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DISSERTATION TITLE **The right to religious freedom: An examination of outlawing of religious clothing or symbols in public and workplaces as a violation of religious freedom in the context of the decisions of the European court of human rights and the UN human rights committee.**

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DISSERTATION

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Introduction

The rights to freedom of thought, conscience, and religion recognised in international human rights instruments, particularly, the Universal Declaration of Human Rights Article 18. And in the International Covenant on Civil and Political Rights Article 18 (1), as well as article 27 concerning the minorities rights in the Covenant, and the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of 1981. In addition to the recognition of this right in all regional human rights instruments, including the 1950 European Convention of Human Rights Article 9 (1). However, there are limitations clauses provided in Article 18 (3) of ICCPR and Article 9 (2) of the ECHR that allows states parties to restrict the right to religious, specifically the religious manifestations. These limitations grounded on various objectives which include; the protection of public safety, order, health, or moral, or fundamental rights and freedoms of the others.

Based on these limitation grounds, there are several European countries enacted domestic laws bans the religious dress and symbols in public and workplace. Such bans created significant tension among the European countries, particularly the bans on attires that wore by Muslim women in general and other garments and symbols that affiliated to other religions such as skullcaps, Turban, and large crosses worn by Christian, Jews, and Sikh. France, for example, bans the wearing of the headscarf and any other religion-related clothing in the school environment, through French law regulating dress in public places of 2004, No. 2004-228[1]. Turkey also bans wearing hijab in schools and government workplace[2]. Hijab, as a term, includes many types of religious clothing worn by Muslim women. The headscarf that worn to cover the head and the neck. The chador was usually worn to cover the whole body except the face and hands. The niqab that was worn to conceal the full body and leaves the eyes only. And the burqa was worn to cover the entire body, but it has a mesh screen in front of the

[1] Oriana Mazza, Journal of Catholic Legal Studies: The Right to Wear Headscarves and Other Religious Symbols in French, Turkish, and American Schools: How the Government Draws a Veil on Free Expression of Faith, Volume 48, 2009, Number 2 Article 6, p.303
[2] Ibid, p.304

eyes[3]. The bans on religious clothing in school campus forced several students from religious minorities in different states in Europe to choose between being faithful to their religion, obey its instruction and get dismissed from school; or to disobey their religious orders and remove their religious dress. Several girls decided to stop going to school and lost their opportunities to study, and this considered the more harmful policies suffered by girls because they lose education which is a significant means of women empowerment[4].

The concept of secularism in France and Turkey represents the main factor behind the bans, and they alleged that it is necessary to separate the state from the church, and there was no one religion favoured over other religions in the country. In line with this concept, French president signed the dress code of 2004, No. 2004-228, the step that was opposed by many other states and considered this law would be violating the rights guaranteed in the European convention, including the United States[5]. The president asserted that the secularism should be considered at the heart of the French republic, and every citizen in France must believe in and be loyal to it. And based on these principles, students were banned from wearing religious garments in schools[6]. After 1989, the number of Muslims immigrants to France has increased, particularly people from countries were under a French colony, and they wear the headscarf in public in France. The French authorities considered this dress as a reflection on Islam identity rather than French identity that contains the culture of secularism[7]. Then, the headscarf wearers considered as foreigners who did not want to integrate with the host community[8].

Turkey also banned the wearing of religious attire in the public places due to the principles of secularism, the Turkish constitution of 2004 in article 2 stipulated that the *"secularism is one of the main characteristics of the state[9]."* Where the wearing of religious garments in public sphere regarded as an expression of religious practice which constitutes a threat to 'secularism and the neutrality of the public sector[10]' including a threat against the unification of educational system,[11] particularly at the

[3] Ibid, p.306
[4] Ibid
[5] T.Jeremy Gunn, Religious Freedom and Laicite: A Comparison of the United States and France, 2004 BYU L. Rev. 419 (2004). Available at: https://digitalcommons.law.byu.edu/lawreview/vol2004/iss2/5428.
[6] Ibid
[7] Ibid, p.456
[8] Ibid, p.457
[9] Bluebook 20th ed. Nurhan Sural, Islamic Outfits in the Workplace in Turkey, a Muslim Majority Country, 30 Comp. Lab. L. & Pol'y J. 569 (2009), p.575.
[10] Ibid, p.576
[11] Ibid, p. 571

universities. The Turkish constitution regulates the dress for the government personnel working in public institution, 'both males and females have to work bareheaded.'[12] However, all types of attires that covered the head or the neck were not allowed in the workplace at the government institutions[13].

Following that development, there were many other European countries, such as the United Kingdom, Germany, Switzerland has enacted laws bans religious dress and symbols in public and workplaces. The individuals who became victims of these bans challenged those before the European Court of Human Rights, claiming that the restrictions placed by their governments on their religious practice constitute violations of their right to the freedom of religion or belief guaranteed under Article 9 of the ECHR. In most of those complaints, however, the European Court accepted the decision made by the state authorities regarding the bans, and in most of these cases, the Court found no violation as claimed by the complainants[14]. In addition to that, the Court usually accepts the justification provided by the States parties, without independent scrutiny by the Court to determine whether such prohibition complies with the limitation requirements that were provided in international law[15].

Worth mentioning here is that the European Court of Human Rights grants States parties discretionary authority through the doctrine of the margin of appreciation. Based on this concept, States parties could restrict religious practise under certain circumstances[16]. The restriction must be prescribed by law, pursue a legitimate aim, and must be a 'necessary in a democratic society' as it provided in international law and European convention. It should be noted that most of the dress bans were based on other arguments such as the secularity of the state, neutrality of the educational system[17], and the principles of living together[18]. The states parties argued that the bans laws are general, applies to everyone, but only those who display religious identity in public places are going to be affected by these laws. Such as Muslim women who wear different types of the religious dress (Hijab, Niqab, and Burga), and crosses and turban wore by Christians and Jews, including religious

[12] Ibid, P.584
[13] Ibid
[14] Dahlab v Switzerland (Application No. 42393/98, ECHR 2001-V)
[15] Baljit Koone, The Veil ofIgnorance: A Critical Analysis ofthe French Ban on Religions Symbols in the Context ofthe Application ofArticle 9 ofthe ECH, P.53
[16] Yutaka Arai, The magin of appreciaition Doctrine and the Principle of proportionality in then Jurisprudence of the ECHR, Intersentia Antwerp- Oxford – New York 2001, P.2. Available: https://books.google.com/books?hl=en&lr=&id=wTjOMvLpgwsC&oi=fnd&pg=PR5&dq=the+margin+of+appreciation+doctrine+and+the+principle+of+proportionality+in+the+echr&ots=262gy6lgAt&sig=FbIMFATVH6BZAuk22f3R7FH1y6A
[17] S. Knights, Religious Symbols in Schools: Freedom of Religion, Minorites and Education, European Human Rights Law Review 5, 2005, 514.
[18] Sonia Yaker v. France, communication No. 2747/2016, para. 7.7

manifestation by other religious minorities. Human rights regimes stated that limitations clauses need to be appropriately applied, in terms of legality, necessity and legitimate aim; otherwise, restrictions will amount to the violation of Article 9, including violation of the right to non-discrimination and freedom of speech in the convention.

The UN Human Rights Committee jurisprudence showed that the Committee applied proper scrutiny on the proportionality test regarding the bans on religious practice. Moreover, the Committee usually asks States to provide a reasonable justification that complies with the limitation clauses provided in human rights regimes. And, the Committee asks states to demonstrate how the wearing of religious clothes constituted an actual threat to the public interest as invoked by the States to restrict the right to religious practice.

This research aims to examine the jurisprudence and practices of the European Court of Human Rights ECtHR and the UN Human Rights Committee regarding the outlawing of religious dress and symbols in the public and workplaces. Because, the majority of those bans were not justified under the European convention nor international human rights regimes, and that was due to the use of the wide range of the doctrine of margin of appreciation by States parties, specifically regarding cases under Article 9 of the ECHR. And the shortcoming of proper scrutiny by the European Court about the proportionality test regarding the bans resulted in a discriminatory treatment suffered by the wearers of religious dress or symbols. The jurisprudence of the European Court's involving this issue was flawed, because, the Court did not ask the States to provide reasonable justification for their interference in the rights of individuals to religious manifestation. This means that if the ECtHR does not apply strict scrutiny of how the states parties apply the limitations regime, it will not be able to protect minorities against majoritarian bias. Also, if the Court did not conduct proper scrutiny about states practice on the bans of wearing religious garments or symbols, states will continue violating the rights of individuals to religious practice, and the individuals will lose trust on the Court as a supranational judicial body.

The significance of the study is to highlight the Court's shortcoming regarding its inadequate scrutiny on the application of the proportionality test, that required by the international law and European convention on issues involving limitation on the right to freedom of religion or belief. The study will reveal the court's improper scrutiny regarding the application of the proportionality test on religious

dress bans. Also, the study will illustrate that the lack of appropriate investigation by the Court on states interference in religious rights will amount to the violation of several other rights. Including indirect discrimination against religious minorities. The research will demonstrate the main differences between the Court and the UN Human Rights Committee practices regarding scrutiny on the three-part-test when states restrict religion manifestation. The Committee applied the proportionality test strictly, while the Court relies on the state's justification, considering that the States parties are the most appropriate party to determine what represent a pressing social need that requires the restriction on the right to the freedom of religion or belief. The study will reveal how the Committee apply the test by asking states to demonstrate that religious attire constituted threat to the protection of public safety, order, morals, health, or the rights and freedom of others, while the Court did not subject the states decision to such kind of scrutiny. The study will give understanding about the relationship between the Court's scrutiny and the doctrine of the margin of appreciation in relation to religious practice.

Methodology:

The methodology of this research is a qualitative one. The study conducted by scrutinising the primary sources that are relevant to the research topic, such as jurisprudence of European Court of Human Rights (ECtHR) that involve case law on issues concerning the rights to religion manifestation, particularly, the restrictions on religious dress and symbols in public or workplace. Also, the study included the Jurisprudence of the UN Human Rights Committee and its general comments that are relevant to the topic of the research. The research looked at the margin of appreciation used by European countries regarding religious manifestation, and to what extent, States practice in this issue conforms with international law regimes. That includes the international covenant on civil and political rights ICCPR and the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief. As well as regional human rights mechanisms that include European convention on human rights and fundamental freedoms of 1950.

Finally, the study advanced by looking at several relevant books, journal articles, and case law that are pertinent to the topic of the study.

The outline:

This research will be divided into five chapters,

Introduction: Will give an overview about the right to freedom of religion or belief grounded in international human rights law and European convention for human rights ECHR, the outline will focus mainly on the limitation clauses applied on the rights to religion manifestation provided in these mechanisms. The introduction will highlight the different trends between UN human rights committee and European court of human rights jurisprudences regarding the bans of religious dresses and symbols in public and workplaces, that differences refer to the application of the proportionality test. Also, this section will highlight the types of bans and the reasons behind the bans. Also, will illustrate that many of these bans were not conform with the international law regime nor European convention, and the Court's practices in this matter are unjustified due to the lack of proportionality test, where, and the Court did not ask States to provide a proper justification for such bans.

Chapter I: This chapter will discuss the theoretical framework on the right to freedom of religion or belief. The discussion will include the scope of the right to freedom of religion or belief in international human rights law article ICCPR, Universal declaration of human rights UDHR, and the European convention articles 9 of the ECHR. The chapter also will discuss the direct and indirect discrimination on religious grounds, because, the lack of proportionality test involving such bans will amount to indirect discrimination on religious grounds.

The chapter also will discuss the margin of appreciation and the relationship to freedom of expression and manifestation. The margin of appreciation is one of the most contentious methods used by the ECtHR in interpreting the convention, in some situation the Court use this doctrine to avoid giving required legal analysis to cases in stakes, such as the bans of religious dress and symbols without proportionate means and justified reason. Also, the chapter will discuss the proportionality test and proper scrutiny by the ECtHR.

Chapter II: will discuss the European Convention on Human Rights Case law concerning the bans of religious dress in some European countries. The discussion will focus on the European Court of Human Rights case law that involves bans of religious clothing and symbols in public and workplaces. Also, the chapter will discuss the possible reasons behind such prohibitions.

