

**THE QUESTION OF THE RELIGIOUS HEADSCARF THROUGH THE
SCOPE OF HUMAN RIGHTS:
CRITICAL ANALYSIS OF THE RESTRICTIONS IN THE APPROACH OF
FRANCE**

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Abstract

The purpose of this essay is primarily to present a constructive critique of restrictive measures for wearing the religious veil, which were introduced in France as an overture in 2004 and later in 2011 and secondly, to equate them with the discriminatory policies of Western countries towards Islam. The essay will try to argue the inadequacy of the approach and highlight the hazard and uncertainty it poses. This assertion would be presented by a number of points. Firstly, the paper will illustrate the danger of stigmatization of the Muslim population, specifically women exercising this practice. Secondly, an attempt will be made to examine this policy in relation to Islamic extremism and fundamentalism in Europe, and in addition, it will offer a brief overview of the refugee crisis and the issues it would (re)open in this area. Finally, the essay will propose an exit thesis according to which the Strasbourg Court will have to take the lead in this debate. By examining some of the leading cases before the European Court of Human Rights (in further text abbreviated as 'the Court') in this regard, the essay will raise a series of questions and stress the necessity for the Court to address this delicate issue with due respect and embrace his role as a promoter of human rights. Ultimately this essay seeks to assess France's approach, but also France's apologetic argumentation as wrong in articulating intercultural dialogue. In the same way, it will point out that despite the tendencies to objectify the act of the veil ban, this act has never lost its "political context".

Keywords: *religious headscarf, secularism, Human Rights, ECHR.*

I. RETROSPECTIVE

Since the beginning of the 21st century, several European countries have adopted regulations restricting religious expression and emphasizing the neutrality of the public sphere. In his work on Human Rights and Religion, Dominic McGoldrick discusses the basic need of human beings to create a positive social identity for themselves, either as individuals or as members of a group. In this regard, he highlights that choice of dress is likely to be particularly important and that a person's clothes can reveal much about their identity, in relation to their gender, class, sexual orientation, and religious beliefs. Yet what an individual wears can also attract great controversy,

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as evidenced by the fact that, in present-day Europe, there have been few issues more controversial than that of religious dress.¹

This phenomenon was first popularized in the French public back in 1989, known as the "veil affair" (l'affaire du voile), then again in 1994 when a memorandum defined the division of "discreet" and "intrusive" religious symbols in order to remove the latter from public spaces. Eventually, this resulted in the first ban on religious symbols in educational institutions back in 2004, a decision strongly influenced by Chirac's Commission on Secularism in Europe.² As a logical continuum of this discussion, the ban on wearing a full face-covering veil in the French public was proposed, which came into force in April 2011.

Historically, Islam has been seen as a serious obstacle to the contentious concept of Frenchness, and Muslims have been thrown out of the axis of social life, stuck in the underdeveloped suburbs where they are generally engaged in low-income jobs.³ They are nonetheless the least widely accepted minority, with this exclusion extending from the Muslim religion to those who practice it. Criticisms relate primarily to the most visible of religious practices (such as the wearing of the veil), with private practices apparently more readily accepted.⁴ The turning point of September 11 2001, with the terrorist attack on the Twin Towers, intensified the sharp dichotomy of civilized and uncivilized, progressive and regressive, reasonable and religious, emancipated and oppressed. Over time, the 21st century has become a breeding ground of growing controversy and discord between the West and Islam, and it seems that Huntington's theory is slowly but surely coming to fruition. Namely, Huntington in his work "The Clash of Civilizations" talks about how the next global conflict, after the Cold War, would be a conflict between Western and Islamic civilizations. As the leading reason for this conflict, he cites the Western "universalist tendencies", that is, a situation where the West considers its values to be universal and strives for them to be claimed as such by other civilizations. According to the author, this would lead to confrontations between the groups. Consequently, attempts by Western nations to impose their values on non-Westerners, especially Muslims, will create intense resentment among Muslims.⁵ One cannot avoid the impression that this thesis is more relevant today than ever before and the dilemma it raises is truly compelling, especially considering the issue of the religious headscarf. In this regard, the increased migration and the growth of the Muslim community in Europe make this continent a front line where these dilemmas will be unravelled. As the essay will try to illustrate, the past two decades one of these liberal and open societies has been the embodiment of an unjust and assertive policy, which some countries with distinguished liberal traditions later undertook and tried to cover it up under the guise of secularism and public order. In Christian-secular Western Europe, wearing a veil in public has become the epitome of fundamentalism and a backward Islamic culture that opposes the principles of freedom and progress. Moreover, the frequent jihadist attacks reaffirmed the sense of mistrust between the communities, as can be observed by the recent rise of right-wing populism in Europe and their increasingly anti-immigrant, anti-Muslim messages. A perfect example in this respect was the brutal murder of Theo Van Gogh in Amsterdam by a religious extremist, following a set off in the tabloids with

