

Bans on the wearing of burqas, niqabs and hijabs, religious freedom and the secular nature of the state

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1. *Introduction*

Witte and Pin's conclusion to their discussion of religious dress cases in Europe sets out clearly the background against which bans on the wearing of headscarves and face-covering veils in Europe must be examined, where they write that:

... religious dress ... will always generate controversy. Religious apparel pits secularism against religiosity, and often majorities against minorities. It channels the debates about the role and the content of the public sphere, challenges a country's cultural legacy, and brings to the surface disputes about migrants.<sup>1</sup>

Bans on face covering veils (niqabs or burqas)<sup>2</sup> are proliferating across Europe,<sup>3</sup> with quite a few European countries now banning the wearing of these veils in some or all public spaces. France, Belgium, Austria, Bulgaria and Denmark ban the wearing of face-covering clothing in all public spaces, while the Netherlands prohibits this in certain places, such as schools, hospitals, public transport and government buildings.<sup>4</sup> Some other countries have introduced regional or municipal bans. Recently, in a referendum in Switzerland, the majority (although only just: 51.2%) has voted for a ban on face-covering veils.<sup>5</sup> The existing legal prohibitions are all phrased in neutral language, but the fact that they are colloquially referred to as 'burqa bans' shows the real target of such bans. These bans have been enacted despite the fact that very few women in Europe actually wear burqas.<sup>6</sup>

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1 John Witte Jr and Andrea Pin, "Faith in Strasbourg and Luxembourg? The Fresh Rise of Religious Freedom Litigation in the Pan-European Courts", 70, 3, *Emory Law Journal* (2021): 635.

<sup>2</sup> The niqab is a veil that covers the head and face with the exception of the eyes. The burqa is a loose robe that covers the female form from head to toe with the exception of the hands and with gauze covering or a slit for the eyes.

<sup>3</sup> For reasons of space, this chapter concentrates on prohibitions on the wearing of Islamic face-covering veils and headscarves in Europe and the case law of the European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>4</sup> Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (London/New York: Routledge, 2020), 1.

<sup>5</sup> "Switzerland Referendum: Voters Support Ban on Face Coverings in Public", *BBC*, 7 March 2021, accessed 24 April 2021, <https://www.bbc.co.uk/news/world-europe-56314173>.

<sup>6</sup> Howard, *Law and the Wearing of Religious Symbols*, 4-5.

In some European countries, the wearing of hijabs<sup>7</sup> or headscarves is prohibited for employees in public employment (and sometimes beyond). For example, in France, government employees, including teachers in state schools, are prohibited from wearing any religious clothing or symbols, which include Muslim headscarves, at work. Following a French law in 2004, school pupils in primary and secondary school are prohibited from wearing ostentatious signs or dress by which they openly manifest a religious affiliation.<sup>8</sup> This means that girls are usually not allowed to wear a hijab to school.<sup>9</sup> A law in Austria which bans ‘ideologically or religiously influenced clothing which is associated with the covering of the head’ in primary schools, adopted in 2019, was struck down by the Austrian Constitutional Court because it was aimed at Islamic headscarves (the government had made clear that head coverings worn by Sikh boys or Jewish skull caps were not covered by the law) and violated the right to freedom of religion.<sup>10</sup>

The decision of the Austrian Constitutional Court suggests that prohibitions on hijabs, niqabs and burqas can amount to an interference with the wearer’s freedom of religion. The right to freedom of religion is guaranteed by Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This right includes the right to manifest one’s religion. Article 9(2) determines that the right to manifest one’s religion can be restricted by the state, but only if the restriction is prescribed by law, and is necessary in a democratic society for the protection of public safety, public health or morals, or for the protection of the rights and freedoms of others. ‘Necessary in a democratic society’ means, according to the case law of the European Court of Human Rights (ECtHR), the Court overseeing the ECHR, that it must fulfil a pressing social need, it must be proportionate to the legitimate aim pursued and the reasons given by the national authorities to justify it must be relevant and sufficient.<sup>11</sup> Prohibitions on the wearing of religious clothing or symbols can amount to a violation of the right to freely manifest one’s religion, unless the prohibition is justified using this test.

A number of arguments have been brought forward in support of such bans,<sup>12</sup> and one of these is that they are necessary to uphold the neutrality or the secular nature of the state. This Chapter will focus especially on this argument and the ECtHR case law on this. That Court has also accepted arguments about the protection of the public order and the minimum requirements of life in society which can both be linked to the secular nature of the state. The Chapter analyses whether these arguments are strong enough to justify restrictions on the

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<sup>7</sup> The hijab is a scarf that covers the hair and neck but leaves the face free. There are other names and variations for Islamic face-covering veils and headscarves, but in this Chapter, we will use the term hijabs for the scarf that leaves the face free, while the terms niqab or burqa are used for veils that cover the whole or part of the face.

<sup>8</sup> Law No. 2004’228 of 15 March 2004, *Journal Officiel* No. 65, 17 March 2004, 5190.

<sup>9</sup> Howard, *Law and the Wearing of Religious Symbols*, 3.

<sup>10</sup> “Austria Court Overturns Primary School Headscarf Ban”, *BBC*, 11 December 2020, accessed 24 April 2021, <https://www.bbc.co.uk/news/world-europe-55277840>.

<sup>11</sup> ECtHR, *Sunday Times v the United Kingdom*, App. No. 6538/74, 26 April 1979, para. 62.

