

# The Theory of Laïcité in the Judicature of the French Conseil d'État: A Comparative Assessment

*Mohamed Abdelaal\**

## Abstract

The French theory of *Laïcité*, or assertive secularism, has rapidly developed to become a significant part of the French constitutional legacy, which subsequently brought out what should have been expected: conflicts between the right to self-determination, local culture, religious freedom, and the state interest in curbing radicalism and extremism.<sup>1</sup> This article analyzes these conflicts based on the decision of the Conseil d'État, which lifted the French ban on the burkini on August 26, 2016.<sup>2</sup> This article discusses the two opposite ways one could read the decision: some could see it as shielding fundamental rights and freedoms, while others could see it as an obstacle in the way of protecting France against Islamic extremism.<sup>3</sup> In doing so, the article aims to provide a critical analysis of the

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\* Assistant Professor, Alexandria University Faculty of Law.

1. Susanne Baer, *A Closer Look at Law: Human Rights as Multi-Level Sites of Struggles Over Multi-Dimensional Equality*, 6 *UTRECHT L.REV.* 56, 57 (2010).

2. *Association de Defense des Droits de l'Homme Collectif Contre l'Islamophobie en France*, LE CONSEIL D'ÉTAT ET LA JURIDICTION ADMINISTRATIVE (Aug. 26, 2016), <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-ordonnance-du-26-aout-2016-Ligue-des-droits-de-l-homme-et-autres-association-de-defense-des-droits-de-l-homme-collectif-contre-l-islamophobie-en-France> [hereinafter *Droits de l'Homme Collectif Contre l'Islamophobie*].

3. See generally Baer, *supra* note 1.

significance of the *Laïcité* policy on individual freedom and religious liberty by following the Conseil d'État, and the European Court of Human Rights, in regards to their ban of religious symbols and attires in France and different comparative jurisdictions.<sup>4</sup>

## I. INTRODUCTION

In June 2009, the French President Nicolas Sarkozy addressed the French Parliament and stated that a burqa—an Islamic attire worn by Muslim women that covers the entire body, including a mesh over the face with an opening for the eyes—never creates a religious problem, instead it poses a serious problem to the freedom and dignity of women, since it is not a religious symbol but a sign of servitude and degradation.<sup>5</sup> “Thus, a burqa is not welcomed on the French territory.”<sup>6</sup>

Two months later, in August 2009, pursuant to President Sarkozy's speech, a Muslim French woman was banned by French officials from swimming in a public pool while wearing a burkini, a swimsuit that covered her entire body.<sup>7</sup> Following what President Sarkozy said in his speech, the French officials avoided raising any

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4. See generally Baer, *supra* note 1; see also S.A.S. v. France, App. No. 43835/11, Eur. Ct. H.R. (2014); CE Sect., June 27, 2008, Rec. Lebon 286798 [hereinafter Rec. Lebon 286798].

5. Nicolas Sarkozy, *La burqa n'est pas la bienvenue sur le territoire de la République*, LIBÉRATION (June 22, 2009), [http://www.liberation.fr/france/2009/06/22/sarkozy-la-burqa-n-est-pas-la-bienvenue-sur-le-territoire-de-la-republique\\_566253](http://www.liberation.fr/france/2009/06/22/sarkozy-la-burqa-n-est-pas-la-bienvenue-sur-le-territoire-de-la-republique_566253).

6. *Id.*

7. Mayor Alain Kelyor, *French Pool Bans 'Burkini' Swim*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/8197917.stm> (last visited Feb. 13, 2017).

religious worries, instead citing hygiene concerns as a reason for the ban.<sup>8</sup>

Despite the fact that we were told that the 2009 burkini ban from swimming pools was not driven by any religious motives, in August 2016—following the recent terrorist attacks in France—the mayor of Cannes, David Lisnard, banned wearing burkinis on Cannes's beaches, citing a possible link to Islamic extremism.<sup>9</sup> Further, the mayor of Villeneuve-Loubet proceeded to implement the provisions of the Decree of August 5, 2016, which was conceded by the State to the town.<sup>10</sup> Article 4.3 of the Decree reads:

Of all the common beach areas, access to swimming is prohibited to anyone that does not have a dress, respectful of morality and the principle of secularism, and compliance with hygiene and safety rules adapted in swimming maritime public domain. Wearing clothes, while swimming, having a connotation contrary to the principles mentioned above is strictly prohibited on the beaches of the town.<sup>11</sup>

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8. *Id.*

9. David Lisnard, *Mayor of Cannes Bans Burkinis on Resort's Beaches*, THE GUARDIAN (Aug. 11, 2016), <https://www.theguardian.com/world/2016/aug/11/cannes-mayor-bans-burkinis-beachwear-must-respect-secularism>.

10. *Another French Riviera Town Bans Burkinis from Its Beaches*, RFI: THE WORLD AND ALL ITS VOICES (Aug. 13, 2016), <http://en.rfi.fr/france/20160813-another-french-riviera-town-bans-burkinis-its-beaches>; *see also* Ed Vulliamy, *'They Want Us to Be Invisible': How The Ban on Burkinis Is Dividing the Côte d'Azur*, THE GUARDIAN (Aug. 21, 2016), <https://www.theguardian.com/world/2016/aug/20/burkini-ban-cote-d-azur-spreads-france-divide>.

11. This law would later be challenged before the French administrative courts and suspended by the Conseil d'État, France's highest administrative court, as it will be discussed later. Philippe Cossalter, *The French Burkini Case: "Uncover this Breast that I Cannot Behold"*, REVUE GÉNÉRALE DU DROIT § 2,

This provision was interpreted by the authorities to address the necessity of prohibiting wearing burkinis on the town's beaches.<sup>12</sup>

One cannot argue that President Sarkozy's approach was cunning in refraining from describing a burqa as a religious symbol.<sup>13</sup> In fact, the mayor of Cannes, as well as the State's Decree of August 5, 2016, were so naive in linking wearing burkinis with religious agendas or extremism.<sup>14</sup> Indeed, any attempt to ban the wearing of a certain dress, which is most often worn by people following a certain religion, would inevitably result in a conflict between a number of concepts that seem to already be contested, such as, freedom of religion, equality, secularism, democracy, and self-determination.<sup>15</sup> Interestingly, any attempt to reconcile these conflicts brings out more paradoxical situations.

First, when religion is given priority it is likely that secularism and democracy will be at stake.<sup>16</sup> The decision of whether the Jewish character of the state should be given preference over the democratic nature of the state or vice versa is something that Israel's Supreme Court found itself troubled with.<sup>17</sup> The Israeli Supreme Court's apparent confusion regarding this decision could simply be attributed

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(Sept. 5, 2016), <http://www.revuegeneraledudroit.eu/blog/2016/09/05/the-french-burkini-case-uncover-this-breast-that-i-cannot-not-behold/>.

12. *Id.*

13. Sarkozy, *supra* note 5.

14. *See generally* Lisnard, *supra* note 9; Cossalter, *supra* note 11.

