

BANNING THE BURKA: INDICATIVE OF A LEGITIMATE
AIM OR A THINLY-VIELED ATTEMPT TO LEGISLATE
RELIGIOUS AND CULTURAL INTOLERANCE

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I. INTRODUCTION

Distracted by the mockery made of the Executive Branch with the 2016 Presidential election cycle, U.S. citizens have lost whatever peripheral attention they paid to international human rights this latter half of the calendar year. While the proposed French ban on “burkinis”¹ ended up failing in the legislature this summer,² Germany, and more specifically Angela Merkel’s party (the “Christian Democrat Party” or “CDU”), proposed banning the full-faced burka in public areas³ and a similar bill advanced in the Swiss legislature.⁴

This is, however, not unprecedented in Europe; France enacted legislation prohibiting the concealment of one’s face in public places—effective as of April 11, 2011.⁵ Belgium quickly followed suit, enacting its own ban of full-face burkas on June 1, 2011.⁶ Various other European legislatures proposed similar bills with little success, before the European Court of Human Rights (“ECtHR”) considered a French citizen’s petition to the 2011 French law.⁷

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¹ The term “burkini” refers to swimwear which was “developed in line with the Islamic code of dressing, and has received official approval and certification from the Islamic community to encourage girls participating in sports.” BURQUINI SWIMWEAR, <http://www.burqini.com> (last visited, Dec. 5, 2016).

² Aurelien Breeden, *French Town’s Ban of Burkini Violates Rights, a Court Rules*, N.Y. TIMES, Aug. 27, 2006, at A1.

³ Specifically, full-faced burkas would be banned in places like courtrooms, administrative buildings, and schools. Jürgen Klockner, *German Leaders Are Split Over Proposed Burqa Ban*, THE WORLD POST, (Aug. 25, 2016 5:29 PM) http://www.huffingtonpost.com/entry/as-europe-continues-to-debate-public-attire-for-muslims-german-leaders-are-split-over-burqa-ban_us_57bf12eae4b085c1ff28119a

⁴ Steven Wildberger, *Switzerland Lawmakers Approve Burqa Ban*, JURIST, Sept. 28, 2016, <http://www.jurist.org/paperchase/2016/09/switzerland-lawmakers-approve-public-burqa-ban.php>.

⁵ S.A.S. v. France, 3 Eur. Ct. H.R. 301, ¶ 14 (2014).

⁶ *Id.* ¶¶ 40-41.

⁷ For example, the Italian legislature proposed a blanket ban on burkas. S.A.S. v. France, 3 Eur. Ct. H.R. at ¶ 40. The Federal Assembly of Switzerland

Since the ECtHR's favorable holding for the respondent, the Government of France, several more countries have created similar legislation.⁸ However, it was not until the waning months of 2016 that members of Germany's Christian Democratic Union, namely Interior Minister Thomas de Maizière, proposed legislating a ban on full-face coverings in certain public places because "it doesn't fit in [the German] society."⁹ Shortly afterward, several other European States were reported to have proposed similar legislation.¹⁰

This article, relying primarily on ECtHR caselaw, will: (A) analyze the newly-proposed legislation in Germany and Switzerland in the context of the precedent set in *S.A.S. v. France* and (B) discuss how the ECtHR created dangerous precedents for European States to effectively implement mechanisms that directly offend the very principles they sought to uphold in *S.A.S.* Through these analyses, this paper will point out the severe implications of what could happen in European States while keeping in mind the wounds of World War II.

II. PROPOSED LEGISLATION

A. Precedent Established By *S.A.S. v. France*

In its July 1, 2014 Grand Chamber Opinion, the European Court of Human Rights ("ECtHR") held that there were no

rejected an initiative to ban clothing that covered a large part of the face in public. *Id.* "Such an option is also being discussed in the Netherlands, notwithstanding unfavorable opinions by the Council of State." *Id.*

⁸ Belgium is just one example. *Belgian Ban of Full Veils Comes into Effect*, BBC NEWS, Jul. 23, 2011, <http://www.bbc.com/news/world-europe-14261921>.

