

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 43835/11 – *S.A.S. v. France*

WRITTEN COMMENTS OF THE OPEN SOCIETY JUSTICE INITIATIVE

INTRODUCTION

1. This case presents important questions regarding the extent to which European States can restrict the clothing worn by individuals, absent a compelling justification, where that dress is an expression of personal identity and religious belief. These written comments address the following issues:
 - *A. Comparative Practice.* A review of the provenance and status of comparative bans on full-face veils in Belgium, Germany, Italy, and the Netherlands, demonstrating that the French law at issue in this case¹ imposes more stringent restrictions than the laws of other countries except Belgium.
 - *B. Proportionality.* A review of the appropriate justifications that may be invoked for controls on wearing clothing, and the evidence upon which any such ban should be based.
 - *C. Unveiling the Truth Report.* The Open Society Foundations study *Unveiling the Truth* indicates that Muslim women in France wear the full-face veil as part of their personal search for identity and an expression of their Muslim faith, rather than because of coercion.

A. COMPARATIVE PRACTICE

2. The number of women who wear a full-face veil in non-Muslim majority countries in Europe is exceedingly small.² The French government estimates that 1,900 women wear the veil in France and some estimates place the number as low as 400.³ Throughout Western Europe, “well below half of one per cent of the Muslim population” wears a full-face veil.⁴
3. Nonetheless, in connection with rising anti-Muslim sentiment, bans on the full-face veil have been implemented nationally or locally not only in France, but also in Belgium, Germany, Italy, the Netherlands and Spain.⁵
4. Bans on the full-face veil have been widely criticized within the Council of Europe as compromising the very principles of the Convention system.

¹ *Loi no. 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public*, JORF n°0237, 12 October 2010, p. 18344 (“Law no. 2010-1192 - Act prohibiting concealment of the face in public space”).

² In this submission, “full-faced veil” encompasses the *burqa* (a loose outer garment that covers the entire body, including the face and has a mesh screen covering the eyes), the *niqab* (a veil that covers a woman’s hair and face, leaving only the eyes clearly visible), and the *sitar*, which is similar to the burqa. The French usage of *voile integrale* also encompasses the burqa, niqab and sitar. The “full-face veil” is to be distinguished from the *hijab*, which covers the hair, ears, and neck, leaving the face uncovered, or the *jilbab/jelbab*, sometimes referred to as an *abaya*, which has the appearance of a long loose-fitting coat that covers the whole body except the face. See Open Society Foundations, At Home in Europe Project, *Unveiling the Truth: Why 32 Muslim Women Wear the Full-face Veil in France*, April 2011 (“OSF, *Unveiling the Truth*”), at page 9, available at http://www.soros.org/initiatives/home/articles_publications/publications/unveiling-the-truth-20110411

³ OSF, *Unveiling the Truth*, at page 11.

⁴ Ralph Grillo and Prakash Shah, *Reasons to Ban? The Anti-Burqa Movement in Western Europe*, Max Planck Institute for the Study of Religious and Ethnic Diversity, Working Paper 12-05, p. 9, available at http://www.mmg.mpg.de/fileadmin/user_upload/documents/wp/WP_12-05_Grillo_Reasons-to-Ban.pdf.

⁵ EU Agency for Fundamental Rights, *Respect for and protection of persons belonging to minorities 2008-2010*, (2011), available at http://fra.europa.eu/fraWebsite/attachments/FRA-Report-Respect-protection-minorities-2011_EN.pdf; see also Amnesty International, *Europe: Choice and prejudice: a summary: Discrimination against Muslims in Europe*, 24 April 2012, available at <http://www.amnesty.org/en/library/asset/EUR01/002/2012/en/d9765dfe-058c-4edf-a15d-5cc31da93c06/eur010022012en.pdf> (documenting surge in anti-Muslim sentiment in Belgium, France, Netherlands, Spain and Switzerland).

- Thorbjørn Jagland, Secretary General of the Council of Europe, considers bans on the full-face veil to “miss the point of European democracy and human rights” and “feed on irrational, populist fear of difference, fear of the unfamiliar.”⁶
 - Thomas Hammarberg, the Council of Europe’s recently-retired Commissioner for Human Rights, said such bans would not liberate oppressed women but might instead lead to their further alienation. In his view, “a general ban on such attire would constitute an ill-advised invasion of individual privacy”, raising “serious questions about whether such legislation would be compatible with the European Convention on Human Rights.”⁷
 - The Council of Europe’s Parliamentary Assembly voted unanimously to “Call on member states not to establish a general ban of full veiling or other religious or special clothing.”⁸
5. The following comparative review reveals that only France and Belgium have adopted bans on wearing the full-face veil in all public areas, while other countries impose bans with more limited application.