15. Baer, *supra* note 1.

16. *Id.*

17. JEWISH AND DEMOCRATIC STATE, [https://en.wikipedia.org/wiki/Jewish\\_and\\_democratic\\_state](https://en.wikipedia.org/wiki/Jewish_and_democratic_state) (last visited Feb. 13, 2016).

to the fact that Israel's constitutional identity is based on two main canons: a) the Jewish nature of the state, as mentioned in the Declaration of Independence of 1948,<sup>18</sup> and b) the democratic character of the state as added by the Ninth Amendment to the Basic Law, the Knesset of 1985.<sup>19</sup> With that being said, one of the big challenges faced by the Israel Supreme Court was how to build a judicial ideology that would demonstrate its commitment to define Israel both as a Jewish state and as a democratic one.<sup>20</sup>

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18. "On November 29, 1947, the General Assembly of the United Nations adopted a Resolution for the establishment of an independent Jewish State in Palestine, and called upon the inhabitants of the country to take such steps as may be necessary on their part to put the plan into effect . . . HEREBY PROCLAIM the establishment of the Jewish State in Palestine, to be called ISRAEL." Declaration of Establishment of State of Israel, 5708–1948 (Members of the People's Council, <http://www.jewishvirtuallibrary.org/the-declaration-of-the-establishment-of-the-state-of-israel> (Isr.)).

19. Article 7(A) of the Ninth Amendment provides "A candidates list shall not participate in elections to the Knesset, if the goals or actions of the list, expressly or by implication, include one of the following: (1) negation of the existence of the State of Israel as a Jewish and democratic state . . . ." *See generally* Knesset Election (Prevention of Participation of Candidates' List), 5718–1958, (Isr.).

20. RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 60 (Oxford U. Press, 2014); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 174 (Harv. U. Press, 2007); *see also* HCJ 359/66 Meatrael v. The Council of the Chief Rabbinate of Israel 48(5) IsrSC 617, (1980) (Isr.); The difficulty of the commitment assigned to the Israeli Supreme Court was evident when it found itself obligated to interpret the Basic Law: Human Dignity and Liberty of 1992, and the Basic Law: Freedom of Occupation of 1992 and 1994, protecting the right of every citizen or resident of the state to engage in any occupation, profession, or business, as well as the right to property, due process of law, freedom of movement, life, personal freedom, privacy, and human dignity. The Court interpreted the two Basic Laws in one of its famous decisions, the Meatrael's case in 1994. The case involved Meatrael, a private company that imports non-Kosher meat products into Israel, that appealed to the Supreme Court against the Ministry of Religious Affairs' refusal to license the company to import non-Kosher meat. The company argued that the Ministry's decision violated its constitutional rights to freedom of occupation and business, which are both granted in Israel's Basic Law: Freedom of Occupation, and its rights to privacy, personal freedom, and property, which are granted in Israel's Basic Law: Human Dignity

Second, the principle of equality may also be at stake when certain religious norms are given priority. To the extent that some liberals see forcing women to wear a hijab, niqab, or burqa in some Muslim countries as disturbing the principle of equality, other conservative Muslims see the ban imposed by some western countries on wearing such Islamic attires, including burkinis, as an attack on the principle of equality.<sup>21</sup> As Susanne Baer once stated, in the conflict between religion versus democracy and secularism, "sex equality, or feminism, is . . . on the agenda very prominently."<sup>22</sup>

Third, when the principle of self-determination is found to be on one side and religion and secularism on the other, they do not coexist. For instance, apart from any religious considerations, muslim women in France could see wearing a burkini as something that is related to

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and Liberty. On the other hand, the Ministry of Religious Affairs defended its decision on the basis that allowing the company to continue importing non-Kosher meat would hurt Israel's Jewish character, which should be regarded as a fundamental constitutional norm. At first, the Court was convinced that freedom of occupation is an enshrined constitutional principle that should not be restricted by refusing to uphold the Ministry's decision to terminate the license of the private company. However, under painstaking pressures from the Ministry of Religious Affairs along with the religious parties, the Basic Code: Freedom of Occupation was amended allowing further amendments by ordinary laws enacted by the Knesset. Subsequently, the Knesset passed a law that prohibits the importation of non-Kosher products into Israel: "the Meat Law of 1994." Based on this law, the Ministry terminated the license to import non-Kosher meat. Meatrael appealed the decision to the Supreme Court for the second time; however, the Court overturned its previous precedent holding based on the new Meat Law and the recent amendments to the Basic Law. In fact, this decision was seen as a response from the Court to the political pressure to realize the Jewish character of Israel. H CJ 359/66 *Meatrael v. The Council of the Chief Rabbinate of Israel*, 48(5) 617, (1980) (Isr.).

21. *Id.*

22. Baer, *supra* note 1, at 57.

self-determination and autonomy, regardless of what France may think about how its strict theory on secularism should be applied.<sup>23</sup>

In Part I of this article I intend to introduce and illustrate the French law on the issue of secularism and public order and how it relates to the burkini ban. In doing so, I will trace the decisions of the French Conseil d'État on the ban on wearing Islamic hijabs in public schools and burkinis on beaches. Further, I will shed light on the European Court of Human Rights' (ECHR) position on banning religious symbols in the public sphere, in an attempt to determine what the opinion of the ECHR would be if a hypothetical burkini ban case were to be presented before the French Court.

In Part II of this article I will survey a wide range of comparative models regarding the position of the world's constitution on religion. Herein, I will highlight: a) the positions of France and Turkey, that regard secularism as a core value of democracy; b) the doctrine of religious neutrality introduced by the United States Constitution; and c) the strong religious establishment clause adopted by the Iranian Constitution.

In doing so, I intend to examine the burkini ban in each of these constitutional models. Finally, I will end with some closing remarks.

## II. THE LAW IN FRANCE

### A. *The Burqua and Hijab Affair*

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23. *Id.* at 57; see also Huda Jawad, *The Burkini Ban is Misogynistic – and Western Feminists Are Turning a Blind Eye*, INDEPENDENT, <http://www.independent.co.uk/voices/burkini-cannes-islamophobia-banning-the-burkini-is-misogynistic-and-western-feminists-are-turning-a-a7188806.html> (last visited Feb. 13, 2017).

In France, the approach governing the relationship between state and religion revolves around the theory of "*Laïcité*", otherwise known in English as "Assertive Secularism."<sup>24</sup> This theory—stemming from the first article of the French Constitution of 1958, which states: "France shall be an indivisible, secular, democratic and social Republic"—simply means that bringing one's religion into the "public sphere" is prohibited.<sup>25</sup>

*Laïcité* was created as an attempt to free the state from the influence of religious clerics and guilds, and to establish a religion-free citizenship and national identity.<sup>26</sup> The policy did not only free France politically and socially from the influence of religion, but rather it continued to grow until it introduced itself as a supra-constitutional value, which established what is now known as assertive secularism or militant secularism.<sup>27</sup>

A careful examination of the French Conseil d'État's decisions reveals ample evidence that is pertinent to the notion of the *laïcité* policy, and the case of Faiza Silmi is an example of this.<sup>28</sup> Faiza Silmi was born in Morocco, married a French citizen of Moroccan origin, and permanently moved to France in 2000, where she had

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24. Ran Hirschl, *Comparative Constitutional Law and Religion*, in *COMPARATIVE CONSTITUTIONAL LAW, RESEARCH HANDBOOKS IN COMPARATIVE LAW* 422, 435 (Tom Ginsburg & Rosalind Dixon ed., 2011).

25. ROAN MCCREA, *RELIGION AND THE PUBLIC ORDER OF THE EUROPEAN UNION* 104 (Oxford U. Press, 2010).

26. REX AHDAR & IAN LEIGH, *RELIGIOUS FREEDOM IN THE LIBERAL STATE* 73 (Oxford U. Press, 2005); *see also* Hirschl, *supra* note 24.