Chapter III: will study the UN Human Rights Committee jurisprudence regarding the bans of wearing religious clothes and symbols in public and workplaces, this will highlight the Committee observations

regarding the unjustified bans on religious dress and symbols, the bans that lack proportionality test according to human rights regime.

Chapter IV: will focus on comparison and analysis between European Court of Human Rights and the UN Human Rights Committee case law, and it will illustrate the incompatibility of European Courts decisions with international human rights regime on the bans of religious dress and symbols.

Chapter V: This chapter will summarise the dissertation arguments and highlight the main points that illustrate whether the bans of religious dress in public or workplace meet the limitation clauses in the international law regime. Whether the proportionality test applied correctly; whether there is insufficient scrutiny by the ECtHR of the application of the test by national governments; whether there is indirect discrimination.

Chapter 1

Scope of the Right to Freedom of Religion or Belief and the Scope of Limitations in International Law and European Convention on Human Rights.

1-1. Granting Clauses

The right to the freedom of religion or belief is a fundamental human right, it is recognised in all human rights treaties, such as in Article 18 of the Universal Declaration of human rights 1948 (UDHR); Article 18 (1) of the International covenant on civil and political rights 1966 (ICCPR. Including, the recognition of this right at the regional level in Article 9 (1) of the European Convention for the protection of human rights 1950 (ECHR)[19]. All the three instruments recognise the rights to religious manifestation through practice, worship, observance and or teaching, either in private or in public, individually or in community with others, including, guarantee the rights to change religion. In addition to these instruments, the UN General Assembly passed a resolution calling for religious tolerance after incidents of anti-Semitic in 1960[20]. That decision led to the draft of the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of 1981. Provisions of article 1 of this declaration articulate similar wording to Article 18 of the UDHR, in its paragraph (2) states that no one shall be coerced to adopt any religion or belief against his choice[21].

[19] Dr Alice Donald and Dr Erica Howar, The right to freedom of religion or belief and its intersection with other rights, A research paper for ILGA-Europe, 2015, p.1
[20] Carolyn Evans, Freedom of religion under the European Convention on Human Rights, Oxford, 2001, P.8
[21] Ibid, Dr Alice, p.2

During the drafting history of article 18 of the universal declaration of human rights, there were two major controversy issues arisen among the drafters, one of them is the inclusion of the right to change religion, and the other matter was the drafting of appropriate limitations clauses on the rights to freedom of religious practice[22]. Because the Islamic states among the participants during the drafting process and they opposed the idea that called for the inclusion of the right to change religion into the provisions of article 18 of the UDHR. And they argued that the right to change religion is incompatible with Islamic law. Despite of that, the right to change religion was included in Article 18 provisions[23]. The other challenge was whether the right to the freedom of religious practice should be subjected to the general limitations contained in article 29 (2), or it should be under special restrictions. However, most participants rejected the suggestion that the right to religious practice should be subject to specific restrictions[24]; but finally, they agreed that this right should be subjected to particular limitation clauses.

1-2. The Limitations clauses

Beside the granting provisions, the International law and domestic constitutions included 'limitations clauses' that allow states parties to restrict the exercise of religious manifestation under certain circumstances[25]. But such restriction should comply with the restriction regime provided in Article 9 (2) of ECHR and Article 18 (3) of the ICCPR, which stipulated that any interference in religious rights must be (prescribed by the law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others)[26]. This limitation clauses apply solely to the right to manifest one's religion or belief[27]. Historically, these clauses were found in one of the oldest and most important documents, that set the right to freedom of religion and non-interference, only if the exercise of this right contradicts to public order. That document was the French Declaration of the Right of Man and Citizen of 1789, which was later included in the French Constitution[28].

The five restrictions grounds mentioned in International law and the ECHR need to be interpreted strictly by the state authorities when decide to intervene in the rights individuals to the freedom of

[22] Ibid, PP.35-36
[23] Ibid
[24] Ibid
[25] John Witte, Jr. & M. Christian Green, Religion and Human Rights: An Introduction, Oxford 2012, p. 255
[26] ICCPR, Article 18 (3). ECHR, Article 9(2).
[27] Ibid, John Witte.
[28] Ibid, p. 255

religion or belief. The European Court of Human Rights (as the central part of this study) should make proper scrutiny to guarantee that the bans on the religious practice conform to the limitation regime.

Restriction due to 'public safety' requires the existence of danger that constitute threat to the safety of persons such as threat life, health, security or property. For example, when religious conflict erupted in North Ireland, Bosnia and Herzegovina, India, or Nigeria[29] state parties are required to intervene and restrict religious practice. Also, in situations where religions used for political purposes, governments might intervene and regulate religion manifestation for maintaining public safety[30]. But the argument is how for religious dress or symbol in public or workplace threat the public safety? In *k. Singh v. Canada*, the applicant, refused to remove his Turban during work due to his religious convictions, and he lost his job because of 'public safety' protection as alleged by the Canadian government. The applicant argued that; any risk result from his refusal to remove his turban was going to be confined to himself only[31]. In the situations of public disturbances, the state is required to intervene and restrict the religious practice to maintain the public order. However, the argument is that; how wearing headscarf, turban, and growing of beards would constitute a danger to the public order[32]? In this context, the European Court in several cases accepted justification from the states concerning bans on the religious dress as a threat to the public order without proper investigation by the Court.

Regarding restriction for health protection, state parties are allowed to take necessary measures to prevent the spread of epidemics that establish a threat to the interest of public health; bans are allowed when religious beliefs contradict with the health of the others[33]. However, the argument also, how religious dress or symbols constitute a menace to public health? Restriction grounded on the protection of morals was the most controversial when it used as a justification for the state interference in the rights of individuals to religion or belief[34]. Morals as a concept it arises from Social,

[29] Tore Lindholm, W. Cole Durham, Jr., Bahia Tahzib-Lie, Elizabeth A. Sewell & Lena Larsen. Facilitating Freedom of Religion or Belief: A Deskbook, Martinus Nilhoff Publishers 2004, P.151
[30] Bluebook 20th ed. Shannon Riggins, Limitations of the Right to Manifest Religion in European Private Companies: Achbita v. G4S Secure Solutions NV under Article 9 of the ECHR and Article 18 of the ICCPR, 33 AM. U. INT'L L. REV. 977, 1018 (2018), p.151
[31] CCPR/C/37/D/208/1986, para.3
[32] Ibid, Shannon Riggins, P.153
[33] Ibid, Tore Lindholm, P.157
[34] Ibid, p.159

philosophical, and religious traditions. Therefore, the prohibition of wearing religious clothing or symbols should not be based on a single religious culture[35].

In some situations, state interference in religious rights considered necessary, particularly for achieving the public interests or address social pressing needs. Such as interference to settle the religious conflict between members of one religion or belief, for example, Jehovah's Witnesses 'refuse to give life-saving blood transfusion[36]' to their sick child based on their religious faith. Or in a situation where there was a group of people who believe in one religion, followed their leader orders to commit collective suicide[37].

1-3. Definition of religion and belief

The terms religion or beliefs have not given any definition in these international or regional human rights mechanisms. But the UN Human Rights Committee in its general comment 22 on article 18 gave a broad interpretation to the wording of Article 18 of the ICCPR. The Committee stated that the terms 'religion and belief' protect 'theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.'[38] And that these terms are not applied to the traditional religions only, but, Article 18 should be given broader interpretation to accommodate all religious and non-religious beliefs[39]. Adding to that, the ECtHR interpreted the terms 'religion or belief widely' to include non-religious beliefs such as pacifism, veganism, and atheism[40]. The Court asserted that the philosophical convictions also protected under the provision of Article 9 of the convention if they achieve 'a certain level of cogency, seriousness, cohesion, and importance.' In line with this, the philosophical convictions should be respected in a democratic society if they do not conflict with human dignity, and they do not conflict with the rights and freedoms of others[41].

1-4. Forum internum and externum of freedom to religion or belief

There are two distinctive rights guaranteed by international human rights law and European convention regarding the rights to the freedom of thought, conscience, and religion which are the absolute rights (forum internum) and the right to religious manifestation which is qualified rights (forum

[35] The UN General Comment 22, para. 8
[36] Ibid
[37] Ibid
[38] HRC, General Comment 22, The right to freedom of thought, conscience and religion (Art. 18), para. 2.
[39] Ibid
[40] Arrowsmith v UK, No. 7050/75, 12 October 1978, para 69-70; veganism: W v UK, No. 18187/91, 10 February 1993; Atheism: Angeleni v Sweden, No. 10491/83, 3 December 1986.
[41] Campbell and Cosans v UK, Nos. 7511/76 and 7743/76, 25 February 1982, para. 36.

externum)[42]. Article 18 of the ICCPR and Article 9 of ECHR guaranteed the full protection for the forum internum from state's interference and considered as non-derogable rights. States parties cannot justify their intervention against the absolute rights[43], and it means that the personal belief and religious creeds represent the integral parts of the rights to freedom of thought and conscience, these are fully protected by the provisions of Article 18 of the ICCPR and Article 9 of the ECHR.

Evans argued that *'the forum internum' represents the inner personal convictions that are inviolable.[44]"* While the forum externum (rights to manifest one's religion) falls under state regulation as stipulated in restriction clauses in Article 9 (2) of ECHR. However, (*Evan 2001, p.73)* added that even the internal dimensions of religion remain unclear because the ECtHR and Human Rights Commission case law showed that the Court tends to deal with the line between internal and external dimensions of religion as a matter of 'self-evident.[45]' (*Taylor, 2005: 119*) Argued that the Court and the Commission granted a 'superficial' recognition to the forum internum in cases of compulsion against belief. Because, the court practice was to avoid asserting that this coercion falls within the internal religious dimension, and that dimension will not be subject to permissible restrictions[46]. Several scholars criticised the ECtHR practice, for considering complaints involve aspects of forum internum under the religion manifestation. Such practice can be seen in situations where the states exercise the coercion against individuals' belief. For instance, individuals forced by regulation to pay taxes (the applicant been forced to pay taxes that will be collected and sent to the military)[47]. Or abide by the requirements that contradict with his religious belief[48].

There were several case law regarding complaints against the violation of the right to religious practice, involving bans on the wearing of religious symbols or cloth in public and workplaces. Wearing of such dress regarded as a manifestation of religious identity that contradicts with certain

[42] Howard, Erica. Law and the wearing of religious symbols: European bans on the wearing of religious symbols in education, Routledge|2012, p.16.
[43] VAN DEN DUNGEN v. THE NETHERLANDS, Application No. 22838/93, para, 1.
[44] Ibid, Howard, Erica, p.17
[45] Bluebook 20th ed. Esra Demir Gursel, The Distinction between the Freedom of Religion and the Right to Manifest Religion: A Legal Medium to Regulate Subjectivities, 22 SOC. & LEGAL STUD. 377, 394 (2013) P.379.
[46] Ibid, Taylor.
[47] C. v. the United Kingdom (Application No. 10358/83)
[48] Ibid, Isra Demir

principles in the democratic society. While the complainants considered these clothes and symbols are an integral part of their religion[49].

1-5. Direct and Indirect Discrimination.

Regarding the discrimination against religious attire wearers, *(Hilal Elever. The Headscarf Controversy, 2012, p 3)* argued that there are different policies lead to different degrees of discriminations, intolerance toward believers who wear the religious dress or symbols in many countries. And this was due to the differences in national policies, cultures diversity, and variances regarding national constitutional orders. Therefore, it was a necessity to present these differences when debating the freedom of religion regarding the 'integrity of constitutional orders.'[50] Adding, these differences must be given due weight when assessing the scope of the state's adherence to religious diversity and international human rights principles. For example, headscarf controversies showed that there was a weak relation between religiosity and modernity. This relation resulted in unintended negative consequences for Muslim women rights in modern societies, such as the legal and social segregation and lack of protection in international human rights and domestic constitutions against abuses that face Muslim women who wear the headscarf.[51] It is worth noting that, remedies for such violation have not adequately applied as prescribed in the local laws and international human rights standards[52]. And there were several facts behind this failure, such as the lack of appropriate understanding regarding the motives behind wearing those religious attires; lack of tolerance and acceptance; misinterpretation of other cultures and religions; and political influences[53].

