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Religious dress and the rights of others

– an analysis of the case law of the European Court of Human Rights

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Contents

Summary

This essay examines the protection of the wearing of religious dress under Article 9 (freedom of religion) of the European Convention on Human Rights, according to the case law of the European Court of Human Rights. It examines how religious dress is protected as a manifestation of religion and with reference to which rights of others and under which circumstances it can be restricted with reference to the legitimate aim protection of the rights and freedoms of others. It also investigates how the right to manifest one's religion through religious dress is balanced against those rights of others in the ECtHR proportionality assessment as well as what margin of appreciation the states are given in these cases. The main material consists of judgments and admissibility decision from the ECtHR where these questions are treated. The results show that the right of others that is most often referred to in this context is secularism, but the right to gender equality and living together are also referred to. The results also show that the states are most often given a wide margin of appreciation in restricting religious dress, with the only exception being when the legitimate aim is the protection of secularism and it concerns private citizens in public places open to all such as streets and public squares. It also shows that in 22 of the 24 cases of this study the rights of others outweigh the right to wear religious dress in the proportionality assessment of the cases.

Sammanfattning

I denna uppsats undersöks i vilken utsträckning religiös klädsel skyddas av artikel 9 (religionsfrihet) i Europeiska konventionen om skydd för de mänskliga rättigheterna, i enlighet med praxis från Europadomstolen för de mänskliga rättigheterna. Det undersöks hur religiös klädsel är skyddat som en utövning av religion samt med hänvisning till vilka "andra personers rättigheter" som den kan begränsas för det legitima målet skydd för andra personers fri- och rättigheter. Den undersöker också hur rätten att utöva sin religion genom religiös klädsel balanseras gentemot andras rättigheter i Europadomstolens proportionalitetsbedömning samt vilket utrymme för skönsmässig bedömning som ges till staterna i dessa fall. Det huvudsakliga materialet består av domar och beslut om huruvida ansökningar kan tas upp till prövning, vilka behandlar dessa frågor. Resultaten visar att de rättigheter för andra personer som oftast hänvisas till är sekulärism, men att det även hänvisas till jämställdhet mellan könen och "living together" (att leva tillsammans). De visar också att stater oftast har ett stort utrymme för skönsmässig bedömning när det gäller att begränsa religiös klädsel, med det enda undantaget när det legitima målet är skydd av sekulärism och det gäller privatpersoner på offentliga platser som är öppna för alla såsom gator och torg. Resultaten visar också att andras rättigheter i 22 av 24 fall i denna studie i enlighet med Europadomstolens proportionalitetsbedömning anses väga tyngre än rätten att bara religiös klädsel.

Abbreviations

ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Research problem and research question(s)

The wearing of religious dress has been a controversial issue in Europe, subject to intense debate, for many years.[1] The debate has mostly concerned Islamic, and particular female, religious dress[2], even if other types of religious dress are also concerned by some of the bans that have been introduced.

In the EU (the EU member states comprise 28 of the 47 Contracting States to the ECHR[3]) it is only in six out of the 28 member states that bans on the religious dress for Muslim women has neither been introduced nor proposed, although only eight EU countries have legally enforceable restrictions in place.[4]

The freedom of thought, conscience and religion (hereinafter "freedom of religion") in the European Convention of Human Rights[5] (hereinafter "ECHR") includes a right to manifest one's religion[6] and the ECtHR has established that this manifestation can take the form of wearing religious dress[7].

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[1] Blaker Strand, Prohibitions against Religious Clothing and Symbols in Public Schools and Universities: Narrowing the Scope by Introducing the Principle of Equal Treatment of Religious Manifestations, 10 Religion & Hum. Rts. 160 (2015), p. 161.
[2] Peter Cumper and Tom Lewis, "'Taking religion seriously'? Human rights and hijab in Europe—some problems of adjudication", Journal of Law and Religion, Vol. 24, No. 2 (2008-2009), pp. 599-627, pp. 601-602.
[3] See European Union, "EU member countries in brief", *Official Website of the European Union* (2019) https://europa.eu/european-union/about-eu/countries/member-countries_en, accessed 22nd of May 2019., Council of Europe and "Chart of signatures and ratifications of Treaty 005", *Council of Europe (*2018) https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures, accessed 22nd of May 2019.
[4] Open Society Justice Initiative (2018) *Restrictions on Muslim Women's Dress in the 28 EU Member States: Current law, recent legal developments, and the state of play, Briefing Paper*, Retrieved from: https://www.opensocietyfoundations.org/sites/default/files/restrictions-on-women%27s-dress-in-the-28-eu-member-states-20180425.pdf, accessed 21st of May 2019, p. 5.
[5] Council of Europe. 1950. "European Convention for the Protection of Human Rights and Fundamental Freedoms", as amended by Protocols Nos. 11 and 14, 4 November 1950.
[6] Article 9 ECHR.
[7] Leyla Şahin v. Turkey, Application No. 44774/98, 10 November 2005, para 78.

However, some Contracting States to the ECHR, those included in the cases in this study are Turkey, France, Switzerland and Belgium[8], have as mentioned above banned the wearing of different kinds of religious dress in certain venues or completely and in several cases the ECtHR have found these kind of bans to be a justified interference with the freedom of religion with respect to the legitimate aim of the protection of the rights and freedoms of others (hereinafter "rights of others").

As Peter Cumper and Tom Lewis state, dress is important for the basic need to create a positive social identity for oneself as an individual or a member of a group by for instance expressing religious belief[9]. In addition, as the ECtHR itself has stated the manifestation of religion, in which religious dress is included, is important for a person for whom that religion is a central tenant of his or her life.[10]

Why is then this manifestation of religion so controversial as to elicit such debates, controversies and even bans restricting it? The Open Society Justice Initiative sees the bans restricting religious dress as a result of increasing Islamophobia after 9/11, since almost all restrictions on religious dress were introduced after this event.[11] Peter Cumper and Tom Lewis see three different reasons for the controversy regarding Muslim religious dress: that it is perceived in the West as linked to the subordination of women, that it is perceived to be linked with Islamic fundamentalism and that it highlights the difference between Islamic traditions, where there is no distinction between the private and the public when it comes to religion, and secular liberal traditions where religion belongs to the private and not the public sphere.[12]

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[8] In addition to these countries, the following EU countries have bans: Austria and Bulgaria have national general bans on face veils, Denmark has a national ban on judges wearing religious symbols in courtrooms and Spain has a law prohibiting the use of clothing covering the face during demonstrations as well as local bans on the face veil in general. Germany has local bans on visible religious symbols and Italy has local bans on headcoverings that could conceal the wearer's identity (Open Society Justice Initiative, pp. 9-10).

[9] Cumper and Lewis, p. 599.

[10] Eweida and others v. the United Kingdom, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

[11] Open Society Justice Initiative, p. 6.

[12] Cumper and Lewis, pp. 601-603.

This conflict between the right of religious persons to manifest their religion through religious dress, and the possible right of others to not be subject to this religious manifestation, is what will be treated in this essay.

This essay looks at what the rights of others are that the Court considers can be infringed upon by a person manifesting their religion through the wearing of religious dress and how the Court balances the freedom of religion in these cases against those rights of others.

To investigate this the essay seeks to answer the following questions: What are the rights of others that have been accepted by the ECtHR under the legitimate aim of protection of the rights and freedoms of others? With reference to which rights of others and under which circumstances has the European Court of Human Rights in its jurisprudence found that the interference with the freedom of religion through the restriction of wearing of religious dress as religious manifestation is justified by the legitimate aim protection of rights of others? How has the proportionality assessment been made in these cases and what margin of appreciation has been given to the states?

1.2 Method

This essay will attempt to provide answers to the above questions through an interpretation of Article 9 ECHR based on jurisprudence. It will be an exhaustive analysis of the case law and the decisions on admissibility of the ECtHR where applicants have complained of a violation of their freedom of religion in the form of restrictions on their wearing of religious dress and where the ECtHR has assessed whether the restriction of their freedom of religion is justified on account of protecting the rights and freedoms of others. The case law of the ECtHR is used to establish how Article 9 of the ECHR has been interpreted by the ECtHR under these circumstances.
As opposed to in the legal method in legal research of (for instance) Swedish national law[13], the use of case law to interpret human rights law is not unproblematic. This is because jurisprudence is not expressively

[13] Described (in Swedish) in Jareborg, Nils: 'Rättsdogmatik som vetenskap', *SvJT* 2004/1, pp. 1-10, pp. 4 and 8.

mentioned as a mean of interpretation for international treaties such as human right treaties in the Vienna Convention on the Law of Treaties (hereinafter "VCLT")[14], which is the main guidance for the interpretation of international treaties.

It is, however, mentioned in Article 38d of the Statue of the International Court of Justice[15] that judicial decisions shall be applied in international law disputes as subsidiary means for determination of rules of law.

To legally justify the use of case law in the interpretation of human rights treaties, Scheinin argues that if a treaty has a body that monitors compliance with the treaty that body is inherently empowered to interpret the treaty[16]. In relation to the ECtHR, which is the concern of this essay, this is even explicitly expressed in Article 19 ECHR, which states that the ECtHR shall ensure the observance of the convention and in Article 32(1) ECHR, which states that the jurisdiction if the ECtHR includes "all matters concerning the interpretation and application of the Convention and the Protocols thereto", making the ECHR lex specialis in relation to VCLT[17]. Scheinin finds further support for the use of case law to interpret human rights treaties in considering it as part of the "subsequent practice" mentioned in Article 31 (3) b VLCT[18]. According to Scheinin the agreement of the parties is in this case established in advance and in abstract terms in Article 32.1 ECHR mentioned above and renewed through the role of the treaty states in supervising the execution of the ECtHR judgments according to Article 46(2)[19].

The ECtHR itself has stated that even though it is not formally bound by its previous judgments " it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law "[20], and that there should

[14] The United Nations. 1969. "Vienna Convention on the Law of Treaties".
[15] The United Nations. 1946. "Statute of the International Court of Justice".
[16] Scheinin, p. 29.
[17] Scheinin, p. 29.
[18] Scheinin, pp. 29-30.
[19] Scheinin, p. 30.
[20] Cossey v. the United Kingdom, Application no. 10843/84, 27 September 1990, para 35.

be "cogent reasons"[21] for departing from earlier case law. It can also be seen in the case law of the ECtHR that it reiterates "general principles" from earlier case law that it then applies on the case in question.[22] Bearing all of this in mind, even though the case law of the Court is not formally binding, its importance in accordance with the above, makes interpretation based on jurisprudence[23] a relevant method to use for this essay.

The main material of this essay, in the form of admissibility decisions and judgments, was found using quantative methods of database search in the Hudoc database. The search was first made of Case-Law – Judgments in English with the following key words: (wear) AND ("Article 9") AND manifest. Then the search was made in French with the key words ("l'article 9" OR "article 9") AND (porter) AND (manifester). From the search results, the cases concerning the legitimate aim of "protection of the rights and freedoms of others" were manually extracted. To find the decisions on admissibility the search was carried out of "Decisions" with the same keywords, first in English, then in French. In the same way as with the judgments, the inadmissibility decisions concerning the legitimate aim of protection of the rights and freedoms of others were then extracted manually.

Finally, a comparison was made with the ECtHR's own guide on Article 9[24], to make sure that no important case was missed in the search carried out, which was not the case.

In chapter 4 of this essay a critical legal analysis of the case law that constitutes the main material of this essay is carried out.

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[21] Cossey v. the United Kingdom, Application no. 10843/84, 27 September 1990, para 35.
[22] See eg. Hamidović v. Bosnia and Herzegovina, Application no. 57792/15, 5 December 2017, para 36, S.A.S. v. France, Application no. 43835/11, 1 July 2014, para 124, Ebrahimian v. France, Application no. 64846/11, 26 November 2015, para 54, Leyla Şahin v. Turkey, para 104.
[23] Kestemont Lina, Handbook on Legal Methodology. From Objective to Method. (Cambridge: Intersentia Ltd, 2018), p. 29.
[24] European Court of Human Rights, "Guide on Article 9 of the European Convention on Human Rights", *Council of Europe* (Updated on 31 December 2018). https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf, accessed 26th of January 2019.

1.3 Material, scope and delimitation of the study

The main material for this study consists of ECtHR judgments and ECtHR and Commission (responsible for decisions on admissibility before its abolition in 1998[25]) decisions on admissibility where the application has been found to be manifestly ill-founded. The judgments and admissibility decisions included are the ones where applicants have complained of a violation of their freedom of religion in the form of prohibiting them from wearing religious dress and where the Commission or the ECtHR assesses whether the restriction of their freedom of religion is justified on account of protecting the rights and freedoms of others. The requirement that the restriction should be "prescribed by law" is only described briefly in Chapter 2 and not analysed in relation to the cases since it is not of relevance to the focus of this essay.

Only religious dress is included in this case study, and not religious symbols, such as the cross, even though a comparison between these is also an interesting subject.[26] In two admissibility decisions it is unclear whether the existence of an interference has been established in the first step so that the second step of assessing whether it was necessary in a democratic society is carried out. However, since in these cases the rights of others are in fact discussed, they are still included in the study. When referring to both judgments and admissibility decisions together the term "cases" is used.

Due to the language knowledge restrictions of the author, the material is restricted to judgments available in English and French.

Since the study mainly concerns the steps "legitimate aim" and "necessary in a democratic society", cases where the ECtHR found no interference with the freedom of religion at all are not included, except for

[25] Council of Europe, "European Court of Human Rights", *Council of Europe* (2018) https://www.coe.int/en/web/tirana/european-court-of-human-rights, accessed April 2019.
[26] For more on this, see for instance Ivana Radacic, "Religious Symbols in Educational Institutions: Jurisprudence of the European Court of Human Rights", *Religion & Human Rights*, Vol. 7, Issue 2 (2012), pp. 133-150.

two admissibility decisions where it is unclear whether an interference was found or not.

In one of the admissibility decisions found through the search the application was actually found admissible, which means that no assessment was made by the ECtHR at the stage of the decision.[27] This application was however later struck out of the list because the applicant recalled it.[28] Therefore, since no material assessment was made in relation to this application, it is not included in this study.

The main material for the first part of this study comprises a total of nine judgments, of which two (*Leyla Şahin v. Turkey* and *S.A.S v. France*) are Grand Chamber judgments, and 15 decisions on inadmissibility. In addition to this main material a few other cases as well as doctrine are used in chapter 2 to give an introduction of Article 9, and in chapter 4 to critically analyse the main material.

The different forms of case law used in this essay are Grand Chamber judgments, Chamber judgments and decision on admissibility. These have different authoritative value. Harris, O'Boyle, Bates and Buckley underline that the Grand Chamber in *Cossey v. the United Kingdom*[29] describes its approach to its own Grand Chamber judgments when stating that it should not depart from its earlier case law without cogent reasons and that the Grand Chamber feels freer to depart from previous Chamber judgments[30]. This is natural since the Grand Chamber constitutes a Court of Appeal of sorts to the Chambers. Parties can refer cases to it for which judgments were given in the Chambers. The Grand Chamber will try these cases if they raise "a serious issue of general importance" [31] or "a serious question affecting the interpretation or application of the Convention"[32]. The Chambers can also, according to Article 30 ECHR, relinquish cases to the Grand Chamber when there are

[27] Tekin c. Turquie (dec.), requête no 41556/98, 2 juillet 2002.
[28] Tekin c. Turquie (arrêt : radiation), requête no 41556/98, 29 juin 2004.
[29] Cossey v. the United Kingdom, para 35.
[30] David Harris, Michael O'Boyle, Ed Bates, Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2018), pp. 23-24.
[31] Article 43 ECHR.
[32] Ibid.

"serious questions affecting the interpretation of the Convention" or if there are risks of inconsistencies. From this approach it follows, as Harris, O'Boyle, Bates and Buckley state, that Grand Chamber judgments are more authoritative than Chamber judgments and that the Chambers should follow them regardless of "cogent reasons".[33]

As regards the decisions on admissibility the ones that are concerned in this essay are the ones that are declared inadmissible due to being considered "manifestly ill-founded" according to Article 35.3, and in particular the ones where the ECtHR sees reason to do a legal evaluation but finds no prima facie-violation of the Convention[34]. Harris, O'Boyle, Bates and Buckley state that "any statement by way of interpretation of the Convention by the Court, and formerly the Commission[35] is significant".[36] Support for this statement can be seen in the ECtHR's case law where, as we will see in this essay, the ECtHR often bases its arguments on admissibility decisions in addition to on judgments. However since the examination of the merits of the application are only preliminary, the investigation is just whether there is a prima facie violation and they are given in single judge or Committee (three judges) formations[37] they must be considered less authoritative than judgments.

As regards the time aspect of the decisions it is relevant in this context that the Convention is subject to a dynamic or evaluative interpretation. According to the Court it is "a living instrument which … must be interpreted in the light of present day conditions"[38]. According to Harris, O'Boyle, Bates and Buckley the changes in interpretation from the Court is not sudden but gradual[39], but this characteristic of the Convention

[33] Harris, O'Boyle, Bates, Buckley, p. 24.
[34] Paul Harvey "Admissibility of Applications" in Harris, O'Boyle, Bates and Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, (Oxford: Oxford University Press, 2018) pp. 45-106, p. 75.
[35] The commission gave decisions on admissibility until its abolition in 1998 (Harris, O'Boyle, Bates, Buckley, p. 23).
[36] Harris, O'Boyle, Bates, Buckley, p. 23.
[37] Articles 27 and 28 ECHR.
[38] Tyrer v. the United Kingdom, Application no. 5856/72, 25 April 1978, para 31.
[39] Harris, O'Boyle, Bates, Buckley, p. 8.

as a living instrument means that later judgments must be considered more authoritative than earlier ones regarding the same kind of circumstances.

