offer any evidence that any student had been the victim of any religious proselytism or coercion, by Sahin or any other Hijab-wearing student, either before or after the ban was brought in.

3.2.4 Concluding Observations

It is interesting to note that, although the reasoning behind the ECtHR's decision has been criticised, the sole dissenting judgment has been considered as providing a 'more sophisticated analysis of secularism, equality and liberty'. It is respectfully submitted that the ECtHR did not undertake a proper scrutiny of the government’s claim that a ban on Hijabs in the universities in Turkey was necessary. In the absence of such scrutiny and corroborating evidence from Turkey, it was not clearly established that the wearing of the Hijab was contrary to the principle of secularism and necessary in a democratic society.

276 Malcolm D Evans, Religious Liberty And International Law In Europe (1997), 328.
277 This reliance was severely criticised by Judge Tulkens in the grand chamber paragraph 12.
278 Leyla Sahin v Turkey, No 44774/98, para 108-09 (Eur Ct HR, June 29, 2004); Human Rights Watch have also reported that there is no reported incident of coercion by religious female students to other students (interview with Professor Kevin Boyle): http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=26768.
Furthermore, as a consequence of taking such a thorough examination of the facts and arguments of the case, it is submitted that the ECtHR failed to consider significant facts in making its decision. One key fact was that the prohibition was not only disproportionate but also discriminatory towards Muslim women as other religious symbols such as Christian crucifixes or Jewish skullcaps were not prohibited. This arguably undermines the alleged justification of the law. If, as an ostentatious religious symbol, the Hijab cannot be tolerated in the public sphere in a secular society, how can other ostentatious religious symbols be permitted?

The decision in Sahin is not a clear precedent to establish the Court’s approach to a future case, claiming a violation of Article 9 in regard to the French ban. This is because the facts can be greatly distinguished from a case brought by an applicant in France against the new law. It has been argued that in Sahin ‘the Court rested its judgment thoroughly on the peculiarity of Turkey's history’, referring much to the specific Turkish context regarding Turkish secularism and its fragile democracy as well as historic and religious considerations in its reasoning.

An application against France would be brought by a student belonging to a religious minority in the country, which does not share the same peculiar social context as Turkey.

4. Secularism - The Key Element in the Reasoning

The principle of secularism has been fundamental to both the prohibitions and the subsequent ECtHR rulings in the cases of Sahin and Dahlab. It is also the main principle upon which the French government has introduced the ban on religious symbols in public schools. As considered earlier, two main forms of secularism exist; liberal secularism and fundamentalist secularism. Whilst the former is compatible with human rights, the latter is not.

In the aforementioned cases the ECtHR acknowledged that the measures brought in by the HCPs were to preserve the principle of

280 As Turkey could not provide any evidence to support an assertion that the prohibition what is necessary grounds of maintaining secularism or public order.
282 The bill which the French parliament agreed to in 2004 was named "application of the principle of secularity".
secularism.\textsuperscript{283} It failed, however, to distinguish between the two distinct forms of secularism.

In \textit{Sahin}, the ECtHR provided a useful definition of what can be considered as the role of a liberal secular state:

The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed and that it requires the State to ensure mutual tolerance between opposing groups.

However, having provided such an articulate formulation, it failed to effectively examine the definition of secularism in practice in Turkey to see if it measured up to the requirements of a liberal, pluralist secularist state. Gibson argues that, if the ECtHR had undertaken such an examination, it would have recognised the existence of a fundamentalist secularism regime in Turkey, which was prejudicial to religion,\textsuperscript{284} and, consequently, found no 'scope for the application of any margin of appreciation',\textsuperscript{285} which was key to its ruling in favour of the state.

4.1 Secularism in France

The ban on religious symbols in France is allegedly enacted to maintain the principle of secularism; thus, it is important to review the French interpretation of secularism and to analyse whether the ban is compatible with liberal secularism and, as such, the ECHR. If an application is brought to the ECtHR, alleging a violation of article 9 against France in respect to the prohibition of religious symbols, this distinction may prove of importance in the ECtHR’s decision.


\textsuperscript{284} It is interesting to note that the founder of Turkish secularism actually despised religion: Nicole Pope & Hugh Pope, \textit{Turkey Unveiled: Atatürk and After}, (1997) 50–62.

