DISCRIMINATION OR DEMOCRACY? REVIEWING THE FRENCH VEIL BAN IN LIGHT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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DOI: https://doi.org/10.33344/vol17iss1pp40-55

Helsinki Law Review, 1/2023, pp. 40–55

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ABSTRACT

This article aims to examine the rhetoric and legal logic exercised in S.A.S. v France, where the European Court of Human Rights reviewed French national legislation which treads perilously upon codified European human right norms. This article focuses on the French ban on full-face coverings in public and critically analyzes the logic of the arguments utilized by France to defend the ban. The case commentary is enriched with an analysis of the political and social rhetoric that must not be ignored when discussing justice and law.

Despite nearly a decade having passed since the verdict, it remains crucial to review the legal vocabulary utilized and understand how it complicated the Court's analysis due to France framing the matter as a judgement over values. This rhetoric persists today, making it improbable to contest these violations beyond a national judicial system. The article seeks to challenge the complacency of the Court due to hesitation to make a judgement over values, despite its existence to safeguard specific values. It also encourages continued skepticism toward the Court's ability to secure human rights and fundamental freedoms.

I. INTRODUCTION

Human rights in Europe are codified within a multilayered framework, encompassing Member States within the Council of Europe (CoE), the European Union (EU), and through mechanisms of international institutions. There is a wide spectrum of rights protected amidst these regimes, but one that deserves particular attention is the right to expression of religion and belief. This fundamental right is a cornerstone to human rights law within Europe, and one that exists across continents, societies, and at international levels. However, practice always differs from principle. What happens when one's ability to express their religion is infringed upon in the name of democracy within Europe? Such an inference, the ban on full-face veils in France, will be reviewed in this article through teasing apart the case against France on the grounds that the law inhibited an applicant's right to express their belief, in addition to other rights.[1]

Analyzing this ruling from a decade ago is both timely and imperative, given that a strikingly similar ban on loose-fitting garments worn by individuals of the Islamic faith in state schools was recently upheld by the State Council in France, affirming that the ban does not violate freedom of religion, the principle of non-discrimination, or other rights. There appears no recourse, given the ruling of *S.A.S. v France* among other case law of the European Court of Human Rights (ECtHR or the Court), that have validated 'living together' based in secularism as a legitimate aim to curtail human rights. Revisiting S.A.S. with the lens of legal rhetoric is critical in understanding how the above notions are being advanced as integral to democracies, yet in practice are leveraged against fundamental rights of people in France via laws that are tailored against those of a particular faith.

This article is woven with multiple threads, in hopes to advance the analysis beyond the legal realm. The fabric to be used in this work is derived not only from legal studies, but also social sciences, namely political science. It is with this perspective that this article hopes to invite readers to understand how 'legal vocabulary' was deployed in order to justify and perpetuate discrimination in the face of human rights doctrine.

1 Conseil d'Etat, 'In the interests of secularism, the Conseil d'État dismisses the application for interim measures against a ban on wearing the abaya in schools' (2023) <https://www.conseil-etat.fr/en/news/in-the-interests-of-secularism-the-conseil-d-etat-dismisses-the-application-for-interim-measures-against-a-ban-on-wearing-the-abaya-in-schools> accessed 14 September 2023 (Conseil d'État).

The structure of the article is as follows:

(I) History of the Ban

(II) Development of Human Rights Doctrine in Europe

(III) The Language of Law

(IV) Argumentation Analysis

(V) Commentary: Consequences & Contemporary Implications

This article is guided by several research questions alongside context that allows readers to understand the differences and limitations of the forum in which this case was relegated. The questions that will be answered include:

(i) What legal arguments in *S.A.S v France* did the Court accept to address?

(ii) How were the arguments construed in order to frame S.A.S v France as a judgement over values?

Prior to analyzing the argumentation of the case, a brief history of full-face coverings in Europe is offered along with succinct affirmation on the importance of human rights within European legal orders. This context will help frame the case and will encourage readers to combat the urge to separate the legal from the socio-political elements at play. Offering a brief summation of the history of the ban and development of human rights in Europe also encourages readers to keep in mind the values that institutions such as the CoE and the EU claim to be comprised of and defend. Context matters because, after all, cases are never decided within a vacuum.