France

6. The legislative history of the law demonstrates that the intent was to regulate the *burqa* and *niqab*, which were specifically identified as the target of the ban. As then-President Nicolas Sarkozy declared in a speech to the National Assembly in 2009, “The burqa is not welcome on the territory of France,” as “[t]he burqa is not a religious sign; it is a sign of subservience, a sign of debasement.”⁹ Jean-François Copé, the majority leader of the National Assembly at the time, defended the ban in a *New York Times* op-ed, calling the veil a “blow against the dignity of women.”¹⁰
7. The *exposé des motifs* accompanying the draft law upon its introduction to the *Assemblée Nationale* on 19 May 2010 stated that the aims of the law were to promote public order and gender equality, and to preserve the principles underlying the French state.¹¹ The parliamentary impact study declared that the veil “annihilates the identity of women” who wear it.¹²
8. After objections to the law were raised in the early stages of drafting the Prime Minister asked the *Conseil d’Etat* for an opinion on the “legal grounds for a ban on the full veil” which should be “as wide and effective as possible” while “not offending our Islamic compatriots.”¹³ The *Conseil d’Etat* carried out an extensive assessment of the legality of the proposed ban and issued a 50-page advisory opinion on 25 March 2010, which found that:
- Enacting a law banning full face covering veils would be unconstitutional unless limited to situations including those involving public security, age verification, polling stations, and appearances at city hall. (pages 33, 41)
 - Reliance on dignity and gender equality “do not seem appropriate in this instance since they cannot be applied to persons who have deliberately chosen to wear the full veil.” (page 23)
 - Public safety cannot be relied upon “to require everybody to have their faces uncovered at all times and in all places.” (page 35)
 - “Secularism could not provide the basis for a general restriction on the expression of religious convictions in the public space” (page 20)
9. Despite this advice the Minister of Justice presented a draft bill to the *Assemblée Nationale*. It was adopted on 14 September 2010, and confirmed by the *Conseil Constitutionnel* on 8 October

⁶ Thorbjørn Jagland, Secretary General of the Council of Europe, 7 July 2010,

http://www.coe.int/t/secretarygeneral/sg/Opeds_jagland/20100707_burqa_en.asp

⁷ Thomas Hammarberg, then Council of Europe Commissioner for Human Rights, 8 March 2010, available at http://www.coe.int/t/commissioner/Viewpoints/100308_en.asp

⁸ Parliamentary Assembly of the Council of Europe, Recommendation 1927 (2010), 23 June 2010,

<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1927.htm>

⁹ Address to the Senate and the National Assembly, Versailles, 22 June 2009. Full text of the speech available at http://www.rfi.fr/actufr/images/114/22_06_Congres1.pdf.

¹⁰ Jean-François Copé, *Tearing Away the Veil*, N.Y. Times, 5 May 2010, at A31.

¹¹ *Projet de loi interdisant la dissimulation du visage dans l’espace public: Exposé des Motifs*, Bill No. 2520, 19 May 2010, available at <http://www.assemblee-nationale.fr/13/projets/pl2520.asp>.

¹² *Ibid*, *Etude d’impact*, at 3.

¹³ *Conseil d’Etat, Study of possible legal grounds for banning the full veil* (25 March 2010), at page 7.

2010, on condition that an exception be carved out for wearing of face-concealing garments in places of worship.¹⁴ The law came into effect on 11 April 2011, after a six-month period of “education” to explain to women already wearing full-face veils the consequences of their continuing to do so.¹⁵

10. The French ban is far-reaching and punitive. It provides that “No one shall, in any public space, wear clothing designed to conceal the face”¹⁶ and defines public space “as composed of the public highway and premises open to the public or used for the provision of a public service.”¹⁷ Any person defying the ban is subject to a fine of €150 and/or required to complete a citizenship course in order to remind the convicted person of “republican values of tolerance and respect for human dignity, and to raise awareness of [her] penal and civil responsibility and duties imposed by life in society.”¹⁸
11. In addition, the law also imposes heightened punishments for any person who forces another to wear a veil, specifying fines of €30,000 and imprisonment for up to one year (the fine and prison sentence increase to €60,000 and two years if the person forced to wear the veil is a minor). These written submissions do not address the separate offence of coercing another to wear a veil.
12. As of 31 March 2012, one year after the ban was implemented, the French Ministry of Interior reports that 299 women have received a fine for wearing the full-face veil, and 354 women have been stopped and asked for visual identification.¹⁹

