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Lifting The Veil by Covering It: European Prohibitions on the Practice of Veiling Constitute the Forced Covering of Muslim Women

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**LIFTING THE VEIL BY *COVERING* IT: EUROPEAN
PROHIBITIONS ON THE PRACTICE OF VEILING
CONSTITUTE THE FORCED COVERING OF MUSLIM
WOMEN**

C. Scott Maravilla *

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INTRODUCTION

A dichotomy exists in the laws of Europe addressing the religious freedom of Muslim women, particularly those interpreting the guarantees of religious freedom under Article 9 of the European Convention on Human Rights (Convention).¹ European and international covenants, generally influenced by the postcolonial sympathies of many United Nations member states, aim at protecting the human rights of minorities. In contrast, some state domestic laws may reflect a country's xenophobia toward minority groups. This contrast is well illustrated by the ban on wearing the Islamic headscarf, especially the burqa and niqab.² Since April 11, 2011, when France became the first European country to ban the wearing of the Muslim veil,³ followed by Belgium and Bulgaria,⁴ twenty-one European nations have enacted some form of partial or full restriction on veiling by Muslim women.⁵

Article 9 of the Convention guarantees the protection of religious freedom.⁶ Article 9 provides that “[e]veryone has the right to freedom of thought, conscience and religion.”⁷ An individual has the

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1. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, E.T.S. No. 5 [hereinafter Convention].
2. See Ronan McCrea, *The Ban on the Veil and European Law*, 13 HUM. RTS. L. REV. 57, 91, 94 (2013).
3. Ralf Michaels, *Banning Burqas: The Perspective of Postsecular Comparative Law*, 28 DUKE J. COMP. & INT’L L. 213, 218 (2018). The law was passed on October 11, 2010, but the ban was not formally enforced until April 11, 2011. See C.M.A. McCauliff, *Dreyfus, Laïcité and the Burqa*, 28 CONN. J. INT’L L. 117, 140 (2012).
4. See Michaels, *supra* note 3, at 219–21.
5. Virginia Villa, *Women in Many Countries Face Harassment for Clothing Deemed Too Religious – or Too Secular*, PEW RSCH. CTR. (Dec. 16, 2020), <https://pewrsr.ch/3nqbvQJ> [<https://perma.cc/BM3B-7DR5>] (finding that 21 out of 45 European countries had government restrictions on head coverings for women).
6. Convention, *supra* note 1.
7. Article 9 of the Convention provides:

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.
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

right to worship and observance except where “prescribed by law and . . . 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.”⁸ Notwithstanding this language in Article 9, the European Court of Human Rights (ECHR) (and domestic courts of European Union member states) upheld these veiling bans on the grounds that they are “necessary in a democratic society.”⁹

However, this interpretation of the Convention by European courts has created an exception for religious observance,¹⁰ specifically where the wearing of the burqa, niqab, or hijab by Muslim women is at issue.¹¹ While ostensibly balancing policies aimed at protecting religious freedom in pluralist societies with religious expression, in practice the ban amounts to a forced assimilation of Muslim minorities.

This article will (1) provide an overview of the religious practice of veiling and the sociological theory of “covering,”¹² (2) discuss the controversy of European countries’ partial and full bans on the practice of Muslim veiling,¹³ and (3) argue that forced covering is wrongful and constitutes a harmful suppression of religious expression by Muslim women.¹⁴

I. TWO TYPES OF COVERING

A. *The Religious Practice of Veiling by Muslim Women*

Our examination of the European prohibitions against wearing the burqa, niqab, or hijab must first begin with a look at the practice of

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.

Id.

8. *Id.*

9. *E.g.*, *S.A.S. v. France*, App. No. 43835/11, ¶ 158 (July 1, 2014), <http://hudoc.echr.coe.int/eng?i=001-145466> [<https://perma.cc/V6AU-4JMM>]. *See generally* Michaels, *supra* note 3, at 222–23 (reviewing veiling bans in European courts).

10. *See, e.g.*, *S.A.S.*, App. No. 43835/11, ¶ 151.

11. *See, e.g., id.*

12. *See infra* Part I.

13. *See infra* Part II.

14. *See infra* Part III.

veiling by women in Islam. The two most cited passages of the Qur'an in support of veiling are 24:30-31 and 33:58-59:

*The believing men are enjoined to lower their gaze and conceal their genitals and the believing women are enjoined to lower their gaze and conceal their genitals, draw their headdress to cover their cleavage, and not to display their beauty, except that which has to be revealed, except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or their slaves, or eunuchs or children under age; and they should not strike their feet to draw attention to their hidden beauty. O Believers, turn to God, that you may know bliss.*¹⁵

And,

*Those who harass believing men and believing women undeservedly, bear (on themselves) a calumny and a grievous sin. O Prophet! Enjoin your wives, your daughters, and the wives of true believers that they should cast their outer garments over their persons (when abroad): That is most convenient, that they may be distinguished and not be harassed.*¹⁶

The practice of veiling among most Muslim women emerged three or four generations after the death of the Prophet Muhammad.¹⁷ Veils were initially worn to distinguish the wives of the Prophet.¹⁸ Later, women wore veils to signify membership in the upper class.¹⁹ With the Safavids in the Ottoman Empire in the sixteenth century, the veil consolidated as a symbol of social status, and later in the nineteenth century a symbol of cultural identity.²⁰

Veiling here refers to a diversity of garments: the hijab, shayla, khimar, chador, niqab, the burqa, abaya, and jibab. The hijab is a

15. *Qur'an* 24:30–31.

16. *Id.* at 33:58–59.

17. JOHN L. ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM 95 (1st ed. 2002).

18. *Id.* at 95–96.

19. *Id.*

20. See Ashraf Zahedi, *Contested Meaning of the Veil and Political Ideologies of Iranian Regimes*, 3 J. MIDDLE E. WOMEN'S STUD. 75, 79–80 (describing the origin of veiling as tied to social status until the sixteenth century when more women began the practice); ESPOSITO, *supra* note 17, at 16 (discussing the importance of cultural identity to Muslims during the nineteenth century).

“square scarf that covers the head and neck but leaves the face clear.”²¹ In colloquial terms, a headscarf. Interestingly, the term hijab is derived from the Arabic word meaning “cover.”²²

The shayla is “a long, rectangular scarf that is wrapped loosely around the head and tucked or pinned at the shoulders” and “often leaves the neck and face clear.”²³ The khimar is “a long, cape-like scarf that is wrapped around the head and hangs to the middle of the back.”²⁴ The chador is a full-body cloak that “is held in place under the neck by hand.”²⁵

The niqab—the subject of most of the bans along with the burqa—is “a face-covering that covers the mouth and nose, but leaves the eyes clear.”²⁶ The burqa “covers the entire face [and body], with a crocheted mesh grill over the eyes.”²⁷ The abaya, required in Saudi Arabia, is “[t]ypically black . . . [and] constructed like a loose robe or caftan and covers everything but the face, hands and feet.”²⁸ Finally, the jilbab, which is discussed in the Qur’an, is a general reference to “any head-to-toe style of modest dress, especially a head scarf.”²⁹

Women choose to wear the hijab as a sign of faith, modesty, or as a matter of identity, both religious and cultural.³⁰ Others decline to wear the veil citing other means of achieving modesty, and that the public display of the veil in Western society, by drawing attention to

