

## *S.A.S. v. France*: The Full-Face Veil as a Threat to Public Safety and the Protection of Others

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### I. OVERVIEW

The French government enacted a law that prohibited concealment of the face in public, including the Islamic full-face veil for women.<sup>1</sup> The applicant, a French national, is a devout Muslim woman who wears the *burqa* and *niqab* in accordance with her religion, culture, and personal convictions.<sup>2</sup> She wore the *niqab* in private and public spheres, but not systematically.<sup>3</sup> She wished to wear the *niqab* at her choosing, when most comfortable or spiritually inclined.<sup>4</sup> The Law 2010-1192 of 11 October 2010 “prohibited the concealment of one’s face in public places” and was enforced throughout France starting April 11, 2011.<sup>5</sup> In 2009, the Conference of Presidents of the National Assembly charged a parliamentary commission with the task of drafting a report on “the wearing of the full-face veil on national territory.”<sup>6</sup> The report found it “necessary to ‘release women from the subservience of the full veil.’”<sup>7</sup> Therefore, it promoted a three-prong course of action: “to convince, protect women, and to envisage a ban” of the full-face veil.<sup>8</sup> The Council

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1. *S.A.S. v. France*, App. No. 43835/11 Eur. Ct. H.R. para. 3, HUDOC (July 1, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466>.

2. *Id.* paras. 10-11.

3. *Id.* para. 12.

4. *Id.*

5. *Id.* para. 14.

6. *Id.* para. 15. The parliamentary commission was comprised of members from various parties. *Id.*

7. *Id.* para. 17.

8. *Id.* There were four proposals to accomplish the three-prong course of action. They were:

[F]irst, to adopt a resolution asserting Republican values and condemning as contrary to such values the wearing of the full-face veil; secondly, to initiate a general survey of the phenomena of amalgamation, discrimination and rejection of others on account of their origins or faith; thirdly, to reinforce actions of awareness and education in mutual respect and diversity and the generalizing of mediation mechanisms; and fourthly, to

of Europe created a resolution and a recommendation that led to the eventual enactment of a bill, which became Law 2010-1192.<sup>9</sup> The applicant brought suit against the French government, claiming that the ban deprived her of her option to wear the full-face veil in public.<sup>10</sup> She alleged there was a violation of articles 3, 8, 9, 10, and 11, together and separately from article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>11</sup> The suit was assigned to the European Court of Human Rights' (ECtHR) Fifth Section, and the French government was given notice of the suit against them on February 1, 2012.<sup>12</sup> On May 28, 2013, the Chamber of the Fifth Section relinquished their jurisdiction to the Grand Chamber.<sup>13</sup>

The French government brought three preliminary objections, which included (1) whether the applicant was a "victim," (2) whether the applicant had exhausted all domestic remedies, and (3) whether the applicant abused the right of individual application.<sup>14</sup> The court dismissed all three of the government's preliminary objections.<sup>15</sup> The allegations brought by the applicant included (1) a violation of article 3 of the ECHR, taken separately and together with article 14; (2) a violation of article 11 of the ECHR, taken separately and together with article 14; and (3) a violation of articles 8, 9, and 10 of the ECHR, taken separately and together with article 14.<sup>16</sup> The allegations that articles 3, 10, and 11 of the ECHR were violated were deemed inadmissible by the

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enact legislation guaranteeing the protection of women who were victims of duress

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*Id.*

9. *Id.* paras. 24-25, 27. The Resolution aforementioned is Resolution 1743 and was adopted on the same day as Recommendation 1927. Both will be discussed further. *Id.* para. 111.

10. *Id.* para. 3.

11. *Id.* The articles from the Convention for the Protection of Human Rights and Fundamental Freedoms include: article 3: Prohibition of Torture; article 8: Right to Respect for Private and Family Life; article 9: Freedom of Thought, Conscience, and Religion; article 10: Freedom of Expression; article 11: Freedom of Assembly; and article 14: Prohibition of Discrimination. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

12. *S.A.S.*, App. No. 43835/11, para. 4.

