

The question of the full-face veil as an issue of human rights



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(Theodora, Arnaoutoglou Georgiou,)

A handwritten signature in black ink, appearing to be 'Theodora Arnaoutoglou Georgiou', written in a cursive style.

Table of Contents

Chapter 1	5
Introduction	5
Chapter 2	9
The veil, its history and its significance	9
2.1 The history of the veil	9
2.2 The significance and different meanings of the Islamic veil	12
Chapter 3	14
The debate over full face veil in the European countries and its content	14
3.1 The debate over the full face veil.....	14
3.2 European countries' reaction to the full face veil	15
3.2.1 The full face veil ban in France	17
3.2.2 The full face veil ban in Belgium	17
3.2.3 The full face veil ban in other European countries	19
3.3 The logic behind the veil bans	20
Chapter 4	23
Freedom of Religion under the ECHR and the full face veil case	23
4.1 The ECHR.....	23
4.2 Article 9 ECHR.....	24
4.3 The restrictions of Article 9 (2) ECHR.....	25
4.4 Article 9 and the full face veil.....	26
Chapter 5	29
The full face veil ban and the approach of the ECtHR	29
5.1 The approach of the ECtHR over the religious symbols and clothing ban.....	29
5.1.1 Public sphere	30

5.1.2 Schools and universities.....	30
5.1.2.1 Teachers	31
5.1.2.2 Students.....	32
5.2 The main elements of reasoning in Dahlab and Sahin cases and some comments	33
5.2.1 Proselytism.....	36
5.2.2 Gender Equality	38
5.2.3 Intolerance and Secularism	39
5.3 The S.A.S. v. France case-law of the ECtHR	40
5.4 Comments on S.A.S. decision.....	43
5.5 The Belgian cases on the full face veil ban.....	44
Chapter 6	46
Conclusions.....	46
References.....	51

Fig. 1: The different variations of the veil	12
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Chapter 1

Introduction

Europe has encountered many wars and threats that resulted into the development of the nation-state, the establishment of its institutions and the urge to separate the churches from the bodies of national politics. The notion of liberty, the concept of equality and the presence of pluralism are considered as necessary ingredients of democracy while the main pursuit is the aim of binding the citizens in the context of peaceful and coherent states while allowing and respecting their differences in the course of their coexistence¹.

In that context, Europe has been evolving leading to a crucial modification in its demographic synthesis, while major changes have resulted into the flows of people from their home-countries towards the European states, seeking job, shelter or even better life conditions. Linked to these flows is the fact that many Muslims are to be found in the European area, while their presence is combined with some important challenges².

However, those challenges are not only linked with Muslims but with other races as well, since Europe is the destination of many people leaving wars, terrorism and seeking for a better future. Multiculturalism has emerged as a notion of vital importance in contemporary era, while democracy, pluralism and the respect for all the cultures is required as an ingredient of the basic values and principles of contemporary societies³.

Multiculturalism is associated with the presence of different cultures, including their religion. In Western societies, the presence of many religious symbols has proven to have raised some challenges, especially in public places. Much debate has been developed in Europe, focusing mainly on the admissibility of the Islamic full face veil in educational institutions and other public places, while some states⁴ have already introduced⁵ legislation enacting an absolute ban of the veil in public places⁶.

¹ Adrian, M. (2016). *Religious Freedom at Risk - The EU, French Schools, and Why the Veil was Banned*. New York: Springer, p.1

² Teitelbaum, V. (2011). The European Veil Debate. *Israel Journal of Foreign Affairs*, 5(1), pp. 89 – 99, p.89

³ *Ibid*, p.92

⁴ Like France and Belgium, or to a lesser extent Spain, Italy and Germany in specific regions

⁵ Or are considering introducing

Since the beginning of the 21st century many countries in Europe are struggling to find a balance to the dilemmas that have emerged due to the Muslim or Islamic veils since their wearing by Muslim women has raised a series of questions related to tolerance, to equality, to freedom of religion etc.⁷.

As a consequence, the veil bans⁸ have activated human rights activists and scholars, who are almost unanimous in criticizing and accusing the governments and the competent public authorities of violating the religious freedom and establishing discriminations on grounds of religion and gender. All the relevant discussions are stuffed with human rights rhetoric⁹. At the same time, this debate revolves around a central question, i.e. what sort of societies of European countries desire? On which basis should the coexistence of the citizens be created? Multiculturalism, as an AngloSaxon model demands the prevalence of group identity over individual one. It promotes the differences and the creation of common values in the name of cultural relativism. On the contrary, countries like France support a secular State which means that the national authorities are left a wide margin of appreciation in order to legislate, thus restricting many times the rights and the freedoms not only of the majorities but mainly of the minorities, while trying to succeed in establishing a regular and peaceful “living together” of their citizens¹⁰.

It has to be mentioned that there is a low number of Muslim women wearing the full face veil in most of the non Muslim European countries. In the Western Europe less than half percent of the Muslim population wears a full face veil. However, due to the rise of anti-Muslim sentiments and the emergence of security concerns (especially due to terrorism) the number of countries introducing and implementing general or limited bans of religious clothing is growing bigger. Full face veil falls within the scope of similar prohibitions either at national or local level. The use of the full face veil has been related to a great degree of debate throughout Europe, and is considered as a representative symbol of Islamic extremism, of women

⁶ Canamares, S., & Angeletti, S. (2019). Legal Regulation of the Full-Face Veil in Public Spaces in Spain and Italy: Some Critical Reflections on the Applicability of the ECtHR Doctrine in *S.A.S. v. France*. *Religion and Human Rights*(13), pp. 117 – 152, p.118

⁷ Teitelbaum (2011), op. cit., p.89

⁸ Known as Burqa bans

⁹ Bribosia, E., & Rorive, I. (2014). *Insider Perspectives and the Human Rights Debate on Face Veil Bans*. Centre Perelman de Philosophie du Droit, pp.1-4

¹⁰ Teitelbaum (2011), op. cit., p.92

being oppressed and as an element that reflect the failure of the Muslims' integration¹¹.

For all the above mentioned reasons, the main object of the present Master Thesis is to examine the case of the full face veil bans, as an issue of human rights, and from the perspective of the European Convention of Human Rights¹² and that of the European Court on Human Rights¹³. Since it is accepted that wearing religious symbols and clothing constitutes a part of Article 9¹⁴ of the ECHR, the basic research question is to approach the full-face veil as an element of human rights and through its establishment on the ECHR and the relevant views of the ECtHR via its established case-law.

The interest of the present Thesis is apparent. Living in multicultural societies, getting daily in touch with different cultures, habits and religions makes it clear that it is essential to fully understand the function of the Muslim veil and the different approaches that have been developed.

For that research purpose to be fulfilled, the present paper is structured as follows:

The first and present chapter serves as an introductory part, for the reader to understand the main question and the issue that will be examined.

The second chapter deals with the history of the veil, while its significance is being presented over the times.

The third chapter includes the debate that has been developed over the use of the Islamic veil and its lifting demand. The reaction of the European countries towards that debate is presented, especially in France and Belgium. Moreover, the logic behind those reactions is examined, so that the reader has a fully understanding of the situation.

The fourth chapter presents the provisions of the ECHR that are relevant to the full face veil prohibitions and accordingly the conditions under which such a restriction is valid and permitted by the European Convention.

The fifth chapter approaches the ECtHR's stance in the above mentioned issue. The most crucial case law is presented from 2001 until today, in order to fully

¹¹ The European Wergeland Center. (2016). Experiences with general and limited band on wearing religious symbols and clothing, with a focus on the full-face veil across Europe. Oslo: European Wergeland Center - Council of Europe, p.2-5

¹² Herein after ECHR

¹³ Herein after ECtHR

¹⁴ Freedom of thought, conscience and religion

examine the shifts of its views and the way it has reacted to the issue of the burqa bans.

The sixth and last chapter includes the relevant conclusions that have been extracted from the present study.

It has to be pointed out that the basis of the present Master Thesis and the point of view from which the veil banning is examined is that of Article 9 of the ECHR and the ECtHR's jurisprudence relatively. The Universal Declaration of Human Rights is not being examined in the present thesis¹⁵. Finally, it has to be mentioned that in order to complete this paper the methodology that has been chosen as the most appropriate is that of literature review, meaning secondary research based on relevant bibliography while using the necessary key-words.

¹⁵ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.un.org/en/universal-declaration-human-rights/>

Chapter 2

The veil, its history and its significance

2.1 The history of the veil

Behiery¹⁶ has supported that “There exists no site more conflated with the Muslim woman than that of the veil”. It is true that in the Middle East and in other Islamic countries as well, the veil¹⁷ that covers the head, the body or the face of the woman is a representative element of women’s clothing. However, what should be mentioned is that it does not constitute a simple accessory of fashion. On the contrary, it is a representative element of the Muslim religion and the Muslim culture. While there are many people – that are mainly outside of Islam – who believe that the women of the Muslim countries are forced to wear the veil due to a predominant patriarchal society, Muslim women support that it is their choice to bear that piece of clothing. The veil means something very important to Islamic societies and it can be interpreted through the examination of the origins of the hijab¹⁸.

It has to be mentioned that Islam was not the first culture in which the veil practice was exercised by women. Moreover, it is well known that these practices started long before the birth of the Islamic prophet, Muhammad. In societies like the Byzantines, the Sassanid alongside other cultures¹⁹, the veil was a common practice that was being exercised. Furthermore, there is evidence that even two clans – the Banū Ismā‘īl and the Banū Qaḥṭān- in southwestern Arabia resorted to that practice during the pre – Islamic time²⁰.

It has to be pointed out that the use of the veil was considered as an element that represented the social status of the women in those societies. In Mesopotamia, the use of the veil demonstrated the high status and the respectability of the women. In

¹⁶ Behiery, V. (2013). A Short History of the (Muslim) Veil. In *Implicit Religion* (pp. 387 - 415), p.387

¹⁷ Or hijab

¹⁸ Slininger, S. (2014). Veiled Women: Hijab, Religion, and Cultural Practice. *Historia*, pp. 68 – 78, p.68

¹⁹ In Near East and Middle East

²⁰ Esposito, J. L. (2011). *What everyone needs to know about Islam*. Oxford: Oxford University Press, p.7-10

fact they used the veil in order to differentiate themselves either from women that were slaves or from unchaste women²¹.

In certain ancient legal traditions²², it was forbidden for unchaste women or unclean women²³ to wear a veil. It is interesting that if they were caught to use the veil illegally they would be held liable to severe penalties²⁴.