Direct discrimination occurs where someone treats a person less favourably than the way he or she treats the others on religious grounds [54]. Therefore, bans of religious dress and symbols in public or workplace is violating the principle of equality and non-discrimination if it is not reasonably justified[55]. And it constitutes direct or indirect discrimination based on religion or belief — the application of the law prohibiting religious dress to all people in a community that has religious diversity may form discrimination if the prohibition was not proportionate to a legitimate aim[56]. For instance, ban Muslim

[49] Ibid, Isra. P.380
[50] Hilal Elver, The Headscarf Controversy: Secularism and Freedom of Religion, Oxford 2012, p. 3.
[51] Ibid
[52] Ibid
[53] Ibid
[54] Howard, Erica. Law and the wearing of religious symbols: European bans on the wearing of religious symbols in education, Routledge|2012, pp.78-81.
[55] Ibid
[56] Ibid

women from wearing the headscarf in the workplace and allow nuns to wear habits or Sikhs to wear turbans, will constitute direct discrimination against Muslim women[57]. And bans wearing the headscarf in schools and allow Sikhs boys to wear turbans will amount to direct discrimination against Muslim girls on gender and religion grounds. Even the neutral school dress constitutes indirect discrimination on non-Christian followers, their faith might require them to dress in a specific form of clothing, and such bans affect disproportionately on particular people[58].

The practice of the ECtHR showed that the Court did not look regularly into the claims of violations raised under Article 14 of the ECHR, when it reads together with Article 9 of ECHR, because, Article 14 considered as an accessory in the convention — adding to that the Court was not willing to admit discrimination-related claims[59]. In *Aktas case and six others v. France*, which involves six pupils alleging the violation of their rights under Article 14, the difference in treatment on religious grounds. The ECtHR did not consider that treatment as a violation and assured that the rules applied on them were to preserve neutrality and secularism within the school and to protect adolescence at the age that easily influenced, and to safeguard the interests of the public education system[60].

1-6. The Margin of Appreciation and the Relationship to Freedom of Expression/Manifestation.

The concept of the doctrine of margin of appreciation refers to the discretion power recognized by the ECtHR regarding states practices on the application of limitations clauses that provided in the ECHR[61]. This concept is associated with the ECtHR as a supranational judicial body, and the Court depends on this doctrine to make a balance between the sovereignty of states parties and the necessity to secure the protection of human rights enshrined in the ECHR[62]. In practice, this theory interpreted in a way that gives national authorities a discretionary power to determine the situations that require states to intervene and restrict individuals' rights. Such as in the circumstances of emergencies that are threating the life of people; or interference for a legitimate public policy, and the

[57] Ibid, pp.78-81
[58] Ibid
[59] S. Knights, Religious Symbols in Schools: Freedom of Religion, Minorites and Education, European Human Rights Law Review 5, 2005, 514.
[60] Aktas v. France- Application No: 43563/08, July 2009
[61] Bluebook 20th ed. Monica Lugato, The Margin of Appreciation and Freedom of Religion: Between Treaty Interpretation and Subsidiarity, 52 J. CATH. LEG. STUD. 49, 70 (2013), P.51
[62] LA 8th ed. Ambrus, Monika. "European Court of Human Rights and Standards of Proof in Religion Cases, The." Religion & Human Rights: An International Journal, vol. 8, no. 2, 2013, pp. 107-138. HeinOnline.

protection of the rights of others, public health, morals, or public order[63]. Concerning the right to the freedom of religion or belief, states parties were granted a wide range of the margin of appreciation, and that is due to religious diversity[64]. Particularly in Europe where there was not possible to find a unified concept of the significance of religion in the society, and the causes of religious offences were different from place to place, and the states were regarded as the best to determine actions that guarantee the protection of the religious feelings of the others[65].

Religious manifestations in the context of the freedom of expression include various forms of religious practices that were amounted to restriction when that was necessary. These practices include individuals can pray alone or in groups; teach religion to their children; write religious works in many different types. Besides that, there are many other methods of expressing religious identity such as; religious dress, wear of religious symbols, and exercise of religious rites. All these practices involve freedom of expression that subject to restriction by the states using the wide range of the margin of appreciation[66]. However, there were several criticisms directed against the ECtHR reliance on the outcome of the state's application of the margin of appreciation on issues where there was no standard mechanism agreed among states parties to apply. Many views stated that the European Court usually depends on the balancing test provided by the states regarding the restrictions on individuals rights, while the Court can make its balancing test[67]. Another criticism is that the doctrine of the margin of appreciation is 'not applied consistently and transparently[68].' Because the European Court did not conduct proper scrutiny about the state's decisions involving restrictions on the right to manifest the religion. In many cases, the court accepted the decisions of the state, restricting the rights to religion without taking independent investigation as a supranational judicial body. Regularly the Court decides that there was no violation of Article 9 of ECHR because the Court relies on the state justification.

1-7. The Proportionality Test and the Scrutiny by the ECtHR

1-7-a. Prescribed by law

[63] Ibid, Monica.
[64] Ibid, Carolyn Evans, p.143.
[65] Otto-Preminger-Institut v. Austria, Application no. 13470/87.
[66] Ibid, John Witte, p.188
[67] Bluebook 20th ed. Alastair Mowbray, A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights, 10 HUM. RTS. L. REV. 289, 318 (2010)., 10 Human Rights Law Review (2010), p. 316.
[68] Jan Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', 29 Netherlands Quarterly of Human Rights (2011), p. 343

International Human Rights Law and European Convention stated clearly that any restriction on the rights of individuals to religious practice, must be prescribed by the law; necessary in a democratic society to protect the public safety, order, health, moral, and fundamental rights and freedom of others. The term 'prescribed by the law' entails three requirements. Firstly, there must be an enforced law stipulates precisely that certain forms of religious practice constitute a breach to the provision of this law, on the other word, the action by government authorities to restrict religious manifestation should be grounded in the law and not on the state discretion[69]. Secondly, the law must be accessible by all people under state jurisdiction, and it should be available and publicly published, meaning that unpublished laws, regulations, and norms should not be used to restrict the rights to religious practice. Thirdly, the law should be written clearly, in a way that everybody can read it and understand its provisions. So that when he/she practice his/, her religion understands whether his practice constitutes a breach to the law, the law should not be vague, arbitrary, and it should not give the state any discretion authority[70].

In many case law raised under Article 9 (2), complainants claim that the dress code that restricted their rights to the freedom of religion did not comply with the limitations requirement[71]. In general, such laws are drafted broadly to regulate religious behaviour, on which many members of religious minorities were targeted[72]. In many cases, the Court accepted that the prohibition of religious dress or symbols was 'prescribed by the law.'[73]

1-7-b. The Necessity Test

The second part of the proportionality test is that the restriction on religious dress and symbols must be 'necessary in a democratic society' according to the purposes listed in article 9 (2) of ECHR. *(Jim Murdoch, 2007, p.31)* Argued that this principle means that the restriction must address a pressing social need, it must be proportionate to a legitimate aim to achieve, and the state needs to justify its interference. For instance, protection of national security seems to be a strong consideration for 'pressing social need,' but this does not exempt the state from providing reasonable justification for its actions, such as the requirements of wearing crash helmets by all motorcycle[74]. *(Neville Cox, Behind*

[69] Ibid, John Witte, PP.259-260
[70] Ibid
[71] Ibid, Carolyn Evans , p. 139
[72] Ibid
[73] Ibid, Howard Erica, p.105
[74] Jim Murdoch, cit. note 91

the veil 2019, p.221) Argued that justification of bans on religious dress and symbols under the claim of state secularism is questionable whether it passes the necessity test. Because state secularism is not one of the legitimate grounds that provided in international law and ECHR. For example, in *Sahin v. Turkey*, state interference was described that it lacks the necessity test, as indicated by the judge Tulkens[75]. That there was no proper evidence before the Court, to prove that the dress of Hijab in Turkish universities represents a threat to the public order, to the extent that Turkish secularism will not afford. However, there was no concrete evidence to prove that wearing of religious attire in public places constituted an actual threat to state secularism and open society[76].

The UN Human Right Committee and the European Court indicated that the pluralism is a fundamental principle that needs to be taken into consideration when states restrict the manifestation of religion. The Committee asserted that restrictions impose on religious expression considered to be necessary if it was aimed to 'reconcile the interests of different groups and to ensure respect for the convictions of all.' In doing so, the committee added that states need to be 'neutral and impartial' and work to achieve religious pluralism and best practice of democracy[77].

1-7-c. Legitimate aim

States interference and restrict the rights of individuals to religion or belief must be justified with a legitimate objective that conforms with the five grounds provided in Article 9 (2)[78]. Case law showed that the ECtHR favour the state's justification behind the restriction rather than considering the applicant's argument against the state's reasoning. ECtHR developed a 'superficial analysis[79]' for such precondition test. Because, the case law showed that the Court accepted justification from states invoking the protection of the rights and freedoms of others, public order and safety as a legitimate aim to ban the schoolteacher from wearing a headscarf[80]. Without appropriate scrutiny by the Court to determine how public order and safety were relevant for such restriction? In addition to that, individuals wore face-covering during the Carnivals and were not constituted threat to public

[75] Sahin v. Turkey, (Application no. 44774/98) para 10.
[76] Neville Cox, Behind the Veil: A critical Analysis of European Veiling Laws, Edward Elgar, UK 2019, p.222
[77] M. TODD PARKER, the Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR, P.96
[78] Paul M. Taylor. Freedom of religion: UN and European human rights law and practice, Cambridge University Press| 2005, pp. 301-304
[79] Ibid, P.304
[80] Dahlab v Switzerland (Application No. 42393/98, ECHR 2001-V)

safety[81]. Also, people used to conceal their faces during cold weather, and they were not identified, and the state authorities did not consider them a threat to public safety.

Moreover, the UN Human Rights Committee accepted that requirement of wearing headgear by individual working as an electrician in the railway maintenance was considered as a legitimate aim for the protection of public health[82]. Restriction on religious proselytization was considered as reasonable justification for a legitimate aim which was the protection of the rights and freedoms of others[83]. Concerning the limitation on the rights to religious practice to protect public morals, the UN HR Committee stated that the judgment on morality was not to be measured by reference to a single religious culture[84]. *Taylo*r argued that the observation that made by the Committee on the standard of morality makes it impossible for the states parties to interpret Article 18 (3) in the way that it indicates that the public morality should be determined by the state religion or by the majority religion in the state [85]. *"Future application of "morals" grounds of limitation should take better account of the demands of pluralism rather than the threat posed by pluralism"* Taylor emphasised[86]; also, it should include a broad explanation for the issues that requires a wide range of the margin of appreciation[87].

The next chapter will examine the European Court of Human Rights' scrutiny regarding the restrictions applied by states parties on the wearing of religious dress and symbols in public and workplace. There were Several case laws showed that the standard of scrutiny provided by Court was not at the level required by the international human rights regime, particularly, the Court's scrutiny on the application of the three-part-test. Which stated clearly that restriction on religious practice must be 'prescribed by the law'; it 'pursue a legitimate aim'; and it is 'necessary in a democratic society'.

Chapter 2

European Convention on Human Rights Case law.

The European Courts of Human Rights (ECtHR) Case Law

[81] Ibid, Howard, Erica, p.107
[82] Ibid, Taylor, P.321
[83] Ibid, Dahlab case.
[84] Hertzberg et al. v. Finland Communication No. R.14/61 (2 April 1982)
[85] Ibid, Taylor, P.327
[86] Ibid, p.328
[87] Ibid

The provisions of Article 9 of the European convention intended to protect the rights of the individual and the rights of the others in the community. This protection required law enforcement institutions to intervene in certain circumstances to balance between these rights to guarantee the conformity of individuals rights (qualified rights) with the public interest (community interests). Such balance is significant to avoid arbitrary state interference into the individuals' rights to religion; also, the balance between rights regarded as an effective measure that determines whether the States parties interfering in the rights of individuals was necessary for the interest of the democratic society. Under protocol 9 to the European Convention for the protection of Human Rights (ECHR), individuals who claim violation of their rights under Article 9 of the ECHR can submit their complaints to the European Court of Human Rights ECtHR[88]. The European Court, as a supranational judicial body is authorised under protocol 11 to examine and determine the status of the allegations submitted by individuals claiming that their states violated their rights to the freedom of religion or belief, guaranteed by Article 9 of the ECHR. The European Court has the jurisdiction to assess the grievances presented by the individuals in terms of admissibility and merits[89]. Under this jurisdiction, there were several cases received by the Court, but in most of these cases, the Court declares inadmissibility. Because the Court always accepts the reasoning provided by the state party[90] behind the restriction placed by the state on the rights of individuals to the freedom of religion or belief, without independent scrutiny by the Court to balance the state allegations.