13. *See id.* para. 5. The composition of the Grand Chamber was determined in accordance with the provisions of article 27 paragraphs 2 and 3 of the ECHR and Rule 24. *Id.* para. 6. Article 27 is about the competence of single judges. ECHR, *supra* note 11, art. 27. Paragraph 2 states, "[t]he decision shall be final," and paragraph 3 states, "[i]f the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination." *Id.*

14. *S.A.S.*, App. No. 43835/11, paras. 53-68.

15. *Id.* para. 68.

16. *Id.* paras. 69-74.

court and dismissed.<sup>17</sup> The ECtHR *held* that Law 2010-1192 was not in violation of articles 8, 9, and 14 of the ECHR, and the law was upheld. *S.A.S. v. France*, App. No. 43835/11 Eur. Ct. H.R., HUDOC (July 1, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466>.

## II. BACKGROUND

The French values stated in the country's motto aid in the cohesion of the nation.<sup>18</sup> Liberty, equality, and fraternity represent the values of the Republic and connect the French to their history, destiny, and image.<sup>19</sup> The country never acted truer to its roots than when it created legislation under these principles.<sup>20</sup> As an increasing number of women were concealing their faces in public due to religious reasons, these values were called into question.<sup>21</sup> A bill before the French government stated, "[T]he wearing of the full veil is the sectarian manifestation of a rejection of the values of the Republic."<sup>22</sup> The bill went on to further describe that the voluntary and systematic concealment of the face was problematic because it was incompatible with the fundamental requirements of "living together," which the French society holds so dear.<sup>23</sup> This is an express rejection of "fraternity" as enumerated in the French motto, and thus has no place within the French territory and society.<sup>24</sup> The French National Assembly followed the Council of Europe's Resolution's stance on this radical practice that undermines the dignity and equality of women and that is incompatible with the values of the Republic.<sup>25</sup>

Resolution 1743 (Resolution) was adopted in 2010 to further the concept of gender equality of men and women as an argument in support of the ban.<sup>26</sup> Paragraph 14 of the Resolution calls on the Muslim community to abandon any and all traditional practices that may be interpreted as denying the equality of women and men.<sup>27</sup> Wearing the *burqa* or *niqab* is often viewed as a "symbol of subjugation of women to

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17. *Id.* paras. 71-73.

18. Projet de Loi No. 2520 du 19 mai 2010 [Bill No. 2520 of May 19, 2010], Treizième Légis. 3 (2010) (Fr.).

19. *Id.* The motto for the country of France is "liberté, égalité, fraternité." *Id.*

20. *Id.*

21. *Id.*

22. *Id.* (author's translation).

23. *Id.*

24. *Id.*

25. Eur. Parl. Ass., *Islam, Islamism and Islamophobia in Europe*, 23d Sitting, Res. No. 1743 (2010), available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1743.htm> [hereinafter Res. No. 1743].

26. *Id.*

27. *Id.* para. 14.

men,” which allows the role of women within society to be restricted.<sup>28</sup> The Resolution stated that discrimination against women, whether religious-based or not, goes against articles 8, 9, and 14 of the ECHR.<sup>29</sup> On the same day that the Resolution was implemented, the Council of Europe’s Recommendation 1927 (Recommendation) was adopted.<sup>30</sup> The Recommendation called for state members to establish a general ban of the full-face veil in order to protect women from physical and psychological duress and to protect their freedom of choice.<sup>31</sup> After the drafted law was compliant with the French Constitution, the National Assembly enacted it as Law 2010-1192 on October 11, 2010.<sup>32</sup>

Belgium and Spain addressed similar issues regarding women wearing the full-face veil in public prior to Law 2010-1192’s enactment in France.<sup>33</sup> The Belgian Law of June 1, 2011, “prohibit[ed] the wearing of any clothing entirely or substantially concealing the face” and included a criminal provision, which differed from the French law.<sup>34</sup> The criminal provision stated that any person who was found to be in a public place with their face partially or fully covered, enough to not be identifiable, was liable for a fine, imprisonment for one to seven days, or both.<sup>35</sup> A suit was brought against the Belgian government for unconstitutionality, and the Court of Cassation (the highest court in Belgium) approached the issue by examining three general aims: public safety, gender equality, and the concept of “living together.”<sup>36</sup> The Court dismissed the alleged violations of article 9 of the ECHR and, in turn, dismissed the suit, stating that the ground for appeal was unfounded.<sup>37</sup>

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28. *Id.* para. 15.