Trying to take into consideration the spread of the veil practice throughout the ancient world, it can be understood that it was achieved through the most common tool for the circulation of ideas at that time, meaning the invasion. This can be explained as follows: when one culture invades another one, it is established that there is a fusion of the cultural practices on behalf of the people. In practice, it is observed that while the Greek empire, the Persian Empire and the Mesopotamian Empire mixed with the Semitic people – that had already adopted the veil practice, as it is found in biblical verses²⁵ - originating from the Middle East, the consequence was the adoption of the veiling practice of women as well. Both Jews and Christians recognized the great importance of the placement of the veil on women's head. It was considered that the absence of the veil was a dishonor of herself and of Christ, of her husband and of the rest of the male relatives. This was based on the fact that the woman would reflect the glory of the man and the glory of the God. Moreover, at the time of Muhammad, the placement of the veil was not a widespread practice. Muhammad's wives and upper-class women were the ones that used the veil, which reflected their status. It is interesting, however, that as a consequence of the fact that Muhammad had many enemies that were willing to harm his family, the women of his household used to veil themselves in order to hide their identity from the rest of the people²⁶.

While examining the Qur'an, verse 33:53²⁷ is considered as the hijab verse. Before the teaching of this verse, wives of Muhammad participated in the communal affairs on a daily basis. The rest of the community's women did not bear the obligation to wear the veil. After a generation, and after the death of their leader, the women of Islam adopted the veil practice, while it no longer constituted a practice of

²¹ Slininger (2014), op. cit., p.68

²² For example in the Assyrian law

²³ Like for example harlots and slaves

²⁴ Slininger (2014), op. cit., p.69

²⁵ Genesis 24:65, Isaiah 3: 18 – 19, Corinthians 11: 3 - 7

²⁶ Stowasser, B. F. (1994). *Women in the Qur'an, Traditions, and Interpretation*. New York: Oxford University Press, p.132

²⁷ Qu'ran 33:53 (2013) translated by Abdullah Yusuf Ali. Ware, Hertfordshire: Wordsworth Editions Limited

the upper class. However, it is apparent that the expansion of that practice can be attributed to the Qur'anic verse. While no verse refers to the clothing of women, hijab is being mentioned in the above mentioned verse in a curtain form or a spatial partition²⁸.

Any reference to veiling or hijab from the beginning of Islam was considered to serve as a way of distinction between two people or as a tool of separation between them. This separation or distinction could refer to mortal and God, to righteous and wrongdoers, to believers and non believers. At the same time the use of hijab showed a kind of modesty, apart from seclusion and separation. Therefore, it was regarded that the veil practice would aim at modesty or protection of the women and it was not adopted in order to oppress them or exclude them from the community. On the contrary, its aim was safety²⁹.

In that way, up to the modern times hijab is considered as the ultimate cultural and religious symbol that is combined with the concept of Islam. Nevertheless, it has to be mentioned that the hijab practices vary. Different styles have been developed, while hijab is not only a synonymous of veiling but serves as a style of veiling as well. Those styles are depicted in fig. 1 and are described as follows: "(Hijab) is a square scarf that covers the head and neck, but leaves the face free. The least common and most concealing is the burqa, which covers the whole face and body down to the feet, leaving just a mesh screen over the eyes³⁰ ... The niqab is the style of veil found in Saudi Arabia, covering the face and the whole body like the burqa, but leaves an opening for the eyes"³¹. Finally, the mildest form of hijab is the khimar, which is a headscarf, with the alamira being its modern form. The shayla is a long rectangular scarf which is being wrapped around the woman's head³².

²⁸ Esposito (2011), op. cit., p.11

²⁹ The term Al-tabbaruj, meaning immodest, was used in the Islamic countries for the description of the public manners of women. At the same time al-tahhajub means modesty and is represented in the clothes and the manners of women. As Slininger (2014), op. cit., at p.71-72 describes "*in Arabic words are based o triconsonantal or quadrilateral roots, a set of three or four letters which denote a specific meaning. The words tahhajub and hijab come from the same root, h+j+b*". Therefore, any word with the same root is associated with the concept of separation, of screens and barriers

³⁰ It has to be mentioned that burqa is associated with the Taliban rulers of Afghanistan, while their years of power, all women were ordered to wear this item. Moreover, even after their fall in 2001, many women in Afghanistan kept wearing the burqa, despite the fact that legal penalties were no longer provided. It is interesting that the only country where it is legally enforces to wear the veil is Saudi Arabia

³¹ Slininger (2014), op. cit., pp.73-74

³² *Ibid*

In any case it has to be pointed out that the above mentioned styles are found in many countries, while women are not limited to the veiling style that has been listed to their country.

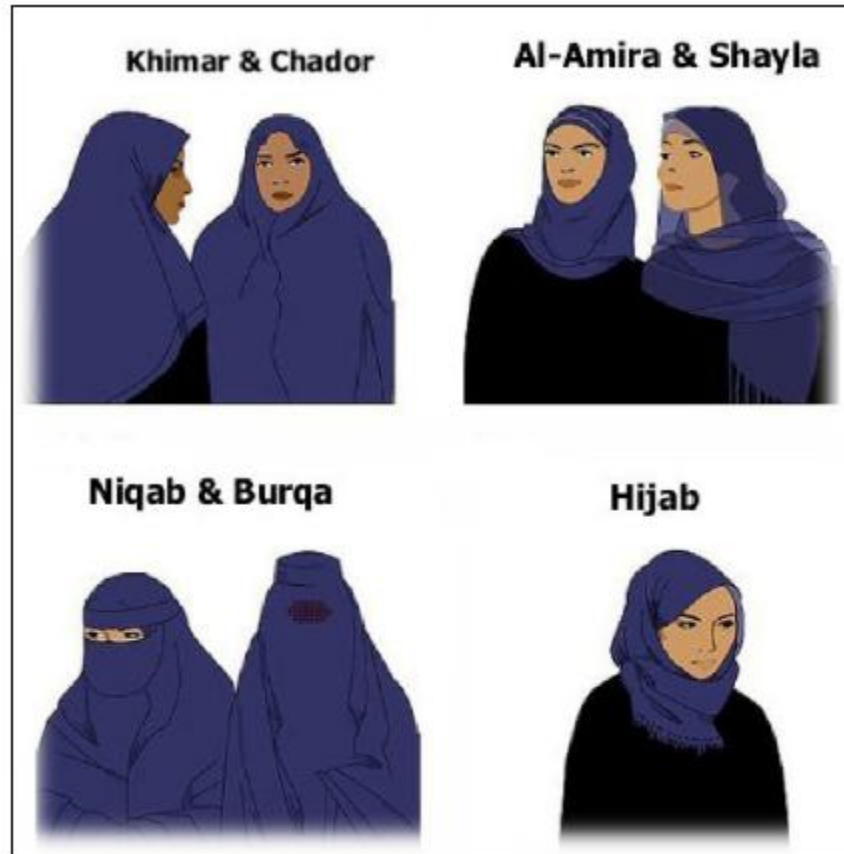


Fig. 1: The different variations of the veil, Source: Slininger, 2014

2.2 The significance and different meanings of the Islamic veil

In the last years the use of the veil has been considered as an issue highly debatable not only in Muslim but in non-Muslim societies as well. The same degree of debate is found in the meaning of the veil and the things it represents. Mahmood (2005) explains that the veil is considered by the traditional and the contemporary Islamic scholars and sociologists as an assurance of the women's integrity and as a sign of protection from being exploited by predators as a sexual object. On the other hand, many contemporary societies regard the usage of the veil as a tool demeaning for women and as an element that suppresses femininity. For many sociologists the use of the veil is considered to be an expression of the opposition to modernity, as it is defined in the West, while at the same time many countries like Algeria, Turkey and

Egypt use the veil as a symbol that represents freedom from the colonial oppression. What is apparent is that the usage of the veil and its meaning depends on its context while it varies from being a symbol of freedom to a symbol of suppression³³.

Moreover, for the majority of the Muslim countries, the understanding of the veil is that it serves as a symbol of identity or as a symbol of culture. Being a representative of freedom is a common meaning, while for others it represents suppression. However, there is a common acceptance that it serves as a symbol of the society. What is important in order to conceive the meaning of the usage of the veil is to examine the content of secularism, as it varies between the United States and Europe. In the former secularism is conceived as freedom of religion, while in the latter as freedom from religion³⁴.

Finally, it is important to be mentioned that due to the above mentioned difference of the content of secularism, opposition to the full face veil is usual in Europe, however it is not widespread in the United States. It is mentioned that Europe is more repressive in what concerns this piece of religious clothing due to the fact that European political processes reflect many theoretical representations of the meaning of the veil phenomenon³⁵.

³³ Galadari, A. (2012). Behind the Veil: Inner Meanings of Women's Islamic Dress Code. *The International Journal of Interdisciplinary Social Sciences*, 6(11), pp. 115 – 125, p.

³⁴ *Ibid*, p.116-117

³⁵ Baehr, P., & Gordon, D. (2013). From the headscarf to the burqa: the role of social theorists in shaping laws against the veil. *Economy and Society*, 42(2), pp. 249 – 280, p.249

Chapter 3

The debate over full face veil in the European countries and its content

3.1 The debate over the full face veil

The debate in western countries as for the lift of the veiling of women under Islam tends to be dismissive of the voices and experiences of the Muslim women. The ban has been based on the argument that it is a patriarchal tool which oppresses and silences the Muslim women³⁶.

The main arguments that have presented and which support the burqa bans are the followings:

The ban³⁷:

- Protects the rights of women, assuming that the veil reflects an infringement of their autonomy, of their dignity and their rights.
- Protects public security and public order because the full face veil restricts social relationships and may be used by criminals as a disguise.
- Protects national identity and enhances the republican values.
- Promotes the integration of the Muslims into western societies, since the veil may have a negative effect on the cohesion of each community.
- Discourages fundamentalist Islam from being established deeply in Europe.

On the other hand, this debate includes plenty of arguments against the veil prohibition and the enactment of relative strict legislative measures. The most important argument is that the bans are as well related to the right of freedom of expression, while they constitute a violation of article 9 of the ECHR, as it will be thoroughly presented below. Therefore, the most crucial aspect that is supported as being related to the veil bans is the infringement of the human right to freedom of religion, expression and equal treatment. Moreover, it has been argued that such a ban promotes conflicts with national identities and democratic values, shows no respect on

³⁶ Ferracioli, L. (2013). Challenging the Burqa Ban. *Journal of Intercultural Studies*, 34(1), pp. 89 – 101, p.89

³⁷ Article 19 - Global Campaign for Free Expression. (2010). Legal Comment Bans on the Full Face Veil and Human Rights A Freedom of Expression Perspective. London: Free World Centre, p.11; Teitelbaum (2011), op. cit., p.89 - 90

diversity and pluralism, while it promotes discrimination against Muslims. This can lead to their alienation and to the demoralization of the Muslim women. Finally, it has been pointed out many times that all the policies and the governments' announcements over the lifting of the Muslim veil is strongly related to national interests and are mainly politically motivated, an element that should not be dominant in the context of democratic societies³⁸.