International Human Rights Law and the European Convention on Human Rights precisely stipulated that the restriction on the rights of individuals to the freedom of religion or belief must comply with the limitation clauses provided in International Law[91] and European Convention[92]. These instruments stated that the restrictions on the right to religion or belief are not allowed only if it 'prescribed by the law', and they are 'necessary in a democratic society' to protect public safety, order, health, or morals or the fundamental rights and freedoms of others[93]. However, there were several cases submitted to the European Court by the individuals claiming that the prohibition of religious dress or symbols in public or workplaces, violated their rights to practice their religion. Practically, the Court did not make

[88] Ibid, Carolyn Evans, pp. 9-11
[89] Ibid, Paul M. Taylor, pp.16-17
[90] EVA BREMS. Above Children's Heads: The Headscarf Controversy in European Schools from the Perspective of Children's Rights1, The International Journal of Children's Rights, 14: 119–136, 2006, p. 123
[91] ICCPR, Article 18 (3).
[92] ECHR, Article 9 (2)
[93] Ibid

proper scrutiny on the proportionality test (prescribed by the law, necessary in a democratic society, and legitimate aim) regarding such bans on religious dress. This chapter will examine the European Court of Human Rights scrutiny regarding the three-part-test concerning bans of religious clothing and symbols in public or workplaces.

2-1. *Leyla Sahđn v. Turkey*

In *Sahin v. Turkey* case, many commentators stated that democracy does not mean that the views of the majority would always prevail. But there is a need to achieve the balance between the rights of individuals and the public interest to guarantee the equal treatment and avoid abuses against minorities rights[94]. In assessing the necessity test in *Sahin* case, the Turkish authorities prohibited her from wearing the headscarf in public higher education. The applicant claimed a violation of her rights to religion or belief under Article 9, including her rights under Articles 8,10 and 14 of the ECHR, and Article 2 of Protocol No. 1. However, the Court failed to subject the arguments of Turkish government to the proper scrutiny to determine how was necessary for Turkish authorities to restrict religious dress in higher education. Turkish government invoked that it was essential to uphold secularism and gender equality in the state. And considered as legitimate aims[95] that required prohibition of wearing the Islamic headscarf in educational institutions. Undoubtedly, maintaining secularism is compatible with the legitimate objectives under Article 9 (2) of ECHR, which amount to the protection of the public order and freedom of others. Despite that, the Court did not ask the Turkish authorities to demonstrate practically how the wearing of Islamic headscarf would threat the secular of state? And how that religious attire would challenge the equal status of Turkish women'[96]? The Court can hear alternative views to balance the necessity of the prohibition, but the Court accepted the Turkish arguments[97]. Such Court position will prove the inappropriate scrutiny by the Court regarding justifications on such bans.

Moreover, the Court did not criticise Turkish national courts for their interpretation that the Islamic headscarf is a symbol of political Islam and flag for 'women subjugation'[98]. And without proper evidence, the Turkish authorities link hijab to the Islam extremists, in their justification for this claim

[94] Leyla Sahin vs Turkey, supra note 4, at paras 106-108.
[95] Ibid, Leyla paras 90-110, and paras 100-116.
[96] MLA 8th ed. Gibson, Nicholas. "Unwelcome Trend: Religious Dress and Human Rights following Leyla Sahin vs Turkey, An ." Netherlands Quarterly of Human Rights, vol. 25, no. 4, 2007, pp. 599-640. HeinOnlin
[97] Ibid
[98] Ibid, Leyla Sahin v, supra note 4, at para. 115.

they stated that wearing the headscarf was supporting the Islamic extremists[99]. Anyhow, it is the responsibility for the state party to prove that such intervention is necessary and proportionate to achieve a legitimate aim[100]. But the Turkish government has failed to provide concrete evidence to support its arguments that wearing a headscarf in school would either lead to the collapse of the Turkish democracy or it influences on the applicant colleagues to dress the hijab themselves[101].

The proportionality seems to be absent in the *Sahin* case because there is no reasonable relation between the prohibition headscarf-wearing and the aim that state intended to achieve. There was no fair balance between the interest of the broader community and the harm inflicted on the applicant because of bans on religious clothing in public places. The arguments here is that if the bans policy intended to control Islamic extremists, then other options might be useful and proportionate too, the governments can enforce real punishments against the extremists. If Turkey concerned about the possibility of adoption of Sharia by some political parties, taking other regulations such as to resolve such parties might be more effective than the bans of wearing the headscarf.

2-2. *Dahlab v. Switzerland*

The complainant was a female teacher working at the primary school in Switzerland, and she wore the Islamic headscarf for three years. There were no complaints recorded from the pupils' parents nor her from the teachers about her hijab during that period[102]. The Directorate-General for Primary Education asked her to remove her headscarf during her professional duty and explain to the applicant that wearing religious clothes during school time was incompatible with section 6 of the Public Education Act. The applicant requested the directorate general to confirm such decision in a formal regulation. The director-general confirmed the decision and emphasised that headscarf constituted a clear religious identity expressed by the applicant before the pupils, and that was not allowed, especially in public and secular education system.[103] The applicant appealed this decision and claimed state violated his rights religion or belief under Article 9 of ECHR. The complainant argued that the decision has no basis in the law, and there was no definite evidence to prove that wearing headscarf contradict to the public-interests[104], and she complained that she was subjected to

[99] Ibid
[100] Kokkinakis vs Greece, 25 May 1993, European Human Rights Reports, Vol. 17, p. 397, at para. 49.
[101] Ibid, Gibson, Nicholas, p. 607
[102]Ibid, DAHLAB v.
[103] Ibid
[104] Ibid, Para. 3-4

discrimination based on sex. Swiss authorities grounded their ban decision on “Articles 164 of the cantonal Constitution of 6 November 1940 which indicates a clear separation between state and the church in the canton. In the educational system, this separation is given practical effect by section 120(2) of the Public Education Act"[105]. Based on that, the Swiss authorities alleged that the ban was aimed to ensure the education system observes the principles of denominational neutrality in the canton. Also, the decision intended to protect the rights of pupils and their parents and religious harmony in the school.

Regarding the legitimate aim, Swiss government alleged that the objective behind the bans was to observe ‘denominational neutrality in schools and religious harmony.[106]’ Concerning the necessity test, the state party submitted that the appellant was a public civil servant bound by special regulations within the country, and she represents the state in such situations. Her conduct by wearing hijab indicates that the state favored one religion than the other religions in the state[107]. The European Court upheld the decision made by the Swiss government and accepted that the interference was under the law, and the ban was to protect the neutrality of the education system against religious influence[108]. Regarding the necessity test, the Court emphasized that the contracting states enjoy a discretion power to intervene and restrict individuals’ rights if such rights conflict with the public interests. One could argue that states parties are not free to limit the rights of individuals as they wish, but the state parties subjected to the supervision by the Court in terms of the law applied; the necessity of the ban; and the purpose of the prohibitions.[109]

Noteworthy in this case, some scholars commented that the Court overstepped its competencies, by explaining that, the Islamic headscarf does not comply with the tolerance message and the principles of respect of others and non-discrimination, and gender equality, that all teachers in schools should convey to their pupils[110]. By such explanation, it means that the Islamic headscarf does not conform with the rights guaranteed in the convention. It could better if the Court focuses on whether such bans considered "necessary in a democratic society.”[111] Also, such interpretation by the Court suggests

[105] Ibid, Para, 4
[106] Ibid, para.9
[107] Ibid
[108] Ibid, para.12
[109] Ibid, P.13
[110] Imen Gallala, 'The Islamic Headscarf: An example of Surmountable Conflict between Sharia and the Fundamental Principles of Europe' (2006) 12(5) European Law Journal 601.
[111] Ibid

that all women who wear the hijab were forced by their oppressive husbands to wear it, but in reality, women are free to choose their dress and that Muslim women activists wear headgear "as a symbol of defiance and not as a symbol of gender inequality."[112] The Court has no jurisdiction to assess the Islamic faith and stigmatise it. It was expected from the Court to apply proper scrutiny by asking the Swiss authorities to provide concrete evidence to prove that wearing of headscarf intervened with the rights of others or it constituted a real threat to the public order.

The Swiss government also alleged that wearing headscarf amounted to proselytization for Islam. However, the Court failed to make a balance between wearing the headscarf by a school teacher and the proselytization, and, there were some pupils come to school with headcover and some of their parents as well[113]. Therefore, pupils were familiar with the headscarf. Concerning the protection of public order, the appellant was wearing the hijab for three years, and there were no complaints from the pupils or their parents and teachers; that such clothing endangers the public order as claimed by Swiss authorities and the court ignored this fact[114]. In several countries where Christian majority prevails, such as in the UK, some of the school teachers wore the Islamic headscarf, and it was not considered as a threat to the public order. Therefore, the bans, in this case, was not proportionate, and the ECtHR did not demonstrate proper scrutiny for the three-part-test that required by the limitation clauses in Article 9 (2) of the ECHR. Also, the bans considered not necessary in a democratic society.

2-3 Eweida and Others v. the United Kingdom

2-3-a. *Eweida Case*.

In this case, the European Court stated there was no contradiction in procedures between the domestic Court and the ECtHR. The applicant was insisted to display the crosses visible as a symbol of her religious identity at the workplace. The crosses display proved her motive to manifest her loyalty to the Christian belief[115]. Any actions motivated by religious desire considered as a

[112] Anastasia Vakulenko, ' Islamic Dress in Human Rights Jurisprudence: A critique of Current Trends' (2007) 7 Human Rights Law Review 729.
[113] Keith Golder, Limitations on the Wearing of Religious Dress: An Examination of the Case Law of the European Court of Human Rights, 1 UK L. STUDENTS' REV. 21, 28 (2012).
[114] Ibid
[115] CASE OF EWEIDA AND OTHERS v. THE UNITED KINGDOM, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) para, 89.

manifestation of faith "in the form of worship, practice and observance that "[116]required protection under Article 9 of ECHR.

British Airlines intended to maintain the unique company's brand and the particular staff uniform at the workplace, for this reason, the company has restricted the applicant right to manifest her religion, by visibly she displayed crosses (the sign of Christian identity).

Regarding the test of 'prescribed by the law', in the UK there was no law regulating religious clothing or symbols at the workplace, but private institutions have their regulation, such as the British Airways Company[117]. The company claimed that the restriction on applicant rights was pursuing a legitimate aim, which is to communicate a particular image of the company and to enhance recognition of its brand and staff. The applicant resisted this decision before the Employment Tribunal, where the Tribunal found that the British airways uniform code disproportionate because it failed to identify religious symbols from 'pieces of jewellery worn for decoration reasons.' But the Court of appeal described that the ban was as proportionate[118]. The Court accepted the legitimate aim claimed by the company, but there was no definite evidence to prove that wearing of other religious clothing such as turbans and hijabs by other employees will harm the company image or the brand[119].

The court emphasised that a fair balance between the appellant rights and the public interest was not achieved. The complainant insisted on displaying her religious manifestation, which is a fundamental right. And the healthy democratic society requires diversity and tolerance and to maintain pluralism[120]. Also, it was about the value when an individual puts his religion as an integral part of his life and ability to communicate that belief to others. Finally, the Court concluded that the national authority failed to protect the applicant rights to manifest her religion because there was no actual breach of the interests of the others[121].