¹ Dominic McGoldrick, *Human Rights and Religion: the Islamic Headscarf Debate in Europe*, Hart, 2006.

² Hilal, E. *The Headscarf Controversy: Secularism and Freedom of Religion*, Oxford University Press, 2012, pp. 112-117.

³ Ibid, pp. 113-114.

⁴ CNCDH: REPORT ON THE PREVENTION OF RACISM, ANTI-SEMITISM AND XENOPHOBIA, 2015, p. 11, https://www.cncdh.fr/sites/default/files/les_essentiels_-_report_racism_2015_anglais.pdf.

⁵ Huntington, Samuel P. *The Clash of Civilizations and the Remaking of World Order*. New York: Touchstone, 1997, pp. 20-21, p. 211.

fear-mongering headlines.⁶ Under absolutely unsubstantiated excuses, several Western European countries, including France as a leading advocate, have taken utterly disproportionate measures targeting a vulnerable portion of this religious minority by imposing restrictions on wearing religious attire. France, as the most prominent spokesman against the headscarf, undertook this measure at a time when the number of Muslim women in the country that actually exercised this religious practice was absolutely insignificant, approximated 2000.⁷ The country led this dubious battle with the motto of strengthening dignity and equality between the genders, the liberation of long-oppressed Muslim women and public safety, with an emphasis on the responsibility that citizens have to bear as part of the community.⁸ Whether those claims are sound, however, is a subject of considerable debate.

II. ARGUMENTATION OF THE FRENCH AUTHORITIES

France has a long tradition of secularism, which occupies a central place in the constitutional culture of this country, a principle that was underlined as dominant in the debate over the religious headscarf.⁹ That is to say, French history was strongly influenced by Catholicism and the struggles for a secular monarchy, and then a republic. As such, France's cultural matrix drastically differs from that of countries with an Islamic tradition, hence the sharp confrontation. In 2004, the French law on secularity and conspicuous religious symbols in schools banned most religious signs, including the hijab, from public primary and secondary schools in France. The law was assessed as highly controversial, targeting only Muslim women and Jewish men. Despite the social disapproval of these measures, the French government adopted a new restriction 6 years later and the three main arguments France authorities made while passing the 2011 ban were based on gender equality, public safety and the defence of secularism. Accordingly, this line of reasoning brought them to a hasty generalization that the veil must be banished from the public sphere.

The first argument states that with the implementation of this measure many of the oppressed women who forcibly wore the veil will be liberated and emancipated just like Western women. Furthermore, the now-former French President Sarkozy stated that the practice is unacceptable and isolates women from social life and deprives them of their own identity.¹⁰ Even a large percentage of the French feminist lobby considered wearing a veil a threat to women, arguing that the alleged forcing of women to cover their faces is sexist and that Muslims who continue this practice should be forced to assimilate into traditional French social norms. On the other hand, this debate initiated and sparked a new feminist movement of veil supporters, who explicitly distinguished themselves from Western feminism and labelled it racist and paternalistic. According to them, what this policy has failed to see is that a large percentage of

⁶ The Guardian: "*The murder that shattered Holland's liberal dream*", 7 November 2004, <https://www.theguardian.com/world/2004/nov/07/terrorism.religion>

⁷ Amnesty International: "*European Court ruling on full-face veils punishes women for expressing their beliefs*", 1 July 2014, <https://bit.ly/3prwyT7>;

CNN: "*French Senate approves burqa ban*", 15 September 2010, <https://cnn.it/2NxrFKY>;

Amnesty International: "*France votes to ban full-face veils*", 13 July 2010, <https://bit.ly/3poUOoW>;

⁸ Jean-François Copé, The New York Times: "*Tearing away the veil*" <https://nyti.ms/37yvszd>.