3.2 European countries' reaction to the full face veil

Over the last decade there is great debate on the wearing of the full face veil, like the burqa and the niqab by the women of the Muslim countries. Belgium and France were two countries which firstly considered and introduced the adoption of legislation that aims at the prohibition of the usage of the full face veil. In Belgium the related law referred to banning the veil anywhere in public while in France it was provided that the prohibition of the full face was to be applied while accessing public places³⁹.

Before proceeding with the presentation of such legislation, some reactions of politics have to be referred to in order to understand the logic behind those measures. President Jacques Chirac in 2003 had stated that the veil is linked with the undermining of secularism – one of the biggest successes of the Republicanism – and is a threat to social peace and national cohesion. Moreover, Tony Blair and Gordon Brown suggested that the veil serves as a marker of separation which undermines not only societal but national unity as well⁴⁰. Nicolas Sarkozy, in his speech of 2009 mentioned that “behind a mesh is not the French republic's idea of women dignity” while the veil was described as “a sign of servitude and degradation”⁴¹.

³⁸ Article 19 - Global Campaign for Free Expression. (2010), op. cit., p.12; Teitelbaum (2011), op. cit., p.89 - 90

³⁹ Amnesty International. (2010). *Bans on Full Face Veils would violate International Human Rights Law (Public Statement of 21st of April 2010)*. Retrieved 1st of July 2019, from <http://www.amnestymena.org/en/magazine/issue16/Hijab.aspx?articleID=1021>

⁴⁰ Heindl, B. S. (2017). Muslim immigration and religious human rights. *International Politics*(54), pp. 26 – 42, p.30-31

⁴¹ Genevey, M. (2015). *How would you apply different theories of human rights to questions of freedom of religion and its limits?* Retrieved 3rd of June 2019, from https://www.researchgate.net/publication/282074939_Apply_different_theories_of_human_rights_to_freedom_of_religion_and_its_limits_-_The_issue_of_the_full-face_veil

Taking into account that wearing the veil (full face or not) constitutes a religious practice and is recognized as a part of the right established and protected by Article 9 ECHR⁴² it has to be mentioned that duality is to be observed in the complex relationship that is developed between religion and human rights. It is supported that some religious values -like education or tolerance form the basis of the modern international system of human rights- have to be protected, while some patterns of religion, like aggressive proselytism, or patriarchy, will undermine the essence of that system. As it is explained “the concept of religious freedom is itself problematic: on the one hand, the aptitude of individuals to seek for the ultimate meaning of their existence is coextensive with humanity, and an essential feature of inherent human dignity. On the other hand, the expression of the right to religious liberty can infringe other human rights, such as the principle of non-discrimination, or contradict the values organizing democratic societies, such as secularism”⁴³.

This matter of coexistence that has to be balanced between religion on the first hand and State neutrality on the other hand has emerged as a central social, ethic and legal concern. In the different European countries the waves of decolonization has led to the increase of the number of Muslim in European states. While in Italy, Spain and Austria many relevant discussions have been developed, France and Belgium are the first countries that have enacted legislation introducing a general ban of religious clothing that conceals the face. As the first European country to ban such clothing, France has emerged as the object of wide and intense debate related to this issue. At a legal level this controversy has been dealt with by the Conseil Constitutionnel and the European Court of Human Rights, as it will be presented below, however, at a philosophical level this issue is still burning. This can be justified taken into consideration that the banning of the full Islamic veil in the public sphere is linked with the concept of the clash between individual rights and minority rights against the overall well being of the society, hence this issue reflects the traditional and philosophical dichotomy that has been developed between consequentialists and natural rights defenders⁴⁴.

⁴² As it will be analyzed below

⁴³ Genevey (2015), op. cit., p.1

⁴⁴ *Ibid*

3.2.1 The full face veil ban in France

On the 11th of April 2011, France became the first country in Europe to introduce a general ban that concerned “clothing designed to conceal the face” in public space. This prohibition included the full-face veil⁴⁵. The scope of the law was the promotion of the public order and of gender equality and the preservation of the principles deriving from the constitution and the legal order of France. The administration of President Sarkozy introduced the ban claiming that the veil was a symbol of women’s oppression and an element that is not welcome in the country. The relevant Law provided that in case of non compliance a fine of 150 Euros was to be imposed while a citizen course was to be completed by any person – either french or foreign – that defied the provision so that the republican values of tolerance and respect of human dignity would be reminded to that person. Moreover, it was provided that a fine of 30.000 would be imposed to any person forcing a woman to fully cover her face⁴⁶.

It is interesting to mention that in 2010, an extensive assessment by the Council d’ Etat followed the prime Minister’s request. This examined the legality of such a ban. The Council announced the risk incorporated in the ban related to stigmatizing the Muslims in France. In spite of such an advice, the Ministry of Justice proceeded with the draft bill that was later adopted. After a six month period of educating the women wearing the full face veil on the results of them continuing to wear it the ban came into force. It has to be mentioned that in France more than five million Muslims live, however, it is estimated that more or less 2.000 of them wear the full face veils. Under the ban, according to relevant statistics, a little more than 1,500 fines were imposed⁴⁷.

3.2.2 The full face veil ban in Belgium

Belgium was the next country that introduced a similar – a general – ban on “clothing that obscures the identity of the wearer” that included – as it can be understood – the case of full face veil. This provision came into force in the July of

⁴⁵ Law No. 2010-1192 – Act prohibiting concealment of the face in public space, Article 1

⁴⁶ Teitelbaum (2011), op. cit., p.94

⁴⁷ The European Wergeland Center (2016), op. cit., p.7-8

2011. The prohibition referred to any piece of clothing that would hide the identity of the wearer in public places, in both parks and the streets. A fine of 15 – 20 Euros or imprisonment was to be imposed depending on the severity of the action⁴⁸.

In December 2012 the Constitutional Court of Belgium rejected the appeal for the annulment of the prohibition and supported that it did not constitute a violation of the human rights. By 2016 almost 60 women had already been prosecuted for not complying with the above mentioned prohibition.

Before this enactment and as far as schools are related it has to be mentioned that different practices were applied due to the fact that in Belgium education is regulated by three different communities, meaning the Flemish, the French and the German speaking. Those bear the duty to organize an educational system with a neutral character, as it is provided in the Constitution of Belgium, implying the need to show respect towards religious, political and ideological convictions and beliefs of parents and pupils⁴⁹.

The Belgian Constitutional Court on the case of the burqa ban has supported that “individuality in a democratic society requires the visibility of the face ... people appearing in public without their face being visible make human relations in society impossible ... individualization through the face is a fundamental condition linked to the essence of a person”. Those are statements of general and highly abstract nature that derive from the travaux parlementaire of the Belgian burqa ban^{50 51}

Finally, it has to be mentioned that in years, many local authorities and educational institutions in Belgium had adopted internal regulations that would introduce prohibitions on the use of head covering generally and more specifically religious and cultural symbols and dresses⁵².

⁴⁸ Teitelbaum (2011), op. cit., p.93

⁴⁹ Article 24.1 of the Belgian Constitution: “... La communauté organise un enseignement qui est neutre. La neutralité implique notamment le respect des conceptions philosophiques, idéologiques ou religieuses des parents et des élèves

⁵⁰ Belgian Constitutional Court, judgments 145/2012 of 6th December

⁵¹ Brems, E. (2015). Equality problems in multicultural human rights claims: the example of the Belgian "burqa ban". In M. van den Brink, S. Burri, & J. Goldschmidt (Eds.), *Equality and human rights: nothing but trouble? Liber amicorum Titia Loenen (Vol. 38)* (pp. 67 - 85). Utrecht, The Netherlands: Netherlands Institute of Human Rights, p.71

⁵² The European Wergeland Center (2016), op. cit., p.9

3.2.3 The full face veil ban in other European countries

Despite the fact that France and Belgium are the only countries so far that have enacted legislation establishing a general ban on garments concealing fully the face, other European countries as well are considering this legislation or have already introduced it in some of their regions.

In Germany no general ban was introduced on the full face veil, since the Federal Constitutional Court had stated that a general ban would contravene the secular constitution of the country. Nevertheless, on the 6th of December 2016, Chancellor Angela Merkel stated that the use of full face veil would be prohibited in the country wherever this is legally possible. The related proposal on the prohibition of the full face veil in the public sector, meaning even in schools and universities, was filed by the Interior Minister de Maizier in August of 2016⁵³.

After all, between 2004 and 2006 eight German federal states introduced ban that prohibited the teachers' wearing religious symbols in public schools. Those measures seem to have raised many questions related to their compliance with the application and the effects of international human rights law in what concerns domestic law and policy making⁵⁴.

Moreover, in Italy and Spain the same consideration are being developed over the enactment of legislation prohibiting the full face veil, in order to enhance public safety and order and promote the living together⁵⁵. As a matter of a fact, Spain has already introduced a ban in some Catalanian and Andalusian regions⁵⁶.

Finally, it has to be mentioned that even the Netherlands deal with that issue in the same manner. In September 2011 even the Dutch government announced its plans for the introduction of relevant legislation banning the use of the full face veil. This was the aim since 2005 however, due to political reasons there was a delay in this enactment⁵⁷

⁵³ The European Wergeland Center (2016), op. cit., p.10-11

⁵⁴ Squatrito, T. (2015). Domestic Legislatures and International Human Rights Law: Legislating on Religious Symbols in Europe. *Journal of Human Rights*, p.1-2

⁵⁵ Canamares & Angeletti (2019), op. cit., p.119

⁵⁶ Teitenbaum (2011), op. cit., p.95; Burchardt, M., Grier, M., & Garcia-Romeral, G. (2016). Narrating Liberal Rights and Culture: Muslim Face Veiling, Urban Coexistence and Contention in Spain. *Journal of Ethnic and Migration Studies*, 41(7), pp. 1068 – 1087, p.1069

⁵⁷ Marshall, J. (2014). The legal recognition of personality: full-face veils and permissible choices. *International Journal of Law in Context*, 10(1), pp. 64 – 80, p.67

It is interesting, however, that the example of Netherlands proves that the strong tradition of secularism in a state is not the condition for the introduction of the prohibition of the veil. The Netherlands is a country that has eschewed the strict separation between state and religion compared to Belgium and France, nevertheless, a similar ban was introduced. This can be attributed to the fact that doubts have emerged related to multiculturalism which have coincided with the political rise of Pim Fortuyn in the last decade⁵⁸.

3.3 The logic behind the veil bans

In order to understand the controversy that the issue of the full face veil has caused in Europe, the approach of France will be examined, since it serves as the first European country that enacted a general ban of apparel concealing the face in public places.