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21. *Types of Islamic Veils*, BARRINGTON STAGE CO., <https://barringtonstageco.org/types-of-islamic-veils/> [<https://perma.cc/TXY2-35X2>] (last visited Aug. 30, 2021); *see also* ESPOSITO, *supra* note 17, at 183 (defining the hijab as a “[v]eil covering the hair and head of a Muslim woman”).
 22. *Hijab is the Arabic Term For “Cover”*, ISLAMIC RSCH. FOUND. INT’L, INC., https://www.irfi.org/articles/articles_1451_1500/hijab_is_the_arabic_term_for_cover.htm [<https://perma.cc/X46N-NLUZ>] (last visited Aug. 30, 2021).
 23. *Islamic Position on Hijab*, MUSLIM INSPIRE, <https://musliminspire.com/islamic-position-on-hijab/> [<https://perma.cc/3M59-DZC8>] (last visited Aug. 30, 2021).
 24. *Id.*
 25. Russell Goldman, *What’s That You’re Wearing? A Guide to Muslim Veils*, N.Y. TIMES (May 3, 2016), <https://www.nytimes.com/2016/05/04/world/what-in-the-world/burqa-hijab-abaya-chador.html> [<https://perma.cc/ALY9-88XT>]; *Types of Islamic Veils*, *supra* note 21.
 26. *Islamic Position on Hijab*, *supra* note 23; *see* Sigal Samuel, *Banning Muslim Veils Tends to Backfire—Why Do Countries Keep Doing It?*, ATLANTIC (Aug. 3, 2018), <https://www.theatlantic.com/international/archive/2018/08/denmark-burqa-veil-ban/566630/> [<https://perma.cc/76G9-92CP>].
 27. Goldman, *supra* note 25 (alteration in original); *see also* ESPOSITO, *supra* note 17, at 182.
 28. Goldman, *supra* note 25 (alteration in original).
 29. *Id.*
 30. *See* ESPOSITO, *supra* note 17, at 96–97.

women, provides the opposite of the underlying rationale for wearing the veil.³¹

B. *The Theory of “Covering”*

Covering is a blending in phenomenon. Erving Goffman’s 1963 seminal work, *Stigma*, discusses this interrelationship between social identity and society at large in the context of race, nationality, and creed.³² He defines a “stigma” as “the situation of the individual who is disqualified from full social acceptance.”³³ A stigma is defined as “a special kind of relationship between attribute and stereotype”³⁴ He splits these into two categories: virtual social identity and actual social identity.³⁵ Virtual social identity involves traits imputed to the group, while actual social identity are traits actually possessed.³⁶

If someone conforms with societal norms, they are defined as “normals.”³⁷ This may lead those in society to “believe [a] person with a stigma is not quite human.”³⁸ The self-awareness of difference lends itself to “[s]hame” on the part of the individual.³⁹ Goffman

31. *Id.* at 97 (“[Critics of Islamic dress] see such women as under the sway of an oppressive patriarchal culture or just submitting to the dictates of their religion.”). For a good discussion on this topic, see Samina Ali, *What Does the Quran Really Say About a Muslim Woman’s Hijab?*, YOUTUBE (Feb. 10, 2017), https://www.youtube.com/watch?v=_J5bDhMP9IQ [<https://perma.cc/6J9S-R2RT>].

32. See generally ERVING GOFFMAN, *STIGMA* (1963).

33. *Id.* at Preface.

34. *Id.* at 4.

35. *Id.* at 2.

36. *Id.* at 2–3.

37. *Id.* at 5.

38. *Id.* (“We construct a stigma-theory, an ideology to explain his inferiority and account for the danger he represents”) (alteration in original). Goffman also describes a contrary group of society he calls the “wise.” *Id.* at 28. Goffman defines them as “persons who are normal but whose special situation has made them intimately privy to the secret life of the stigmatized individual and sympathetic with it, and who find themselves accorded a measure of acceptance, a measure of courtesy membership in the clan.” *Id.*

39. *Id.* at 7 (alteration in original). Goffman specifically states:

[T]he standards he has incorporated from the wider society equip him to be intimately alive to what others see as his failing, inevitably causing him, if only for moments, to agree that he does indeed fall short of what he really ought to be. Shame becomes a central possibility, arising from the individual’s perception of one of his own attributes as being a defiling thing to possess, and one he can readily see himself as not possessing.

Id.

further provides that the individual response may be an “attempt to correct what he sees as the objective basis of his failing”⁴⁰ The individual may also avoid what Goffman calls “mixed contacts”—the interaction between the “stigmatized” individual and “normal” people.⁴¹ This may also lead to attempts at “normification.”⁴² Goffman defines this as “the effort on the part of a stigmatized individual to present himself as an ordinary person, although not necessarily making a secret of his failing.”⁴³

“Social information” refers to information conveyed about an individual.⁴⁴ This “information as well as the sign through which it is conveyed, is reflexive and embodied; that is, it is conveyed by the very person it is about, and conveyed through bodily expression in the immediate presence of those who receive the expression.”⁴⁵ Social information is conveyed often through “symbols.”⁴⁶ These symbols may be “prestige symbols” or “stigma symbols.”⁴⁷ Some symbols “are not frankly presented as disclosures of stigma, but purportedly attest rather to membership in organizations claimed to have no such significance in themselves.”⁴⁸

“Disidentifiers” are positive or negative characteristics that “break up an otherwise coherent picture . . . throwing severe doubts on the validity of the virtual one.”⁴⁹ In other words, disidentifiers make it hard to identify an individual as being from the stigmatized class.⁵⁰ Goffman refers to the presence of these disidentifiers as “passing.”⁵¹ Passing is “[w]here the stigma is nicely invisible and known only to the person who possesses it, who tells no one”⁵² However, an individual who may otherwise “pass” as to their social identity, may instead elect to disclose their identity by “voluntarily [wearing] a stigma symbol, a highly visible sign that advertises his failing wherever he goes.”⁵³

40. *Id.* at 9 (alteration in original).

41. *Id.* at 12.

42. *See id.* at 31.

43. *Id.*

44. *Id.* at 43.

45. *Id.*

46. *Id.*

47. *Id.* at 43–44.

48. *Id.* at 100.

49. *Id.* at 44 (alteration in original).

50. *Id.*

51. *Id.* at 42, 73.

52. *Id.* at 73.

53. *Id.* at 100.

“Passing” leads to “Covering.”⁵⁴ Covering is where “[t]he individual’s object is to reduce tension, that is, to make it easier for himself and the others to withdraw covert attention from the stigma, and to sustain spontaneous involvement in the official content of the interaction.”⁵⁵ In other words, covering encompasses techniques to assimilate into normal society.⁵⁶ A challenge to covering is when “a known-about attribute obtrudes itself into the center of attention, for obtrusiveness increases the difficulty of maintaining easeful inattention regarding the stigma.”⁵⁷

Kenji Yoshino eloquently defines what it means to “cover” in his book, *Covering*⁵⁸: “Everyone covers. To cover is to tone down a disfavored identity to fit into the mainstream. In our increasingly diverse society, all of us are outside the mainstream in some way. Nonetheless, being deemed mainstream is still often a necessity of social life.”⁵⁹ Quoting Goffman’s book on managing “spoiled” identities, he further describes those who cover as “‘persons who are ready to admit possession of a stigma . . . [who] may nonetheless make a great effort to keep the stigma from looming large’ . . . covering pertains to its *obtrusiveness*.”⁶⁰ Conversion,⁶¹ passing, and covering⁶² are all means by which those who are seen as outside “normal” society seek to assimilate.⁶³

54. *Id.* at 102.

55. *Id.*

56. *Id.* at 103.