Belgium

13. In Belgium, a national ban on wearing the full-face veil in public entered into effect in July 2011. The ban provides that individuals who appear in places accessible to the public with their face covered or concealed, fully or partially, in a manner in which they may not be identified, will be fined between €15 and €25 and/or imprisoned for one to seven days.²⁰
14. While the Belgian law is facially neutral, its legislative history makes clear that the intent of many lawmakers was to target the *burqa* which they argued was an affront to the principles of civility, living together, sociability and gender equality. Much of the debate focused on the perceived incompatibility of the *burqa* and Belgian values.²¹

Germany

15. Germany presently has no national ban on the full-face veil; however, eight of 16 Länder have enacted laws prohibiting teachers from wearing particular visible items of religious clothing and symbols in public schools.²² The laws do not explicitly target Islamic dress, but the laws in five Länder make exceptions for clothing and symbols linked to Christianity or other Western traditions, and the legislative histories demonstrate an intention to target Islamic dress.²³

¹⁴ Conseil Constitutionnel, *Decision no. 2010-613DC of 7 October 2010*, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en2010_613dc.pdf.

¹⁵ Law no. 2010-1192 - Act prohibiting concealment of the face in public space, Article 5.

¹⁶ *Ibid.*, Article 1 (“Nul ne peut, dans l’espace public, porter une tenue destinée à dissimuler son visage.”)

¹⁷ *Ibid.*, Article 2.I (“l’espace public est constitué des voies publiques ainsi que des lieux ouverts au public ou affectés à un service public”)

¹⁸ Ministry of Justice, *Le stage de citoyenneté*, available at <http://www.justice.gouv.fr/justice-penale-11330/les-peines-11336/le-stage-de-citoyennete-16412.html>.

¹⁹ Interview of Pierre-Henri Brandet, spokesperson for the Minister of Interior, 11 April 2012, available at <http://www.lefigaro.fr/flash-actu/2012/04/10/97001-20120410FILWWW00564-loivoile-300-femmes-verbalisees.php>.

²⁰ Article 563bis, *Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage of 1 June 2011*, *Moniteur Belge*, 13 July 2011, page 41734.

²¹ Leen Dierick, *Rapport fait au nom de la Commission de l’Intérieur, des Affaires Générales, et de la Fonction Publique*, Doc. 53 (0219/004), at 5-13, 18, 20 (Apr. 18, 2011).

²² See “Kopftuchverbot Für Lehrkräfte in Deutschland”, Institut für Europäisches Verfassungsrecht, Trier University, available at <http://www.uni-trier.de/index.php?id=24373>

²³ Human Rights Watch, “Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany” (2009), at page 25, available at http://www.hrw.org/sites/default/files/reports/germany0209_webwcover.pdf

Italy

16. Italian courts have interpreted a 1975 national anti-terrorism law that forbids masks or clothing preventing identification of the wearer to contain an exception for religious garments.²⁴ In June 2008, the Council of State refined the exception by finding that it would be sufficient for “those who wear a veil [to] remove it upon request by public security authorities for security reasons, allowing personal identification of the person concerned.”²⁵
17. The Italian Parliament is considering a blanket ban resembling the French law, but it has not yet been passed. In August 2011, the Constitutional Affairs Committee approved a bill that would modify the 1975 law “specifically prohibiting the use of the *burqa* and *niqab* and any other accessory that prevents recognition of the person’s face.”²⁶ The Committee expressly singled out the *burqa* and *niqab* and dress worn by women in the Islamic community.²⁷ If enacted, the law would impose a fine of €100 to €300 on anyone wearing the *burqa* or *niqab* in any public place.

The Netherlands

18. In the Netherlands, in September 2011 the Prime Minister announced plans to ban full-face veils in public, including in schools, hospitals and on public transportation as part of an “integration policy based on Dutch values” and in order to address feelings within the general public of insecurity purportedly caused by the full-face veil.²⁸ Women who violated the law would be fined up to €380.
19. In 2007, the Dutch Council of State had rejected an earlier proposal to ban the *burqa* or *niqab* in public on the basis that there was insufficient justification for a general public ban. The Council of State observed that there was not a sufficiently clear connection between the wearing of the *burqa* and the emancipation of Muslim women, that a ban could in fact increase the social isolation of women who chose to wear a full-face veil, and was not a proportionate response to any security threat, and would therefore contravene Article 9 of the ECHR.²⁹
20. In response to the 2011 draft law, the Council considered that the government could not decide on behalf of women whether they wished to wear a full-face veil, but that this should be left to the women themselves, that any feelings of insecurity purportedly created amongst the public by those who wear a full-face veil did not justify a general ban, and that any particular security concerns were already addressed in other specific regulations.³⁰

Spain

21. Starting in 2010, twelve Catalan municipalities enacted measures prohibiting the *burqa* in municipal buildings or while carrying out municipal duties.³¹ A prohibition was also adopted in other Spanish Autonomous Communities such as Andalucía, where the municipality of Coin banned the use of the *niqab* in public buildings. At the national level, the *Senado* voted on 23 June 2010 to ban the use of the *burqa* and the *niqab* in public spaces including streets,³² but the proposed law was rejected by the *Congreso de los Diputados* on 20 July 2010 out of concern that the law could lead to the regulation of Catholic religious symbols.³³

²⁴ 22 Maggio 1975 n. 152 (1975 Law), “Provisions for the Protection of Public Order.”