<sup>12</sup> For a discussion of these arguments see; Howard, *Law and the Wearing of Religious Symbols*, 36-66.

wearer's freedom of religion; or, whether they signify an Islamic practice that secular democracies find objectionable.

This Chapter will start, in section 2, with examining the arguments that legislation against the wearing of religious clothing, including face-covering clothing, is necessary to preserve the secular nature of the state. The fear of Islam and Muslims that are often at the basis of this argument has two main aspects: the fear of proselytising, which is analysed in section 3; and, the fear of segregation from society and the rejection of the minimum requirements of life in society, analysed in section 4. Section 5 will contain an assessment of how the argument for the preservation of the secular nature of the state as well as these fears can be countered. This leads to the conclusion in section 6.

## 2. *Preserving the secular nature of the state*

The argument that laws against the wearing of religious clothing and symbols are necessary for the preservation of the secular nature of the state and to uphold the separation between church and state has been brought forward to justify such prohibitions, especially in countries such as France and Turkey, where the principle of the secular state is laid down in the constitution.. Mazher Idriss writes about the French constitutional principle of *laïcité*<sup>13</sup> that it symbolises 'the non-religious nature of the state, where the state neither recognises nor subsidises a particular religion'; this means that 'no one religious code should be imposed by the state upon its citizens' and that 'religious beliefs should remain outside the public sphere'.<sup>14</sup> Poulter points out:

There are deep ambiguities about the notion of *laïcité*. On the one hand, it can be viewed as a passive neutrality of non-intervention by the state in the private religious domain, coupled with a principle of non-discrimination in the public sphere. On the other hand, it can be interpreted as a more active secularism, in terms of which the nation is promoted as a fundamentally political society fiercely independent of any religious authority but one in which the values of the state can be utilized through the concept of *l'ordre public* to justify interference where necessary with some religious organizations.<sup>15</sup>

The second form of *laïcité* described by Poulter is the prevailing one in French governmental and educational organisations, according to Mazher Idriss, who calls this a 'far more aggressive' form of *laïcité*, 'where the state will strive hard to maintain its religious neutrality by curtailing religious freedom, in the interests of the public order'. He then

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<sup>13</sup> The term *laïcité* is often translated in English as secularism and I will use these terms as having the same meaning, although I am aware that 'the English term does not fully capture the true (and French) meaning' as Mazher Idriss writes, see: Mohammad Mazher Idriss, "Laïcité and the Banning of the 'Hijab' in France", 25, 2 *Legal Studies* (2005): 262. For more information on the meaning of *laïcité* see: Mazher Idriss, "Laïcité", 260-265; Sebastian Poulter, "Muslim Headscarves in School: Contrasting Legal Approaches in England and France", 17, 1 *Oxford Journal of Legal Studies* (1997): 49-52; Dawn Lyon and Deborah Spini, "Unveiling the Headscarf Debate", 12 *Feminist Legal Studies* (2004): 335-336.

<sup>14</sup> Mazher Idriss, "Laïcité", 261.

<sup>15</sup> Poulter, "Muslim Headscarves in School", 50.

continues that ‘this interpretation of *laïcité* allows the government justifiably to control religious expression in governmental institutions, including schools, on the part of schoolteachers and school pupils’.<sup>16</sup> Where state neutrality is used as an argument for banning religious symbols from educational and other public institutions, it is, therefore, used in the second meaning of an active, more aggressive secularism. This is clear from Article 25 of the French law on the rights and obligations of civil servants, which states that civil servants are bound by the obligation of neutrality and that they have to exercise their duty in accordance with the principle of secularism, by refraining from manifesting their religious opinion while carrying out their duties.<sup>17</sup>

In *Ebrahimian v France*, a psychiatric social worker in a public hospital did not have her temporary contract renewed because she refused to remove her veil.<sup>18</sup> The ECtHR stated that the reasons for not renewing Ms Ebrahimian’s contract – the requirement of religious neutrality in a context where the users of the public service were in a vulnerable situation – pursued the legitimate aim of the protection of the rights of others. This was because ‘the purpose was to ensure respect for all of the religious beliefs and spiritual orientations held by the patients who were using the public service and were recipients of the requirement of neutrality imposed on the applicant, by guaranteeing them strict equality’.<sup>19</sup> The ECtHR thus held that the legitimate aim of the protection of the rights of others included the constitutional principle of secularism.

The more aggressive secularism, referred to above, can also be seen in *Sahin v Turkey*, concerning a medical student at university who was not allowed to sit her exams wearing a hijab. According to the ECtHR, this was an interference with the student’s right to manifest her religion, but it was justified (among other reasons) because it aimed at preserving the secularist nature of the Turkish state.<sup>20</sup> The Chamber and the Grand Chamber of the Court both considered that the notion of secularism is consistent with the values underpinning the ECHR and that upholding this principle, which is one of the fundamental principles of the Turkish State, may be considered necessary to protect the democratic system in Turkey.<sup>21</sup> The Grand Chamber mentioned that the principle of secularism was the paramount consideration for the ban on the wearing of religious symbols in universities; and, that it was, therefore,

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<sup>16</sup> Mazher Idriss, “Laïcité”, 261-262.

<sup>17</sup> Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants.

<sup>18</sup> ECtHR, *Ebrahimian v France*, App. No. 64846/11, 26 November 2015. The ECtHR referred to Ms Ebrahimian wearing a veil, but commentators have referred to her wearing an Islamic headscarf, see, for example: Eva Brems, “Ebrahimian v France: Headscarf Ban Upheld for the Entire Public Sector”, *Strasbourg Observers*, 27 November 2015, accessed 24 April 2021, <https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/>.