(I) History of the Ban

Across European jurisdictions, there exists a patchwork of laws that target full-face coverings, from municipal to national levels. These bans generally apply only in public place, and the wording of the laws refrain from naming the face coverings used in practice of Islamic faith (specifically the niqab and burqa). In France, a national act was passed in 2010 "prohibiting the concealment of the face in public space".[2] In this article, this legislation will be simply termed the 'veil ban', though the phrasing of the law may deviate from that wording. Upon the ratification of this act, France was the first country in Europe to ban full-face coverings. This law was not drafted unexpectedly, but was passed among the proliferation of acts enshrining France as a secular state, further solidifying a separation of religion and state. France has a long history of secularism within the public realm, but a more modern example of secular reform is an act banning the wearing of religious symbols in state schools from 2004.[3] However, the political moment in which the veil ban emerged must not be neglected. The 2010s was colored by debates around migration to Europe along with a rise in nationalist and populist politics. With the increase in the number of migrants from the Global South, many began to draw lines on what it meant to be a member of a secular European society – including religious traditions. This trend was even given attention by the highest bodies of government in Europe. The European Union found it necessary to measure Islamophobia within the continent and published its first comprehensive report on this matter in 2015. The report found problematic the "French articulation of secularism (laïcité) which is promoted by many as a bulwark against Islam... or as a way to preserve an ethnically defined French identity".[4] The motives of France for the veil ban could be construed as a means to further codify secularism plus to construct a stronger national identity, but the impact of this law is clear. The prohibition of the use of full-face coverings is narrowly tailored to target members of the Islamic faith who wear such clothing out of religious practice, and this connection must not be ignored.

Considering those who wear such coverings are typically women of the faith, there are added dimensions of feminist critique against the law. There is a wide range of literature across disciplines which emphasize the sexist, racist, and anti-religious sentiments of this French law[5], and such critiques deserve mentioning although the scope of this paper is primarily a legal one. This context is important to consider because in light of the wide protections afforded by anti-discrimination laws found across the continent, it is not unreasonable to conclude that the French law is in clear violation of such principles. Yet, the Court held otherwise.

2 *Loi* n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (FR) (Face Covering Ban).

3 'The Islamic veil across Europe' British Broadcasting Company (London, 31 May 2018) <www.bbc.com/news/world-europe-13038095> accessed 26 January 2023 (BBC news). See also loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (FR).

4 Enes Bayrakli and Farid Hafez (eds), European Islamophobia Report 2015 (SETA 2016) 158, 165 (Islamophobia Report).

5 This French legislation received a fair share of critique from scholars and civil society on the social implications. Several articles cited draw from other disciplines to highlight the general concern from civil society. Please see Shaista Gohir, 'The Veil Ban in Europe: Gender Equality or Gendered Islamophobia?' (2015) 16 Georgetown Journal of International Affairs 24; Dolores Morondo Taramundi, 'Between Islamophobia and postfeminist agency: intersectional trouble in the European face-veil bans' (2015) 110 Feminist Review 55; Robert Kahn, 'Face Veil Bans and "Living Together"— What's Privacy Got to Do with It' (2021) 6 Public Governance, Administration and Finances Law Review 7; Barbara Friedman and Patrick Merle, 'Veiled Threats: Decentering and unification in transnational news coverage of the French veil ban' (2013) 13 Feminist Media Studies 770.

(II) Development of Human Rights Doctrine in Europe

European institutions, which created the multilayered human rights regimes discussed here, hold human rights as fundamental to their creation and their mission. For example, the legal fabric of the EU is imbued with the values of "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights" and the subsequent aims of the Union are equally as empowering and noble.[6] While the founding treaties of the EU mentioned fundamental rights, the legal doctrine was a bit undefined. There was a need for further clarification and codification of such rights granted to Union citizens, which eventually gave rise to the European Union Charter of Fundamental Rights (EUCFR). Jurisprudence of the European Court of Justice (ECJ) clarified that the EUCFR only applies when reviewing national laws conflicting with fundamental rights when it is "within the scope of Community law".[7] This means that the French national law, coming into force on national accord, renders the EUCFR inapplicable. If France was acting on an EU directive to implement legislation, which banned full-face coverings, then the Charter could be invoked to dispute the law.