1.4 Terminology for religious dress

The terms used to describe the types of religious dress included in the cases of this study are many and sometimes unclear. In this subchapter the types of clothing will be outlined and categorised for the purposes of this essay. The religious dress in the cases of this essay are referred to as follows: "Islamic headscarf"[40]/"foulard islamique"[41], "headscarf"[42]/"foulard"[43], "veil"[44]/"voile"[45], "couvre-chef[46]", "bonnet"[47] and "bandana"[48], burqa[49] and niqab[50], skull cap[51] and turban, salvar (a type of trousers) a tunic and a staff worn all together[52], "keski" (sous-turban = "mini turban"[53]), The terms "headscarf"/"foulard", "Islamic headscarf"/"foulard islamique" and "veil"/"voile" appear to be used interchangeably by the Court and to mean largely the same thing, i.e. a scarf that covers the head except for the face. In this essay the term "Islamic headscarf" or "headscarf" will be used as a

[40] Leyla Şahin v. Turkey, para 35 ("tight, knotted headscarf hiding the hair and the throat"), Kurtulmuş v. Turkey (dec.), Application no. 65500/01, 24 January 2006, pp. 1 and 5, Dahlab v. Switzerland (dec.), Application no. 42393/98, 15 February 2001, pp. 1 and 13.
[41] Bulut c. Turquie (dec.), Requête No 18783/91, 3 mai 1993, p. 4.
[42] Dogru v. France, Application no. 27058/05, 4 December 2008, para 6, Kurtulmuş v. Turkey p. 4, Dahlab v. Switzerland pp. 1 and 12.
[43] Kervanci c. France, Requête no 31645/04, 4 décembre 2008, paras 7 and 47, Bulut c. Turquie pp. 2.
[44] Ebrahimian v. France, para 46 (« a head covering which conceals her hair, her neck and her ears »).
[45] Kervanci c France, para 48, Aktas c. France (dec.), requête no 43563/08, 30 juin 2009, p. 2.
[46] Ghazal c. France (dec.), requête no 29134/08, 30 juin 2009, p. 2 ("les cheveux et les oreilles couverts"), Gamaleddyn c. France (dec.), requête no 18527/08, 30 juin 2009, pp. 2 (« couvrant le front, les oreilles et la nuque »), Bayrak c. France (dec.), requête no 14308/08, 30 juin 2009, p. 2, Aktas c. France, p. 2 (examples : « bandana », « bonnet »).
[47] Bayrak c. France, pp. 2 and 8 (« substituer au voile un bonnet » and « substitué un bonnet au foulard ») and Gamaleddyn c. France, pp. 2 and 9 ("voile auquel elle substitua un bonnet" and « substitué un bonnet au foulard »).
[48] Aktas c. France, p. 2.
[49] S.A.S vs France para 11 ("full-body covering including a mesh over the face").
[50] S.A.S vs France para 11 ("full-face veil leaving an opening only for the eyes"), Dakir v. Belgium, Application no. 4619/12, 11 July 2017, para 7: "a veil covering the face except for the eyes", Belcacemi et Oussar c. Belgique, Requête no 37798/13, 11 juillet 2017, para 6: "voile couvrant le visage à l'exception des yeux ").
[51] Hamidović v. Bosnia and Herzegovina, para 7.
[52] Ahmet Arslan et autres c. Turquie, Requête no 41135/98, 23 février 2010, para 7.
[53] Ranjit Singh c. France (dec.), requête no 27561/08, 30 juin 2009, pp. 2 and 8, Jasvir Singh c. France (dec.), requête no 25463/08, 30 juin 2009, pp. 2 and 8.

group term for these. Another interesting form of "religious" dress in the material used are the "bonnets" or "couvre-chef"/"head covering", i.e. other kinds of headgear than the headscarf that are used to substitute for the headscarf. In this essay the term "head covering" will be used as a group term for these. When it comes to the niqab and the burqa the terms are sufficiently clear and defined and will be used as such, as a group term for these two the term "full-face veil" will be used, since it is used as such by the ECtHR[54]. Also the terms "keski" and "skull cap" are sufficiently clear as is "turban", "salvar" and "tunic".

1.5 Disposition

Chapter 2 outlines the functioning of Article 9 ECHR in general and how religious dress has been considered protected by it. It also outlines under what circumstances limitations of Article 9 are permitted, i.e. that the limitations should be prescribed by law, have a legitimate aim and be necessary in democratic society to achieve that aim. It also discusses the proportionality assessment used by the ECtHR in establishing whether the limitations are necessary in a democratic society and explains the concept of margin of appreciation and how it is afforded by ECtHR to the State.
In chapter 3, the case law of the ECtHR concerning the limitation of the wearing of religious dress with the legitimate aim of protection of rights of others is explored. The chapter looks at what rights are referred to and accepted under the legitimate aim protection of rights of others in these cases, how the proportionality assessment is done and what margin of appreciation is afforded to the states. In Chapter 4 the case law in Chapter 3 is deconstructed and subjected to critical analysis, using doctrine and other ECtHR judgments and dissenting/concurring opinions. In Chapter 5 the conclusions from the findings of this essay are presented.

[54] See, eg. SAS v. France, paras 11 and 119.

2 Article 9 ECHR and religious dress

2.1 Introduction

This chapter will lay out the general functioning of Article 9 as well as how it has been considered to protect religious dress and how it can be limited. First what can be considered religion or belief as well as the distinction of internal and external religious freedom will be outlined, then what is included in manifestation of religion or belief will be discussed with focus on religious dress, thereafter the requirements for limiting the right will be outlined, including that the limitation should be prescribed by law, pursue a legitimate aim and be necessary in a democratic society. As regards the requirement of being necessary in a democratic society the proportionality assessment and the margin of appreciation given to the state that the ECtHR employs to assess the requirement "necessary in a democratic society" will be outlined.

2.2 Scope of religion and belief and internal and external dimension

Article 9 (freedom of thought, conscience and religion) of the ECHR reads as follows:

> 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.

The ECtHR in its case law describes the freedom of thought, conscience and religion as one of the foundations of a "democratic society" within the meaning of the ECHR.[55] It covers both religious and non-religious belief, and also the right not to believe. According to ECtHR in *Kokkinakis v. Greece* "[i]t is in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned."[56] It has afforded protection to not only traditional religions but also new religions such as Scientology[57] and, of interest to this essay, also to secularism[58].

As can be seen from its text Article 9.1 has an internal dimension, the right to thought, conscience and religion, and an external dimension, the right to manifest the religion or belief. It is only the external dimension that can be subject to limitations in accordance with Article 9.2.

According to Peter Cumper the distinction between the internal and external dimension is not clearly defined, but the Court tends to lean towards a narrow interpretation of the internal dimension.[59] For instance the obligation to swear an oath on the Christian Gospels was considered by the Court as an interference with the external dimension of religious freedom and not the internal one.[60] What has been considered a violation of the internal dimension is for instance "indoctrination of religion by the state"[61] and requirements to disclose personal convictions[62]. The focus of this essay,

[55] Kokkinakis v. Greece, Application no. 14307/88, 25 May 1993, para 31.
[56] Ibid.
[57] Church of Scientology Moscow v. Russia, Application no. 18147/02, 5 april 2007.
[58] Lautsi and Others v. Italy, Application no. 30814/06, 18 March 2011, para 58.
[59] Peter Cumper "Article 9: Freedom of thought, conscience and religion" in Harris, O'Boyle, Bates and Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, (Oxford: Oxford University Press, 2018) pp. 45-106, p 75, p. 573.
[60] Buscarini and others v. San Marino, Application no. 24645/94, 18 February 1999.
[61] Angeleni v Sweden (dec.), Application no. 10491/83, 3 December 1986, p. 48.
[62] Kosteski v Former Yugoslav Republic of Macedonia, Application no. 55170/00, 13 April 2006, p. 38.

the wearing of religious dress, belongs to the external dimension, i.e. the manifestation of religion or belief.

2.3 Manifestation of religion and religious dress

The right to manifests one's religion according to Article 9.1 ECHR can be enjoyed through worship, teaching, practise and observance, alone or in community with others, in public or in private. Already at this stage a mere interpretation based on the wording is not sufficient to establish what is included in manifestation. Looking at the case law of the ECtHR the Court has established that not every act motivated or influenced by religion are considered a "manifestation", it must be "intimately linked to the religion or belief"[63].

In earlier case law the Commission made an evaluation of if the manifestation was a necessary part of the religion or belief in question, for example in *Arrowsmith v. the United Kingdom*[64], where it considered that the word "practice" for a pacifist did not include distributing leaflets to soldiers to advise them to refrain from serving in Northern Ireland[65], but only included a more general proclamation of the idea of pacifism[66]. As Peter Cumper remarks this approach could be seen as problematic in that the Court should decide what is required by different religions and beliefs, and define what is reasonable for people to believe.[67] Later the ECtHR has departed from this approach of the Commission and stated that the existence of a sufficiently close nexus of the act and the belief must be determined on a case by case basis and that there is no requirement that the applicant can prove that her religion mandates the manifestation in question[68].

[63] Eweida and others v. the United Kingdom, para 82.
[64] Arrowsmith v. the United Kingdom (dec.), Application no 7050/75, 16 May 1977.
[65] Arrowsmith v. the United Kingdom, para 74.
[66] Arrowsmith v. the United Kingdom, para 71.
[67] Cumper, p. 582.
[68] Eweida and others v. the United Kingdom, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013, para 82.

The latter approach can be seen as regards the cases in this study in the Grand Chamber case *Leyla Şahin v. Turkey*, where the ECtHR on grounds of the applicant's statement that she was wearing the Islamic headscarf to fulfil a religious duty accepted the wearing of the Islamic headscarf as a manifestation of her religion in that case "without deciding whether such decisions are in every case taken to fulfil a religious duty"[69]. In later judgments and admissibility decisions concerning the Islamic headscarf the Court has referred to *Leyla Şahin v. Turkey* to establish that the wearing of the headscarf can be considered a manifestation of religion[70], and has repeated that the wearing of the headscarf should be seen as a manifestation of the religion when the applicant considers it a religious duty to wear the headscarf[71]. This reasoning has also been used for the wearing of a "bonnet" (hat) instead of a veil[72].

As regards the cases concerning the burka and the niqab, focus is again on the applicants approach to the religion, for example in *S.A.S v. France* where the Court stated that the applicants dilemma, i.e. "either she complies with the ban and thus refrains from dressing in accordance with **her approach to religion**; or she refuses to comply and faces criminal sanctions"[73](emphasis added), constituted an interference with Article 9. Also in the case of *Ahmet Arlsan et autres c. Turquie* the Court found that the wearing by the applicants of turban, salvar (a type of trousers) a tunic and a staff could be considered a manifestation of their religion since they considered that their religion required them to dress like this and they had been dressed like this during a religious ceremony[74].

In a few of the cases of this study the reasoning has been more close to the evaluation of the necessity of the manifestation that was the earlier practise of the Commission. For instance as regards the skull cap in Hamidović v. Bosnia and Herzegovina the ECtHR supports the conclusion

[69] Leyla Şahin v. Turkey para 78.
[70] See for example Dogru v. France p. 47 and Kervanci c. France p. 47.
[71] Kurtulmuş v. Turkey, p. 5.
[72] " Gamaleddyn c. France, p. 7« ...si le port d'un bonnet répond à un devoir de conscience, comme le précise les requérants, l'interdiction du port d'un tel signe religieux [...]est constitutive d'une restriction au sens du second paragraphe de l'article 9 de la Convention ».
[73] S.A.S v. France, para 110.
[74] Ahmet Arlsan et Autres c Turquie, para 35.

that it can be considered a manifestation by stating that "it is in line with the official position of the Islamic Community in Bosnia and Herzegovina, according to which the wearing of the skullcap does not represent a strong religious duty, but it has such strong traditional roots that it is considered by many people to constitute a religious duty"[75]. As regards the wearing of turbans by Sikhs the ECtHR also stated that the Sikh religion mandates the wearing of the turban in all circumstances as a motivation for why it could be considered a manifestation of religion or belief[76].

Using sometimes an approach closer that where the ECtHR itself evaluates whether the manifestation is necessary to the belief and sometimes an approach based on the applicant's approach to the manifestation in relation to their belief the ECtHR has concerning all the different types of religious dress included in this study reached the conclusion that they can be considered manifestation of the applicant's religion.

2.4 Requirements for limitations

The freedom to manifest one's religion or belief, i.e. the external dimension of Article 9.1, can, as opposed to the internal dimension, be subject to limitations according to Article 9.2. There are three requirements that need to be fulfilled for such a limitation to be justified: 1. The limitation needs to be prescribed by law. 2. It needs to pursue one of the legitimate aims that are enumerated. 3. The limitation must be "necessary in a democratic" society to achieve those aims. In the following subchapters each of these requirements will be looked at in turn and explained using doctrine and case law.

[75] Hamidović v. Bosnia and Herzegovina, para 30.
[76] Mann Singh c. France (dec.), requête no 24479/07, 13 novembre 2008, p. 5.

2.4.1 Prescribed by law

The "prescribed by law" requirement is not one that this essay will treat further so it will only be treated very briefly here. For this requirement to be fulfilled the law in question must according to the ECtHR case law be "adequately accessible"[77] and "formulated with sufficient precision to enable the citizen to regulate his conduct"[78]. The ECtHR used to avoid any real scrutiny of this requirement[79], but, starting with *Hasan and Chaush v. Bulgaria*[80] in 2000, this has changed and the ECtHR has since then found that states have failed to comply with the "prescribed by law"-requirement in a number of cases[81]. The "prescribed by law"-requirement has been considered to be fulfilled in all of the cases in this study, with the possible exception of two admissibility decisions[82], where it is uncertain whether the ECtHR/Commission considers that there has been a limitation of the freedom of religion that needs to be justified or not.

2.4.2 Legitimate aim

The legitimate aims which must be pursued by the limitation of the freedom of religion are "public safety", "protection of public order", "health or morals" or "protection of the rights and freedoms of others". The ECtHR underlines that the list of legitimate aims is exhaustive, that the definition of the aims is restrictive and that the limitation to be justified must be linked to one of the legitimate aims listed.[83] Arai-Takahashi, however, claims that "the Strasbourg organs may prefer to focus their scrutiny on the third

[77] Sunday Times v. the United Kingdom, Application no. 6538/74, 26 April 1979, para 49.
[78] Ibid.
[79] Cumper, p. 584.
[80] Hasan and Chaush v. Bulgaria, Application no. 30985/96, 26 October 2000, para 86.
[81] Cumper, p. 584, referring to among others Biserica Adevãrat Ortodoxã din Moldova v Moldova, Application no. 952/03, 27 February 2007, Poltoratskiy v Ukraine, Application no. 38812/97, 29 April 2003, Igors Dmitrijevs c. Lettonie, Requête no 61638/00, 30 novembre 2006.
[82] Karaduman v. Turkey (dec.), Application no 16278/90, 3 May 1993, Bulut c. Turquie.
[83] Svyato-Mykhaylivska Parafiya v. Ukraine, Application no. 77703/01, § 132, 14 June 2007, and Nolan and K. v. Russia, Application no. 2512/04, § 73, 12 February 2009.

standard, finding it unnecessary to ascertain compliance with the first and second standards"[84] (the second standard being "legitimate aim").

The legitimate aim that is treated in this study, that of the "protection of the rights and freedoms of others", is according to Peter Cumper the most "nebulous"[85] one and most suggestions of rights of others referred to seem in fact to be accepted by the ECtHR under this legitimate aim, even for instance the maintenance of a company of its corporate image[86].
In all the cases of this study the limitation has been considered to pursue the legitimate aim of the protection of the rights and freedoms of others; even in the two admissibility decisions where it is uncertain whether the ECtHR/Commission considers that there has been an interference that needs to be justified or not, the protection of the right of others is still mentioned and accepted as a legitimate aim[87]. All rights of others referred to by the states (who in some cases have referred to several) have not been accepted however, which will be seen in the following.

2.4.3 Necessary in a democratic society

The requirement that the limitation should be "necessary in a democratic society" is expressed in Article 9.2 to describe when limitations pursuing a legitimate aim are justified. This expression has been interpreted by the ECtHR to mean that the restriction must be "proportionate to the legitimate aim pursued" [88]. How this proportionality assessment is carried out by the ECtHR will be discussed in the subchapter 2.3.3.1. It has also been established by the ECtHR that the states enjoy a certain margin of appreciation when assessing whether limitations are necessary in a

[84] Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (Antwerpen: Intersentia, 2001), p. 9.
[85] Cumper, p. 585. Nota bene, his study is from 2001 and, at least as regards the first standard (i.e. "prescribed by law"), this has changed as described in subchapter 2.3.1.
[86] Eweida and others v. the United Kingdom, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013, para 94.
[87] Karaduman v. Turkey, Bulut c. Turquie.
[88] Case of Handyside v. the United Kingdom, Application no. 5493/72, 7 December 1976, para 49.

democratic society[89]. The functioning of this margin of appreciation will be discussed in subchapter 2.3.3.2.