⁹ Klockner, *supra* note 3.

¹⁰ For example, Switzerland, Bulgaria, and Norway all proposed similar legislation. See Lizzie Dearden, *Switzerland Moves Toward Nationwide Burqa Ban as Draft Law Approved in Parliament*, THE INDEPENDENT, Sept. 28, 2016, <http://www.independent.co.uk/news/world/europe/switzerland-burqa-ban-swiss-parliament-national-council-draft-law-vote-latest-muslim-veils-walter-a7334631.html>; Siobahn Fenton, *Bulgaria Imposes Burqa Ban and Will Cut Benefits of Women Who Defy It*, THE INDEPENDENT, Oct. 1, 2016, <http://www.independent.co.uk/news/world/europe/bulgaria-burka-ban-benefits-cut-burkini-niqab-a7340601.html>; Gabriel Samuels, *Norway Sets Out Plans for Banning Burqa in Schools and Universities*, THE INDEPENDENT, Oct. 6, 2016, <http://www.independent.co.uk/news/world/europe/norway-banning-burqa-in-schools-and-universities-a7347521.html>.

violations of human rights under the European Convention of Human Rights when a French national challenged the State's newly implemented "blanket ban" on full-face veils in public places, for which criminal penalties were prescribed.¹¹ The Petitioner alleged that the law violated Articles 3, 8, 9, 10, and 11 of the European Convention on Human Rights ("Convention"),¹² separately and in conjunction with Article 14.¹³ Dismissing the other claims, the Court assessed only the alleged violations of Articles 8¹⁴ and 9¹⁵ separately and without consideration of Article 14.¹⁶ The Court considered the complaint to "mainly raise an issue with regard to the freedom to manifest one's religion or beliefs."¹⁷ Therefore, the

¹¹ S.A.S. v. France, 3 Eur. Ct. H.R. at ¶ 28 (citing French Law no. 2010-1192).

¹² The European Convention on Human Rights was written after the end of the Second World War in an attempt to unify Europe and protect inherent human rights and liberties. Aisha Gani, *What is the European Convention on Human Rights?*, THE GUARDIAN, Oct. 3, 2014, <https://www.theguardian.com/law/2014/oct/03/what-is-european-convention-on-human-rights-echr>; See also The European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf, (providing a legal framework for which an individual may bring a cause of action if their human rights were violated).

¹³ S.A.S. v. France 3 Eur. Ct. H.R. at ¶ 3; See also The European Convention on Human Rights (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 Association;" Article 14: "Prohibition of Discrimination").

¹⁴ Article 8 of the ECHR, "Right to Respect for Private and Family Life," states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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." *European Convention of Human Rights*, Article 8.

¹⁵ Article 9 of the ECHR, entitled "Freedom of Thought, Conscience and Religion," states: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. 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." *European Convention of Human Rights*, Article 9.

¹⁶ S.A.S. v. France, 3 Eur. Ct. H.R. at ¶¶ 106 – 163.

¹⁷ *Id.* at ¶ 108.

Court's analysis of the application was focused on Articles 8 and 9, "but with emphasis on the second of those provisions."¹⁸

Focusing on Article 9, Petitioner argued against the validity of the French law because the law created a "serious interference" with her rights under the Convention because it "did not pursue any of the legitimate aims listed in the second paragraph of [Article 9] and was not 'necessary in a democratic society.'"¹⁹

Petitioner also submitted that the French law "entailed a violation of her right to respect for her private life under Article 8 of the Convention."²⁰ Petitioner argued that the law negatively impacted her rights for three reasons: (a) wearing the veil was important to her with regard to her religion and culture, (b) she was still entitled to a private life "even in a public context," and (c) it forced her to adopt split lives for different contexts.²¹ Again, Petitioner "argued that the interference did not pursue any of the legitimate aims enumerated in the second paragraph of Article 8 of the Convention."²²