<sup>19</sup> *Ebrahimian v France*, para. 53.

<sup>20</sup> ECtHR, *Sahin v Turkey*, App. No. 44774/98, 29 June 2004 (Chamber); 10 November 2005, (Grand Chamber).

<sup>21</sup> *Sahin v Turkey*, Chamber para. 106; Grand Chamber, para. 114.

‘understandable that the relevant authorities considered it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn’.<sup>22</sup>

This suggests that the ECtHR sees the preservation of secularism as a legitimate aim for restrictions on the freedom to manifest one’s religion by wearing religious clothing or symbols. This is confirmed by *Ahmet Arslan and Others v Turkey*, where the ECtHR took into account the importance of the principle of secularism for the democratic system in Turkey, and accepted that the interference complained of, in so far as it aimed at ensuring respect for secular and democratic principles, pursued several of the legitimate aims enumerated in Article 9: the maintenance of public security, the protection of order as well as the protection of the rights and freedoms of others.<sup>23</sup>

The above also suggests that a state can require neutrality and support for secularism from its employees. Support for this can be found in a recommendation of the Parliamentary Assembly of the Council of Europe where it states that ‘legal restrictions on this freedom [freedom of religion] may be justified where necessary in a democratic society, in particular for security purposes or where public or professional functions of individuals require their religious neutrality or that their face can be seen’.<sup>24</sup>

The ECtHR confirmed this in *Hamidovic v Bosnia and Herzegovina*,<sup>25</sup> where a witness in a criminal trial had been held to be in contempt of court after he refused to remove his skull cap in court. The ECtHR accepted the legitimate aim of upholding secular and democratic values as part of the protection of the rights and freedoms of others. However, it distinguished this case from previous cases concerning the wearing of religious symbols by public officials at work, because they may be ‘under a duty of discretion, neutrality and impartiality, including a duty not to wear such symbols and clothing while exercising official authority. In democratic societies, private citizens, such as the applicant, are normally not under such a duty’.<sup>26</sup> The ECtHR went on to find a violation of Article 9 ECHR.

But what is behind this emphasis on preserving religious neutrality and upholding secularism? In a Resolution in 2010, the Parliamentary Assembly states that it ‘deplores that a growing number of political parties in Europe exploit and encourage fear of Islam and organise political campaigns which promote simplistic and negative stereotypes concerning Muslims in Europe and often equate Islam with extremism’.<sup>27</sup> Power-Forde expresses a similar view where she writes that ‘in recent years, a discourse has sprung up that not only criticizes extremist and

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<sup>22</sup> *Sahin v Turkey*, Grand Chamber, para. 116.

<sup>23</sup> ECtHR, *Ahmet Arslan and Others v Turkey*, App. No. 41135/98, 23 January 2010, para. 43.

<sup>24</sup> Parliamentary Assembly, Council of Europe, Recommendation 1927, *Islam, Islamism and Islamophobia*, (2010), para. 3.13, accessed 24 April 2021, <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17881&lang=en>.

<sup>25</sup> ECtHR, *Hamidovic v Bosnia and Herzegovina*, App. No. 57792/15, 5 December 2017.

<sup>26</sup> *Ibid.* para. 40.

<sup>27</sup> Parliamentary Assembly, Council of Europe, Resolution 1743, *Islam, Islamism and Islamophobia* (2010) para. 12, accessed 24 April 2021, <https://pace.coe.int/en/files/17880/html>.

radical interpretations of a politicized Islam (and rightly so), but which also attack Islam itself as if it were “somehow an intrinsically inhuman religion”.<sup>28</sup> This suggests that Islam is seen as ‘inhuman’, as going against the values of human rights, pluralism and tolerance, against the value of secular societies. And, Muslims are then seen as not fitting into these societies and not wanting to subscribe to its values.

This fear of Islam and Muslims, also referred to as Islamophobia, exploited by some political parties, appears to be behind the stress on neutrality and secularism and behind the calls for restrictions on the wearing of Islamic headscarves and face-covering veils. In *S.A.S. v France*, a challenge to the French law banning face-covering clothing in public spaces,<sup>29</sup> the ECtHR expressed its concern about ‘the indications of some of the third-party interveners to the effect that certain Islamophobic remarks marked the debate which preceded the adoption of the Law of 11 October 2010’.<sup>30</sup> This fear can be said to have two main and interlinked aspects: fear of proselytism or religious propaganda; and, fear of separation and segregation from society and a threat to the minimum requirements of life in society, of living together. Each of these will be examined in turn.

### 3. *Fear of proselytism*

The first aspect of this Islamophobia appears to be fear of religious indoctrination. Lyon and Spini, writing about the headscarf debates before the 2004 French law prohibiting schoolchildren from wearing ostentatious signs of religious affiliation, put this as follows:

there was the argument that the *foulard islamique* [Islamic headscarf] is a form of religious propaganda, for which there should be no place in public schools, all the more so since the *foulard* can be read as opposing certain values which are protected in French Republicanism, such as tolerance and equality’.<sup>31</sup>

Therefore, in this view, the wearing of the headscarf, even by schoolchildren, is seen as indicating that the wearer wants to propagate her religion and wants to convert others.

