

The Burqa Challenge to Europe

by Paul Cliteur and Machteld Zee

In the summer of 2014, the European Court of Human Rights (ECHR) upheld previously passed French legislation, popularly known as the “burqa ban.”¹ In doing so, it accepted the argument that the public wearing of this Islamically-connected full-body and face veiling violated a core value of French society, the principle of “living together” (*le vivre ensemble*). A review of how the court arrived at this conclusion, and what other arguments against the burqa it chose to ignore, may offer clues as to what forebodes for European Union societies and their relations with burgeoning Muslim populations.



In the summer of 2014, the 47 justices of the European Court of Human Rights upheld previously passed French legislation, popularly known as the “burqa ban.” While women in Muslim-majority countries had been progressively un-veiling for most of the twentieth century, this practice has reversed due to the Islamist resurgence of the last four decades.

To Cover or Not to Cover?

The ECHR’s decision originated in an application against the French Republic lodged with the court under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on April 11, 2011.²

¹ The term burqa is used in this article interchangeably with *niqab*. The difference between the two veils is that niqab covers the entire face with a small space cut out for the eyes while burka has a mesh over the eye opening.

² Law no. 43835/11.

The applicant, known only by her initials, S.A.S., is a Pakistani-born French national, who, according to her testimony, is a devout Muslim and wears the full-body and face veil. She claimed to do so in accordance with her Islamic faith, her culture, and her personal convictions, and she emphasized that neither her husband nor any other member of her family put pressure on her to dress in this manner.³

The burqa is a recent phenomenon in the West, virtually unseen before the year 2000, but, some ten years later, donned by approximately 1,900 women in France. The practice is controversial, not only due to its extreme nature but also because some Muslims question whether it is truly Islamic. The four Sunni schools of jurisprudence differ regarding the obligation for women to cover their face, with the Hanbali school, prevalent in Saudi Arabia, the strictest observer. For their part, Shiite Muslims do not believe that the face of a Muslim woman is a part of the body that needs to be covered in public although Iran's current theocratic rulers insist that women wear the chador, a cloak that leaves the face open, in public. In Turkey, Lebanon, Tunisia, Malaysia, and before the civil war, in Syria, the face veil has been subjected to bans, mostly in public and educational institutions, as it is considered to run counter to national values and traditions.⁴ Yet while women in Muslim-majority countries had been progressively un-veiling for most of the twentieth

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It is in the West that the most outspoken

Muslim critics of full-face veiling are active. Sihem Habchi, for example, president of the French feminist movement *Ni putes ni soumises* (Neither whores nor submissives)⁵ has stated passionately and categorically: "As a woman, as a French citizen, and as a Muslim woman, I demand that the Republic protect me from the vilest fanaticism that is infecting our public space."⁶ These sentiments were echoed by French Muslim women's rights activist Fadela Amara who wrote that it "is a mistake to see the veil as only a religious issue. We must remember that it is first of all a tool of oppression, alienation, discrimination, and an instrument of men's power over women. It is not an accident that men do not wear the veil."⁷ Thus in the eyes of burqa opponents, the state must fulfil its positive obligation to protect human rights: Women should be made safe from severe pressure to cover.

At the same time, women, including many converts, voluntarily choose to cover their faces. When the French burqa prohibition came

³ *S.A.S. v. France*, European Court of Human Rights, Strasbourg, France, July 1, 2014, para. 10-12.

⁴ For an overview of burqa bans in Islamic countries, see Phyllis Chesler, "[Ban the Burqa? The Argument in Favor.](#)" *Middle East Quarterly*, Fall 2010, pp. 33-45.

⁵ Fara Amara and Sylvia Zappi, *Breaking the Silence: French Women's Voices from the Ghetto*, trans. Helen H. Chenut (Berkeley: University of California Press, 2006), originally published under the title *Ni Putes Ni Soumises (Neither Whore nor Submissive)*.

⁶ André Gérin, et al., *Rapport d'Information* (Paris: Assemblée Nationale, Jan. 2010), p. 324.

⁷ Karima Bennoune, "Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality under International Law," *Columbia Journal of Transnational Law*, May-Aug. 2007, pp. 390-1.

into force on April 11, 2011, S.A.S. found herself in a dilemma: Either obey the ban and compromise her personal beliefs, or ignore it and risk criminal charges in the form of a €150 fine. Instead, she decided to put her faith in Strasbourg.

“*Vivre Ensemble*”

When the ECHR rendered its decision, it essentially echoed the reasoning found in the “Gérin report” of 2010. This derived from a June 2009 decision by the conference of presidents of the French National Assembly, which established a parliamentary commission comprising members from various parties and presided over by the left-wing politician André Gérin, with the task of drafting a report on “the wearing of the full-face veil on national territory.” In January 2010, the commission published its findings on the topic based on interviews with more than two hundred witnesses and experts.