29. *Id.* para. 14.

30. Eur. Parl. Ass., *Islam, Islamism and Islmaphobia in Europe*, 23d Sitting, Recommendation No. 1927 (2010) available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1927.htm> [hereinafter Recommendation No. 1927].

31. *Id.* para. 3.13.

32. See *S.A.S. v. France*, App. No. 43835/11 Eur. Ct. H.R. para. 27, HUDOC (July 1, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466>; Loi 2010-1192 du 12 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 12, 2010 Prohibiting the Concealment of One’s Face in Public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344.

33. *S.A.S.*, App. No. 43835/11, para. 40.

34. *Id.* para. 41; Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage [Law Forbidding the Wearing of Any Clothing Covering the Face Completely or in a Significant Manner] of June 1, 2011, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], July 13, 2011, 41, 743.

35. *S.A.S.*, App. No. 43835/11, para. 41.

36. *Id.* para. 42; Cour constitutionnelle [CC] [Constitutional Court] decision no 145/2012, Dec. 6, 2012, <http://www.const-wurt.be> (Belg.).

37. *S.A.S.*, App. No. 43835/11, para. 42.

The Tribunal Supremo (Supreme Court of Spain) ruled upon such an issue on February 6, 2013.<sup>38</sup> The Court examined the aims of public safety and gender equality.<sup>39</sup> However, unlike the Belgian and French courts, the Supreme Court of Spain overturned the ban on the full-face veil.<sup>40</sup> The Court reasoned that it was not shown that wearing the full-face veil was detrimental to the interests of public safety, and whether or not wearing the veil was voluntary, it was hard to reconcile the practice with the principle of gender equality.<sup>41</sup> Therefore, the Court stated that whether wearing the full-face veil was voluntary or not, it was not possible to restrict a constitutional freedom based on the supposition that women who did wear the veil were under duress.<sup>42</sup>

Within article 8 of the ECHR is the aim that “there shall be no interference by a public authority” except what is “necessary in a democratic society.”<sup>43</sup> The ECtHR in *Dudgeon v. United Kingdom* examined the term “necessary”<sup>44</sup> and defined the word as “‘useful,’ ‘reasonable,’ or ‘desirable.’” More importantly, the court stated it implied the existence of a “pressing social need.”<sup>45</sup> When taken in the context of a democratic society, the court used this definition and implication.<sup>46</sup> The court in *Dudgeon* suggests that not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the reach in regard to the aim of the democratic society.<sup>47</sup> The ECtHR in *Norris v. Ireland* stated the same.<sup>48</sup> The *Norris* court added that the impugned legislation is “necessary in a democratic society” to support a larger legitimate aim of the society and community.<sup>49</sup> The court held that the interference into the private life of a homosexual man was not legitimate enough of an aim to prohibit such an activity in regard to the public sphere.<sup>50</sup> In *Modinos v. Cyprus*, the ECtHR drew from *Dudgeon* and *Norris* regarding another homosexual male applicant who

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38. *Id.* para. 43; S.T.S., Feb. 6, 2013 (No. 4118/2011) (Spain).

39. *S.A.S.*, App. No. 43835/11, para. 47.

40. *Id.* paras. 44-45.

41. *Id.* para. 47.

42. *Id.*

43. ECHR, *supra* note 11, art. 8.

44. *Dudgeon v. United Kingdom*, App. No. 7525/76 Eur. Ct. H.R. para. 51, HUDOC (Oct. 22, 1981), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473>.

45. *Id.*

46. *Id.* para. 53.

47. *Id.* para. 52.

48. *Norris v. Ireland*, App. No. 10581/83 Eur. Ct. H.R., HUDOC (Oct. 26, 1988), <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57547>.

49. *Id.* para. 44.

