

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Marika Koskinen

**JUSTIFIABILITY OF GENERAL BURQA BAN AND
EVALUATION OF PROPORTIONALITY – CASE OF FRANCE**

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Supervisor: Jenna Uusitalo

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Marika Koskinen

(signature, date)

Student code: 177694HAJB

Student e-mail address: makosk@ttu.ee

Supervisor: Jenna Uusitalo, M.A.

The paper conforms to requirements in force

.....
(signature, date)

Chairman of the Defence Committee:

Permitted to the defence

.....
(name, signature, date)

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ABSTRACT

Following the example of France, as the first country to implement a blanket ban on wearing a burqa in public places, other European countries have increasingly adopted laws to ban the practice of concealing one's face. Although the ban interferes with the rights provided in Articles 8, 9 and 10 of the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) found that the ban served a legitimate aim that was necessary in a democratic society and therefore did not constitute a violation of human right. In 2018, regarding the same ban, the UN Human Rights Committee (HRC) stated that the blanket ban violated the right to thought, conscience, and religion and therefore, dismissed the justifications. This paper will set out the context of the face veil ban in France and the legal challenges resulting from it. In light of the given context, it will be examined whether there is, in respect of human rights, any grounds to justify the general burqa ban which applies to all public places at all times, excluding places of worship. Subsequently, this thesis examines whether such measure is proportionate in respect of the legitimate aim it pursues. Qualitative research methods will be applied to answer these two research questions. Particularly, the study will focus on the case of France. Eventually, the paper will conclude that a blanket ban cannot be justified on the grounds that have been argued in favor of the ban, nor is such a general measure proportionate to the aim.

Keywords: burqa ban, freedom of expression, freedom of religion, European Convention on Human Rights, SAS v France

INTRODUCTION

There is an ongoing politically heated debate in several liberal societies concerning the practice of women concealing their faces. The debate has accelerated as a result of laws enacted in Europe recently to ban or to restrict the wearing of full-face clothing in public places, and many European countries have been discussing enacting such law. Since April 2011, throughout France, it has been prohibited for anyone to wear full-face covering clothing in all public places.¹ The Netherlands was the latest country to implement burqa ban law in August 2019, thus indicating that the issue of balancing between human rights and legitimate restrictions on them is a topical and ongoing controversy.² The ban under evaluation in this paper does not prohibit wearing the veil in the private sphere. Moreover, in the French case, the ban does not cover religious buildings.

The topic heated again in 2019 following the decisions of the HRC in *Yaker v. France* and *Hebbadj v. France* which were in clear contrast with the decision of the ECtHR in *SAS v France* from 2014. Although the French law interferes with the right to manifest religion, the ECtHR found in *SAS* that the restriction did not constitute a violation of Article 9 ECHR since it fell within the state's margin of appreciation and it pursued the legitimate aim of 'living together'.³ Moreover, the Court accepted the concept of 'living together' to fall within the legitimate restriction of 'rights and freedoms of others' under Article 9(2) ECHR.⁴ Contrarily, regarding the same law in *Yaker and Hebbadj*, the HRC found that such ban violated not only Article 18 of the International Covenant on Civil and Political Rights (ICCPR), the right to thought, conscience, and religion, but also Article 26, the right to equality before the law.⁵ The reasonings in *Yaker* and *Hebbadj* are identical so hereinafter only other one of them will be referred to.

¹ Loi n 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (Law 2010-1192 of October 11, 2010 on the prohibition of concealing the face in public space)

² ECRI (2019). Report on Netherlands. Fifth monitoring cycle, CRI(2019)19.

³ *S.A.S. v France*, no. 43835/11, Grand Chamber Judgment, ECtHR 2014.

⁴ *ibid.*

⁵ *Hebbadj v. France*, Communication no. 2807/2016, Human Rights Committee, 2018 and *Yaker v. France*, Communication no. 2747/2016, Human Rights Committee, 2018.

This study aims to analyze the compatibility of the general burqa ban with human rights protected by international conventions, namely ECHR and ICCPR. There are two research questions that this thesis aims to address that are modelled as follows:

1. Can any of the reasons provided for the general burqa ban justify the prohibition of wearing full-face clothing in public spaces at all times?
2. Is the general burqa ban proportionate to the legitimate aims it pursues?

The study will be conducted through qualitative research methods with the focus on France since the ban has been in force the longest there and France as a first country to implement a blanket ban serves as a so-called pioneer in light of other European countries considering to adopt a ban. The data for the research will be gathered from relevant academic sources, preparatory papers, international as well as national legislation and case law. The academic sources include peer-reviewed publications, namely books, journals, and articles that are used to analyze the justifications provided for the ban. The most relevant international legislation in this matter include the ECHR and the ICCPR, while the main national legislation in concern is the Law 2010-1192 on the Prohibition of Concealing the Face in Public Space (the Law). Relevant case law will be analyzed to interpret the norms and scope of exceptions and limitations within such norms. Comparative examination of the decisions, and particularly the reasoning, by the ECtHR in *SAS* and, that of the HRC in *Yaker* and *Hebbadj* provide the main basis of this thesis.

The analysis will include examining the wording of the Law, preparatory parliamentary papers, and the debate around the subject before the adoption of the ban to achieve a comprehensive understanding of the aims and motives behind the Law. Moreover, this will help to assess whether the Law is discriminatory against Muslim women. The second research question, the proportionality of the ban, will be assessed in the light of the wording of the Law, the extent of interference posed by the restriction, the severity of penalties for violating the ban – whether criminalization of the practice of concealing the face is appropriate, evaluating whether the ban is the least restrictive measure for pursuing the legitimate aims, and finally considering the consequences of the ban – whether it achieved its aim and on the other hand, what it has caused to those whose rights have been restricted. Additionally, empirical research on the experiences of women after the adoption of the burqa ban will be used as a source to analyze the effects of the ban on women wearing the veil.

Separate chapters are devoted to the two research questions. To examine the burqa ban specifically in France, it is necessary to set out the context of the face veil ban there including the specific circumstances in France, and the challenges resulting from the ban. The first chapter will address the justifiability of the ban by examining the potential justifications in contrast to the human rights protected by international conventions. Shortly, the relevant human rights that the ban interferes with are specified. Subsequently, the French ban is examined more precisely and the statements of French advisory groups in respect of the ban are asserted. Then, the reasonings of the contradicting decisions of the HRC and the ECtHR will be compared and analyzed. Inevitably, assessing the research questions the ECtHR's concept of 'margin of appreciation' receives attention as well. After determining the possibilities of a state to impose restrictions on human rights, the analysis in respect of the first question will consider separately the merits of different grounds presented for justification of the ban that are: guaranteeing public safety, public order, human dignity, and protecting the rights and freedoms of others. Furthermore, the issue of proportionality is evaluated in the second chapter. It will be determined by evaluating whether the measure of the blanket ban is fit for its purpose of protecting the rights and freedoms of others considering its restriction of an individual's right to freely express oneself and practice religion. First, the framing of the law will be analyzed as to whether it targets all people covering their faces and not only Muslim women. Subsequently, the extent of the interference with human rights will be analyzed. Finally, the last chapter will conclude the findings.

This topic has been researched numerously, though most of the academic articles date back to the time when the first bans were enacted. Besides, several pieces of research on the topic have focused on the ban as liberating and empowering oppressed Muslim women.⁶ Instead, this research will examine more precisely the ban in the light of contradicting decisions of the ECtHR and that of the HRC. Moreover, this piece aims to elaborate on those researches to consider also the most recent developments regarding this debate and the consequences that the ban has had. This consideration will be done in light of the conditions that lead to the adoption of such law.

To avoid confusion, as a terminological point, the veils discussed in this research will include niqab, a full-face veil that leaves only eyes visible, and burqa, a full-body veil that includes a mesh

⁶ Eg. Ferracioli, L. (2013). Challenging the burqa ban. *Journal of Intercultural Studies*, 34(1), 89–101.; Idriss, M. M. (2016). Criminalisation of the burqa in the UK. *The Journal of Criminal Law*, 80(2), 124-137.

that covers also the eyes.⁷ Notion “veil” will be used to describe both of the aforementioned garments.

⁷ Griece, A. (2011, 23 October). Champion of UK burqa ban declares war on veil-wearing constituents. *Independent online*.