2.4.3.1 Proportionality

Christoffersen concludes the following as regards the use of the principle of proportionality as it is used by the ECtHR: It does not fit the general description of proportionality from German administrative and constitutional law, i.e. the principle of suitability (that the measures restricting the right must be suitable for its purpose), the principle of necessity (that there is no other measure available that is less restrictive) and the principle of balancing (that the "measure may not upset the fair balance and/or destroy the essence of the right").[90] As regards suitability, he argues that, even though it plays a role in the ECtHR practice[91] it "rarely stands out as an independent principle"[92]. He also states that the more important the interest that is protected by the limitation is, the less information is required regarding the suitability[93]. As regards the necessity principle Christoffersen states that the "least onerous means"-test has been rejected by the Court.[94] However here he is somewhat contradicted by Harris, O'Boyle, Bates and Buckley who state that the "least restrictive means"-approach "has been adopted by the Court in some cases, but not in others"[95]. Regarding the necessity principle Arai-Takahashi brings up the "less restrictive alternative", but calls its application by the ECtHR "sporadic and underdeveloped".[96]

[89] Handyside v the United Kingdom, paras 48-49.
[90] Christoffersen, pp. 69-70.
[91] Referring to inter alia Wemhoff v. Germany, Application no 2122/64, 27 June 1968, pp. 24-25 para 12, Handyside v. the United Kingdom, Application no. 5493/72, 7 December 1976, para 50 cf. Wemhoff v. Germany pp. 24-25 para 12, Dudgeon v. the United Kingdom, Application no. 7525/76, 22 October 1981, para 54, cf. Handyside v. the United Kingdom, para 50.
[92] Christoffersen, p. 225.
[93] Christoffersen, pp. 187-191 (basing the argument on Smith and Grady v. the United Kingdom, Applications nos. 33985/96 and 33986/96, 27 September 1999, Dahlab v. Switzerland and Fretté v. France, Application no. 36515/97, 26 February 2002).
[94] Christoffersen, p. 225.
[95] Harris, O'Boyle, Bates, Buckley, p. 13.
[96] Arai-Takahashi, p. 194.

The concept of fair balance is used "for assessing the proportionality of respondents' interferences with the Convention rights of applicants"[97], as a part of the proportionality assessment[98]. It was referred to in the *Belgian Linguistic case* as a "a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter" and thereafter used in several other cases[99]. Harris, O'Boyle, Bates and Buckley refer to *Soering v. the United Kingdom* to outline the importance of the fair balance[100], where it is stated that: "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"[101], and further states that the fair balance can be needed in cases where different Convention rights are in conflict with each other[102].

To conclude, as regards the proportionality principle some different approaches, i.e. suitability, least restrictive means/ least onerous means/less restrictive alternative, fair balance, are sometimes used by the ECtHR but not in a consistent way. Of these, the fair balance principle seems the most employed, while for instance the "least restrictive means"-test is much more sporadically used. Therefore the fair balance test of the ECtHR is the part of the proportionality assessment that will mainly be explored in the cases in this study. The search for a fair balance is expressed in the general principles reiterated in nearly all cases in this study:

> "Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth

[97] Harris, O'Boyle, Bates, Buckley, p. 14, citing Mowbray 10 HRLR 289, para 315 (2010).
[98] Cristoffersen p. 40.
[99] Christoffersen, pp. 198-199.
[100] Harris, O'Boyle, Bates, Buckley, p. 14.
[101] Soering v. the United Kingdom, Application no. 14038/88, 07 July 1989, para 89.
[102] Harris, O'Boyle, Bates, Buckley, p. 14.

> in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society".[103]

The search for a fair balance is also expressed in the general principles as it in particular concerns the freedom to manifest one's religion or belief:

> "In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. This follows both from paragraph 2 of Article 9 and the State's positive obligation under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined therein."[104]

2.4.3.2 Margin of appreciation

Another important aspect when the ECtHR assesses whether the limitation is "necessary in a democratic society" is the margin of appreciation that is given to states in determining this necessity. The margin of appreciation was first explained by the Court in *Handyside v. the United Kingdom* where it stated that national authorities are "by reason of their direct and continuous contact with the vital forces of their countries […] in principle in a better position than the international judge to give an opinion on the […] 'neccessity' of a 'restriction' or 'penalty'"[105] and that this gives the contracting states a margin of appreciation[106]. However it also stated that this margin of appreciation is not unlimited but goes hand in hand with European supervision[107]. According to Christoffersen there are two aspects of the margin of appreciation that are different, but closely intervowen, that is subsidiarity and discretion. The discretion (which he also calls implementation freedom) is a consequence of the general nature of the substantive norms of the ECHR and applies both to national institutions and

[103] See e.g. Leyla Şahin v. Turkey, para 108.
[104] See e.g. Leyla Şahin v. Turkey, para 106.
[105] Handyside v the United Kingdom, paras 48-49.
[106] Ibid.
[107] Ibid.

the ECtHR when interpreting and applying the norms of ECHR. The subsidiarity pertains to the fact that the ECtHR's role in relation to the member states authorities is subsidiary.[108] Christoffersen sees the main problem of the subsidiarity in that it is a principle of what the Court will not do, but there is no opposite principle stating what the Court will do.[109]

According to Arai-Takahashi the proportionality principle and the margin of appreciation are not used by the ECtHR in a way that makes their relationship to each other symbiotic and coherent.[110]

As to the width of the margin of appreciation in different circumstances Harris, O'Boyle, Bates and Buckley state that the extent of the margin of appreciation of the state differs within different areas[111]. Of importance for this essay, they bring up the examples that the margin of appreciation is wide when[112] "there is no consensus[113] within the member states […] either as to the relative importance of the interest at stake or as to the best mean of protecting it"[114] and "if the state is required to strike a balance between competing interests or Convention rights"[115], but limited where "a particularly important facet of an individual's identity is at stake"[116].

In his analysis of the Court's case law regarding the freedom of religion or belief and the margin of appreciation Arai-Takahashi finds a general tendency to intensify the scrutiny, i.e. affording a narrower margin of appreciation, requiring more weighty evidence of the necessity of the restriction when it concerns the restriction of freedom of religion or

[108] Christoffersen, pp. 356-357.
[109] Christoffersen, p. 357.
[110] Arai-Takahashi, p. 193.
[111] Harris, O'Boyle, Bates, Buckley, p. 16.
[112] Ibid.
[113] The concept of "consensus" or "European consensus" is used by the ECtHR when interpreting the ECHR in accordance with its dynamic character described in subchapter 1.3. The ECtHR looks at state practice to determine if there is a European consensus. When there is sufficiently wide acceptance among the European states of a change in policy this can be considered a European consensus that can affect the meaning of the Convention, and a state that is alone in not following this change in policy can be subject to a judgment from the ECHR against it, following the European consensus. (Harris, O'Boyle, Bates, Buckley, p. 9). If there is no consensus on the other hand, this has, as described above been used to indicate that a state should be afforded a wide margin of appreciation in the assessment.
[114] Evans v. the United Kingdom, Application no. 6339/05, 10 April 2007, para 77.
[115] Ibid.
[116] Ibid.

belief[117]. His study of the margin of appreciation, however, is from 2001, and this essay gives a more updated view, concerning specifically religious dress.

To conclude as regards the margin of appreciation, its relationship with proportionality is according to Arai-Takahashi not symbiotic and coherent[118]. According to Christoffersen there is a need for determining when the Court should do something, and not just when it should step back[119]. Harris, O'Boyle, Bates and Buckley as well as Arai-Takahashi give examples of different areas where the margin of appreciation is wider or narrower[120] and to what extent their conclusions are true for the cases in this study will also be seen in the following.

2.5 Conclusion

To conclude, this chapter has shown that the wearing of religious dress is considered a part of the external dimension of the freedom of religion, i.e. a manifestation. As such it can be limited in accordance with Article 9.2 if the limitation is prescribed by law, has a legitimate aim and is necessary in a democratic society, i.e. is proportionate to the aim pursued. In the assessment of whether the limitation is necessary in a democratic society the ECtHR can afford the state different margins of appreciation.

In the following chapter the assessment of the ECtHR will be looked at for all the cases constituting the main material of this study regarding the second and third requirements for limitations described above, i.e. the legitimate aim, more specifically that of "protection of the rights and freedom of others", and the requirement that the limitation should be "necessary in a democratic society". The latter requirement is assessed through looking at the proportionality assessment of the ECtHR and the margin of appreciation it affords the state.

[117] Arai-Takahashi, p. 100.
[118] Arai-Takahashi, p. 193.
[119] Christoffersen, p. 357.
[120] Harris, O'Boyle, Bates, Buckley, p. 16.

3 ECtHR case law on restriction of religious dress with the justification protection of the rights of others

In this chapter the different rights and freedoms of others accepted by the ECtHR under the legitimate aim protection of the right and freedoms of others will be outlined using the main material of this essay, i.e. the judgments and admissibility decisions described in chapter 1.2. In addition the assessment by the ECtHR of whether the measure was "necessary in a democratic society" , i.e. ECtHR's use of the proportionality assessment and the margin of appreciation, will be reviewed for the cases in relation to the rights of others referred to in those cases as well as their circumstances. The different rights of others under the legitimate aim of protection of rights of others that are treated are secularism (subchapter 3.1), gender equality (subchapter 3.2) and "vivre ensemble" ("living together") (subchapter 3.3.).

3.1 Secularism

The most common right of others referred to under the legitimate aim protection of rights and freedoms of others in the cases in this study is that of secularism or "laicîté"[121]. It is referred to and accepted by the ECtHR in all the 15 admissibility decisions and in six[122] out of nine of the judgments.

Secularism is a constitutional principle in Turkey[123] and France[124] and also in Switzerland, although only in schools (denominational neutrality in schools[125]). In Bosnia and Herzegovina the principle of secularism is not

[121] See eg. Kervanci c. France, para 37.
[122] Leyla Şahin v. Turkey, Kervanci c. France, Dogru v. France, Ebrahimian v. France, Hamidović v. Bosnia and Herzegovina and Ahmet Arslan et autres c. Turquie
[123] Constitution of the Republic of Turkey Article 2.
[124] La Constitution Française de 1958 art 1.
[125] Article 27 § 3 of Switzerland's Federal Constitution of 29 May 1874.

expressed in the Constitution.[126] The judgments and admissibility decisions where secularism is referred to as the legitimate aim all but two have Turkey and France as respondent states, one admissibility decision, concerning a primary school teacher, has Switzerland as the respondent state[127] and one judgment has Bosnia and Herzegovina as the respondent state[128]. The right of others of secularism is also expressed in the cases in terms of "denominational neutrality"[129], "laïcité"[130], "religious neutrality"[131] and "neutrality"[132]. Neutrality is considered a resultant principle[133] of the principle of secularism.

The majority of cases where secularism is referred to and accepted as a right of others under the legitimate aim of protection of rights of others (3 judgments[134] and 9 admissibility decisions[135]) concern students or pupils in public schools. 1 judgment[136] and 6 admissibility decisions[137] concern public servants (6 teachers[138] and 1 social assistant[139]). 2 judgments[140] concern "private citizens"[141] other than students and pupils. In the following the ECtHR's reasoning and use of proportionality assessment and the margin of appreciation in relation to the legitimate aim of protection of secularism as a right of others will be outlined.

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[126] Hamidović v. Bosnia and Herzegovina, para 13.
[127] Dahlab v. Switzerland.
[128] Hamidović v. Bosnia and Herzegovina.
[129] Dahlab v. Switzerland, p. 9.
[130] See eg. Kervanci c. France, para 37.
[131] See eg. Ebrahimian v. France, para 53
[132] See eg. Ebrahimian v. France, para 60.
[133] Ebrahimian v. France, para 63.
[134] Leyla Şahin v. Turkey, Kervanci c. France and Dogru v. France.
[135] Aktas c. France, Bayrak c. France, Gamaleddyn c. France, Ghazal c. France, Jasvir Singh c. France, Ranjit Singh c. France, Köse and 93 others v. Turkey (dec.), Application no. 26625/02, 24 January 2006, Bulut c. Turquie and Karaduman v. Turkey.
[136] Ebrahimian v. France.
[137] Çağlayan c. Turquie (dec.), requête no 1638/04, 3 avril 2007, Dahlab v. Switzerland, Karaduman c. Turquie (dec.), requête no 41296/04, 3 avril 2007, Kurtulmuş v. Turkey, Tandogan c. Turquie and Yilmaz c. Turquie.
[138] Ibid.
[139] Ebrahimian v. France.
[140] Hamidović v. Bosnia and Herzegovina and Ahmet Arslan et autres c. Turquie.
[141] "Private citizens" is the term that is used by the ECtHR in Hamidovic v. Bosnia and Herzegovina to distinguish from public servants, and that term will also be used in this essay. For the purposes of this essay "private citizens" shall be understood to mean persons who are not public servants, nor pupils or students in schools and universities, even though the latter two groups are in fact also private citizens. Sometimes the addition "other than students and pupils" will be used to clarify.

3.1.1 Public servants

This subchapter takes a closer look at the cases where ECtHR has accepted protection of secularism as a right of others under the legitimate aim protection and rights of others when restricting the freedom of public servants to manifest their religion through religious dress. The judgment under this subchapter concerns a social assistant whereas the six admissibility decisions concern teachers. The cases are discussed in chronological order.

Dahlab v. Switzerland concerned a primary school teacher who was prohibited from wearing her Islamic headscarf at work. The ECtHR accepted the protection of the right of the pupils to be taught in a context of denominational neutrality as a legitimate aim. [142]

As for the proportionality assessment and the relationship between the margin of appreciation and the proportionality assessment, the ECtHR stated that the states have a "certain margin of appreciation"[143] but that this margin of appreciation is subject to European supervision[144]. The course that the ECtHR then followed was to first do a proportionality assessment and then conclude that with regards to the result of this proportionality assessment the state had not exceeded their margin of appreciation.[145]

In the proportionality assessment ECtHR weighed "the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony"[146]. As for the right of the teacher to manifest her religion the ECtHR brought up that it was "purely in the context of her activities as a teacher"[147] that the applicant was "prohibited […] from wearing a headscarf" [148]. It also underlined her role as a representative of the

[142] Dahlab v. Switzerland p. 12-13.
[143] Dahlab v. Switzerland, p. 12.
[144] Ibid.
[145] Dahlab v. Switzerland, p. 12-13.
[146] Dahlab v. Switzerland p. 13.
[147] Dahlab v. Switzerland p. 12.
[148] Ibid.

state[149] (the neutral state education system[150]), mainly in referring to the Federal Courts reasoning[151], but also reiterating her role as a state representative in its own conclusion[152].

As for the rights of the pupils to denominational neutrality the ECtHR considered that it could not "be denied outright that the wearing of a headscarf might have some kind of proselytising effect"[153] and that with reference to the "tender age"[154] of the pupils, which made them easily influenced, the balance that was struck by the state was not in excess of its margin of appreciation[155]. To conclude, the ECtHR in this case made a proportionality assessment and found the measure reasonable in light of that proportionality assessment, and from this it drew the conclusion that the state had not exceeded its margin of appreciation. There was no discussion in this case whether or not this is an area where the states in general have a wider or narrower margin of appreciation.

Kurtulmuş v. Turkey and four other admissibility decisions, very similar to *Kurtulmuş v. Turkey* [156], refer back to *Dahlab v. Switzerland*, but concern high school or university teachers. Of the five admissibility decisions concerning high school and university teachers it is only in *Kurtulmuş v. Turkey* that the ECtHR carries out a detailed assessment, in the others it just refers back to *Dahlab v. Switzerland* and *Kurtulmuş v. Turkey*, stating that it finds no reason to depart from the conclusion in these cases[157]. Therefore only *Kurtulmuş v. Turkey* will be treated in the following.

Kurtulmuş v. Turkey concerned a professor at the University of Istanbul who was subject to a disciplinary procedure and disciplinary measures and was finally deemed to have resigned from her post because she wilfully failed to comply with the rules on dress applicable to staff in

[149] Dahlab v. Switzerland p. 13.
[150] Dahlab v. Switzerland p .12.
[151] Ibid.
[152] Dahlab v. Switzerland p. 13.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Karaduman c. Turquie, Çağlayan c. Turquie, Tandoğan c. Turquie, Yilmaz c. Turquie.
[157] Karaduman c. Turquie, p. 4, Çağlayan c. Turquie, p. 7-8, Tandoğan c. Turquie, p. 4, Yilmaz c. Turquie, p. 6.

state institutions.[158] She was later subject to an amnesty and could have requested to be reinstated in her post, which she did not.[159] However, since her application concerned the rules of dress as a violation of her freedom of religion, the Court considered that it had a duty to assess the case despite the amnesty.[160]

In *Kurtulmuş v. Turkey* the ECtHR stated that the measure could be considered to have the legitimate aim of the protection of rights and freedoms of others and that this was not disputed by the parties. [161] In the assessment of whether the measure was necessary in a democratic society the ECtHR expressed that the right of others that was being protected was the principle of secularism.[162]

When it comes to the margin of appreciation, the difference between *Kurtulmuş v. Turkey* and *Dahlab v. Switzerland* is interesting. With reference to *Leyla Şahin v. Turkey*, treated below, the ECtHR stated in *Kurtulmuş v. Turkey* that the wearing of religious symbols in educational institutions is an area where "the role of the national decision-making body must be given special importance"[163], since in these cases "questions concerning the relationship between the state and religions are at stake, on which opinion in a democratic society may reasonably differ widely." [164] Instead of as in *Dahlab v. Switzerland* basing the state's margin of appreciation on the proportionality assessment, here the margin of appreciation was used as an independent factor, based on the lack of consensus among Member States.[165] This is in line with the ECtHR's statement in *Evans v. the UK*, quoted above[166], that the margin of appreciation is wide when there is no consensus between the member states.