27. Hirschl, *supra* note 24.

28. *Id.*

three children.<sup>29</sup> She applied for citizenship of France in 2004, however, her application was denied in 2005.<sup>30</sup> The government denied her application citing her radical beliefs and actions, which included amongst other things: wearing the Islamic niqab since she arrived in France, leaving her house only when her husband joined her, and being in a complete submission to men.<sup>31</sup> According to the French government, Silmi's beliefs and actions were inconsistent with the values of French society and the principle of equality between the two sexes.<sup>32</sup> Silmi appealed the government's decision to the Conseil d'État.<sup>33</sup>

Relying on the information provided by the government, the Conseil upheld the decision to deny Silmi's application for citizenship.<sup>34</sup> The Conseil reasoned that the applicant “adopted a radical practice of her religion, incompatible with the essential values of the French community . . . .”<sup>35</sup> The Conseil argued that the applicant's beliefs failed to assimilate into the French culture, as

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29. *Id.*

30. Article 21-2 of the French Civil Code of 1804 provides "An alien or stateless person who marries and whose spouse is of French nationality may, after a period of two years from the marriage, acquire French nationality by way of declaration provided that, at the time of the declaration, the community of living, both affective and physical, has not come to an end and the French spouse has kept his or her nationality. The foreign spouse must also prove a sufficient knowledge of the French language, according to his or her condition." The article would later be amended to allow "Foreigners or stateless persons who contracts marriage with a French citizen spouse may, after a period of four years from the marriage, acquire French nationality." *Id.*; *see also* C. CIV. art. 21–2 (Fr.).

31. Hirschl, *supra* note 24.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*; *see also* Rec. Lebon 286798, *supra* note 4.

mentioned in Article 21-4 of the French Civil Code,<sup>36</sup> which allows the government to deny a citizenship application of a foreign spouse for lack of assimilation on grounds other than linguistics.<sup>37</sup>

Likewise, the controversy surrounding the wearing of Islamic headgear—hijab—in public contributed to the development of the scope of the *laïcité* policy, particularly the decisions of the Conseil d'Etat. For instance, on November 27, 1989, pursuant to the Minister of Education's request for a decision on the issue of whether school principals could expel students who wear religious attire, the General Assembly of the Conseil rendered its legal opinion:

It results from the above that, in teaching establishments, the wearing by students of symbols by which they intend to manifest their religious affiliation is not by itself incompatible with the principle of *laïcité*, as it constitutes the free exercise of freedom of expression and of manifestation of religious creeds, but that this freedom should not allow students to sport signs of religious affiliation that, due to their nature, or the conditions in which they are worn individually or collectively, or due to their ostentatious and provocative character, would constitute an act of pressure, provocation, proselytism, or would harm the dignity or the freedom of the student or other members of the educative community,

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36. Hirschl, *supra* note 24; *see also* C. CIV. art. 21–4 (Fr.).

37. "By a decree in Conseil d'Etat, the Government may, on grounds of indignity or lack of assimilation other than linguistic (Act no 2003-1119 of 26 Nov. 2003), oppose the acquisition of French nationality by the foreign spouse within a period of one year after the date of the acknowledgement of receipt provided for in Article 26, paragraph 2, or, where the registration was refused, after the day when the judgment which admits the lawfulness of the declaration has entered into force." C. CIV. art. 21–4 (Fr.).

or would compromise their health or safety, or would perturb the educational activities or the education role of the teaching personnel, or would trouble public order in the establishment or the normal functioning of the public service.<sup>38</sup>

Moreover, in a claim concerning the annulment of a decision by the board of governors of the secondary school Jean Jaurès at Montfermeil on September 28, 1990—which prohibited wearing an "Islamic headscarf"—the Conseil, quoting its previous legal opinion, ruled that "strictly banning the wearing of any distinctive sign, clothing or other religious, political or philosophical" attire constitutes a general and absolute prohibition which is in breach of the principle of *laïcité*.<sup>39</sup> Likewise, on March 14, 1994, the Conseil rendered its opinion on the validity of a public school regulation, which stipulates that "no pupil shall be admitted to the classroom, study or refectory with their head covered."<sup>40</sup> The Conseil declared that such a rule infringes the principles inherited in the French society, in particular the principles of freedom of expression, neutrality, and secularism (*laïcité*).<sup>41</sup>

In what may appear as a stark deviation from its previous position, in 1995 the Conseil delivered a decision that highly disturbed the relation between the principle of *laïcité* and its previous

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38. CE Ass., Nov. 27, 1989, 346.893 [hereinafter CE Ass. 346.893].

39. CE Sect., Nov. 2, 1992, Rec. Lebon 130394.

40. CE Sect., Mar. 14, 1994, Rec. Lebon 145656.

41. *Id.*

rulings on wearing religious symbols and garbs.<sup>42</sup> Specifically, on March 10, 1995, the Conseil presided over a case regarding the expulsion of three Muslim students from a high school for wearing hijabs, which violated the school's policy against the establishment of proselytism.<sup>43</sup> Contrary to its previous holdings, the Conseil upheld the expulsion, stating that the ruling was justified because “wearing this headscarf is incompatible with the proper conduct of physical education classes; that the decision definitively excluding these two pupils was taken on account of the unrest caused by their refusal in the life of the establishment . . . .”<sup>44</sup> However, on November 27, 1996, the Conseil seemed to adhere again to its lenient approach on the interpretation of the principle of *laïcité* when it struck down the decision of the Lille Administrative Court, which had upheld decisions by high schools to expel Muslim students who wore hijabs.<sup>45</sup> The Conseil reasoned that although “pupils in question intended to express their religious beliefs cannot be regarded as a sign which, by its nature, is ostentatious or demanding, and which would in any case be an act of pressure or Proselytism.”<sup>46</sup>

On the legislative level, a law that highly reflects the *laïcité* policy is Law 2004-228 concerning the ban of religious symbols and

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42. *See generally* CE Sect., Mar. 10, 1995, Rec. Lebon 159981.

43. *Id.*

44. *Id.*

45. CE Sect., Nov. 27, 1996, Rec. Lebon 170208.

46. *Id.*

garbs in public schools.<sup>47</sup> Despite the fact that the law does not expressly state an intention to impose a ban on a certain emblem or attire of a particular religion—being that the law bans the wearing of all Islamic, Christian, Jewish symbols and garb in public schools—<sup>48</sup> many people felt, however, that the main purpose of the law was to ban the Islamic headscarf (hijab) in public schools.<sup>49</sup>

The French Stasi Commission, established by former President Jacques Chirac and named after its commissioner and Mediator of the Republic Bernard Stasi to oversee the application of the *laïcité* policy in the French territory, has taken upon itself the task of defending the law against its critics.<sup>50</sup> On December 11, 2003, the Commission published a report in which it expressed considerable fears that wearing religious attires and displaying religious symbols in public schools would constitute a stark violation of the policy of *laïcité*,

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47. Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics. [Law No. 2004–228 of March 15, 2004, concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004 [hereinafter Loi 2004-228].

48. The first Article of the Law reads, "It is inserted in the Education Code, Article L. 141-5 after article L. 141-5-1," which reads as follows as follows: "Art. L. 141-5-1. – In schools, colleges and public high schools, the wearing of signs or clothes by which pupils overtly manifest a religious affiliation is prohibited. The rules shall state that the implementation of a disciplinary procedure is preceded by dialogue with the pupil." Loi 2004-228, *supra* note 47.