However, legal remedies are not only relegated to the ECJ or national courts. Across Europe, and some states located outside the continent, there exists another human rights declaration. Emerging out of World War II, the Council of Europe codified their moral convictions of the guarantees for humanity in the European Convention on Human Rights (ECHR or the Convention). The Convention gave life to the European Court of Human Rights which offered another forum for citizens of states party to the Convention the opportunity to adjudicate any instances in which their fundamental rights were infringed upon. A reading of these two European documents mentioned above would highlight the near similarity of wording and rights guaranteed. Both secure the freedom of thought, conscience, and religion[8], and the respect for private and family life[9], and prohibit discrimination[10]. For the issue at hand, the latter of the two human rights regimes was the forum for the legal challenge against the French law due to the limited applicability of the EUCFR. Although the EU doctrine is not relevant for the case at hand, its mention is warranted to demonstrate how integral human rights are to the legal fabric of Europe. Human rights are more than just words, but rather are incorporated into societies and states across the continent. It ought to be the role of the Court to ensure violations against these guarantees are curbed and challenged in order to live to the standards set forth by the existing multilayered regime.

6 Consolidated Version of the Treaty on European Union [2016] OJ C202/1 Art 2 and Art 3.
7 Case C-260/89 *ERT AE v Pliroforissis & Kouvelas* [1991] ECR I-2925.
8 Council of Europe, 'European Convention on Human Rights' [1950] (ECHR) Art 9; Charter of Fundamental Rights of the European Union [2016] OJ C202/389 (EUCFR) Art 10.
9 ECHR Art 8; EUCFR Art 7.
10 ECHR Art 14; EUCFR Art 21. Both articles prohibit discrimination on the grounds of sex, race, color, ethnicity, religion or belief, among other categorizations.

It is important to note that the ECHR does not guarantee absolute rights. The Articles invoked in this case all include a second paragraph that provides for the legal restrictions to the rights mentioned. The Articles define the grounds on which the rights can be restricted. These limitations are the crux of the judgement issued on the French veil ban.

(III) The Language of Law

S.A.S. v France encapsulates the notion that law acts as a vocabulary or language, meaning that law is neutral and can be manipulated in a manner according to one's objective. This concept has been advanced by one scholar in particular, Martti Koskenniemi, who advocates a reconceptualization of legal thinking in a manner "to think about law in the context of power, namely the power of law as language".[11] Moreover, applying a political lens to the case can be seen as engaging an alternative vernacular to move beyond a strictly legal analysis. Perhaps it is time to rid ourselves of such distinctions in order to fully grasp the situation. As Koskenniemi has said, "the relationship between politics and law is like that. The two are not out there, in the world, but in here with us, as part of our conceptual vocabularies, institutions and systems of expertise, each equally capable of describing the whole world".[12] This approach must be emulated when analyzing *S.A.S. v France* because the core of the decision sheds light into the crevasse that is international law, international politics, and justice. If the motive of creating international legal regimes is to safeguard human rights and prevent violations, it must be asked if that outcome was achieved in this case. Law as a vocabulary can declare mighty concepts on paper, but when applied, fall short of its objectives, and render itself useless.

Koskenniemi also establishes this link between legal and political objectives when arguing: "what rights there are and how they can be limited and balanced against countervailing rights both takes place in legal process by distinctly legal ways of argument and depends on political priorities".[13] Leveraging legal argumentation to advance political priorities is palpable in the case *S.A.S. v France* when analyzing the specific argument put forward by France that a full-face ban is necessary for democracy and 'living together', which is expanded upon later. The Court also acknowledges that the question at hand is uniquely political when it concedes that, "it can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes

11 Koskenniemi, Martti: To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870. CUP 2021, p. 8. (Koskenniemi 2021).
12 Koskenniemi, Martti: Speaking the Language of International Law and Politics: Or, of Ducks, Rabbits, and then Some, in Handmaker, Jeff and Arts, Karin (eds): Mobilising International Law for 'Global Justice'. CUP 2019, p. 22–45, 27.
13 ibid 40.

a choice of society".[14] By deferring to societal opinion vis-à-vis solely accounting for the outcome of domestic policy processes in their considerations, the Court invites the political into the legal. Also being aware of their limits of jurisdiction and supremacy, the Court claimed a "duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question".[15] Yet it seems to ignore the democratic process of France's accession to the ECtHR. *S.A.S.* is a very politically charged decision by a Court that meticulously carried out a strict legal analysis, only to ultimately concede to the political process in delivering a verdict. A decade later, France is continuing to advance the notion of secularism and 'living together' to accomplish their political objectives with confidence, recognizing that the ECtHR shies away from addressing this explicit infringement on human rights.