The prohibition of the concealing of the face in public in France was based on the argument that such religious clothing is not welcome in the soil of France as it was expressed by the President Sarkozy. The arguments that enhanced this view can be distinguished in two categories, the first is the feminist one and the second the philosophical one, meaning the need to preserve the French ideals and values.

Feminist perception were echoed in the President's allegations, where not only the veil per se was conceived as a symbol of patriarchal oppression but it was expressed that even the women wearing it many times are forced to do so without their will. It was supported that the use of the full face veil, a piece of clothing that hides the entire body of women, their faces the essence of public personality is objectified and the existence of those women as subjects of the society is erased. It is argued that the veil lowers the women's dignity in the public places while they are transformed into mere objects, a fact which has more serious dimensions in case the veil's use is violent and not their choice. For many French politicians "women wearing the burqa are in fact doing so under the oppressive demands of their husbands

⁵⁸ Schyff, G. v., & Overbeeke, A. (2011). Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Ban. *European Constitutional Law Review*, 7(3), pp. 424 – 452; p.433; Teitelbaum (2011), op. cit., p.95

and families, rather than exercising authentic choice”⁵⁹. This explains why the burqa ban law, in article 4 refers to the “forced concealment of the face”, where a stricter fine is imposed⁶⁰.

This provision reflects the opinion that women are forced to use the veil, despite their own opinion and conscience while it is supported that such a coercion constitutes a limitation to religious freedom and to expressive freedom of the individual that is involved. Therefore, the wearing of the full face veil that is coerced cannot be incorporated in the French legal and public order as an expression of religious freedom, because the involved women do not exercise this practice freely. Under that view, the use of the burqa is conceived as a genuine and symbolic mark of oppression of Muslim women hence on that basis this prohibition was justified⁶¹.

The second set of arguments refers to the French values and principles that are in danger due to the wearing of the full face veil. It is supported that those values and principles are violated, while the concept of *laïcité* has been developed. This concept has been described as the appropriate relationship that should be observed between the State of France and the Church, referring to a strict separation between those two institutions. This derives from the French Constitution and has been characterized as an aggressive form of secularism while at the same time respecting the beliefs. *Laïcité* refers to the State neutrality as regards religions and includes an absolute detachment between religious and public sphere. Religion is recognized as a private matter while any form of public activity primarily falls within the State. Under that view, a unique vision of democratic secularism is observed and is implied that the government of France should not be involved in the way the religious institutions function and adversely that religions are not allowed to interfere in the function of the State. *Laïcité* is of great importance in France and is considered as a cornerstone of the French Republic⁶².

Finally, the French government has supported that the veil – as a form of human right – does not only contain the form of the protection but refers to an obligation as well. Such rights not only prohibit the state from the mistreatment of the citizens but they demand as well that the state should take all the positive actions in order to establish a

⁵⁹ Leane, G. (2011). Rights of Ethnic Minorities in Liberal Democracies: Has France Gone Too Far in Banning Muslim Women From Wearing the Burqa? *Human Rights Quarterly* , 33, pp. 1032 – 106, p. 1049

⁶⁰ Genevey (2015), op. cit., p.2-3

⁶¹ Schyff & Overbeeke (2011), op. cit., p.424-430

⁶² Genevey (2015), op. cit., p.3

political and a social space in which those rights will be meaningfully exercised. This is the case of the French law, which permits such a meaningful exercise⁶³.

⁶³ Heindl (2017), op. cit., p.33

Chapter 4

Freedom of Religion under the ECHR and the full face veil case

4.1 The ECHR

The primary human rights instruments in the context of Europe are to be found in the activities of the Council of Europe and in the legislation of the European Union. The Council of Europe preserves an extensive body of human rights mainly through the European Convention of Human Rights and Fundamental Freedoms and the jurisprudence of the European Court of Human Rights⁶⁴.

Equality is considered as the cornerstone principle in the field of human rights law. From that point of view, universality has to be examined, as it refers to all the human beings, with no exception, enjoying their human rights. No exclusion can be established as far as the above mentioned enjoyment is concerned. After all, the drafters of the Universal Declaration of Human Rights took into consideration an abstract human being, who is devoid of certain characteristics like ethnicity, gender, religion etc. Regardless of all the similar characteristics, the principle is that all the human beings shall enjoy the same rights. However, more than half a decade later than its draft, the world has become a witness of a range of emancipation movements that led to many additions and amendments in the field of the international human rights law, in order to promote and enhance its inclusiveness and so that to correct any bias. This can be justified taking into consideration that in real and contemporary world there are not abstract human beings, no neutral vantage point in order to conceive the concept of the human being. Therefore, in spite of the best and pure intentions of the drafters of the human rights texts, the concept of human in the aspect of human rights represents inevitably the views, the needs and the experiences of the most dominant groups, meaning that they reflect the human being that is “among other things, male, adult, not disabled, heterosexual, and Western”⁶⁵.

Under this paper the main right of interest is that provided in Article 9⁶⁶ ECHR. More specifically, article 9 established freedom of thought, of conscience and

⁶⁴ Squatrito (2015), op. cit., p.1-2

⁶⁵ Brems (2015), op. cit., p.68-69

⁶⁶ Article 9 (Freedom of thought, conscience and religion):

religion as a fundamental right that is not protected only by the ECHR but by a number of national, international and European texts.

4.2 Article 9 ECHR

Freedom of consciences and religion is regarded as one of the bases of a democratic society and as the vital tool available to people to create their identity of believers and their approach of life. At the same time is a precious tool for atheists, for agnostics, for skeptics, and for the unconcerned. It enhances pluralism in a democratic society and entails the freedom to sustain or to reject religious beliefs and practices or to abstain for those practices. The Scope of Article 9 is wide, since it covers not only religious but non religious as well opinions and convictions⁶⁷.

There is an internal and an external aspect of the right of article 9. The internal aspect refers to an absolute freedom, meaning the ideas, the beliefs and the convictions in the person's conscience. Those are internal and cannot threat public order nor can they be subject to restrictions. However, the external aspect of the freedom is relative since it refers to the above mentioned manifestation and can harm public order⁶⁸

Therefore, according to article 9(1) ECHR two strands are contained, the first is the right to hold a belief and the second is the right to manifest it. Manifestation covers not only private but public places as well. However this right is not absolute.

“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, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”.

Additionally, relevant to the issue under examination are the following articles of the ECHR:

Article 14 (Prohibition of Discrimination, based on, among other things, religion and opinions):

“The enjoyment of the rights and freedoms set forth in [the] 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”.

Article 2 of Protocol No. 1 (Right to Education):

“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, the State shall respect the right of parents to ensure such education and teaching for their children in conformity with their own religious and philosophical convictions”.

⁶⁷ European Court of Human Rights. (2018). *Factisheet: Religious symbols and clothing - Display of religious symbols in State-scholl classrooms*. Retrieved 2nd of June 2019, from https://www.echr.coe.int/documents/fs_religious_symbols_eng.pdf , p.7-8

⁶⁸

This is based on the fact that one's manifestation may have an impact on other persons, hence this issue is covered by § 2. Therefore, any limitation may be provided by the law if it is necessary in a democratic society and while protecting legitimate aims⁶⁹.

Under the provision of the ECHR it is clear that it is allowed for a State to place limitation on the freedom to manifest one's religion, on freedom of expression, of privacy while similar limitation have to be "prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or moral, or the protection of the rights and freedoms of others"⁷⁰.

4.3 The restrictions of Article 9 (2) ECHR

A threefold test is introduced by article 9(2) of ECHR. The first part of the test is whether the restriction is prescribed by law. The second is whether the restriction is necessary in the context of a democratic society while the third examines the aim of the restriction. If it is aimed at the protection of public order, public safety, morals and health or the protection of the rights and the freedoms of the others then the test is satisfied⁷¹.

Four interpretive principles have been developed by the ECtHR⁷². The first is that the freedoms that are provided and established by 9(1) have to be conceived in their widest sense while the restrictions have to be conceived in a narrow way. This means that the rights are to be given the ultimate protection and have to be limited only when this is necessary. Under that view, after all, pluralism and democracy are protected⁷³. The second principle is related to the fact that any limitation on religious freedom has to be prescribed by law and has to be considered as necessary in the democratic society. In this aspect, legal certainty is required to be respected while any

⁶⁹ European Court of Human Rights. (2019). *Guide on Article 9 of the European Convention on Human Rights - Freedom of thought, conscience and religion*. Retrieved 1st of June 2019, from https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf , p.11,30

⁷⁰ McCrea, R. (2013). The Ban on the Veil and European Law. *Human Rights Law Review*, 13(1), pp. 57 – 97, p.62

⁷¹ Adrian (2016), op. cit., p.54-55

⁷² Martinez-Torron, J. (2005). Limitations on religious freedom in the case law of the European Court of Human Rights. *Emory International Law Review* , 19 (2), pp. 578 – 636, p. 595 - 599

⁷³ *Ibid*

piece of legislation has to be precise, predictable and accessible to all the citizens⁷⁴. The element of necessity is explained as “a society based upon the guarantee of pluralism and upon the supremacy of law in which necessary means that there has to exist a pressing social need that has to be evaluated according to the facts at hand”⁷⁵.

The third principle refers to the concept of the margin of appreciation. It is a controversial yet complex doctrine. The margin of appreciation deals with the idea that every country is entitled to a certain flexibility and scope in the context of which it can adjudicate the rights of the individuals, the national interests taking into consideration the universal values. In this context all the states enjoy some discretion between the competing values of the nation, while this doctrine guarantees the necessary flexibility. Finally the fourth principle is that any restriction has to be proportionate to the aim pursued⁷⁶. The ECtHR identifies and repeats the lack of the European consensus as far as the margin of appreciation of the States is concerned in case questions arise which are related to the relationship that should be developed between the State and the religions⁷⁷. However, the wider the margin, the less strict is the Court while analyzing the proportionality requirements, while the narrower the margin the stricter the examination by the Court⁷⁸.

All the above prove the width of the rights and the narrow character of the restrictions and that “laws must be open, precise and predictable, that limitations must meet a pressing social need, that a margin of appreciation is allowed to each state, and that the aim of the restriction must be proportionate”⁷⁹.

4.4 Article 9 and the full face veil

Article 9 ECHR protects the right to believe *foro interno* and the right to manifest the belief in the outside world. The Court has not doubted that the use of the Islamic veil constitutes such a manifestation of religious belief, while it is accepted that it falls within the scope of the protection of Article 9. However, the question that has emerged is whether the right of the religion’s manifestation can be limited “by a constraining condition attached to Article 9, which concedes the possibility of

⁷⁴ Schyff & Overbeeke (2011), op. cit., p.437

⁷⁵ Adrian (2016), op. cit., p.55

⁷⁶ *Ibid*, p.55-56; Martinez-Torron (2005), op. cit., pp. 595 - 599

⁷⁷ Bribosia & Rorive (2014), op. cit., p.5

⁷⁸ Schyff & Overbeeke (2011), op. cit. p.437

⁷⁹ *Ibid*, p.56

limitations to this right if they are prescribed by law and necessary in a democratic society”⁸⁰.