1. JUSTIFIABILITY OF A GENERAL BAN

1.1. Rights affected by the ban

Article 1 of the Law provides that: “No one may, in a public space, wear any apparel intended to conceal the face.”⁸ Article 2 specifies where the Law is applicable, providing that “a public space shall mean public streets and walkways and places open to the public or designated for a public service”⁹, and sets out the exceptions to the restriction “the prohibition set out in Article 1 does not apply if such clothing is prescribed or authorized by legislative or regulatory provisions, is justified for health reasons or on professional grounds, or is part of sporting, artistic or traditional festivities or events”.¹⁰

Since the burqa ban interferes mostly with religious freedom, the main focus of this paper rests on Article 9 of the ECHR which provides everyone the right to freedom of thought, conscience, and religion in private and public. Article 9(2) provides that any limitation of such right can only be justified if it is ‘prescribed by law and is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others’.¹¹ However, also Articles 8 and 10 of the ECHR are concerned since they provide the right of to freely express oneself and the protection of one’s identity. Protection under Article 8 can be claimed on the basis that compliance with one’s religious precept constitutes an individual’s religious identity.¹² The practice of wearing the veil receives protection also under Article 10 of the ECHR since such practice represents the fundamental elements of one’s identity and beliefs.¹³ Protection of these rights form the basis for personal development and identity, as well as for ensuring pluralism in the state. In *SAS*, the ECtHR dismissed the applicant’s claims

⁸ Loi 2010-1192, *supra nota* 1, §1. English translation retrieved from *Yaker v. France*, Communication no. 2747/2016, Human Rights Committee, 2018. para 2.2.

⁹ *ibid.*, §2.

¹⁰ *ibid.*

¹¹ European Convention on Human Rights, Council of Europe, 3 September 1953, art. 9(2).

¹² *Peck v. United Kingdom*, no. 44647/98, ECtHR 2003, para. 57.

¹³ McCrea, R. (2013). The Ban on the Veil and European Law. *Human Rights Law Review*, 13(1). 57–97, 66.

under Articles 3,10 and 11 ECHR and focused on Articles 8, 9, and 14 ECHR on its decision.¹⁴ Yet, considerable emphasis was laid on Article 9.

Article 9 is a core element of a democratic society.¹⁵ Moreover, pluralism that is indissociable from a democratic society, is based on the rights and freedoms provided therein.¹⁶ Therefore, the protection of Article 9 is especially important to upholding democratic society. Not only the burqa ban interferes with the right to freedom of religion but also generates claims of discrimination since the practice of wearing a veil is chiefly focused on Muslim women.

1.2. The case of France

In *SAS*, the ECtHR justified the interference with the right to manifest religion by the argument that there was a legitimate aim of ‘living together’ and the interference fell within the State’s margin of appreciation¹⁷ - a doctrine that the ECtHR applies, whereas the HRC does not. Therefore, ECtHR concluded that the interference did not constitute a violation of Article 9 of the ECHR. However, the UN Human Rights Committee reached a contrary conclusion in the decisions of *Yaker* and *Hebbadi*.¹⁸ All three decisions regarded the compatibility of the prohibition to conceal one’s face in public with the right to manifest religion.

1.2.1. Reports by the French institutions

Four national organs gave their statements to the French government on a bill banning the burqa. The Parliamentary commission reported that the practice of wearing the veil was against the Republican values, namely, liberty, equality and fraternity.¹⁹ The veil was considered to breach those values as a symbol of subservience, and also it infringed the principle of dignity.²⁰ Additionally, the veil was considered as a denial of fraternity and thus infringed the principle of

¹⁴ S.A.S. v. France (2014). *supra nota 3*.

¹⁵ European Court of Human Rights, 2020, Guide on Article 9 of the European Convention on Human Rights, (Last updated on 31 August 2020). 6-98, 7.

¹⁶ *Sahin v. Turkey*, no. 44774/98, Grand Chamber Judgment, ECtHR 2005, para. 104.; European Court of Human Rights, 2020, Guide on Article 9 of the European Convention on Human Rights, (Last updated on 31 August 2020). 6-98, 8.

¹⁷ S.A.S. v. France (2014), *supra nota 3*.

¹⁸ *Hebbadj v. France* (2018), *supra nota 5*.

¹⁹ S.A.S. v. France, *supra nota 3*, para.16-17.

²⁰ *ibid*.

living together. Along with a request to reinforce awareness and education, the Parliamentary commission was in favor of banning the veil from public sphere.

On the contrary, the National Advisory Commission on Human Rights (CNCDH) was not in favor of prohibiting the use of the veil by a general ban.²¹ Furthermore, it argued that the prohibition would have to be limited in time and space, so that public order could serve as a justification for the ban.²² The CNCDH raised a concern that the ban could cause harm to women by depriving them of access to public places in a situation where those women were forced to wear the veil. Moreover, it found that the ban would cause a risk of stigmatizing Muslims.

The Conseil d'Etat (Council of State) was requested to study the possible legal grounds to ban wearing the veil so that the ban is "as wide and effective as possible".²³ In its advice, the Council of State concluded that the principle of protection of human dignity shall not justify the ban as the principle of human dignity signifies in itself the respect for freedom of an individual.²⁴ The Council of State also considered equality and human dignity as vertical duties binding the state more than providing the state the possibility to initiate action.²⁵ Finally, the Council of State concluded that there is no basis for a ban that is applicable in all public places at all times.

The Council of State founded its position on the fact that there already existed several legal provisions that serve to ban or restrict people in certain circumstances from covering their faces. At the time of adoption of the Law, in the protection of the principle of secularism, the full veil was already banned from public employees when exercising their functions and from people in public education establishments.²⁶ Additionally, the provisions allow the head of a company to ban employees from wearing the veil where necessary. Moreover, there already existed provisions that provided grounds for requiring people to uncover their faces and identify themselves for the sake of public-security and anti-fraud.²⁷ On the other hand, the Council found that the grounds for prosecuting a person who forces somebody to wear the veil were insufficient. In respect of that,

²¹ *ibid.*, 18-19.

²² *ibid.*

²³ Conseil D'etat (2010). Etude relative aux possibilites juridiques d'interdiction du port du voile integral. <https://www.conseil-etat.fr/ressources/etudes-publications/rapports-etudes/etudes/etude-relative-aux-possibilites-juridiques-d-interdiction-du-port-du-voile-integral>

²⁴ *ibid.*, 21.

²⁵ *ibid.*, 20.

²⁶ *ibid.*

²⁷ *ibid.*

the new Law was a significant enhancement for protecting human dignity and equality between men and women in situations where a woman is forced to wear the veil.

Lastly, the French government requested a report of the constitutionality on the bill. In its decision, the Constitutional Council did not refer to the extensive report of the Council of State.²⁸ Thus, the advice from the Council of State was ignored as it is not binding.²⁹ Moreover, the decision of the Constitutional Council is in stark contrast to the Council of State's report. Although the Constitutional Council demanded that the law shall leave the places of worship outside of the scope of the ban, it found that apart from that, the bill was not a disproportionate measure to pursue the legitimate aims of securing the constitutionally protected rights and ensuring public order.³⁰

In addition, a resolution of the National Assembly before the adoption of the Law provided that radical practices, such as the veiling, that are harmful in respect of human dignity and equality between men and women are in contradiction with the Republican values.³¹ Therefore, it remarked that such practices should be prevented or limited by all possible measures to protect human dignity and equality between men and women, and especially protect women from pressure or violence, for instance in circumstances when a woman is forced to the veil.³² Moreover, prior to the adoption of the ban, the French president Nicolas Sarkozy explicitly stated that burqas are not welcome in France.³³

This debate indicates that the explicit target of the ban was the veil worn by Muslim women. There is a clear political will to ban the Islamic veil as it is in many ways emphasized in the reports of advisory groups. Moreover, these statements fail to recognize that some women freely choose to wear the veil.

1.2.2. Decision of the UN Human Rights Committee

²⁸ Decision No. 2010 – 613 DC of 7 Oct. 2010, French Constitutional Council.

²⁹ Brems, E. (2014). Face veil bans in the European Court of Human Rights: the importance of empirical findings. 517-551. 523

³⁰ Decision No. 2010 – 613. *supra nota* 28, 5.

³¹ Hebbadj v France, *supra nota* 5., para 7.2.