4.1.1 Principle of Laïcité

The origins of the doctrine of Laïcité lie in the anti-clerical movement in France following the French Revolution, which preceded the separation of church and state in law of 1905. The term was first applied regarding the opposition to clerical influence in relation to the debate about the neutrality of public schools. The separation doctrine enabled freedom of expression and religion for everyone within the Republic, and was opposed to the powerful Catholic Church, whose influence was said to have covered the ‘whole of social, cultural and political life’.

A particular concern was its monopoly of primary education, which it is said to have used to preach against Republican and Democratic principles.

However, Laïcité has ‘undergone a series of evolutionary stages… linked to the prevailing socio-political context’ and the ‘practical application and exploitation over the years reveal that it is limiting, inaccurate even, to define it purely in terms of the clear-cut separation of churches and state’.

4.1.2 Laïcité and the Hijab Debate

The current socio-political context in which the doctrine is being applied is the Hijab dispute in France. To apply the doctrine, which was initially used to secure freedoms of expression and religion, Laïcité has been interpreted by the government as ‘a more active secularism, in terms of which the nation is promoted as a fundamentally political society fiercely independent of any religious authority, and one in which the values of the state can be defended through the concept of l’ordre public in order to justify interference’ with religion.

Supporters of the ban argue that the Hijab is incompatible with this interpretation of French secularism for various reasons. One of the main arguments, based on the neutrality of state principle, is that the Hijab is

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286 C L Glenn ‘Historical Background to Conflicts over Religion in Public Schools’ (2004) 33 Pro Rege (September) 1 at 4.
291 See Cécile Laborde, op cit; she argues that the Hijab and can be justified on principles of French secular philosophy.
impermissible in the public sphere as it ‘immediately denote(s) religious affiliation’.  

4.1.3 The Neutrality-of-State Principle

In 2004 the Conseil d’Etat published a report assessing the application of the doctrine in France over the last hundred years. In this report it explained that the principle of Laïcité requires the separation of state and church, which implied the neutrality-of-state, obliging public authorities to remain neutral with regard to their opinions and beliefs. As considered earlier, in a secular state, prohibiting state officials or civil servants from wearing religious symbols may be justifiable by the neutrality-of-state principle. However, a view of the principle which extends the scope past government officials is distorted as the requirement should not apply to citizens, especially school children, who ‘are not agents of government, and should not be made subject to principles that were imposed specifically to combat government abuses’.  

It is submitted that, in contrast with its historical application in France of opposing the improper influence of the Catholic Church on state institutions, the usage of the principle to restrict the religious freedoms of a small minority of the population is disproportionate. Elhabti argues that the requirement of neutrality in public schools ‘means the neutrality of teachers, of the space itself, not neutrality of students’.  

4.2 Liberal or Fundamentalist Secularism?

The Conseil d’Etat has been consistent in its definition and application of Laïcité. Following the Criel dispute in the 1980s, it was of the opinion that wearing religious apparel as a symbol of affiliation with a particular religious belief was not itself incompatible with Laïcité. In

294 However, Gibson argues that “requiring civil servants to waive all the individual rights... would narrow the universal jurisdiction of human rights unjustifiably”: Nicholas Gibson, “Faith in the Courts: Religious Dress and Human Rights”, (2007) CLJ, p 16.
295 “What the current French government has done in blurring the distinction is a violation of democracy, and is in direct contradiction of the traditional freedom of worship enshrined not only in Napoleonic law but also in the 1905 act which the current law makers professed to be extending”: Francis Magnion, Muslim headscarves and French secularism, http://www.headscarf.net/index2.htm, 2003.
298 In the absence of improper conduct such as provocation, proselytism and propaganda.
1999 it reiterated its opinion, stating that Laïcité tolerated every religious manifestation.\textsuperscript{299} The Conseil d’Etat also noted that ‘one of the assets of Laïcité is that it confirms that all religions have the right to express their beliefs’.\textsuperscript{300}

The interpretation which the Conseil d’Etat has consistently applied is compatible with Liberal secularism: in previous cases considered earlier,\textsuperscript{301} it annulled the ban on Hijabs in schools, where there was no evidence of any disruption to public order or the school.