In 1989, the French *Conseil d’État* gave a ruling on the compatibility with the principle of secularism of wearing signs at school indicating affiliation to a religious community, which stated that the freedom of expression and of manifesting religious beliefs ‘should not allow pupils to display signs of religious affiliation, which, inherently, in the circumstances in which they are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytism or propaganda’.<sup>32</sup> Poulter discussing the developments in France in relation to the wearing of headscarves at schools after 1989,

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<sup>28</sup> Ann Power-Forde, “Freedom of Religion and ‘Reasonable Accommodation’ in the Case Law of the European Court of Human Rights”, 5, 3 *Oxford Journal of Law and Religion* (2016) 578.

<sup>29</sup> Law no. 2010-1192 of 11 October 2010.

<sup>30</sup> ECtHR, *S.A.S. v France*, App. No. 43835/11, 1 July 2014, para. 149.

<sup>31</sup> Lyon and Spini, “Unveiling the Headscarf Debate”, 335-336.

<sup>32</sup> Avis n° 346.893 du Conseil d'Etat - 27/11/1989 - *Port du foulard islamique*. English translation can be found in ECtHR, *Dogru v France*, App. No. 27058/05, 4 December 2008, para. 26.

refers to a circular from the French Minister for National Education in 1994, which stated that ostentatious insignia would be, in themselves, elements of proselytism.<sup>33</sup> Poulter recounts that girls wearing headscarves were excluded from school because their actions amounted to proselytism, provocation or the disruption of the good order of the school and that this was upheld by several judicial authorities.<sup>34</sup>

*Dahlab v Switzerland* concerned a teacher in a primary school (her pupils were between 4 and 8 years old) who challenged a ban on her wearing a headscarf in school. The ECtHR accepted that ‘it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children’; and, that ‘it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect’.<sup>35</sup> This was despite the fact that, as the ECtHR noted, Ms Dahlab had been teaching with a headscarf for more than three years without any complaints from parents, and that this implied that ‘there were no objections to the content or quality of the teaching provided by the applicant, who does not appear to have sought to gain any kind of advantage from the outward manifestation of her religious beliefs’.<sup>36</sup>

In *Dogru v France*,<sup>37</sup> the applicant was a girl who was excluded from school for refusing to remove her headscarf during physical education classes. She had offered to wear a hat or balaclava, but this was not accepted by the school. The ECtHR held that this exclusion was justified for the protection of the rights and freedoms of others and the protection of public order. But can it be said that a hat or balaclava would have had a proselytising effect?

All this appears to be based on the fact that the mere wearing of a hijab has a proselytising effect and puts pressure on other people to convert to Islam. However, it can be asked whether this is really the case? This is further analysed in section 5 below. First we examine the second main aspect of the fear of Islam and Muslims that exists in Europe.

#### 4. *Fear of retreating from ‘living together’*

There are two linked parts to this fear: first, the wearing of headscarves and face-covering veils is a sign of failed integration and assimilation of migrants in the society in which they live, which means that these groups are marginalised and excluded and this ‘raises fears of groups being radicalised (for example into violent and terrorist activity)’.<sup>38</sup> Second, these veils are also seen as a sign of both an unwillingness and an inability to integrate and to take part in society. As DeBula Bains writes, ‘a simple *hijab*, when worn by Muslim girls, signifies to many

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<sup>33</sup> Poulter, “Muslim Headscarves in School”, 61-62.

<sup>34</sup> *Ibid.* 61-62.

<sup>35</sup> ECtHR, *Dahlab v Switzerland*, App. No. 42393/98, 15 February 2001 (Admissibility Decision), under ‘The Law’, 1.

<sup>36</sup> *Ibid.*

<sup>37</sup> ECtHR, *Dogru v France*, App. No. 27058/05, 4 December 2008.

<sup>38</sup> Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford/Portland, Oregon: Hart Publishing, 2006) 19.

French a refusal to become French'.<sup>39</sup> Headscarves and face-veils set the wearer apart from other people and this leads to the creation of separate communities, thus furthering social and cultural division. Both can lead to threats to safety and the public order.

In *S.A.S. v France*, the French government brought forward as one of the legitimate aims of the ban: ensuring 'respect for the minimum set of values of an open and democratic society', which was part of the protection of the rights and freedoms of others. According to the French government:

the face plays a significant role in human interaction: more so than any other part of the body, the face expresses the existence of the individual as a unique person, and reflects one's shared humanity with the interlocutor, at the same time as one's otherness. The effect of concealing one's face in public places is to break social ties and to manifest a refusal of the principle of "living together" (le "vivre ensemble").<sup>40</sup>

The ECtHR accepted this argument as a legitimate aim, and then found that the ban was justified 'in so far as it seeks to guarantee the conditions of "living together"'.<sup>41</sup> The ECtHR stated that:

It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.<sup>42</sup>

However, the ECtHR accepted that the notion of 'living together' was flexible and thus risked being abused and that, therefore, 'the Court must engage in a careful examination of the necessity of the impugned limitation'.<sup>43</sup>

In the debates in the Belgian Parliament on the law banning face-covering in all public spaces, the principles of civility and sociability were mentioned. These principles mean that the visibility of someone's face forms the basis for – even minimal - communication between members of society and that the identity of an individual is expressed in their face. So, covering the face is a barrier to normal communications in everyday society which can only properly

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<sup>39</sup> Cynthia DeBula Bains, "L'Affaire des Foulards – Discrimination, or the Price of a Secular Public Education System?", 29 *Vanderbilt Journal of Transnational Law* (1996): 311.

<sup>40</sup> *S.A.S. v France*, para. 82.

<sup>41</sup> *Ibid.* para. 142.

<sup>42</sup> *Ibid.* para. 122.