³² *ibid.*

³³ Associated Press, Sarkozy: Burqas 'Not Welcome' in France, CBS News (June 22, 2009), <https://www.cbsnews.com/news/sarkozy-burqas-not-welcome-in-france/> (accessed 17.12.2020)

The HRC dismissed the justifications in 2018 in *Yaker* and *Hebbadj* on the grounds that the law violated the right under Article 18 of the ICCPR.³⁴ Moreover, the Committee found that the law was also in violation of Article 26 of the ICCPR which provided the right to equality before the law. This was because the law had a disproportionate impact on Muslims and women.³⁵ Even a neutrally formed law with discriminatory effects may violate the right to non-discrimination if the state does not show that the law pursues a legitimate interest and is based on objective criteria.³⁶ The dissenting opinion of Committee member Achour, on the other hand, question whether Article 2 of the Law providing the exceptions can be considered as discriminatory within the meaning of Article 26 ICPPR since the exceptions therein are “circumstantial and temporary”.³⁷

Restrictions on Article 18 ICCPR are permitted only if such restrictions “prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”³⁸ The HRC, however, noted that the exceptions specified in Article 18(3) must be strictly interpreted and restrictions that are not listed therein shall not be allowed.³⁹ Furthermore, such restrictions must be proportionate to the aim they pursue. Regarding the rights of others, France argued that uncovering the face is necessary to the establishment of the “minimum level of trust required to live together”.⁴⁰ However, the Committee held that France failed to establish any connection between the human rights of others and the ability to see the face of a veiled woman. Furthermore, it emphasized that there are no such rights provided by the ICCPR as a right to interact with another person in public or a right to be disturbed by someone covering their face with the veil.⁴¹ In the absence of such rights, they cannot provide a legal basis for justifying a restriction within the meaning of Article 18(3) of the ICCPR. Moreover, this indicates that such rights cannot provide a basis for applying the exception of ‘rights and freedoms of others’ since it is unclear what are the rights of others that wearing the veil infringes.

³⁴ *Hebbadj v. France*, *supra nota 5*.

³⁵ McCrea, R. (2010). *Religion and the Public Order of the European Union*, Oxford/New York: Oxford University Press, chapter 6.

³⁶ McCrea, R. (2013). *supra nota 13*.

³⁷ *Hebbadj v. France*, Dissenting opinion of Committee member Yadh Ben Achour, *supra nota 5*, para 9.

³⁸ International Covenant on Civil and Political Rights, United Nations General Assembly, 16 December 1966. Art. 18(3).

³⁹ *Hebbadj v. France*, *supra nota 5*. para 8.4.

⁴⁰ *ibid.*, para 7.7.

⁴¹ *ibid.*, para 8.10.

In its reasoning, the HRC stated that as a result of the ban burqa-clad women could rather be confined at their homes than be protected by such a ban. Consequently, their access to public services would deteriorate. The HRC also noted that France did not provide any justification nor explanation for why covering the face for several purposes set out in the exception clause is allowed but prohibited for religious purposes. Moreover, France did not show that the ban was the least restrictive measure.⁴² Nor was there any explanation by France why the already existing legislation that provided temporary restrictions on wearing the veil in specific locations, such as public hospitals and schools, or restrictions for specific purposes, such as identity checks, was not sufficient for pursuing public safety and order.⁴³

Concurring opinion of Committee members in *Yaker* was in support of the view of the National Assembly of adopting all appropriate measures to eliminate all forms of discrimination against women to the extent that such measures are not discriminatory against women.⁴⁴ However, taking away the autonomy of Muslim women to decide on their dressing does not advance such an objective.

1.3. Right to impose restrictions

A legitimate restriction shall have a legal basis, the restriction shall pursue a legitimate aim which is listed in the exception clause, and the restriction has to be necessary in a democratic society meaning that the measure has to be proportionate in relation to the aim pursued.⁴⁵ The European legal order enables the states to take measures to protect their national cultural traditions, particularly the cultural norms regarding interaction in public places.⁴⁶ This leaves some scope for a state to undertake actions promoting the interaction of men and women on equal terms. The ECtHR has consistently held that upholding such traditions and ideas of public morality are considered to be legitimate public policy goals that can potentially justify interference with the rights provided by the ECHR, even if such restrictions were indirectly discriminatory.⁴⁷

⁴² *Yaker v France*, *supra nota 5.*, para 7.6.

⁴³ *Yaker v France*, Joint concurring opinion of Committee members Ilze Brands Kehris and Sarah Cleveland, *supra nota 5.*, para 1.

⁴⁴ *Yaker v France*, Joint concurring opinion of Committee members Ilze Brands Kehris, Sarah Cleveland, Christof Heyns, Marcia V.J. Kran and Yuval Shany, *supra nota 5.*, para 2.

⁴⁵ Brems, E. (2014). *supra nota 29.*, 534.

⁴⁶ McCrea, R. (2013). *supra nota 13.*, 23.

⁴⁷ McCrea, R. (2013). *supra nota 13.*

Furthermore, states may take measures to protect the liberal democratic nature of the European public order in which the separation of religion from law and politics is a significant element.⁴⁸ Matters of religion are generally under the legislative competence of states, and the national approaches to religious matters overlap significantly.⁴⁹ This leaves the individuals across Europe in an unequal situation in respect of the right to freedom of religion. Nonetheless, the Court acknowledges that matters of national concern are often better judged by national authorities,⁵⁰ and therefore states are afforded a leeway, known as the margin of appreciation, in upholding the Convention.⁵¹ The Court has upheld restrictions on wearing the Islamic veil in universities and schools since it is considered necessary for the protection of the secular nature of the state and neutrality of schools.⁵² However, the state interest concerning general public space is weaker than in government buildings and educational institutions.

1.3.1. Margin of appreciation

There is strong political support in many European countries to enact laws banning the veil.⁵³ Given the argument that national governments are better to judge on religious matters, this may spur the Court to accord a wide margin of appreciation to states. Concerning the application of the margin of appreciation, the narrower the margin accorded to a state, the stricter the Court's proportionality analysis usually will be.⁵⁴ Contrarily, where the margin is wider, the less strict the analysis becomes. The latter was the case with *SAS v France*.

In *Şahin v Turkey*, the Grand Chamber explained that due to the differences in rules regarding the role of religion in society that vary from one country to another, and the meaning of religious expression differ according to time and context, it is not possible to determine a uniform

⁴⁸ McCrea, R. (2010). *supra nota* 35.

⁴⁹ Doe, N. (2011). *Law and religion in Europe: A comparative introduction*. 1st ed. Oxford: Oxford University Press.

⁵⁰ *Wingrove v. The United Kingdom*, no. 17419/90, ECtHR 1996, 58.

⁵¹ Arai-Takahashi, Y. (2002). *The Margin of Appreciation Doctrine in the Jurisprudence of the ECHR*, Antwerp: Intersentia, 1-2.

⁵² *Donaldson v. United Kingdom*, no. 56975/09, ECtHR 2011.

⁵³ McCrea, R. (2013). *supra nota* 13.

⁵⁴ Matscher, M. 'Methods of Interpretation', in MacDonald, R.St.J., Matscher, F. and Petzold, H. (eds.), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993), 79; Arai-Takahashi, *supra nota* 51. 14-15; Van der Schyff, G., Overbeeke, A. (2011). *Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans*. *European Constitutional Law Review*, 7(3), 221-222.

conception of the religion's significance throughout Europe.⁵⁵ Therefore, France was accorded a wide margin of appreciation on the basis that from the Court's view there is little common ground across Europe in this matter and special weight should be put on the domestic policy-maker in matters of general policy which may originate widely differing opinions in a democratic society.⁵⁶ Nonetheless, it cannot be assumed that a wide margin would be recognized in all cases concerning the freedom of religion but any decision must consider the facts of the case in applying these principles.⁵⁷ Otherwise, it would undermine the role of Article 9 ECHR as the fundamental right in a democratic society.

Although the ECtHR explicitly recognized the risk of abuse resulting from the flexibility of the notion of 'living together' falling within the justification of rights and freedoms of others, it accepted the wide margin of appreciation of France.⁵⁸ This is even more controversial given that the Court was concerned about the risk of abuse to the extent that it recognized the need to carefully scrutinize the necessity of the ban.⁵⁹ ECtHR accorded such a wide margin of appreciation to France on basis of the fact that the ban had been adopted as a result of a democratic process.⁶⁰ Moreover, the ECtHR stated its concern regarding certain Islamophobic remarks that some of the third-party interveners brought into the debate preceding the adoption of the Law.⁶¹ Given the recognized risk of abuse with these concerns, the Court should have carefully scrutinized the legitimacy of such ban and the motives to ban the practice of wearing the full-face veil as there were real concerns regarding intolerance around the debate that preceded the adoption of the ban, and not accord a wide margin of appreciation to France.