57. *Id.*

58. KENJI YOSHINO, *COVERING* 79 (2006) (“[G]ays can cover along many axes *Appearance* concerns how an individual physically presents herself to the world. *Affiliation* concerns her cultural identifications. *Activism* concerns how much she politicizes her identity. *Association* concerns her choice of fellow travelers”). Yoshino’s book elaborates on the concept of “covering” within the context of homosexuals in a mainstream heterosexual culture. *See generally id.* While not directly on point with physical coverings like the hijab or burqa, Yoshino’s discussion elaborates on Goffman’s *Stigma* and is closely analogous to the physical coverings of Muslim women in traditionally non-Muslim societies. *See generally id.*; GOFFMAN, *supra* note 32.

59. YOSHINO, *supra* note 58, at ix.

60. *Id.* at 18 (alteration in original).

61. *Id.* at 46 (defining “conversion” as “a spiritual transformation of our core”).

62. *Id.* at 79 (stating that “covering is a strategy of assimilation available to all groups”).

63. *Id.* at 21. Yoshino further states:

The selective uptake of gay culture . . . shows that acceptance is driven by the desires of the straight cultural consumer rather than the dignity of the gay person. It is natural for consumers to be selective in their appropriation of minority cultures – they choose the parts that are meaningful to them, and that give them pleasure

In response to the practice of covering, he says that his “real commitment is to autonomy – giving individuals the freedom to elaborate their authentic selves.”⁶⁴ Yoshino elaborates that “we should require . . . *reason-forcing conversion*, making the state or the employer justify burdens placed on a protected group.”⁶⁵ The state or employer can demand conformity so long as it backs the demand with a reason rather than a bias.⁶⁶ However, “[p]ermitting the preservation of a common culture to stand as a justification for coerced covering would make the reason-forcing conversion pointless, as demands for assimilation can always draw on that justification.”⁶⁷

Yoshino concludes that “[a] useful lesson of the religious apparel cases is that no one argues that the covering demand is trivial.”⁶⁸ He sends forth a clarion call for further inquiry: “This is a covering demand that requires uncovering.”⁶⁹ This article hopes to accomplish this.

II. THE CONTROVERSY OF EUROPEAN PROHIBITIONS ON VEILING

A. *Legislative Prohibitions on Veiling*

The guarantee of religious freedom is well established in both international and European law. In April 2011, however, France became the first European country to enact legal restriction on

and self-definition . . . True pluralism would be receptive to traits valued by those who bear them, regardless of their mainstream appeal.

Id. at 85.

64. *Id.* at 93.

65. *Id.* at 178.

66. *Id.*

67. *Id.* at 179. Kenji Yoshino looks to the external pressures exerted on Muslim women to refrain from wearing the burqa or hijab. *Id.* at 178–79. In a 2003 case, a Florida State court barred a Muslim woman from wearing a veil in her drivers’ license photograph. *Id.* at 178. The court’s rationale posited the state security interest in being able to identify someone as a “compelling reason to justify that burden.” *Id.* In another 2003 case, a student in Oklahoma was suspended by her school for wearing a headscarf as a violation of the dress code. *Id.* at 178–79. The case was settled the following year with the U.S. Department of Justice. *Id.* at 179. The school’s dress code was changed to reflect an exception for religious observance. *Id.*

68. *Id.* at 180.

69. *Id.* at 178.

veiling.⁷⁰ That same year, Belgium enacted a law prohibiting “the wearing of any clothing which totally or principally conceals the face.”⁷¹ On December 6, 2012, the Belgian Constitutional Court, applying Article 9 of the Convention, upheld the ban, reasoning:

[T]he legislature sought to defend a societal model where the individual took precedence over his philosophical, cultural or religious ties, with a view to fostering integration for all and to ensuring that citizens shared a common heritage of fundamental values such as . . . the principle of separation between church and State.⁷²

Problematically, even if the wearing of a veil or headscarf is a voluntary act of religious observance, “the principle of gender equality . . . justifies the opposition by the State.”⁷³

Taking the opposing view, the Council of the State of the Netherlands rejected public restrictions on wearing the veil because “it was not for the Government to exclude the choice of wearing the burqa or niqab for religious reasons.”⁷⁴ In between these two rulings, the Spanish Supreme Court upheld a local ordinance banning the wearing of a veil and headscarf when seeking a reduced fare on public transportation because the regulation “did not constitute a restriction on fundamental rights.”⁷⁵

In 2017, following suit, Austria enacted a law prohibiting Muslim women from publicly wearing full-face veils and imposing a fine of 150 euros.⁷⁶ The law applies to the niqab and the burqa with Muslim headscarves still permitted.⁷⁷ The language was broadly drafted so as not to appear to target Muslims.⁷⁸ However, one of the consequences of such a broadly worded measure was that a man dressed as Santa Claus was publicly directed by the police to remove his hat and

70. S.A.S. v. France, App. No. 43835/11, ¶ 41 (July 1, 2014), <http://hudoc.echr.coe.int/eng?i=001-145466> [<https://perma.cc/V6AU-4JMM>].

71. *Id.* ¶ 16.

72. *Id.* ¶ 42.

73. *Id.*

74. *Id.* ¶¶ 49, 51.

75. *Id.* ¶¶ 47–48.

76. Iain Burns, *You're Saint Nicked! Man is Ordered by Police to Remove Fake Father Christmas Beard in Austria Under its Laws Banning the Burka*, DAILY MAIL, <https://www.dailymail.co.uk/news/article-5182895/Man-ordered-remove-Santa-beard-violating-burqa-ban.html> [<https://perma.cc/M55W-652M>] (Dec. 15, 2017, 7:59 AM).

77. *Id.*

78. *Id.*

beard.⁷⁹ The rationale provided by the Austrian government behind the law is the integration of Muslims into Austrian society.⁸⁰ One member of the Social Democratic Party hailed it as “creating a continuous integration concept for the first time.”⁸¹ Support for the proposal, however, was far from monolithic.⁸² The measure faced opposition from Austrian President Alexander Van Der Bellen and was condemned by the Austrian Bar Board as violating “the fundamental rights of the freedom of conscience and the freedom of private life.”⁸³

B. *State Cases Upholding Veiling Prohibitions*

Article 9 of the Convention is the primary basis for challenging European State laws banning the wearing of Islamic garb.⁸⁴ Domestic courts and the European Court of Justice have wrestled with the balance of protecting religious freedom and the bans on wearing the Islamic veil imposed by Parliaments.⁸⁵ The veil has been legally challenged in the context of educational institutions, employment discrimination, and, finally, the French prohibition on wearing the veil in public.⁸⁶ This section will discuss how European State courts and, ultimately, the ECHR have attempted to reach this balance.

1. Education

The initial challenges to prohibitions against Muslim garb arose in the context of schools and universities. In *R v. Headteacher and*

79. *Id.*

80. See generally Christian Bartlau, *Austria’s Controversial ‘Burqa Ban,’ a Year On*, DW (Jan. 10, 2018), <https://www.dw.com/en/austrias-controversial-burqa-ban-a-year-on/a-45719874> [<https://perma.cc/R667-2YWP>].

81. Pam Barker, *‘Enlightenment Values’ – Austria Enacts Anti-Burqa & Compulsory Integration Law*, EUR. RELOADED (June 11, 2017), <https://www.euopereloaded.com/enlightenment-values-austria-enacts-anti-burqa-compulsory-integration-law/> [<https://perma.cc/Z87Z-3T5V>].

82. *Id.*

83. Dan Bilefsky & Victor Homola, *Austrian Parliament Bans Full Facial Veils in Public*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/world/europe/austria-veil-ban-muslim.html> [<https://perma.cc/9NZL-DXFN>].