⁹ "Constitution". Journal Officiel de la République Française (in French): 9151–9173. 5 October 1958. <https://bit.ly/2LRFIQG>

¹⁰ Hilal E. *The Headscarf Controversy*, 2012, p. 111

European Muslim women wear the veil of their choice and free will, so this ban is in direct conflict with the autonomy and self-determination of those women. The feminist movement of Muslim women constantly pleads for the fact that it is wrong to identify and compare European Muslim women with those of the Middle East, where there are legitimate suspicions that women are indeed being forced into this practice.¹¹ Moreover, the denigration of the members of this community and their labelling as backward, regressive, fundamentalist and illiberal, are a method of inflammatory rhetoric that French spokesmen often used in this debate. This may be interpreted as an argument that France does not treat the opposing side in this intercultural dialogue with the necessary respect nor does consider them equal. What was clearly stated and emphasized was that the effects this measure officially aimed to achieve could've been achieved with less repressive measures.¹²

What the ban actually does is it dictates Muslim women on how to dress and practice their religion, manifesting as an offence to their identity and depriving them of the right to practice this apparently harmless cultural practice that has existed for centuries and occupies a central place in their religion. The lack of substantive arguments from the French authorities, as well as from other EU countries, is what makes the ban illegitimate and puts the majority in a privileged position to decide on issues that do not really concern or affect them. Moreover, it was pointed out that in the tradition and culture of France and Europe in general, wearing a veil is perceived as a hostile act of isolation and backwardness, which creates mistrust. This is a rather tendentious argument, especially considering the traditional clothing of medieval and modern Europe, where the veil was not such an unusual phenomenon.¹³

The second argument proclaimed was the security issue caused by the covered faces. The aforementioned argumentation goes so far as to link robberies by masked criminals and identity thefts with Muslim women for whom the veil is part of the identity. The absurdity here is that all the security "problems" that have been highlighted have in fact long been regulated by the criminal codes of the countries and stipulated as criminal offences. In order to illustrate the contradiction in adjecto we shall pose a question. What if an atheist or a Christian decides to rob a bank and commit a crime while wearing a black mask covering his face, how will a ban on the religious veil reduce the chances of this happening? In addition, the ban is even depicted as an arbitrary act especially when viewed from today's post-pandemic perspective, where it feeds the fear of the government intruding the right of privacy under the justification of "public safety". The measure was also deemed "inappropriate for a democratic society" by the Court regarding the *S.A.S. v. France* case. According to the Court, this blanket ban on the veil could only be validated as proportionate if there was an existent threat to public safety. France failed to demonstrate such a threat, furthermore, it forced women concerned to give up completely an element of their identity which they considered important.¹⁴

The second part of this argument was that there is a social hindrance towards the veil within the French society, which relies on facial recognition and expression in communication. In other words, they called upon the protection of the rights and freedoms of others as a legitimate basis

¹¹ Ibid, p. 120

¹² Human Rights Watch France: "*Submission to the National Assembly Information Committee on the full Muslim Veil on National Territory - Proposed public veil ban would violate fundamental rights*", 20 November 2009, <https://bit.ly/2Zlmtwt>

¹³ Burghartz, Susanna, *History Workshop Journal: Issue 1 "Covered Women? Veiling in Early Modern Europe"*, Volume 80, 23 September 2015, <https://bit.ly/3u3eaUr>

¹⁴ *S.A.S. v. France*, Application no. 43835/11, ECHR, 1 July 2014 <https://bit.ly/3u09yhz>

for the measure. And while this may be a reasonable and factual claim seeing how French culture is clearly incompatible with this practice, it by far overrides the notion of proportionality and poses a threat to what other practices could be muffled and trumped by this fairly flexible principle of “living together”. Therefore the result of this argumentation is an evident non sequitur, whereas France poses this as a dilemma where there are only two possible alternatives in this manner, from which they have chosen the lesser evil.