1.4. Grounds for justification of a general ban

⁵⁵ Şahin v. Turkey, *supra nota 16.*, para 109.

⁵⁶ Article 19. (2010). Legal Comment, Bans on the Full Face Veil and Human Rights, A Freedom of Expression Perspective.

⁵⁷ Van der Schyff, G., & Overbeeke, A. (2011). *supra nota 54.*, 439.

⁵⁸ SAS v France, *supra nota 3.*, para 155.

⁵⁹ *ibid.*, para 122.

⁶⁰ *ibid.*, para 154.

⁶¹ *ibid.*, para 149.

Right to privacy, religious freedom, and right to freedom of expression are protected by the ECHR and ICCPR but each right may also be restricted by a burqa ban.⁶² French government invoked ensuring the ‘respect for the minimum set of values of an open and democratic society’ and public safety as legitimate aims for upholding the ban.⁶³ France referred to three values in respect of the first-mentioned legitimate aim. These values were gender equality, human dignity and respect for the minimum requirements of life with fellow members of society – which has also been referred to as the concept of ‘living together’.⁶⁴

Potential grounds for justifying the general burqa ban can be identified in 4 categories. These are (1) public safety; (2) public order; (3) human dignity; and (4) the right of a state to defend its national cultural norms regarding the interaction with others in accordance with the concept of ‘living together’.

1.4.1. Public safety

While public safety was found by the ECtHR to be a legitimate aim, we need to address whether wearing a veil in public can be considered to constitute a real threat to public safety and if this threat was proven by the French government. In SAS, applying the principle of proportionality the ECtHR dismissed the grounds of public order and public safety.⁶⁵ The Council of the state acknowledged the need for burqa bans in specific contexts but opposed a general ban.⁶⁶ It found that public safety could never prove a justification for banning all face coverings in all circumstances in a public space. Furthermore, the argument seeking to justify the general ban on grounds of public safety is weak since no evidence has been shown that full-face veils in public spaces pose a threat.⁶⁷ The new law banning the veil can be considered unnecessary for guaranteeing public security as prior to 2010 France already had national legislation allowing law enforcement authorities to demand individuals to uncover their faces where identification would be necessary.⁶⁸

⁶² Ferracioli, L. (2013). *supra nota 6*.

⁶³ SAS v. France, *supra nota 3*.

⁶⁴ Marshall, J. (2015). S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities. *Human Rights Law Review*, 15(2), 377–389.

⁶⁵ SAS v. France, *supra nota 3*.

⁶⁶ Conseil d’Etat, *supra nota 23*, 37-38.

⁶⁷ Nanwani, S. (2011). The Burqa Ban: An Unreasonable Limitation on Religious Freedom or A Justifiable Restriction, *Emory International Law Review*, 1-55, 8.

⁶⁸ Amnesty International (2012), Choice and Prejudice. Discrimination against Muslims in Europe, Amnesty International, 95-96.

Given the circumstances above and the fact that it has not been demonstrated by France how the veil constitutes a real threat to public security and how the already existing legislation was not adequate for pursuing security, it has to be concluded that public security cannot serve as justification for the general ban.

1.4.2. Public order

The dissenting opinion of Achour in *Yaker* emphasized that the French order is Republican, democratic, and secular.⁶⁹ The question of the necessity of the ban must be considered in light of a democratic society. In deciding which measures interfering with the individual's rights are necessary, the norms and the objectives of such society must be the guiding elements.⁷⁰ France referred to the promotion of the values of the Republican social contract and of fraternity that can be considered as advancing the interests of public order.⁷¹ Although Turkish authorities have been accorded considerable leeway due to the threat to the secular system, in *Arslan v Turkey* the ECtHR considered that not merely wearing specific clothing could provide sufficient grounds to justify the ban based on protection of secularism.⁷²

Restriction on the freedom to manifest religion, including wearing a veil, may be necessary in particular state contexts such as government offices or schools for the protection of secularism, and the ECtHR has repeatedly upheld such restrictions.⁷³ This is because citizens of diverse religious backgrounds are required to come together in such places. However, restriction of the right in all public places (with the exemption of religious buildings) goes beyond state contexts. Symbols or statements made or worn in non-state contexts will not affect the interests of a state in the running of its functions and the protection of its identity.⁷⁴

State neutrality constitutes a core part of the French constitutional tradition and culture, and France is one of the European states where the idea of secularism has been taken the farthest.⁷⁵ Veiling oneself involves the attribution of an absolute priority of one's allegiance to religious identity over

⁶⁹ *Yaker v France*, dissenting opinion of Committee member Yadh Ben Achour, *supra nota 5.*, para 3.

⁷⁰ Van der Schyff, G., & Overbeeke, A. (2011). *supra nota 54.*

⁷¹ *ibid.*

⁷² *Arslan and Others v. Turkey*, no. 41135/98, ECtHR 2010.

⁷³ McCrea, R. (2013). *supra nota 13.*

⁷⁴ *ibid.*

⁷⁵ Van der Schyff, G., & Overbeeke, A. (2011). *supra nota 54.*

one's duties as a member of society. Such an approach is incompatible with the idea of secularism in a liberal democracy.⁷⁶

As the Court also noted in *SAS*, it ruled in *Refah* that secularism is one of the fundamental principles of the state.⁷⁷ Therefore, an individual will not enjoy the protection of Article 9 of the ECHR where one's attitude fails to respect the principle of secularism and necessarily will not be covered by the freedom to manifest religion. However, it has to be noted that a state pursuing secularism is different from the need to protect democratic society.⁷⁸ Though the state is allowed to pursue secularism, it shall not eliminate religious plurality from society which could in fact happen under a general ban. Moreover, in *SAS* the ECtHR repeatedly emphasized tolerance, pluralism and broadmindedness as essential elements of a democratic society.⁷⁹ However, the Court legitimized a law that restricts pluralism. Moreover, the Law has not pursued tolerance but has prohibited the action that was seen as the cause of tension.⁸⁰

However, justification on grounds of secularism and the necessity to protect liberal democracy by restricting offensive speech is problematic concerning Article 10 which acknowledges that the veil may have multiple meanings.⁸¹ The Court emphasized in *Vajnai* that any restrictions shall be applied with extreme care, particularly in cases where symbols with multiple meanings are involved.⁸² The meanings can be categorized as a command of conscience requiring an individual to adhere to sexual modesty, and on the other hand, as an individual's allegiance to a political and legal order based on sharia law.⁸³

Wearing the veil is not a religious requirement common to all Muslims, and Islamic scholars disagree on the practice of veiling as a precept of Islam.⁸⁴ There is range of meanings for wearing the veil.⁸⁵ First and foremost, the veil is a religious symbol worn by Muslim women but women

⁷⁶ McCrea, R. (2013). *supra nota* 13., 65.

⁷⁷ *Refah v. Turkey*, no. 41340/98, 41342/98 and 41344/98, Grand Chamber, ECtHR 2003.

⁷⁸ Van der Schyff, G., & Overbeeke, A. (2011). *supra nota* 54.

⁷⁹ *SAS v France*, *supra nota* 3.

⁸⁰ *ibid.* Dissenting judge, para 14.

⁸¹ McCrea, R. (2013). *supra nota* 13., 77.

⁸² *Vajnai v. Hungary*, no. 33629/06, ECtHR 2008.

⁸³ McCrea, R. (2013). *supra nota* 13., 77.

⁸⁴ Ipgrave, M. (2007). Crosses, Veils and Other People: Faith as Identity and Manifestation. *Religion & Human Rights*, 2(3), 163–180.