The report criticized the practice as being “at odds with the values of the Republic,” as expressed in the maxim “*liberté, égalité, et fraternité*” (liberty, equality, and fraternity), and of violating the fundamental French value of *laïcité* or secularism.⁸ Full-face veiling, it argued, infringed on the principle of liberty by being a symbol of subservience that negated both principles of gender equality and the equal dignity of human beings. Moreover, by setting up a significant barrier to contact with others, this practice was a denial of fraternity and a flagrant infringement of the French principle



The most outspoken Muslim critics of full-face veiling are active in the West where the ability to speak one’s mind is protected by the state. French Muslim Fadela Amara, a women’s rights activist, wrote that it “is a mistake to see the veil as only a religious issue. ... it is first of all a tool of oppression, alienation, discrimination, and an instrument of men’s power over women.”

of living together (*le vivre ensemble*).⁹ An explanatory memorandum accompanying the burqa ban bill states that the “voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of ‘living together’ in French society” and that the “systematic concealment of the face in public places, contrary to the ideal of fraternity ... falls short of the minimum requirement of civility that is necessary for social interaction.”¹⁰ Hiding one’s face in general—not just by means of a burqa—therefore, is at odds with the “respect for the minimum requirements of life in society,” and banning the full veil can be linked to the legitimate aim of the “protection of the rights and freedoms of others.”¹¹

⁸ Gérin et al., [Rapport d’Information](#).

⁹ [S.A.S. v. France](#), para. 17.

¹⁰ [Ibid.](#), para. 25 and 141.

¹¹ [Ibid.](#), para. 121.

Individuals in France thus have the human right to live in a society where one is not confronted with face covering veils in public spaces.

To establish a social bond, every person must be able to see everyone else's face.

The bill was supported by the National Assembly's Delegation on the Rights of Women and Equal Opportunities and was formulated in general terms—as the Gérin committee had advised—thereby deflecting a legal debate on religious freedom. What became law no. 2010-1192 was passed by the National Assembly on July 13, 2010, with 335 votes in favor, one against, and three abstentions, and shortly thereafter, by the Senate on September 14 with 246 votes for and one abstention. On October 7, France's Constitutional Council ruled that the ban was compliant with the constitution, and thus the law was enacted on October 11, 2010.

The plaintiff then took her case to the ECHR in the hope of having the bill overturned. On July 1, 2014, the Grand Chamber, the ultimate court within the ECHR released its verdict, supporting the French prohibition.

The court extensively cited past jurisprudence on religious freedom and acknowledged that the ban had indeed a significant negative impact on the lives of those women who had chosen to wear the veil for religious reasons.¹² But it concluded that the ban did not violate the right to respect for private life (Article 8 ECHR), freedom of religion (Article 9 ECHR), or freedom of expression (Article 10 ECHR). The decision hinged on the notion of *vivre ensemble* as being a sufficient and compelling enough factor to enable the

French to ban the burqa without violating the convention.¹³ It agreed with the French rationale that the social bond that

citizens form with one another is an essential foundation of democracy. To establish that social bond, it is imperative that every person be able to see everyone else's face. This argument is detached from the religious aspect of face veiling and encompasses every form of face concealment in a public setting.

Accusations of "Islamophobia"

Although the final rationale for the burqa ban centered around the secular values that had been an integral part of the French Republic since its inception, both critics and supporters of the ban raised additional arguments to buttress their case, and it is instructive to look at them since they may play a role in future decisions or challenges to the current one.

Many critics claimed that the push for a ban was actually a manifestation of "Islamophobia." Coined in the late 1980s, the term gained greater currency after the 1997 publication of a British report, "Islamophobia: A Challenge for Us All,"¹⁴ and was widely adopted by Muslim advocacy groups after the 9/11 terror attacks in reaction to the worldwide critical focus on Islam and Islamism.

¹² *Ibid.*, para. 146.

¹³ Frances Raday, "[Professor Frances Raday Comments on SAS v France](#)," *Oxford Human Rights Hub*, University of Oxford, Oxford, July 19, 2014.

¹⁴ While the word "phobia" suggests fear, the term has commonly referred to "dread or hatred of Islam—and, therefore, to fear or dislike of all or most Muslims." "[Islamophobia: A Challenge For Us All](#)," Commission on British Muslims and Islamophobia, British Runnymede Trust, London, 1997, p. 1.



Demonstrators protest against the French ban on burqas. The decisive argument for the ban was that the burqa represented a denial of French fraternité by setting up a significant barrier to contact with others and thus was a flagrant infringement of the French principle of living together (le vivre ensemble).