The protection of freedom of thought, conscience and religion is an obligation of the State. The latter has to accept that individuals may adopt in free way convictions and develop their approach towards the society. Nevertheless, this does not mean that the relations between the State and the religious communities lie outside the Court’s scrutiny⁸¹.

The ECtHR has established that the restrictions on the right to manifest one’s religion can be considered as a violation of the European Convention, however, the Court has to balance the free practice and the religion’s manifestation against other rights and the national interests while assessing the national consideration and taking in full consideration the provision of article 9(2) ECHR, which is regarded as an escape clause⁸².

Three categories where such a limitation may be justified are developed, in which an absolute ban of the full face veil may seem as being compatible with the public order of Europe⁸³. The first is the rights of the states to counteract and eliminate threats to secular and liberal democracy. The second is the restriction of offensive and symbolic speech or similarly of a religious practice and the third is the right of the states to impose the minimum social duties that are related to public behavior. This category includes the duty to show respect towards cultural norms compared to the way someone appears in public, to demonstrate a minimum level of openness while interacting with the rest of the members of the society or an individual duty to show respect towards the human dignity⁸⁴.

The veil is considered as a religious symbol that reflects fundamental elements of social order, it refers to the relationships between the two genders, it is related to religious beliefs and the way the latter is related to the duties as a member of a broader society and the duties as they interact with the duties of the rest of the members of that society. Most of the cases of the burqa ban lie on the idea that this specific piece of clothing represents a specific meaning that reflects values repellent

⁸⁰ Joppke, C. (2013). Double Standards? Veils and Crucifixes in the European Legal Order. *European Journal of Sociology*, LIV(I), pp. 97 – 123, p.101

⁸¹ European Court of Human Rights - Research Division. (2013). *Overview of the Court's case law on freedom of religion*. Council of Europe, p.8-15

⁸² Squatrio (2015), op. cit., p.10-11

⁸³ McCrea (2013), op. cit., p.62-63

⁸⁴ *Ibid*

to the morals, values and principles of liberal democratic societies. Moreover, the negation of the equality between the two sexes, the idea of ownership of women by men, the idea of women's oppression and subordination to men are some of the arguments that have been presented and render the veil an offensive element in western societies, according to some States point of view⁸⁵.

It is established that wearing religious symbols is subject to restrictive national regimes. Some of them are restrictive to a greater extent and others to lesser extent⁸⁶. In any case, the bans that have been imposed are mostly justified on a wide range of grounds, mainly by being referred to the protection of secularism and equality of genders, the protection of human dignity of Muslim women, the promotion of social cohesion and the preservation of public order and safety⁸⁷.

⁸⁵ McCrea (2013), op. cit., p.64-65

⁸⁶ Steinbach, A. (2015). Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights. *Cambridge Journal of International and Comparative Law*, 4(1), pp. 1 – 25, p.1

⁸⁷ Marshall (2014), op. cit., p.68

Chapter 5

The full face veil ban and the approach of the ECtHR

5.1 The approach of the ECtHR over the religious symbols and clothing ban

In this subsection the main views and approaches of the ECtHR will be presented over the issue of the religious clothing ban. The three major cases that the Court dealt with will be referred to, while later on (in the second subsection) more details about them will be analyzed in order to reach some conclusions.

The main provision that is relevant to the cases the ECtHR examined over the issue of burqa ban is article 9 of the ECHR. The first subsection of that article presents the positive scope of the freedom of religion⁸⁸.

In *Eweida and Others v. the United Kingdom* the Court held that in the context of a democratic society it is essential that the States tolerate and protect pluralism and diversity in the sphere of religion. Furthermore, it is essential that individuals who consider their religion as a central element in their lives should mainly be able to communicate their belief to other people, inter alia through the use of religious symbols and pieces of clothing⁸⁹. The use of such a symbol or clothing is motivated by his faith or by his desire to bear witness to the chosen faith. This is regarded as a manifestation of his beliefs and constitutes worship, practice and observance. Therefore, all the above actions fall within the scope of Article 9 ECHR⁹⁰.

Nevertheless, this right, i.e. the right to wear religious symbols and clothing, is not an absolute one while it has to be balanced with other legitimate interests of either natural or even legal persons. The relevant case law of the ECtHR can be distinguished in three different fields, the first is the public sphere, the second is the workplace and the third is the schools and the universities⁹¹. What is interesting is that the ECtHR has upheld many times states' bans on wearing religious symbols and

⁸⁸ It is interesting that unlike the constitutions of the United States or that of Australia, the European Convention on Human Rights states in an explicit and clear way that religious freedom is not to be conceived as being limited to the beliefs, but on the contrary that it includes even manifestations. This means that religious freedom extends to both actions and beliefs. Therefore, it is apparent that wearing a piece of religious clothing falls within the scope of Article 9 ECHR clearly compared to the above mentioned constitutional systems

⁸⁹ *Eweida and Others v. the United Kingdom*, decision § 94

⁹⁰ *Ibid*, § 89

⁹¹ The European Wergeland Center, op. cit. p.3

clothing in public spaces, while universities and schools are included in the latter. More specifically:

5.1.1 Public sphere

The most famous case as regards the usage of religious clothing in public space is the *S.A.S. v. France* (2014). In this case the complainant -before the ECtHR- was a 24 years old French citizen from Pakistan. The complain she filed referred to a prohibition to wear the full face veil in public, a measure which came into force in France in 2011 according to a French provision stating that it is prohibited to conceal one's face in public places. In that case the ECtHR upheld that there was no violation of article 8, 9 and 14 of the ECHR since it was accepted that the French ban served a legitimate aim and constituted a proportionate provision that was aimed at the protection of the "respect for the minimum requirements of life in society...of the rights and freedoms of others" and most importantly the principle of living together.

The Court supported that such a prohibition is not "expressly based on the religious connotation of the clothing in question but solely on the fact that it concealed the face". It was supported by the French government that the face is an element that is important in social interaction and that fact had to be taken into consideration in the above mentioned ruling. Nevertheless, the ECtHR accepted that such a provision was related inevitably with negative effects on Muslim women who chose to use the full face veil in public spaces⁹².

5.1.2 Schools and universities

It is important to mention that related to the regulations that are to be applied in case of state educational institutions the ECtHR has stated that an extensive margin of appreciation is to be enjoyed by the states. After all, a uniform conception of religion in the context of the society is not possible to be developed in Europe. The impact or the meaning of the public expression of religious beliefs differs to a great extent from country to country and from time to time. This means that the rules that are applied in this context vary from state to state based on the national traditions and

⁹² The European Wergeland Center, op. cit. p.4

the requirements that are introduced and applied due to the need to protect the rights and the freedoms of all the people and to achieve the maintenance of the public order. All the above led the Court to the ruling that the form and the extent of the related to schools and universities (public) regulations should be left to a certain point to the State involved since it is dependable on the specific domestic environment and context⁹³. At this level, the cases that the ECtHR has examined can be distinguished in two categories, on the criterion of whether the applicant, meaning the person that was banned from using religious symbols or clothing, was a student or a teacher:

5.1.2.1 Teachers

In case the claimant was the teacher the ECtHR has examined the balance that has to be found between the right of the employee to manifest his religion compared to the respect that has to be shown towards the neutrality of the state education and the need to protect the legitimate interests of the students through the guarantee of an inter faith harmony. The court has put emphasis on the nature of the school teachers. It established that they constitute “participants in the exercise of educational authority ... and ... representatives of the state in the eyes of their pupils”. Moreover, the court emphasized that the age of the pupils – students is important and should be taken into consideration since the younger the children, the easier to be influenced compared to older ones⁹⁴.

More specifically, in *Dahlab v. Switzerland* (2001) the claimant was a primary school teacher, who was responsible for a class of children aged from four to eight, who was found wearing an Islamic headscarf during teaching. Her complain was based on the allegation of the ban violating the freedom to manifest her religion, as it was protected by Article 9. The Court stated that claimant had indeed every right to wear the scarf during teaching, however, it attached a great degree of importance to the fact that her wearing the religious clothing impacted on the children and was considered as “a powerful external symbol”, that was not easy to reconcile with the message of tolerance, of respect towards the others, with equality and non discrimination that all the teachers should demonstrate to their pupils. The ban was justified by the Court on the ground that it was permissible since it served as a tool of

⁹³ *Layla Sahin v. Turkey* decision, § 109

⁹⁴ *The European Wergeland Center*, op. cit. p.5

protecting the others' freedoms and rights, meaning teaching children of tender age in the public educational field⁹⁵. The Court ruled that in order to keep a democratic society and to preserve religious diversity "it may be necessary to place restrictions on the freedom of religion in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected"⁹⁶. According to the position adopted by the Court in the afore mentioned case, the prohibition of the teacher's wearing a headscarf is aimed at the fulfillment of a legitimate purpose for the protection of the religious beliefs of others and therefore is regarded as being necessary for serving that aim. Therefore, the Court in that case concluded that there was no violation of the provisions of the ECHR⁹⁷.

In *Kurtulmus v. Turkey* (2006) a disciplinary sanction was imposed on an associate professor of a State University of Turkey, the claimant, due to her wearing the Islamic headscarf while teaching, since this action did not comply with the dress code of public servants. The Court supported that in the context of a democratic society the state has the right to impose such requirements to public servants so that it is ensured that they are loyal to principles deriving from the constitution. On that ground the complainant, as a state's representative was expected to follow the rules that demanded abstaining from the expression of her religious beliefs in public institution⁹⁸.

5.1.2.2 Students

In *Leyla Sahin v. Turkey* (2004) the facts are the following: in 1998 the University of Istanbul introduced a measure while informing its students that the latter are not to bear headscarves or to have long beards, otherwise they will not be permitted in lectures and examinations. Ms. Sahin, a fifth year student of medical school, was not allowed to enter the lectures and was banned from the exams due to her wearing a headscarf. The Court established that the religious freedom was restricted, however, it was considered as being legitimate and in compliance with the University's aims and the state urge to protect the nation's secularism. It is mentioned that "in the context of Turkey, the issue of the Islamic headscarf could not be assessed

⁹⁵ Schyff & Overbeeke (2011), op. cit., p.436

⁹⁶ § 83 of the decision

⁹⁷ Squatrito (2015), op. cit.

⁹⁸ The European Wergeland Center, op. cit. p.5

without considering the potential impact of this symbol, presented or perceived as a mandatory religious duty, on those who did not wear it”⁹⁹.