⁸⁵ McGoldrick, D. (2006). *Human Rights and Religion: The Islamic Headscarf Debate in Europe*. 1st ed. Oxford: Hart Publishing. 8-12.

wear the veil for a variety of reasons such as religious commitment, rebellion, an expression of freedom, or a fashion statement.⁸⁶

There are some negative attributions related to the practice of wearing a burqa, such as the idea that the veil represents gender apartheid as well as prioritizing one's own religious identity while compromising the duties towards other people in public.⁸⁷ Consequently, the person can be considered to reject secular, liberal democracy.⁸⁸

The ECHR does not provide any right not to be shocked or offended, and accordingly, public order cannot be conceived as preventing people from being disturbed. Moreover, the public order cannot be equated with the majority's perception of favorable religious expression or accommodating the majority's taste. This has been argued also by the politicians who are concerned that the 'very fibre of society' becomes endangered by people covering their faces in the public sphere.⁸⁹ This social bond requires interaction between the members of society which in turn requires that people can recognize each other - something that the veil prevents. Therefore, veiling oneself both isolates that individual from others and weakens the most fundamental bonds of society. Protection of the very basis of the society amounts undoubtedly to a legitimate aim that can be pursued under public order, a point in principle recognized also by the French Council of State.⁹⁰ Although the Council of the state found that the *fraternité* as a republican tradition could support such a ground, due to the fear of not having sufficient precedent for such a positive interpretation and the possibility of state abusing the aim of maintaining public order to enforce its conception of the society, the Council eventually argued that public order shall not be used so to effect a general prohibition on veiling.⁹¹

1.4.3. Protection of human dignity

There are plenty of issues attributed to the use of a veil. First, the veil is considered as a "symbol of stigmatization and degrading women".⁹² The practice of wearing the veil renders women invisible in public space, thus this has been argued to involve negation of the equality between

⁸⁶ Marshall, J. (2015). *supra nota 64*.

⁸⁷ McCrea, R. (2013). *supra nota 13.*, 66.

⁸⁸ *ibid.*, 64.

⁸⁹ Van der Schyff, G., & Overbeeke, A. (2011). *supra nota 54.*, 444.

⁹⁰ Conseil d'Etat, *supra nota 23.*, 26.

⁹¹ Van der Schyff, G., & Overbeeke, A. (2011). *supra nota 54*.

⁹² SAS v France, *supra nota 3*.

men and women, and ownership and control of women by men have been attributed to the veil.⁹³ The ban has been defended on the grounds that the practice of wearing a veil is a patriarchal tool to oppress and silence Muslim women.⁹⁴ Liberal states have a moral duty to protect Muslim women who may be forced to wear a full-covering veil.⁹⁵ The Court held that gender equality can not be invoked by a state to ban a practice of wearing a veil which is defended by the applicant and women in general.⁹⁶ Consequently, the ECtHR did not consider gender equality and human dignity as legitimate aims for the ban.

The ban that aims to protect women's autonomy and dignity is controversial to the extent that wearing the veil is based on an autonomous and free decision of an individual. Furthermore, empirical findings of the research indicate that women have become more dependent on their husbands after the ban since they avoid going outdoors.⁹⁷ Moreover, there are available other less intrusive measures than the general ban, such as education and awareness-raising. Given the argument of ECtHR that this justification shall not be invoked to prohibit a practice which is defended by the individuals whom the ban pursues to protect and the disproportionality of such measure, there is no grounds for a legitimate restriction.

1.3.4. Living together and rights and freedoms of others

While 'respect for the minimum set of values of an open and democratic society' or 'living together' do not fit within any of the restrictions on Article 8 and 9 ECHR, in *SAS* the ECtHR interpreted that such justification can under certain conditions be linked to the legitimate aim of protecting the rights and freedoms of others.⁹⁸ The concept of 'living together' has been relatively recently recognized by the ECtHR as a legitimate dimension of others' rights and freedoms which may serve as a justification for the restrictions of rights that are protected within the ECHR.⁹⁹ The concept of 'living together' constitutes the strongest justification for the laws prohibiting the veil in public. This is chiefly because how others experience the public space may be affected by how

⁹³ McCrea, R. (2013). *supra nota 13*.

⁹⁴ Ferracioli, L. (2013). *supra nota 6*.

⁹⁵ McCrea, R. (2013). *supra nota 13*.

⁹⁶ *SAS v France*, *supra nota 3*, 119.

⁹⁷ Open Society Justice Initiative (2013). After the ban: The experiences of 35 women of the full-face veil in France, research report, 1-18, 8.

⁹⁸ *SAS v France*, *supra nota 3*, 121.

⁹⁹ Trispiotis, I. (2016). Two interpretations of "living together" in European Human Rights Law. *The Cambridge Law Journal*, 75(03), 580–607, 1.

an individual appears in public and hence living together in society requires individuals to exercise their rights in a manner that is compatible with the duties that they have as members of society.¹⁰⁰

The fact that a significant degree of communication occurs through facial expressions endorses upholding the ban since concealing the face excludes one from the possibility of visual communication with fellow members of society. Moreover, one wearing the veil leads to a situation where that individual is able to see the others in public space whereas the others cannot see the individual behind the veil. The approach of the French Constitutional Council seems to have been based on this idea when it upheld the constitutionality of the general ban.¹⁰¹ Albeit, the Conseil d'Etat concluded in its legal advice that such justification may not provide sufficient grounds for a prohibition on wearing the veil in all public places.¹⁰²

The ECtHR accepted the French government's view that in social interaction the face plays an important role and therefore the face ought to be visible to others. Moreover, the ECtHR emphasized that there was clear political consensus in the National Assembly of the will to ban the veil.¹⁰³ Indeed, 434 of the 435 votes were cast in favor of the ban.¹⁰⁴ Therefore, the French argument, that concealing one's face makes living together harder as it breaches the right of others to live in socialization with fellow members of society, was accepted by the Court.¹⁰⁵ On the contrary, the ban has been criticized to be potentially harmful for integration by undermining social cohesion and risk polarising society.¹⁰⁶

To justify the ban on basis of the rights of others, we need to address more precisely who are these others and what are their rights that need to be protected by the ban. In this matter, the ECtHR's jurisprudence does not provide a coherent category of interests that may be protected as 'rights of others'.¹⁰⁷ Furthermore, the integrity of the 'legitimate aim' test will be arguably undermined if the rights of others were understood as an unspecified public interest.¹⁰⁸ Accordingly, the two dissenting judges in *SAS* held it doubtful that any legitimate aim was pursued by the law since they

¹⁰⁰ McCrea, R. (2013). *supra nota* 13., 79, 95.

¹⁰¹ Decision of French Constitutional Council, *supra nota* 28.

¹⁰² Conseil d'Etat, *supra nota* 23.

¹⁰³ *SAS v France*, *supra nota* 13.

¹⁰⁴ Van der Schyff, G., & Overbeeke, A. (2011). *supra nota* 54., 425.

¹⁰⁵ *SAS v France*, *supra nota* 13., 122.

¹⁰⁶ Idriss, M. M. (2016), *supra nota* 6., 129.

¹⁰⁷ Bomhoff, J. (2007). The Rights and Freedoms of Others: The ECHR and Its Peculiar Category of Conflicts between Individual Fundamental Rights' in Brems, E. (ed.), *Conflicts between Fundamental Rights*. Antwerp/Oxford: Intersentia, 2008.

¹⁰⁸ Bomhoff, J. (2007). *supra nota* 107.

found that the majority had not shown which concrete rights of others the abstract principle of ‘living together’ provided.¹⁰⁹

The exceptions to Articles 9 and 10 of the ECHR are too narrow to enable legislation that contains a general prohibition.¹¹⁰ Therefore, neither the need to protect the secular nature of the state nor the offensiveness of the beliefs which the veil is regarded as expressing can justify such a general ban. While individuals may legitimately be restricted from expressing their particular ideas in shared institutions such as schools, the ECHR also provides them the right to be illiberal.¹¹¹ Thus, individuals are allowed to express their illiberal beliefs as long as there is no pressing social need that would prevent such right to express.

While socializing with others is also possible without looking into each other’s eyes, the dissenting judges mentioned also ‘the right to be an outsider’.¹¹² It can also be questioned whether wearing the veil really prevents communication considering that the role of the face in communication has decreased in the age of online communication and mobile phones.¹¹³ While the individuals have the right to communicate with others, similarly they have the right not to communicate with others in public places.¹¹⁴ Although the veil evokes strong feelings associated by some with subservience, exclusion and inferiority, the dissenting judges remarked that even if such interpretations were correct, the Court’s previous case law indicates that the Convention does not provide a right to be provoked or shocked by the religious or cultural identities of others that are not in compliance with one’s own beliefs and values. Accordingly, the ECHR protects also opinions that offend or shock and not merely those that are favorably received. To conclude this matter, there is no democratic society without these demands of ‘pluralism, tolerance and broadmindedness.’¹¹⁵

Besides, problematic is that a concept that had not been previously recognized by the ECtHR and has not been expressed in the ECHR, in *SAS* it was prioritized over explicit rights and freedoms of an individual guaranteed in the ECHR.¹¹⁶ Such an approach introduces a risk that the majority’s

¹⁰⁹ *SAS v France*, *supra nota 3*, joint partly dissenting opinion, para 12.