49. *Id.*

50. See generally COMMISSION DE REFLEXION SUR L'APPLICATION DU PRINCIPLE DE LAÏCITE DANS LA REPUBLIQUE, RAPPORT AU PRESIDENT DE LA REPUBLIQUE (2003) [hereinafter Rapport Au President De La Republique].

which was translated by the report as the principle of secularity in France.<sup>51</sup>

However, it is worth mentioning that the report paid significant attention to the wearing of the Islamic headscarf—hijab—in public schools, arguing that "to those who wear the veil—Islamic hijab—, it can have different meanings."<sup>52</sup> "It may be a personal choice or rather a constraint, particularly intolerable for the young girls."<sup>53</sup> Further, the report identified that some people regard wearing a Muslim hijab as a manifestation of "the pubescent girl or woman as solely responsible for the desire of 'man', a vision that fundamentally violates the principle of equality between men and women."<sup>54</sup> Eventually, the report recommended that a law should be enacted to meet the demand of a ban on wearing any visible religious signs in France: Law 2004-228 was the outcome of this recommendation.<sup>55</sup>

Another instructive example of the *laïcité* policy could be found in France's ban on the Islamic burqa. On September 14, 2010, motivated by President Sarkozy's speech in June 2009, the French National Assembly passed a bill by a vote of 335–1, which banned people from wearing face-covering headgear, including burqas, niqabs, and other attires in public.<sup>56</sup> For those who violate the ban,

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51. *Id.*

52. *Id.* at 57.

53. *Id.*

54. *Id.*

55. Rapport Au President De La Republique, *supra* note 50, at 58; *see generally* Loi 2004-228, *supra* note 47.

56. Loi 2010-1192 du 11 Octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Act Prohibiting

the law sets forth a sanction consisting of a fine up to €150, and/or a requirement to complete a citizenship education course.<sup>57</sup>

Upon taking all of the steps necessary to finalize the law, the Conseil d'État was called to give its opinion on it.<sup>58</sup> In a report titled "Study on the practice of wearing the Full Veil," the Conseil emphasized that the practice of wearing a full body veil that hides the face is prohibited in two situations: "(1) for public officials in the course of their functions; and (2) integral veils in public schools, [worn] in the name of the principle of secularism."<sup>59</sup> Further, the Conseil argued that the general ban on face coverings could be justified on "public safety considerations and the fight against fraud."<sup>60</sup> More precisely, the Conseil allowed the ban, "for purposes of identity checks and the performance of certain official procedures such as, marriage and voting" since in these situations a woman's refusal to uncover her face constitutes a "denial of access or delivery of these services."<sup>61</sup>

However, the Conseil came to the conclusion that a general prohibition on wearing a full veil or any mode of face covering in

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Concealment of the Face in Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010.

57. *Id.*

58. *Étude Relative Aux Possibilités Juridiques d'Interdiction du Port du Voile Intégral*, LE CONSEIL D'ÉTAT ET LA JURIDICTION ADMINISTRATIVE (Mar. 3, 2010), <http://www.conseil-etat.fr/Decisions-Avis-Publications/Etudes-Publications/Rapports-Etudes/Etude-relative-aux-possibilitesjuridiques-d-interdiction-du-port-du-voile-integral> [hereinafter *Interdiction du Port du Voile Intégral*].

59. *Id.*

60. *Id.*

61. *Id.*

public would expose serious risks under the constitution and the safety of the European Convention on Human Rights and Fundamental Freedoms.<sup>62</sup> Thus, according to the Conseil, a general ban on full veils or any kind of attire that conceals the face would confer "considerable legal uncertainty."<sup>63</sup> Despite the Conseil's condemnation towards the ban on burqas, the Constitutional Council of France cleared all legal obstacles surrounding the Law of 2010-1192—banning the concealment of one's face in public—when it confirmed its constitutionality in October 2010, ordering its publication in the Official Journal of the French Republic.<sup>64</sup>

### ***B. The Burkini Affair***

As mentioned above, the French ban on burkinis started to take its legislative form in 2016, when the town of Villeneuve-Loubet applied the provisions of the Decree of August 5, 2016, whereby Article 4.3 explains that the wearing of the burkini is declared to be against the principle of secularism, hygiene, and safety rules.<sup>65</sup> Since the implementation of the Decree of August 5, 2016, as well as the ban of the burkini on Cannes's beaches, a wide public and political

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62. *Id.*

63. Interdiction du Port du Voile Intégral, *supra* note 58.

64. Constitutional Council, Decision n° 2010-613 DC of October 7th 2010. In confirming the constitutionality of the law, the Constitutional Council argued that French Parliament "has felt that such practices (covering faces) are dangerous for public safety and security and fail to comply with the minimum requirements of life in society. It also felt that those women who conceal their face, voluntarily or otherwise, are placed in a situation of exclusion and inferiority patently incompatible with constitutional principles of liberty and equality." Nicolas Boring, *Global Legal Monitor*, LIBR. CONGRESS (Jan. 6, 2014), <http://www.loc.gov/law/foreign-news/article/france-2010-law-banning-full-islamic-veil-challenged-in-court/>.

65. Cossalter, *supra* note 11.

outcry rapidly grew over the apparent public humiliation and ostracism of Muslim women.<sup>66</sup>

The public and political outcry was translated in a legal claim filed by the League of Human Rights (LDH) and the Committee against Islamophobia in France (CCIF), before the Nice Administrative Court asking for the suspension of the Decree of August 5, 2016, based on Article L. 521-2 of the Administrative Code of Justice.<sup>67</sup> In its decision, the Court dismissed the petitioners' claim, refusing their arguments that the Decree violated a pack of fundamental rights and freedoms, such as freedom of religion and freedom of expression.<sup>68</sup> The Court reasoned that, pursuant to the July 2016 terrorist attacks in Nice, the ban on wearing burkinis seemed "necessary, appropriate and proportionate" to eliminate extremism and retain public order.<sup>69</sup> Further, the Court found the ban on burkinis to be consistent with French law regarding prohibiting actions that neglect the "relations between public authorities and

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66. Alissa J. Rubin, *French 'Burkini' Bans Provoke Backlash as Armed Police Confront Beachgoers*, N.Y. TIMES (Aug. 24, 2016), [https://www.nytimes.com/2016/08/25/world/europe/france-burkini.html?\\_r=0](https://www.nytimes.com/2016/08/25/world/europe/france-burkini.html?_r=0).

67. "On an application justified by a sense of urgency, the judge may take any measures necessary to safeguard the fundamental freedom to which a legal person of public law or private law body responsible for the management of a public service would have worn in the exercise of its powers, a serious and manifestly illegal infringement. The judge will rule within forty-eight hours." Loi 2000-597 du 30 Juin 2000 relative au référé devant les juridictions administratives [Law 2000-597 of June 30, 2000 on the Relating to Summary Proceedings Before the Administrative Courts], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 13, 2017.