There were several submissions by outside parties in the *S.A.S. v. France* case that stated that the French ban was an “Islamophobic” and populist reaction to a minority already facing tough times in an increasingly intolerant Europe. For instance, Thomas Hammarberg, commissioner for Human Rights of the Council of Europe, was cited as arguing that the prohibition would lead to further exclusion of the Muslim community and that it had not been proven that burqa-wearers “are victims of more gender repression than others.”¹⁵ Likewise, Amnesty International asked the ECHR to examine the case, contending that the debate surrounding the ban and the ban itself reinforced “negative stereotypes and Islamophobia.”¹⁶

¹⁵ *S.A.S. v. France*, para. 37; see, also, Thomas Hammarberg, *Human Rights in Europe: No Grounds for Complacency. Viewpoints by Thomas Hammarberg* (Strasbourg: Council of Europe Publishing, 2011), pp. 39-43.

¹⁶ *S.A.S. v. France*, para. 98.

Although the court upheld the ban, it did not ignore this argument altogether. In its own words, “the Court is very concerned by the indications of some of the third-party interveners to the effect that certain Islamophobic remarks marked the debate.” Additionally, it claimed that “the debates surrounding the drafting of the bill may have upset part of the Muslim community, including some members who are not in favour of the full-face veil being worn.”¹⁷

While some proponents of the “Islamophobia” charge may be motivated by true concern for anti-Muslim discrimination, there is another, pernicious side to the ledger that the court seemed to ignore, namely, the common use of “Islamophobia” to silence and defame legitimate criticism of Islam and Muslims. There is absolutely no reason why Muslim beliefs should be spared the free and vigorous debate, including abrasive lampooning and ridicule, to which Christians, Jews, atheists, or any other group have long been subjected. In a free society, Muslims and Islam should not be exempted on the grounds of some sense of fear or hostility unless that critique takes the form of incitement to hate and/or violence. Nor does favoring a burqa ban mean ipso facto hostility to Islam. The overwhelming majority of Muslim women do not wear burqas while many abhor it because it gives Islam a bad name. Numerous Muslim intellectuals, men and women, have spoken up in favor of a ban and have done so in

¹⁷ *Ibid.*, para. 148-9.

Muslim-majority countries as well.¹⁸ One can only wonder whether the court is aware of the implicit message it is sending: first, that “Islamophobia” is a phenomenon deserving recognition by Europe’s highest court, and second, that fierce (and at times uncivil) debate can be so upsetting to one bloc of people—which the court has lumped together based on their cultural heritage regardless of individual differences—that the rights of free expression of individuals, who are the actual carriers of the liberties that the Convention for the Protection of Human Rights bestowed upon them, may be trampled upon.

The other anti-veiling argument maintains that such garb is a threat to public safety.

“the Salafists’ banner”¹⁹ and does not consider it to be “clothing.”²⁰ Others have derided full-face veiled women as “the Trojan horse of extremist

Islamism ... the cloth hides not only a face but secret intentions as well: to attack secularism and impose Islamic rule.”²¹ Seen from this perspective, banning the burqa—as well as outlawing Nazi uniforms—is a justified act of “militant democracy,” that is, the use of legal restrictions on political expression and participation in order to stop anti-democratic political groups and movements from gaining currency.²²

The other anti-veiling argument, articulated most prominently by American political commentator and historian Daniel Pipes, maintains that such garb is a threat to public safety. Both in his personal writings and in the archives of Islamist Watch, a project of the Middle East Forum, which he heads, Pipes has documented cases worldwide involving crimes committed by

A Threat to Civil Society?

There are two other arguments, cited in the Gérin report and the French bill’s accompanying explanatory memorandum, that the ECHR chose to dismiss. The first contention is that Islamist women wear burqas (or Islamist men put women under pressure to wear burqas) as a way of expressing solidarity with and identifying themselves as adherents of a specific, political belief system. This makes the outfit not just an expression of religion but a political statement informed by a totalitarian ideology.

French philosopher Élisabeth Badinter, for example, has called the burqa

¹⁸ See, for example, Lydia Girous, *Allah est grand la République aussi* (Paris: J.C. Lattès, 2014); idem, *#Je suis Marianne* (Paris: Grasset, 2016); Mona Elthahawy, *Headscarves and Hymens: Why the Middle East Needs a Sexual Revolution* (New York: Farrar, Straus and Giroux, 2015); BBC, July 19, 2010.

¹⁹ Salafism is an ultra-orthodox movement within Sunni Islam that condemns any innovations or changes to the faith that are perceived as deviating from the practices of the prophet Muhammad and his earliest followers.