The subsequent section of this article will dissect the case's arguments and focus on the vocabulary utilized which led to the conclusion that the French full-face ban is not in violation of the European Convention on Human Rights.

(IV) Argumentation Analysis

A. Applicants Arguments Dismissed by the Court: Articles 3 and 11

According to Article 3 of the ECHR, *no one shall be subjected to torture or to inhuman or degrading treatment or punishment*. The applicant claimed that a violation of her rights occurred under this Article read in conjunction with Article 14 (anti-discrimination). The claim was that if she had worn her niqab in public, not only would she have faced criminal charges, but also encountered harassment and discrimination, thus constituting degrading treatment. The Court quickly rejected this argument, citing jurisprudence that established a minimum level of severity to constitute degrading treatment, a threshold not crossed in the present case.[16] Article 11 regards the freedom of assembly and association, with the applicant arguing that by prohibiting wearing a niqab violated her right to associate with her religious beliefs. Article 14, which prohibits non-discrimination, was also invoked in conjunction with Article 11. The Court rejected her arguments based on Article 11 as they "did not indicate how the ban imposed by the Law... would breach her right to freedom of association and would generate discrimination against her in the enjoyment of that right".[17] The Court's dismissal of Article 11 represents a complete disregard of the simple notion that wearing religious symbols in public not only allows one to signal their beliefs to fellow members of their faith, but also to those outside of it. Unfortunately, the Court also clearly failed to recognize how she may face discrimination when wearing a full-face covering, despite the growing number of bans on full-face coverings in Europe as well reports commissioned by the European Union regarding Islamophobia.[18] From a strict legal perspective, the petitioner did fail to present facts that would have created a clear link between this law and her right to association, but it is unfortunate that the Grand Chamber declined to address this Article despite the documented existence of discrimination outside of the courtroom.

B. Applicant's Arguments Accepted by the Court: Article 8, 9, and 10

The Court deemed the petitioner's arguments admissible based on three Articles, which then turned the analysis to assess whether the law met the permissible limitations. The aims outlined in the Convention that validate limitations include public safety, prevention of crime, protection of health and morals, as well as protection of rights and freedoms of others.[19]

Article 8, which protects one's private life, was contended to be violated under the French law. The petitioner presented three arguments why this law constituted a violation:

> (i) The ban restricted her from wearing the niqab which was an important part of her social and cultural identity[20]
>
> (ii) That even in a public context, there is a "zone of interaction"[21] that constitutes one's private life, thus triggering the protections of this Article[22]
>
> (iii) If it was the case that she cannot wear the niqab in public, thus forcing her to only wear it in the confines of her home, this creates a situation as if she were a prisoner and created a double life[23]

Furthermore, by citing Article 14, which prohibits discrimination, in conjunction with Articles 8, 9, and 10, she asserted that this ban inherently singled out Muslim women, thereby resulting in discrimination based on sex, religion, and ethnic origin. Here, it is also important to note that the French law itself had exceptions to the ban. According to Article 2 § 2 of the Act, wearing a full-face covering is permissible in the context of "festivities or artistic or traditional events".[24] The petitioner argued that this favored the Christian or Catholic majority in France, by allowing them to

14 *S.A.S v France (S.A.S.)* App no 43835/11 (ECtHR, 1 July 2014) para 153.
15 ibid para 154.
16 *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) para 162; A case on torture in the UK which defined what constitutes torture and degrading treatment.
17 *S.A.S.* n 14 para 72.
18 BBC news n 3; Islamophobia Report n 4.
19 ECHR Art 8.2 and Art 9.2.
20 *S.A.S.* n 14 para 79.
21 *Von Hannover v Germany* App no 59320/00 (ECtHR, 2004), paras 50 and 69.
22 *S.A.S.* n 14 para 79.
23 ibid.
24 Face Covering Ban n 2.

wear it for rituals, processions, and for dressing up as Santa Claus. Highlighting these was meant to bolster the argument of discrimination while also trying to bring into the Court the social elements of Islamophobia ongoing within France.[25]