68. *Id.*

69. Ben Quinn, *French Police Make Woman Remove Clothing on Nice Beach Following Burkini Ban*, THE GUARDIAN (Aug. 23, 2016), <https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach>.

private individuals on the basis of religion."<sup>70</sup> The decision was appealed to the French Conseil d'État.<sup>71</sup>

On appeal, the Conseil satisfied its jurisdiction requirement by reasoning that the urgency requirement of Article L. 521-2 of the Administrative Code of Justice, which allows a court to "order any measure necessary to safeguard a fundamental freedom" that was illegally infringed by the administrative authority, was fulfilled.<sup>72</sup> In deciding the subject of the appeal, the Conseil acknowledged that, "under Article L. 2212-1 of the General Code of Local and Regional Authorities, the mayor is responsible, under the administrative control of the State Representative, for the municipal police," and that the municipal police, as set out in Article L.2212-2, "aims to ensure public order, safety, security and health."<sup>73</sup> However, the Conseil emphasized that although the mayor is charged with policing the municipality, "he must reconcile the accomplishment of his mission with respect for the freedoms guaranteed by law."<sup>74</sup>

In examining the public order concerns which were raised by the mayor of the town of Villeneuve-Loubet as justification for the ban on the burkini, the Conseil, in an interesting analysis, stated that the apparent purpose of the Decree of August 5, 2016 is to set forth requirements concerning "the right access to the shore, safe bathing

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70. Michael Curtis, *France Addresses Muslim Women*, ENG. REV. (Aug. 16, 2016), [http://www.newenglishreview.org/blog\\_direct\\_link.cfm/blog\\_id/64918/cat\\_id/1403/France-Addresses-Muslim-Women](http://www.newenglishreview.org/blog_direct_link.cfm/blog_id/64918/cat_id/1403/France-Addresses-Muslim-Women).

71. Droits de l'Homme Collectif Contre l'Islamophobie, *supra* note 2.

72. *Id.*

73. *Id.*

74. *Id.*

and hygiene, and decency on the beach."<sup>75</sup> Consequently, the Conseil concluded that mayors do not have the authority to deviate from this purpose in order to justify their actions on other considerations that are likely to restrict individual freedoms by proven risks of harm to public order.<sup>76</sup>

### III. MAKING SENSE OF THE CONSEIL D'ÉTAT'S DECISIONS

A careful examination of the previous decisions of the Conseil d'État reveals that it set out a group of legal principles—related to secular public life and education, and freedom of religion and expression—that define the limits of the relationship between the principle of *laïcité* and the wearing of religious symbols and attires as an expression of individual freedom.<sup>77</sup>

First, in the headscarf cases, the Conseil established a prominent legal principle that wearing an Islamic headscarf, *per se*, is not against the principle of secularism.<sup>78</sup> Through this principle, the Conseil intentionally sought to ensure the importance of acknowledging certain individual freedoms, such as the freedom of expression and the freedom of manifesting one's religion.<sup>79</sup> This approach was evident in the Conseil's aforementioned decision of 1989 where it declared that wearing a headscarf is "not by itself incompatible with the principle of secularism, insofar as it constitutes

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75. *Id.*

76. Droits de l'Homme Collectif Contre l'Islamophobie, *supra* note 2.

77. *See generally id.*

78. Fatima Osman, *Legislative Prohibitions on Wearing a Headscarf: Are They Justified?*, 17 POTCHEFSTROOM L.J. 1, 49 (2014).

79. *Id.*

the exercise of freedom of expression and freedom of manifestation of religious beliefs."<sup>80</sup>

Second, in the same decision, the Conseil tried to limit the scope of the principle that wearing a headscarf is "not by itself incompatible with the principle of secularism" by emphasizing that religious symbols (the headscarf in this case) could be considered against the principle of secularism if by its nature, or by the conditions in which its worn, or by its ostentatious character it constitutes "an act of pressure, provocation, proselytism or propaganda," or it degrades the human dignity of the students and employees of the educational institutions, or it endangers their health and safety, or it disturbs the educational system or the public service.<sup>81</sup> However, the Conseil refrained from determining whether the nature of a religious symbol, or the conditions in which it is worn, or its ostentatious character violates the principle of secularism.<sup>82</sup> With that being said, it seems like the Conseil intended to evaluate how the wearing of a religious symbol would be against secularism on a case by case basis rather than establishing a legal precedent with a binding effect settling this issue.<sup>83</sup>

Third, the Conseil affirmed its theory in the niqab and burqa cases.<sup>84</sup> For instance, in the Case of Faiza Silmi, the Conseil upheld

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80. CE Ass. 346.893, *supra* note 38.

81. Nicky Jones, *Religious Freedom in a Secular Society: The Case of the Islamic Headscarf in France*, MACQUARIE L.J. 1, 3–4 (2009).

82. *Id.*

83. Nicky Jones, *Beneath the Veil: Muslim Girls and Islamic Headscarves in Secular France*, 9 MACQUARIE L.J. 47, 53 (2009).

84. Hirschl, *supra* note 24.

the government's decision denying her of French citizenship, not because of the fact that she wore the niqab, *per se*, but because of the conditions in which the niqab was worn.<sup>85</sup> For example, Silmi started wearing the niqab once she arrived in France, which led her not to leave her house without her husband and to be in complete submission to men, which according to the Conseil constituted a breach to the French secularity.<sup>86</sup> Likewise, in its comment on the Law of 2010-1192 regarding the prohibition of concealed faces in public, the Conseil welcomed the ban on wearing a burqa and a niqab for security reasons if uncovering the woman's face is necessary for an identity check.<sup>87</sup> Nevertheless, the Conseil refused to impose a general ban on wearing burqas and niqabs since it would impose an undue restriction on fundamental freedoms.<sup>88</sup>

Fourth, in overturning the ban on wearing burkinis, the Conseil applied its lenient theory, that wearing certain symbols that reflect ones religious affiliation is not against the principle of secularism, when it refused the argument of the Villeneuve-Loubet mayor that the wearing of the burkini shows a sign of Islamic extremism and disturbs the public order.<sup>89</sup> Interestingly, in reaching this opinion, the

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85. *Id.*

86. *Id.*

87. Interdiction du Port du Voile Intégral, *supra* note 58.

88. *Id.*

89. In one of its famous decision, the Conseil argued that the concept of public policy may justify extending the traditional trilogy of public order, which revolves around the concepts of security, tranquility and public health, to include public morality aspects. Soeren Kern, *Europe Debates the Burkini*, Gatestone Inst. (Sept. 4, 2016, 5:30 AM), <https://www.gatestoneinstitute.org/8855/europe-burkini>; *see also* CE Ass., Oct. 27, 1995, 136727, Rec. Lebon.

Conseil adopted a pragmatic approach in interpreting Article L. 2212-2 of the General Code of Local and Regional Authorities by limiting its scope on the mayor's power to ensure public order, safety, and health without the confiscation of fundamental freedoms.<sup>90</sup>

Fifth, the previous decisions of the French Conseil d'État could arguably function as an indication that the Conseil is of the opinion that nothing is wrong with women just wearing a hijab, niqab, burqa, or a burkini as long as their intention is to just wear these religious symbols.<sup>91</sup> In fact, one could see the Conseil's approach as a violation of the French policy of *laïcité*, which necessitates the eclipse of religion in the public sphere.<sup>92</sup> However, it seems like the Conseil decided to give preference to fundamental freedoms, when women do nothing more than wear religious symbols, without completely overruling the *laïcité* policy, since the ban on such symbols will be sustained if the purpose of wearing it is to be used as an act of pressure, or to advance proselytism or propaganda, or to undermine human dignity, or to disturb the order of the good function of the public service.<sup>93</sup>

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90. *Memorandum in Relation to the Criminalization of Homelessness*, HOUSING RTS. WATCH, [http://www.housingrightswatch.org/sites/default/files/2012-1211\\_RPT\\_FRANCE\\_anti\\_soc\\_laws\\_en.pdf](http://www.housingrightswatch.org/sites/default/files/2012-1211_RPT_FRANCE_anti_soc_laws_en.pdf) (last visited Feb. 13, 2017).