Nonetheless, the concept of Laïcité is dynamic, and although "the principle... is uncontested, its content is not".\textsuperscript{302} The definition of Laïcité, which, supporters of the ban argue, justifies an absolute ban on religious symbols, is not compatible with liberal secularism. An interpretation of Laïcité which prescribes the need to purge the public sphere of all religious signs is akin to the model of fundamentalist secularism, which restricts the freedom of religious manifestation of both state officials and citizens who enter the public sphere.\textsuperscript{303}

This notion of strict Laïcité\textsuperscript{304} seems to contradict the traditional purpose of the doctrine, which was intended as a guarantee of religious freedoms, rather than a limit: ‘The principle of Laïcité has never been a principle of exclusion; it has always been a principle of emancipation and freedom’.\textsuperscript{305}

It is submitted that the only interference of the manifestation or expression of religious beliefs that liberal secularism permits is where ‘the exercise of such freedom poses a threat to public safety or mores or impinge on the rights of others’.\textsuperscript{306} This is consistent with the pluralist and liberal values of democratic societies whose role ‘is not to remove the cause of tension by eliminating pluralism, but to ensure that competing groups tolerate each other’.\textsuperscript{307}

It is submitted that there is insufficient evidence from any of the commissioned reports or independent research of a pressing social need for an absolute ban on all religious symbols in public schools. France has

\hspace*{1cm}\footnotesize{\textsuperscript{299} Ministre de l'Education Nationale, de la Recherche et de la Technologie c Met Mme Ai't Ahmad, CE, No 181-486, 20 October 1999.}

\hspace*{1cm}\footnotesize{\textsuperscript{300} M. M. Idris, 'Laïcité and the Banning of the "hijab" in France', 25 (2) Legal Studies (2005) 260-95, p 262.}

\hspace*{1cm}\footnotesize{\textsuperscript{301} Considered earlier in part 2.2.2.}

\hspace*{1cm}\footnotesize{\textsuperscript{302} McGoldrick (2006) \textit{op cit}, page 303.}

\hspace*{1cm}\footnotesize{\textsuperscript{303} Ingvill Thorson Plesner; http://www.strasbourgconference.org, \textit{op cit}, p 3.}

\hspace*{1cm}\footnotesize{\textsuperscript{304} Ibid, p 15.}

\hspace*{1cm}\footnotesize{\textsuperscript{305} Raja El Elfhati, (Director of Research of Karamah, The Muslim Women Lawyers for Human Rights Group); http://pewforum.org/events/index.php?EventID=55.}

\hspace*{1cm}\footnotesize{\textsuperscript{306} Mr Kjaerum, member of The Committee on the Elimination of Racial Discrimination (CERD); UN Doc CERD/C/SR.1675, paras 49-50 (20 of February 2005).}

\hspace*{1cm}\footnotesize{\textsuperscript{307} Sahin (2005) 41 EHRR8, at para 93.}
not convincingly established\textsuperscript{308} that the prohibition on religious symbols is required to uphold the principle of secularism.

Kjaerum contends that the Hijab itself does not undermine the principle of secularism, even in public schools.\textsuperscript{309} It is further argued that, worn as a religious symbol, the Hijab is actually compatible with Liberal secularism, which promotes the principles of mutual respect and tolerance within and between different religious groups. Support for this assertion can be found in the fact that the majority of the Muslim population in France,\textsuperscript{310} including women who wear the Hijab, actually support (liberal) secularism.\textsuperscript{311}

Furthermore, the International Helsinki Federation has expressed its concern that the French interpretation and application of Laïcité 'appears to amount to advocacy of one worldview and seems to contradict the principle of neutrality to which the state proclaims to be committed'.\textsuperscript{312} This ideology of secularism has been criticised as 'the mirror image of religious extremism'.\textsuperscript{313}

In conclusion, the French ban on religious symbols (specifically the Hijab) and is contrary to the historical concept of Laïcité, Liberal secularism and, thus, the European Convention.

5. Conclusions

5.1 Observations of Previous Rulings

In previous cases where the Hijab has been prohibited in public schools, namely Dahlab and Sahin, similarities in the approach taken by the ECtHR can be identified. The ECtHR has consistently allowed a broad margin of appreciation, owing to the nature of the freedom itself,\textsuperscript{314} and because the principle of secularism has been used by the HCPs to justify interference.