The petitioner also argued that Article 9, regarding the freedom of thought, conscience, and religion, was violated as donning the niqab was the manifestation of her religion in practice and observance. Again, speaking to the interferences which are allowed, she argued that though the ban was "prescribed by law", the aims were not met, nor was the ban "necessary in a democratic society".[26] Freedom of expression, protected under Article 10 of the Convention, was argued to be violated on the grounds that the law was restricting her ability to express her religious beliefs. This Article was accepted by the Court to be reviewed but no expansion of the argumentation was mentioned in the judgement. The Court found the claim made under Article 10 admissible, but by a unanimous vote, found no issue of violation under the French law.

The arguments of the French government ('government') in defense of their legislation rested on permissible limitations found in the second paragraphs of Article 8 and 9. In their view, the full-face ban was imperative because showing one's face is essential for society. This was necessary for two reasons:

(i) Ensuring public safety which requires one to show their face in order to combat identity fraud as well as a need to identify people to prevent danger and ensure safety of people and property

(ii) In order to protect the rights and freedoms of others, the government is obliged to respect the values of an open and democratic society. There were three values the French government felt compelled to uphold:

(1) *Le vivre ensemble*, or "living together". Minimum requirements of life in society dictate that the face is necessary in human interaction. Concealing a face leads to the breakdown of social ties and is a refusal of the principle of "living together"[27]

(2) Gender equality. The government argued it was repressive that women must wear the veil on the grounds of their gender alone, and that wearing the veil was not dictated for both men and women.

(3) Human Dignity. Women wearing a full-face covering are "effaced" from the public, which is dehumanizing.

25 Ultimately the Court declined to address any of the socio-political elements of the case and adhere to a strict legal analysis. This notion is expanded upon in Section V: Commentary & Contemporary Implications.
26 See ECHR Art 8.2.
27 *S.A.S.* n 14 para 83.

The government also argued that the law met both of the required criteria for permissible limitation – 'necessity' and 'proportionality'. Citing that the legislation passed with near unanimity in both chambers of government and followed the process of wide consultation of civil society, the government claimed it satisfied the criteria. The government also pointed out that this ban did not single out a particular religion, but was a general ban on full-face coverings, and argued that people were still able to express religious beliefs through other articles of clothing. Further, the government claimed that one of the objectives of the law was to combat discrimination of women that are potentially forced to wear a veil. The government felt only a total ban could meet this goal, noting that if a law was tailored to exclusively ban the 'forced' donning of full-face veil on women, then the law would fail to meet that objective. It would not be "sufficiently effective" as coercion is "diffuse in nature" and women implicated may fail to report the forced wearing.[28] The French legal team also advocated the position that paying a 150 euro fine or taking a citizenship course was not a harsh penalty for violation of the law. In addressing the claims of interference under Article 8, the government simply claimed this law only applied in public spaces, not implicating the petitioner's private life nor physical integrity. Speaking to Article 9, the government deferred to the arguments mentioned above – the "justification for the interference and its proportionality".

To address the petitioner's claims of discrimination based on Article 14 of the Convention, the government shared that one of their motives for this law was to prevent discrimination, as mentioned prior, which occurs when wearing a full-face veil because one is "effaced from the public space".[29] The government further contended that this law did not generate any discrimination nor was it discriminatory in nature against Muslim women, citing some high-profile Muslims who criticized wearing a niqab or burqa, and claiming the notion that this practice was a recent development in France. For these reasons, the French claimed that Article 14 could not be admitted separately nor in conjunction with the petitioner's argument on the other Articles.

C. Court's Findings on Article 8 & 9

Regarding the application of Article 8, the Court found that how an individual wishes to appear physically, in public or private, falls under the notion of private life, citing decisions of the European Commission on Human Rights and previous case law. Regarding the application of Article 9, the Court stated that when "practice of their religion requires them to wear [clothing]... it mainly raises an issue with regard to the freedom to manifest one's religion or beliefs"[30] – therefore accepting the Article 9 issue as raised by the petitioner.

28 ibid.
29 ibid para 82.
30 ibid para 108.