In response, the French Government ("Government") contended that "the limitation pursued legitimate aims and that it was necessary, in a democratic society, for the fulfillment of those aims."²³ Specifically with regard to Article 9, the Government argued that the legislation served the purposes of ensuring public safety and protecting the "rights and freedoms of others by ensuring respect for the minimum set of values of an open and democratic society."²⁴ The Government articulated three values with regard to the referenced "minimum set of values," including: (a) the vital role of the face in human interaction (b) the protection of gender equality; and (c) the need to respect human dignity.²⁵

The Government dismissed the Petitioner's allegations with regard to Article 8 of the Convention because "they were not convinced that this provision applied since the ban on clothing designed to cover the face concerned only public places and it could

¹⁸ *Id.* at ¶ 109.

¹⁹ *Id.* at ¶ 76.

²⁰ *Id.* at ¶ 79.

²¹ S.A.S. v. France, 3 Eur. Ct. H.R. at ¶ 79.

²² *Id.*

²³ *Id.* at ¶ 81.

²⁴ *Id.* at ¶ 82 (internal quotations omitted).

²⁵ *Id.* at ¶ 82.

not be considered that an individual's physical integrity or privacy were at stake."²⁶

Taking into consideration the submissions of several third-party interveners,²⁷ the Court found that there were no violations of the European Convention on Human Rights as a result of the French law.²⁸ While the Court held that the Government did not show that there was a legitimate concern for public safety, it still held that the ban was proportionate to the aim of guaranteeing the conditions of "living together."²⁹

The Court reasoned that while the scope of the ban was broad, it wasn't necessarily directed at Muslims because "the ban is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face," thus distinguishing it from prior cases where violations were found when specific religious items were banned.³⁰ Allocating a "wide margin of appreciation" to the Government, the Court held that the ban "can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the protection of the rights and freedoms of others."³¹

B. Switzerland

The Swiss National Council, the lower house of Parliament, approved a measure to constitutionally ban the full-faced burka in public on September 27, 2016.³² While the measure would need approval from the Swiss Council of States, the upper house of Parliament, or through a national referendum, one of the cantons, Ticino, has already implemented a ban on "the full face Islamic veil . . . with fines ranging from 100 to 10,000 francs".³³ The bill's text is minimal, and strongly resembles the French legislation, but the

²⁶ S.A.S. v. France, 3 Eur. Ct. H.R. at ¶ 84.

²⁷ *Id.* at ¶¶ 86-88 (The Belgian Government); ¶¶ 89-91 (Amnesty International); ¶¶ 92-94 (Article 19 [organization]); ¶¶ 95-98 (The Human Rights Centre of Ghent University); ¶¶ 99-101 (Liberty); ¶¶ 102-05 (Open Society Justice Initiative).

²⁸ S.A.S. v. France, 3 Eur. Ct. H.R. at ¶¶ 159, 162-63.

²⁹ *Id.* at ¶¶ 139, 157.

³⁰ *Id.* at ¶ 151.

³¹ *Id.* at ¶¶ 155 - 57.

³² Wildberger, *supra* note 4.

³³ 1 Swiss Franc equals approximately 1.01 U.S. Dollars. *Switzerland Edges Toward Nationwide Burqa Ban*, THE LOCAL, Sept. 28, 2016, <https://www.thelocal.ch/20160928/switzerland-edges-towards-nationwide-burqa-ban>.

bill's author, Walter Wobman, has said that the goal of the bill is to "maintain public order and respect for the dignity of women."³⁴

If the European Court on Human Rights were to assess a claim brought by a Swiss national under the proposed law in the future, using the precedent set in *S.A.S.*, the Court would likely determine that the ban on covering one's face in public does not violate the European Convention on Human Rights. This is because the legislation is justified on the grounds of "maintaining public order." Under *S.A.S.*, if the bill had proposed banning burkas specifically (or Muslim head coverings in general), that would likely push the Court to find a violation.