<sup>43</sup> *Ibid.*

take place when people can see each other's face.<sup>44</sup> After the law in Belgium was adopted, it was also challenged before the ECtHR, which followed its own judgment in *S.A.S. v France* and held the ban justified for the same reasons.<sup>45</sup> The main argument for introducing a ban on face-covering clothing in education, public transport, public buildings and health care in the Netherlands was that covering the face seriously affects open and mutual communication.<sup>46</sup> And, the preparatory notes to the Austrian law banning covering the face in public, show that the aim was 'to facilitate integration by strengthening participation and living together in society. Integration is a process involving society at large while its success depends on the cooperation of everyone in Austria and is based on social interaction'.<sup>47</sup>

Therefore, the living together argument stresses the importance of mutual and open interaction between people in society which is important to facilitate integration.

## 5. Counter arguments

Whether the wearing of religious symbols must be prohibited in order to preserve the secular nature of the state depends on the interpretation given to secularism or *laïcité*. Bans are not necessary if these terms are interpreted as a passive neutrality,<sup>48</sup> as referring to a policy of non-intervention where all religions and religious symbols are treated equally. State neutrality would only be affected if the state prohibited symbols of a certain religion only, because it would indicate that the state is of the opinion that this particular religion does not deserve equal respect and does not need to be treated equally with other religions. State neutrality, the secular nature of the state, would be maintained as long as there is no favouring of one religion over others and if there is no religious indoctrination of any sort. However, if secularism is interpreted as a more 'active'<sup>49</sup> or 'aggressive'<sup>50</sup> *laïcité*, then the state will aim to keep all religions outside the public space.

### 5.1 Preservation of the secular nature of the state

The argument that bans on religious clothing and symbols are necessary for the preservation of the secular nature of the state can, independent of the interpretation of

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<sup>44</sup> DCO 52 2289/005 Chambre des Représentants de Belgique, Proposition de Loi Visant à Interdire le Port de Tout Vêtement Cachant Totalement ou de Manière Principale le Visage, 9 April 2010, para. 6-7, accessed 24 April 2021, <http://www.lachambre.be/FLWB/PDF/52/2289/52K2289005.pdf>.

<sup>45</sup> ECtHR, *Belcacemi and Oussar v Belgium*, App. No. 37798/13, 11 July 2017, para. 61; ECtHR, *Dakir v Belgium*, App. No. 4619/12, 11 July 2017, para. 60.

<sup>46</sup> Erica Howard, *Religious Clothing and Symbols in Employment: A Legal Analysis of the Situation in the EU Member States* (European Network of Legal Experts in Gender Equality and Non-Discrimination, European Commission, Directorate General for Justice and Consumers, 2017), 78, accessed 24 April 2021, [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=608849](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=608849).

<sup>47</sup> *Ibid.* 82.

<sup>48</sup> Poulter, "Muslim Headscarves in School", 50.

<sup>49</sup> *Ibid.*

<sup>50</sup> Mazher Idriss, "Laïcité", 261-262.

secularism, be countered even more strongly in the following way. According to the French *Conseil d'État*, secularism should manifest itself in three principles: state neutrality, religious freedom and respect for pluralism.<sup>51</sup> Therefore, state neutrality clearly goes hand-in-hand with religious freedom and pluralism. The ECtHR also clearly links pluralism to tolerance and broadmindedness, as it has held that a society cannot be a democratic society without these three.<sup>52</sup> Allowing the wearing of religious symbols in public places would show tolerance, broadmindedness and respect for pluralism, as well as respect for every individual's right to freedom of religion and to manifest that religion. It is suggested that pluralism is about accepting differences and diversity between groups and treating everyone with the same respect. As the ECtHR stated in *The Moscow Branch of the Salvation Army v Russia*, 'pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of ... religious beliefs...'.<sup>53</sup> Allowing religious symbols to be worn in schools and other public places rather than banning this would show genuine recognition of, and respect for, pluralism and diversity. And, as the ECtHR continued, 'the harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion'.<sup>54</sup> It is clear that this also counteracts the fear of groups retreating from society, from 'living together'.

As was mentioned, in *S.A.S. v France*, the ECtHR expressed its concern about the fact that Islamophobic remarks had marked the debate on the French law banning face-covering in public spaces. The ECtHR then considered:

It is admittedly not for the Court to rule on whether legislation is desirable in such matters. It would, however, emphasise that a State which enters into a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance. ... The Court reiterates that remarks which constitute a general, vehement attack on a religious or ethnic group are incompatible with the values of tolerance, social peace and non-discrimination which underlie the Convention ...<sup>55</sup>

The dissenters in *S.A.S. v France*, agreed with the applicant that 'the French legislature has restricted pluralism, since the measure prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public'. They described the blanket ban 'as a sign of selective pluralism and restrictive tolerance'; and, they pointed out that the ECtHR has held that the state has a duty to ensure mutual tolerance between opposing groups

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<sup>51</sup> *Conseil d'État, Study of Possible Legal Grounds for Banning the Full Veil*, Report adopted by the Plenary General Assembly of the *Conseil d'État*, 25 March 2010, 23-24, accessed 24 April 2021, <https://www.conseil-etat.fr/ressources/etudes-publications/rapports-etudes/etudes/etude-relative-aux-possibilites-juridiques-d-interdiction-du-port-du-voile-integral>.

<sup>52</sup> ECtHR, *Handyside v United Kingdom*, App. No. 5493/72, 7 December 1976, para. 49. This was also stressed by the Grand Chamber in *Sahin v Turkey*, para. 108; and, in *S.A.S. v France*, para. 128.