In its proportionality assessment the ECtHR underlined that the rule of dress applies equally to all public servants irrespectively of

[158] Kurtulmuş v. Turkey, p. 1-2.
[159] Kurtulmuş v. Turkey, p. 2.
[160] Kurtulmuş v. Turkey, p. 4.
[161] Kurtulmuş v. Turkey, p. 5.
[162] Kurtulmuş v. Turkey, p. 6.
[163] Kurtulmuş v. Turkey, p. 6.
[164] Ibid.
[165] Ibid.
[166] Evan v. the UK, para 77 (footnote 108 cross-reference).

function or religious belief.[167] The main differences in comparison with the assessment in *Dahlab v. Switzerland* are the weight attached to the fact that secularism is a fundamental principle of the Turkish state, with reference to *Leyla Şahin v. Turkey*, and the, in comparison to *Dahlab v. Switzerland* where it was just mentioned that the applicant was a state representative, more clearly expressed statement that democratic states can require of public servants to be loyal to constitutional principles', with reference to Vogt v. Germany[168]. *Kurtulmuş v. Turkey* also differs from *Dahlab v. Switzerland* by the absence of the "tender age" factor that was present in *Dahlab v. Switzerland*, which in that case increased the weight to be put on the protection of the rights of the pupils, and by a lack of assessment of how the students would be affected by the teachers wearing of the headscarf, i.e. no discussion of a possible proselytising effect.

In the conclusion in *Kurtulmuş v. Turkey* the margin of appreciation was again emphasised: the ECtHR first stated that the extent and form of regulations on religious dress is within the scope of the state's margin of appreciation and in conclusion found that the measure was justified "[i]n the light of the foregoing and **having regard to the margin of appreciation left to the Contracting States in this sphere**" (emphasis added)[169]

The possibilities to restrict the religious dress of public servants with reference to the legitimate aim of protection of the right to secularism was confirmed in the judgment in *Ebrahimian v. France*. In this case the applicant was a social assistant at a hospital and her contract was not renewed[170] due to the fact that she refused to stop wearing[171] what she and the hospital referred to as a "head-covering" ("coiffe" in French) but what the majority of the domestic authorities and the ECtHR referred to as a veil[172], i.e. what in this essay is called an Islamic headscarf. The ECtHR

[167] Kurtulmuş v. Turkey, p. 6.
[168] Kurtulmuş v. Turkey, p. 6, referring to Vogt v. Germany, Application no. 178521/91, 2 September 1996, para 59.
[169] Kurtulmuş v. Turkey, p. 7.
[170] Ebrahimian v. France, para 7.
[171] Ebrahimian v. France, para 47.
[172] Ebrahimian v. France, para 46.

decided to use the term veil in this case because the head covering "resembles a scarf or an Islamic veil, has been described as a veil by the majority of the domestic courts which have examined the dispute"[173]. There is no further discussion about this in the case, but this aspect of a head covering not being an ostentatious sign of religion will be discussed further regarding some other cases in subchapter 3.1.2.1 below.

In *Ebrahimian v. France*, the only judgment (as opposed to *Dahlab* and *Kurtulmuş* that were admissibility decisions) concerning public servants, the ECtHR considered that the measures pursued the legitimate aim of protection of the rights and freedoms of others referring here to both secularism and the equality of treatment of the users of the public service with no discrimination on basis of their religion.[174] The ECtHR underlined that it had already, in *Dahlab v. Switzerland* and *Kurtulmuş v. Turkey* discussed above, established that the wearing of religious dress by civil servants could be restricted with reference to the principles of state secularism and neutrality[175], underlining also that civil servants in this way are distinguished from ordinary citizens[176] who are not bound by a duty of discretion in the public expression of their religious beliefs[177].

As for the margin of appreciation the ECtHR again here reiterated that in questions regarding the relationship between the state and religions the role of the national decision makers must be considered especially important. [178] The ECtHR also noted, concerning the margin of appreciation, that there is a lack of consensus regarding the wearing of religious dress for civil servants in Europe, that the national context of state-church relations must be taken into account and that the fact that France has determined the balance between the neutrality of the public authorities with religious freedom gave it a wide margin of appreciation.[179]

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[173] Ibid.
[174] Ebrahimian v. France, para 53.
[175] Ebrahimian v. France, para 64, para 57, referring to Dahlab v. Switzerland, Leyla Şahin v. Turkey and Kurtulmuş v. Turkey.
[176] This is the term used in Ebrahimian v. France. In this essay the term "private citizens", which is used in Hamidovic v. Bosnia and Herzegovina will be used. See footnote 143.
[177] Ebrahimian v. France, para 64, referring to Ahmet Arslan et autres c. Turquie.
[178] Ebrahimian v. France, para 56.
[179] Ebrahimian v. France, para 65.

It also stated that the hospital environment in itself entailed a wide margin of appreciation since hospital authorities are better placed to take decisions in their hospitals than an international court.[180]

The ECtHR then did a proportionality assessment to see whether the state had overstepped its margin of appreciation. [181] In the proportionality assessment it brought up that France has a ban on faith-based discrimination of public employees as regards access to posts and thus protects religious freedom in this way, but that manifestation of the religion of the employees is restricted due to the requirement of state secularism. [182] The ECtHR put great emphasis on the fact that the French model of state neutrality and secularism as a constitutional principle depended on the public servants representing it.[183] It also underlined that the disciplinary process tried to reconcile the interests involved, that there was dialogue with the applicant, as well as safeguards, and that the applicant must have known she had to comply with the requirements of neutrality. [184] It also stated that she was included in the list of candidates in the competition for social assistants after the decision not to renew her contract but that she chose not to participate.[185]

As for the rights of others the ECtHR accepted the claim of the hospital authorities in the respondent state that there had been "difficulties" in the unit with colleagues and patients, although it considered that those difficulties could have been expanded on further.[186] The ECtHR stated that although there had been no proselytism, provocation or pressure by the applicant towards colleagues or patients[187], the veil had been considered an ostentious sign of religion[188] and that the ostentiousness and impact of the religious sign in question had been taken into account by the authorities[189].

[180] Ibid.
[181] Ebrahimian v. France, para 66.
[182] Ibid.
[183] Ebrahimian v. France, para 68.
[184] Ebrahimian v. France, para 70.
[185] Ebrahimian v. France, paras 10 and 70.
[186] Ebrahimian v. France, paras 8 and 69.
[187] Ebrahimian v. France, para 62.
[188] Ibid
[189] Ebrahimian v. France, para 69.

The ECtHR also brought up that France placed greater emphasis on the rights of the patients to be treated in an equal manner and not have reason to doubt the impartiality of their treatment, than on the manifestation of religious beliefs.[190] The ECtHR concluded that France did not overstep its margin of appreciation when giving priority to the requirement of state neutrality over the applicant's manifestation of her religious beliefs[191] and that the interference consequently was proportionate to the aim pursued[192].

In conclusion in all the cases concerning public servants in this study, secularism is consistently accepted as a legitimate aim and the measures of banning the religious dress as well as the actions taken when the ban is not followed are considered proportionate to this aim by the ECtHR. In *Dahlab v. Switzerland* the focus of the ECtHR in the proportionality assessment was more on the possible proletysing effect on others, i.e. how the pupils of the "tender age" could be affected by the religious manifestation of the teacher of the wearing of the Islamic headscarf. In *Kurtulmuş v. Turkey* and *Ebrahimian v. France* the focus was more on that secularism is a fundamental principle of the French and the Turkish states respectively and on the need for the public servants to represent the neutrality of the state when it comes to religion.

As for the margin of appreciation afforded to the state within this area it has grown from "a certain margin of appreciation" in *Dahlab v. Switzerland* to a wide margin of appreciation in both *Kurtulmuş v. Turkey* and *Ebrahimian v. France*.

3.1.2 Students and pupils

Not only teachers, in their role of public servants, but also their students and pupils have had their right to manifest religion through religious dress restricted in the cases of this study. This subchapter will take a closer look at the possibilities according to the case law of ECtHR for the contracting

[190] Ebrahimian v. France, para 71.
[191] Ebrahimian v. France, para 70.
[192] Ebrahimian v. France, para 72.

states to restrict the wearing of religious dress by pupils and students at schools and universities, using the legitimate aim of the protection of secularism as a right and freedom of others as a justification.

In the two earliest cases concerning students and religious dress in this study, the admissibility decisions *Karaduman v. Turkey* and *Bulut c. Turquie* from the Commission from 1993, it is unclear whether the Commission considered that an interference was even established in the first step so as to make Article 9.2 applicable.

The admissibility decisions from the Commission, *Karaduman v. Turkey* and *Bulut c. Turquie*, are very similar so they will be treated together. The quotes will be taken from *Karaduman v. Turkey*, since that decision is in English. Both cases concerned applicants who supplied identity photographs of themselves wearing headscarves[193] and therefore were refused a provisional certificate of having received a bachelor degree[194] and a university diploma[195] respectively. The state in these cases maintained firstly that there had been no interference with the applicant's freedom of religion, arguing that the applicant was not hindered in practising her religion by the fact that she had to be bare-headed either on university premises or on the ID-photo, and maintained secondly that if there was an interference it was justified in accordance with Article 9.2 with the legitimate aim of protecting secularity.[196]

In the reasoning of the Commission it is unclear whether or not it does an assessment of whether the measures are justified under Article 9.2 or if it just considers that they are not an interference under Article 9.1. The fact that this is unclear can be seen in that scholars have different interpretations regarding this. Jill Marshall considers that in *Karaduman v. Turkey* the "Convention institutions have found that in a democratic society, the relevant member state is entitled to ban adult women from wearing the Islamic headscarf on the basis that such bans have been **prescribed by law, have a legitimate aim, that is, protecting the rights and freedoms of**

[193] Karaduman v. Turkey, p. 103, Bulut c. Turquie p. 2 (no page-numbering).
[194] Karaduman v. Turkey p. 103.
[195] Bulut c. Turquie, p. 2 (no page-numbering).
[196] Karduman v. Turkey p. 107, Bulut c. Turquie p. 4 (no page-numbering).

others, and are necessary in a democratic society"[197] (emphasis added), and Sara Haverkort-Speekenbrink describes that the measures in these cases had the aim of secularity and that the rights of the applicants to freedom of religious manifestation were outweighed[198] (i.e. that there had been a proportionality assessment). Other researches, such as for instance Nicholas Gibson as well as Peter Cumper and Tom Lewis do not believe that the Commission in these cases found that the measure contravened Article 9.1, and therefore believe that it was never was assessed under Article 9.2. [199].

The fact that the Commission stated that it first must ascertain whether the measure complained of constituted an interference with the exercise of the freedom of religion[200] and then concluded by stating that it found no interference under Article 9.1[201] are strong signs that the Commission considered itself only doing an assessment under Article 9.1 and not looking at justification under Article 9.2. Also some of the reasoning points towards this, such as the statements that "[t]he purpose of the photograph affixed to a degree certificate is to identify the person concerned"[202] and that "[i]t cannot be used by that person to manifest his religious beliefs."[203]

However, it can also be argued that there is a de facto assessment of the legitimate aim and a proportionality assessment in these decisions. The Commission accepted a legitimate aim of protecting secularism as a right of others by stating that at a secular university certain rules need to be followed to ensure respect for the rights and freedoms of others.[204]

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[197] Jill Marshall, "Freedom of Religious Expression and Gender Equality: Sahin v Turkey" *The Modern Law Review*, Vol. 69, No. 3 (2006), pp. 452-461, p. 453.
[198] Sarah Haverkort-Speekenbrink, *European Non-Discrimination Law: A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Cambridge: Intersentia, 2012), p. 182.
[199] See Cumper and Lewis, p. 608 and Nicholas Gibson, "Faith in the Courts: Religious Dress and Human Rights", *The Cambridge Law Journal*, Vol. 66, No. 3 (2007), pp. 657-697, p. 668.
[200] Karduman v. Turkey p. 108, Bulut c. Turquie p. 5.
[201] Karduman v. Turkey p. 109, Bulut c. Turquie p. 6.
[202] Ibid.
[203] Ibid.
[204] Karduman v. Turkey p. 108, Bulut c. Turquie p. 5.

It also did a proportionality assessment and in this brought up an argument that would be of great importance in the proportionality assessment of chronologically following cases concerning restriction of religious dress in Turkey, i.e. that in countries where the majority practises one religion the manifestation of that religion by religious symbols can constitute pressure on those who do not practise the religion and that fundamentalist religious movements through this can try to interfere with the beliefs of others.[205]

Weighing this against the right of the applicants to manifest their religion the Commission considered, as factors giving the applicants' rights less weight in this context, the fact that the diploma and the degree certificate respectively are not intended for the general public[206] and that the applicants were never forced to remove their headscarves on campus[207]. It also underlined, as regards the diploma in *Bulut c. Turquie* that the applicant was already in possession of a degree certificate, giving her all the advantages of a diploma[208]. The Commission also underlined that the rejections in both cases of delivering a degree certificate and a diploma respectively were not definitive but that the degree certificate and the diploma would be awarded to the applicants' if they handed in photographs without headscarves.[209]

Nothing is mentioned in the decisions about margin of appreciation, but it seems that a proportionality assessment of some kind has been made in these decisions, which is also supported by the fact that a reference to the reasoning in these cases, regarding the pressure that could be put on others by the wearing of the headscarf, is included in the proportionality assessment of the Grand Chamber judgment *Leyla Şahin v. Turkey*.

[205] Karduman v. Turkey p. 108, Bulut c. Turquie p. 5.
[206] Karduman v. Turkey p. 109, Bulut c. Turquie p. 6.
[207] Ibid.
[208] Bulut c. Turquie p. 6.
[209] Karduman v. Turkey p. 109, Bulut c. Turquie p. 6.

The Grand Chamber judgment *Leyla Şahin v. Turkey* is the most important case concerning students or pupils and the limitation on wearing religious dress with respect to the legitimate aim of secularity.

In *Leyla Şahin v. Turkey* the applicant was not enrolled and was refused the possibility to sit examinations and attend lectures at Istanbul University due to the fact that she was wearing a headscarf.[210] The respondent state, Turkey, referred to the legitimate aim of protecting the rights and freedoms of others gender equality and secularism.[211] Both of these were accepted by the ECtHR.[212] The gender equality aspect will be discussed further in subchapter 3.2.

As regards the margin of appreciation this is the chronologically first case included in this study where it is established that the national decision maker has an important role when it comes to regulating religious symbols as an aspect of the relationship between the state and religions. [213] The ECtHR states that this is an area where there is no consensus between the different states and where the choice of extent and form should therefore to a point be up to the state[214], i.e. implying that the state has a wide margin of appreciation in this area. The ECtHR also states that the "margin of appreciation goes hand in hand with a European supervision"[215] and that the ECtHR should do its own proportionality assessment[216].

As regards the proportionality assessment the ECtHR accepted the government's explanation that in Turkey there was a situation with a majority religion and certain extremist religious movements seeking to exert pressure on those not practising that religion, and that under these circumstances the wearing of the headscarf could be seen as exerting pressure on non-wearers. The ECtHR considered that it was therefore a legitimate aim to protect the rights of others to preserve the "pluralism" and

[210] Leyla Şahin v. Turkey, para 17.
[211] Leyla Şahin v. Turkey, para 112.
[212] Leyla Şahin v. Turkey, para 115.
[213] Leyla Şahin v. Turkey, para 109.
[214] Ibid.
[215] Leyla Şahin v. Turkey, para 110.
[216] Ibid.

secular nature of the university.[217] As mentioned above Karaduman v. Turkey was referred to for this reasoning.

The ECtHR then brought up that Muslim students were allowed to, in other ways than through religious dress, manifest their religion, and that it was not only Islamic religious attire but also other religious attire that was banned.[218] The ECtHR also put emphasis on that there was a dialogue when introducing the rules.[219] Again, related to the margin of appreciation, the ECtHR underlined that, having established that the rules have a legitimate aim, it should not assess how the university had ensured compliance with the rules[220]. Just as in *Kurtulmuş v. Turkey* discussed above the ECtHR also emphasised the margin of appreciation in the conclusion finding the interference justified and proportionate "[i]n the light of the foregoing and having regard to the Contracting States' margin of appreciation in this sphere".[221]

In *Köse and 93 others v. Turkey*, an admissibility decision following shortly upon the judgment in *Leyla Şahin v. Turkey*, the main assessment of the ECtHR took place regarding another Convention right, i.e. the right to education, under Article 2 of Protocol no. 1[222], which reads: "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 in conformity with their own religious and philosophical convictions." The assessment of whether there was a violation of Article 9 referred back to the assessment of whether there was a violation of the right of education.[223]

This case is interesting since it concerns the prohibition of wearing of religious dress in what is in fact schools for religious training, although it is also state schools[224], in Turkey. The applicants were refused

[217] Leyla Sahin v. Turkey, paras 115-116.
[218] Leyla Şahin v. Turkey, para 118.
[219] Leyla Şahin v. Turkey, para 120.
[220] Leyla Şahin v. Turkey, para 121.
[221] Leyla Şahin v. Turkey, para 122.
[222] Köse and others v. Turkey, p. 9.
[223] Köse and others v. Turkey, p. 15.
[224] Köse and others v. Turkey, p. 13.

access to the schools because they refused to remove their headscarves[225] in accordance with the rules on dress prohibiting head coverings[226].

There is no possibility within the limits of this essay to thoroughly look into the workings of Article 2 of protocol no 1, so it will only be briefly presented. Article 2 of Protocol no. 1 is a negative obligation, i.e. there is no obligation on states to have a state system of education but only not to deny access to it if it exists. There is no explicit mentioning in Article 2 of the possibility to limit the right to education, however the ECtHR has established that limitations are permitted[227] since the right "by its very nature calls for regulation by the State"[228]. Similar as to in Article 9 it has been established that the limitations must pursue a legitimate aim and that there needs to be proportionality between the means and the aim.[229]

In *Köse and others v. Turkey* the ECtHR accepted that the measures pursued the legitimate aim of protection of the freedoms and rights of others referring here to the neutrality of secondary education[230] and secularism.