C. Germany

Several of Germany's Ministers, including Interior Ministers Thomas De Maiziere and Lorenz Caffier, have voiced support for a ban on full-faced burqas in all public places within the State.³⁵ While this may be surprising from an outsider's perspective, it is less-so understood in the current socio-political dynamic of the country. According to a recent survey, 81% of Germans favor "some form of [a] ban on the burqa."³⁶ While the German proposal is still in the drafting phase, thus having no articulated legislation on which to comment, the language that De Maiziere has used in justifying the ban indicates that the law would fall into the "living together" loophole created in *S.A.S.*³⁷

In August, De Maiziere said: "[w]e agree that we reject the burqa, we agree that we want to introduce a legal requirement to show one's face in places where it is necessary for our society's coexistence - at the wheel, at public offices, at the registry office, in schools and universities, in the civil service, in court."³⁸ De Maiziere also went on the record stating that the full face veil "does not belong in our cosmopolitan country."³⁹ This language fits perfectly into the exception carved out in *S.A.S.*; perhaps to the point where

³⁴ *Id.*

³⁵ *Interior Minister Proposes Partial Burqa Ban*, THE LOCAL, Aug. 19, 2016, <http://www.thelocal.de/20160819/merkel-burqa-burka-integration>.

³⁶ *Vast Majority of Germans in Favor of Burqa Ban: Poll*, THE LOCAL, Aug. 26, 2016, <http://www.thelocal.de/20160826/vast-majority-of-germans-in-favour-of-burqa-ban-poll>.

³⁷ THE LOCAL, *supra* note 35.

³⁸ *Id.*

³⁹ *Id.*

one might start to worry if legislation aiming to discriminate one group's culture could be successfully justified in the European Court of Human Rights based on the notion that it's necessary for the sake of "brotherhood," "coexistence," or the like.

III. DANGEROUS PRECEDENT

A. *Socio-Political Context*

Understood from an outsider's perspective, perhaps there could be valid justification, to which a U.S. citizen would not be privy, for the national burka bans being proposed and implemented in European States. However, taken in the context of the increasing 'islamophobic' rhetoric in Europe, it's hard to forget its not-too-distant past that haunts Germany.⁴⁰

Taken separately, the issues of public safety and "togetherness" might lead a reader to believe that the burka bans are necessary steps for integration into a national society. However, these issues coupled with the current socio-political context in many European States, might indicate a much larger problem.

Is this about "public safety" and "living together" or is Europe's progressive model being challenged yet again by the unfamiliar? Are the end-results of cultural integration and gender equality really being achieved by burka-banning legislation or are the realistic effects entrenching the opposite? At what point will European countries start getting uncomfortable with the ghosts of the greatest modern tragedy lingering from less than a century ago? With these questions in mind, we look to the research entities tasked with analyzing data.

i. The European Commission Against Racism and Intolerance's ("ECRI") May 26, 2016 Annual Report on 2015⁴¹

Another trend noted by the ECRI is antisemitism, which increased further in 2015, after levels had already peaked in many countries in the preceding year. The ECRI also observed continued discrimination against black persons, Roma and Travellers, and

⁴⁰ "Islamophobic" meaning "Dislike of or prejudice against Islam or Muslims, especially as a political force." OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/islamophobia> (last visited Dec. 13, 2016).

⁴¹ Annual Report 2015, COUNCIL OF EUROPE (2016), http://www.coe.int/t/dghl/monitoring/ecri/Library/PressReleases/217-26_05_2016_AnnualReport2015_en.asp (last visited Dec. 13, 2016).