91. Jones, *supra* note 83, at 57.

92. *Id.*

93. CE Ass. 346.893, *supra* note 38.

#### IV. THE POSITION OF THE EUROPEAN COURT OF HUMAN RIGHTS

After the French Parliament passed the Law of 2010-1192—the Act Prohibiting Concealment of the Face in Public Space—on September 14, 2010, and after the constitutionality of the law was confirmed by the French Constitutional Council on October 7, 2010, and despite the concerns expressed about the law by the Conseil d'État in its report, a claim was lodged against the French Republic challenging the law for being inconsistent with the European Court of Human Rights (ECHR).<sup>94</sup>

The plaintiff, a French national, claimed that the law violates the European Convention on Human Rights of 1950.<sup>95</sup> Precisely, the plaintiff identified that Article 3 (prohibiting torture and inhuman treatment), Article 8 (protecting privacy and family life), Article 9 (protecting freedom of thought, conscience, and religion), Article 10 (protecting freedom of expression), Article 11 (protecting freedom of assembly and association), and Article 14 (prohibiting discrimination) of the Convention are inconsistent with French law.<sup>96</sup>

After spending considerable time examining a wide range of legislative history that was related to the case, the ECHR found that there was no violation of Article 3 or Article 14 of the Convention since the Court's standard for "the minimum level of severity required for ill-treatment" was not satisfied.<sup>97</sup> Thus, the complaint under these two cases does not meet the standard of admissibility set

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94. S.A.S., *supra* note 4, at 9–11.

95. *Id.* at 3.

96. *Id.*

97. S.A.S, *supra* note 4, at § 70; *see also Ireland v. United Kingdom.*

forth in Article 35 § 3(a) of the Convention.<sup>98</sup> Likewise, the Court dismissed the applicant's Article 11 argument for being manifestly ill-founded within the meaning of Article 35 §3(a) of the Convention since the applicant failed to show how the French law would breach her freedom of assembly and association.<sup>99</sup>

In examining Articles 8, 9, and 10 of the Convention, the Court found that the ban on wearing veils and face coverings, established by the law, violates the requirements of the right to privacy, the right to freedom of expression, and the freedom of thought and religion laid down in the Articles.<sup>100</sup> However, the Court emphasized—what would turn out to be its favored path in deciding such claims—that the mechanism of the European Convention on Human Rights has a "fundamentally subsidiary" role, which means that national authorities with "direct democratic legitimation" are in a better position than an international court to evaluate and decide its local needs.<sup>101</sup>

In setting the standard mentioned above, the Court examined the argument raised by the government that the contested law intends to maintain "gender equality," "human dignity," and "respect for the minimum set of values of an open and democratic society."<sup>102</sup> The

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98. "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application." S.A.S., *supra* note 4, at § 70.

99. *Id.* at § 73.

100. *Id.* at §120–22.

101. *Id.* at § 129.

102. *Id.* at § 119.

Court was unconvinced that "gender equality" and respect for "human dignity" would justify an absolute ban on a full face veil.<sup>103</sup> Nevertheless, the Court seemed convinced that the full face veil may constitute a violation of respect on the minimum set of values of an open and democratic society.<sup>104</sup> The Court reasoned that the concealment of one's face is incompatible with the "requirements of living together" in a French society,<sup>105</sup> and that it violates the notions of fraternity and civility inherited in society since it inhibits social interaction.<sup>106</sup> Thus, according to the Court, the French law is valid and must stand.<sup>107</sup>

This decision summarizes the Court's philosophy that local authorities are in a better position to determine what is best for preserving and maintaining their constitutional norms and social values, and thus they should be empowered with wide discretion in making such determination.<sup>108</sup> More precisely, the Court delegated the task of determining what is best for the application of *Laïcité* to the French authorities by declaring the mechanism of the European Convention on Human Rights as being fundamentally subsidiary, and that considerations made and measures taken by a legitimate authority in a democratic society should be given priority.<sup>109</sup>

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103. S.A.S, *supra* note 4, at § 119–20.

104. *Id.* at § 139.

105. *Id.* at § 141.

106. *Id.*

107. *Id.* at § 162.

108. S.A.S, *supra* note 4, at § 129.

109. *Id.*

## V. THE EUROPEAN COURT OF HUMAN RIGHTS ON THE BURKINI BAN – A HYPOTHETICAL COMPARATIVE ASSESSMENT

The French ban on wearing burkinis has never been challenged in the European Court of Human Rights, neither before or after the decision of the Conseil d'État.<sup>110</sup> However, despite the absence of such challenge, this section will try to speculate on the position of the European Court towards the burkini ban in France through the examination of some of its decisions regarding the ban on wearing religious attires and symbols in different jurisdictions.

### A. *Turkey*

Like France, Turkey does not adopt a neutral position towards religion, however, it advances a system of assertive secularism that resents the manifestation of religion in the public sphere and views the principle of secularism (*laik*) as a supra-constitutional value in modern and free civic societies, which should be guarded by all of the state's institutions, especially the Turkish Constitutional Court (TCC).<sup>111</sup> For instance, in 1989, the TCC ruled that wearing headscarves in public universities violated the separation of religion

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110. Stephanie Berry, *A Red Line Even for the European Court of Human Rights?*, OXFORD HUM. RTS. HUB (Sept. 7, 2016), <http://ohrh.law.ox.ac.uk/the-burkini-ban-a-red-line-even-for-the-european-court-of-human-rights/>; *see also* Kern, *supra* note 89.

111. The Preamble of the 1982 Turkish Constitution provides that "religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism." Likewise, Article 2 of the Constitution reads, "The Republic of Turkey is a democratic, secular (*laik*) and social State based on the rule of law that is respectful of human rights in a spirit of social peace, national solidarity and justice, adheres to the nationalism of Atatürk and is underpinned by the fundamental principles set out in the Preamble." Hirschl, *supra* note 24, at 436; *see also Anayasasi* (Constitution), Article 2 (Turk.).

and state.<sup>112</sup> Further, in a decision delivered in 1991, the Court reaffirmed its view by holding that "in institutions of higher education, it is contrary to the principles of secularism and equality for the neck and hair to be covered with a veil or headscarf on grounds of religious conviction."<sup>113</sup>

Turkey's strong established secularism was tested in the landmark case of *Leyla Şahin v. Turkey*.<sup>114</sup> The case originated in an application submitted to the European Court of Human Rights by Leyla Şahin, a devoted Muslim Turkish student who wears Islamic hijabs, challenging the decision of the Vice-Chancellor of the Istanbul University, which banned students with beards and those who wore an Islamic headscarf from attending lectures and written examinations.<sup>115</sup>

Şahin argued that the decision of the Vice-Chancellor constituted an unjustified interference with her religious freedom and violated Articles 9 and 14 of the European Convention on Human Rights—concerning the right to freedom of thought, conscience and religion, and the prohibition of discrimination.<sup>116</sup> In delivering its decision, the Court emphasized that Article 9 of the European Convention on Human Rights "does not protect every act motivated

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112. The Turkish Constitutional Court found that "Regardless of whether the Islamic headscarf is a precept of Islam, granting legal recognition to a religious symbol of that type in institutions of higher education was not compatible with the principle that State education must be neutral, as it would be liable to generate conflicts between students with differing religious convictions or belief." Yargıtay (Sup. Ct.), E. 1989/12 (Turk.).

113. Yargıtay (Sup. Ct.), E. 1991/8 (Turk.).

114. *Leyla Sahin v. Turkey*, App. No. 44774/98, 608 Eur. Ct. H.R., 1 (2005).