The Turkish government supported that the wearing of religious clothing had a specific political meaning inside the country while extremist movements were active in order to impose their religious symbols. It was upheld that such a prohibition protected pluralism and was justified in that context¹⁰⁰.

The Court ruled against the complainant and supported that after taking into consideration the margin of appreciation of the contracting states once again the interference, meaning the ban of the headscarf, can be justified and is considered as being proportionate to the pursued aim¹⁰¹. The Court accepted that “the role of the national decision making must be given special importance”¹⁰², accepting a wide margin of appreciation to the States for determining any limitations that are legitimate and proportionate in the field of religious freedoms while it upheld that that such restriction to religious freedoms are allowed in schools¹⁰³.

5.2 The main elements of reasoning in Dahlab and Sahin cases and some comments

Firstly, it has to be mentioned that the Court has developed a variety of tests for the concept of worship, teaching, observance and practice. The bearing of a particular piece of clothing can be spotted in the category “practice” which has been characterized as the most amorphous and least clearly defined category of protected religious freedom. This can be attributed to the fact that the Court usually accepts a breach of article 9 and then proceeds with the examination of the limitations of the second paragraph of that article without elaborating the claims of each and particular practice under the first paragraph. This can be observed in both the Dahlab and Sahin case assuming that wearing a religious clothing is covered by the first paragraph. In Sahin, the approach of the Grand Chamber was slightly more encouraging, due to the fact that it was discussed that the applicant had the impression that she did obey a strict religious injunction in wearing a headscarf which meant that her decisions can

⁹⁹ *Ibid*, p.6

¹⁰⁰ Heindl (2015), op. cit., p. 35

¹⁰¹ § 122 of the decision

¹⁰² § 100 of the decision

¹⁰³ Squatrito (2015), op. cit., p.11

be considered as being motivated and inspired by her religious beliefs. This issue is of great importance because the Court in many occasions has stated that it is not every action motivated by religious beliefs that can be regarded as falling under the article 9. However, in *Sahin* the Court has mentioned that the regulation of the clothing in this particular case constitutes an interference with the right to manifest religion. Nevertheless, it has to be reiterated that there is no clear finding by the Court, but a mere assumption, that religious freedom has been interfered with while no clear relevant test was elaborated by the Court for future cases¹⁰⁴.

Nevertheless, it has to be mentioned that in *Arrowsmith v the United Kingdom* (1978) the Court supported that the concept of practice of article 9(1) does not cover every act motivated or influenced by a religion while it accepted that manifestations must be “normal and recognized manifestations of the religion or belief that actually express the belief concerned”¹⁰⁵.

It is interesting that in the two major headscarf cases that the ECtHR examined the national level restrictions were upheld and they were characterized by the Court as necessary in the context of a democratic society, based on article 9(2) ECHR. Over the years this test, as it was developed in *Arrowsmith*, was narrowed to a form of necessity test in which the Court would assess whether a specific activity was to fall within the scope of article 9 through posing the question of whether this activity was demanded by the religion in question. Under that test, it is apparent that wearing a headscarf by women who think that this wearing constitutes a mandatory obligation according to their religion has to be regarded as a manifestation of religious practice. However, the fact that the Court avoided to state the above test explicitly proves that it is reluctant to acknowledge the value and religious significance of many religious practices apart from Christianity¹⁰⁶. On the other hand it has to be mentioned that even in case the wearing of a religious apparel fall within article 9(1), the second paragraph of that article states that this right, meaning the right to manifest a religion, is subject to limitation of specific form. This means that even in case this wearing is considered as a manifestation of religion, it can be limited in case limitations are

¹⁰⁴ Evans, C. (2006). The Islamic Scarf in the European Court of Human Rights. *Melbourne Journal of International Law*, 7(1), p.4

¹⁰⁵ § 20 of the decision

¹⁰⁶ Evans (2006), op. cit., p.4-5

considered as required in a democratic society. The Court had to examine these limitations in the cases it ruled related to headscarf¹⁰⁷.

In Dahlab case it is remarkable that there were no complaints on behalf of the parents or the pupils against the teacher's clothing while the use of the veil was explained as "sensitivity to the cold". It has been supported that this was a thin basis for building the argument of proselytism, as it will be referred to below. The Court, however, added that the veil "appears to be imposed on women by a precept in the Koran and ... is hard to square with the principle of gender equality"¹⁰⁸. Therefore, the Court concluded that – following the view of the Federal Court of Switzerland, the veil "appears difficult to reconcile with the message of tolerance, respect for others and above all, equality and non discrimination that all teachers in a democratic society must convey to their pupils"¹⁰⁹. According to Joppke, there is an irony in that ruling, since the prohibition, i.e. the opposite of tolerance, is established by being referred to the concept of tolerance¹¹⁰. Dahlab case, according to the Court, dealt with a civil servant that represented the official State and therefore was engaged by a special form of relationship of subordination to the public authorities while the authorities function under the principle of the separation of Church and the State. Unlike national high courts' ruling in favor of veiled teachers¹¹¹, the ECtHR adopted the approach that when the civil servant enters an employment contract with the state, he seeks "nearness" to that. However, Joppke supports that it is doubtful whether public school teachers can be compared to state functionaries¹¹² and that they exercise sovereign state function, hence they have to be and appear as "neutral"¹¹³.

On the other hand, in Sahin v. Turkey the case was brought before the Court by a university student. In this case it is interesting that there was a shift of the emphasis from the defense of the right of the others to the protection of secularism and the protection of gender equality. This can be conceived as the protection of the public order and the morals that have to be observed in a democratic society, as stipulated by article 9§2 of the ECHR. The Court reiterated that "in democratic

¹⁰⁷ Ferri, M. (2017). The freedom to wear religious clothing in the case law of the European Court of Human Rights: an appraisal in the light of states' positive obligations. *Religion, State & Society*, 45(3 - 4), pp. 186 – 202, p.189

¹⁰⁸ ECtHR, Dahlab v. Switzerland (2001) App. No. 42393/98

¹⁰⁹ *Ibid*

¹¹⁰ Joppke (2013), op. cit., p.102

¹¹¹ For example the German Federal Constitutional Court in 2003 in Ludin case

¹¹² Like police officers or judges

¹¹³ Joppke (2013), op. cit., p.102

societies in which several religions coexisted within one and the same population, it might be necessary to place restrictions on the freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs were respected"¹¹⁴.

In both cases the ECtHR examined briefly the key elements of contention between the parties, while the main focus was concentrated on the question whether the State could justify such restrictions on the clothing of the complainants based on 9(2) ECHR. The core of the Dahlab decision is dealt with in one paragraph. The Court weighs the different interests in both the cases, meaning the protection of the rights and the liberties of others compared to the conduct of the applicant of which she was accused. However, the Court did not weigh the rights of Ms Dahlab against the rights of the others, on the contrary it set a scenario in which mysterious others and ill defined others are to be protected against a presumptive accused as wrongdoer.

Three are the main elements of the Court's reasoning in Dahlab and served as a basis for the reasoning of Sahin as well: the first is the fact that the headscarf served as a proselytizing tool, the second is that it was not compatible with the gender equality and the third is that it was not compatible with tolerance and respect for the others. It has to be mentioned that in Sahin the proselytizing element is less apparent, however the judgment refers to gender equality and religious tolerance, as it was conceived through the concept of margin of appreciation. Proselytism was not examined in Sahin, since it is apparent that most of the students shared the same religion. In the following paragraphs the main elements of Dahlab case will be presented, since the two of them (apart from the proselytizing effect feature) were visible in Sahin and relied upon by the Court in the latter¹¹⁵.

5.2.1 Proselytism

The first form of harm that the court referred to in Dahlab is proselytizing. At first it has to be mentioned that direct proselytism was not existent in Dahlab. She did

¹¹⁴ § 106 of the decision

¹¹⁵ Evans (2006), op. cit., p.11

not even reveal to her students the real reasons why she wore the headscarf let alone verbally try to convert them¹¹⁶.

Moreover, indirect proselytism is weak as well based on the mere wearing of the Islamic headscarf. The Court recognized that there was no empirical evidence to support such claims of harm. The impact of wearing this specific piece of clothing was difficult to be assessed. While it heavily qualified as proselytism the Court supported that “it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect”¹¹⁷. The wording of this decision proves the lack of evidence of the proselytizing impact of the headscarf apart from the assertion of the Government over the existence of such an effect. The Court tried to blur this picture through the creation of the impression that there are unknown effects instead of accepting that there was no harm, especially since Ms Dahlab was a sensitive teacher over the issue of the apparel. The evidence of harm was very weak and it was not apparent how this effect was sufficient to discharge the burden of necessity as it is required in the context of a democratic society. However, it has to be mentioned that the Court referred to the particular vulnerable groups and special protection that is required for them and the need to ensure that position of authority as that of Ms Dahlab should not be abused. In Dahlab both the factors were examined. At first children are regarded as a particularly vulnerable group especially to intellectual and to emotional manipulation. Secondly, the relationship between them and Ms Dahlab was that of student – teacher, meaning an element of power is open to being abused. However, this behavior was not close to proselytism. Even in case the students are vulnerable and particularly curious it was not established that coercive or malign influence was exercised by Ms Dahlab. This is based on the fact that it was not revealed to them that she was Muslim, she did not demand that the students participated in religious activities nor did she give them explicit religious instructions¹¹⁸.

¹¹⁶ Nigro, R. (2010). The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil. *Human Rights Review*(11), pp. 531 – 564, p.541-543

¹¹⁷ Dahlab v. Switzerland, 15 February 2001, European Court of Human Rights, No. 42939/98, p. 4

¹¹⁸ Evans (2006), op. cit., p.11-14; Steinbach (2015), op. cit. p.7-10

5.2.2 Gender Equality

The second type of harm found by the Court was gender inequality. It did not receive adequate consideration by the Court. In both cases the Court asserted that the wearing of the veil is not compatible with gender equality stating that “it appears to be imposed on women by a percept which is laid down in the Koran”¹¹⁹. However, it has to be mentioned that the majority of religious obligations have an imposing character while the Court usually does not refer to them in such a negative way. It is not explained why wearing the headscarf is imposed on women by the Qu’ran in a more apparent way than the absence from alcohol or from pork or compared to obeying to the Ten Commandments for the Jews and the Christian. Ms Dahlab and Ms Sahin lived in societies where no such an imposition was established by the state requiring them to wear a particular piece of religious clothing. It is apparent that both governments were unsupportive of such an action. Therefore, it can be understood that its wearing was more close to a voluntary compliance rather than a religious and imposed obligation¹²⁰.