84. Sarah H. Cleveland, *Banning the Full-Face Veil: Freedom of Religion and Non-Discrimination in the Human Rights Committee and the European Court of Human Rights*, 34 HARV. HUM. RTS. J. 217, 218–20 (2020).

85. *Id.*

86. *Id.* at 224–26; see also Bill Chappell, *Employers’ Hijab Ban Isn’t ‘Direct Discrimination,’ European Court Says*, NPR (Mar. 14, 2017, 10:27 AM), <https://www.npr.org/sections/thetwo-way/2017/03/14/520113736/employers-hijab-ban-isnt-direct-discrimination-european-court-says> [<https://perma.cc/8LZW-W59R>].

Governors of Denbigh High School, a United Kingdom case, a student, “R,” was excluded from attending secondary school for wearing full Islamic covering.⁸⁷ She challenged her exclusion under Article 9 of the European Convention on Human Rights.⁸⁸ The House of Lords sidestepped the larger issue of wearing Islamic dress in state schools, favoring a narrower disposition of the case at hand.⁸⁹

The school was co-educational for children aged 11 through 16, 79% of whom were Muslim.⁹⁰ The dress provided for an exception to wear the shalwar kameeze (“a combination of the kameeze, a sleeveless smock-like dress with a square neckline, revealing the wearer’s collar and tie, with the shalwar, loose trousers, tapering at the ankles.”).⁹¹ The controversy arose when R elected to wear the jilbab (“a long coat-like garment”) instead of the shalwar kameeze because it concealed her body more.⁹²

Some parents were against allowing the wearing of the jilbab because it would lead to the outward differentiation among Muslim sects based on their dress.⁹³ The head of the school felt that holding to the dress code was “necessary to promote inclusion and social cohesion.”⁹⁴ Because the school would not admit R on the premises dressed in a jilbab, she ceased to attend.⁹⁵ The school’s committee of governors “urged [R] to return, or to seek a place at another school.”⁹⁶ They even offered to facilitate the transfer.⁹⁷

The House of Lords applied Article 9 of the Convention on the principle of the right to outward observance of religious belief.⁹⁸ The Lords, however, held that “[t]he freedom of religion, as guaranteed by Article 9, is not absolute.”⁹⁹ The Lords turned to the question of “whether [R]’s freedom to manifest her belief by her dress was subject to limitation [or interference under the exceptions listed in]

87. *R v. Headteacher & Governors of Denbigh High Sch.* [2006] UKHL 15, [1], [3]–[4] (appeal taken from Eng.).

88. *Id.* ¶ 1.

89. *Id.* ¶ 2 (“The House is not . . . invited to rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country.”).

90. *Id.* ¶¶ 3, 6.

91. *Id.*

92. *Id.* ¶ 10.

93. *Id.* ¶ 18.

94. *Id.*

95. *Id.* ¶ 11.

96. *Id.* ¶ 16.

97. *Id.*

98. *Id.* ¶ 20.

99. *Id.* ¶ 22 (alteration in original).

Article 9(2), and whether [it] was justified.”¹⁰⁰ They reasoned that a finding of interference by the state is based upon “the totality of the circumstances.”¹⁰¹

In the case of R, her family elected for her to go to a school outside of her designated “catchment area.”¹⁰² The school in question “went to unusual lengths to inform parents of its uniform policy.”¹⁰³ R was enrolled in the school for two years before asserting her right to wear the jilbab.¹⁰⁴ There were also three schools she could attend that did allow wearing of the jilbab, one of which she ultimately attended.¹⁰⁵

The Lords could not find interference by the state (it was deemed “debatable”), so they proceeded to the issue of justification.¹⁰⁶ To be justified under Article 9(2), the “interference must be (a) prescribed by law and (b) necessary in a democratic society for a permissible purpose”¹⁰⁷ The interference “must be directed to a legitimate purpose and must be proportionate in scope and effect.”¹⁰⁸ The Lords found that the school had statutory authority to establish a uniform dress code.¹⁰⁹ The Lords noted, “The school did not reject [R]’s request out of hand: it took advice, and was told that its existing policy conformed with the requirements of mainstream Muslim opinion.”¹¹⁰ Based on those facts, the Lords concluded the actions of the school were justified.¹¹¹

In a similar ruling, the European Court of Human Rights upheld a university dress code restricting the wearing of the hijab as not violating Article 9 of the Convention.¹¹² In August 1997, Leyla Sahin was a fifth year medical student at the Cerrahpasa Faculty of

100. *Id.* ¶ 21 (alteration in original).

101. *Id.* (citing *Kalac v. Turkey*, (1997) 27 EHRR 552, ¶ 27 (“‘Article 9 does not protect every act motivated or inspired by religion or belief’ and ‘an individual may need to take his specific situation into account.’”)); see *Ahmad v. United Kingdom*, (1981) 4 EHRR 126, ¶ 11 (“[I]t may, as regards the modality of a particular religious manifestation, be influenced by the situation of the person claiming that freedom.”).

102. *See R v. Headteacher & Governors of Denbigh High Sch.* [2006] UKHL at [25].

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* ¶ 26 (alteration in original).

108. *Id.*

109. *Id.*

110. *Id.* ¶ 33 (alteration in original).

111. *Id.* ¶ 34.

112. *Sahin v. Turkey*, App. No. 44774/98, ¶ 17 (Nov. 10, 2005), <http://hudoc.echr.coe.int/fre?i=001-70956> [<https://perma.cc/UN8F-63KR>].

Medicine at Istanbul University in Istanbul, Turkey.¹¹³ She was from an observant Muslim family, and wore the hijab for religious reasons.¹¹⁴ The University dress code provided that “students whose ‘heads are covered’ . . . and students . . . with beards must not be admitted to lectures, courses or tutorials.”¹¹⁵ These prohibitions were consistent with transitional section 17 of Law no. 2547.¹¹⁶

On March 12, 1998, Leyla Sahin was denied admission to her exams by the invigilators because she was wearing the hijab.¹¹⁷ Subsequently, on March 20, 1998, she was also denied enrollment in an orthopaedic traumatology class for wearing the hijab.¹¹⁸ On April 16, 1998, she was again denied admission to a neurology lecture, and then on June 10, 1998, her exam in the public health course.¹¹⁹ Finally, she was suspended from the University altogether under the Students Disciplinary Procedure Rules.¹²⁰

The ECHR first observed that the Turkish Republic, founded in 1923, emphasized secularism (*laik*).¹²¹ In reviewing Article 9 of the Convention on whether interference if prescribed by law was legitimate and “necessary in a democratic society,”¹²² the Court found that the exception to Article 9 for legitimate restrictions aimed at protecting the freedom of others and public order, was not in dispute.¹²³

The Court stated that Article 9 does not serve to “protect every act motivated by a religion or belief” because “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.”¹²⁴ The State is “the neutral and impartial organiser of the exercise of various religions, faiths and beliefs,” and playing this part is “conducive to public order, religious harmony and tolerance in a democratic society.”¹²⁵ In this role, the

113. *Id.* ¶ 15.

114. *Id.*

115. *Id.* ¶ 16 (alteration in original).

116. *Id.* ¶ 40 (“Choice of dress shall be free in institutions of higher education, provided that it does not contravene the laws in force.”).

117. *Id.* ¶ 17.

118. *Id.*

119. *Id.*

120. *Id.* ¶ 24.

121. *Id.* ¶ 30.

122. *Id.* ¶ 75.

123. *Id.* ¶ 99.