<sup>53</sup> ECtHR, *The Moscow Branch of the Salvation Army v Russia*, App. No. 72881/01, 5 October 2006, para. 61.

<sup>54</sup> *Ibid.*

<sup>55</sup> *S.A.S. v France*, para. 149.

and, that ‘the role of the authorities ... is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other’.<sup>56</sup> The dissenters conclude that, by banning the full-face veil, the French legislature has done the opposite. It has not sought to ensure tolerance between the vast majority and the small minority but has prohibited what is seen as a cause of tension.<sup>57</sup> The dissenting judges thus clearly expressed that ‘tolerance, broadmindedness and pluralism’ would be an argument against bans on face-covering clothing and against the proposition that these bans are necessary for the preservation of the secular nature of the state.

It was suggested above that a state can require neutrality and support for secularism from its employees. However, both the Parliamentary Assembly of the Council of Europe<sup>58</sup> and the ECtHR, in *Hamidovic v Bosnia and Herzegovina*,<sup>59</sup> appear to suggest that such a duty is subject to the justification test in Article 9(2) ECHR. The dissenting judge, in *Ebrahimian v France*, stated that the judgment of the majority suggested that ‘the abstract principle of *laïcité* or secularism of the State requires a blanket prohibition on the wearing by a public official at work of any symbol denoting his or her religious belief’ but that this ‘rests on the false (and, I would add, very dangerous) premise ... that the users of public services cannot be guaranteed an impartial service if the public official serving them manifests in the slightest way his or her religious affiliation’.<sup>60</sup> This suggests that the mere wearing of a headscarf indicates a lack of impartiality or the presence of partiality and this could be linked to the fear of proselytism.

## 5.2 Fear of Proselytism

However, should the mere wearing of a headscarf or face-covering veil be seen as proselytism, as indicating that the wearer wants to convert others? It is submitted that a distinction has to be made between practising one’s religion on the one hand and trying to proselytise/convert others on the other hand. The latter might be legitimately restricted if it interferes with the right of others to freedom of religion or to be free from religion. Nathwani writes that, ‘indoctrination can be and needs to be distinguished from the simple wearing of religious symbols’ and suggests that indoctrination can be avoided in other, less intrusive ways than banning the wearing of headscarves and face-veils.<sup>61</sup> Sharpston also points out that this distinction should be made and that proselytising may legitimately be prohibited in order to safeguard the rights of others; and, that a legitimate limitation on proselytising would, for

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<sup>56</sup> *S.A.S. v France*, Dissenting Opinion Judges Nußberger and Jäderblom, para. 14; the dissenters refer to ECtHR, *Serif v Greece* App. No. 38178/97, 14 December 1999, para. 53.

<sup>57</sup> *S.A.S. v France*, Dissenting Opinion, para. 14.

<sup>58</sup> Parliamentary Assembly, Council of Europe, Recommendation 1927, para. 3.13.

<sup>59</sup> *Hamidovic v Bosnia and Herzegovina*.

<sup>60</sup> *Ebrahimian v France*, Dissenting Opinion Judge de Gaetano.

<sup>61</sup> Niraj Nathwani, “Islamic Headscarves and Human Rights: A Critical Analysis of the Relevant Case Law of the European Court of Human Rights”, 25, 2, *Netherlands Quarterly of Human Rights* (2007) 230-231.

example, be ‘protecting vulnerably [sic] younger children from being influenced towards adopting a particular religion by the persuasive discourse of a teacher’.<sup>62</sup>

The ECtHR itself, in *Dahlab*, noted that there were no complaints regarding any attempt at proselytising. Moreover, ‘there was no evidence of the applicant having a political agenda, and even the Swiss Federal Court accepted that she only wished to wear the headscarf “in order to obey a religious precept”’.<sup>63</sup> Sharpston suggests that *Dahlab* should not be seen as authority for accepting that a ban is justified because the wearing of the headscarf in itself is a form of proselytising, mainly because: the events in *Dahlab* happened in the early 1990s; the ECHR is a living instrument and moves with the times; and, the ECtHR has already moved on from its decision in *Dahlab*.<sup>64</sup> Support for this can also be found in *Ahmet Arslan v Turkey*, where the ECtHR considered, in relation to the allegation of the Turkish government of possible proselytising on the parts of the applicants, that there was no evidence to show that they had sought to exert inappropriate pressure on passers-by in public streets and squares in order to promote their religious beliefs.<sup>65</sup> This, indeed, suggests that the ECtHR has moved on and is now seeing the mere wearing of religious clothing without proper evidence of proselytising as insufficient to justify prohibiting this.

In her dissenting opinion in *Sahin v Turkey*, Judge Tulkens mentioned that there was no evidence that Ms Sahin wore the headscarf in order to ‘exert pressure, to provoke a reaction, to proselytise or to spread propaganda’ nor was it used to ‘undermine – or was liable to undermine – the convictions of others’. Neither was there a suggestion or any evidence of ‘disruption in teaching or in everyday life at the university, or any disorderly conduct’.<sup>66</sup> The two dissenting judges in *S.A.S. v France* write that ‘it seems to us, however, that such fears and feelings of uneasiness are not so much caused by the veil itself, which – unlike perhaps certain other dress-codes – *cannot be perceived as aggressive per se*, but by the philosophy that is presumed to be linked to it’ [emphasis added].<sup>67</sup> This links this clearly to the fear of Islam. They continue that ‘the full-face veil was also linked to the “self-confinement of any individual who cuts himself off from others whilst living among them”’.<sup>68</sup> The latter links in with the fear of retreating from society.