After finding basis within the Article 8 and 9 arguments, the Court needed to determine if there had been an inference on the petitioner's rights, citing two other cases where individuals had to choose between either compliance with the law or refrain from exercising their rights.[31] This full-face ban created a similar situation: the outcome of this case depended on whether the limitations created by the French law were permissible, which require both a legitimate aim and necessity.

The Court accepted the motivation of French legislators to address public safety through this law. However, the Court held the government failed to provide any context where this law is addressing an eminent public threat, thus deeming this law unnecessary for public safety purposes. Another aim put forth by the government was respecting the three democratic values mentioned above, all of which the Court addressed individually. The Court was "not convinced" of the government's claim based on the concern for gender equality. Regarding the argument for human dignity, the Court could not find any proper justification, thereby dismissing this assertion. The only argument that was deemed to have a proper link between a permissible limitation laid out in the Convention was the value of 'living together' due to its necessity in respecting others' rights. The Court stated that this value, "can be linked to the legitimate aim of the protection of the rights and freedoms of others", noting the face is significant in social interaction.[32]

The next question was whether this was a necessary measure in a democratic society. The Court embarked upon robust exhortation on religious (and atheistic) plurality as being fundamental to a democratic society, as well as affirmed the neutral role the state ought to play. However, it ultimately stated that when tension does arise between groups, the role of the government is to "not remove the cause of tension... but to ensure the competing groups tolerate each other".[33] However, the Court deferred to national authorities as possessing 'special weight' for policy decisions, since an international court cannot fully speak to local needs and conditions.[34]

In this vein, the Court said the State should be "afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or belief is necessary".[35] Once all other aims or claims of necessity had been dismissed, the only question that remained was whether the value of living together met the aim of protecting the rights and freedoms of others.

The Court was clearly aware of the socio-political implications of this law on the Islamic community,

31 ibid para 110. See also ECtHR judgements in Dudgeon v UK (1981) and Norris v Ireland (1988), cases in which the Court found refusing to comply with a law led to criminal sanctions, leading to a continuing interference of exercising one's rights.
32 *S.A.S.* n 14 para 121.
33 ibid para 127.
34 ibid para 129.
35 ibid.

and how the discourse surrounding the drafting of the French legislation was not immune to Islamophobic remarks. In recognition of the third-party briefs that highlighted the Islamophobic context, the Court was "very concerned" and made clear that such "attacks on a religious or ethnic group are incompatible with the values of tolerance, social peace, and non-discrimination which underlie the Convention...".[36] Yet, despite this awareness, the Court felt, "it is admittedly not for the Court to rule on whether legislation is desirable in such matters".[37]

Further, despite the Court admitting that the ban disproportionately affects Muslim women[38], it ultimately ruled that the law was not in violation of the Convention by affirming the connection of 'living together' and respecting the rights of others. The Court pointed out that this law did not ban full-face coverings due to their religious nature, but rather because it conceals the face, and that violations of this law only led to "light" sanctions[39]. The Grand Chamber also ruled conclusively that it is the French society's prerogative to decide if concealing a face is in conflict of societal values, not the Court's, thus giving France a "wide margin of appreciation".[40] France was "seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society".[41] So, the Court decisively held that there was no violation of Article 8 or Article 9 in this case, accepting the limitation on the grounds that it was "proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others'".[42] The French law banning full-face coverings in public spaces was not in any violation of the rights secured by the European Convention on Human Rights.

(V) Commentary: Consequences & Contemporary Implications

A. Consequences

The victors of this case appear to be French secularism and the margin of appreciation. While making value judgements of French society is outside the scope of the Court's competence, it appears as if they chose to elevate secularism over widespread concerns of discrimination raised among scholars, NGOs, and the petitioner. There was plenty of robust discussion among civil society on this case's impact on religious freedom and Islamophobia, which the Court acknowledged in their judgement, yet ignored in their analysis. The Court could have taken

36 ibid para 149.
37 ibid.
38 ibid para 151.
39 ibid para 155.
40 ibid.
41 ibid para 153.
42 ibid para 157.

issue with the exceptions included in the French law allowing for face coverings in some religious contexts. From an outside perspective, it appears that France had successfully redefined Judeo-Christian ideals and practices as cultural, rather than religious, which garnered none of the Court's attention. While these religions have a longer history in France, there is reason to worry about France leveraging this line of argumentation – defending democratic values – as permissible attempts to erase outward expressions of Islam from the public sphere. Considering the 2004 ban on religious symbols, France does not explicitly promote Judeo-Christian religions, aligning with their aim to establish a secular public society. However, this generates additional concerns whether the government is actively working against religious expression – a right protected by the Convention. How will France continue to ensure secularism and assimilation while also balancing commitments to the values of higher institutions such as the Council of Europe and the European Union?