50. *Id.* paras. 46-47.

claimed a violation of article 8.<sup>51</sup> In *Modinos*, the court held that article 8 was violated because the interference unjustly peered into the applicant's private life.<sup>52</sup> The reasoning was the same as in *Dudgeon* and *Norris*, and the court stated that the interference caused by the legislation was unwarranted and not necessary to protect the democratic society.<sup>53</sup>

To address the next aim in question, the ECtHR in *Phull v. France* questioned whether requiring a man to remove his turban in an airport security check constitutes a justifiable interference under this aim.<sup>54</sup> The court examined the second paragraph of article 9 of the ECHR to resolve the issue.<sup>55</sup> The court held that security checks were undoubtedly necessary to the public safety, and therefore this interference was within the provision of article 9.<sup>56</sup> The court also held that the implementation of such bans in regard to security checks, such as requiring a man to remove his turban, were within the state's reach to ensure public safety.<sup>57</sup>

The ECtHR in *El Morsli v. France* again addressed the issue of "public safety."<sup>58</sup> The facts of this case involved security checks and whether an individual was required to remove face-concealing clothing.<sup>59</sup> Here, the court followed the ruling of *Phull*, without any departure.<sup>60</sup> It was within the state's reach to ensure the public safety in a democratic society by requiring a woman to remove her veil for a security check, regardless of whether the attendant was female or not.<sup>61</sup>

In *Von Hannover v. Germany*, the ECtHR addressed the more in-depth question of whether the expansion of the "zone of interaction" is necessary for public safety in a democratic society.<sup>62</sup> The court in *Von Hannover* stated that there is a "zone of interaction" of one person with another, even in the public context, that may fall within the private life of

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51. *Modinos v. Cyprus*, App. No. 15070/89 Eur. Ct. H.R. para. 25, HUDOC (Oct. 26, 1988), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57834>.

52. *Id.* paras. 24-26.

53. *Id.*

54. *Décision sur la Recevabilité [Admissibility Decisions]*, *Phull v. France*, App. No. 35753/03 Eur. Ct. H.R. 2, HUDOC (Nov. 1 2005), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77018>.

55. *Id.* at 2-3.

56. *Id.* at 3.

57. *Id.*

58. *El Morsli v. France*, App. No. 15585/06 Eur. Ct. H.R. para. 1, HUDOC (Mar. 4, 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117860>.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Von Hannover v. Germany* (No. 2), App. Nos. 40660/08, 60641/08 Eur. Ct. H.R. para. 95, HUDOC (Feb. 7, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109029>.

the individual.<sup>63</sup> This extended the scope of the article 8 protection beyond the family life to include social dimensions.<sup>64</sup>

Lastly, the French Court of Cassation was called upon to address a case on appeal about a woman who was ordered to attend a two-week citizenship course as punishment for wearing the full-face veil with the intent to protest Law 2010-1192.<sup>65</sup> In a decision from March 2013, the Court of Cassation upheld the ban.<sup>66</sup> The Court's reasoning was that even though article 9 of the ECHR guaranteed the exercise of the freedom of thought, conscience, and religion, paragraph 2 stipulated that such freedoms may be stifled and limited as prescribed by law and that such restriction is necessary for public safety in a democratic society.<sup>67</sup>

### III. COURT'S DECISION

In the noted case, the ECtHR carefully considered the facts brought by the applicant in light of Law 2010-1192 and the prohibition to conceal one's face in public.<sup>68</sup> The issue was whether the law violated articles 8 and 9 of the ECHR, taken together and separately with article 14.<sup>69</sup> The ban on wearing clothing designed to conceal one's face raised two questions in regard to articles 8 and 9.<sup>70</sup> The right to respect private life was addressed under article 8. The court concluded that the ban on wearing such clothing does fall within the scope of article 8, and it did not violate the article.<sup>71</sup> Article 9 addressed one's freedom to manifest their beliefs in what they choose to wear.<sup>72</sup> The court concluded that

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63. *Id.*

64. *Id.* para. 98.