²⁵ Council of State, Judgment No. 3076 of 19 June 2008.

²⁶ Disegno Di Legge [Bill] N. 2343, Modifica all’articolo 5 della legge 22 maggio 1975, n. 152, available at <http://www.senato.it/service/PDF/PDFServer/BGT/00509744.pdf>

²⁷ Chamber of Deputies, XVI Legislature, Prohibition of wearing garments called burqas and niqab, <http://nuovo.camera.it/701?leg=16&file=AC0378B>.

²⁸ Government of the Netherlands Press Release, *Integration Policy Based on Dutch Values*, June 17, 2011, available at <http://www.government.nl/documents-and-publications/press-releases/2011/06/17/integration-policy-based-on-dutch-values.html>.

²⁹ Dutch Council of State, *Response to the Proposal of Mr. Wilders and Fritsma for Public Burqa Ban*, 21 September 2007 available at <https://zoek.officielebekendmakingen.nl>.

³⁰ Dutch Council of State, Advice, 28 November 2011 (published on 6 February 2012), available at http://www.raadvanstate.nl/adviezen/zoeken_in_adviezen/zoekresultaat/?advicelib_id=10095.

³¹ EU FRA, note 5 above, at page 61 (internal citations omitted).

³² *Ibid.*

³³ *See* El País, CiU apoya al PP en el último minuto para aprobar el veto al 'burka' en el Senado, 23 June 2010, available at http://sociedad.elpais.com/sociedad/2010/06/23/actualidad/1277244003_850215.html.

B. PROPORTIONALITY

22. The French ban was justified on the basis of (1) public order, (2) gender equality, and (3) secularism, each of which must be considered according to the principles of proportionality established by the Court, which require that the restriction is not excessive in relation to the needs and interests that give rise to it, and that sufficient evidence is adduced to support the assertions made.
23. In relation to Article 8 the Court has established that “the margin of appreciation left to the authorities will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights. Since Article 8 concerns rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community, where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant”.³⁴
24. Article 9(2) only permits states to interfere with the “freedom to manifest one’s religion or belief”, rather than all of the rights in Art.9(1). States must take account of “the need to maintain true religious pluralism, which is vital to the survival of a democratic society.”³⁵ While a wide margin of appreciation may be granted to states seeking to preserve a constitutional protection for secularism when designing policies restricting the manifestation by pupils of their religious beliefs on school premises³⁶ this case law does not extend to a general ban in all public spaces.³⁷
25. In considering Article 14, the treatment need not amount to a violation of Article 8 or 9, but need only “fall within the ambit of one or more of the Articles of the Convention”.³⁸ Where the government seeks to justify a difference in treatment, they must provide a convincing explanation as to how the general interest relied upon is served by the interference complained of.³⁹ The scope of the margin of appreciation “will vary according to the circumstances, the subject matter and the background” of the issue. However, “very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention”.⁴⁰ Where the difference of treatment is on the basis of religion, the Court has found that “[n]otwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable.”⁴¹ The Court has also held that “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.”⁴²

1. Public safety and national security

26. Public safety was proffered as a justification for the full face ban by the French legislature which considered that a full face cover “could constitute a danger to public security and ignores the minimum requirements of life in society”.⁴³ The parliamentary impact study accompanying the law identified the need to address more effectively the specific problem of “violent acts committed by persons in balaclavas at the margins of public assemblies”⁴⁴
27. The Court “has spoken out in strong terms against any generalised linkages between religious groups and violence threatening peace and security” unless there is a “threat sufficient to warrant restrictions”.⁴⁵ While it is largely for the Member States to define the elements of national security, “[t]he individual must be able to challenge the executive’s assertion that national security is at stake. While the executive’s assessment of what poses a threat to national security

³⁴ *Yordanova and Others v. Bulgaria*, ECtHR, Judgment of 24 April 2012, at para. 117.

³⁵ *Bayatyan v. Armenia*, ECtHR (GC), Judgment of 7 July 2011, at para. 122.