2-3-b. The Second applicant: *Shirley Chaplin v. The United Kingdom*

The appellant was a public servant, working as a nurse in a geriatric ward which it has a uniform working policy regulated by the ministry of health which stated: "*no necklaces will be worn to reduce*

[116] Ibid
[117] Ibid, para, 92
[118] Ibid
[119] Ibid, para, 94
[120] Ibid
[121] Ibid

the risk of injury when handling patients," and any staff member want to wear religious symbols should get an approval from the direct manager[122]. *Ms. Chaplin* was asked to remove the religious symbols (cross) around her neck during work, and she refused to comply with that requirement, and the authority moved her to a non-nursing job. However, she complained of direct and indirect discrimination before the Employment Tribunal. But the tribunal dismissed her allegation of indirect discrimination since there was no evidence to show that she was treated less favorably than other staffs wished to wear religious symbols. The tribunal found that the health authority policy is proportionate to the aim that wants to achieve.[123] The Court agreed that the applicant manifested her religious belief, and the health authority interfered in the applicant's freedom to religious practice[124].

In this case, the European Court needs to determine whether the restriction complies with Article 9 (2) proportionality and necessity test. The prohibition was to protect the health and safety of nurses and patients, and that was viewed as a legitimate aim.[125] According to the health mangers, there is an actual risk that the patient may pull the cross or the chains and cause more injuries to himself and the nurses. And that the cross may aggravate the sickness if it meets an open wound. Also, there were two Sikh nurses were informed not to wear the religious dress and the flowing hijabs[126]. However, the Court admitted that the bans on wearing a visible cross must carefully weight when it involves the protection of health and safety in the hospital. The Court stressed that such situation requires a wide range of the margin of appreciation to the local authorities, particularly hospital directors were in a better position to judge rather than the Courts, and specifically international courts who have not heard direct evidence[127]. The court was unable to conclude that the measures against appellant' freedom to manifest religion were not proportionate, but the Court accepted it as 'necessary in a democratic society,' and there was no violation to article 9 of the convention[128]. However, the Court should make independent scrutiny to investigate the situation according to the limitation regime in human rights law.

2-3-c. The third appellant: *Ms Ladel v. The UK.*

[122] Ibid, EWEIDA case, p.36
[123] Ibid
[124] Ibid
[125] Ibid
[126] Ibid, para, 98
[127] Ibid para, 99
[128] Ibid, para, 100

The third appellant was a Christian Orthodox, who with a strong belief that same-sex marriage is against God-will, and the wedding is a union between man and woman for life. She lost her job because such relationships are against her religious beliefs, she refused to participate in the establishment of an institution to support same-sex marriage, in which she assigned as registrar of civil partnership[129]. She claimed that she was subjected to indirect discrimination under article 14, but the Court considered the complaint in conjunction with Article 9 of the convention. The Court stated that religious beliefs motivated the applicant to refuse participation that supports same-sex marriage[130].

The domestic authorities alleged that their action was pursued a legitimate aim, which was the promotion of equal opportunities and principles of non-discrimination against others and that required all employees to act accordingly[131]. The court emphasised that same-sex marriage needs the same recognition of marriage from different sex, in terms of legal protection. In Europe, this type of marriage was evolving, and the countries enjoy the margin of appreciation to protect it; the national authorities are the best party to decide on matters involving such issues[132]. Therefore, the court considered the domestic authorities were pursuing a legitimate aim.

Regarding the proportionality test: The Court should determine whether the means that was used by the state authorities proportionate to the legitimate aim. The Court stated that the appellant did not waive her rights to manifest religion when entered in the work contract, and the condition in question was introduced on a later date by the employer[133]. However, the Court stated that the contracting states enjoy a wide margin of appreciation to protect the rights contained in the convention, particularly in balancing the individual interest as well as collectives[134]. Finally, the court concluded that the national authorities did not overstep the margin of appreciation that they enjoy[135]. Als, the Court did not make a proper investigation by asking state party to demonstrate how the wearing of religious crosses endangered the health of the patients. So that the Court can determine the legal position of the state interference in applicant rights.

[129] Eweida, para 102
[130] Eweida, para 103
[131] Eweida, para 105
[132] CASE OF SCHALK AND KOPF v. AUSTRIA, *(Application no. 30141/04) para 62.*
[133] Ibid, Eweida case, para 105
[134] Evans v. the United Kingdom [GC], no. 6339/05, para 77, ECHR 2007
[135] Ibid

2-3-d. The fourth applicant: *Mr McFarlan v. The UK*

Mr McFarlan complained that he was subjected to disciplinary action by his employer because he refused to provide psychosexual counselling to same-sex couples, he refused to do that due to his religious convictions. He complained of indirect discrimination, and his case was rejected at all levels of domestic justiciability[136].

The Court asserted that his refusal merely motivated by his religious beliefs. The Court added that an individual accepted an employment contract knowing that the agreement contains provisions that are contrary to his or her religious faith. However, a balance must be struck between competing interests to determine the necessity of state intervention and to protect these rights[137]. The government authorities utilised the margin of appreciation to strike a balance between the appellant rights to manifest his religious belief and the employer's rights and commitments to guarantee the provision of service to customers without discrimination. Finally, the Court concluded that there was no evidence to prove that the local authorities have exceeded the scope of the margin of discretion in this case[138].

2-4. Ebrahimian v France

The applicant was employed in a temporary contract as a social assistant in the psychiatric wing of a public hospital in the Paris area. She lost her job due to disciplinary measures by the state authority following her insistence to wear the Islamic headscarf at work[139]. According to the particulars of the case, there were some complaints from the patients and the staffs regarding wearing of religious dress. She complained that the state authorities violated her right to freedom of religion or belief. The French domestic courts stated that the hospital was allowed not to renew her contract due to the manifestation of religion in the workplace. The French authorities claimed that the ban was aimed to protect the principles of secularism and neutrality of public service. The public service is understood in its broader sense to include the employees and private entities that provide the public services[140].

The appellant challenged the decision of the French Courts before the European Court, which upheld the judgment of the domestic courts. The European Court relied on its case law involving headscarf issue such as *Sahin* case, on which the states enjoy a wide range of the margin of appreciation to

[136] Eweida, para 107
[137] Eweida, para 109
[138] Ibid, para 110
[139] CASE OF EBRAHIMIAN v. FRANCE, (Application no. 64846/11)
[140] Ibid, para, 24,25,27

decide on such matters. Also, the Court affirmed the secular system that became like a constitution that used to restrict individual rights to express their religion[141]. In assessing the proportionality test, it would be better if the Court considers the possibility of changing the post for the applicant as it happened in the *Eweida* case because such decision will affect the applicant and will not get a job in the whole public sector[142]. Many people lost their jobs, mainly Muslim women, Sikh, and Jewish men because of religious dress. The Court relied on the state justification, and the state enjoys a wide range of the margin of appreciation. However, there was no separate assessment from the Court, nor critical examining the relevance of the approach took by the state in such restriction[143].

According to the facts, the Court mentioned that the applicant was in direct contact with the patients, and there were some difficulties regarding conducting her duties. Although, there was no clear evidence prove applicant conduct constituted real problem with patients or the staffs. The Court specified that there was a need for more explanation to identify the difficulties faced by applicant when performing her duties[144]. Many observers indicated that the abstract principle of secularism requires the prohibition of wearing religious clothes or symbols by public officials to guarantee the provision of services to customers with neutrality, and without showing their religious identity[145]. However, the abstract principle of secularism became 'a pressing social need' used regularly by states parties to justify restrictions on the wearing of religious symbols. And the Court, to some extent, accepts restriction against individuals rights based on weak assumptions, such as the guarantee of service provision with neutrality so that the 'patients cannot have any doubts as to the impartiality of those who were treating them.'[146] Finally, the European Court's scrutiny regarding proportionality and the principle of ‘necessity’ was weak, because the Court accepted the abstract principle of secularism and assumptions as bases for prohibition the headscarf, instead of whether the bans were addressing a pressing social need such as real threat to the neutrality or the rights of others[147].

2-5. S.A.S. v. France

[141] Ibid , para 52
[142] Eva Brems comments, 2017, Ebrahimian v. France, Freedom of Religion.
[143] Ibid
[144] Case Ebrahimian, para 69
[145] Frank Cranmer, Niqabs, hijabs and hospitals: Ebrahimian v France, comments 2015. Available: https://www.lawandreligionuk.com/2015/11/27/niqabs-and-hospitals-ebrahimian-v-france/
[146] Ibid.
[147] Ibid, Ibrahimian case, para 64

The applicant was a French national, and she wore a Muslim religious dress based on her belief and culture. She complained to the European Court about the French dress code of 2010 that bans the wearing of religious clothing in public places, has prevented her from wearing the full-face veil in the public sphere. She claimed that the bans violated her rights under Articles 3, 8, 9, 10, 11, and 14 of the Convention[148]. Furthermore, she insisted that she wore face veil based on her choice and there was no pressure from anybody else to wear the Niqab. She argued that she wears the Niqab occasionally and did not mean to annoy other people; she intended to feel inner safety. And always she was ready to show her full face when the government officials required her to display her identity[149].

The Court concluded that Article 9 addresses the rights of the individuals to manifest their religious belief, including wearing of garments and symbols affiliated to religion[150]. However, the Court affirmed that Article 9 does not protect any act motivated by religious convictions that which does not consider the difference in the exercise of rights in public and private places [151].

To determine whether the personal choices fall under rights to respect for private and family life under Article 8 of the convention, the Court must investigate the state intervention in the applicant's right to private life[152]. In this case, the Court identified that the way that applicant appeared in public or private places is an expression to her personality, and it falls under her private life,[153] and state bans constituted intervene with applicant's right to private life. Then the Court should scrutiny whether such restriction is 'prescribed by the law, pursue a legitimate aim, and is a 'necessary in a democratic society.'[154]

Regarding the alleged violation under article 9 of the convention, the Court found that the ban grounded in sections 1 to 3 of the Law of 11 October 2010. However, the assumption provided by the state claiming that women who wear face veil were forced by their husbands and relatives to do so was baseless[155]. Because the explanatory memorandum accompanying the bill indicated that the ban

[148] Ibid, CASE OF S.A.S. v. FRANCE, para 3
[149] Ibid
[150] Ibid, para 108
[151] Ibid, para. 125
[152] Admissibility Decision, Kara v. United Kingdom, App. No. 36528/97 Eur. Ct. H.R. para. 2,
[153] Ibid, S.A.S. para. 107.
[154] Ibid
[155] Ibid, para. 137

does not aim principally to protect women against a practice which was imposed on them or would be detrimental to them[156].

As for the necessity test, it was accepted that the state might regard the bans necessary for the state officials to be able to identify the individuals for the protection of public interests from potential harm[157]. Based on this assumption, the Court found that there was no violation of Article 9 since the procedures were taken for security reasons and public safety within the context of Article provision[158]. Concerning the 'legitimate aim' French authorities invoke 'protection of the rights and freedoms of others' the Court found that the bans law of 2010-1192 was proportionate to achieve a legitimate aim[159]. French government stated that the bans seek to create an inclusive social interaction among the citizens and support tolerance that required in a democratic society, and the bans of wearing the hijab were considered one of the tools that could be used to achieve that aim. The court upheld the idea and regarded it as 'a necessary in a democratic society.'[160] The European Court approach to address complaints brought against French laws on burqa/Niqab bans contradicts to the objectives of human rights regimes. There are inconsistencies in the discussions, analysis, and ruling regarding several cases. The Court reiterated in both articles 8 and 9, the ‘protection of rights and fundamental freedoms of others’ emphasis on its significance, however, in supporting the bans of religious dress, French authorities protect rights and freedoms of others without precise scrutiny to protect rights and freedoms of minorities.

The next chapter will examine the jurisprudence of the UN Human Rights Committee in terms of its scrutiny on the bans on religious dress and symbols in public or workplace. The chapter will illustrate how the Committee scrutinises the proportionality test regarding the bans in some of the European countries. The chapter will argue that the Committee will not accept that States to interfere in the rights of individuals without a reasonable justification that complies with the limitation clauses provided in the human rights regimes.