The Court did not elaborate on the Qur’an imposing such an obligation or on the different meanings that have been attributed to its use by different scholars and societies. There is a broad approach by the Court which seems to be based on the Western views and perceptions of Islam. However, such an assumption is questionable. The two applicants did not appear to be the stereotypical subordinate and oppressed women to what their religion demands. They were ready to litigate in both domestic and international courts in order to protect their right. Moreover, there is no evidence that these two women considered themselves as being less equal to men or that they promoted gender inequality. On the contrary it can be established that the complainants were educated women, intelligent and strong minded and that wearing the headscarf was their choice and not based on the commands of the Qur’an¹²¹.

Therefore, the main argument of the Court should have been broader, meaning that the veil is an unambiguous symbol of gender inequality. The logic of the Court is that no matter the evidence given by the women, wearing the veil is a demonstration

¹¹⁹ Dahlab v. Switzerland, 15 February 2001, European Court of Human Rights, No. 42939/98, p. 4

¹²⁰ Adrian (2016), op. cit., p.63-67

¹²¹ Nigro (2010), op. cit., p.540-541

of the acceptance of gender inequality and of the will to perpetuate this inequality in the context of the society. This reasoning, however, is oblique and not clear whether this is the understanding of the Court.

The Court proceeds with mentioning that “it is difficult to reconcile the wearing of the headscarf and gender equality”. However it has to be mentioned that it is difficult to understand the point in which this difficulty lies. For sure there are arguments by Muslims and non Muslims that apply criticism on the use of the veil as being oppressive for women. Different meaning of the veil have been presented, however the Court fails to engage to this discussion in deep. The Court has failed to identify the different reasons why a Muslim woman engages to such a practice, the Court assumes an understanding and symbolic meaning with no engagement with the women who choose to cover their heads. The assumption that the veil is racist and colonial is not correct while it is a main view of the West it is static and unchanging. In any case it is interesting that the Court in Sahin did not deal with that varied meaning.

Moreover, it has to be stated that the debate over the degree to which the veil perpetuates the inequality of gender is a complex one. In specific circumstances it is permitted for a government to legitimately restrict or even prohibit specific clothing on the basis it promotes gender inequality. However, such a measure should be justified in case there is evidence that women are pressured without their will to wear religious clothes, when there is violence against those who refuse to wear them or in case a specific piece of clothing is imposed for political reasons. However, in both cases the result may seem as the opposite, meaning that the exclusion of the complainants from public places may be the reason why gender inequality is promoted since it can harm those women in their education or their employment rights¹²².

5.2.3 Intolerance and Secularism

The third and final key element of the justification of the prohibition of the Islamic veil is that it is considered as not being compatible with a tolerant and secular society which respects both rights and freedoms of others. The evidence of direct

¹²² Evans (2006), op. cit., p.14-18

intolerance is minimal. Ms Dahlab did not make her students dress or behave accordingly or even believe in the way she did. No students were excluded neither parents from her classroom. She did not promote her beliefs or superiority of her views. Therefore, there wasn't any evidence that she was intolerant of the others' views and opinions. From this point of view it seems that the Court accepts that any person who is Muslim and advertises this may by definition be intolerant. Of course the Court does not explicitly state such a fact, however the equation of Islam with intolerance and Islamic women with oppression seem to be reflected on the judgment of the Court. The Court states that the State should be regarded as a neutral and impartial organizer of the exercise of various religions, faiths and beliefs. This function should be conducive to public order, to religious harmony and to tolerance in a democratic society. State secularity is not considered as a problematic concept and is regarded as a method to ensure that all the religions and the beliefs will be treated and dealt with in a fair and equal way. It has to be mentioned that the Court was willing to accept that the veil is a dangerous indicator of intolerance and antisecular fundamentalism¹²³.

5.3 The S.A.S. v. France case-law of the ECtHR

The S.A.S. v. France case is a landmark in the field of the full face veil prohibition, however, it did not result into the expected outcome of the supporters of the veil. The complainant is a French citizen that was born in Pakistan and resides in the Paris region. She is a law graduate that completed an internship in Birmingham with a law firm. The S.A.S. case constitutes the first time and individual complaint over the national and general ban of the full face veil reached the ECtHR¹²⁴.

In 2011, as mentioned above, France passed a law prohibiting the Muslim face veil in public place. The complainant was never arrested however supported that the French legislation "deprived her of the possibility of wearing the full face veil in public" claiming that five different rights of the ECHR were violated. Three of them were dismissed by the Court with article 8 (private life) and article 9 were examined and taken up. The Court declared a restriction of religious freedom, however,

¹²³ Evans (2006), op. cit., p.18-20

¹²⁴ Brems, E. (2014). Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings. *Journal of Law and Policy*, 22(2), pp. 517 – 551, p.524

proceeded with the examination of the legitimacy of the restriction provision. The applicant supported that such a restriction is not necessary in the context of a democratic society, does not serve as a tool for the protection of public safety since it introduces a blanket ban and does not address certain safety concerns. She claimed that despite the fact that it referred to all face coverings, in reality it dealt only with the Islamic veil since it affects only Muslim women and insisted that such a restriction derides the minorities' cultural practices, degrades female empowerment and free choice and is insulting to women's dignity when they wear the veil. She emphasized that it was her choice to wear the veil and she regarded it as a symbol of empowerment and equality¹²⁵.

It has to be mentioned that in S.A.S. the Court made some assumptions related to the effect of the veil on interpersonal relations, to the idea of established consensus and to the concept of living together¹²⁶. The notion of living together made its first appearance in the S.A.S. case, where the Court held that living together is a legitimate aim that is directly linked with the rights and freedoms of others so that they can live in a space of socialization where life in community is easier. Living together thus was considered as capable ground to justify the restriction and the limitations on private life and on the freedom to manifest freely one's religion, on the condition that those restrictions are required in the context of a democratic society¹²⁷.

The grand Chamber accepted the interference with the rights of the applicant and proceeded with an in depth examination of the aim's legitimacy. French government supported that this restriction was aimed at the protection of the public safety and of the rights and freedoms of others. This would be achieved through the protection of the minimum set of values of an open and democratic society. The Court decided that the justification over public safety was not proportionate, however, it recognized the second legitimate aim, meaning the protection of the rights and freedoms of the others, as legitimate since they entail the protection of the minimum fundamental values in a democratic society. This demanded respect for equality between women and men, for human dignity, for minimum requirements of life inside the society. The Court dismissed the French argument over gender equality supporting that "it is not possible to invoke gender equality in order to ban a practice that is

¹²⁵ Adrian (2016), op. cit., p.67-74

¹²⁶ Adrian (2016), op. cit., p.74

¹²⁷ Trispiotis, I. (2016). Two Interpretations of "Living Together" in European Human Rights Law. *Cambridge Law Journal*, 75(3), pp. 580 – 607, p.580-581

defended by women, such as the applicant”. It is important to pay attention to this part of the judgment since it reveals a shift of the Court towards gender equality compared to previous case-law, especially Dahlab and Sahin case. At the same time it proves the importance of the notion of living together, since this was the ground on which the aim of the French government was considered as being legitimate¹²⁸. After all, visual communication is essential in France since “concealing one’s face in public spaces is to break the social tie and to manifest a refusal of the principle of living together”¹²⁹.

This decision is aligned with Resolution 1743 of the Council of Europe, where it was stated that a general prohibition of the full face veil “would deny women who freely desire to do so their right to cover their face”. The Court moreover, dismissed the French argument related to human dignity and rejected such a ground for the legitimacy of the aim. It was accepted that the full face veil represents a cultural identity that is lined with a different concept of decency as far as the human body is concerned and that there is no evidence that women who wear it show contempt for the rest of the women. It was supported by the French government that the general ban was aimed at prohibiting an incompatible practice “with the ground rule of social communication and more broadly the requirements of living together”. Social interaction was supposed to be protected as it is required in pluralism, in tolerance and in broadmindedness.

Thus, the Court accepted the importance of the face revealing in open and interpersonal relationship and that voluntary concealment is in contravention with the ideal of fraternity and does not comply with the minimum requirements of civility as they are required for the promotion and the success of social interactions. Hence the Court accepted that the full face veil serves as a barrier that is in breach of “the right of others to live in a space of socialization which makes living together easier”. Therefore, it was accepted that “it falls within the power of the State to secure the conditions where individuals can live together in their diversity”¹³⁰.

In S.A.S. the Court followed the above described four part test in order to decide whether the prohibition constitutes an infringement of the rights of the complainant. The Court examined whether the State of France had a legitimate aim pursued by the introduction of the prohibition and accepted that it aims at ensuring the

¹²⁸ *Ibid*, p.587

¹²⁹ §§ 69-70 of the decision

¹³⁰ Trispiotis (2016), op. cit., p.587-589

respect for the minimum values of the open and democratic society, the minimum requirements of life in such a society. After concluding that the ban is based on a legitimate objective of the State, the Court examined the proportionality test. It concluded that the ban is proportionate to the goal pursued, meaning the living together and declared that the blanket ban is not addressed solely towards the Muslim, but rather deals with the general practice of concealing the face fully. Therefore, on that basis, the entire case was based on the argument that facial visibility is required for proper socialization. The majority was characterized as a choice of society¹³¹.

5.4 Comments on S.A.S. decision

It is interesting that the Court endorsed the French general banning in S.A.S. and declared that such a restriction of legitimate because it serves the safeguarding of the immaterial concept of public order, and more specifically that of living together¹³².

It is really remarkable that in this context a new ground for justification of a restriction of article 9(2) ECHR is added, since the concept of living together is seen as part of the right of others as included in the above mentioned provision¹³³.

However, it has to be added that with the decision in S.A.S. it was expected that justice would be brought to Muslim women. Nevertheless, it was considered as a disappointment the granting to the States of the wide margin of appreciation. Still it cannot be overseen that the Court proceeds with a more balanced yet careful reasoning in accepting the justification of the veil prohibition. The court refused to accept previous reasoning as developed in Sahin and Dahlab as legitimate aim on the grounds of gender equality. The same applied to the case of human dignity being protected. The Court declared itself “aware that the clothing in question is perceived as strange by many of those who observe it... it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy”¹³⁴, opening a new “era” for the case of the Islam veil ban. The applicant’s autonomy is respected while the Court abstains from giving a specific meaning to the veil and its being worn. As

¹³¹ Mechoulan, S. (2018). The case against the face-veil: A European perspective. *International Journal of Constitutional Law*, 16(4), pp. 1267 – 1292, p.1271-1272

¹³² Canamares & Angeletti (2019), op. cit., p.119

¹³³ Steinbach (2015), op. cit., p. 10-15

¹³⁴ § 120 of the decision

far as the proportionality test is concerned the Court states “there is no doubt that the ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full face veil for reasons related to their beliefs... they are thus confronted with a complex dilemma, and the ban may have the effect of isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life. It is also understandable that the women concerned may perceive the ban as a threat to their identity”¹³⁵. Thus the Court paid the desired attention to the impact of the restriction on the lives of the Muslim women, as it should had done in the previous cases with which it dealt¹³⁶.