65. S.A.S. v. France, App. No. 43835/11 Eur. Ct. H.R. para. 34, HUDOC (July 1, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466>; Cour de cassation [Cass.] [supreme court for judicial matters] crim., Mar. 5, 2013, No. 12-82852 (Fr.) The Court of Cassation is the highest court in the French judiciary. They have jurisdiction over all matters triable in the justiciable stream with the scope of certifying questions of law and review in determining miscarriages of justice and whether the law was applied correctly. *About the Court*, COUR DE CASSATION, [https://www.courdecassation.fr/about\\_the\\_court\\_9256.html](https://www.courdecassation.fr/about_the_court_9256.html) (last visited Mar. 25, 2015).

66. *See S.A.S.*, App. No. 43835/11, para. 34.

67. *Id.*

68. *See id.* para. 106.

69. *Id.* Prior to ruling on the alleged violations of articles 8 and 9, the court dismissed the French Government's three preliminary objections, the alleged violation of article 3, the alleged violation of article 10, and the alleged violation of article 11. The three preliminary objections included (1) whether the applicant is a "victim," (2) whether the applicant exhausted all domestic remedies, and (3) whether the applicant abused the right of individual application. *Id.* paras. 53-68.

70. *Id.* paras. 107, 110.

71. *Id.*

72. *Id.* para. 108.

article 9 does not protect every act motivated or inspired by a religion or belief and it does not guarantee the right to behave in the public sphere in the same manner as one behaves in the private sphere.<sup>73</sup>

In order to determine whether a personal choice falls within the scope of article 8 of the ECHR, the court must answer whether there was an interference regarding the notion of private life.<sup>74</sup> The court in the noted case found that the personal choice of the applicant's "desired appearance, whether in public or in private places, relate[d] to the expression of . . . her personality and thus fall[s] within the notion of private life."<sup>75</sup> Once it was determined that a personal choice falls within the notion of private life, the court had to decide if the ban had an interference on her private life, which was ensured by article 8, paragraph 1.<sup>76</sup> An interference on a person's private life was best defined as either being forced to choose between complying with the ban, thus refraining from dressing in accordance with one's religion, or facing criminal prosecution if that person refused to comply with the ban.<sup>77</sup> In the noted case, there was an interference on the private life of the applicant.<sup>78</sup> The applicant was forced to either abide by the law, which banned the full-face veil in public, or face criminal charges.<sup>79</sup>

Only after the applicant established an interference on her private life did the court examine whether the interference was justified under article 8, paragraph 2.<sup>80</sup> The first step was to decipher whether the interference was "prescribed by law."<sup>81</sup> In the noted case, the court found that sections 1, 2, and 3 of Law 2010-1192 prescribed the limitation alleged by the applicant.<sup>82</sup> The second step was to determine whether the

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73. *Id.* para. 125.

74. Admissibility Decision, *Kara v. United Kingdom*, App. No. 36528/97 Eur. Ct. H.R. para. 2, HUDOC (Oct. 22, 1998), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-4438>.

75. *S.A.S.*, App. No. 43835/11, para. 107.

76. *Kara*, App. No. 36528/97, para. 2.

77. *See Dudgeon v. United Kingdom*, App. No. 7525/76 Eur. Ct. H.R. para. 41, HUDOC (Oct. 22, 1981), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5743>.

78. *S.A.S.*, App. No. 43835/11, para. 110.

79. *Id.*

80. *Id.*; *see Kara*, App. No. 36528/97, para. 2. Article 8, paragraph 2, states:

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ECHR, *supra* note 11, art. 8.

81. *See S.A.S.*, App. No. 43835/11, paras. 111-112.

82. *Id.* Law 2010-1192 reads:



interference pursued a legitimate aim.<sup>83</sup> For the interference to be compatible with the ECHR, the ban must pursue an aim of the French government.<sup>84</sup> The two aims of the government are “public safety,” as enumerated in article 9 of the ECHR, and to ensure the “respect for the minimum set of values of an open and democratic society.”<sup>85</sup> The former aim was linked to the “protection of the rights and freedoms of others,”<sup>86</sup> and the value in question was as such within the meaning of the second paragraphs of articles 8 and 9.<sup>87</sup> The court focused on this aim, and it found that under certain conditions, the “respect for the minimum requirements of life in society” or “living together” could be linked to the legitimate aim of the “protection of the rights and freedoms of others.”<sup>88</sup> The third and final step was to determine whether the interference was justified under article 8, paragraph 2, and whether the measure was necessary in a democratic society.<sup>89</sup> Here, the court in the noted case examined article 9 more in depth than article 8, regarding the democratic

Section 1

“No one may, in public places, wear clothing that is designed to conceal the face.”