Chapter 3

[156] Ibid
[157] Bluebook 20th ed. Hilary Khoury, S.A.S. v. France: The Full-Face Veil as a Threat to Public Safety and the Protection of Others, 23 TUL. J. INT'L & COMP. L. 607, 622 (2015).
[158] Admissibility Decisions], Phull v. France, App. No. 35753/03 Eur. Ct. H.R. 3,
[159] Ibid, p.617
[160] Ibid.

Human Rights Committee case law

The UN Human Rights Committee is authorised to monitor the implementation of the rights contained in the International Covenant on Civil and Political Rights. To do that, the Committee examines the reports provided by the States, particularly the measures taken by the state to implement the covenant's rights, and monitors the progress made by the States in the realisation of the enjoyment of those rights[161]. The Committee gives its comments on the State's report through the concluding observations which include recommendations such as reviewing the state laws to comply with the ICCPR. And, to guarantee that the state's domestic application complies with the provisions of Article 2 of the Covenant[162]. Besides that, the Committee publishes General Comments aimed to enhance the effective implementation of the ICCPR, through the highlight the deficiencies in the state's report, and to encourage the states parties and the international organisation to promote the protection of human rights[163]. Concerning Article 18, the HR Committee emphasised that its General Comment on Article 18 should be reflected in the state's *'policy and practice'* and given consideration when states parties prepare their reports[164].

The UN Human Rights Committee an essential supervisory tool for the implementation of the ICCPR. Under Article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights, the Committee receives communications from individuals who claim a violation of their rights to freedom of religion or belief[165]. And that will be after the exhaustion of the domestic remedies. Based on this jurisdiction, the Committee received several complaints from the individuals challenging the decisions of their governments concerning the bans laws that restrict the wearing of religious dress and symbols in public or workplaces. The complainants regarded such restriction as a violation of their rights to the freedom of religion or belief. This chapter will discuss the UN Human Rights Committee jurisprudence; the discussion will focus on the Committee's scrutiny of the proportionality test regarding the prohibition of wearing religious clothes and symbols in the public and workplaces in Europe.

3-a. *Hebbadi v France,*

[161] Ibid, Paul M. Taylor, PP. 10-13
[162] Ibid, P.12
[163] Ibid, P. 14
[164] Ibid
[165] Article 2 of the Optional Protocol to ICCPR of 1966.

The author was a French national and Muslim woman who wears the niqab, the police stopped her for identity checks while she was walking in the street, after that, she was charged and prosecuted for a minor offence which is the wearing garments conceal her face in public place [166]. And she was ordered by the community Court in Nantes to pay 150 Euros as a maximum penalty applied according to Article 1 and 2 of the Act No. 2010-1192 of 11 October 2010. Noting that 'the decision of the community court was not subject to appeal.'[167] Where the French authorities alleged that the bans aimed to protect the public safety and public order, and to protect the rights and fundamental freedoms of others.

The applicant challenged the French authority's decision before the national courts, and she claimed that the bans on full-face veil in public space deprived her the freedom of choice to wear garments as she wishes. And she submitted her complaint under Article 18 of the Covenant[168]. She argued that the French Act No. 2010-1192 did not conform to the provisions of article 9 of the European convention that guarantee individuals the rights to manifest religion. She requested from the criminal chamber of the Court of Cassation to review the decision of the community court judge on her case. and she also claimed that the bans law is discriminatory because it 'undermined pluralism by discriminating against a minority practice of the Muslim religion."[169] The cassation court rejected her application on the basis that the community Court judgment is not subject to appeal.

The committee conclusion.

Finally, the applicant challenged the domestic courts' decisions before the HR Committee. According to its general comment No. 22, the Committee found that the author act represents religious practice,[170] and the bans constitute restrictions of applicant rights to manifest her religion or belief within the meaning of Article 18 (1). Then the Committee needs to determine whether such restriction follows the limitations regime contained in Article 18 (3) of the ICCPR. Which provided that any restriction on religious practice must be 'prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.'[171] Moreover, the Committee emphasized that the provisions of Article 18 (3) need strict interpretation, and there were no other

[166] CCPR/C/123/D/2807/2016,
[167] Ibid, para, 2.5
[168] Ibid, para, 2.4
[169] Ibid, para 2.5
[170] Ibid, GC No. 22, para. 4.
[171] Article 18 (3) of the ICCPR, 1966.

grounds for restriction rather than those mentioned in Article 18. Furthermore, the Committee stressed that the restriction must be proportionate to a legitimate aim and should not be applied in a discriminatory manner or for inequitable purposes[172]. On the other side, the French authorities alleged that the restriction was aimed to achieve a legitimate objective, mainly, the protection of public safety; public order; and the protection of the rights and freedoms of others.

Regarding the principle of 'prescribed by the law' the Committee found that the prohibition falls under the scope of article 1 of the French Act No. 2010-1192. As for the public safety and order; the State party claimed that the restriction would help the government authorities to identify individuals when necessary to guarantee public security and combat identity fraud. The Committee agreed that in certain circumstances, individuals would be required to reveal their faces, such as during the procedures to prevent risk for public safety or order, and identity purpose[173]. However, the Committee observed that the French bans code is not limited to specific circumstances and always prohibits a particular dress (face veil). The Committee also found the state authorities were not able to demonstrate that the full-face covering poses a real threat to the public safety or public order so that the ban would be justified [174]. Also, there was no reasoning from the state to explain why it prohibits the wearing of the full-face veil and allows to face-covering in other purposes such as sport, artistic, other traditional faith; and there was no example of the expected threat[175].

Furthermore, the State party failed to provide evidence to show that there was an imminent threat to public safety. Also, the state was unable to prove that the prohibition contained in Act No. 2010-1192 consistent with the legitimate purpose that the state authority aimed to achieve. There was no effort from the state to prove that the ban was the least necessary measures adopted to meet that aim[176]. Moreover, the state did not show the rights of others that are affected by the wearing of the face veil, including persons. Finally, the committee stated that the limitations provided in article 18 (3) need to be interpreted strictly but not abstractly[177]. The committee found that the state violated the rights of the applicant guaranteed by Article 18 of the covenant.

3-b. *Sonia Yaker v. France,*

[172] Ibid, GC No.22, para, 8
[173] See the judgment to this effect in S.A.S. v. France, para. 139.
[174] Ibid, CCPR/C/123/D/2807/2016, para 7.7
[175] Ibid
[176] Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir (E/CN.4/2006/5), para. 58.
[177]Mahabir v. Austria, para. 8.3.

The applicant is a Muslim woman who wore a full-face veil, and the French police stopped her and asked about her identity for security reasons[178]. The face veil wearing was not allowed by the law; therefore, she was prosecuted under the provisions of Act No. 2010-1192 of 11 October 2010 because she wore the veil that concealed her face in the public place. However, she challenged the bans decision and claimed that the state authorities violated her rights under Articles 18 and 26 of the ICCPR, she argued that the bans indicate the failure of her government to provide her with the equal protection before the law, and the right to non-discrimination. She added that the headscarf-wearing represents a religious practice for a particular religious group of Muslims [179].

On the other hand, the French authorities claimed that the restriction was grounded on the protection of 'public safety' and 'living together'[180] . The UN Human Rights Committee stated that there was no dispute that the prohibition was applied according to the law 'prescribed by the law' and the Act No. 2010-1192 of 11 October 2010 was the legal basis for the bans. Regarding the protection of 'public safety,' the Committee accepted that states parties would need to guarantee the public safety, and in certain situations, individuals will be asked to remove their full-face veil and show their identities for security checks[181]. But also, the state authorities will be required to justify their interference in the rights of individuals, and to prove that the wearing of full-face covering constitutes a threat to public safety. But the Committee observed that French government authorities failed to justify that the ban was necessary to address pressing social conditions[182].

Additionally, the French authorities alleged that the restriction was aimed to protect the concept of 'living together' and this concept requires individuals to show their 'readiness to be identified' but not to conceal their faces. In this regard, the Committee stressed that the restrictions grounds provided in Article 18 (3) must be interpreted strictly, and the principle of 'living together' was not mentioned among the limitation grounds provided in Article 18 (3). Finally, the committee found that the ban is discriminatory because the law that imposed the restriction was drafted as a general law, that should be applied to all people, but practically, it applies only on women who wear the full-face veil[183].

[178] Sonia Yaker v. France, communication No. 2747/2016.
[179] A Primer on International Human Rights Law and Standards on the Right to Freedom of Thought,Conscience, Religion or Belief, January 2019, p 15
[180] Sonia Yaker, para 7.7
[181] Ibid
[182] Ibid
[183] Ibid, A primer, p 15

3-c. *Bikramjit Singh v. France*

The complainant was practising Sikh belief, he was living in France, and he went to attend school wearing ‘keski’ which is a 'black piece of cloth’ worn by Sikh men to cover the head and protect their hair. The school administration refused to allow him to enter the school premises wearing a religious dress that reflect his religious identity. And the school authorities considered the cloth wore by the applicant as ‘a sacred, inherent and intrinsic part of the religion’[184]. In addition to that, the school administration allocates a separate place for the applicant to attend his lessons, and he was not allowed to attend the classes with the rest of the students. Finally, the school authorities expelled him permanently from the school, reasoning that the applicant did not comply with the school regulations, and the wearing of religious attire constitutes a breach of Act No. 2004-228 of 15 March 2004[185]. Furthermore, the state authorities stated that wearing religious garments or symbols by teachers or pupils was prohibited by the law, in order to implement the state policy to protect the secular education system. Also, French authorities alleged that the restriction on applicant religious rights was intended to defend the secularism; the interests of pluralism; rights and freedoms of others; and neutrality in public education[186].

The applicant challenged the decision of the French authorities before the UN Human Rights Committee; the appellant claimed that the state authorities violated his rights guaranteed by Articles 18 and 26 of the ICCPR. According to the case particulars, the Committee emphasized the importance of secularism protection within the state education system. The Committee added that the protection constitutes a legitimate aim, particularly, protection of rights and freedoms of others and protection of the public order and safety[187]. Despite that, the Committee found that the state authorities’ interference into the applicant rights was not necessary and not proportionate, because the government authority was not able to prove that the wearing of Keski by the applicant endangered the rights and freedom of others or represented an actual threat to the public order[188].

Worth mentioning that, the Committee stated that the state authorities subjected the complainant to a harmful sanction by expelling him permanently from the school, the reason was not because of his

[184] Ibid, A Primer on International Human Rights Law, p.16
[185] Bikramjit Singh v. France, Communication No. 1852/2008, U.N. Doc. CCPR/C/106/D/1852/2008 (2013) para 2.6
[186] Ibid, para.5.2
[187] Ibid, Bhinder case, para 3.4
[188] Ibid, para 3.14

conduct but because of his affiliation to particular religious category[189]. And the state was not able to provide a justified reason for its action against the applicant, and this led the Committee to conclude that, the French authorities violated the applicant's rights guaranteed by Article 18 of the ICCPR. Also, the Committee emphasised that the permanent expulsion of the applicant from the school was not proportionate to the legitimate aim alleged by the state, and it constitutes severe damage to the applicant educational development, where everyone has right to education[190].

3-d. Ranjit Singh v France

The applicant is an Indian national, and he got refugee status in France, he applied to renew his residence permit and provided the French authorities two photographs. In these photographs, he appeared wearing a Sikh turban (religious dress) that covers some parts of his head[191]. The French authorities refused to accept that photos that he provided, the state alleged that the photos did not meet the requirements stipulated in the French Decree article 11-1 of Decree No. 46-1574 of 30 June 1946[192], the decree that regulates the situations of foreign nationals apply to obtain a French residence permit. The decree specified 'that individuals must appear full face and bareheaded on the photographs destined for the residence permits'.[193] The appellant requested the concerned government officials to relieve him from the conditions that forced him to remove the turban from his head, which was incompatible with his religion or belief[194].