\textsuperscript{308} Aulronic v Switzerland (1990) 12 EHRR 485, at para [61].
\textsuperscript{309} Mr Kjaerum, member of The Committee on the Elimination of Racial Discrimination (CERD); UN Doc CERD/C/SR.1675, paras 49-50 (20 of February 2005).
\textsuperscript{310} French polls in 2003 suggested that 78% of French Muslims supported the principle of Laïcité, believing that it was supportive of religious freedom; cited in J Vaïsse, Veiled Meaning: The French Law Banning Religious Symbols in Public Schools, US-France Analysis Series (March 2004).
\textsuperscript{311} Tulkens' dissent, para 10. It is interesting to note that Turkey did not challenge this assertion.
\textsuperscript{313} Interview with Professor Kevin Boyle: http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=26768
\textsuperscript{314} Kokkinakis v Greece (1994) 17 EHRR 397, at para 47.
Nonetheless, it can be argued that the ECtHR failed to subject the HCPs arguments to proper scrutiny by failing to review the merits of the decisions taken by the HCP. This lack of European supervision, which goes hand in hand with the national margin,\(^{315}\) meant that the ECtHR failed to assess the compatibility of the nature of the secular regime in practice. In the absence of an effective proportionality analysis, the ECtHR rulings lack supporting evidence\(^{316}\) to show how the measures satisfied a pressing social need and were, thus, necessary in a democratic society.

Although deference to HCPs is consistent with the principle of subsidiarity, which is incorporated from the ECHR itself,\(^{317}\) the scope of deference allowed to HCPs should not be ‘unlimited’\(^{318}\) as this would contradict the purpose of the ECHR itself. International human rights courts and organs emerged because it became evident that national democratic institutions were not immune to gross violations of human rights and, thus, external supervision was deemed to be a necessary complement.\(^{319}\)

### 5.2 Consequences of Previous Rulings

The ECtHR approach in *Dahlab* and *Sahin*, illustrates a disparity of treatment by the ECtHR towards Article 9 cases, compared with other personal freedom Articles, as considered earlier.\(^{320}\) The ECHR may be considered as a minimum standard of human rights protection,\(^{321}\) which the HCPs cannot fall below. In this sense, cases such as *Dahlab* and *Sahin*, may illustrate to HCPs that the standard of protection, afforded by Article 9, is very low and not easily violated, compared with other personal freedom articles.\(^{322}\)

Furthermore, in regards to the necessity requirement, the ECtHR has held in the aforementioned cases that the HCPs are best suited to assess,

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\(^{316}\) It is interesting to remember that there was no evidence in *Dahlab* to suggest of any proselytising effect or of any complaints within a substantial time period, from the local community of her religious manifestations. Also in *Sahin* although the ECtHR considered the proselytising effect on other students and possible issues of public disorder, Turkey could not provide any evidence of either Sahin being involved in any fundamentalist activity or any complaints by anyone at the University in regards to her wearing her Hijab.


\(^{318}\) Ibid.


\(^{320}\) See part 3.


\(^{322}\) See part 3.
not only the existence of necessity but also, the extent of the restrictive measures. However, without effective supervision of the ECtHR, such a finding may prove detrimental to religious minority groups. The ECtHR cannot expect that HCPs will always act in the best interests of minority groups, who are numerically inferior and, thus, under-represented in the political process. For these minorities, in terms of securing rights and interests, ‘international judicial and monitoring organs are often their last resort and only reliable avenue of redress’.

5.3 Possible Approach Adoptable by the ECtHR in a Future Application against France

It must be noted that, although applications have been filed against France by applicants who allege to have their rights and freedoms, as protected by the ECHR, violated by the French law, it is uncertain whether these applications will be heard by the ECtHR. This is because the aforementioned rulings, in particular Sahin, may prevent an application against France being heard. The ECtHR has already relied upon its previous rulings in Sahin to declare similar applications inadmissible. Therefore, it is possible that an application made against the French law may also be declared inadmissible, owing to its similarities to Sahin.

Nonetheless, there are slight differences; for example, the restriction in Sahin was imposed in universities rather than schools as in France and, also, because it would be the first application against France in regards to the new law, the ECtHR may allow the application. It is difficult to predict the likely approach which the ECtHR may take to an application against the new French law. It may adopt a highly deferential approach, invoking a wide margin of appreciation, consistent with its previous rulings on the Hijab. Nonetheless, having carefully examined the key issues in the Hijab debate, as well as critically analysing the cases of Dahlab and Sahin, it is submitted that the ECtHR needs to adopt a more

323 Capotorti provides a useful definition of a minority group - “[a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language”: Francesco Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, 78.XIV.1 U.N. Doc. E/CN.4/Sub.2/384/Rev.1 at 96 (1979). 324 Eyal Benvenisti, “Margin of Appreciation, Consensus, and Universal Standards” (1998-1999) 31 New York University Journal of International Law and Politics, 843 at 848. See also Judge Martens’ dissent in Breenigan and McBride v. United Kingdom (1993) 17 EHRR 539, at 590; Judge Martens also referred to the ECtHR as the “last resort protect the of the fundamental rights and freedoms guaranteed under the Convention” 325 See part 2.1.1.
interventionist role to address the significance of the debate, and provide a clear and authoritative precedent.