Section 2

I.—For the purposes of section 1 hereof, ‘public places’ comprise the public highway and any places open to the public or assigned to a public service.

II.—The prohibition provided for in section 1 hereof shall not apply if the clothing is prescribed or authorised by primary or secondary legislation, if it is justified for health or occupational reasons, or if it is worn in the context of sports, festivities or artistic or traditional events.”

Section 3

“Any breach of the prohibition laid down in section 1 hereof shall be punishable by a fine, at the rate applying to second-class petty offences . . . .

An obligation to follow a citizenship course, as provided at paragraph 8° of Article 131-16 of the Criminal Code, may be imposed in addition to or instead of the payment of a fine.”

Loi 2010-1192 du 12 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 12, 2010 Prohibiting the Concealment of One’s Face in Public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p.18344, *translated in S.A.S.*, App. No. 43835/11, para. 28.

83. *See S.A.S.*, App. No. 43835/11, para. 113.

84. *See id.*

85. *Id.* paras. 114-115.

86. *Id.* para. 116.

87. *Id.* para. 117. Article 9, paragraph 2, states:

Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ECHR, *supra* note 11, art. 9.

88. *S.A.S.*, App. No. 43835/11, para. 121.

89. *See id.* para. 123.

necessity.<sup>90</sup> As stated in article 9, freedom of thought is one of the foundations of a “democratic society.”<sup>91</sup> However, article 9 requires a distinction between the conduct of the religion and the belief in the religion itself.<sup>92</sup> Article 9 is “concerned with the fundamental convictions which guide a person’s conduct and not with the conduct itself.”<sup>93</sup> As the court in the noted case stated, article 9 does not protect every act motivated by a religion, and it does not always guarantee the right to act in a public space “in a manner which is dictated by one’s religion or beliefs.”<sup>94</sup> Behind the court’s reasoning on a “democratic society” was the thought that “pluralism, tolerance and broadmindedness [were the] hallmarks of a ‘democratic society,’” and democracy does not mean that the views of the majority must always prevail.<sup>95</sup> “[A] balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”<sup>96</sup>

In addition to the court’s ruling on article 8, the court examined the alleged violation of article 9 of the ECHR.<sup>97</sup> The court first examined the supposition that the women in question wore the full-face veil under duress, and the court found this impertinent.<sup>98</sup> The court further examined whether the impugned interference was “necessary in a democratic society” for public safety.<sup>99</sup> The court understood that an individual state might find it necessary to have the ability to identify individuals in order to prevent potential dangers for the safety of the general public.<sup>100</sup> Therefore, the court found that article 9 was not violated by instances in which there was an obligation to remove clothing with a religious connotation in the context of security checks and for

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90. *See id.*

91. *Id.* para. 124. That freedom allows an individual to hold or not to hold religious beliefs and to practice or not practice how they feel inclined to. *Id.*

92. *Arrowsmith v. United Kingdom*, App. No. 7050/75 Eur. Ct. H.R. para. 41, HUDOC (June 12, 1979), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104188>.

93. *Id.* para. 41.

94. *S.A.S.*, App. No. 43835/11, para. 125.

95. *Young v. United Kingdom*, App. Nos. 7601/76, 7806/77 Eur. Ct. H.R. para. 63, HUDOC (Aug. 13, 1981), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57608>.

96. *Id.*

97. *S.A.S.*, App. No. 43835/11, para. 136.

98. *Id.* para. 137.

99. *Id.* para. 138.