The state authorities rejected his application because it did not satisfy the requirements for residence permit renewal stipulated in French decree. After the exhaustion of the domestic remedies, the applicant appealed the French courts' decision before the UN Human Rights Committee, and he argued that the French authorities' requirements regarding full-face and bareheaded photograph for renewal residence permit were disproportionate and not necessary to the aim of protecting the public order and safety that alleged by the government authorities[195]. He contended that the state authorities did not refuse to issue residence identity with 'a beard covering half of the face' and he claimed that in many other European countries, specifically in Belgium, Germany and Italy such requirements did not

[189] Ibid, A Primer on International Human Rights Law, p.16
[190] Ibid.
[191] Communication No. 1876/2000 - Ranjit Singh v France, para 2.1
[192] Ibid, para 4.1
[193] Ibid
[194] Ibid
[195] Saïla Ould Chaib, Ranjit Singh v. France: The UN Committee asks the questions the Strasbourg Court didn't ask in turban case. https://strasbourgobservers.com/2012/03/06/ranjit-singh-v-france-the-un-committee-asks-the-questions-the-strasbourg-court-didnt-ask-in-turban-case/

exist. He alleged that in those countries, the state authorities used to issue identification cards for individuals wore a turban and how they can be identified holding their identities with turbans in these countries while they cannot be identified in France? Moreover, he appealed that it is easy for the state officials to recognize the applicant with an identification card wearing a turban since he used to wear the hat all the time. Finally, the complainant alleged that he was subjected to discrimination based on his religion because he was forced to choose between his religious duties and access to public services[196].

The state alleged that the residence cards requirements were necessary measures that enable state authorities to combat the falsification and fraud attempts. Therefore, it was essential requirements for individuals to submit photographs show their heads clearly in their cards so that it can be easy to identify them when required. The HR Committee stated that there were no challenges face the state authorities when they want to check individuals' identities for security reasons[197]. Usually, during daily life, people used to appear different than the way they look in their identity cards, and there was no evidence to show that the persons who wore turban involve in crimes of fraud or falsification[198]. All these issues raised by the UN human rights committee, and there was no justification provided by state authorities, and finally, the committee observes that the state has failed to justify its interference, and the Committee concluded that the does not comply with the limitation clauses contained in article 18 (3) of the ICCPR[199].

The next chapter will focus on the comparison and analysis between European Court of Human Rights and the UN Human Rights Committee case law, and it will illustrate the incompatibility of European Courts decisions with international human rights regime on the bans of religious dress and symbols.

Chapter 4

Case law of the UN Human Rights Committee and the European Court of Human Rights: comparison and analysis.

[196] Ibid
[197] Ibid
[198] Ibid
[199] Ibid

This chapter will provide an analysis of comparable cases before the UN Human Rights Committee and the European Court of Human Rights in relation to the wearing of religious dress in public places. It will argue that key differences in the rulings emerge for a differing level of scrutiny used by the two bodies.

Some of the rulings by the UN Human Rights Committee the cases involving the rights to freedom of religion or belief under Article 18 of the International Covenant on Civil and Political Rights were different from the decisions of the European Court of Human Rights on the similar issues under Article 9 of European Convention on Human Rights. The main reason is that the Committee does not use the 'margin of appreciation' The doctrine that relied on by the European countries in balancing the individuals' rights and the public interests of the state in general, particularly on issues where there is no standard among the states.

For example, in 2012, in *Yaker v. France*, two women wore a full-face veil; was stopped by; the police for an identity check. Finally, they were fined with 150 Euros and charged with the violation to The French law, Act No. 2010-1192 that stipulates *"No one may, in a public space, wear any apparel intended to conceal the face [unless the apparel is] authorized by law or justified for health or professional reasons, sports practices, festivities or artistic or traditional manifestations.*[200]*"* After the exhaustion of domestic remedies, the two victims submitted their complaints to the ECtHR and claimed that French authorities violated their rights guaranteed under article 9 of the convention, where the court dismissed the case as inadmissible with no specified reasons. By contrast, the UN Human Rights Committee found that the complaint was admissible despite the challenge from the French authority claiming that France put a reservation on individual communications to the UN committee[201], and supporting the ECtHR decision of inadmissibility of the case in question. In this case, the HR Committee indicated that the ECHR did not mention the grounds of inadmissibility in its decision so that the applicant understands the circumstances led to ineligibility to his case[202]. However, according to the particulars of the case, the HR Committee found the complaint was admissible[203].

[200] UN Human Rights Committee Condemns "Burqa Ban," Countering https://ijrcenter.org/2018/11/14/un-human-rights-committee-condemns-burqa-ban-countering-european-court/
[201] Hebbadj v. France, para. 4.3.
[202] X v. Norway (CCPR/C/115/D/2474/2014), para. 6.2.
[203] Ibid, Habbadj, para. 6.7

Regarding the HR Committee's decision, it should be noted that, the complaints are identical, and in both cases, the applicants alleged that the sentences handed down against them constitute a violation of their right to freedom of religion or belief under Article 18 of the ICCPR and their right to equality before the law under Article 26 of the ICCPR[204]. They argued that Act No. 2010-1192 of France treat them distinctively from the rest of the population by restricting their rights to freedom of movement; they became unable to interact freely with the community due to the dress code[205]. The law did not explicitly target Muslim, but the applicants managed to show that many individuals affected by the bans are the Muslim minority, which indicates that the law is discriminatory[206]. In both cases, the committee concluded that the decision of the French authorities to prohibit the concealment of one's face in public places constituted interference in the applicants right to the freedom of religion under the meaning of article 18 of ICCPR[207]. The French Act No. 2010-1192 forced the applicant to choose between giving up manifesting their beliefs or face the punishment.

a- 'Necessary in a democratic society'

The State authorities argued that the bans are necessary to protect both the rights of others and public safety and order, and the committee recognised that in certain circumstances it might be essential to check individual's identities through seeing their faces for security reasons[208]. But the law constituted a blanket ban not limited to those situations only; therefore, it is not proportionate to the objectives that State officials claimed that the law aimed to achieve. The State party has argued that the concept of 'living together'[209] is a legitimate aim that drives the government to restrict the rights of individuals in order to realise it, but the Committee clearly stated that the grounds for restrictions provided in Article 18 should be interpreted strictly and that the concept of "living together" is very vague and abstract.[210] According to the Committee scrutiny of the case, the State party failed to establish a reasonable connection between the fundamental rights of others and the effect of wearing the full-face veil on those rights. [211] Finally, the Committee decided that the bans imposed on the full-face cover by State authorities were not 'necessary in a democratic society,' and was not

[204] Ibid, para. 3.1, para. 3.2
[205] Ibid, para. 3.12
[206] Ibid, para. 3.13
[207] Hebbadj v. France, paras. 7.2-7.3, Yaker v. France, paras. 8.2-8.3.
[208] Yaker v. France, para 8.7
[209] Ibid, para 8.10
[210] Ibid.
[211] Ibid.

proportionate to achieve a legitimate aim as alleged by the local authorities. It, therefore, held that the convictions imposed on the applicants constitute a violation against their rights for freedom to religion guaranteed under article 18 and the right to 'non-discrimination' in Article 26 of the ICCPR.[212] The law disproportionately affected Muslim women wearing the full-face covering and presented unfair treatment toward them in comparison to those who are permitted to cover their faces as exceptions under by Act No. 2010-1192[213].

b- The European Court decisions on ban of religious dress and symbols

In S.A.S v. France, the applicant was a Muslim woman who wore the full-face veil. She claimed that she wore it as her choice and that wearing it was according to her religious conviction. However, in 2004 the French authorities enacted a law that banned the wearing of religious dress that concealed an individual's face in public places. The applicant claimed that the dress code prohibited her from wearing clothes that she chose to wear and that the law violated several other rights including the right to freedom of religion and belief guaranteed under article 9 of ECHR[214]. About the claim under Article 9, the court found that the state action constituted an interference in the complainant rights to freedom of religious practice, on which the court needed to investigate whether such intervention met the restriction clauses. It maintained that the State intervention must be "prescribed by law," pursues a legitimate aim, and should be "necessary in a democratic society," as it provided for in the second paragraph of article 9 of the convention[215].

c- 'Legitimate Aim'

Regarding the principle of 'prescribed by the law,' the Court found that the bans were introduced by Law no. 2010-1192 of 11 October 2010 and met that particular requirement. Therefore, the Court focussed on the other two principles i.e. legitimacy and necessity. Concerning the need to meet the criterion of a legitimate aim, the State party pushed with two objectives 'public safety', and 'respect for the minimum set of values of an open and democratic society': the state considered them as a legitimate goal and intended to protect these interests by such bans[216]. The public safety enumerated in article 9; but the second goal that claimed by the state was not mentioned in the provisions of

[212] para. 8.12 and para. 8.17.
[213] paras. 8.15-8.17.
[214] Ibid, S.A.S. v. FRANCE, para. 3,10-14.
[215] Ibid, paras. 110-11
[216]Ibid, para. 115.

Article 9, and to some extent, it linked to the protection of 'rights and fundamental freedoms of others' within the meaning of the second paragraph of the article. The court interpreted in some situations, "respect for the minimum requirements of life in society" or "living together" relate to "protection of the rights and freedoms of others"[217].

d- 'Necessary in a democratic society.'

Regarding the criterion of a limitation being 'necessary in a democratic society,' the right to freedom of religion and belief is considered as one of the fundamental freedoms for democratic societies. However, the court stated that article 9 differentiates between the conduct related to this right and the beliefs itself[218]. It noted that the provisions of this article did not protect every act that was motivated by religion or convictions, and it does not assure that individual a right to behave in the public space as the way they might behave in their private sphere[219]. The concepts such as "pluralism, tolerance, and broadmindedness" are considered as features of the democratic society. Although, democracy does not mean that the majority views prevail, it requires a balance must be made between the rights of individuals and the public interest, with the minorities given equal treatment with the majority[220]. The court examined the state allegation that women wear the full-face veil under duress, and the court found this claim is baseless[221]. But removing the cloths that conceal the face for security reasons as claimed by the state authorities, the court considered as necessary for a legitimate aim, which is the interest of public safety[222]. Therefore, the court found that there was no violation of article 9 as long as there is an obligation to remove religious garments for identification and security necessities[223].

The court's scrutiny regarding state justification was weak because the state did not provide any evidence that the rights and freedoms of others have been affected by the wearing of the full-face veil. Several judges argued that the bans affected the abstract principles contained in the convention such as religious and cultural identity, and it was not proportionate to the legitimate aim alleged by the

[217] Bluebook 20the, Hilary Khoury, S.A.S. v. France: The Full-Face Veil as a Threat to Public Safety and the Protection of Others, 23 TUL. J. INT'L & COMP. L. 607, 622 (2015).
[218] Ibid, Arrowsmith v. United Kingdom, para. 41, HUDOC (June 12, 1979), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104188.
[219] Ibid, S.A.S, para. 125.
[220] Young v United Kingdom, App. Nos. 7601/76, 7806/77 Eur. Ct. H.R. para. 63, HUDOC (Aug. 13, 1981), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57608.
[221] Ibid, S.A.S, para. 137.
[222] Ibid, para. 138.
[223] Ibid, Hilary Khoury, p. 617

State party[224]. And this emphasises that such prohibitions are not considered 'necessary in a democratic society,' and the allegations regarding respect for dignity and equality between men and women [are/should] not deemed legitimate to justify the bans[225]. Moreover, the protection of persons, properties and the fight against fraud on identity could be a legitimate aim required individuals to remove their face veil, but this can be a proportionate only in situations of the real general threat to public safety[226].

e- No proper scrutiny by the ECtHR

In many case laws involving the removal of the religious garments due to the security check processes and for identity photos; the ECtHR and the UN Human Rights Committee reached different conclusions[227]. The main reason behind that is the European Court did not conduct proper scrutiny regarding the state's justifications for its interference in individual's rights. The court relies on the state's decisions on issues in question, and this is due to the wide margin of appreciation that is given to states to solve matters where there is no commonly agreed standard among countries[228]. In *Mann Singh v. France,* the European Court of Human Rights dismissed the application and decided that the case was manifestly ill-founded. The French authorities required the complainant to remove his turban and provide them with identity photos[229]. He claimed that this request constituted an interference with his right to privacy and his rights to freedom of religion[230]. The Court concluded that the State interference in the applicant's rights was justified and proportionate to support the public interests, law, and order[231]. The applicant later challenged this decision before the UN Human Rights Committee claiming that French authorities violated his rights guaranteed under articles 18 and 26 of the ICCPR. He argued that the requirements for identity photos are not necessary nor proportionate[232]. The Committee observed that the applicant wears a turban that covers the top of his head and some forehead but leaves his face visible, but local authorities did not explain why it was challenging to identify him when he was wearing it, given the fact that he always wore a turban in his

[224] Ibid, S.A.S, p. 61, para 3
[225] Ibid
[226] Ibid
[227] Mann Singh v. France (dec.), no. 24479/07, 13 November 2008.
[228] Aernout Nieuwenhui, European Court of Human Rights: State and Religion, Schools and Scarves, An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey, Decision of 29 June 2004, Application Number 44774/98.
[229] Ibid, Mann Singh v. France, para 2.2
[230] Ibid, para 2.3
[231] Ibid, 2.4
[232] Ibid

daily life[233]. Besides, the state authorities did not explain how bareheaded identity help the authorities to identify their holders when the holders of these cards always wear turbans in public places, throughout their daily lives; or how it helped the authorities to combat fraud and falsification[234].