LGBT persons, even though the situation of these groups and the success of policies aimed at assisting them varies considerably across the continent.

b. ECRI's March 1, 2016 Press Release on France⁴²

ECRI expresses concern over the high level of under-reporting of racist crime, the cuts in budgets earmarked for integration policies, and the remaining gaps in the criminal-law provisions relating to hate speech. In this connection, the authorities are called on to take measures to ensure that racist motivation and motives related to sexual orientation and gender identity are made an aggravating circumstance of any ordinary criminal offence.

The ECRI is alarmed at the rise of hate speech and the increase in racist, anti-Semitic and islamophobic violence. "Although it was drafted before the November 2015 attacks in Paris, the report contains recommendations to the French authorities which are fully relevant today," said ECRI's Chair.

c. ECRI's March 1, 2016 Press Release on the U.K.⁴³

[T]he commission noted considerable intolerant political discourse in the UK, particularly focusing on immigration. It said that hate speech continues to be a serious problem in tabloid newspapers, and that online hate speech targeting Muslims in particular has soared since 2013.

The ECRI also noted a particularly high number of violent racist incidents in 2013, including a sharp rise in anti-Muslim violence, as well as record levels of anti-Semitic incidents the following year.

d. Pew Research Group's Spring 2016 Global Attitudes Survey⁴⁴

⁴² Fifth Report on France, COUNCIL OF EUROPE (2016), http://www.coe.int/t/dghl/monitoring/ecri/library/PressReleases/208_2016_03_01_France_en.asp (last visited Dec. 13, 2016).

⁴³ Fifth Report on the United Kingdom, COUNCIL OF EUROPE (2016), <http://www.coe.int/t/dghl/monitoring/ecri/library/PressReleases/GBR-PR-V-2016-226-EN.asp> (last visited Dec. 13, 2016).

⁴⁴ Richard Wike, *Negative Views of Minorities, Refugees Common in EU*, PEW RESEARCH CENTER, Jul. 11, 2016, <http://www.pewglobal.org/2016/07/11/negative-views-of-minorities-refugees-common-in-eu> (last visited Dec. 13, 2016).

Even in countries with more positive views, such as Germany, Sweden and the Netherlands, at least half of these people believe Muslims do not want to integrate into the larger society and majorities express concerns that refugees increase the chance of domestic terrorist attacks.⁴⁵

At the least, there is an element of profound discomfort and unrest with regard to Muslims in Europe. What may be less clear are the realistic effects of these laws.

IV. EFFECTS FULL-FACED VEIL LAWS

While the European Court of Human Rights afforded France a wide margin of appreciation to implement the burka ban in an effort to uphold the social tenant of “living together,” the law may have had the effect of doing the opposite. Five years after the implementation of the law, there have been reports of Muslim women being more isolated from French society, physically and psychologically, and some experts even attribute the law to promoting terrorist sympathies.⁴⁶

Among the negative effects reported, there have been reports of women staying inside the home to maintain their cultural-religious practice of covering themselves from the public after the French legislation.⁴⁷ The effect of this reality would lead to a complete separation of an individual to the greater national community, thus, eliminating any opportunity to promote “living together.” Even if one were to host guests in the home, the likelihood of integration outside of one’s cultural group is extremely low for early-generation immigrants.

In 2011, the Open Societies Foundation (“OSF”) published their study of thirty-two Muslim women living in France.⁴⁸ Interestingly, the women had widely varied responses to the soon-to-be implemented burka-banning law.⁴⁹ Some women felt that it was their duty to protest the law by wearing their veils in public, while others discussed a reality that they would ultimately stay in

⁴⁵ *Id.*

⁴⁶ See Ben McPartland, *Burqa Ban Five Years On- ‘We Created a Monster,’* THE LOCAL, Oct. 12, 2015, <http://www.thelocal.fr/20151012/france-burqa-ban-five-years-on-we-create-a-monster/>.