100. *Id.* para. 139.

identification.<sup>101</sup> Security checks were held to be undoubtedly in the interest of public safety within the meaning of the provision.<sup>102</sup>

The court then examined the second question, raised regarding the alleged article 9 violation, which aimed to ensure the observance of the minimum requirements of life in society as part of the “protection of the rights and freedoms of others.”<sup>103</sup> The court found that the ban imposed by Law 2010-1192 was viewed as proportionate to the aim of “protection of the rights and freedoms of others,” namely as the condition of “living together” was an element of such.<sup>104</sup> The French government sought to protect the principle of interaction between individuals in society, as well as to protect and support tolerance and broadmindedness, all of which are required for a democratic society.<sup>105</sup> The court upheld this idea and that the limitation imposed by the ban of the full-face veil could be regarded as “necessary in a democratic society.”<sup>106</sup>

The applicant alleged a final violation, which was the question of article 14 taken together and separately from articles 8 and 9.<sup>107</sup> The court reiterated that the general policy may disproportionately have a prejudicial effect on one particular group, even when it was not aimed at that group and does not harness a discriminatory intent.<sup>108</sup> The ban purported by Law 2010-1192 was one such example, and while it may be considered that it had a negative effect on Muslim women who choose to wear the full-face veil, this measure had objective and reasonable justifications, which, as discussed above, outweigh such possible side effects.<sup>109</sup> Therefore, the court held that article 14 was not violated.<sup>110</sup>

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101. *E.g.*, Décision sur la Recevabilité [Admissibility Decisions], Phull v. France, App. No. 35753/03 Eur. Ct. H.R. 3, HUDOC (Nov. 1, 2005) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77018>.

102. *Id.*

103. *S.A.S.*, App. No. 43835/11, para. 140.

104. *Id.* para. 157.

105. *Id.* para. 153.

106. *Id.* para. 158.

107. *Id.* paras. 160-162. Article 14 reads, “The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” ECHR, *supra* note 11, art. 14.

108. *S.A.S.*, App. No. 43835/11, para. 161.

109. *Id.* The objective and reasonable justifications include the legitimate aims of articles 8 and 9, which include the “public safety” and “protection of the rights and freedoms of others.” *Id.* paras. 117-118.

110. *Id.* para. 162.

## IV. ANALYSIS

The ECtHR approached the suit brought against the French government in a way that seems to go against the goals of human rights agencies, as well as the trend in Europe as a whole. The court created inconsistencies in their discussion, analysis, and decision in the case that involved the *burqa* and *niqab* ban brought by the French national. They began with the “protection of the rights and freedoms of others,” as stated so prominently in both articles 8 and 9.<sup>111</sup> Both articles contain this phrase, making its emphasis greater. However, in upholding the ban on the full-face veil, France is choosing one group’s rights and freedoms over another. Additionally, the portion of the French population that does not identify with the Islamic faith does not have a right to dictate what those who do participate are permitted to do or not do.

Another peculiar suggestion of the court is that the National Assembly was only asked to draft a report on the “wearing of the full-face veil on national territory” when more Muslim women entered France and became citizens.<sup>112</sup> This occurred in the last fifteen years.<sup>113</sup> The National Assembly seems to imply that because of the recent insurgence of Muslim immigrants into France, the practice of wearing a *burqa* and *niqab* had to be addressed.<sup>114</sup> To further drive this point, the countries that have not had a recent growth in their Muslim population have not taken any action to create a ban on the *burqa* and *niqab*.<sup>115</sup> In the case of France, if their goal was to promote secularism throughout the country, this ban should have been enacted before the recent past; in other words, it should have been enacted whether there was a current phenomena in the growth of the Islamic population or not.<sup>116</sup> This would allow the law to stand in its own right as an independent act from the country of France and not as a response to a “problem” within the country.<sup>117</sup>

When examining the motive behind the court’s decision, it must be questioned whether the court simply had their desired decision in mind prior to hearing the full arguments and trial before them. Law 2010-1192 was passed and enacted in a very controversial and tense time in the

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111. ECHR, *supra* note 11, arts. 8-9.

112. *See S.A.S.*, App. No. 43835/11, paras. 15-16.

113. *Id.* para. 16.