Requiring an individual to remove his turban and submit a photo for identity purpose is considered neither proportionate nor necessary. This is because, if the applicant obtained an identity card with a bareheaded photo, then he will be required regularly to remove his turban for security and identity checks. And this will constitute a violation of the individual's religious rights if there is no convincing justification on the part of the state, and his religious convictions require that the turban be worn all the time[235].

f- Schools and Public Institutions

The jurisprudence of the European court and the UN Human Rights Committee regarding the prohibition of religious dress and symbols in schools and public places took two different paths. Teachers and students submitted several cases to the Court claiming a violation of their rights to freedom of religion, but the court dismissed them by declaring inadmissibility or non-violation of Article 9 of ECHR. In *Kurtulmus v. Turkey*, involving the dismissal of a University teacher from her job because of wearing the Islamic headscarf, the Court agreed with the decision of the State authorities that wearing headscarf was a threat to the secularism and that the Turkish constitution guarantees, and to the principle of secularism. Therefore, the Court found no violation of Article 9[236]. The same judgment was applied to the case of *Sahin v. Turkey* where the Court relied on the principles of secularism[237]. In *Ebrahimian v. France* case, the Court found no violation and agreed with the local authority not to renew the contract of a social worker in a public hospital because the applicant refused to stop wearing the Islamic headscarf[238]. The Court relied on its previous case law and agreed that the religious dress in the workplace was a threat to the principle of the secularism, accepted the state claimed to protect the rights and freedoms of others, and that the action was necessary to maintain the neutrality of governments officials to guarantee the equal delivery of

[233] Ibid, para 9.4
[234] Ibid
[235] Ranjit Singh v. France, para 8.4
[236] Kurtulmus v. Turkey (dec.), no. 65500/01, 24 January 2006
[237] Leyla Sahin v. Turkey [GC], no. 44774/98, ECHR 2005-XI, Judgment of 10 November 2005, para 122
[238] Ebrahimian v. France, 26 November 2015 applcation No. 64846/11

services and treatment for patients[239]. As for the proportionality of the bans with a legitimate aim, the Court accepted the State's claim that the government employees are not allowed to disseminate their religious convictions while performing their professional duties[240].

In all these cases, the European Court and the HR Committee reached different conclusion. For example, in case of *Raihon Hudoyberganova v. Uzbekistan,* the Committee considered that expulsion of the student from the school because she refused to remove her hijab while attending her class, was a violation of the applicant's rights to freedom religion or belief since the state did not provide a reasonable justification for its interference[241]. Also, it found coercion against the applicant's freedom to adopt faith or convictions according to his or her choice. In the case of *Bikramjit Singh v. France,* the HR Committee emphasized that the restriction was '*aimed to protect the rights and freedoms of others*'[242], public order and safety. The state alleged that the bans sought to tackle the phenomenon of religious dress that created tensions and harassments in the schools[243]. Despite that, the HR Committee held that the interference was not justified because the state failed to demonstrate how the wearing of religious dress by the applicant endangered the rights or freedoms of others at the school. Also, there was no evidence that the permanent expulsion from school would serve the best of the public interests or that it was the last restrictive measure[244]. The lack of evidence led the HR Committee to decide that there was a violation of the applicant rights under article 18 of the ICCPR.

As the foregoing shows, two different human rights systems reach differing conclusions on comparable cases regarding the restriction of the right to manifest religion or belief regarding the wearing of religious clothing in public spaces. Across a range of cases a common pattern emerges, and that is that the Human Rights Committee applies a higher level of scrutiny of State actions and demands more specific evidence to establish necessity. The European Court however, under the doctrine of 'margin of appreciation' is less stringent in its scrutiny of the necessity requirement. In some cases, the Court has also been more willing than the Committee to accept arguments put

[239] Jeroen Temperman, and others, The European court of human rights and the freedom of religion or belief: the 25 years after Kokkinakis, Brill Nijhoff, (eBook) 2019, p. 340
[240] Ibid
[241] Raihon Hudoyberganova v. Uzbekistan, Communication No. 931/2000, Views of 5 November 2004.
[242] Case Summary S.A.S v France Application Number: 43835/11.
https://www.equalrightstrust.org/ertdocumentbank/Court%20Watch%20-%20SAS%20v%20France.pdf
[243] Ibid, Bikramjit Singh v. France, para 8.6
[244] Ibid, paara. 8.7

forward by the State on the legitimacy criterion too, as in the case of protecting a right to living together in the SAS v France case.

The next chapter will summaries the key arguments of the dissertation and highlight the main points that illustrate whether the bans on religious dress in public or workplace in some of the European countries meet the limitation clauses in the international law regime. The conclusion will show whether the proportionality test been applied properly; whether there is insufficient scrutiny by the ECtHR of the application of the test by national governments; and whether there is indirect discrimination.

Conclusion.

As well illustrated that the right to the freedom of religion or belief recognized in all international human rights mechanisms, including the regional instruments for the protection of human rights such as the European convention. Article 18 of the ICCPR and Article 9 of the ECHR[245] provided granting clauses as well as limitations clauses. There were two issues arisen during the drafting history of the Article 18 one involved the inclusion of the right to change one's religion, while the other one was the imposition of restriction clauses on the rights to manifest religious practice.

Regarding the limitations clauses, international law and the European convention precisely provided that restriction on religious practice is only allowed if it is grounded in the three-part test contained in these instruments; prescribed by the law, pursue a legitimate aim, and necessary in a democratic society (Article 18 (3) ICCPR, and Article 9 (2) of the ECHR). According to these instruments, the legitimate aim means that the restriction should be justified that it protects public safety, order, health or morals or the fundamental rights and freedom of others[246]. However, many European countries enacted laws that restrict the right to the freedom of religious practice in public and workplaces. But the application of these laws affected several people because they wear religious attire and believe that these garments represent an integral part of their religion. There were many complaints submitted before the European Court of Human Rights, alleging that their governments violated their rights to the freedom of religion manifestation guaranteed by the European convention. It is quite noticeable that the complainants before the European Court are individuals from religious minorities, which include Muslim women who generally wear the hijab (Headscarf, Burga, Veil), Sikh people who

[245] Article 18 of ICCPR, and article 9 of ECHR.
[246] Ibid, article 18 (3), article 9 (2)

wear Turbans, and Christians who display crosses. This dissertation examined the jurisprudence of the European Court in terms of standard of scrutiny by the Court regarding the decisions of the state authorities on the bans of religious dress in public and workplaces. The conclusions of this research showed that the European Court practice in investigating the bans decision was flawed because the Court accepted the judgements provided by States parties on this matter, without making independent scrutiny about those decisions to guarantee that it conforms to the limitation regime in human rights law. Also, the findings presented that there was no dispute that the bans were made according to the principle 'prescribed by the law.' But the other two conditions required independent scrutiny by the Court, to guarantee that the restriction does not constitute a violation to the right of individuals to the freedom of religion or belief. Practically, there was no proper investigation demonstrated by the Court in many cases ruled under the Court jurisdiction. For instance, usually, States parties invoke the secularity of the state and gender equality as a legitimate aim to restrict the right of individuals to manifest their religion. States alleged that the wearing of religious dress in public or workplace constituted a threat to the secularism and endangered the principle of gender equality[247]. The Court accepted that sustaining secularism and achieving gender equality was considered a legitimate and maintaining them requires states parties to adopt measures to protect them. But in general, the Court did not ask states parties to demonstrate how the wearing of such attire hinder secularity of the state and affect the gender equality principle, and there was no evidence to show that such restriction was required to address a pressing social need[248].

The study found that one of the reasons that make the European Court accept the justification from states parties regarding bans on the religious dress or symbols without further investigation by the Court was that the Court granted states parties discretion power through the doctrine of the margin of appreciation. This concept allows state authorities to strike a balance between the rights of individuals and the public interests of the community, and this doctrine applied to issues where there was no agreed universal standard or practice among the states parties to be applied. And the prohibition of wearing religious clothing and symbols in public places was one of the matters that subjected to the margin of appreciation. Therefore, the Court did not properly investigate the main reasons and motives behind states interference in the rights of individuals to freedom of religious manifestation. It

[247] Ibid, Leyla paras 90-110, and paras 100-116.
[248] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW: CDL-AD(2008)032 Opinion no. 496/2008 EUROPEAN COMMISSION : http://www.legislationline.org/documents/id/15360

was also noted that the Court relied on the decisions of States concerning the bans because the Court believes that States are best to determine what would constitute a pressing social need

Unlike the UN Human Rights Committee, in all cases submitted before the Committee, there was proper scrutiny on States decisions regarding the bans on wearing religious attire and symbols in public and workplaces. In its case law, the Committee asks the state to provide a reasonable justification behind the bans that affect the rights of individuals to religion. And also, it asks States to demonstrate how the wearing of religious garments constituted a threat to the protection that alleged by the State. The Committee also investigates whether the measures were taken by the State were proportionate to a legitimate aim. And whether such actions were the least necessary measures to be made by the state to meet that lawful purpose. The Committee stated that the restrictions contained in Article 18 (3) of ICCPR need to be interpreted strictly within the meaning of the covenant and not abstract interpretation[249]. It was expected from the Court to stress on whether the action put forward by the State to restrict the rights was proportionate to the legitimate aim or not. For example, in circumstances where the State authorities refused to issue an identity card for the applicant because he refused to remove his turban due to his religious beliefs[250]. The Committee concluded that the State authorities failed to demonstrate that the issuance of identity card with bareheaded photograph was necessary to fight the fraud and falsification attempts. The Committee also stressed the fact that the applicant wears the turban all the times and argued that it was not rational to issue an identity card with bareheaded-photo for someone who wears a turban through all his life. And it will be easy for the State authorities to identify him with his identity card wearing turban whenever required for security check. However, such scrutiny proved that the State action was not proportionate to aim that invoked by the State. While the European Court did not subject state interference in the rights of individuals to guarantee that such procedures were proportionate to the aim alleged by states.

The bans on religious clothing and symbols would violate several other rights in the convention including indirect discrimination if the Court did not apply proper scrutiny about the bans in terms of the proportionality test. The study found out that the bans laws are general laws that were drafted broadly and applied to all people, but in reality, these laws affect disproportionately on specific individuals, and mainly persons of religious minorities such as Muslim women, Sikhs, Jews and

[249] Ibid, Hudoyberganova v. Uzbekistan
[250] Ibid, Mann Singh v. France.

Christian. The lack of appropriate scrutiny by the Court resulted in that many girls lost their opportunity to education. Because the ban laws forced them to choose between the removal of their religious dress and continue their education or remain loyal to their religious orders and lose their education opportunities. Several other individuals lost their jobs because of ban laws that were applied against the wearing of religious dress or symbols in public or workplace. There was a clear difference between the European Court of Human Rights jurisprudence and the UN Human Rights Committee in terms of scrutiny for the proportionality test regarding the bans on the religious manifestation in some of the European countries. The Committee applied proper scrutiny for the three-part-test as it provided in human rights regime, while the Court usually relied on its previous case law and the justification provided by the state authorities. Because the Court considers States are the best to determine situations that constitute a pressing social need, and that requires states to intervene and restrict the rights of individuals to achieve public interest, without a proper examining by the Court on the bans in such situations.

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