If an application against France reaches Strasbourg, the ECtHR must carry out an effective comparative analysis of the law and practice of HCPs in order to conclude whether there is a European consensus on the restrictions of religious symbols in public schools, providing comprehensive reasoning for its conclusions. If the ECtHR find that there is no European consensus, it may, consistent with precedent, allow a wide margin of appreciation. However, in determining the scope of the margin to be allowed, the ECtHR may wish to consider that, as France does not recognise minority rights, it cannot automatically assume that the best interests of a small percentage of a minority group have been considered.

Regardless of the margin allowed, however, the ECtHR must not abdicate its supervisory role, and subject the HCP’s argument to proper scrutiny. It must ensure that France convincingly establishes that the prohibition on religious symbols was in furtherance of a legitimate aim contained in Article 9(2), and that the prohibition was proportional and necessary within a democratic society, and was the least intrusive method available.

Thus, the ECtHR must undertake a thorough examination of the ideology of secularism which the Hijab is argued to be incompatible with, and whether this notion of secularism is compatible with the pluralist, liberal values underpinning the ECHR. If compatible with the ECHR, how the prohibition is needed to maintain the principle is another consideration. In assessing whether the prohibition is necessary to maintain the principle of secularism, the ECtHR may refer to the decisions of the Conseil d’Etat, who have consistently held that in the absence of any impropriety, the Hijab is compatible and permissible with Laïcité.

If, in the ECtHR’s assessment, the findings of the Stasi Commission’s report are to be considered, the ECtHR must remain open-minded to the impartiality and credibility of the report and also to its

326 The application of the European consensus analysis by the ECtHR has been criticised as irregular and superficial; DJ Harris, M O’Boyle and C Warbrick, Law of the European Convention on Human Rights (Butterworths, London, 1995), pp 12-15.
327 Auronomic v Switzerland (1990) 12 EHRR 485, at para [61].
328 An analogy could be made to the domestic case of R. (on the application of Shabina Begum) v Headteacher and Governors of Denbigh High School [2005]. In that case, regarding a restriction on a particular item of Islamic clothing (Jilbab), the public school in the UK, following comprehensive dialogue with the ethnic and religious communities in the locality, adopted a school uniform policy which could be seen as the least intrusive and most acceptable option for the whole community.
329 Considered earlier in part 2.2.2.
relevance, noting the insufficient number of veiled women, invited for interviewing, during the Stasi Commission's investigation. Regardless of the conclusion reached by the ECtHR, it has an obligation to undertake a thorough examination of all the issues. In doing so, it will instil trust in the enforcement mechanism of the ECHR, as well as caution HCPs that the ECtHR will hold Contracting Parties accountable to their obligations under the ECHR.

In the current socio-political climate in Europe, the Hijab debate is of paramount importance; many of those who are opposed to a blanket ban on religious symbols in schools call for better dialogue.\(^\text{330}\) If the ECtHR rules against France, it will force France and other HCPs to adopt less intrusive policies, and possibly open a more open and balanced debate in Europe in regards to the Hijab.

It is argued that, through better interaction with those who wear the Hijab, a better understanding of the real reasons and motivations behind wearing the Hijab can be gained. Possibly many fears, based on ignorance or through inaccurate and irresponsible media coverage, can be dispelled. Furthermore, legitimate issues of concern, such as those who are coerced into wearing the Hijab may be addressed.

Instead of broad disproportionate measures, which suppress the freedom of religion of everyone, HCPs should adopt detailed, tailored and precise measures in order to protect those who are being coerced into wearing the Hijab, while respecting the independent and voluntary decision of those who choose to adopt the Hijab.

It is submitted that, in accordance with the liberal, tolerant, broadminded and pluralist values which underpin the ECHR, we should 'take a stand against those who would force women to wear the headscarf, and those who would force them not to wear it.'\(^\text{331}\)

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\(^{330}\) See for example, Interview with Professor Kevin Boyle, \textit{op cit.}

\(^{331}\) N Walter, "When the Veil Means Freedom—Respect Women's Choices that are Not Our Own, Even if they Include Wearing the Hijab", \textit{The Guardian}, 20 January 2004.