As one of the leading fears that seemed to justify this measure, and at the same time the third main argument, was the concern expressed for the growing number of Muslims in Europe, more specifically France, who posed a threat to the principle of *laïcité*, that is secularism. Namely, the presence of Muslims in Western Europe is constantly on the rise, so the purpose of the measure was not mainly aimed at preventing the wearing of the veil at the time of its adoption, since this was not a significant issue at the time, but rather to prevent a priori what may be an insoluble and fiery problem in the future, or to a greater extent a threat to national identity. This logic sets a dangerous precedent that explicitly states "modern" Europe will not tolerate minority practices whenever they are perceived as a threat. What is even more frightening is the fact that the measure is latently aimed at only one religion and sends the message that there is no place for Islamic fundamentalism in Christian Europe.

Despite attempts to pass this ban on as reasonable, it has apparently failed to hide its ambiguity. Namely, certain authors emphasize the fact that the ban on the veil in France was intended to slow down the flourishing of Islam in the country. Specifically, they go to say that the government's argument that the ban emancipates women and promotes gender equality may not be the real reason behind the ban. A critical review behind this phenomenon reveals that it may have been established because the appearance of the veil in Western societies is a symbol of the growing status and presence of Islam in them.¹⁵

Finally, a significant portion of the French government's arguments were refuted at the outset of the Covid19 pandemic, when face-covering became mandatory. This has made some of the claims seem paradoxical and subjected them to scrutiny. On that account, the veil ban mirrors an assimilationist understanding of Frenchness.¹⁶

III. AFTERMATH FROM BANNING THE VEIL

What inevitably followed the ban was further stigmatization and discrimination against Muslim women, which inevitably isolates them from the rest of the community, the exact opposite of what was desired when the measure was enacted. Even the Human Rights Committee reacted to France's approach, through individual cases.¹⁷ Unmistakably, the best indicator for these claims is the notorious *SAS v France*, where the Strasbourg institution failed to identify the breach and violation of human rights. Another example is the ruling in Luxembourg by the European Court of Justice in March 2017, where Asma Bounaoil was denied a complaint of discrimination. Namely, in 2008 she was fired for wearing a religious headscarf from the company "Micropole",

¹⁵ Chakraborti, N., & Zempi, I. (2012). The veil under attack: Gendered dimension of Islamophobic victimization. *International Review of Victimology*, 18(3), pp. 269-284.

¹⁶ Diallo, Rokhaya, Al Jazeera: “Coronavirus exposed the real reasons behind France’s ‘burqa ban’”, 15 May 2020, <https://bit.ly/2Zl94Vs>

¹⁷ UN rights experts: Sacking woman for wearing "Islamic veil" violated her freedom of religion, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23544&LangID=E>.

an act that the court did not assess as discrimination.¹⁸ Additionally, what was more frightening than the stigma itself, and what followed as an opportune reaction, was the intensified wave of jihadist terrorist attacks in Europe. These incidents were especially present in France, where 188 terrorism suspects were arrested in 2014, more than any other country combined.¹⁹ By contrast and in the manner of the aforementioned, the National Consultative Commission on Human Rights reported a rapid increase of anti-Muslim attacks since 2011, with 2015 being critical.²⁰ Although the interconnectedness of openly Islamophobic policies and the growing number of terrorist/jihadist attacks need to be further elaborated, their interplay is at least remotely conspicuous. Consequently, all this caused a continuous chain of action-reaction, which spins in a vicious circle resembling an impasse (dead end).

On the one hand, there are fears that Muslim fundamentalism will intensify if such prohibitions are not implemented, but on the other hand, the same prohibitions act as fuel for the already inflamed Islamic fundamentalism. It is argued that in fact, the increase of laws surrounding the banning of headscarves and other religious paraphernalia has led to an increase in not just the sales of headscarves and niqabs, but an increase in the current religiosity of the Muslim population in Europe: as both a product of and a reaction to westernization.²¹ The Islamic community, which is one of the most significant minorities on the European continent, feels threatened and rejected by these policies. Although many of their cultural practices are incompatible and problematic if experienced in the context of the modern European liberal society, this in no way justifies authoritarian decision-making where the majority simply disregards and bends the minority to its will, without including them in the decision-making process, as it so blatantly happened in France. In this regard, in two landmark decisions, the United Nations Human Rights Committee found that France violated the human rights of two women by fining them for wearing the niqab, a full-body Islamic veil. The Human Rights Committee received the two complaints in 2016 after two French women were prosecuted and convicted in 2012 for wearing articles of clothing intended to conceal their faces in public.²² Likewise, more findings show that victimization and discrimination against Muslims continued after the ban came into force, especially in the first years that followed, where a significant number of cases of assault and discrimination were identified.²³

The latest reigniting of the problem happened in 2019 after an incident where a Muslim mother who was volunteering on a school trip, was attacked by a far-right politician. He stated: “Madame has ample time to wear her veil at home, on the street, but not here, not today,” citing France’s values of secularism, known as *laïcité*.²⁴ What was more concerning was the French

¹⁸ Bougnaoui and ADDH, Case C-188/15, CJEU, 14 March 2017, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=170734>.