²⁰ André Gérin, et al. (Gerin Commission), *Mission d’information sur la pratique du port du voile intégral sur le territoire national* (Paris: Assemblée Nationale, Sept. 2009); Gérin, et al., *Rapport d’Information*, p. 104.

²¹ Sylvie Tissot, “[Excluding Muslim Women: From Hijab to Niqab, from School to Public Space.](#)” *Public Culture*, Winter 2011, p. 43.

²² Paul Cliteur and Bastiaan Rijpkema, “The Foundations of Militant Democracy,” in Afshin Ellian and Gelijn Molier, eds., *The State of Exception and Militant Democracy in a Time of Terror* (Dordrecht: Republic of Letters Publishing, 2012), pp. 227-73.

burqa-clad perpetrators. There are more than one hundred cases listed, including incidents of child abduction, robbery, bombings, murder, theft, acid attacks, and suspects evading justice under the cover of this garment (most notably the 1937 flight from Palestine of the notorious Jerusalem mufti, Hajj Amin Husseini).²³

In the explanatory memorandum accompanying the burqa ban bill, the French government made the case that in certain situations the practice of concealing one's face in a public setting could represent a danger to communal safety.²⁴ Concealing one's identity would certainly hamper any criminal investigation. The public safety argument is not then tied to any religious aspect of full face-veiling, nor is it relevant whether or not the burqa is worn voluntarily. Everyone needs to show their face, and this would include covering them by means of helmets, masks, theatrical make-up, and so forth. The European Court agreed that freedom of religion would not be unjustly compromised if individuals had to show their faces "in the context of security checks" and on identity photos for official documents. A blanket ban for this reason, however, was deemed overkill and

"proportionate only in a context where there is a general threat to public safety."²⁵

Yet, as Pipes' database makes eminently clear, security considerations are far from hypothetical, for the simple reason that "one cannot allow faceless and bodyless persons walking the streets, driving cars, and otherwise making use of public places; the dangers are too great."²⁶ Indeed, the Belgian government seems to fully subscribe to this view. Rather than wait for burqa-donning criminals to strike, it chose public safety as one of the main reasons for its 2012 ban of the burqa, and the Belgian Constitutional Court concurred.²⁷



There is a well-documented concern that the burqa is a threat to public safety. Worldwide, there have been more than one hundred cases of criminals hiding under the burqa to perpetrate murders, child abductions, acid attacks, bombings, and robberies like the one attempted on this British shopkeeper in 2013.

²³ Daniel Pipes, "[Niqabs and Burqas as Security Threats](#)," *DanielPipes.org*, Mar. 7, 2002, updated Jan. 11, 2015.

²⁴ *S.A.S. v. France*, para. 25.

²⁵ *Ibid.*, para. 139.

²⁶ Pipes, "[Niqabs and Burqas as Security Threats](#)."

²⁷ Jelle Flo and Jogchum Vrieling, "[The constitutionality of the Belgian burqa ban](#)," *OpenDemocracy.net* (Manchester, N.H.), Jan. 14, 2013.

Conclusion

The drafters of the Gérin report, and subsequently French legislators, and ultimately, the ECHR had a difficult task in deciding on the best arguments for banning the burqa. Despite the generalized formulation concerning the covering of one's face used in the laws eventually adopted, it would be disingenuous to ignore the fact that the ban is at least occasioned by the appearance of burqa-draped Muslims on the streets of Europe.²⁸

But despite an acceptance of cultural and religious differences on the part of Europe's elites—an acceptance that may not necessarily be shared by the European “man on the street” who views the burqa as yet one of the foremost manifestations of the continent's growing Islamization—tolerance toward the full-face covering has reached its limit at least in France and Belgium. *Vivre ensemble*—the principle of “living together”—was the one ground the European Court of Human Rights latched on to as a means of upholding the French burqa ban despite other equally significant arguments. By setting aside other similarly important, yet perhaps more politically sensitive arguments, such as gender equality, human dignity, or the outlawing of Islamist symbols, the court followed the carefully constructed

French reasoning, which sought to disentangle the issue from the claims of religious discrimination.

This ruling paves the way for more European countries to ban full-face veiling, as demonstrated by the 2015 banning of face-covering Islamic veils in schools, hospitals, and public transportation in Netherlands.²⁹ As Western European societies are overwhelmed by a tidal wave of Muslim immigration, it remains to be seen how widespread this ban will become.

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²⁸ Koen Lemmens, “Larvatus Prodeo? Why concealing the face can be incompatible with a European conception of Human Rights,” *European Law Review*, Jan.-Feb. 2014, pp. 47-71.

²⁹ *The Guardian* (London), [May 22, 2015](#).