114. *Id.*

115. *Id.* These countries include the Czech Republic, Bulgaria, Romania, Hungary, Latvia, and Germany. *Id.*

116. *Id.*

117. *Id.*

world's history. With the recent aggression towards Muslims and the Islamic faith,<sup>118</sup> which has been emphasized since the September 11, 2001, attacks on the World Trade Center buildings in New York City, it is not a far leap to assume the French government wanted to enact this law as a way of stifling the religion that has grown substantially within the country in the past fifteen years. The ECtHR took the French government's side in ruling for their law, and the court's reasoning is one that seems stretched in order to create the outcome the court had predetermined, even if that predetermination was subconscious.

After the ECtHR examined the noted case, the Commissioner for Human Rights of the Council of Europe published a "Viewpoint" stating his opinion on the issue at hand.<sup>119</sup> This Viewpoint, in essence, disagreed with the court's decision. In the Viewpoint, several possible adverse effects were discussed that all support overturning Law 2010-1192.<sup>120</sup> The very first sentence of the Viewpoint stated that the prohibition of the *burqa* and *niqab* will likely oppress Muslim women within France more than liberate them.<sup>121</sup> It may lead to their future exclusion and alienation within European societies due to the fact that they may not leave their houses if they are not allowed to wear the full-face veil in public.<sup>122</sup> The Commissioner also addressed the meaning of respect within the ECHR and that this ban lacks such respect for people and their beliefs.<sup>123</sup> Europe seeks to uphold its traditions of tolerance and democracy and such a ban is foreign to these European values.<sup>124</sup> The Commissioner thus urged for the promotion of a multicultural dialogue and a respect for human rights instead of tearing them down.<sup>125</sup>

In light of the decision from this court, policy concerns include the possibility of violence from Muslim women and men who will protest the decision and the implications this ban will have on other religions and religious symbols. In regard to possible protests and violence that may occur, as aforementioned, the French Court of Cassation already reviewed a case on appeal from a woman who was punished for wearing the full-face veil in protest of the ban.<sup>126</sup> Though there was no violence in

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118. Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 33 (2009).

119. *S.A.S.*, App. No. 43835/11, para. 37.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* para. 34.

this case, there is always a possibility that protests may become violent once the police become involved, or they may begin with violence; that is dependent on the individuals initiating the protests and those involved. This is a serious concern that the French government should consider when moving forward with the ban, especially now since the court has upheld it.

Another policy concern is the possible implications on other religions in the name of “public safety” and “protection of the rights and freedoms of others.” For example, crucifixes may soon be banned as well because they may imply violence or encourage other drastic forms of punishment, as the image of Jesus nailed to a cross does. If the court stretches the article of the ECHR to allow the ban of a *burqa* and *niqab*, the possibilities are endless in regard to which religions and religious symbols may be affected.

## V. CONCLUSION

Law 2010-1192 brings to light an important international issue, which has been discussed numerous times all over the world. The French government utilizes arguments that are a stretch in order to argue that “prohibiting the concealment of one’s face in public places” should be upheld by the court. The government relies on “public safety” and “protection of the rights and freedoms of others” to convince the court to uphold a law that in turn takes away the rights and freedoms of other citizens within the country. The applicant called this her “Jekyll and Hyde personality” and averred that she is forced to act like a prisoner within her own home if she chooses to wear the *burqa* and *niqab*.<sup>127</sup> I agree with the applicant’s concession that during regulation security and identification checks the full-face veils should be removed. Furthermore, to ban the full-face in all public spheres holds a discriminatory aspect that does not seem necessary in the French society. The court, as discussed above, does address the discriminatory nature that the ban may impose. However, I do not believe the court relies enough on other parts of the ECHR in order to allow the applicant a chance to fight for her rights in a democratic society. For example, article 11, paragraph 1, which allows for the freedom of assembly and association may be utilized to support the applicant in stating that the full-face veil represents her freedom of association with her religion.<sup>128</sup> However, the court dismissed the alleged violation of article 11 brought by the

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127. *Id.* para. 73.

128. *Id.*

applicant. Additionally, because the Resolution and Recommendation calls for state members to establish a general ban to “protect [women’s] free choice to wear religious or special clothing,” the ban takes away such a freedom the Resolution purportedly advocates.<sup>129</sup>

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129. Recommendation No. 1927, *supra* note 30, para. 3.13; Res. No. 1743, *supra* note 25.

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