124. *Id.* ¶¶ 105–06.

125. *Id.* ¶ 107.

nation state may not “assess the legitimacy of religious beliefs.”¹²⁶ The Court proceeded to reason that “democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.”¹²⁷

The State seeking to strike a balance of the rights among individuals serves as the basis of a “democratic society.”¹²⁸ With the regulation of religious practices, “opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance.”¹²⁹ The secularism embodied in the Turkish Constitution is the “paramount consideration underlying the ban on the wearing of religious symbols in universities.”¹³⁰ Accordingly, the ECHR concluded that Article 9 of the Convention does not guarantee outward religious expression, or “the right to disregard rules that have proved to be justified.”¹³¹

2. Employment

In *Achbita v. G4S Secure Solutions NV*, the European Court of Justice upheld a veiling ban in the context of employment and workplace discrimination.¹³² The Court of Cassation, Belgium, pursuant to Article 267 of the Treaty on the Functioning of the European Union, which establishes jurisdiction,¹³³ requested a

126. *Id.*

127. *Id.* ¶ 108.

128. *Id.*

129. *Id.* ¶ 109.

130. *Id.* ¶ 116.

131. *Id.* ¶ 121.

132. Case C-157/15, *Achbita v. G4S Secure Sols. NV*, ECLI:EU:C:2017:203, ¶ 44 (Mar. 14, 2017), <https://curia.europa.eu/juris/document/document.jsf?docid=188852&doclang=EN> [<https://perma.cc/CH4Y-7BLV>].

133. The Treaty on the Functioning of the European Union states:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a

preliminary ruling from the European Court of Justice.¹³⁴ The Belgium court sought an interpretation of Article 2(2)(a) of Council Directive 2000/78/EC (November 27, 2000) on equal treatment in the employment arena.¹³⁵

Article 6 of the Treaty of the European Union provides that the EU is “founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.”¹³⁶ Protection against discrimination is a universal right.¹³⁷ Articles 1 and 2 of the Treaty establish “a general framework for combating discrimination on the grounds of religion or belief . . . as regards employment and occupation.”¹³⁸

G4S was a private company for receptionist services.¹³⁹ G4S had an “unwritten rule” that employees could not wear political or

decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Consolidated Version of the Treaty on the Functioning of the European Union art. 267, May 9, 2008, 2008 O.J. (C 115) 47.

134. *Achbita*, Case C-157/15, ECLI:EU:C:2017:203, ¶ 1.

135. *Id.*

136. Council Directive 2000/78, 2000 O.J. (L 303) ¶ 1 (EC).

137. *Id.*

138. The purpose of the Directive is:

[T]o lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

. . . .

For the purposes of this Directive, the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

Id. ch. I, art. 1–2 at 18.

139. *Achbita*, Case C-157/15, ECLI:EU:C:2017:203, ¶ 10.

religious garb at work.¹⁴⁰ On February 12, 2003, Achibita, a Muslim woman, held a position as a receptionist with the company with an “employment contract of indefinite duration.”¹⁴¹ In April 2006, Achibita told G4S that she intended to wear the hijab at work.¹⁴² The company responded negatively.¹⁴³ On May 29, 2006, G4S turned its informal rule against religious symbolism into an established employment rule.¹⁴⁴ Subsequently, on June 12, 2006, Achibita was fired for her desire to wear the hijab at work.¹⁴⁵

The issue in the case was a prohibition enacted by G4S on its employees to wear any outward religious symbols while at work.¹⁴⁶ In other words, “whether the imposition of an internal prohibition against the hijab by a private company constitutes direct discrimination in violation of Article 2(2)(a) of the Directive.”¹⁴⁷ In upholding the ban, the European Court of Justice found that:

Article 2(2)(a) of Directive 2000/78 must be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking imposing a blanket ban on the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that directive.¹⁴⁸

140. *Id.* ¶ 11.

141. *Id.*

142. *Id.* ¶ 12.

143. *Id.* ¶¶ 7–17.

144. *Id.* ¶ 15.

145. *Id.* ¶ 16.

146. *Id.* ¶ 21.

147. *Id.* ¶¶ 19–20.

148. *Id.* ¶ 44.

By contrast, such an internal rule of a private undertaking may constitute indirect discrimination . . . if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain.

Id.

C. *The French Full Ban on Veiling by Muslim Women*

The most restrictive law against the practice of veiling by Muslim women was promulgated by France.¹⁴⁹ France completely banned wearing the veil in public under any circumstance.¹⁵⁰ In *S.A.S. v. France*, the ECHR upheld the French ban on the wearing of Islamic dress concealing the face.¹⁵¹ This time in the broader context of concealing the face in a public place pursuant to French Law No. 2010-1192 (October 11, 2010).¹⁵² Law No. 2010-1192 provided that “[n]o one may, in public places, wear clothing that is designed to conceal the face.”¹⁵³ It further defined “public places” as “the public highway and any places open to the public or assigned to a public service.”¹⁵⁴ The French Constitution Council (Conseil Constitutionnel) on October 7, 2010 (no. 2010-613 DC) upheld the law.¹⁵⁵

“S.A.S.” was a French citizen and observant Muslim woman.¹⁵⁶ She sometimes wore the burqa and niqab, which cover the entire body and face except for the eyes, in public.¹⁵⁷ She voluntarily wore it for religious beliefs and was not coerced in any way.¹⁵⁸ Moreover,

149. *S.A.S. v. France*, App. No. 43835/11, ¶¶ 14, 28 (July 1, 2014), <http://hudoc.echr.coe.int/eng?i=001-145466> [<https://perma.cc/V6AU-4JMM>].

150. *Id.*

151. *Id.* ¶¶ 14, 28, 157–59.

152. *Id.*

153. *Id.* ¶ 28.

154. *Id.*

155. *Id.* ¶ 30.

The legislature was of the view that such practices might be dangerous for public safety and fail to comply with the minimum requirements of life in society. It also found that those women who concealed their face, voluntarily or otherwise, were placed in a situation of exclusion and inferiority that was patently incompatible with the constitutional principles of liberty and equality.

Id.

156. *Id.* ¶¶ 10–11.

157. *Id.* ¶ 11.

158. *Id.* Article 225-4-10 of the French Criminal Code was also changed to address situations involving coercion in wearing the Islamic veil: “[a]ny person who forces one or more other persons to conceal their face, by threat, duress, coercion, abuse of authority or of office, on account of their gender, shall be liable to imprisonment for one year and a fine of 30,000 euros.” *Id.* ¶ 29. Stiffer penalties were provided in cases involving a minor. *Id.*

in her testimony, S.A.S. did not dispute that she should reveal her face for security and identification purposes.¹⁵⁹

The ECHR concluded that Article 8 of the Convention embodied the right to respect private life, and Article 9 implicated the right of Muslim women to wear the burqa for religious reasons.¹⁶⁰ Because wearing the burqa involved choices for appearances, it “relate[s] to the expression of his or her personality and thus fall[s] within the notion of private life.”¹⁶¹ The question was one of “limitation” or “interference,” S.A.S. could either wear the burqa to fulfill her religious obligations or face criminal penalties.¹⁶² The ECHR further found that the measure was “prescribed by law” because it involved sections 1–3 of the Law of 11 October 2010.¹⁶³ The Court accepted that there was a legitimate concern of the French Parliament for “public safety” under Articles 8 and 9.¹⁶⁴

The ECHR’s inquiry then turned to the idea that devout Muslim women wearing the burqa is an “expression of a cultural identity which contributes to the pluralism that is inherent in democracy.”¹⁶⁵ It observed the inherent contradiction that “a State Party cannot invoke gender equality in order to ban a practice that is defended by women.”¹⁶⁶ The “respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places,” even if “the clothing in question is perceived as strange by many of those who observe it.”¹⁶⁷ However, the ECHR reasoned that:

[I]ndividuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.¹⁶⁸

159. *Id.* ¶ 13.