¹⁹ EUROPOL: “European Union Terrorism Situation and Trend report 2015”, ctp. 18-19 <https://bit.ly/3dfoYCh>.

²⁰ CNCDH: REPORT ON THE PREVENTION OF RACISM, ANTI-SEMITISM AND XENOPHOBIA, 2015, p. 10, https://www.cncdh.fr/sites/default/files/les_essentiels_-_report_racism_2015_anglais.pdf.

²¹ John W. Scott, *The Politics of the Veil*, Princeton University Press, 2007

²² United Nations Human Rights: OHCHR, *France: Banning the niqab violated two Muslim women’s freedom of religion* - UN experts, 23 October 2018, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23750&LangID=E>

²³ Amnesty International: “European Court ruling on full-face veils punishes women for expressing their beliefs”, 1 July 2014, <https://bit.ly/3rWVfiQ>.

²⁴ Aurelien Breeden, The New York Times: “Another Hijab Furor Hits France, Over a Mother on a School Trip”, 19 October 2019, <https://www.nytimes.com/2019/10/19/world/europe/france-hijab-school-trip-mother.html>

Minister of Education's statement that women wearing headscarves are not welcome and should be advised to take their garments off when in public. He went on to say that these women have enough time to wear their headscarves at home.²⁵ These events reopened the dreadful and obviously misconstrued question of the headscarf.

Parallel to these developments in France, reactions followed in Europe right after the first ban of religious symbols in 2004, when later in 2006, British Prime Minister Tony Blair described the face veil as a "mark of separation"²⁶. In this regard, an FT-Harris poll conducted in 2010 after the French ban on face-covering went into effect, an overwhelming majority in Italy, Spain, Germany and the UK expressed support for passing such bans in their own countries.²⁷ The trend on banning the veil followed in several European countries with the latest being Switzerland in 2021, where the veil ban was voted on a referendum.²⁸

IV. DEMYSTIFICATION OF OPPRESSIVE POLICIES THROUGH THE REFUGEE CRISIS

The icing on the cake was the refugee crisis of 2016 when Europe faced an influx of refugees migrating predominantly from Islamic countries. As a result, a strong right-wing Islamophobic movement emerged in Europe, part of which propagates a fascist ideology. The PEDIGA movement was a glaring example of how these phenomena are smouldering in the background of liberal Europe and are one of the many dangers that hide behind oppressive policies, such as the veil ban. This does not come as a surprise if we take into account the conflicting history of the European continent and its cultural paradigm that was strongly influenced by Christianity. Another identical manifestation of these oppressive policies was the minaret ban in mosques in Switzerland.²⁹ The message conveyed by this ban is no different from that of the veil, neither by the apologetic arguments that were offered in defence nor by its latent purpose, an attack against the Islamization of Europe, which Europeans ultimately fear. The new generation of Muslim migrants has intensified this fear and led to a "new" anti-immigrant hysteria on the continent, filled with xenophobia and frustration.

Therefore, while the frequency of these policies has become vividly present in the political discourse, little progress has been made in regards to the Muslim questions. In addition, despite the failure that France is facing in terms of receiving refugees, officials state that the country is open and stands in solidarity on this matter.³⁰ The real question raised is whether the "veil affair" will intensify in the near future and whose side will prevail this time?

²⁵ Angelique Chrisafis, *French education minister reignites row over Muslim headscarf*, *The Guardian*, 25 September 2019, <https://www.theguardian.com/world/2019/sep/25/french-education-minister-reignites-row-over-muslim-headscarf>

²⁶ *Blair's concerns over face veils* BBC News Online. 17 October 2006, http://news.bbc.co.uk/2/hi/uk_news/politics/6058672.stm.