In the proportionality assessment the ECtHR, similarly to in the public servant case *Dahlab v. Switzerland*, took into account the need to protect the adolescent pupils since they are in an "impressionable age". [231] Emphasis was also, as in *Leyla Şahin v. Turkey*, put on that the wearing of the headscarf could constitute a pressure on others in the Turkish context and that secularism is a constitutional principle in Turkey. [232] The ECtHR underlined that the rules on dress had to be complied with by all pupils in all secondary schools in Turkey irrespective of their religious beliefs[233], and

[225] Köse and others v. Turkey, p. 1.
[226] Köse and others v. Turkey, p. 5.
[227] Leyla Şahin v. Turkey, para 154.
[228] Belgian linguistics case, p. 32, para 5.
[229] Leyla Şahin v. Turkey, para 154.
[230] Köse and others v. Turkey p. 11.
[231] Ibid.
[232] Köse and others v. Turkey, p. 12. This argument in Köse is noted by the ECtHR as statements from the Human Rights Committee attached to the Istanbul Regional Governor's Office and from the Constitutional Court of Turkey, but the ECtHR states that "[these] principles appear to […] be clear and perfectly legitimate", Köse and others v. Turkey, p. 12.
[233] Köse and others v. Turkey, p. 11.

that even if the schools concerned here were religious schools they were not exempt of the principle of secularism[234]. It also underlined that there was an exception in the religious schools in question, permitting head-covering to be worn during Koran lessons, which made it a not strict prohibition[235] in this case. As in *Leyla Şahin v. Turkey* and *Kurtulmuş v. Turkey*, emphasis was also put on the rules being applied in a spirit of dialogue[236]. As for the margin of appreciation, it was established that the states have a certain margin of appreciation in establishing regulations concerning the access to education[237] but the margin of appreciation in connection with Article 9 in particular was not discussed.

In the above treated Turkish cases of bans on religious dress in schools and universities, reference is made to the particular situation in Turkey as a justification for limiting the freedom of religious manifestation through religious dress. However in two judgments from 2009, *Dogru v France* and *Kervanci c. France*, the ban on religious dress is no longer in a Turkish, but a French context.

Dogru v France and *Kervanci c. France* are very similar to each other and concern pupils who had refused to remove their headscarves during physical education classes and therefore were not allowed to participate in said classes. They were finally expelled from the school for failing to participate.[238] In the following, the case *Dogru v. France* will be quoted since it is available in English, however in all these cases the text in English in *Dogru v. France* corresponds to text in French in the same paragraphs in *Kervanci c. France*.

The legitimate aim as regards rights and freedoms of others is not completely clear in these cases. In both cases the government submitted that the legitimate aims were those of "protection of order and the rights and freedoms of others, in the present case compliance by pupils with the duty to wear clothes adapted to and compatible with the proper conduct of

[234] Köse and others v. Turkey, p. 13.
[235] Ibid.
[236] Köse and others v. Turkey, p. 11.
[237] Köse and others v. Turkey, p. 10.
[238] Dogru v. France, paras 7-8.

classes, both for safety reasons and on public-health grounds"[239]. From this sentence, it seems that the Government is stating that the legitimate aims of protection of order and the rights and freedoms of others in this case were ensured through ensuring compliance by pupils with the wearing of adapted and compatible clothes for safety and public health reasons. This becomes even more confusing, since "safety" and "public health" are similar to two other legitimate aims in Article 9.2, namely "public safety" and "health or morals". It could in fact be interpreted as that the Government is referring to four different legitimate aims. As concerns the legitimate aim rights and freedoms of others it is first in the next step, when discussing necessity in a democratic society, that the Government brings up secularism, stating that "the measure in question had mainly been based on the constitutional principles of secularism and gender equality"[240].

The ECtHR accepted the legitimate aims pursued as public order and the protection of the rights and freedoms of others[241]. As it was by the government, secularism was emphasised by the ECtHR in connection with the legitimate aim of protection of the rights and freedoms of others. In the assessment of if the measure was "necessary in a democratic society" the Court underlined that secularism is a constitutional principle in France[242] and in general it mainly discussed secularism as the right of others being protected. Even if it briefly mentioned that the "the domestic authorities justified the ban on wearing the headscarf during physical education classes on grounds of compliance with the school rules on health, safety and assiduity which were applicable to all pupils without distinction"[243], it then returned directly to discussing secularism stating "more generally, that the purpose of that restriction on manifesting a religious conviction was to adhere to the requirements of secularism in state schools"[244] The ECtHR did not at all discuss gender equality in connection with the assessment of this case.

[239] Dogru v. France para 36.
[240] Dogru v. France, para 37.
[241] Dogru v. France, para 60.
[242] Dogru v. France, para 72.
[243] Dogru v. France, para 68.
[244] Dogru v. France, para 69.

As for the margin of appreciation and the proportionality assessment the ECtHR again underlined the important role of the national authorities in questions concerning the relationship between the state and religions[245], i.e. the wide margin of appreciation in this area. The ECtHR stated that even though the wearing of religious symbols wasn't necessarily incompatible with the principle of secularism in school it could be so under special circumstances[246], for instance if the religious symbols were ostentatious and could constitute a "source of pressure"[247]. Referring to *Köse and others v. Turkey*, it stated that it was for the national authorities to within their margin of appreciation, while respecting pluralism and democracy, ensure that religious manifestations in schools did not constitute a source of pressure[248]. The ECtHR considered that the French secular model seemed to have answered this need.[249] It also underlined that in France just as in Turkey and Switzerland secularism is a constitutional and founding principle.[250] It did not, however, indicate in what way the wearing of the headscarf could be considered a source of pressure in the French context, which is very different from the Turkish context, with for instance Islam far from being the majority religion[251]., but just quoted *Köse and others v. Turkey* as support for this argument[252].

The ECthR also took into account that the disciplinary proceedings against the applicant according to the ECtHR had balanced the different interests at stake, with many (unsuccessful) attempts to enter into dialogue with the applicant and with safeguards to protect pupils' interests.[253] It also underlined that the ban was restricted to the physical education classes, and was therefore not a strict ban and that the events had

[245] Dogru v. France, para 63.
[246] Dogru v. France, para 70.
[247] Dogru v. France, para 71.
[248] Dogru v. France, para 71.
[249] Dogru v. France, para 71.
[250] Dogru v. France, para 72.
[251] At an estimated 7-9 % of the population, with Christians estimated at 63-66 % according to: Central Intelligence Agency, "The World Factbook : Europe: France", *Central Intelligence Agency*, https://www.cia.gov/library/publications/the-world-factbook/geos/fr.html , accessed 21st of May 2019.
[252] Dogru v France, para 71.
[253] Dogru v. France, para 74.

led to an atmosphere of tension in the school.[254] As regards the fact that the most severe penalty was chosen the ECtHR considered that it was up to the national authorities to decide how to ensure respect for internal rules[255] and consequently did not take this into account in the proportionality assessment, apart from mentioning that it was possible for the applicant to continue her schooling through correspondence[256]. Also the the question of whether the applicant's offer to exchange her headscarf for a hat should be seen as a sign of compromise was considered to fall within the state's margin of appreciation.[257]

The ECtHR concluded that "taking into account the margin of appreciation that should be left to the State in this domain" as well as the circumstances of the cases the interference was justified and proportionate.[258]

In *Dogru v. France* and *Kervanci c. France* the applicants both argued that their offer to replace the headscarf with a hat/bonnet showed a will of compromise, an argument that was not accepted[259]. The ECtHR stated that whether this showed a willingness to compromise or still was overstepping the applicant's freedom to manifest her religion fell within the margin of appreciation of the State.[260] The aspect of the applicants wearing, or offering to wear, other head coverings than the traditional Islamic headscarf are treated more in detail in the cases in chapter 3.1.2.1.

To summarize, the legitimate aim of the protection of secularism was accepted in all the cases treated above concerning students and pupils. The margin of appreciation afforded to the state was established to be wide in *Leyla Şahin v. Turkey* and was considered to be so also in the following cases, except for in *Köse and others v. Turkey*, where it was not discussed in connection to Article 9, since this case mostly focused on the right to education under Article 2 of Protocol no. 1. When it comes to the

[254] Ibid.
[255] Dogru v. France, para 75.
[256] Dogru v. France, para 76.
[257] Dogru v. France, para 75.
[258] Dogru v. France, para 71.
[259] Dogru v. France, para 44.
[260] Dogru v. France, para 75.

proportionality assessment the most pertinent factors in all these cases are the importance of secularism as a constitutional principle, and the religious dress, here the headscarf, constituting a pressure on others which threatens their right to secularism. In the Turkish cases a particular situation in Turkey is referred to where fundamentalist religious groups seeks to pressure others. However, in the French cases, without referring to any such situation in France, it is just stated that the wearing of religious dress could constitute a source of pressure. In *Köse and others v. Turkey* the impressionable age is taken into account as a factor, but this is not the case in the other cases, even though *Kervanci c. France* and *Dogru v. France* concern students of the same age as in *Köse and others v. Turkey*.

3.1.2.1 Ostentatiousness of the religious dress

Of interest when it comes to pupils and religious dress are a string of admissibility decisions where the applicants argue that their manifestation of their religion through religious dress does not threaten the right to secularism in public education, since it is not an ostentatious sign of religion.[261] In these cases the ECtHR in general follows exactly the same reasoning as in *Dogru v. France* and *Kervanci c. France*, stating that it sees no reason to depart from this case law even though the cases concern a prohibition of religious dress in all classes and not just in physical education classes as in *Dogru* and *Kervanci*.[262] Of interest in these cases is how the ECtHR assessed the particular argument of different head coverings not being ostentious signs of religion. This is interesting since this concept of an "ostentious sign" has been very important in the justification of the ban of the headscarf as have been seen in the cases of this study.

In *Jasvir Singh c. France* and *Ranjit Singh c. France* the religious dress in question was the "keski", a sikh mini-turban[263]. These cases are very similar and thus will be treated together. Jasvir Singh and Ranjit Singh

[261] This was also argued in Ebrahimian v. France, treated above.
[262] Jasvir Singh c. France, p. 8, Ranjit Singh c. France, p.8, Ghazal c. France, p. 7, Aktas c. France, p. 9, Bayrak c. France, p. 8, Gamaleddyn c. France, p. 9.
[263] Jasvir Singh c. France, p. 2, Ranjit Singh c. France, p. 2.

both refused to stop wearing the keski and were, after dialogues and disciplinary procedures, consequently expelled.[264] The ECtHR quoted its reasoning in *Dogru* and *Kervanci* and established that it saw no reason to depart from it as explained above. What is of interest here is that the applicants argued that the keskis that they were wearing instead of full sikh turbans were not ostentatious signs of religion that constituted pressure.[265] The ECtHR answered this by stating that the assessment of whether or not the keski constituted an ostentatious sign was within the margin of appreciation of the state.[266] It went on stating that it agreed with the analysis of the internal authorities who had considered that the wearing of the keski on a permanent basis also constituted a ostentatious manifestation of religion and that the internal authorities reasoning was not unreasonable given that it in the legislation concerned was established that the law had to be able to respond to new religious sign and attempts to go around it.[267]

In *Ghazal c. France* what the applicant was wearing was described as a "couvre-chef" (head covering)[268]. The applicant argued that what she was wearing was a simple head covering that had no religious connotations or at least was not an ostentatious sign that constituted pressure on others.[269] The ECtHR responded to this, not by stating that the head-covering looked like an Islamic headscarf, as in *Ebrahimian v. France* discussed above, but by using the exact same reasoning as in *Jasvir Singh c. France* and *Ranjit Singh c. France* described above about the assessment being within the margin of appreciation of the state and of the need to respond to new signs and attempts to go around the law.[270]

In *Bayrak c. France* and *Gamaleddyn c. France* the applicants exchanged their headscarves for hats ("bonnets")[271]. In *Aktas c. France* the applicant offered to exchange her headscarf for a hat or a bandana, and to

[264] Jasvir Singh c. France, p. 2, Ranjit Singh c. France, p. 2.
[265] Jasvir Singh c. France, p. 8, Ranjit Singh c. France, p. 8.
[266] Ibid.
[267] Ibid.
[268] Ghazal c. France, p. 2.
[269] Ghazal c. France, p. 7.
[270] Ghazal c. France, pp. 7-8.
[271] Bayrak c. France, p. 2 and Gamaleddyn c. France, p. 2.

not wear it in class.[272] In all of these cases the applicants argued that their respective hat or bandana was not an ostentatious sign of religion and ECtHR used the exact same argument against this as in *Jasvir Singh c. France*, *Ranjit Singh c. France* and *Ghazal c. France*[273].

To conclude, in the admissibility decisions treated in this subchapter the ECtHR in general used the same reasoning as in *Dogru v. France* and *Kervanci c. France*. What distinguished the cases in this subchapter from *Dogru v. France* and *Kervanci c. France*, apart from the fact that the ban was extended from physical education classes to all classes, was the ECtHR's treatment of the argument from the applicants that their respective attires did not constitute ostentatious signs of religion that could put pressure on others. In all these cases the ECtHR used the same answer to this argument stating that it was within the margin of appreciation of the state to decide whether the attire in question constituted an ostentatious sign of religion and that restricting even hats and bandanas could be reasonable to thwart attempts to go around the laws in question.

3.1.3 Private citizens other than students and pupils

The bulk of the EctHR case law on interferences with the freedom of manifesting ones religion, where the legitimate aim secularism is used, concerns, as can be seen above, students and pupils in state schools and public servants. However, states have also attempted to use the legitimate aim of secularism to restrict the right of private citizens, other than students and pupils, to manifest their religion through religious dress. This has however had less success with the ECtHR. The two judgments *Ahmet Arslan et autres c. Turquie* and *Hamidović v. Bosnia and Herzegovina* illustrate this.

In *Ahmet Arslan et autres c. Turquie* the applicants, Ahmet Arslan and 126 others, were dressed in religious clothing, consisting of as

[272] Aktas c. France, p. 2.
[273] Gamaleddyn c.. France, p. 9-10, Bayrak c. France, p. 8, Aktas c. France, p. 9.

described above in chapter 1.3.1 a turban, salvar (a type of trousers) a tunic and a staff worn all together, while making a tour of Ankara[274] and later when appearing in court charged with terrorist activities[275]. The applicants were condemned for wearing religious clothing and the period of the crime was stated to be from the date of the tour of Ankara until two days after the Court hearing where they refused to remove their religious clothing[276]. The government argued that the applicants had mainly been punished for disrespect of the court but the ECtHR considered that the main event that the applicants were being punished for was the wearing of religious clothing in public places open to all[277]. ECtHR found this to be the case since the decision was founded on laws prohibiting the wearing of religious clothing in public places open to all and not on disrespect for the court[278] and since the main period that they were being punished for was before the audience at the court[279]. In addition to this, three of the applicants removed their turbans in court at the demand of the judges, and this had had no impact on their convictions[280].

The ECtHR considered that because of the importance of secularism for the democratic system in Turkey the protection of secularism could be considered to fall under the legitimate aim of protection of the rights and freedoms of others[281]. However, unlike in the student/pupils/public servant cases, it did not find that the measures were necessary in a democratic society to achieve this aim. The ECtHR stated that since the applicants were not public servants none of the case law concerning public servants was applicable to this case.[282] It also underlined that the case mainly concerned the wearing of religious dress in public

[274] Ahmet Arslan et autres c. Turquie, para 7.
[275] Ahmet Arslan et autres c. Turquie, para 8.
[276] Ahmet Arslan et autres c. Turquie, para 11.
[277] « Public places open to all such as streets and public squares » is the expression that is used in Ahmet Arslan et autres c. Turquie (« lieux publics ouverts à tous comes les voies ou places publique», para 49). In this essay the expression « public places open to all » shall be understood to mean places such as streets and public squares and not for instance a court room, which will instead be referred to as a "public institution".
[278] Ahmet Arslan et autres c. Turquie, para 32.
[279] Ahmet Arslan et autres c. Turquie, para 33.
[280] Ibid.
[281] Ahmet Arslan et autres c. Turquie, para 43.
[282] Ahmet Arslan et autres c. Turquie, para 48.

places open to all, and not in public institutions where the respect of religious neutrality could take prominence over the freedom to manifest one's religion[283]. When it came to the margin of appreciation the ECtHR here underlined that this meant that the important role of the national authorities in deciding about bans of religious clothing in public educational institutions was not applicable either[284], i.e., that in the case of private citizens in public places open to all the margin of appreciation for the state was not wide.

The ECtHR then went on to do the proportionality assessment stating that the applicants in the beginning had only gathered in front of a mosque for a religious ceremony[285] and that there was no evidence of any proselytism or pressure from the applicants towards the passers-by[286]. The clothing did not represent any religious power known by the state and the effect of the applicants' activities was very limited[287]. The ECtHR concluded after this assessment that the measure limiting the applicants' freedom of religion was not necessary in a democratic society.[288]

If the ECtHR in *Ahmet Arslan et autres c. Turquie* avoided assessing the question of the religious dress in the courtroom, leaving this issue open, it instead had to assess it in *Hamidović v. Bosnia and Herzegovina*.