³⁶ *Dogru v. France*, ECtHR, Judgment of 4 December 2008, at para.7.1

³⁷ *Ahmet Arslan and Others v. Turkey*, ECtHR, Judgment of 23 February 2010, at para.50

³⁸ *E.B. v. France*, ECtHR (GC), Judgment of 22 January 2008, at para. 47.

³⁹ *Larkos v. Cyprus*, ECtHR, Judgment of 18 February 1999, at para. 31.

⁴⁰ *Stec and Others v. UK*, ECtHR (GC), Judgment of 12 April 2006, at para. 52.

⁴¹ *Hoffmann v. Austria*, ECtHR, Judgment of 23 June 1993, at para. 36.

⁴² *D.H. and Others v. Czech Republic*, ECtHR (GC), Judgment of 13 November 2007, at para.176.

⁴³ Conseil Constitutionnel, *Decision no. 2010-613DC*, note 14 above, “que le législateur a estimé que de telles pratiques peuvent constituer un danger pour la sécurité publique”.

⁴⁴ *Etude d’impact*, note 12 above, at 3.

⁴⁵ Malcolm Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, at pages 92-93.

will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of ‘national security’ that is unlawful or contrary to common sense and arbitrary.”⁴⁶ In *Manoussakis and Others v. Greece*, involving the refusal of permission to use a building for religious events, Judge Martens in a concurring opinion warned that where freedom of religion is at stake, “public order arguments may easily disguise intolerance.”⁴⁷

28. Where public order is relied upon as a justification for an interference with a Convention right, the Court requires that the State must demonstrate “direct, concrete evidence” when considering whether a particular response is proportionate. In *Palau-Martinez v. France*, the Court rejected assumptions about a religion’s presumed negative impact on a child, without concretely adducing evidence to that effect:

“42. The Court notes firstly that the Court of Appeal ... asserted only generalities concerning Jehovah’s Witnesses. It notes the absence of any direct, concrete evidence demonstrating the influence of the applicant’s religion on her two children’s upbringing and daily life ... the Court considers that the Court of Appeal ruled *in abstracto* and on the basis of general considerations ... Although relevant, that reasoning was not in the Court’s view sufficient.”⁴⁸

As a result, the Court found that the removal of a child as a result of a domestic court decision based on observations of a general nature about Jehovah’s Witnesses was a disproportionate and discriminatory interference with Article 8.

29. In a case under Article 5 where it was argued that releasing an individual would lead to “social disturbance”, the Court concluded that this factor could only be taken into account in exceptional circumstances, and “can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused’s release would actually disturb public order.”⁴⁹
30. In the instant case, the *Conseil Constitutionnel* appears only to have relied upon the assertion by the government that the full-face veil *could* constitute a danger to public security, without referring to any evidence.⁵⁰ The *Conseil d’Etat* was critical of using a blanket ban approach to address public order and security needs that had not arisen:

“Public security, which constitutes the main component of substantive public policy, could not provide a basis for a general ban on the full veil alone. Indeed, the full veil as such **has yet to give rise to** any particular public security problems, public policy problems or violent reactions that would justify a general ban.”⁵¹

2. Gender Equality

31. Proponents of the ban argued that it was necessary for the promotion of women’s equality and dignity, by criminalizing both the women who choose to wear the veil and anyone who forces them to do so.⁵² Central to this proffered objective is the claim that many, if not most, women who wear the veil are coerced to do so, rather than by their own free choice. In January 2010 the cross-party Parliamentary Commission to Study Wearing of the Full Veil in France issued a 658-page report on its findings, which served as an important step in furthering the campaign to adopt the ban. The report concluded, in part, that the full-face veil “flouts the principle of gender

⁴⁶ *Al-Nashif v. Bulgaria*, ECtHR, Judgment of 20 June 2002, at para.124.

⁴⁷ *Manoussakis and Others v. Greece*, ECtHR, Judgment of 26 September 1996, Concurring Opinion of Judge Martens, at para. 6.

⁴⁸ *Palau-Martinez v. France*, ECtHR, Judgment of 16 December 2003, at para. 43.

⁴⁹ *Letellier v. France*, ECtHR, Judgment of 26 June 1991, at para. 51.

⁵⁰ *Conseil Constitutionnel, Decision no. 2010-613DC*, note 14 above.

⁵¹ Note 13 above, at page 23, above (emphasis added). The *Conseil d’Etat* suggested a more narrowly tailored alternative: “[A] person cannot conceal his face when he/she needs to be identified in order to guarantee the safety of goods and persons, prevent or prosecute infringements of the law, and more generally ensure respect for legal and regulatory provisions that make access to goods and services dependent upon personal attributes (identity, age, gender, etc.)” (at pages 12-13). See also OSF, *Unveiling the Truth*, above, at 13 (“All of the women interviewed responded positively and without hesitation when asked whether they would identify themselves by unveiling their faces. Only three women said that they would ask for a woman to identify them.”).