²⁷ James Joyner, *French Burqa Ban Widely Supported in Europe*, New Atlanticist: Policy and analysis blog, 1 March 2010, https://web.archive.org/web/20130511091109/http://www.acus.org/new_atlanticist/french-burqa-ban-widely-supported-europe.

²⁸ BBC News: *The Islamic veil across Europe*, 31 May 2018,

<https://www.bbc.com/news/world-europe-13038095>;

DW: *Swiss narrowly pass Muslim 'burqa ban'*, 7 March 2021,

<https://www.dw.com/en/swiss-narrowly-pass-muslim-burqa-ban/a-56797836>.

²⁹ Swissinfo: "Switzerland's controversial minaret ban, ten years on", 29 November 2019, <https://bit.ly/2MYYIIh>.

³⁰ EURACTIV: "France commits to welcoming more refugees despite 'reception crisis'", 22 September 2020 <https://bit.ly/2OJFVKN>.

V. LIMITATIONS OF ARTICLE 9 AND THE MISSIONARY ROLE OF THE ECHR AS AN EXIT SOLUTION

The Strasbourg institution, rightly labelled as the most effective mechanism of international human rights, plays a key role in addressing this issue, performing as a "European Constitutional Court". This delicate matter and the need for intercultural dialogue can be traced back to the precedents set by the Strasbourg Court. The Court bears the burden of finding a solution that will satisfy both parties, that is, a well structured and well-argued approach to reduce the tension between the opposing sides.

The influence and authority that the Court enjoys in the field of human rights is indisputable, especially with regard to the interpretation of Article 9 on the limits of religious freedom. As an illustrative example, we have the *Sahin v. Turkey* verdict, which, in addition to provoking heated debates on both fronts and a series of incidents, also set a dangerous precedent from which other European countries drew practice.³¹ Therefore, as the number of Muslims is constantly growing, Europe will not be able to avoid this conflict by simply referring to the doctrine of the margin of appreciation. On the contrary, the Court should establish clear recommendations and guiding judgments on the margin of appreciation and its limitations in relation to Article 9, consequently increasing the predictability to the rights of individuals. Especially if taken into account that Article 9 is a provision without clear theoretical grounds and sufficient legal precedents, without a consensual guiding definition, and a highly unforeseeable future.

Besides, the increasing number of naturalized Muslims, who are also nationals of these countries, will inevitably bring these questions to the forefront of political dialogue, so as national systems face difficulties when dealing with these practices, it is up to the Court to fight this battle and to interpret the convention in the light of tolerance, democracy and coexistence in order to reach a consensus on this issue.

What the Court needs to amend is the general impression that Europe is practising distinct anti-Islamism, while invoking on the principle of secularism. A leading verdict in the opposite, harmful direction is the verdict in the case of *Lautzi and others v. Italy*.³² Namely, despite the obvious display of a religious symbol in a public institution, the Court refused to label it as wrong referring to the doctrine of margin of appreciation and interpreting the cross as a cultural symbol instead of a religious one, in a way favouring Christianity. Another such case is the *Otto Preminger Institute v. Austria*, which may also cast doubt on the ECHR's double standard policy. In particular, the Court's analogy was based on respect for religious feelings and religious peace stating, inter alia, that the seizure and forfeiture of the film were aimed at the protection of the rights of others, namely the right to respect for one's religious feelings, and at ensuring religious peace.³³ This hazardous policy of double standard in this case is perceived as an act of tyranny of the majority over a religious minority, specifically as a violation of the right of the latter to enjoy their cultural practices in the same way as the majority.

Another important step is the necessity of a special emphasis on women's rights in the whole debate so that the dialogue can be redirected from the cloak of progressive West and regressive Islam to the actual problem and real victims of this conflict, women and their rights. However,

³¹ Hilal E. *The Headscarf Controversy*, 2012, pp. 87-90.

³² *Lautsi v Italy*, (30814/06), ECHR, 3 November 2009, <http://hudoc.echr.coe.int/eng?i=001-95589>.