160. *Id.* ¶¶ 35, 37.

161. *Id.* ¶ 107.

162. *Id.* ¶ 110.

163. *Id.* ¶¶ 111–12.

164. *Id.* ¶ 115.

165. *Id.* ¶ 120.

166. *Id.* ¶ 119.

167. *Id.* ¶ 120.

168. *Id.* ¶ 122.

Thus, the issue was “[w]hether the measure is necessary in a democratic society.”¹⁶⁹

Article 9 of the Convention guarantees the “freedom of thought, conscience and religion” as one of the “foundations of a ‘democratic society’ within the meaning of the Convention.”¹⁷⁰ That freedom includes whether the individual does or does not want to hold or observe a religious belief.¹⁷¹ Finally, the ECHR held that Article 9 does not have absolute protections for every religious observance.¹⁷²

With respect to the limitations to the protections under Article 9, the Court stated that “[i]n democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one’s religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.”¹⁷³ The State serves “as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society.”¹⁷⁴ Therefore, the ECHR reasoned, the State must “ensure mutual tolerance between opposing groups”¹⁷⁵

The ECHR stated that, “[D]emocracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position.”¹⁷⁶ The ECHR further urged a “dialogue and spirit of compromise.”¹⁷⁷ In other words, to protect the freedoms of some under the Convention, the States may need to restrict those of others.¹⁷⁸ Governments are in the best position to make such determinations, and their decisions should be given “special weight.”¹⁷⁹ Accordingly, under Article 9, “the State should thus, in principle, be afforded a wide margin of appreciation

169. *Id.*

170. *Id.* ¶ 124; *see* Convention, *supra* note 1.

171. *S.A.S.*, App. No. 43835/11, ¶ 124; *see* Convention, *supra* note 1, art. 9.

172. *S.A.S.*, App. No. 43835/11, ¶ 125.

173. *Id.* ¶¶ 125–26.

174. *Id.* ¶ 127.

175. *Id.* ¶¶ 127–28 (citation omitted) (“Pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society.’”).

176. *Id.* ¶ 128.

177. *Id.*

178. *Id.* (“It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a democratic society.”).

179. *Id.* ¶ 129 (citing *Maurice v. France*, App. No. 11810/03, ¶ 117) (“[N]ational authorities . . . are . . . better placed than an international court to evaluate local needs and conditions.”).

in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is 'necessary.'"¹⁸⁰

In the case of the law challenged by S.A.S., the ECHR reasoned that "a State may find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud."¹⁸¹ However, public safety cannot solely justify a blanket ban on clothing designed to conceal the face.¹⁸² It comes "within the powers of the State to secure the conditions whereby individuals can live together in their diversity."¹⁸³

The ECHR held that "the impugned ban can be regarded as justified in its principle solely in so far as it seeks to guarantee the conditions of 'living together.'"¹⁸⁴ There were approximately 1,900 women wearing the full-face veil in France in 2009.¹⁸⁵ The ECHR observed that "the women concerned may perceive the ban as a threat to their identity."¹⁸⁶ However, the ECHR further found it significant "that the ban is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face."¹⁸⁷ The prohibition "can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others.'"¹⁸⁸ Accordingly, the ECHR concluded, the French ban on wearing the full-face veil in public did not violate Articles 8 or 9 of the Convention.¹⁸⁹

180. *Id.*

181. *Id.* ¶ 139.

182. *Id.* (The court took the view that "a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety.").

183. *Id.* ¶ 141.

184. *Id.* ¶ 142.

185. *Id.* ¶ 145.

186. *Id.* ¶ 146.

187. *Id.* ¶ 151.

188. *Id.* ¶ 157.

189. *Id.* ¶ 159.

III. EUROPEAN PROHIBITIONS ON THE PRACTICE OF VEILING CONSTITUTE THE FORCED COVERING OF MUSLIM WOMEN

A. *European Courts' Upholding of Veiling Bans is Harmful Forced Covering*

Covering involves an election by the individual to remove societal stigma.¹⁹⁰ In other words, to be identified with “normal” society, individuals must overcome the societal prejudices that lead the stigmatized class to appear less than human.¹⁹¹ A sense of self-awareness of difference leads the individual to cover.¹⁹² It is a personal desire on the part of the outsider to assimilate into the host society.¹⁹³ As stated by Kenji Yoshino, covering is a means to joining mainstream society.¹⁹⁴

As mentioned previously, Erving Goffman writes that one of the reasons individuals cover is to avoid “mixed contacts” and allow “a stigmatized individual to present himself as an ordinary person”¹⁹⁵ In the case of the French law, it is a regulation of the encounters between observant Muslim woman and French, secular society.¹⁹⁶ The veil is “a practice at odds with the values of the Republic’ as expressed in the maxim ‘liberty, equality, fraternity.’”¹⁹⁷ It is “incompatible with secular French society,” and “a flagrant infringement of the French principle of living together (*le ‘vivre ensemble’*).”¹⁹⁸ In the terms discussed in Goffman’s *Stigma*, the veil is “stigmatized” whereas French democratic principles are “normal.”¹⁹⁹

However, the voluntary wearing of the hijab or burqa by observant Muslim women in Europe does not indicate a desire by an individual to blend into society. Rather, it is an affirmation of individual identity through the outward observance of religious belief; prohibitions on these outward observances are state-enforced covering.²⁰⁰ It is the

190. GOFFMAN, *supra* note 32, at 102.

191. *Id.* at 102–03.

192. *Id.*

193. *Id.* at 103.

194. *See supra* notes 58–59 and accompanying text.

195. *See* GOFFMAN, *supra* note 32, at 12; *see supra* notes 41–43 and accompanying text.

196. S.A.S. v. France, App. No. 43835/11, ¶¶ 16–17 (July 1, 2014), <http://hudoc.echr.coe.int/eng?i=001-145466> [<https://perma.cc/V6AU-4JMM>].

197. *Id.* ¶ 17 (quotation in original).

198. *Id.*

199. *See* GOFFMAN, *supra* note 32, at 12.

200. *See* Case C-157/15, Achbita v. G4S Secure Sols. NV, ECLI:EU:C:2017:203 (Mar. 14, 2017),

European State that sees them as “stigmatized.”²⁰¹ These countries have sought through legislation to direct Muslim women’s assimilation into “normal” society, such that the societal stigma becomes the veil.

Some of the cases discussed earlier in this article dealt with limited circumstances of dress codes in schools and employment.²⁰² These cases challenged the rules of general applicability that infringed on religious expression.²⁰³ Some upheld and some struck down by the reviewing courts.²⁰⁴

Notwithstanding its limited scope, the reasoning of the ECHR in *Leyla Sahin v. Turkey* sounds like covering.²⁰⁵ The ECHR emphasized that it is incumbent upon the nation-state to be “the neutral and impartial organiser of the exercise of various religions, faiths and beliefs” to provide “public order, religious harmony and tolerance in a democratic society.”²⁰⁶ While the nation does not “assess the legitimacy of religious beliefs,” it strives to balance the rights of individuals when it comes to religious practice.²⁰⁷ In *Sahin*, the ECHR sought to uphold Turkish secularism.²⁰⁸ In other words, by covering observant Muslim women, they became part of mainstream (secular) Turkish society.