⁵² See National Assembly, *Exposé des Motifs*, note 11 above, at 6.

- equality,”⁵³ a proposition that ultimately surfaced as one of the principal justifications for the ban.
32. Under the Convention, States may “treat differently persons whose situations are significantly different,” where there exists an “objective and reasonable justification” to do so.⁵⁴ This means that disadvantaged groups may be treated differently in order to correct a pre-existing disadvantage.⁵⁵ However, any specific measures taken to correct “factual inequalities” between men and women must function to gradually equalize the perceived imbalance and may not be permanent.⁵⁶
 33. In *Sahin*, the Court accepted that the need to promote gender equality in a secular educational environment could be a justification for an interference with Article 9, in a country where headscarves were seen as a “compulsory religious duty ... where the majority of the population ... adhere to the Islamic faith”, and in a context where “extremist political movements” were seeking to “impose on society as a whole their religious symbols and conception of a society founded on religious precepts”.⁵⁷ The Court declined to follow this approach in *Dogru v. France*: although gender equality was proposed as a justification for a headscarf ban in public schools, the Court relied instead on the protection of secularity in such establishments.⁵⁸ More recently, in *Arslan*, the Court was of the view that attaching a “special importance” to the role of the national decision making bodies concerning the relationship between state and religions, as approved in *Sahin*, was not appropriate when considering a ban in public spaces, rather than official or educational establishments.⁵⁹
 34. In cases where measures aimed to achieve positive discrimination have been challenged, the Court has examined statistical evidence of the “factual inequality” to ensure that the difference in treatment is objectively justified. In *Stec and Others v. UK*, which considered the disparity of pensionable ages between men and women, the Court considered statistical evidence of the gradual “development of parity in the working lives of men and women” over the previous 40 years, but found that the precise timing and process for equalizing pensionable ages fell within the State’s margin of appreciation.⁶⁰ In *Runkee and White v. UK*, the Court applied this reasoning to widow’s benefits, another measure aimed at achieving economic parity between men and women. Because the statistical evidence demonstrated that “the comparative disadvantage of women in the labour market had by no means disappeared,” the Court found no violation of the Convention.⁶¹
 35. The need for sufficient evidence to justify an interference with a Convention right was emphasized by Judge Tulkens in a dissenting judgment in *Sahin*, highlighting the fact that any “pressing social need” used to justify an interference must be demonstrated by “indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears.... [T]he Court’s case-law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples” (at para.5). Judge Tulkens concluded that the headscarf “does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to” (at para.11).
 36. The perceived inequality used to justify the French ban has not been quantified, and the legislative history does not provide concrete evidence that women are disadvantaged by the full-

⁵³ National Assembly, *Rapport d’information fait en application de l’article 145 du reglement au nom de la mission d’information sur la pratique du port du voile integrale sur le territoire national*, 26 January 2010, at 87, available at <http://www.assemblee-nationale.fr/13/pdf/rap-info/i2262.pdf>.

⁵⁴ *Thlimmenos v. Greece*, ECtHR, Judgment of 5 April 2000, at para. 44.

⁵⁵ See, e.g., *Stec and Others v. UK*, ECtHR (GC) Judgment of 12 April 2006, at paras. 51, 61-62 (no prohibition under Article 14 from treating groups differently in order to correct “factual inequalities” between them).

⁵⁶ See EU Agency for Fundamental Rights, *Handbook on European non-discrimination law* (2011), at 37 (noting the “accepted function” of such measures “as a short-term and exceptional means of challenging prejudices against individuals who would normally suffer discrimination ...”). See also *Runkee and White v. UK*, ECtHR, Judgment of 10 May 2007, at para. 15 (unequal survivor benefits scheme favouring women recognized as temporary measure to be curbed as the margin of comparative disadvantage narrowed).

⁵⁷ *Leyla Sahin v. Turkey*, ECtHR (GC), Judgment of 10 November 2005, at para. 115.

⁵⁸ *Dogru v. France*, ECtHR, Judgment of 4 December 2008, at paras. 71-72.

⁵⁹ *Ahmet Arslan and Others v. Turkey*, ECtHR, Judgment of 23 February 2010, at para. 49.

⁶⁰ *Stec and Others v. UK*, ECtHR (GC), Judgment of 12 April 2006, at paras. 62, 64-65.