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<sup>62</sup> Eleanor Sharpston, Former Advocate General of the Court of Justice of the European Union, “Shadow Opinion of Former Advocate General Sharpston: Headscarves at Work (Cases C-804/18 and C-341/19)”, *EU Law Analysis*, 23 March 2021, para. 125-126, accessed 24 April 2021, <http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html>

<sup>63</sup> Peter Cumper and Tom Lewis, “‘Taking Religion Seriously’? Human Rights and *Hijab* in Europe: Some Problems of Adjudication”, 24, *Journal of Law and Religion* (2008-2009), 609.

<sup>64</sup> Sharpston, Shadow Opinion, para. 301-307.

<sup>65</sup> *Ahmet Arslan and Others v Turkey*, para. 51.

<sup>66</sup> *Sahin v Turkey*, Dissenting Opinion Judge Tulkens, para. 8.

<sup>67</sup> *S.A.S. v France*, Dissenting Opinion, para. 6.

<sup>68</sup> *Ibid.*

### 5.3 Fear of retreating from society

A number of counter arguments can be brought forward here as well. First of all, the argument that bans are necessary to promote ‘living together’, because hiding the face is to break social ties and makes open, interpersonal relationships impossible, suggests that human interaction can only take place when people can see each other’s faces. However, not only does this seem to overlook that much communication in present day society takes place via telephones and texts, it has also been brought into perspective during the global Covid-19 pandemic, which has led to the compulsory wearing of face masks in many countries. If communication with people wearing face masks is possible, why is it not possible with people wearing a niqab? What is the difference?<sup>69</sup> In fact, in France, where the wearing of face-masks was compulsory, the burqa and niqab were still prohibited. So a woman could simultaneously be fined for not wearing a face mask and for wearing a face-covering veil.<sup>70</sup>

Second, the argument that wearing a hijab, niqab or burqa shows the wearer’s reluctance to integrate, to be part of and take part in the society she lives in, is not borne out by any evidence. As Brems writes, empirical evidence shows that:

Within their familiar environment, especially before the ban, face veil wearers participated in a range of social activities involving contact with others at schools (picking up children), in shops, administrative offices etc. ... But there does not appear to be a pattern of withdrawal from everyday social life - at least not before the ban.<sup>71</sup>

Above we mentioned that the dissenting judges, in *S.A.S. v France*, stated that the veil ‘linked to self-confinement of any individual who cuts himself off from others whilst living among them’.<sup>72</sup> The dissenters follow this with pointing out that this and other interpretations of the veil had all been called into question by the applicant in that case.<sup>73</sup> The ECtHR, in *S.A.S. v France*, appears to say something similar where it states that ‘it does not have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others’.<sup>74</sup>

Moreover, rather than preventing the retreat from life in society, the legal prohibition on face-covering in public spaces could have the opposite effect in that it stops women, who wear face-covering veils for religious reasons, from leaving the house at all, from taking part in

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<sup>69</sup> Katherine Bullock, “We are All Niqabis Now: Coronavirus Masks Reveal the Hypocrisy of Face Covering Bans”, *The Conversation*, 27 April 2020, accessed 24 April 2021, <https://theconversation.com/we-are-all-niqabis-now-coronavirus-masks-reveal-hypocrisy-of-face-covering-bans-136030>.

<sup>70</sup> James McAuley, “France Mandates Masks to Control the Corona Virus. Burqas Remain Banned”, *The Washington Post*, 10 May 2020, accessed 24 April 2021, [https://www.washingtonpost.com/world/europe/france-face-masks-coronavirus/2020/05/09/6fbd50fc-8ae6-11ea-80df-d24b35a568ae\\_story.html](https://www.washingtonpost.com/world/europe/france-face-masks-coronavirus/2020/05/09/6fbd50fc-8ae6-11ea-80df-d24b35a568ae_story.html).

<sup>71</sup> Eva Brems, “SAS v France: A Reality Check”, 25 *Nottingham Law Journal* (2016) , 67.

<sup>72</sup> *S.A.S. v France*, Dissenting Opinion, para. 6.

<sup>73</sup> *Ibid.* para. 7.

<sup>74</sup> *S.A.S. v France*, para. 120.

society. Brems, in the quote above, stresses that she was talking about evidence ‘before the ban’ and mentions later on that the empirical research from France, which was presented to the ECtHR in *S.A.S. v France*, ‘shows clearly that the ban has decreased the level of participation of these women’.<sup>75</sup>

Another effect of the bans which can be seen as a counterargument here is that bans, because they clearly target Muslims, could lead to a strengthening of the Muslim identity and an increase in the polarisation between Muslims and others in society, which could exacerbate social divisions and, thus, achieve the opposite of ‘living together’ by increasing segregation, radicalisation and risks to public safety.

Another counterargument under this heading would be that the task of the ECtHR, as the dissenters in *S.A.S. v France* point out, is to protect small minorities against disproportionate interferences. In this same case, the ECtHR expresses the same where it states:

Pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position.