¹¹⁰ McCrea, R. (2013). *supra nota 13*.

¹¹¹ *ibid.*

¹¹² *SAS v France*, *supra nota 3*, joint partly dissenting opinion

¹¹³ Brems, E. (2014). *supra nota 29.*, 538.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*, 7.; Dissenting judges citing *Mouvement raelien Suisse v Switzerland*, no. 16354/06, ECtHR 2012, 48; and *Stoll v Switzerland*, no 69698/01, ECtHR 2007, 101.

¹¹⁶ *SAS v France*, dissenting opinion, *supra nota 3.*, para 2.

view dictates so that the minorities have to assimilate to be able to ‘live together’.¹¹⁷ This is clearly against the aim of pluralism in a democratic society and undermines the value of fundamental rights.

¹¹⁷ *ibid.*

2. PROPORTIONALITY OF GENERAL BAN

In 2010, 7,5% of the French population were Muslims and in 2020 the percentage is around 8,3%.¹¹⁸ Moreover, of about five million Muslims in France merely about 2000 women wear full-covering veils.¹¹⁹ Respectively, out of the population of 17 million in the Netherlands, the estimation suggests that the number of women wearing the veil is between 200 and 400.¹²⁰ The proportionality of the prohibition and the necessity of such in a democratic society must be assessed in light of this information. It is questionable whether such a tiny minority within a minority could break the social bond of society by concealing their faces considering that the likelihood of facing a burqa-clad woman in the streets of France would be minimal even without the ban.

Although the ECtHR acknowledged that the ban de facto affected mainly Muslim women and was broad in scope of application, the Court found it significant that the ban was neutral as it was based on the fact that the veil conceals the face and not expressly targeted the religiously motivated clothing.¹²¹

2.1. Effects of the ban

Legislation that prohibits the wearing of certain clothing is in contrast with the European firm tradition of liberal individualism.¹²² In European law, this tradition is embodied in the strong commitment to individual autonomy and equal treatment.¹²³ Equal treatment is a fundamental principle protected under Article 14 ECHR that challenges a potentially discriminatory ban, as it inevitably affects Muslim women more than other groups. Such laws that ban concealing the face

¹¹⁸ Pew Research Center, Religious Composition by Country, 2010-2050.

¹¹⁹ *Yaker v France*, *supra nota* 5; BBC (2018). The Islamic veil across Europe.

¹²⁰ Zajíčková, Z. (2019). Burqa Ban: new law came into effect in the Netherlands. Czech Centre for Human Rights and Democracy

¹²¹ Marshall, J. (2015). *supra nota* 64., 386.

¹²² McCrea, R. (2013). *supra nota* 13., 94.

¹²³ *ibid.*

interfere significantly with the individual's right to define their identity and right to choose how to express this identity to others.

Freedom to develop one's identity as one wishes will in a liberal democracy flourish when individuals are free from fear of the consequences of wearing specific clothing.¹²⁴ One of the purposes of human rights law is to ensure that an individual's choices regarding lifestyle and identity are protected from majoritarian policies.¹²⁵ The ECtHR has faced criticism for yielding to cultural bias¹²⁶ as well as prioritizing majoritarian preferences over the fundamental rights of individuals.¹²⁷ The ban essentially attempts to restrict individuals' public conduct that is inconsistent with the collective notions regarding human dignity, openness to others, and gender equality. Instead of allowing people to exercise their freedoms as they wish and enabling a state to restrict such freedoms where necessary, the ban, by enforcing specific perceptions of society, in effect steer the people's way of life.¹²⁸

Instead of respecting women as equal and recognizing them as an individual capable of making their own choices of what to wear, prohibiting women by law from freely choosing the clothing, actually leads the ban to exclude and disrespect them.¹²⁹ Consequently, the ban does neither protect the identity nor religious rights of such women. In addition, since the women wearing the veil often live in socially deprived areas which are exclusively immigrant Muslim communities, the office of the European Commissioner for Human Rights emphasized the need for education, employment and provision of information for such women.¹³⁰

Neither criminalizing the act of wearing a piece of clothing does recognize the individual who wears the veil in a democratic society as being worthy of respect for who they are.¹³¹ Moreover, criminally prohibiting the practice of wearing the veil for the protection of rights and freedoms of

¹²⁴ Marshall, J. (2015). *supra nota* 64., 387.

¹²⁵ *ibid.*

¹²⁶ Brems, E. (2014). *supra nota* 29., 537.

¹²⁷ Adrian, M. (2016). Religious Freedom at Risk: The EU, French Schools, and Why the Veil Was Banned, 71–75; Yusuf, H. (2014). S.A.S v France: supporting 'living together' or forced assimilation? *International Human Rights Law Review*, 3(2), 277-302.; Berry, S. (2014). S.A.S. v France: Does Anything Remain of the Right to Manifest Religion?, *EJIL: Talk!*; Howard, E. (2014). S.A.S. v France: Living Together or Increased Social Division?, *EJIL: Talk!*.

¹²⁸ Van der Schyff, G., & Overbeeke, A.(2011). *supra nota* 54.

¹²⁹ Marshall, J. (2015). *supra nota* 64., 388.

¹³⁰ Parliamentary Assembly of the Council of Europe, Resolution 1743 (2010), Islam, Islamism and Islamophobia in Europe. para 16-17. Cited in Marshall, J. (2015). 388.

¹³¹ Marshall, J. (2015). *supra nota* 64., 389.

others whereupon the majority consider it difficult to communicate with such a person, fails to recognize such an individual with an identity to be valued and their fundamental rights to be guaranteed. Interestingly, no comprehensive analysis is given to the concept of rights and freedoms of others. Such an approach is contrary to the rights protected in human rights law.¹³² It seems that the decision of the ECtHR allows the state to legitimately limit fundamental rights to promote a particular way of living together, and although in accordance with the strong political consensus, promoting the majoritarian policies.

If one of the purposes of the human rights law is to protect an individual's identity, then the concepts within ECHR should not be interpreted as restraining identities.¹³³ The subjective identity of an individual is protected under Article 8 and therefore the right to identity cannot be compromised for protecting the unspecified and unanalyzed rights and freedoms of others so far as it has not been explained what the particular rights and freedoms of others are.¹³⁴ Moreover, the case-law regarding Article 8 shows that the ECtHR is committed to enabling individuals the freedom to develop their personalities, instead of restricting the free identities of individuals.¹³⁵ If the rights and freedoms are chiefly aimed for the protection of individuals, the focus of the interpretation should not be at the perception of others about the practices of expression of one's identity. In other words, the ban on such practices should not be based on the perception of fellow members of society. As the two dissenting judges argued in the *SAS*, the idea of 'living together' as a justification for the ban is problematic due to its 'far-fetched and vague' nature.¹³⁶ While the decision restricts the freedom of women to wear the veil in public, the ban may potentially render some forms of expression pushed out in a society where such expressions are deemed unacceptable to the majority.¹³⁷ Furthermore, the conclusion achieved in the *SAS* effectively restrains the right to a personal identity in situations when such an identity is perceived as unacceptable and non-permissible by the majority.¹³⁸

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ *eg.* *Pretty v United Kingdom*, no. 2346/02, Merits and Just Satisfaction, ECtHR 2002; *Niemietz v Germany* no. 13710/88, Merits and Just Satisfaction, ECtHR 1992; *Botta v Italy*, no. 153/1996/772/973, Merits and Just Satisfaction, ECtHR 1998; *Bensaid v United Kingdom*, no. 44599/98, Merits and Just Satisfaction, ECtHR 2001.

¹³⁶ *SAS v France*, *supra nota 3*, joint partly dissenting opinion, 5.

¹³⁷ Marshall, J. (2015). *supra nota 64*.