In *Hamidović v. Bosnia and Herzegovina* the applicant had been called as a witness in front of the state court and refused to remove his skullcap worn for religious reasons when he was asked to do so by the president of the trial chamber[289]. He was sentenced to a fine.[290] The ECtHR here accepted the protection of the right of others to secularism as a legitimate aim, with reference to *Leyla Şahin v. Turkey* and *Ahmet Arslan et autres c. Turquie*.[291] Of interest here is that nothing is mentioned by the

[283] Ahmet Arlsan et autres c. Turquie, para 49.
[284] Ahmet Arslan et autres c. Turquie, para 49.
[285] Ahmet Arslan et autres c. Turquie, para 50.
[286] Ahmet Arslan et autres c. Turquie, para 51.
[287] Ibid.
[288] Ahmet Arslan et autres c. Turquie, para 52.
[289] Hamidović v. Bosnia and Herzegovina, para 7.
[290] Ibid.
[291] Hamidović v. Bosnia and Herzegovina, para 35.

ECtHR in this case about secularism being a constitutional principle in Bosnia and Herzegovina. The ECtHR did not really assess the argument from Bosnia and Herzegovina that even though it is not expressively stated in the constitution, Bosnia and Herzegovina is a secular state according to the Freedom of Religion Act of Bosnia and Herzegovina and the case law of its Constitutional Court[292].

The ECtHR reiterated the wide margin of appreciation afforded to states when it comes to the relationship between the state and religions but also reiterated that this margin of appreciation goes hand in hand with European Supervision and that the ECtHR needs to assess if the measures were justified in principle and proportionate.[293]

The ECtHR then did a proportionality assessment. As in *Ahmet Arslan et autres c. Turquie* it underlined that this case must be distinguished from the wearing of religious symbols by public officials, since private citizens are not, as public officials, under a duty of discretion, neutrality and impartiality[294]. It underlined that the freedom to manifest one's religion is a fundamental right and very important to the religious person[295]. It also underlined that the applicant had no choice but to appear as a witness[296] and did not in any other way show disrespect for the court[297]. The ECtHR considered that the refusal to remove the skullcap was based on a sincere religious belief with no agenda on the part of the applicant to cause disturbance or "incite others to reject secularity or democracy".[298] The ECtHR concluded considering the above that the authorities had overstepped their wide margin of appreciation.[299]

To summarize, also in the case of private citizens other than students and pupils the ECtHR has accepted the protection of the right of others of secularism as a legitimate aim for measures limiting the right to manifest religion through religious dress. However, it has in these cases not

[292] Hamidović v. Bosnia and Herzegovina, para 13.
[293] Hamidović v. Bosnia and Herzegovina, para 36 and para 38.
[294] Hamidović v. Bosnia and Herzegovina, para 40.
[295] Hamidović v. Bosnia and Herzegovina, para 41.
[296] Hamidović v. Bosnia and Herzegovina, para 37.
[297] Hamidović v. Bosnia and Herzegovina, para 42.
[298] Hamidović v. Bosnia and Herzegovina, para 41.
[299] Hamidović v. Bosnia and Herzegovina, para 43.

considered the measures in question to be proportionate and therefore necessary in a democratic society. In the case of private citizens in public places open for all, in the form of streets and public squares, i.e. *Ahmet Arslan et autres c. Turquie*, it has even foregone the wide margin of appreciation afforded to the state in all the other cases concerning restriction of religious dress with the legitimate aim of the protection of secularism. However, in the case of a private citizen in the role of a witness in a court room (*Hamidović v. Bosnia and Herzegovina*) the wide margin of appreciation was kept.

As for the proportionality assessment, in both the cases concerning private citizens other than pupils and students, emphasis was put on how the wearing of religious dress of the applicants actually impacted the right of others of secularism, i.e. the fact that there was no evidence of any proselytism or incitement to reject secularism on the part of any of the applicants.

3.1.4 Conclusion

The case law of the ECtHR in the area of the wearing of religious dress being restricted with reference to the legitimate aim of protecting the right of others of secularism is very extensive. The protection of secularism has in all cases been considered a legitimate aim and in all cases except two the measures taken have been considered legitimate to this aim.

In common for all cases regarding public servants, students and pupils is the weight put on the fact that secularism (or laïcité or denominational neutrality) is a constitutional principle in the respondent states Turkey, France and Switzerland.

In the public servant cases focus was in *Dahlab v. Switzerland*, concerning a pre-school teacher, on the "tender age" of the pupils and the possible proselytising effect that the wearing of the Islamic headscarf could have on them. In the two later cases *Kurtulmuş v. Turkey* and *Ebrahimian v. France* focus was more on the public servants' duty to represent the secularism and the neutrality of the state. In *Ebrahimian v. France* this was

also expressed as the right of the patients not to doubt the impartiality of their treatment.

In the student and pupils cases there has been two main interesting developments. One is that the argument that pressure could be put on others through the wearing of the Islamic headscarf, which was developed in the cases concerning Turkey with reference to the situation in Turkey (Islam as a majority religion and groups trying to exert religious pressure) was also used in later cases concerning France, without any description of the actual situation in France. The other is that, with reference to *Kervanci* and *Dogru*, where the prohibition of the Islamic headscarf in schools in France was considered justified, several admissibility decisions accepted also restrictions on less ostentatious dress such as hats, mini-turbans and bandanas.

In the cases concerning private citizens other than students and pupils the picture is different. In Ahmet *Arslan et autres c. Turquie*, which concerned private citizens in streets and public squares, weight was put in the proportionality assessment on that there was no evidence of proselytism or attempts to pressure others and that the effect of the applicants' activities was limited. In *Hamidović v. Bosnia and Herzegovina*, which concerned a private citizen in a courtroom, weight was put on the fact that the applicant did not have a disrespectful attitude and that there was no reason to believe that the applicant wanted to incite others to reject secularism or democracy.

As regards *Hamidović v. Bosnia and Herzegovina* it is also of interest that the factor that is so important in the cases concerning Turkey and France, of secularism being a constitutional principle, is not discussed in *Hamidović v. Bosnia and Herzegovina*. As explained in subchapter 3.1. Bosnia and Herzegovina is a state where the principle of secularism is not expressively included in the Constitution.

As regards the margin of appreciation afforded to states in cases concerning public servants and students and pupils it has widened from not at all being mentioned in *Karaduman v. Turkey* and *Bulut c.*

Turquie[300], to "a certain margin of appreciation" in *Dahlab v. Switzerland* and to a wide margin of appreciation in all the following cases[301] starting with *Leyla Şahin v. Turkey* from 2005.

This trend of a widening margin of appreciation is less clear when it concerns private citizens other than students and pupils, with a difference depending on the place where they manifest their religion through religious dress. In *Ahmet Arslan et autres c. Turquie*, which concerned private citizens in streets and public squares, the ECtHR clearly stated that the important role of the national authorities, i.e. the wide margin of appreciation, did not apply. In *Hamidović v. Bosnia and Herzegovina*, which concerned a private citizen as a witness in a court room, i.e. in a public institution, however, it reiterated the wide margin of appreciation given to states in questions concerning the relationship between the state and religions.

3.2 Gender equality

Gender equality was accepted by the ECtHR as a right to be protected under the legitimate aim protection of rights of others in one admissibility decision, *Dahlab v. Switzerland*, and in one Grand Chamber judgment, *Leyla Şahin v. Turkey*. These cases as well as the Grand Chamber judgment, S.A.S, and the two following judgments *Dakir v. Belgium* and *Belcacemi et Oussar c. Belgique*, where gender equality was rejected as a right to be protected, will be discussed in this subchapter. For the cases where the protection of the right of others of gender equality was accepted as a legitimate aim, the proportionality assessment and the margin of appreciation is not treated in detail in this chapter, since it is in essence the same as for the legitimate aim of secularism, these two rights of others being very much connected to each other in the ECtHR's reasoning in those cases.

[300] As mentioned above this might however be due to the fact that the Commission did not consider itself doing a proportionality assessment in this case.
[301] Except Köse, which does not treat Article 9 directly, but in the treatment of Article 9 refers to the treatment of Article 2 protocol 1.

In *Dahlab v. Switzerland*, concerning a primary school teacher who was prohibited to wear her Islamic headscarf at work, the Court agreed with the Federal Court in Switzerland that the wearing of the headscarf seemed "difficult to reconcile […] with the message of […] equality and non-discrimination"[302], thus finding, also with reference to preserving "religious harmony"[303] and the possibility of a proletysing effect due to the "tender age"[304] of the therefore easily influenced children, that the measure was justified in principle and proportionate to the legitimate aim of the protection of the rights and freedoms of others[305]. In *Dahlab v. Switzerland* it appears it was the right of the children not to be influenced by a message which was difficult to reconcile with gender equality that was considered to be protected by the limitation of the applicants' freedom of religion.

In the Grand Chamber judgment *Leyla Şahin v. Turkey*, the circumstances of which have been presented in subchapter 3.1.2, the ECtHR underlined regarding gender equality that equality between men and women was emphasised in the Turkish constitution, and was one of the key principles underlying the ECHR and connected it to the legitimate aim of protection of secularism, discussed in the previous subchapter, as a right of others in violation of which others could be subjected to pressure by someone wearing the headscarf[306], stating the following:

> "In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn."[307]

[302] Dahlab v Switzerland, p. 13.
[303] Ibid.
[304] Dahlab v Switzerland, p. 13.
[305] Ibid.
[306] Leyla Şahin v. Turkey, paras 115 and 116.
[307] Leyla Şahin v. Turkey, para 116.

In *S.A.S v France* the ECtHR (Grand Chamber) for the first time rejected the protection of gender equality as a legitimate aim for limiting freedom of religion by banning the use of religious dress. The *S.A.S. v France* judgment concerned the French law that prohibits the complete or partial concealment of the face in public places.[308] The applicant complained that the law was a violation of her freedom of religion since it made it impossible for her to wear the niqab and burka in public which she did in accordance with her religious convictions. [309] As regards the legitimate aim protection of rights of others the Government referred to "respect for the minimum set of values of an open and democratic society"[310] which it stated included the values of gender equality, human dignity and living together[311].

As regards gender equality the ECtHR was not convinced by the Government's argument, and stated that "a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms"[312]. As regards the impact on others, the argument that the wearing of the full-face veil would "shock" the majority of the French population because it infringed the principle of gender equality was answered by the ECtHR in stating that the wearing of the full-face veil was an expression of cultural identity that was a part of the pluralism in a democracy and there was no evidence that the women wearing the full-face veil sought to express contempt for or offend others.[313] This is a significant step away from *Dahlab v. Switzerland* and *Leyla Şahin v. Turkey* where the ECtHR simply established the wearing of the Islamic headscarf as "difficult to reconcile […] with the message of […] equality and non-

[308] S.A.S v France, para 3.
[309] S.A.S v France, paras 3 and 11.
[310] S.A.S v France, para 82.
[311] Ibid.
[312] S.A.S v France, para 119.
[313] S.A.S. v France, paras 119-120.

discrimination"[314] and "contrary to […] values" of equality of men and women[315].

In *Dakir v. Belgium* and *Belcacemi et Oussar c. Belgique*, the two niqab cases following the *S.A.S v. France* case and concerning the Belgian law prohibiting the partial or full concealment of the face, the ECtHR only referred back to *S.A.S v. France* in stating that also here the only right that was accepted under the legitimate aim of the protection of rights of others was that of "living together"[316], i.e. gender equality was dismissed here as well, and no new reasoning was introduced.

To summarize the ECtHR has accepted the legitimate aim of protection of the right of gender equality in the two cases *Dahlab v. Switzerland* and *Leyla Şahin v. Turkey*, which concerned a public servant and a student at a university. In both cases this aspect was tied to the right of secularism and concerned the way in which others in connection with the possible proselytising effect of the wearing of the headscarf could be pressured by the applicants wearing the headscarf to accept the practise of wearing the headscarf which the ECtHR then considered "difficult to reconcile […] with the message of […] equality and non-discrimination"[317].

The ECtHR has however later rejected gender equality as a legitimate aim concerning the prohibition of wearing in streets and public squares of the burka and the niqab by private citizens in *S.A.S v. France* and the two following cases *Dakir v. Belgium* and *Belcacemi et Oussar c. Belgique*, underlining that gender equality cannot be used to ban a practise that is defended by women and that as regards the effect on others there was no evidence that the applicants sought to offend.

[314] Dahlab v Switzerland, p. 13.
[315] Leyla Şahin v. Turkey, para 116.
[316] Dakir v Belgium, para 51 and Belcacemi et Oussar c. Belgique, para 51.
[317] Dahlab v Switzerland, p. 13.

3.3 "Vivre ensemble"

"Vivre ensemble", or "living together" was introduced as a legitimate aim with the Grand Chamber judgment in the case *S.A.S vs France* in 2014. It has in that case, and two following ones[318], been accepted by the Court as falling under the legitimate aim of the protection of the rights and freedoms of others in cases with persons wearing religious dress in form of the burka as well as the niqab in public places open to all.

As opposed to the cases discussed in subchapter 3.1, where the protection of secularism was considered a legitimate aim, and as opposed to most of the ECtHR's case law, as discussed in subchapter 2.3.2., in *S.A.S v France* the legitimate aim was not accepted until after an extensive discussion. The ECtHR reiterated that "the enumeration of the exceptions to the individual's freedom to manifest his or her religion or beliefs, as listed in Article 9 § 2, is exhaustive and that their definition is restrictive"[319].

As mentioned above the ECtHR dismissed the respondent state's aim of protecting the right of gender equality as a legitimate aim for this limitation of freedom of religion. It also dismissed the aim of protecting "human dignity"[320]. When it came to the third stated aim of the respondent State, that of protecting the right of "living together" or "vivre ensemble", the ECtHR finally agreed with the respondent state that the face was important in social interactions, that there existed a right of others "to live in a space of socialisation which makes living together easier" and that concealment of the face could breach this right.[321]

As for the margin of appreciation and the proportionality assessment the ECtHR stated that since the notion of "living together" is very flexible it had to do a careful examination of whether the measures were necessary in a democratic society.[322] This implied a narrower margin of appreciation for the State. However the ECtHR contradicted this when it also reiterated the

[318] Dakir v Belgium, Belcacemi et Oussar c. Belgique.
[319] S.A.S. v. France, para 113.
[320] S.A.S v France para 120.
[321] S.A.S v France para 121-122.
[322] S.A.S v. France, para 122.

importance that should be afforded the national decision maker in issues regarding the relationship between the state and religions[323] and that the states have a wide margin of appreciation under Article 9 in deciding whether a limitation of a the right to manifest ones belief is necessary[324], and a wide margin of appreciation since there is no European consensus regarding the question of the wearing of the full-face veil in public[325].

In its proportionality assessment the ECtHR underlined that the measure could seem excessive for the protection of the rights of others since only a small number of women wear the full-face veil in France.[326] As for the negative effects for the women affected by the ban it brought up that they could be isolated as a result of the ban and perceive it as a threat to their identity.[327] It also brought up the existence of Islamophobic remarks during the drafting of the legislation[328] and the fact that the law and debates around its drafting "may have upset part of the Muslim community"[329], even those not advocating the full-face veil[330].

On the other side it brought up that although the ban was broad in that it concerned all places open to the public (except places of religious worship), it was not broad since it did not ban all religious clothing, just the religious clothing concealing the face. The ECtHR also argued that even though the ban mainly affected Muslim women wishing to wear the full-face veil, it was of significance that it was not the religious connotation of the full-face veil that underlay the ban, but the fact that it concealed the face.[331]

As for the sanctions, the ECtHR brought up that it must be traumatising for the women who wear the full face veil for religious reasons to be prosecuted for this, but that it was of importance that it was the lightest

[323] S.A.S. v. France, para 129.
[324] Ibid.
[325] S.A.S. v France, paras 155 and 156.
[326] S.A.S. v. France, para 145.
[327] S.A.S. v. France, para 146.
[328] S.A.S. v. France, para 149.
[329] S.A.S. v. France, para 148.
[330] Ibid.
[331] S.A.S. v. France, para 151.

sanctions that were imposed.[332] Finally it stated that even though the ban in some aspects restricted the pluralism in society it was done with a legitimate aim of protecting the "living together", a principle of interaction that France considered essential for the expression of tolerance and broadmindedness which are required for a democratic society, and that this was a choice of society[333], underlining again through this the margin of appreciation.

In the following cases concerning the same kind of ban in Belgium, *Dakir v. Belgium* and *Belcacemi et Oussar c. Belgique*, the legitimate aim of protection of the right of "living together" was simply accepted, with reference to *S.A.S v. France*[334], with no mentioning of it being a flexible concept that needed a careful assessment of its necessity in a democratic society.

The ECtHR did not discuss if there could be a difference between the burka (which also covers the eyes) and the niqab (which does not cover the eyes) neither in S.A.S. France, nor in the following cases, *Dakir v. Belgium* and *Belcacemi et Oussar c. Belgique*, which concerned the Belgian law prohibiting the partial or full concealment of the face. In the latter cases the applicants were only wearing the niqab[335] and the ECtHR referred to and reached the same conclusion as in *S.A.S v. France* which shows that no such distinction was in fact even considered.

To conclude, as regards the legitimate aim of the protection of the right of others of "living together", the ECtHR accepted this as a legitimate aim, but underlined that due to the flexibility of this right of others a thorough assessment of whether the measures were "necessary in a democratic society" had to be made, implying a narrower margin of appreciation for the State. However, the ECtHR at the same time claimed that a wide margin of appreciation applied since it was a question of the relationship between the state and religions and since there was no European consensus regarding the issue. In the proportionality assessment in support of its conclusion of not finding a violation, the ECtHR again underlined the

[332] S.A.S. v. France, para 152.
[333] S.A.S. v. France, para 153.
[334] Dakir v. Belgium, para 51, Belcacemi et Oussar c. Belgique, para 49.
[335] Dakir v. Belgium, para 7, Belcacemi et Oussar c. Belgique, para 6.

margin of appreciation of the state as a factor, together with only two other factors: that the ban was not targeting religious dress in general, but only clothing covering the face, and that the sanctions were the lightest sanctions. In the two following similar cases, *Dakir v. Belgium* and *Belcacemi et Oussar c. Belgique*, the legitimate aim of the protection of "living together" was simply accepted without any mentioning of the need to do a careful assessment of the necessity.