³³ *Otto Preminger Institut v. Austria*, (13470/87), ECHR, 20 September 1994

despite the Court's efforts, many of these dilemmas still need to be addressed through political dialogue between communities and to avoid such authoritarian prohibitions that, even if necessary, are incorrectly formulated and in an isolated way addressed to a vulnerable community making them feeble and fruitless. This establishes the Court's obligation to conclude that the ban does not improve the status of women in society and that the measure is too restrictive and the burden it carries is unnecessary in relation to its purpose.³⁴

VI. SUMMARY

The present paper analyses legislation and case-law surrounding religious attire in France, in the context of the European continent with its regional mechanisms, and how they affect the human rights of women and girls who wear the veil in France and in the broader context. It also more broadly analyses discrimination and violence experienced by women wearing the veil in the respective region. The paper is grounded in human rights norms and principles, namely: religious freedom, equality and non-discrimination as well as women's and girl's autonomy and choice as key concepts to fully understand the impact of the restriction analyzed.

It is clearly evident that the measures taken by the French government disproportionately affect Muslims, women in particular, despite their initial "neutrality". Instead of providing actual facts, French authorities largely weigh in with opinions masquerading as facts. However, what's more, troubling is their reasoning that the measure is not just necessary at the present moment but will serve as prevention for future conflicting situations regarding this topic. Therefore, the end result is an ultimatum which is arbitrarily forced upon women concerned. Islamic dress is also seen as a symbol of the existence of parallel societies, and the failure of integration.

As one of the most reasonable and pursuable arguments presented by the veil ban advocates is the emphasis put on the actual, real social barrier that this practice creates between westernized communities and Muslim women. Therefore, the paper does not contradict or neglect the problematic nature of this practice in Western countries, nor does it claim that the practice should be left out of discussion/s. Its goal is rather to clearly outline the hazardous effects caused by the strict measures and the aftermath it may lead to. Thus, the paper proposes another alternative approach, where this collision will be discussed and faithfully resolved in a peaceful and tolerant manner. The questions of fundamental rights, such as the right to freedom of thought and religion, should not be decided upon or limited in such an insensitive and autocratic manner, creating an ill feeling of abandonment by the law with subjects affected by the measures. This moralistic argumentation applies even more so in cases where the justification of the limitation does not satisfy the principle of proportionality, nor by the basis of its appropriateness nor by its necessity. In contrast, these kinds of attitudes as demonstrated by the states when regulating and constricting human rights may in themselves constitute a breeding ground for future tensions on this front.

Even the United Nations Human Rights Committee stated that the general criminal ban on the wearing of the veil in public introduced by the French law disproportionately harmed the petitioners' right to manifest their religious beliefs and that France had not adequately explained why it was necessary to prohibit this clothing. In particular, the Committee was not persuaded by France's claim that a ban on face-covering was necessary and proportionate from a security

³⁴ Nanwani, Shaira, Emory International Law Review: *The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?*, 25 Emory Int'l L. Rev. 1431 (2011) <https://bit.ly/3akq4kK>.

standpoint or for attaining the goal of "living together" in society. The Committee acknowledged that States could require that individuals show their faces in specific circumstances for identification purposes, but considered that a general ban on the veil was too sweeping for this purpose. The Committee also concluded that the ban, rather than protecting fully veiled women, could have the opposite effect of confining them to their homes, impeding their access to public services and marginalizing them."³⁵

In the same regard, the Strasbourg Court itself in the *S.A.S v. France* case stated that the lack of common ground between the member States of the Council of Europe as to the question of the wearing of the full-face veil in public places supported its finding that the State had a wide margin of appreciation. Even more so, the Joint Opinion of Judges Nussberger and Jaderblom regarding the *S.A.S v. France* case, referred to the problem more realistically and in a manner of Dworkin's theory of rights, in contrast of the Court's more "balancing and neutral" approach. They stated that the ban sacrifices concrete individual rights guaranteed by the Convention to abstract principles and that it is doubtful that the blanket ban on wearing a full-face veil in public pursues a legitimate aim. They go on to say that such a far-reaching prohibition, touching upon the right to one's own cultural and religious identity, is not necessary for a democratic society and that there indeed was a breach of Articles 8 and 9 of the European Convention on Human Rights.³⁶

In conclusion, during an intercultural dialogue in which a minority practice is at stake, for it to be fair and result in a positive outcome, or any outcome whatsoever that is not catastrophic at the very least, it must be established in the manner of tolerance, it must be bifocal that is, to take place in the light of mutual respect and understanding and to show that the majority has the patience to listen to the minority.³⁷

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