⁶¹ *Runkee and White v. UK*, ECtHR, Judgment of 10 May 2007, at para. 23, 42.

face veil. As the OSF study *Unveiling the Truth*, *infra*, illustrates, the debate surrounding the ban did not materially probe the assumption that women are oppressed by wearing the full-face veil or that they are somehow forced to wear it, whether by their husbands or by presumed oppressive attitudes and practices more generally.

3. Secularism

37. A further justification for the ban is that it is necessary to promote the French principle of secularism, or religious neutrality, which the *Conseil d'Etat* described as
“require[ing] a strictly neutral attitude on the part of the state and public authorities towards the practitioners of a religion and vice versa... Secularism is inseparable from freedom of conscience and religion and also from the universal freedom to proclaim one’s religion or convictions. These freedoms are protected both by the French Constitution and by the European Convention.”⁶²
38. The principle of secularism has been recognized as a legitimate state interest by the Court.⁶³ In *Arslan*, the government sought to justify a criminal conviction for wearing a particular type of clothing in public spaces upon the need to protect secularism and to prevent proselytism. The Court considered that a state interest in preserving religious neutrality through secularism might supersede an individual’s right to express religious belief, but only in limited circumstances such as in schools and for those employed in the civil service, which did not apply where the sanction was for wearing the clothing in a public place (at paras.48-49). There was no duty to give deference to domestic courts in such a situation (para.50). In finding a breach of Article 9, the Court noted that the State had not presented any evidence that the applicants had attempted to convert any passers-by, so as to justify the threat to secularity (at para.51).
39. In the *Sahin* case, Judge Tulkens found “no evidence to show that the applicant, through her attitude, conduct or acts, contravened th[e] principle [of secularism]. This is a test the Court has always applied in its case-law” (at para.7.) “Merely wearing the headscarf cannot be associated with fundamentalism, and it is vital to distinguish between those who wear the headscarf and ‘extremists’ who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views” (at para.10.)
40. The *Conseil d'Etat* agreed with the Court that the principle of secularism is only “directly binding on society or individuals by virtue of the specific demands made on certain public services (as in the case of educational establishments)” (at page 20).

C. OSF REPORT “UNVEILING THE TRUTH”

41. The April 2011 report by the Open Society Foundations “At Home in Europe” project, *Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France*, is the first empirical research into the experiences and motivations of women who wear a full-face veil in France. It provides evidence that is relevant for assessing the proportionality between the law’s stated aims – promoting public order and gender equality – and the means adopted to further those aims, in the form of a blanket ban.
42. Despite the lengthy period of debate and consultation leading up to the introduction of the law, there was no real engagement with the Muslim women who wear the full-face veil, their families and the communities in which they live. The cross-party Parliamentary Commission heard testimony from 211 people – only one of them was a Muslim woman who wore a full-face veil. She was required to remove her veil in order to be heard. Only 10 lines of the lengthy 658 page report are devoted to her testimony.
43. Shortly before the French ban went into effect in April 2011, the Open Society Foundations released *Unveiling the Truth*, presenting testimonies of 32 women who live in France and who wear the full-face veil, interviewed between October 2010 and March 2011. The aim of the report “is to distinguish myths and misrepresentations surrounding women who wear the full-face veil from the actual experiences and testimonies of the women themselves.”⁶⁴

⁶² *Conseil d'Etat*, note 13 above, at page 20.

⁶³ *Dogru v. France*, ECtHR, Judgment of 4 December 2008, at para. 17.

⁶⁴ OSF, *Unveiling the Truth*, at page 11.