Regarding the margin of appreciation afforded to France, this case was not the first instance in which the Court has granted a State this margin. This was one of the arguments put forward by France in defense of their law, noting the jurisprudence in which the Court granted a "wide margin of appreciation" when private or public interests conflict with rights in the Convention.[43] While this margin can be explained by several factors including the clear lack of supremacy or jurisdiction over the Member States of the Council of Europe, by affording France (or other nations) this margin, behavior can be justified which is antithetical to the *raison d'être* for the European Convention of Human Rights. This conundrum, while it can be rationalized in legal terms, runs counter to a functionalist understanding of the Court.

Viewing the argumentation with the notion of law as a language, it is intriguing to see how France deployed argumentation that framed the question for the Court to be a declaration over which values a democracy ought to comprise of, knowing that the Court is not empowered to decide. France claimed that their understanding of 'living together' is essential to protecting the rights of others which takes the form of showing one's face in public. It is not surprising then that the Court must defer to a margin of appreciation in order to decide a case resting on value judgements. Justice, in this case, is difficult to identify and goes beyond solely interpreting how the Convention is understood in simple legal terms. Just as Koskenniemi states in his work on international law, politics, and justice,"[the notion of] justice is both the most abstract and obscure" yet it is often seen "in the way speakers in the realm of both law and politics usually suggest that it is the very point of those vocabularies to reach justice and frequently quarrel over their respective abilities to attain it".[44] In *S.A.S. v France*¸ the quarrel over rights precisely plays out in a legal manner, yet it remains difficult to claim justice was achieved. To restate, what can be noticed in this case

43 ibid para 83. See *Evans v the United Kingdom* App no 6339/05 (ECtHR, 10 April 2007). For a compelling critique focused on the margin of appreciation notion, see Fleming, Nathaniel: SAS v France: A Margin of Appreciation Gone Too Far. Connecticut Law Review 2020, vol. 52, p. 917.

44 Koskenniemi 2021 22.

is how democratic 'values' and 'rights' were dressed up in legal language with one side arguing that their guaranteed right is infringed while the other knows it is beyond the role of the Court to decide what values their democracy ought to embody.

B. Contemporary Implications

Groups ranging from NGOs to academics were concerned that what is considered necessary for 'living together' would be exploited, since the Court left the work to France to define what is necessary for 'living together' when granting them the margin of appreciation. The worries also flow from the belief that states could cite their 'values' as justification to evade review and legalize discrimination. Following case law of the Court can provide insight if concerns have materialized. In two cases, also challenging bans on full-face coverings, the Court declined to revisit this issue and again reiterated the same points as issued in *S.A.S.* – the accepted aim of 'living together', the legitimate democratic process resulting in the legislation, and the wide margin of appreciation of States.[45] When reviewing the instances where the Court mentioned 'living together' in their judgements, one scholar found little reference to the concept, and when it was cited, it was in cases regarding Article 8.[46] This shows that to date there has not been any major exploitation of the S.A.S. judgement's formulation of 'living together'. However, perhaps such a narrow focus on legal arguments that leveraged 'living together' fails to consider larger questions over the effectiveness of the ECtHR in upholding the ECHR. Presently, with a recent ban enacted on religious garments in school[47], it is difficult to imagine that anyone could challenge this on the basis of the ECHR. Therefore, it is with a healthy skepticism that those concerned with religious freedom and broadly, human rights, are apprehensive towards total embrace of the judgement in *S.A.S. v France*. A sustained vigilance is necessary given the continuing encroachments on religious freedom in France.

Additionally, comments of the Court have not withstood the test of time. In the judgement, the Court noted a lack of European consensus on banning the burqa and niqab, and claimed "France was in the minority position in Europe: except Belgium, no other – State – has opted for such

45 Megan Pearson, 'What Happened to 'Vivre Ensemble?': Developments after *SAS v France*' (2021) 10 Oxford Journal of Law and Religion 185. Another case for considering the Court's understanding of secularism and limits on religious expression, which occurred prior to S.A.S. and held similarly, find *Leyla Sahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).