3.4 Conclusion

In this chapter it has been established that the rights that have been referred to, and accepted by the ECtHR, under the legitimate aim protection of rights and freedoms of others are secularism, gender equality and the right of living together ("vivre ensemble"). However, out of these, gender equality has subsequently been rejected by the ECtHR.

The margin of appreciation to be given to the state has been considered to be wide in cases of protection of secularism concerning public servants, students and pupils and other private citizens who are inside of public institutions. It has not been considered to be wide in cases concerning private citizens in public places open to all. In the proportionality assessment the measures of restricting religious dress have been considered proportionate to the aim of protecting secularism in all the cases of public servants and pupils and students. In the two cases concerning private citizens other than pupils and students the measures have not been considered proportionate.

As regards the aim of the protection of the right of living together the margin finally given to the state was wide, despite introductory remarks of the need of a strict scrutiny from the ECtHR due to the flexibility of the right of others of "living together", and the measures were considered proportionate. The cases outlined in this chapter will now be critically assessed in the following chapter.

4 Critical analysis of the ECtHR case law on religious dress and rights of others

In this chapter the case law of the ECtHR that has been outlined in the previous chapter will be deconstructed and subjected to a critical analysis, using doctrine concerning the subject as well as other relevant judgments from the ECtHR including concurring and dissenting opinions from ECtHR judges. The rights of others that have been accepted under the legitimate aim protection of the rights and freedoms for others, the circumstances under which they have been accepted and how the ECtHR has weighed these rights of others against the right to manifest one's religion through religious dress will be looked at and analysed separately, but also in connection with each other.

As can be seen in the previous chapter the by far most common right of others that has been referred to in the cases of this study is secularism. This is not surprising since, as mentioned in chapter 2, it has in fact been established that secularism is itself a belief that is subject to the protection of Article 9. As mentioned above the protection of the right of others of secularism has in all cases where it was invoked been accepted as a legitimate aim. The majority of these cases concern Turkey and France where secularism is a constitutional principle. One case concerns Switzerland in a preschool context where denominational neutrality in schools is a constitutional principle. One case, however, concerns Bosnia and Herzegovina, where secularism is not expressively stated in the Constitution as a constitutional principle.

4.1 Secularism – public servants and students and pupils

The measure of restricting religious dress has in all cases concerning public servants (including teachers) and students and pupils in state schools and universities been considered proportionate to reach the legitimate aim of the protection of the right of others of secularism.

This is linked to the fact that the margin of appreciation given to the states has, since *Leyla Şahin v. Turkey*, been wide in the area of regulating religious dress. This follows the statements in subchapter 2.2.2. that the margin of appreciation is wide when[336] "there is no consensus within the member states […]"[337], which is something the ECtHR consequently refers to in these cases, and "if the state is required to strike a balance between competing interests or Convention rights"[338]. However it cannot be said to be consistent with the statement that the margin of appreciation is limited where "a particularly important facet of an individual's identity is at stake"[339], since religion is as stated by the ECtHR in the general principles in almost all of these cases "one of the most vital elements that go to make up the identity of believers"[340] It is also inconsistent with Arai-Takahashi's findings up to 2001, as stated in subchapter 2.2.2., of freedom of religion generally being an area with a narrow margin of appreciation.

Linked to the wide margin of appreciation for the states in regulating the wearing of religious dress is also a trend of a lacking proportionality assessment where no actual balancing is taking place. [341] This can be seen through a move from a focus on how the wearing of the religious dress concretely affects others who have a right to secularism to less focus on how others are concretely affected by the wearing of religious

[336] Harris, O'Boyle, Bates, Buckley, p. 16.
[337] Evans v. the United Kingdom, para 77.
[338] Ibid.
[339] Evans v. the United Kingdom, para 77.
[340] See eg Leyla Şahin v. Turkey, para 104.
[341] Bleiberg, Benjamin, "Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey", *91 Cornell L. Rev. 1*(2005), pp.129-169, p. 159.

dress. The actual effect on the "others" has become less and less important and the acceptance of limiting the right for public servants and students and pupils in state schools and universities to manifest their religion through religious dress with the justification of the protection of the right of secularism has become almost automatic. As Ian Leigh and Rex Ahdar state, the ECtHR in its jurisprudence on religious dress lacks demonstration of how the state's responsibility to protect the rights and freedoms of others permits it to limit the religious manifestation of an individual.[342]

In the public servant cases the fact that the actual concrete effect on others has become less important can be seen from a move from emphasis on the possible proselytising effect, in *Dahlab*, to more of a focus on secularism as a constitutional principle and the duty of public servants to be loyal to constitutional principles, in *Kurtulmuş v. Turkey* and *Ebrahimian v. France*. In *Ebrahimian v. France*, even though the impact on others was considered in that the religious dress could make the patients doubt the impartiality of their treatment, it can still be argued as Eva Brems does, that there was no development of the concrete way in which the wearing of religious dress of the applicant had affected the rights of others, only unspecified "difficulties"[343] being mentioned, which even the ECtHR stated "would have been worth expanding on"[344]. [345] The ECtHR also stated in the judgment that there had been no proselytism, pressure or provocation from the applicant towards colleagues or patients. [346]

The trend of the actual effect on others becoming less important is even clearer in the student and pupils cases and can be seen in these cases through two main factors. One is that the ECtHR has gone from bringing up the situation in the state in question (Turkey) as important to

[342] Ian Leigh and Rex Ahdar, "Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away", *The Modern Law Review*, Vol. 75, No. 6 (2012), pp. 1064-1098, p. 1078.
[343] Ebrahimian v. France, paras 8 and 69.
[344] Ebrahimian v. France, para 69.
[345] Brems, Eva, "Ebrahimian v France: headscarf ban upheld for entire public sector", *Strasbourg Observers* (27 November 2015). https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/, accessed 20 May 2019.
[346] Ebrahimian v. France, para 62.

assess the "pressure" that could be put on others by the wearing of the religious dress, to, when the case concerned another state (France), not at all assessing the situation in that state.

As regards this, already the argument of the special situation in Turkey as a reason for restricting the wearing of religious dress has been under severe critique. This critique has concerned the facts that the ECtHR presented no evidence of or examples of pressure being exerted by fundamentalist groups in Turkey[347] and that, even if such pressure was being exerted, there was no evidence suggesting that the applicant herself held such fundamentalist views or was trying to exert any pressure[348]. Judge Tulkens in his dissenting opinion in *Leyla Şahin v. Turkey* underlined the importance of distinguishing between mere headscarf wearers and extremists trying to impose the wearing of the headscarf. [349]

As mentioned above, the ECtHR in the cases of ban of religious dress in schools in France[350] did not even discuss a possible situation in France that could mean that the wearing of the headscarf could constitute pressure, but only departed from the assumption that the Islamic headscarf in itself could constitute such a pressure, with reference to *Köse v. Turkey*. This is contrary to the conclusion that Antje Pedain draws from *Leyla Şahin v. Turkey* in her article from 2004, on the context-dependence of the scope of freedom of religion, i.e. that"[t]he political and social context in Turkey—in particular, the feared dominance of the "majority faith", and within it the resurgence of influence of its most conservative members— may justify restrictions on the manifestations of this faith which may well be unjustifiable in other countries, where only a minority adheres

[347] See e.g. Leyla Şahin v. Turkey, dissenting opinion of Judge Tulkens, para 10, Tom Lewis, "What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation", *The International and Comparative Law Quarterly*, Vol. 56, No. 2 (2007), pp. 395-414, p. 409, Jennifer M Westerfield, "Behind the Veil: An American Legal Perspective on the European Headscarf Debate" *The American Journal of Comparative Law*, Vol. 54, No. 3 (2006), pp. 637-678, pp. 645-646.
[348] Leyla Şahin v. Turkey, dissenting opinion of Judge Tulkens, paras 8 and 10, Lewis, p. 408, Bleiberg, pp. 159-160.
[349] Leyla Şahin v. Turkey, dissenting opinion of Judge Tulkens, para 10.
[350] Kervanci c. France, Dogru v. France, Aktas c. France, Bayrak c. France, Gamaleddyn c. France bonnet, Ghazal c. France, Jasvir Singh c. France, Ranjit Singh c. France.

to it."[351] The cases concerning France that are included in this study on the ban of religious dress in schools show that the ECtHR does not in fact at all consider such a context-dependence.

Another strong sign of this departure from how the wearing of religious dress actually affects the right of secularism of others is the admissibility decisions discussed in subchapter 3.1.2.1 where the non-ostentatiousness of the religious dress is brought up as an argument by the applicants. In these cases the applicants are ultimately forbidden from wearing hats and bandanas, which are very difficult to argue as being signs of religion, nevertheless "ostentatious" such signs that could constitute pressure on others. Here it would have been fitting to apply the suitability part of the proportionality assessment as described in subchapter 2.2.2. It would have been appropriate with an assessment of whether the right of others of secularism is effectively protected by forbidding people to wear hats and bandanas. However, such an assessment is not made since the ECtHR, in accordance with what has been established for cases concerning the relationship between the state and religion, leaves the assessment of this completely up to the state's margin of appreciation.

It is also questionable, in the case of hats and bandanas, if one can really argue, as the ECtHR does in these cases that the decisions not to allow these head coverings are based on "the requirements of protecting the rights and freedoms of others"[352] "and not on any objections to the applicant's religious beliefs"[353]. These cases are, however, just admissibility decisions, and it would be interesting to see this issue tried and decided in a Chamber judgment, although the chance of this happening is unlikely since these inadmissibility decisions have been considered "to indicate the Court's unwillingness to engage further in debate about the prohibition of religious items in French schools"[354].

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[351] Antje Pedain, "Do Headscarfs Bite?" *The Cambridge Law Journal*, Vol. 63, No. 3 (2004), pp. 537-540, pp. 539-540.
[352] Dogru v. France, para 76, referred to in Bayrak c. France, p. 8.
[353] Ibid.
[354] James Welch and Anna Fairclough (eds.), 'Case Comment, Aktas v France (43563/08): Wearing of Religious Items in French Schools', *European Human Rights Law Review*, vol. 14 (2009), pp. 814-817, p. 816.

This willingness to justify restriction of religious dress within schools and universities and for public servants is seen by Ingvill Thorson Plesner as the ECtHR accepting a "fundamentalist secularism"[355], since the ECtHR makes no proper individual assessments of the cases but accepts a general ban[356]. Fundamentalist secularism, which has also been called "militant secularism"[357] or even "hostile secularism"[358] means that religion is a private issue that should be kept entirely within the private sphere such as homes and places of worship[359]. According to Plesner this kind of secularism may undermine human rights and conflict with the dual purpose of secularism that she expresses as "equal freedom and rights of all inhabitants to live according to their conceptions of "the good", and peaceful coexistence in a plural society".[360] Vibeke Blaker Strand argues that "strict secularism treats all religious manifestations in an equal manner".[361] But there is also the argument against this, expressed for instance by Judge Power in his concurring opinion in Lautsi v. Italy, that secularism is just a world view among others and that its preference over other world views is not neutral.[362] Indeed, secularism has itself, as stated in chapter 2.1, been considered a belief protected by Article 9.

This "fundamentalist secularism" is however not completely applied by the ECtHR in the same way in cases that do not concern students, pupils and public servants. This will be seen in the following chapter which discusses the two cases, *Ahmet Arslan et autres c. Turquie* and *Hamidović v. Bosnia and Herzegovina*, that concern private citizens, who are not students and pupils in schools and universities.

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[355] Ingalill Thorson Plesner. (2005) *'The European Court on Human Rights Between Fundamentalist and Liberal Secularism',* paper for the seminar on The Islamic head scarf Controversy and the Future of Freedom of Religion and Belief, Strasbourg, 28–30 July 2005. http://www.strasbourgconference.org/papers/index.php, accessed 20th of May 2019, pp. 3-4 and 7.
[356] Ibid.
[357] Pedain, p. 540.
[358] Leigh and Andar, p. 1070.
[359] Thorson Plesner, p. 3.
[360] Thorson Plesner, pp. 3-4.
[361] Blaker Strand, p. 177.
[362] Lautsi and other v. Italy, concurring opinion of Judge Power, p. 44-45.

4.2 Secularism – private citizens other than students and pupils

The fact that the "fundamentalist secularism" is not applied by the ECtHR in the same way in cases that do not concern students, pupils and public servants is especially clear in the case *Ahmet Arslan et autres c. Turquie* which concerned private citizens in public places open to all. In *Ahmet Arslan et autres c. Turquie* secularism was accepted as a legitimate aim, but it was stated that under these circumstances the state did not enjoy the wide margin of appreciation that it enjoys in cases concerning public servants or pupils and students. In addition the effect that the wearing of religious dress could have on the right of secularism of the surrounding others was actually properly assessed in the proportionality assessment of this case, taking into account the lack of proselytism and finally concluding that the measure of banning the religious dress was not justified.

As opposed to in *Ahmet Arslan et autres c. Turquie*, the ECtHR did not in the case *Hamidović v. Bosnia and Herzegovina* let go of the wide margin of appreciation. The difference between these cases is the place, which in *Hamidović v. Bosnia and Herzegovina* was a public institution, a courtroom. ECtHR here reiterated the wide margin of appreciation given to states in questions concerning the relationship between the state and religions, showing that inside of buildings that are public institutions the wide margin of appreciation is maintained, regardless of who it concerns.

However, as opposed to what has been the case for pupils and students, a proper proportionality assessment was still carried out in this case, taking into account how others could be affected, putting emphasis on that there was no attempt of the applicant to incite others to reject secularism, and that the applicant, as a witness, had no choice but to appear at Court. The ECtHR then concluded that the state had overstepped its wide margin of appreciation in this case. The dissenting Judge Ranzoni probably saw this inconsistency when he considered the state should not have made

its own necessity assessment to substitute that of the state if the state had not "clearly overstepped its margin of appreciation"[363].

Since in *Hamidović v. Bosnia and Herzegovina*, as opposed to what has been the trend in the student and pupils-cases, a proper consideration of how the rights of others were actually affected was made, and the ECtHR found the measure of restricting dress not proportionate, the question here is in what way private citizens in the form of students and pupils differ from a private citizen as a witness in a court. As Jeroen Temperman states pupils do in no way represent the State, they are in their private capacity making use of a (compulsory) public service.[364] This is exactly the same as is the case in *Hamidović v. Bosnia and Herzegovina*, a private citizen making use of a (compulsory) public service. Still the automatism and lacking proportionality assessment, i.e. "fundamentalist secularism" that has developed in the student and pupil cases was not visible in *Hamidović v. Bosnia and Herzegovina*.

4.3 Hamidović v. Bosnia and Herzegovina through the lens of Lachiri c. Belgique

As regards *Hamidović v. Bosnia and Herzegovina* the question is in what places and for which people the protection of secularism can be considered proportionate as a legitimate aim to prohibit the wearing of religious dress.

In *Hamidović v. Bosnia and Herzegovina*, which concerns a private citizen in a public institution (court room), in the role of a witness, the situation is somewhat unclear. A wide margin of appreciation is afforded, but a thorough proportionality assessment is still carried out, taking into account how the rights of others are actually affected, finding the measures not proportionate to the aim. The question which arises is if all public institutions are to be considered places where the state will be given a wide

[363] Hamidović v. Bosnia and Herzegovina, dissenting opinion of Judge Ranzoni.
[364] Jeroen Temperman, "State Neutrality in Public School Education: An Analysis of the Interplay Between the Neutrality Principle, the Right to Adequate Education, Children's Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers" *Human Rights Quarterly*, Vol. 32, No. 4 (2010), pp. 865-897, p. 888.

margin of appreciation in regulating the wearing of religious dress, even if the persons concerned are not public servants and if then the right to manifest religion through religious dress still will be, as it is in *Hamidović v. Bosnia and Herzegovina*, more protected for private citizens in other public institutions than schools and universities, in that the actual impact on the right of others is in fact considered.

A case that had the potential to answer these questions was *Lachiri c. Belgique*, in which the applicant was a civil party in a trial in Belgium who was not allowed to enter the courtroom wearing the Islamic headscarf[365] and thus brought a case to the ECtHR of violation of her freedom of religion[366]. In *Lachiri c. Belgique*, however, the state did not invoke protection of the rights and freedoms of others as a legitimate aim, but only the legitimate aim of "protection of public order"[367], an aim for which the measures where not considered justified by the ECtHR[368].

However, the ECtHR give "hints" in this case as to what the outcome would have been if the legitimate aim invoked would instead have been the protection of the right of others of secularism. The most pertinent of those "hints" is that the ECtHR in *Lachiri*, as opposed to in *Hamidović v. Bosnia and Herzegovina*, established that even if the applicant is not a public servant representing the state[369], the courtroom is a public place, that even if it is open for all, cannot be considered the same as a street or a public square[370]. The ECtHR established that a courtroom is a public institution just as an institution for public education where the respect of religious neutrality can outweigh the right to manifest one's religion, and in connection with this referred to *Leyla Şahin v. Turkey* [371].