However, the ECtHR, in *S.A.S. v France*, has been accused of not scrutinising whether the ban actually succeeds in achieving the aim of living together and ‘that there is evidence that it does not and only succeeds in further marginalising an unpopular minority’.<sup>76</sup> Furthermore, the ‘living together’ argument, the recognition of ‘the minimum requirements of life in society’, taken to its full conclusion could mean that any minority practice which makes the majority population feel uncomfortable could be banned. This could include hoodies or sunglasses but also, as Brems suggests, clearing Roma people from the streets because the majority of people in a country do not like to socially interact with Roma; or, accepting prohibitions on ‘homosexual propaganda’ as a choice of Russian society because this makes many Russians uncomfortable.<sup>77</sup> Edwards similarly argues that:

the French ban and the opinion of the ECtHR [in *S.A.S. v France*] sends out the message that matters of interest and habit that may characterise a minority, where disapproved of by the majority, will in fact not be tolerated but simply eradicated and erased and extinguished’.<sup>78</sup>

Therefore, feelings of fear and uneasiness of the majority would then dictate what a majority could do or wear. This would not only hinder rather than promote integration of

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<sup>75</sup> Brems, “SAS v France: A Reality Check”, 68.

<sup>76</sup> John Adenitire, “Case Comment. Has the European Court of Human Rights Recognised a Legal Right to Glimpse at a Smile?”, 131, *Law Quarterly Review* (2017) 48.

<sup>77</sup> Eva Brems, “S.A.S. v. France as a Problematic Precedent”, *Strasbourg Observers*, 9 July 2014, accessed 24 April 2021, <https://strasbourghobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/>.

<sup>78</sup> Susan Edwards, “No Burqas We’re French: The Wide Margin of Appreciation and the ECtHR Burqa Ruling”, 26 *Denning Law Journal* (2014) 255.

Muslims and, especially veil wearing Muslim women, but would also go against the pluralism, tolerance and broad-mindedness which characterises a democratic society. The Parliamentary Assembly of the Council of Europe sums all this up well where it notes that ‘in many Council of Europe member states, Muslims feel socially excluded, stigmatised and discriminated against; they become victims of stereotypes, social marginalisation and political extremism’.<sup>79</sup> And,

A great majority of European Muslims share the principles at the basis of our societies and it is essential to fight against Islamophobia, which stems mainly from lack of awareness and from negative perceptions associating Islam with violence. Failing to address these issues, many European governments pave the way to the rise of extremism.<sup>80</sup>

The Parliamentary Assembly suggests that national governments and the Council of Europe ‘must give priority to fostering the social inclusion of Muslims and other religious minorities’.<sup>81</sup>

## 6. Conclusion

In this Chapter, legal bans on the wearing of hijabs, burqas and niqabs have been analysed and particular attention has been given to the argument that such bans are necessary for the preservation of the secular nature of the state and the counter arguments brought forward against this. Throughout the whole chapter, the ECtHR case of *S.A.S. v France* played an important role, as the decision of the Grand Chamber and of the dissenting judges dealt with the aspect of the secular nature of the state in the form of the argument that bans were necessary to guarantee the minimum requirements of living together in society.

It was argued that, independent of what interpretation is given to the term ‘secularism’, the preservation of the secular nature of the state should not be accepted as a legitimate aim for bans, and that prohibiting the wearing of religious symbols in public places would go against the respect for pluralism, tolerance and broadmindedness that are, according to the case law of the ECtHR, requisites for a democratic society. It would also not respect every individual’s right to freedom of religion and to manifest that religion freely.

Two aspects of the fear of Islam and Muslims, which often lies at the basis of the argument that bans on the wearing of religious clothing are necessary for the preservation of the secular nature of society, were examined. The fear of proselytising is based on the, as was argued, erroneous assumption that the mere wearing of a hijab, niqab or burqa signifies the wearer’s intention to proselytise and to try and convert others. A distinction has to be made between practising one’s religion and proselytism. This is supported by the fact that the ECtHR now sees the mere wearing of religious clothing without proper evidence of proselytising as insufficient to justify prohibitions.

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<sup>79</sup> Parliamentary Assembly, Council of Europe, Resolution 1743, para. 1.

<sup>80</sup> Ibid. para. 2.

<sup>81</sup> Ibid. para. 8.

A number of arguments were brought forward against the second fear, the fear of retreat from society, including the hypocrisy of banning face-covering clothing but making the wearing of face-masks compulsory during the global Covid-19 pandemic; the lack of empirical evidence that veil wearing women are unable or unwilling to take part in society; that bans might actually stop women from doing so and could lead to more segregation, polarisation and social divisions which, in turn, could lead to radicalisation; and, upholding bans based on the living together argument panders to the feelings of unease from the majority and ignores the ECtHR's duty to protect minorities in society. This would then also go against the pluralism, tolerance and broadmindedness which form the foundation of a democratic society.

It is submitted that bans on the wearing of headscarves and face-covering veils do constitute an interference with the wearer's freedom to manifest their religion. There is no evidence to support the assertion that women who wear hijabs, niqabs or burqas are doing this to convert others, nor that they want to segregate themselves from society. Just because the majority in society finds certain forms of dress objectionable, that is no reason to prohibit these. Therefore, it appears that headscarves and face-covering veils indeed signify an Islamic practice that secular democracies find objectionable and that the ECtHR has accepted this as reason for banning such clothing. It is submitted that the ECtHR should, instead, scrutinise justifications brought forward for bans very strictly and should require factual evidence that bans are necessary to preserve the secular nature of society. The ECtHR should not simply accept that this is the case based on feelings of fear and uneasiness of the majority. There is, as the dissenters in *S.A.S. v France* state, 'no right not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the traditional French and European lifestyle' and neither is there 'a right to enter into contact with other people, in public places, against their will'.<sup>82</sup> The ECtHR should heed this.

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