44. The report presents aggregated data on the backgrounds of the women who participated. Each participant completed a detailed background questionnaire; the majority also sat for in-depth follow-up interviews. The 32 women were selected with the aim of obtaining testimony from a representative sample from a diverse cross-section of France from the north to the south, urban and rural areas, and places with and without large established Muslim communities. If the official estimate is accepted, 1,900 women wear the full-face veil, and the study represented 1.7% of the total.⁶⁵
45. *Relevance of Study to Stated Aim of Women's Equality.* The testimonies and profiles of the women who participated in the study reveal a markedly different image to that of the oppressed and coerced Muslim woman, stripped of her dignity through wearing a face-covering veil. Instead, a pattern emerges of individual women independently seeking to define for themselves their relationship to the society in which they live and the manner in which they choose to experience and express their faith. For example, some of the key findings of the study show:
- *Youth of the population wearing the full-face veil.* 85 per cent of respondents were under 40. Adoption of the veil formed an integral part of their developing understanding of their Muslim heritage and faith.
 - *Education and employment.* 14 interviewees hold at least a secondary school diploma; a significant number left or said they had to leave school after they began wearing a headscarf. Approximately one third of the interviewees were working full- or part-time. Only one woman stated that she felt she should remain at home and not work.
 - *Independence.* While the majority of interviewees were brought up in Muslim households, 30 out of 32 were the first in their family to wear the full-face veil (at page 15). “The overwhelming majority of the women interviewed did not adopt the full-face veil as a result of any direct encounter or involvement with a Muslim organization/groups, local imam, or scholar.”⁶⁶ Over two-thirds did not know any other Muslim women who were wearing the full-face veil prior to adopting the practice (53).
 - *Opposition from family members and community members.* In fact, many of the respondents began wearing the veil despite strong opposition from parents and other family members; some still wear the veil only in secret for this reason.
 - *Actual practice of wearing the full-face veil not perceived as permanent.* About one-third of interviewees do not wear the full-face veil as a permanent and daily practice.
 - *Respondents do not view the veil as a rejection of socialization.* The majority of the respondents maintain active social lives.
46. The testimonies reveal a distinct gap between the ban's stated aim of protecting women, based on the perception that women who wear the veil are victims of oppression, and the reality of their decision-making process. Some quotations from the testimonies illustrate this point:
- “What I'm doing is a spiritual journey and not an act of provocation. One cannot prohibit someone just because of who he wants to be.” (73).
- “One day, I sat down and I started reflecting. When I looked at all the things around me, many deaths, many youngsters who had died, and many things like that, it made me think. I told myself I wasn't happy....I had everything I needed, but that wasn't enough. Then I started questioning myself. And one morning I awoke, I put on my headscarf and I went out.” (38).
- “I was educating myself as much as possible. I really wanted to know what this religion was about and where it would take me to, because I could easily have chosen Christianity.” (38).
- “I had a feeling that the headscarf and the jilbab [long coat covering the body but not the face] were not enough. I felt the need to develop spiritually. For me it was one of the paths. In fact there are several paths to be nearer to God. For some it's prayer. So it was one of the ways that could bring me closer to God. And spiritually I yearned for something stronger in fact. But I didn't consider it an obligation. For me it was something extra, it was good.” (41).

⁶⁵ *Ibid.* at page 23 (Methodology).

⁶⁶ *Ibid.* at page 49. Only one of the 32 women belonged to a Muslim “organization” as a board member of her local mosque.

47. The report also confirms that, as the *Conseil d'Etat* warned,⁶⁷ the disproportionate impact of the ban has contributed to discontent and alienation among Muslim women who wear the full-face veil:

“They say that it’s our husbands who are locking us away but it’s actually they who are locking us away. Now my husband doesn’t want me to go out alone as he saw how people were abusing me when he was with me. So he thinks that on my own [the abuse] will multiply, and always insists I be accompanied...[W]hat is clear is that I’m really going to restrict the number of times I go out to the bare minimum.” (74).

“[T]ruthfully, the day the law will be [implemented] I’ll no longer feel at home here.” (71).

48. *Relevance of Study to Stated Aim of Public Order*. The study also describes numerous incidents of verbal abuse as well as several physical attacks on women wearing the full-face veil. These attacks have gradually increased alongside increasing political attacks on the veil as a symbol of Muslim culture and a perceived threat to Western or traditional French values. Many women expressed a general lack of faith in the police to defend against verbal and physical abuse (especially so following the ban’s adoption) and fear of abuse by police officers themselves, particularly those living in Paris.⁶⁸ Given that a key aim of the ban is the protection of public order, such attacks suggest that precisely the opposite effect bears out in reality. One respondent stated this fact plainly:

“I had [previously] never been attacked and I had been wearing it for the last 11 years. The first time [it happened] it was the day after our illustrious President of the Republic said before the National Assembly and on TV that the burqa was not welcome in France.” (60).

CONCLUSION

49. From the information outlined above it is possible to draw the following conclusions:
- The European consensus is against such bans, as the French ban is the first general ban on full-face veils in Europe, and only Belgium has a similar ban.
 - Blanket bans may not be proportionate where less intrusive measures might be possible. Justifications based on public order must have their foundation in concrete evidence. Measures introduced to promote equality must be objectively and reasonably justified and, where undertaken to compensate for a prior disadvantage, temporary. Restrictions to promote an asserted state interest in secularism must be strictly necessary.
 - The only significant empirical research of the views of women who wear the full-face veil in France shows that they all chose to wear the full-face veil voluntarily. Their decision to wear the veil was typically an expression of their personal identity and religious belief.

New York

10 July 2012

⁶⁷ See note 16 above, at 24 (cautioning that the ban carries the risk of “stigmatising persons of the Moslem faith in France”).

⁶⁸ OSF, *Unveiling the Truth*, at page 66.