115. *Id.*

116. *Id.*

or inspired by a religion or belief," before arguing that "pluralism," "tolerance," and "broadmindedness" are the core values of any democratic society, and that when the relationship between the state and the religion is at stake, the discretion of national authorities must be given special consideration.<sup>117</sup> Consequently, according to the Court, there has been no violation of Articles 9 or 14 of the Convention and thus, the decision of the university's Vice-Chancellor must stand.<sup>118</sup>

### ***B. Italy***

Interestingly, the principle of secularism has never been mentioned anywhere in the Italian Constitution of 1948.<sup>119</sup> However, this should not be construed to mean that the Italian Constitution adopts a strong establishment clause that advances for a religious state.<sup>120</sup> In fact, the Italian Constitution avoided determining the relationship between state and religion in an explicit manner; instead it merely emphasized that discrimination among citizens based on religion must be prohibited,<sup>121</sup> and that the religion of any party or

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117. *Id.* at 5.

118. In 2008, urged by the necessity of preserving the secular character of the state, the Turkish Constitutional Court annulled a constitutional amendment presented by the moderately religious Justice and Development Party that effectively lifted the ban on wearing the Islamic headscarf in public institutions. *Id.* at 5–6.

119. *See generally* Costituzione [Cost.] (It.).

120. *Id.*

121. "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic and social nature which in fact limit the freedom and equality of citizens, impede the full development of the human person and the effective participation of

association should not be a cause for a special legislative, fiscal, or judicial measure or activity.<sup>122</sup>

The Italian interpretation of the principle of secularism was questioned in 2005 in the case of *Lautsi v. Italy*.<sup>123</sup> This case involved a claim filed by an atheist woman, who is a citizen of Finland and of Italy, in the Veneto Administrative Court, challenging the conduct of the board of an Italian public school in refusing to remove crucifixes from classrooms arguing that it violated the principle of secularism.<sup>124</sup> However, the Court dismissed the claim holding that displaying crucifixes in State-school classrooms does not offend secularism.<sup>125</sup>

The applicant, whose children attended public schools in Italy, appealed the decision to the ECHR arguing that displaying crucifixes in classrooms violated Article 9 of the European Convention on Human Rights and Protocol 1, Article 2 of the Convention respectively—regarding freedom of thought, conscience and religion, and the right of the parents to educate their children in institutions that are consistent with their philosophical convictions and religious

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all workers in the political, economic and social organization of the country." Art. 3 Costituzione [Cost.] (It.).

122. "The ecclesiastical character and the purpose of religion or worship of an association or institution may not be a cause for special legislative limitations, nor for special fiscal impositions in its constitution, juridical capacity and any form of activity." Art. 20 Costituzione [Cost.] (It.).

123. *See generally* Lautsi v. Italy, App. No. 30814/06 Eur. Ct. H.R. (2011).

124. *Id.* at 3.

125. The Court claimed that although the crucifix is a religious symbol, it became a symbol of Christianity in general not only Catholicism. Thus, it represents a point of reference for other creeds as well. *Id.* at 5.

beliefs.<sup>126</sup> The Court agreed with the applicant's claim holding that hanging crucifixes in State-school classrooms violates the principles of "neutrality" and "disestablishment."<sup>127</sup>

In 2011, the Italian government appealed the decision to the Grand Chamber of the ECHR.<sup>128</sup> In advancing a clear compatible reasoning, the Court's Grand Chamber upheld the right of the government to display crucifixes in State-school classrooms.<sup>129</sup> The Court argued that the presence of the crucifix in Italy's public schools is a result of the State's historical development by explaining that the crucifix is not only a religious symbol, but also a matter of tradition and identity in Italy, which falls within "the margin of appreciation of the respondent State."<sup>130</sup>

### ***C. Switzerland***

In 2001, the ECHR ruled on the admissibility of wearing an Islamic headscarf in Swiss schools in the case of *Dahlab v. Switzerland*.<sup>131</sup> In this case, the applicant, a primary school teacher who had converted to Islam, challenged the decision by the school's authority that banned her from wearing a headscarf while carrying

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126. "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." *Id.* at 14, 18, 25; *see also* Eur. Conv. on H.R. art. 2, Protocol 1.

127. Hirschl, *supra* note 24, at 428–29.

128. Lautsi, *supra* note 123, at 16–18.

129. *Id.*

130. *Id.* at 50.

131. *See generally* Dahlab v. Switzerland, App. No. 42393/98, Eur. Ct. H.R. (2001).

out her professional duties.<sup>132</sup> Explaining that such conduct violates section 6 of the Public Education Act, which stipulates that "[T]he public education system shall ensure that the political and religious beliefs of pupils and parents are respected."<sup>133</sup>

The applicant appealed against that decision to the Geneva Cantonal Government, which dismissed the appeal on the grounds that the applicant's Islamic headscarf was incompatible with the State's school policy to not disturb "denominational neutrality,"<sup>134</sup> and that the applicant's wearing of the headscarf should not be extended beyond the personal sphere.<sup>135</sup> The applicant appealed this decision to the Swiss Federal Court, claiming that it violated Article 9 of the European Convention on Human Rights regarding freedom of thought, conscience, and religion, and that the ban on wearing the headscarf interfered with "the inviolable core of freedom of religion."<sup>136</sup> However, the Federal Court upheld the decision of the Geneva Cantonal Government, arguing that although the applicant demonstrated that she wears the headscarf, not for aesthetic reasons, but to show allegiance to a particular faith, "the wearing of a headscarf and loose-fitting clothes remains an outward manifestation which, as such, is not part of the inviolable core of freedom of religion."<sup>137</sup>

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132. *Id.* at 1.

133. *Id.* at 4.

134. *Id.* at 2.

135. *Id.*

136. Dahlab, *supra* note 131, at 3.

137. *Id.*

After exhausting all of the domestic appeals, the applicant filed a claim in the ECHR stating that the Swiss Court's conduct, in upholding the ban on wearing the headscarf while teaching, constituted a breach of her freedom of religion protected by Article 9 of the European Convention on Human Rights.<sup>138</sup> The Court decided the case on a clear admissibility test rejecting the applicant's claim for being ill-founded within the meaning of Article 35 § 3.<sup>139</sup> According to the Court, the measures taken by the Geneva Cantonal Government and upheld by the Swiss Federal Court are reasonable and proportionate in protecting the rights and freedoms of others, and in promoting public order and public safety, and banning the applicant from wearing the headscarf while teaching is "necessary in a democratic society."<sup>140</sup>

## **VI. THE EUROPEAN COURT ON HUMAN RIGHTS ON THE BURKINI BAN**

As mentioned before, the ECHR is yet to render its opinion on the French burkini ban.<sup>141</sup> However, for the purpose of our argument, the hypothetical question that we should pose right now is: if a legal claim is lodged with the Court, challenging the decision of the Conseil d'État which lifted the ban on wearing burkinis,<sup>142</sup> how is the Court likely to respond?

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138. *Id.* at 7.

139. *Id.* at 13.

140. *Id.*

141. Berry, *supra* note 110.

142. *See* Droits de l'Homme Collectif Contre l'Islamophobie, *supra* note 2.

A careful examination of the Court's previous comparative assessment regarding the legitimacy of displaying religious symbols and garbs in public reveals that there are some main principles settled by the Court that would govern its future determinations regarding how the conflict between secularism and the wearing of religious symbols and garbs is to be solved. Among these principles, three are of a paramount significance.