¹³⁸ *ibid.*

Regardless of the threat of punishment, the implementation of the ban has not stopped women from wearing the veil. Some women even have adopted the veil after the ban was implemented.¹³⁹ Out of 35 women, eight have stopped wearing the veil in public, while 27 still wear it irrespective of the ban.¹⁴⁰ Six out of those eight respondents who ceased wearing the veil explained that the decision was connected to the ban. Women who have continued to wear the veil despite the ban explained that if they stopped wearing the veil they would abandon their religious identity.¹⁴¹ Similarly, 26 women went outdoors less frequently after the implementation of the law, while the frequency remained the same for 3 respondents and increased for 3 respondents.¹⁴² In light of these statistics, instead of pursuing social interaction, the ban has decreased the mobility of individuals who wear the veil and as a result, women wearing the veil have socialized less. Moreover, while only one interviewee said that she was socializing more, 27 interviewees out of 32 socialized considerably less and decreased their outdoor activities after the ban had been implemented. Additionally, the interviewees who still continued wearing the veil despite the ban, reported verbal abuses and harassment by other members of the society. Given such consequences of the ban on women still wearing the veil, the ban has not been fit for its purpose since it has clearly had an opposite effect to what the ban was aimed at - increasing social interaction in society.

2.2. Right to religion

The ECtHR has consistently held that Article 9 of the ECHR does not provide individuals the absolute right to express their religious beliefs in public.¹⁴³ Furthermore, the Court has emphasized that such restrictions on rights shall be proportionate and limit the right to a minimum degree necessary to achieve the legitimate purpose. The Court has interpreted the veil ban in two ways in its jurisprudence. On the one hand, it has demanded the state to show the necessity of such restriction in a democratic society. Generally, it has been sufficient that restriction applies in contexts where the state has an especially strong interest, such as schools, as already determined

¹³⁹ Open Society Justice Initiative (2013). After the ban: The experiences of 35 women of the full-face veil in France, research report. 1-18, 2.

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ Eg. *Arrowsmith v. The United Kingdom*, no.7050/75, Council of Europe: European Commission on Human Rights 1978.; and *Kalaç v. Turkey*, no. 20704/92, ECtHR 1997, 27.

above. On the other hand, religion has been considered as a private activity that has to conform to the needs of communal life in public contexts.

In addition, individuals remain free to choose what to wear on private occasions and in their homes. Exemptions regarding the religious buildings and other religious occasions are necessary for the ban to survive the proportionality analysis. However, the fact that wearing the veil is permitted in private does not actually resolve the issue of women who believe that they should be veiled in public.¹⁴⁴ Women who feel a moral duty to conceal the face in public may face difficult choices resulting from the ban.

2.3. Wording of the law

2.3.1. Neutral framing

The provisions of the Law are framed neutrally so that the ban is aimed at any garment that intends to conceal the face, not expressly only burqas.¹⁴⁵ However, it is widely acknowledged that the ban, regardless of its neutral framing, is intended most at the minority of Muslim women who wear face-concealing veils, such as niqab and burqa.¹⁴⁶

An analysis of case-law provides that the Court favors context-specific bans respectively applicable to all face coverings.¹⁴⁷ For instance, in *Phull v France* the Court held that requiring an individual to remove a turban for security check at an airport fell within the state's margin of appreciation.¹⁴⁸ The case against the individual is stronger if the restrictive measure is an occasional whereas a general burqa ban is not occasional measure which leads to the conclusion that such a ban interferes more severely with the individual's rights and hence increases the state's burden of proof.¹⁴⁹ The further a restriction interferes with individual's right, the more convincing the justification of it should be.

¹⁴⁴ McCrea, R. (2013). *supra nota* 13., 96.

¹⁴⁵ Van der Schyff, G., Overbeeke, A. (2011). *supra nota* 54.

¹⁴⁶ E.g. S.A.S. v France, *supra nota* 3., para. 151.

¹⁴⁷ Van der Schyff, G., & Overbeeke, A. (2011). *supra nota* 54.

¹⁴⁸ *Phull v. France*, no. 35753/03, ECtHR 2005.

¹⁴⁹ Van der Schyff, G., Overbeeke, A. (2011). *supra nota* 54., 442.

Regardless of the neutral framing, the law banning the practice of covering one's face is widely known as the 'burqa ban'. This indicates how it is interpreted among the public and furthermore, this is reaffirmed by the exceptions laid out in Article 2 of the law, allowing a broad range of exemptions, which in effect leaves the Islamic veil as the primary target of such law. Several researchers have argued in favor of this claim that the ban chiefly targets the full veil.¹⁵⁰ Although formally the ban applies to all face coverings without distinction to religious veils, considering the political discourse and the parliamentary debates surrounding its adoption, as well as the practice of the ban's implementation, indicate that the ban target merely burqa and hijab.¹⁵¹

2.3.2. Definition of public place

The wording of the public space is broad. Section 1 of the French law prohibits anyone from wearing an item of clothing in a public space that is designed to conceal the face.¹⁵² It provides that any premises used for the provision of public service and places open to the public compose the public space.¹⁵³ Therefore, public space defined by the legislation refers to any space outside of the home which indicates that it is defined as extensively as possible.¹⁵⁴ Given that the state's interest in non-state contexts (such as schools or government buildings) is weaker, such broad application of restriction is controversial. On the other hand, the Law provides exemptions for face-coverings in religious contexts as well, such as religious buildings and religious or cultural processions or festivals.

2.4. Extent of the interference

¹⁵⁰ Bleich, E. (2009). State Responses to 'Muslim' Violence: A Comparison of Six West European Countries, *Journal of Ethnic and Migration Studies*, 35(3), 361-379, 373.; Davis, B. D. (2011). Lifting the Veil: France's New Crusade, *Boston College International and Comparative Law Review*, 1-29, 117-118.; Howard, E. (2012). Banning Islamic veils: Is gender equality a valid argument? *International Journal of Discrimination and the Law*, 12(3), 147-165, 148.; Idriss (2016), *supra nota 6.*, 126-127.; Nanwani (2011), *supra nota 67.*, 2.

¹⁵¹ Brems, E. (2014). *supra nota 29.*, 519.

¹⁵² Law no. 2010-1192, *supra nota 1.*

¹⁵³ *ibid.*

¹⁵⁴ Laborde, C. (2012). State Paternalism and Religious Dress, *International Journal of Constitutional Law*, 10(2), 398-410.

The extent of the interference is evaluated on basis of the sanctions - the nature and severity of the imposed penalties.¹⁵⁵ France, as well as the Netherlands, has approached the violations of the ban as a problem of criminal law and they all chose to impose fines.¹⁵⁶ The French law provides a citizenship course which an individual in violation of the ban can be compelled to follow in addition to a fine of 150€, or as an alternative for it. Furthermore, regarding a person who forces someone to cover their face, the French law allows a prison sentence of one year and a fine of 30,000€.¹⁵⁷ If such an act is committed against a minor, the fine will be 60 000€ and the imprisonment of two years. When considering the severity of the interference with the fundamental rights of an individual, it is undoubtedly clear that imposing a prison sentence for wearing a piece of clothing is severe interference. Correspondingly, the heavier the fine, the severer is the interference with the fundamental right.¹⁵⁸ Furthermore, even without considering the nature of the sanctions imposed for the violation of the ban, the criminalization of the practice of expressing one's religious (or non-religious) convictions in public is as such a severe interference. Were public safety found as being a pressing social need warranting a general ban, criminal law would seem an appropriate choice to satisfy such need.¹⁵⁹ Importantly though, the severity of the sanctions to enforce a ban must be regarded in assessing the proportionality, that is to say, whether fines are in line with the legitimate aim pursued. It seems unlikely that simply wearing clothing contravening the legal dress code justifies imposing such severe sanctions unless the person actually poses a threat to public safety.¹⁶⁰ This has been already established that no threat to public security had been shown in the French case. Moreover, ensuring public safety through criminal law means may be appropriate in relation to the aim, but protecting the rights and freedoms of others in a similar manner is at least questionable. The dissenting opinion of Committee member in *Yaker* advocates the proportionality of the penalties claiming that the role of education was prioritized by lawmakers, as the alternative penalty is a mandatory citizenship course.¹⁶¹ Citizenship course as an educational sanction, on the other hand, cannot be considered to be disproportionate.

Ultimately, attention in testing the proportionality must be paid especially to the purpose of the ban, to determine whether such a measure is fit for the aim. The Dutch Council of state disputed

¹⁵⁵ *Gerger v. Turkey*, no. 24919/94, ECtHR 1999., 51.