Indeed, with respect to the limitations to the protections under Article 9 of the Convention, the ECHR stated that “[i]n 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 beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.”²⁰⁹ The State serves “as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and

<https://curia.europa.eu/juris/document/document.jsf?docid=188852&doclang=EN> [<https://perma.cc/CH4Y-7BLV>]; *Sahin v. Turkey*, App. No. 44774/98 (Nov. 10, 2005), <http://hudoc.echr.coe.int/fre?i=001-70956> [<https://perma.cc/UN8F-63KR>]; *R v. Headteacher & Governors of Denbigh High Sch.* [2006] UKHL 15 (appeal taken from Eng.).

201. See cases cited *supra* note 200.

202. See cases cited *supra* note 200.

203. See cases cited *supra* note 200.

204. See cases cited *supra* note 200.

205. See *Sahin*, App. No. 44774/98, ¶¶ 106–08.

206. *Id.* ¶ 107.

207. *Id.*

208. See *id.* ¶ 116.

209. *Id.* ¶ 106 (citations omitted).

tolerance in a democratic society.”²¹⁰ Therefore the State must “ensure mutual tolerance between opposing groups . . . to ensure that the competing groups tolerate each other.”²¹¹ Importantly, as expressed by the dissenting opinion in *S.A.S. v. France*, this view is not monolithic.²¹²

Judges Nussberger and Jäderblom filed a dissenting opinion in *S.A.S.*, stating that the holding of the Court “sacrifices concrete individual rights guaranteed by the Convention to abstract principles.”²¹³ The dissent observed that “fears and feelings of uneasiness [associated with the Muslim veil] are not so much caused by the veil itself . . . but by the philosophy that is presumed linked to it.”²¹⁴ There is “no right [under the Convention] not to be shocked or provoked by different models of cultural or religious identity.”²¹⁵ The freedoms guaranteed by the Convention include those exercised that “offend, shock or disturb.”²¹⁶ The French concept of “living together” cannot be used as the basis to justify “that human interaction is impossible if the full face is not shown.”²¹⁷ Accordingly, the judges argued that the Law violates Articles 8 and 9 of the Convention because “the French legislature [] restricted pluralism, since the measure prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public.”²¹⁸ They refer to this as “selective pluralism and restricted tolerance.”²¹⁹

The idea that the French concept of “living together” is no more than a cover is supported by the domestic debates over the law, which divided France. The explanatory memorandum of the French Law of October 11, 2010, (“prohibiting the concealment of one’s

210. *Id.* ¶ 107.

211. *Id.* ¶¶ 107–08 (“Pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society.’”).

212. *See* *S.A.S. v. France*, App. No. 43835/11, ¶¶ 1–26 (July 1, 2014) (Nussberger, J. and Jäderblom, J., dissenting), <http://hudoc.echr.coe.int/eng?i=001-145466> [<https://perma.cc/V6AU-4JMM>].

213. *Id.* ¶¶ 2, 5 (“The very general concept of ‘living together’ does not fall directly under any of the rights and freedoms guaranteed within the Convention.”).

214. *Id.* ¶ 6.

215. *Id.* ¶¶ 7–8 (alteration in original) (“[I]t can hardly be argued that an individual has a right to enter into contact with other people, in public places, against their will.”).

216. *Id.* ¶ 7 (quoting *Mouvement raelien suisse v. Switzerland*, App. No. 16354/06, ¶ 48 (July 12, 2012)).

217. *Id.* ¶¶ 9, 13 (“[I]t is all the more difficult to argue that the rights protected outweigh the rights infringed.”).

218. *Id.* ¶ 14.

219. *Id.*

face in public places”)²²⁰ emphasized the values of the French Republic as the reason for banning the veil.²²¹ The Prime Minister’s Circular of March 2, 2011, implementing Law no. 2010-1192 (October 11, 2010), provided that the law was *specifically* aimed at the wearing of the burqa and niqab by Muslim women.²²² The Parliamentary Commission report on the “wearing of the full-face veil on national territory” found that the instances of Muslim women wearing the burqa and niqab increased at the millennium.²²³ The French Government was openly concerned with Islamic extremism.²²⁴

The French opposition was equally clear. On January 21, 2010, the National Advisory Commission on Human Rights (*Commission nationale consultative des droits de l’homme* – CNCDH) issued an opinion against the proposed law banning the wearing of the burqa and niqab in public.²²⁵ The Commission stated that “the principle of secularism alone could not serve as a basis for such a general measure, since it was not for the State to determine whether or not a given matter fell within the realm of religion, and that public order could justify a prohibition only if it were limited in space and time.”²²⁶ Using language that the Commission could have taken right out of Goffman’s work, the Commission stated the proposed law posed a “risk of *stigmatising* Muslims.”²²⁷

On January 29, 2010, the *Conseil d’Etat* also came out against the proposed ban.²²⁸ The *Conseil* issued a study on “the legal grounds for a ban on the full veil.”²²⁹ They “questioned the legal and practical viability” of banning the burqa and niqab in light of “rights and religious freedoms guaranteed by the [French] Constitution, the [European] Convention [on Human Rights,] and European Union

220. *Id.* ¶¶ 14, 25 (majority opinion).

221. *Id.* ¶¶ 15–29.

222. *See* Law No. 2010-1192 of Oct. 11, 2010, J.O., Oct 12, 2010, p. 1. “The concealment of the face in public places is prohibited from 11 April 2011 throughout the territory of the Republic.” *S.A.S.*, App. No. 43835/11, ¶ 31. “The offence is constituted when a person wears an item of clothing that is designed to conceal his or her face and when he or she is in a public place.” *Id.* The prohibition includes specifically the burqa and niqab. *See id.*

223. *S.A.S.*, App. No. 43835/11, ¶¶ 15–16.

224. *Id.* ¶ 16.

225. *Id.* ¶¶ 18–19.

226. *Id.* ¶ 18.

227. *Id.*

228. *See id.* ¶¶ 20–23.

229. *Id.* ¶ 20.

law.”²³⁰ The *Conseil* asserted that, “[T]he principle of gender equality was not intended to be applicable to the individual person . . .”²³¹

The *Conseil d’Etat* did, however, support limited legislation more narrowly tailored to limiting the wearing of the burqa and niqab only for purposes of identification for public safety or “where identification appeared necessary for access to or movement within certain places.”²³² They also endorsed “strengthening enforcement” against coercive measures to force women to wear the full-faced veil against their will.²³³

Despite the divided domestic opinion, when the issue arose in *S.A.S.*, the ECHR upheld the French ban along the same lines as the narrower Turkish prohibition in *Sahin*. The Court endorsed the French concept of “living together” (covering).²³⁴ The ECHR attempted to balance religion with “the preservation of the conditions of ‘living together.’”²³⁵ In other words, the mainstreaming of Muslim women into European society through the absence of the veil.

B. *Permissible Covering when Religious Observance Balanced with Safety*

There is an appropriate place for forced covering when it comes to religious symbols; those limited exceptions include where a job raises safety issues.²³⁶ Most cases considering this issue, however, conclude that the harm of suppressing religious freedom outweighs the perceived societal benefit, at least where there are no physical safety issues.²³⁷ Indeed, it is actually worse where, as in the case of France, an entire class of religious observance is suppressed for the general idea of “living together.”²³⁸

230. *Id.* ¶ 22.

231. *Id.*

232. *Id.* ¶ 23.

233. *Id.*

234. *Id.* ¶¶ 141–42 (“[T]he impugned ban can be regarded as justified in its principle solely in so far as it seeks to guarantee the conditions of ‘living together.’”).