As Julie Ringelheim states this suggests if the state had justified the exclusion of the applicant from the courtroom with reference to the legitimate aim of the protection of secularism and neutrality it might have

[365] Lachiri c. Belgique, Requête no 3413/09, 18 septembre 2018, paras 8 and 11-12.
[366] Lachiri c. Belgique, para 1.
[367] Lachiri c. Belgique, para 38.
[368] Lachiri c. Belgique, para 47.
[369] Lachiri c. Belgique, para 44.
[370] Lachiri c. Belgique, para 45.
[371] Ibid.

been considered justified.[372] This could mean that the right of other private citizens than pupils and students to manifest their religion through religious dress inside of public institutions would be as limited as it is for students and pupils in the ECtHR case law, and in that case, that the opening that happened in *Hamidović v. Bosnia and Herzegovina* may again be closed.

Something that could possibly distinguish these two cases from each other is that in *Hamidović v. Bosnia and Herzegovina* the applicant was a witness who did not have a choice but to appear in front of the court, whereas Lachiri was a civil party. As regards the fact that Lachiri was a civil party, Eva Brems believes that, given the ECtHR's proportionality assessment in *Hamidović v. Bosnia and Herzegovina*, all members of the audience in the courtroom, even if they are not compelled to be there would be allowed to wear religious dress.[373]

4.4 The importance of secularism being a constitutional principle

It is also interesting in the case *Hamidović v. Bosnia and Herzegovina* that the weight put by the ECtHR on secularism being a constitutional principle in the respondent State, usually an important factor, is not present in this judgment, and as has been mentioned before, secularism is not expressively stated in the Constitution of Bosnia and Herzegovina. This is something that Judge De Gaetano put focus on in his concurring opinion where he stated the following:

> *"Only in exceptional cases, such as when the principle of secularism is embedded in the constitution of a country or where there is a long historical tradition of secularism, can secularism be said to fall, in principle, within the*

[372] Ringelheim, Julie "Lachiri v. Belgium: Headscarf ban imposed on a civil party in a courtroom in violation of religious freedom", *Strasbourg Observers* (23 November 2018). https://strasbourgobservers.com/2018/11/23/lachiri-v-belgium-headscarf-ban-imposed-on-a-civil-party-in-a-courtroom-in-violation-of-religious-freedom/, accessed 20 May 2019.
[373] Brems, Eva, "Skullcap in the Courtroom: A rare case of mandatory accommodation of Islamic religious practice", *Strasbourg Observers* (11 December 2017). https://strasbourgobservers.com/2017/12/11/skullcap-in-the-courtroom-a-rare-case-of-mandatory-accommodation-of-islamic-religious-practice/, accessed 20 May 2019.

ambit of the expression "for the protection of the rights and freedoms of others" for the purposes of the second paragraph of Article 9.[374]

However, the majority in *Hamidović v. Bosnia and Herzegovina* seems to consider that this is not necessary, not even taking into account Bosnia and Herzegovina's argument that it is a secular state even if this is not expressively stated in its Constitution. This could point towards an opening where the protection of secularism can be used as a legitimate aim also in states where secularism is not a constitutional principle, with a similar kind of automatism regarding restriction of religious dress being proportionate for public servants and in schools and universities.

The question if a general ban on wearing religious dress in schools and universities (for teachers as well as student and pupils) would have been treated differently by the ECtHR in states where secularism or denominational neutrality is not a constitutional principle divide scholars. James Welch and Anna Fairclough consider it likely that ECtHR will not treat general bans on religious dress in public schools and universities in a state like the United Kingdom, that does not have secularism as a constitutional principle, any different than those in Turkey, Switzerland and France[375]. Vibeke Blaker Strand, on the other hand, believes that, looking at the reasoning in *Lautsi v. Italy* and *Eweida and others v. the UK*, the scrutiny by the ECtHR will be stricter when the state allows manifestations of some religions but not others, than when it, as is the case in Turkey and France, does not allow manifestations of any religions.[376]

4.5 Gender equality

Connected to the legitimate aim of the protection of secularism in the cases *Dahlab v. Switzerland* and *Leyla Şahin v. Turkey* is the aim of the protection of gender equality, where the Islamic headscarf was considered in and by itself to be "difficult to reconcile […] with the message of […] equality and

[374] Hamidović v. Bosnia and Herzegovina, concurring opinion of Judge De Gaetano.
[375] Welch and Fairclough, pp. 816-817.
[376] Blaker Strand, p 176-177.

non-discrimination"[377] and contrary to the value of "equality before the law of men and women". This aim was also referred to in *S.A.S. v. France* where it was rejected. In *S.A.S. v France* the ECtHR established, contrary to *Dahlab v. Switzerland* and *Leyla Şahin v. Turkey*, that a practice that was defended by women could not be banned with reference to the gender equality rights of those women, since one cannot be protected from one's own rights and, as regards the rights of others, that the wearing of the full face veil was an expression of cultural identity and that there was no evidence that the women wearing it had any intention to offend those surrounding them.

The gender equality-aspect in *S.A.S v. France* has been greeted as being a departure from the highly criticized view in *Leyla Şahin v. Turkey* and *Dahlab v. Switzerland*[378] of Islamic religious dress on women somehow in itself being a violation of the principle of gender equality.

4.6 "Vivre ensemble"

Finally, the third legitimate aim used in the cases in this study, that of the protection of the right of "living together" or "vivre ensemble" in French, is highly questionable. In the general principles of nearly all the cases in this study, and also in *S.A.S v. France*, the ECtHR reiterates regarding the fair balance of different rights that:

> *"In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. This follows both from paragraph 2 of Article 9 and the State's positive obligation under Article*

[377] Dahlab v Switzerland, p.13.
[378] Saïla Ouald-Chaib and Lourdes Peroni, "S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil", *Strasbourg Observers* (3 July 2014). https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/, accessed 6 May 2019.

1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined therein."[379]

Article 1 of the ECHR referred to here only concerns the other rights in the ECHR, of which the right of "living together" is not one. In addition to this the ECtHR has stated that "the enumeration of the exceptions to the individual's freedom to manifest his or her religion or beliefs, as listed in Article 9 § 2, is exhaustive and that their definition is restrictive"[380]. Still, it here accepts the right of others of "living together" which is not included as a right in the ECtHR. This is not completely uncharacteristic of the ECtHR though; as mentioned in the subchapter 2.2.2., Peter Cumper describes the protection of the rights of others as the most "nebulous" legitimate aim and the ECtHR has accepted such things as the maintenance of a company of its corporate image[381] as a right to be protected, which of course is not included in the ECtHR either. However the right of "living together" is very vague, and the ECtHR itself i*n S.A.S. v. France* refers to its "flexibility"[382] and states that due to this flexibility a careful necessity assessment has to be carried out.

Here then is the largest inconsistency of this case. The ECtHR first states that due to the "flexibility" of the right of "living together" a careful necessity assessment has to be carried out by the ECtHR, i.e. the state has a narrow margin of appreciation, but then goes on to later give the state in this case a wide margin of appreciation due to the lack of consensus in Europe regarding this issue and the fact that it considers it an issue that regards the relationship between the state and religions.

Apart from the obvious contradiction of first giving the state a narrow margin of appreciation and then giving it a wide one, another question here is if this really can be said to be a case that regards the relationship between the state and religions, since it is also underlined in the judgment that "the ban is not expressly based on the religious connotation of the clothing in

[379] S.A.S. v France para 126, see also e.g. Leyla Şahin v. Turkey, para 106.
[380] S.A.S. v. France, para 113.
[381] Eweida and others v. the United Kingdom, para 94.
[382] S.A.S. v. France, para 122.

question but solely on the fact that it conceals the face"[383], which according to the ECtHR is what distinguishes it from *Ahmet Arslan et autres c. Turquie*. Judges Nussberger and Jäderblom argue in their partly dissenting opinon that it is not convincing to refer to the relationship between the state and religion in this case, since the ban in targeting clothing that conceals the face goes beyond the religious context.[384] As Saïla Ouald Chaib and Lourdes Peroni add, if it is not a question of the relationship between the state and religion why should the state follow the margin of appreciation afforded in those kind of cases?[385]

I would like to add here that if it is to be considered that the case does concern the relationship between the state and religions, it is surprising that ECtHR did not follow what it has established in Ahmet *Arslan et autres c. Turquie* as regards the margin of appreciation of the state in regulating religious dress, i.e. that in the case of private citizens in a public place open for all such as streets and public squares the margin of appreciation for the state is not wide. Indeed Saïla Ouald Chaib and Lourdes Peroni, when in 2010 discussing whether a burka and niqab ban would be considered justified by the ECtHR, believed that it would not be considered justified with reference to that in *Ahmet Arslan et autres c. Turquie* the ECtHR "left less room for restrictions in open public areas"[386].

By moving away from the legitimate aim of protection of secularism, in relation to which the measures of restricting religious dress could not be considered proportionate in *Ahmet Arslan et autres c. Turquie,* to the very wide "living together" as the right to be protected, the state could be considered justified in restricting religious dress also in public places open to all such as streets and public squares. Or, as Eva Brems expresses it: "Who needs the cover of neutrality, now that it is allowed for societies to openly choose to be intolerant for minority expressions that disturb the

[383] S.A.S. v. France, para 151.
[384] S.A.S. v. France, Joint partly dissenting opinion of Judges Nussberger and Jäderblom, pp. 64-65.
[385] Ouald Chaib and Peroni.
[386] Lourdes Peroni, Saïla Ouald-Chaib and Smet Stijn "Would a Niqab and Burqa ban pass the Strasbourg test?", *Strasbourg Observers* (4 May 2010). https://strasbourgobservers.com/2010/05/04/burqa-and-niqab-ban/#more-166, accessed 19 May 2019.

majority?"[387] In the following two similar cases *Dakir v. Belgium* and *Belcacemi et Oussar c. Belgique* the legitimate aim of protection of the right of "living together" was simply accepted, with reference to *S.A.S v. France*, with no mentioning of it being a flexible concept that needs a careful proportionality assessment and the ECtHR only brought up the reasons for a wide margin of appreciation, following the reasoning regarding this in *S.A.S. v. France*.

The so ready acceptance of the very vague concept of "living together" as a legitimate aim to protect, together with the wide margin of appreciation that was attributed to this aim, in contradiction to the ECtHR's initial announcement of the need for a thorough proportionality assessment, has been considered a very worrying development. Eva Brems considers it an open acceptance of states to ban minority expressions because they make the majority feel uncomfortable, leaving the very core of what human rights is about.[388] Stephanie Berry believes that "what little remained of the right to manifest religion may […] have been eroded"[389].

What is interesting to see, regarding this, is how the ECtHR will judge in future cases of private citizens and religious dress that is not the full face veil. *Ahmet Arslan et autres c. Turquie* as well as *Hamidović v. Bosnia and Herzegovina* are the two cases where some hope is given for the right to manifest one's religion through religious dress. In *Ahmet Arslan et autres c. Turquie* this is in relation to private citizens in public spaces open for all in the form of streets and public squares.

However, after *S.A.S v. France*, which concerned the same group and place, the question is if Eva Brems is right in that this right now only will be ensured for religious dress that the majority does not feel uncomfortable with. Speaking against this, and indicating that this is a very particular exception, is the fact that ECtHR does underline that the fact that the full

[387] Eva Brems, "S.A.S. v. France as a problematic precedent", *Strasbourg Observers* (9 July 2014). https://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/, accessed 6 May 2019.
[388] Ibid.
[389] Stephanie Berry, "SAS v France: Does Anything Remain of the Right to Manifest Religion", *Strasbourg Observers* (2 July 2014). https://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/, accessed 6 May 2019.

face veil covers the face is what distinguishes this religious dress from that worn in *Ahmet Arslan et autes c. Turquie*[390], underlining that the face is important for social interaction and that concealing it could harm the possibility of interpersonal relationships[391]. Speaking against it is also that the ECtHR expresses that also clothing that is perceived as "strange" contributes to the pluralism inherent in democracy.[392] However, speaking for the development that Eva Brems fears is that the ECtHR does not discuss a possible difference between the burka, which covers all the face, and the niqab, which does not cover the eyes, in this respect. I would argue that seeing the eyes and not seeing the eyes makes quite a difference in social interaction. As mentioned in subchapter 3.3, in the cases following upon *S.A.S. v. France*, i.e. *Dakir v. Belgium* and *Belcacemi et Oussar c. Belgique*, that only concern the niqab, the ECtHR referred to and reached the same conclusion as in *S.A.S v France*, without considering any such distinction.

[390] S.A.S. v. France, para 136.
[391] S.A.S. v. France, para 122.
[392] S.A.S. v. France, para 120.

5 Conclusion

To conclude, this study has shown that in the case law of the ECtHR the protection of the rights of others has almost always taken precedence over the right to manifest one's religion through wearing religious dress.

The rights of others that have been referred to by the states and accepted by the ECtHR under the legitimate aim of the protection of rights of others are secularism, gender equality and "living together". Of these, the by far most common one is secularism, the protection of which has been accepted as a legitimate aim in all 15 admissibility decisions and in six of the nine judgments. The focus is often on secularism (or denominational neutrality) being a constitutional principle in the states concerned, and the states concerned are in all but in one case states where this is the case. However, it seems through the example of Bosnia and Herzegovina in *Hamidović v. Bosnia and Herzegovina* that the protection of secularism can be considered a legitimate aim also in states that do not have secularism as a principle clearly expressed in the Constitution.

The protection of the right of gender equality has been accepted as a legitimate aim in two of the cases (one admissibility decision and one judgment) where secularism also has been accepted, and rejected in three chronologically later cases (all judgments). In these three just mentioned cases the right of "living together" has been accepted as a legitimate aim.

When it comes to the legitimate aim of protecting the right of secularism the measures taken restricting the wearing of religious dress have been considered proportionate to that aim in all 15 admissibility decisions and in four of the six judgments where it has been referred to.

The cases were the measures have been considered proportionate, and therefore justified, all concern public servants and pupils and students in public schools. The two judgments where the measures were not considered proportionate concern private persons other than students and pupils, one case in public places open to all such as streets and squares, and one in a public institution, a courtroom.

The ECtHR has, since *Leyla Şahin v. Turkey* in 2005 afforded the states a wide margin of appreciation in the cases concerning public servants, students and pupils, with reference to the restriction of religious dress for these people in these venues being an issue that concerns the relationship between the state and religions, and in the proportionality assessments of especially the student and pupil cases there has been a trend of a lacking proportionality assessment where the actual effect on the right of others of secularism has become less and less important.

These trends have been partly broken when it comes to private citizens other than students and pupils in universities and schools. The only case where the margin of appreciation has not been considered wide for the state in a case with the protection of secularism as a legitimate aim is in *Ahmet Arslan et autres c. Turquie*, which concerned private citizens in public places open for all such as streets and public squares. Here the ECtHR in its proportionality assessment took into account how the right of others of secularism was actually impacted by the applicants' wearing of religious dress and reached the conclusion that it was not impacted in a way that outweighed the right of the wearers of religious dress to manifest their religion.

The same kind of proportionality assessment, taking into account the actual impact on the right of others of secularism and through this reaching the conclusion that the right of the applicant to manifest religion through religious dress took precedent, was carried out in *Hamidović v. Bosnia and Herzegovina*, which concerned a private citizen as a witness in a courtroom. The proportionality assessment was carried out in this way despite of the fact that the ECtHR, like in the student and pupil cases, afforded a wide margin of appreciation to the state with reference to the situation concerning the relationship between the state and religions.

In another case of interest, *Lachiri c. Belgique*, where the protection of rights of others was not invoked as a legitimate aim the ECtHR established, however, that a courtroom is a public institution just as an institution for public education where the respect of religious neutrality can outweigh the right to manifest one's religion, and in connection with this

referred to *Leyla Şahin v. Turkey*. This can be seen as an indication that the same lack of assessment of the impact on others and the same automatism in accepting measures as proportionate to protecting secularism that exists concerning pupils and students in public schools and universities could possibly in future case law from the ECtHR be transferred to other public institutions such as courtrooms.

As regards streets and public squares the narrow margin of appreciation afforded in *Ahmet Arslan et autres c. Turquie* was not repeated in a very similar case, *S.A.S v. France*, which had a protection of a different right as a legitimate aim, namely that of "living together". Even though the right protected was different, the justification for a wide margin of appreciation in *S.A.S v. France* was the same as in the secularism-cases, i.e. that it concerns a question of the relationship between the state and religions, meaning that the ECtHR was inconsistent with what it established in *Ahmet Arslan et autres c. Turquie* in *S.A.S v. France*, where the legitimate aim of protection of secularism was not connected with a wide margin of appreciation when the applicants were private citizens and the venue was streets and public squares.

Regarding the legitimate aim of protection of the right of "living together", this is a very vague aim even considering the fact that the ECtHR has been known to accept a wide variety of rights to be protected. The ECtHR itself admitted to its "flexibility" and therefore suggested a narrower margin of appreciation, only to annul it again by prompting for a wide margin of appreciation with the justification that it was an issue where there was lack of European consensus and that concerned the relationship between the state and religions, the latter an argument usually being used with secularism-cases as discussed above.

When it comes to the legitimate aim of the protection gender equality the ECtHR has gone from equating the wearing of religious dress by women with a violation of the principle of gender equality to accepting that a practise defended by the female wearers themselves cannot be banned with reference to gender equality.

Two questions of interest that remain to be seen in the future case law of the ECtHR are the following: How far can the legitimate aim of the protection of the right of "living together" go in restricting religious dress for private citizens in streets and public squares? Will the same automatism of accepting measures as justified with reference to the protection of secularism that exists for students and pupils in schools and universities also extend to private citizens in other public institutions such as court rooms?

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