⁴⁷ *Unveiling the Truth: Why 32 Muslim Wear the Full-Face Veil in France*, OPEN SOCIETY FOUNDATIONS (2011) https://www.opensocietyfoundations.org/sites/default/files/a-unveiling-the-truth-20100510_0.pdf [hereinafter *Unveiling the Truth*].

⁴⁸ *Id.*

⁴⁹ *Id.*

the home or leave France.⁵⁰ In any case, the social barriers allegedly sought to be broken down in the 2011 law have only increased in strength.

Moreover, the arguments that the full-face coverings functioned to promote male control over females seem to be largely unfounded; the 2011 OSF publication noted that of the thirty-two women surveyed, “none had been forced to wear the full veil.”⁵¹ Furthermore, where male control over a female might be a significant factor, the law only augments the reality that those women will be much less likely to go out in public because they won’t be able to do so with a full-face veil.

Interestingly, since the French law’s implementation, some women have actively worn full-faced veils in public as means of protest. A French sociologist and filmmaker, Agnes De Feo, upon reflecting on the French legislation noted that

[b]efore the ban most Muslim women wore the veil for religious reasons. Now a lot of the women who wear the niqab, started doing so after the law was introduced. They converted to Islam and began wearing the veil because it became an identity to them. For them it’s an act of resistance against the state, just like the punk or skinhead movements.⁵²

Contrary to the aims of “living together,” the law ultimately made the full-face veil more attractive to those feeling disenfranchised in the country and may have even encouraged intentional disobedience to the national government.

Perhaps most troubling is the reality that the law served as a tipping point for some young women. “Those who have left to go and fight in Syria say that this law is one of things that encouraged them. They saw it as a law against Islam. It had the effect of sending a message that Islam was not welcome in France.”⁵³

The effects of the French legislation indicate that, at least for the Muslim population, the law resulted in the complete opposite

⁵⁰ *Id.*

⁵¹ See, Angelique Chrisafis, *France's Burqa Ban: Women are 'Effectively Under House Arrest,'* THE GUARDIAN (Sept. 19, 2011, 4:00 PM) <https://www.theguardian.com/world/2011/sep/19/battle-for-the-burqa/>.

⁵² McPartland, *supra* note 46.

⁵³ *Id.*

product than what was argued for by the French Government in S.A.S. Muslim women were ultimately removed from the French society, either physically or psychologically, and some even found motivation to fight against Western societies because of the law.⁵⁴ If this is the reality for France, why should we expect anything differently from Switzerland, Germany, Bulgaria, or Norway? What is the probability that collectively disenfranchising this population results in an exponential incline in acts that would indicate the inability to live together? It is my fear that these State leaders will give into the populist pressure and continue down a path that leads to another world war and, given the current socio-political dynamic of the United States, I do not know who would intervene.

V. CONCLUSION

If European States are to truly foster the tenant of “living together” it is necessary to reflect on the real results of their laws and proposed legislation. A society’s ultimate “togetherness” cannot be achieved through isolating a minority population; it must be done through education, integration, and social support. France’s legislation may have reduced the number of women wearing full-faced veils in public, but has it reduced islamophobia? As of March, 2016, the data would support the opposite conclusion.

Furthermore, the hardship placed on Muslim women is extraordinarily disproportionate in comparison to the rest of the population; eliminating full-face veils in public has been shown to isolate these women from society physically or psychologically, and has even motivated some to take up arms for the Islamic State.

Perhaps the most baffling aspect of this newly-developing trend is that the exception was carved out by the European Court of Human Rights; the institution tasked with upholding the standards of a Convention formed in the wake of World War II. Conceivably, the Court will determine that the contexts differ in other States when their burqa-banning legislation is inevitably brought to the Court. However, based on the language being used to justify the legislation (i.e., not “fitting within the society”), it would not an unfathomable inference to conclude that the politicians constructing the burqa-banning legislation are well-aware of S.A.S. and have crafted their message to fall squarely within its exception.

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Id.