235. *Id.* ¶ 157.

236. *See, e.g.*, *Eweida v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10, ¶¶ 19–20, 99–100 (Jan. 15, 2013) (exemplifying a situation where forced covering qualifies as an exception for job safety reasons), <https://hudoc.echr.coe.int/eng?i=001-115881> [<https://perma.cc/U9AR-QQ98>].

237. *See, e.g., id.* ¶¶ 91, 94–95.

238. *S.A.S.*, App. No. 43835/11, ¶¶ 4–5 (dissenting opinion) (“The very general concept of ‘living together’ does not fall directly under any of the rights and freedoms guaranteed within the Convention.”).

The ECHR has heard multiple cases involving the wearing of religious garb.²³⁹ Its jurisprudence related to other forms of religious observance support the idea that the prohibition against wearing the Muslim veil is forced covering.²⁴⁰ Case law demonstrates that there is a proper place for covering religious symbols if there are safety issues.²⁴¹ Most cases, however, still consider the harm of suppressing religious freedom.²⁴² Where there is no physical safety at issue, the regulation is considered worse than the harm to religious freedom.²⁴³

In *Eweida and Others v. United Kingdom*, the ECHR struck down a workplace restriction on wearing the Christian cross as a violation of Article 9 of the Convention.²⁴⁴ In the case of *Eweida*, a devout Coptic Christian challenged a policy of her employer, British Airways, that prohibited her from openly wearing a cross.²⁴⁵ On May 20, 2006, Eweida began visibly wearing a cross at work as a sign of devotion.²⁴⁶ British Airways's policy was that accessories worn for "mandatory religious reasons should at all times be covered up by the uniform."²⁴⁷ Interestingly, a Muslim employee was allowed to wear the hijab if it was in British Airways colors.²⁴⁸ Accordingly, the Court found the prohibition by British Airways to be a violation of Article 9 of the European Convention on Human Rights.²⁴⁹

The issue was "whether Ms. Eweida's right freely to manifest her religion was sufficiently secured within the domestic legal order and whether a fair balance was struck between her rights and those of others."²⁵⁰ In the case of visibly wearing a cross, British Airways did not strike a fair balance.²⁵¹ Her wearing the crucifix was a

239. See *Eweida*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10, ¶¶ 12, 20, 94–95; *S.A.S.*, App. No. 43835/11 ¶¶ 3, 11–14.

240. See generally *Overview of the Court's Case-law on Freedom of Religion*, Eur. Ct. Hum. Rts. (Oct. 31, 2013), https://www.echr.coe.int/documents/research_report_religion_eng.pdf [<https://perma.cc/UQ2S-U8U3>] (examining the legal standards on freedom of religion and discussing relevant cases enforcing these principles).

241. See, e.g., *Eweida*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10, ¶¶ 19–20, 99–100.

242. See, e.g., *id.* ¶¶ 41, 48–49, 63, 66, 72, 79, 81, 91, 94–95.

243. See, e.g., *id.* ¶¶ 79–84, 89–110.

244. See *id.* ¶¶ 96–101.

245. *Id.* ¶¶ 93–95.

246. *Id.* ¶ 12.

247. *Id.* ¶ 10.

248. *Id.* ¶ 11.

249. See *id.* ¶¶ 94–95.

250. *Id.* ¶ 91.

251. *Id.* ¶ 94.

fundamental right “because a healthy democratic society needs to tolerate and sustain pluralism and diversity[.]”²⁵² There is “value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others.”²⁵³

The Court further observed that “[r]eligious freedom is primarily a matter of individual thought and conscience.”²⁵⁴ Article 9 guarantees the protection “to manifest one’s belief . . . to practice in community with others and in public.”²⁵⁵ To constitute manifestation of one’s religion the act must be “intimately linked to the religion or belief.”²⁵⁶ Eweida wore the cross as a sign of devotion.²⁵⁷ The fact that British Airways would not provide reasonable accommodation to allow her to wear a cross constituted interference with her “right to manifest her religion.”²⁵⁸ The ECHR found that the British courts gave too much deference to British Airways’ desire to project a certain corporate image.²⁵⁹ It further noted that British Airways’ subsequently changing its policy to allow the wearing of religious articles was evidence that the “prohibition was not of crucial importance.”²⁶⁰

In contrast to *Eweida*, in the same consolidated opinion, the Court upheld a prohibition of medical staff wearing jewelry in the operating room.²⁶¹ Chapin was a nurse at a state hospital with a policy that religious jewelry may be discreetly worn.²⁶² The hospital’s policy further required that a supervisor could not unreasonably bar visibly wearing religious symbols.²⁶³ Chapin “believe[d] that to remove the cross would be a violation of her faith.”²⁶⁴

The record in this case, however, showed that the interference by the state institution was necessary “to protect the health and safety of nurses and patients.”²⁶⁵ Dangling necklaces could pose a threat to patients undergoing surgery.²⁶⁶ Accordingly, the ECHR concluded

252. *Id.*

253. *Id.*

254. *Id.* ¶ 80.

255. *Id.*

256. *Id.* ¶ 82.

257. *See id.* ¶¶ 82, 94.

258. *Id.* ¶ 91.

259. *See id.* ¶¶ 94–95.

260. *Id.* ¶ 94.

261. *Id.* ¶¶ 98–100.

262. *Id.* ¶¶ 18–19.

263. *Id.* ¶ 19.

264. *Id.* ¶ 18.

265. *Id.* ¶ 98.

266. *See id.*

that hospital administrators must be granted deference to their policy to ensure the safety of patients.²⁶⁷ In other words, the restriction was for permissible reasons of safety, not to suppress religious observance.²⁶⁸ Accordingly, they found no violation of Article 9.²⁶⁹

CONCLUSION

Pulling back the veil of the European laws, generally, and the French law, specifically, we see that the underlying reasoning behind the bans of wearing the Muslim veil constitute State-sponsored covering of Muslim women. In *Eweida*, the ECHR appeared to adopt a more balanced and nuanced approach to outward expressions of Christianity.²⁷⁰ However, despite this approach, the implications of State-forced covering extends to all religious practice.²⁷¹ The reasoning of the ECHR in upholding the ban applies to any form of outward religious expression, and is not limited to displays of Christian symbols. For example, the reasoning in *Eweida* could also be applied to the practices of Orthodox Judaism or Ash Wednesday observance for Roman Catholics.²⁷² When applying this reasoning to other circumstances, it becomes clear that the religious freedom guarantee under Article 9 of the ECHR becomes swallowed by the Court's exception.²⁷³

While Article 9 of the Convention provides for limited exceptions:

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.²⁷⁴

Veiling is a visible form of religious expression practiced by minority populations throughout the EU.²⁷⁵ Thus, blanket bans on public religious expression may improperly expand the Convention's

267. *Id.* ¶¶ 99–100.

268. *Id.* ¶ 100.

269. *Id.*

270. *See supra* Section III.B.

271. *See supra* Section III.B.

272. *See generally* GOFFMAN, *supra* note 32 (discussing stigmas associated with different religious and ethnic groups and their forms of expression).

273. *See supra* Section III.B.

274. Convention, *supra* note 1; *see supra* note 7 and accompanying text.

275. *See supra* Section I.A.

narrow exception. In doing so, the blanket bans subsume the protection sought by Article 9.²⁷⁶

276. *Compare supra* Section III.A. (explaining the generalized application of the exception in the public context), *with supra* Section III.B. (explaining the more realistic application of the exception in private contexts).