46 ibid.

47 The recent ban on religious garments known as the abaya or qamis found basis in the 2004 French law targeting "conspicuous manifestation of religious affiliation" in state schools (see loi n° 2004-228 n 3). The Conseil d'État rejected the appeal by the Action Droits des Musulmans regarding the ban (see Conseil d'État n 1). For an analysis on this recent ban which highlights the socio-political considerations, see Roger Cohen, 'Muslim Students' Robes Are Latest Fault Line for French Identity' *The New York Times* (15 September 2023) <https://www.nytimes.com/2023/09/15/world/europe/france-abaya-ban-attal.html> accessed 21 September 2023.

a measure".[48] Since then, there has been a shift in the political landscape of Europe on this topic. Not only has nationalism been on the rise in Europe, but there now exists nine contracting parties to the Convention with national veil bans in some form, and sixteen others with regional, private, or institutional bans.[49] While the role of the Court in 2014 was not to speculate and rule on future hypothetical scenarios, it is valid to consider if their ruling would be different if the legal challenge was presented now. Would it finally be clear to them that the full-face veil in observance of the Islamic faith has been deemed contrary to these nations' 'democratic values'? It is worth pondering whether the proliferation in legislation against visible expressions of Islam, such as veil, can be traced back to this ruling.

Ultimately, the verdict of *S.A.S. v France* fails to uphold the spirit of the Convention and positions the Court into a predicament where it further acknowledges its limited jurisdiction and supremacy. This further amplifies the calls for reform of the Court. However, this article is not a call for reform or abolition, but rather a disputation against any claims that it is for legal reasons alone that the ban survived review. The nature of the case delved into the arena of politics and the Court has not equipped itself with the vocabulary to find a legal solution to this political problem. By affirming that the veil ban was not in violation with Convention, the Court also negates the historical tradition and values in which European institutions proclaim. "Legislation of this kind goes against the strong tradition of liberal individualism in European culture that is reflected in a deep commitment to individual autonomy and equal treatment in European law"[50] , one scholar said best when discussing veil bans. Further, the Convention itself is a declarative judgement of which values these nations have come to agree are worth securing. In S.A.S., the Court permitted France to render the judgement, contradicting the core purpose of establishing a higher court to adjudicate human rights matters. Hopefully in the future the Court is not as timid to include the overlaying political and social dimensions in cases, because ultimately there is little difference in objectives of utilizing such vocabularies; the sole difference is only the lingua franca of law is allowed in the courtroom.

The French law withstood its most significant legal challenge with the 2014 verdict, marking a significant case concerning limitations on religious freedom and respect of private life in Europe, more likely in respect to the former. The logic expounded in *S.A.S.* is likely embedded in the Court for many years to come, but it remains imperative to continue to claw away at distinguishing between the political and legal outcomes and the notion that this matter is a settled issue, because to this day, expression of religion continues to be threatened in France.

48 *S.A.S.* n 14 para 156.
49 Open Society Justice Initiative, 'Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom' (Policy Report, March 2022).
50 McCrea, Ronan: The Ban on the Veil and European Law. Human Rights Law Review 2013, vol.13(57), p. 94.

CONCLUSION

S.A.S. stands as a pivotal case, hinging on the 'wide margin of appreciation' granted to Member States and advances a precedent that leans towards curtailing rights in the name of secular democracy, while disregarding the existence of pan-European institutions and frameworks affirming pluralist democracies. Despite the Court's awareness of the discriminatory nature of the law, including racist, sexist, and anti-Islamic sentiments, it refrained from factoring these tangible effects into its legal review. While a strict legal analysis may exclude such factors, viewing the case from a perspective similar to the one advocated by Koskenniemi, the intended outcome of the political rhetoric is not much different than the legal. This case was particularly complex because it is a value-driven judgement, prompting the question of whether it was the Court or France to render the decision. Since the landmark ruling, various veil bans across Europe remain in force, bolstered by the ECtHR's endorsement. Currently, explicit exploitation of the 'living together' concept in legal arguments and cases has not materialized. Nonetheless, given persistent violations of the right to freedom of religion and manifestation, coupled with limited recourse through the ECtHR, vigilance is imperative.