¹⁵⁶ Van der Schyff, G., Overbeeke, A. (2011). *supra nota 54*.

¹⁵⁷ Law no. 2010-1192, *supra nota 1*, §3, sec. 4.

¹⁵⁸ Van der Schyff, G., Overbeeke, A. (2011). *supra nota 54*.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ *Yaker v France*, Dissenting opinion of Committee member José Manuel Santos Pais *supra nota 5.*, para 9.

the fit of a measure under criminal law as heavy in pursuing female emancipation.¹⁶² Criminalizing an act which should be protected under the right to religion or the right to freedom of expression may ultimately lead to the decrease of pluralism if, especially representatives of minority abandon their practice due to the fear of sanctions. Consequently, the Court has held that there shall be overriding public interest to justify such measures.¹⁶³ The onus on the state is greater where the interference with Article 9 is taken together with other rights.¹⁶⁴

If the state could show that identifying other people's faces in public at all times is important for social interaction, then a general ban on the veil could arguably be conceivable. Furthermore, the Court would have to be convinced by the state that without such a ban on face coverings the very fabric of society would become disintegrated.¹⁶⁵ This leads to a situation where the state has quite a significant burden of proof. Considering when such burden will be met can be assessed in the light of *Arslan*. The case concerned a small minority group convicted for wearing religious clothing in Turkey, though not concealing their faces. Public order was not considered to be endangered in any remarkable way, instead, the group generated curiosity among others.¹⁶⁶ By comparison to the case with the veil, it is highly questionable whether a relatively small number of women who choose to wear the veil may actually be considered to endanger the very fiber of public order.¹⁶⁷ Admittedly, being able to see others' faces in public is important for what constitutes society. Nevertheless, given the minimal threat that the relatively small number of people concealing their faces poses to the continued existence of society, a general ban enforced by the criminal penalty can be considered to exceed its purpose.¹⁶⁸

However, there would be other less intrusive measures such as awareness-raising and education, criminalizing all forms of forcing another person to wear the veil (which was done by this Law), and non-criminal sanctions to enforce a limited ban applicable on certain occasions and at particular times.¹⁶⁹ Although the political consensus and the specific situation in France supported

¹⁶² Conseil d'Etat, *supra nota* 23., 39-40; Parliamentary Papers, *supra nota* 23., 2.

¹⁶³ Goodwin v. The United Kingdom, no. 14788/90, ECtHR 1996., 39.

¹⁶⁴ Van der Schyff, G., Overbeeke, A. (2011). *supra nota* 54.

¹⁶⁵ Moors, A. (2009). The Dutch and the Face-veil: The Politics of Discomfort, *Social Anthropology*, 17(4), 393, 405

¹⁶⁶ Arslan v. Turkey, *supra nota* 72., 51.

¹⁶⁷ E.g. the Garraud Report estimated in 2010 that the number of women wearing burqa in France was at 1900. Garraud Report (2010). Parliamentary Papers, National Assembly, 13th Legislature, no. 2648, 9.

¹⁶⁸ Van der Schyff, G., Overbeeke, A. (2011). *supra nota* 54.

¹⁶⁹ Yaker v France, concurring opinion of Committee members Ilze Brands Kehris, Sarah Cleveland, Christof Heyns, Marcia V.J. Kran and Yuval Shany, *supra nota* 5., para 3.

the adoption of the Law the Court has the duty to protect minorities against interferences that are not proportionate in respect of the aim such measures pursue.¹⁷⁰

¹⁷⁰ SAS v France, Joint partly dissenting opinion of Judges Nussberger and Jäderblom, *supra nota 3.*, para 20.

CONCLUSION

The aim of this research was to provide a comprehensive understanding of the French burqa ban and reach a conclusion on whether any of the reasons provided for the ban constitutes a legitimate aim which can justify the blanket ban applicable in all public places (excluding places of worship) and at all times. As determined above, for a restriction to be legitimate it shall have a legal basis, it must pursue a legitimate aim which is listed in the exception clause, and the restriction has to be necessary in a democratic society meaning that the measure has to be proportionate in relation to the aim it pursues.

In this case, the margin of appreciation is problematic since resulting from that the ECtHR did not examine the possible justifications with such a scrutiny as would have been necessary regarding the concerns of intolerance around the debate on the ban and the new and unclear concept of 'living together'. The decision of the ECtHR is problematic also as it provides quite a wide scope of justifications that states may claim under 'the rights and freedoms of others'.

As the Council of State remarked, the grounds for prosecuting someone forcing a woman to wear the veil were insufficient prior the adoption of the Law. The new law was a significant enhancement in respect of the protection of dignity and equality between men and women in situations where wearing the veil is not a free choice of a woman. It provides heavy penalties on those who force anyone to wear the veil. Therefore, the main problem concerning the veiling has been solved as the debate around the veil argued that the veil symbolizes subservience and thus it was necessary to ban it. The commitment of France to uphold Republican values and fight against practices that are harmful to human dignity and equality between men and women as such is important. However, considering the impact of the ban on the autonomy of Muslim women and their dignity, it cannot be considered an appropriate measure to deal with such practices and to take away the autonomy of the women who the ban is aimed to protect. The law seems to assume that all women who wear the veil are forced to do so or wear it under pressure. However, it is in many cases a free choice of a woman. Therefore, banning burqas does not empower individuals

nor protect dignity and pursue equality, but instead undermines the autonomy of women to decide how to dress. The ban may even confine those women to their homes, as has happened according to the interviews. Hence, the ban may restrict the access of such women to public places. To conclude, the blanket ban applicable in all places at all times exceeds its purpose on protecting dignity of women and equality between men and women.

Furthermore, the argument on grounds of public safety is unfounded since it does not require recognizability of people all the time, but the identification of individuals occasionally. Thus, there are measures that are less restrictive than a general ban, such as the obligation to uncover the face when necessary for identification or safety purposes. Consequently, the measure is not fit for its purpose, instead it is disproportionate.

It is undeniable that concealing the face hinders communication between individuals, especially in respect of facial expressions. Such communication is also asymmetrical as only the other person veiling oneself can see the face of a fellow communicator. However, communication is possible also without seeing each other, and moreover, the fact that in the time of mobile phones the role of the face has lost its significance in communication undermines the justifiability of the general ban. Furthermore, it has not been explained how the other means of concealing the face that were excluded from the Law would not hinder communication while wearing the veil does. This is especially controversial in respect of the *niqab* which leaves similarly eyes uncovered as does face masks used for other purposes. The right to interact with any individual in public spaces or the right not to be disturbed by other people wearing the full-face veil are neither protected by the ICCPR nor the ECHR, and thus cannot provide the basis for permissible restrictions within the meaning of Article 18(3) ICPR nor within Article 9(2) ECHR. A legal right to see one's face in public spaces does not exist.

Inferring from the arguments introduced above, it cannot be argued that the ban has enhanced the social interaction between individuals who wear the veil and those who do not wear it. Instead, the empirical findings indicate that the ban has decreased the involvement of Muslim women who wear the veil in social life and has stigmatized women who still wear the veil. Thus, the ban as a restrictive measure has not been fit for its purpose of pursuing social interaction between members of the society. Consequently, in the light of the foregoing, legitimate objective cannot be found, and therefore the Law is not compatible with human rights.

Inferring from the text of the Law and the debate preceding its adoption, the Law shall be considered to apply primarily to the Islamic veil which is mainly worn by Muslim women. Though formatted neutrally, the discussions around the ban indicate a clear political will to ban specifically the Islamic veil. Moreover, the exceptions listed in paragraph 2 of the Law support this view by leaving the religious veil the only target of the ban. Thus, the Law is discriminatory against Muslim women and violates Article 26 ICCPR and Article 14 ECHR.

The ban can by no means be considered as proportionate to its objective as it covers all public places at all times and violation of the ban constitutes a criminal offense. There would be other less restrictive measures available, which France failed to demonstrate that the general ban was the least restrictive measure. Since the state interest in general public space is weaker than in government buildings and educational institutions France failed to show why a ban restricted to such premises combined with previous legislation allowing temporary restrictions for safety measures would be inadequate.

In conclusion, there is no legitimate justification for a general ban. In respect of the second research question, the ban disproportionately targets Muslim women and is not fit for its purpose.

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