5.5 The Belgian cases on the full face veil ban

Finally, it has to be mentioned that the Court dealt with two more cases that were this time against Belgium – the most recent cases – the *Dakir v. Belgium* and the *Belcacemi and Oussar v. Belgium* in which once again the Court did not conclude the violation of article 9 of the ECHR. Both of those cases are following the paradigm of the *S.A.S.* The enhancement and promotion of the notion of living together was referred to by the Court and was accepted as the basis for the restriction of article 9(2) and 8 while protecting the rights of others. Once again the wide margin of appreciation was pronounced by the Court. However it has to be mentioned that the Belgian law provides imprisonment as against the French law that faces the violation of the law with a fine, hence criticism relevant as to the proportionality of the restriction was developed. This was attributed to the fact that the Court didn’t deal with this difference and did not examine the proportionality of the punishment in case of not complying with the general ban, as it did in *S.A.S.* Therefore, it has been argued that proportionality test is not met in the above mentioned Belgian cases, and

¹³⁵ § 146 of the decision

¹³⁶ Chaib, S. O. (2014). *S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil*. Retrieved 5th of June 2019, from Strasbourg Observers: <https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/>

that the Court would probably reach a different decision having taken into account this parameter¹³⁷.

¹³⁷ Kalanry, S., & Pradgan, M. (2017). *Veil Bans in the European Court of Human Rights*. Retrieved 6th of June 2019, from American Society of International Law (Vol.21, Iss.15): <https://www.asil.org/insights/volume/21/issue/15/veil-bans-european-court-human-rights>

Chapter 6

Conclusions

In the present Master Thesis the issue of the full face veil has been examined in the context of the human rights, especially in view of the ECHR and the relevant provisions on the first hand and the approach of the ECtHR on the other hand.

At first it has to be concluded that the full face veil falls within the scope of article 9, since it constitutes a religious practice, therefore a manifestation of the right of freedom of religion. As such, it can be restricted by the States and subject to the provisions of article 9(2) ECHR.

Many institutions have dealt with the issue of the lifting of the Muslim veil in contemporary times. In 2010, the Secretary General of the Council of Europe, Thorbjorn Jagland claimed that the bans lead to missing the point of democracy and human rights in Europe and that they serve at feeding “irrational, popular fear of difference, fear of the unfamiliar”¹³⁸. In the same year the former Council of Europe Commissioner for Human Rights, Thomas Hammarberg has pointed out that similar bans do not serve as a way to liberate Oppressed Muslim women but on the contrary that they lead to further alienation since “a general ban on such attire would constitute an ill-advised invasion of individual privacy” that raises many and more importantly serious questions related to whether such provisions comply with the articles of the European Convention on Human Rights¹³⁹.

Moreover, the Amnesty International supported that such a prohibition would constitute a violation of the rights to freedom of expression and of religion of the women who are banned from using the full face veil related to choosing to use it or not in order to express their religious, political and personal identity and accordingly their religious, political and personal beliefs. Amnesty International took the position that such legislation should not be adopted. It supports that the states bear the obligation under the provisions of international law to respect and support the human rights of all the people with no discrimination based on their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth etc. The states are obliged to protect all the people from any form of abuse conducted

¹³⁸ The European Wergeland Center (2016), op. cit., p.2

¹³⁹ *Ibid*, p.2

by third parties including private actors and to promote the exercise of those rights in a practical manner. Additionally, the Amnesty International claims that every person has the right to freedom of expression and to manifest their beliefs and their religion. Such freedoms reach even the choices to dress in a specific way. Towards that direction, the Amnesty International supports that the states are prohibited from introducing legislation that impose generally applicable requirements that demand women to dress in a certain way or to abstain from dressing as such. States are obliged to protect women from any such an imposition while it is wrong to be obliged to wear something or not to wear a piece of clothing¹⁴⁰.

As regards the ECtHR the following conclusions can be drawn:

It is supported by the author that the ECtHR has shown a restrictive attitude in what concerns the freedom of religious clothing in the public places. The secular European governments insist that secular neutrality is harmed because of the religious clothing and the conspicuous religion signs¹⁴¹.

The principle of secularism is regarded – even by the Court - as the one to protect the individuals from state interferences and as well from external pressures that may derive from extremist movements. It is considered that the concept of secularism complies with the values of the ECHR¹⁴².

The reasoning in both the cases (Dahlab and Sahin) demonstrates the broad debate over the Muslim veil and reflects two contradictory views of the women of Islam and their rights. The Court adopts approaches that Evans¹⁴³ characterizes as stereotypes about those women without the Court's recognizing that it reproduces stereotypes. The first stereotype is that the Muslim woman is a victim of gender oppression due to her religion that needs protection from the violent and abusive males and that they are passive and unable to help themselves in facing a culture in which the male is dominant. This view is embodied in the Courts rulings especially in what concerns the reconciliation of the headscarves with equality of the genders. After all it is interesting that many governments use that arguments accompanied by relevant stories which prove women's oppression. In any case it cannot be overseen that there are indeed women being oppressed. In this case it is for the state to guarantee the protection of their rights, their personal safety and autonomy.

¹⁴⁰ Amnesty International (2010), op. cit.

¹⁴¹ Edmunds (2012), op. cit., p.1181

¹⁴² Ferri (2017), op. cit., p.192

¹⁴³ Evans (2006), op. cit., p. 20

However, this does not mean that all Muslim women need protection and being saved¹⁴⁴.

In any case, the above mentioned argument brings to the surface the doctrine of the margin of appreciation of the State. This doctrine is regarded as a mean to grant States the discretionary power to adopt measures and at the same time interfere with some rights or freedoms. This interference is considered as justifiable since it seems necessary in the context of a democratic society. In what concerns the veil case law the Court has applied the doctrine of the margin of appreciation so that it will be possible to draw some conclusions as for the discretionary power of the States¹⁴⁵.

The second stereotype is that the Muslim women force values onto groups that are unwilling and not defended. This is reflected on the proselytism argument. It is not easy for a woman wearing a veil to propagate her views and to be seen as a dangerous proselytizer. The mainstream views of the relevant political debate are that women with headscarves are dangerous, they are intolerant and discriminatory and that they threaten the secular system and the principle of equality. It has been supported that these stereotypes are reflected on the judgments of the Court in Dahlab and Sahin, while they are not true¹⁴⁶.

The case law of the Court on the issue of the Islamic veil has received a great amount of criticism, at least prior to the S.A.S. case. It has been argued that in reality there was no supervision or any control on the margin of appreciation that was recognized to the national authorities. The Court, as it has been supported, did not examine the proportionality of the ban compared to the aim of the protection of the rights and freedoms of others. It has not been established in the relevant case law the way in which the right of the Muslim women to wear the veil interferes with the others' rights and freedoms and the Court failed to prove the connection between the veil and its being the enemy of democracy and secularism. It seems that the Court has acted motivated by political concerns and was not based on legal arguments while the incompatibility of the veil and secularism is not established nor analyzed in an adequate way. Especially in what concerns the Sahin case it has not been proven how it can reflect the discrimination between men and women and the way it promoted

¹⁴⁴ Evans (2006), op. cit., p.20-22

¹⁴⁵ Nigro (2010), op. cit., p.531-538

¹⁴⁶ Evans (2006), op. cit., p.20-22

gender inequality. Therefore, it can be concluded that the Court mainly gave vague arguments in order to support the wide margin of appreciation of the States¹⁴⁷.

Those two cases inaugurate the concept of neutrality that serves as the basis for the restrictions imposed on religious symbols when worn by persons, however, the notion of neutrality works as exclusion of religion, and is a practice that the Court has upheld in the cases that followed the Sahin decision¹⁴⁸.

In that decision the Court recognized the principle of positive obligations, meaning that it is necessary to place some restrictions on the freedom to manifest a religion, under the condition it is purposed at the reconciliation of the interests of the many religions and the relative religious groups and guarantees the respect towards the belief of every member of the society. This positive obligation of the States stems from article 9(2) and the first article of the ECHR in order to secure to everyone inside their jurisdiction the rights and the freedoms that are protected¹⁴⁹.

It is important that the same reference was mentioned in *S.A.S. v. France* where the Court ruled that the blanket ban on the apparel concealing the human face has a great impact on the rights to private life and the freedom of religion, however, it was considered as proportionate. It was regarded that the ban was necessary in order to achieve the aim of living together in the context of a society and as being a part of the system to protect the rights and the freedoms of the other persons. The Court accepted the prohibition as being legitimate for the aim pursued permitting the restriction on the extent of pluralism. Thus, the ECtHR accepted and conferred upon the States a wide margin of appreciation while it embraced the arguments of the French government that the use of the full face veil contravenes the requirements of the living together concept. The Court repeated the principle of the positive obligation of the State, as it was developed in *Sahin*, in order to achieve the reconciliation of the interests of the different religious groups and in order to promote the effectiveness of the freedom of religion of the rest members of each society as well. However, it is crucial to conclude that such a recognition as far as the wide margin of appreciation is concerned permits the positive obligation of the States to establish severe restriction on religious pluralism in the public sphere¹⁵⁰.

¹⁴⁷ Nigro (2010), op. cit., p.542-544

¹⁴⁸ Ferri (2017), op. cit., p.192

¹⁴⁹ *Ibid*, p.193

¹⁵⁰ *Ibid*, p.193

Finally, it is apparent that the S.A.S. judgment is of great importance, since it reflects a shift in the Court's practice towards a more democratic and pro-pluralistic approach. However, it cannot be overseen that the Court, reaching this decision, reached a different than the desired by the Muslims result and expanded the grounds for the justification of a veil restriction. It recognized indispensable requirements for the living together notion and accepted it as a valid ground in order for a State to interfere with the religious freedom. Thus, it created a new category in order to justify the restrictions, a category that goes beyond the previous ones, permitting the States to take action. Under that view, social and cultural norms seem to be protected in the form of "the protection of the rights and freedoms of the others" while vague notions of behavioral norms seem to be protected while they are related to the general public interest, safety and order, rather than to individual rights as it should be. This extension can be considered as the next step in an evolutionary process that reveals that the Court does not support the veil bans in the context of the protection of the human rights under the ECHR provisions nor ignores the margin of appreciation that has been conferred upon the States. Each case should be thoroughly examined and analyzed by the Court and according to its context and environment of the State before the ECtHR, while some restrictions are valid on the condition that they are prescribed by the law, they are necessary in the context of a democratic society, they satisfy the proportionality test, they pursue the interests of the public safety, the protection of the public order, health and morals, or they protect the rights and the freedoms of the other members of a society even if they are aimed at promoting social cohesion in the context of living together¹⁵¹.

¹⁵¹ Steinbach (2015), op. cit., p.5

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