First, the Court is of the opinion that in a democratic society, where secularism is thought to be linked to the identity of the state, the state's authorities are always in a better position to determine on a factual basis whether the wearing of religious symbols and attires in public violates the principle of secularism with a view to fostering better knowledge of the state's limits on rights and freedoms and evaluating local needs.<sup>143</sup>

Second, the Court interpreted Article 8 (right to privacy and family life), Article 9 (right to freedom of thought, conscience, and religion), and Article 10 (right to freedom of expression) of the European Convention on Human Rights to have a mere subsidiary role in implementing the Convention's mechanism, and that Article 9 of the Convention has a limited effect in that it does not protect every act motivated or inspired by a religion or belief.<sup>144</sup>

Third, the Court acknowledged that the ban imposed on wearing religious symbols and attires could be justified on the basis of security and safety concerns.<sup>145</sup> Such concerns could be derived

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143. S.A.S, *supra* note 4, at § 129.

144. *Id.* at § 113.

145. *Id.* at § 139.

from the necessity of verifying the identity of any person if reasonable grounds are available, maintaining the requirements of living together and societal integration, or protecting public health.<sup>146</sup>

In fact, the Court's declaration regarding the question of whether bringing specific religious symbol or attire in public violates the principle of secularism is a matter that falls within the margin of appreciation of the state.<sup>147</sup> More precisely, by this declaration, the Court seems to delegate to the state authorities a great deal of discretionary power in interpreting provisions of the European Convention on Human Rights in an attempt to justify their alleged measure restricting fundamental rights and freedoms.<sup>148</sup>

Consequently, a careful reading of the three principles established by the Court in its decisions shows that the second and third principles merely serve the purpose of the first principle. Specifically, when the Court declares that articles of the Convention concerning the right to privacy and family life, the right to freedom of thought, conscience, and religion, and the right to freedom of expression are of a subsidiary role, it implicitly acknowledges the right of the respondent state to bypass these rights for some other concerns.<sup>149</sup>

Further, when the Court brings security and public safety concerns to light, it consolidates the discretion of the respondent state

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146. *Id.*

147. *Id.* at § 83.

148. S.A.S, *supra* note 4, at § 129.

149. *Id.*

to determine how to guard the principle of secularism.<sup>150</sup> In other words, because it is an international court, the ECHR does not have full access to information and resources that are available to national authorities to determine how a threat to the security and safety of the state would be better administered.<sup>151</sup>

That being said, if the French ban on the burkini would have been challenged, or if the decision of the Conseil d'État which lifted the ban is challenged before the ECHR, it is likely that the Court would respond by upholding the ban or by reversing the Conseil d'État's decision, reinstating the ban.<sup>152</sup> This would be the favored outcome, taking into account the Court's methodology in giving preference to the discretion of the state on how secularism is to be protected in a democratic society.<sup>153</sup> Further, this outcome is reinforced by the security concerns linked to Islamic extremism, cited by the mayor of Cannes in banning the burkini amid the terrorist attacks on French territory in 2016, and by the allegation of the mayor of the town of Villeneuve-Loubet, that wearing the burkini is incompatible with France's secular character since the Court's legal precedents advance a clear adherence to the appreciation of the state when the matter is related to security concerns and how secularism is better functioned.<sup>154</sup>

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150. *Id.* at § 139.

151. *Id.*

152. *See generally* Berry, *supra* note 110.

153. *See generally* S.A.S, *supra* note 4.

154. Harry Zahn, *French Mayor of Cannes Bans 'Burkini' Swimwear*, PBS (Aug. 12, 2016, 3:41 PM), <http://www.pbs.org/newshour/rundown/french-mayor-cannes-bans-burkini-swimwear/>; *see also* Kern, *supra* note 89.

## VII. CONCLUSION

Let me restate the paradox of the ban on wearing religious symbols and attires. On one hand, the promise of secularism advances banning religious features, including wearing religious symbols and attires in public.<sup>155</sup> Yet, on the other hand, this promise actually undermines some fundamental rights and freedoms such as, right to privacy and freedom of religion, thought, and conscience.<sup>156</sup> Secularism should not be construed widely to mean atheism, where religion is not allowed to be practiced, and is always associated with social and political retardation.<sup>157</sup> However, secularism introduces a model where people are not obligated to practice religion, but they are also not obligated to not practice religion.<sup>158</sup>

In this context, it is worth mentioning that there is a difference between a secular state and a secular society. This differentiation is evident in France where the policy of *Laïcité* or secularism is declared as a supra-constitutional value, which requires the separation of the state and the church, and presumes the issuance of a political decision that is free from the influence of religion.<sup>159</sup> On the other hand, a claim that the French society can be rendered as a pure secular one is unlikely to prevail simply because heavy bearded men, women wearing crucifixes, hijab, and niqab, and people reading the

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155. See generally S.A.S, *supra* note 4; Claire Saas, *Muslim Headscarf and Secularism in France*, 3 Eur. J. Migration & L. 453, 453 (2001).

156. *Id.*

157. Hirschl, *supra* note 10, at 423; see also Saas, *supra* note 155.

158. Saas, *supra* note 155, at 455.

159. 1958 CONST. art. 2 (Fr.).

Qur'an, Bible, and Torah can easily be spotted in the French streets and in public transportations.<sup>160</sup>

Despite its constitutional quality, the French *Laïcité* policy should not be interpreted, as the previous cases may recommend, as an instrument to curb Islamic social incursion, unless Islam is thought to constitute a security threat.<sup>161</sup> In France, authorities often raise the argument that protecting the requirements of secularism is always used as a warrant to restrict or even ban wearing religious symbols and attires, like the case of the Islamic hijab and burqa, instead of raising security concerns which are likely to be the motive behind the ban after all.<sup>162</sup> However, in the case of the burkini ban, urged by the 2016 terrorist attacks, French authorities did not find any shortcoming in justifying the ban on the ground that wearing the burkini consolidates for Islamic extremism.<sup>163</sup>

In fact, to the extent that strong constitutional religious establishment clauses, which require the state to formally endorse a certain religion to its state religion, and requires that the entire legal and social system should be inherently committed to the sacred texts and authority of a certain religion, poses a great threat to fundamental rights and freedoms —like in the cases of Iran and Saudi Arabia—<sup>164</sup>

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160. Elizabeth Winkler, *Is it Time for France to Abandon Laïcité?*, NEW REPUBLIC (Jan. 7, 2016), <https://newrepublic.com/article/127179/time-france-abandon-laicite>.

161. *Id.*

162. Zahn, *supra* note 154.

163. Kern, *supra* note 89.

164. Article 1 of the Saudi Basic Law (1993) reads: "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its

secularism could pose the same threat as well. In countries with an extreme religious ideology, such as Iran and Saudi Arabia, a western woman is likely to construe the ban on wearing a bikini in public pools and beaches as an infringement to her fundamental rights and freedoms. Equally, extreme secularism could result in a blatant infringement to fundamental rights and freedoms.

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constitution". In addition, Article 23 establishes the state's duty to advance Islam: "The state protects Islam; it implements its Shari'a; it orders people to do right and shun evil; it fulfills the duty regarding God's call". Article 2 of the Iranian Constitution (1979) advances a strong establishment clause when it stipulates that "The Islamic Republic is a system based on the faith in: 1. one God ("There is no god but God"), the exclusive attribution of sovereignty and the legislation of law to Him, and the necessity of surrender to His commands." Further, Article 4 reads "All civic, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle governs all the articles of the constitution, and other laws and regulations. The determination of such compatibility is left to the Fiqaha of the Guardian Council." Basic Law of Governance [Royal Order No. A/91] Mar. 5, 1992, (Saudi Arabia).

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