

# FACE VEIL BANS IN THE EUROPEAN COURT OF HUMAN RIGHTS: THE IMPORTANCE OF EMPIRICAL FINDINGS

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## INTRODUCTION

European societies' recent struggle with the integration of their Muslim minorities has resulted in many challenging legal debates, particularly with regard to the accommodation of religion in the workplace and in educational settings. Recently, such debates have extended to the proper role of religious expression in the public space. The most widespread example of this new phenomenon is the criminalization of the wearing of the niqab, or Islamic face veil, in public.

One of the most remarkable aspects pertaining to the European bans on face coverings and the surrounding debates is that they proceed on the basis of assumptions about women wearing face veils without any factual support. At the time the bans in Belgium and France were adopted, there was no empirical research available that documented the experiences and motives of the women who wore face veils. Nor was there any effort undertaken to consult those women in the process leading up to the ban.

One such example is the report by the Parliamentary Commission of Inquiry in France before the ban on face veils was adopted.<sup>1</sup> The Commission of Inquiry consisted of 32 members

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<sup>1</sup> A. GÉRIN, ASSEMBLÉE NATIONALE N° 2262, RAPPORT D'INFORMATION FAIT EN APPLICATION DE L'ARTICLE 145 DU RÈGLEMENT AU NOM DE LA MISSION D'INFORMATION SUR LA PRATIQUE DU PORT DU VOILE INTÉGRAL SUR

representing all parliamentary groups. It heard about 200 witnesses and experts and sent out questionnaires to several French Embassies. After six months, it produced a 658-page report.<sup>2</sup> However, the commission had not planned to hear a single woman who actually wore a face veil.<sup>3</sup> The only person whom they did interview who wore a face veil, Kenza Drider, was only heard upon her own request. In the Belgian parliament, a large majority of legislators rejected a request for expert hearings as well as a referral of the bill for advice to the Council of State,<sup>4</sup> the state body that controls amongst others the conformity of proposed new legislation with higher law, such as constitutional and European human rights provisions. Today, however, such qualitative research on the experiences of women who wear the face veil exists. Specifically it has been conducted in France and Belgium, as well as in the Netherlands,<sup>5</sup> the United Kingdom,<sup>6</sup> and Denmark.<sup>7</sup> It is worth noting that the findings of these studies are very similar. While the data on which this paper relies are mostly from my own study in Belgium,<sup>8</sup> it needs to be

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LE TERRITOIRE NATIONAL (2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See Parliament of Belgium, Commission Report 53/219 Nr 4, Sess. 2010–11.

<sup>5</sup> See ANNELIES MOORS, AMSTERDAM SCH. FOR SOC. SCI., GEZICHTSSLUIERS: DRAAGSTERS EN DEBATTEN (2009), available at [http://www.manavzw.be/\\_files/niqaabrapport%2010%20juli%202009%20-%20Annelies%20Moors.pdf](http://www.manavzw.be/_files/niqaabrapport%2010%20juli%202009%20-%20Annelies%20Moors.pdf); see also Annelies Moors, Face-Veiling in the Netherlands: Public Debates and Women's Narratives, in THE EXPERIENCES OF FACE VEIL WEARERS (Eva Brems ed., forthcoming 2014).

<sup>6</sup> See Naima Bouteldja, "France vs. England," in THE EXPERIENCES OF FACE VEIL WEARERS, *supra* note 5.

<sup>7</sup> UNIV. OF COPENHAGEN, RAPPORT OM BRUGEN AF NIQAB OG BURKA (2009), available at <http://www.e-pages.dk/ku/322/>. See also Kate Østergaard et al., *Niqabis in Denmark: When Politicians ask for a Qualitative and Quantitative Profiling of a Very Small and Elusive Sub-Culture*, in THE EXPERIENCES OF FACE VEIL WEARERS, *supra* note 5.

<sup>8</sup> Unless mentioned otherwise, quotes from niqabis (i.e. face veil wearers) are from EVA BREMS ET AL. HUMAN RIGHTS CENTRE OF GHENT UNIVERSITY, WEARING THE FACE VEIL IN BELGIUM (2012) [hereinafter BREMS ET AL., WEARING THE FACE VEIL], available at <http://www.ugent.be/re/publiekrecht/en/research/human->

emphasized that these findings are entirely consistent with those of the French study.

A challenge to the French face veil ban is currently pending before the European Court of Human Rights, the case of *S.A.S. v. France*. This paper assesses what chance the applicant has of succeeding. It argues that a crucial factor will be the extent to which the European judges will be willing to base their reasoning on empirical findings regarding face veils in Europe, rather than on prevalent myths embraced by European audiences and policymakers. This Article will also argue that these empirical findings are crucial for an adequate legal analysis of the human rights dimension involved in face veil bans.

First, this Article will set out the facts and context of face veil bans in Europe and the legal challenges surrounding them. Then, the Article will explain the legal criteria that will be used by the European Court of Human Rights when deciding on this issue. Next, in its central argument, this Article will discuss the possible outcome of *S.A.S. v. France*, by assessing whether the arguments advanced by European governments to ban face veils can pass the human rights test instituted by the court. This assessment will rely on the court's case law, as well as on the case file of the case currently pending before it. It will also include the results of empirical research conducted among women wearing face veils in Europe and analyze whether the government's claims are consistent with those empirical studies.

## I. FACE VEIL BANS IN EUROPE AND THE HUMAN RIGHTS CHALLENGE

Throughout (western) Europe, there is a trend to ban "face coverings" in public spaces, which targets women who wear the Islamic face veil.<sup>9</sup> This phenomenon started with municipal bans; such bans are in place today in Belgium, the Netherlands, Italy,

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rights/faceveil.pdf/at\_download/file.

<sup>9</sup> Formally, these bans apply to "face covering" in general. Yet, both the parliamentary debates and the political discourse surrounding their adoption, as well as the practice of their implementation, indicate that in fact these bans target only Islamic face veils.

and Spain.<sup>10</sup> Nationwide bans were adopted in France in 2010<sup>11</sup> and in Belgium in 2011,<sup>12</sup> and a regional ban was voted into

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<sup>10</sup> In Belgium, the “geographical coverage” of these local prohibitions appears to be the widest, with virtually all major cities and towns disposing of a prohibition, which is regularly enforced (and continues to be enforced despite the nationwide ban, presumably on account of the lighter procedure of administrative sanctions). *See, e.g., Belgium’s Lower House of Parliament Bans Burqa-type Islamic Dress in Public*, DAILY NEWS (Apr. 30, 2010), <http://www.nydailynews.com/news/world/belgium-house-parliament-bans-burqa-type-islamic-dress-public-article-1.169905>. In the Netherlands, such local bans are quite rare. There, as the legality and constitutionality is widely considered controversial, they hardly seem to be enforced in practice. *See, e.g.,* Ofrit Liviatan, *From Abortion to Islam: The Changing Function of Law in Europe’s Cultural Debates*, 36 FORDHAM INT’L L.J. 93, 103 (2013). In Italy, local bans can be found particularly in the north and northeast of the country. *See, e.g.,* Evan Darwin Winet, *Face Veil Bans and Anti-Mask Laws: State Interests and the Right to Cover the Face*, 35 HASTINGS INT’L & COMP. L. REV. 217, 247 (2012). In Spain in 2010, a relatively small number of towns and cities in Catalonia (including, most notably, Barcelona), started to pass regulation banning face covering in municipal buildings. *See, e.g.,* Natalie Orenstein, *France Hardly Alone on Burqa Ban*, NEWSDESK (July 21, 2010), <http://newsdesk.org/2010/07/21/france-hardly-alone-on-burqa-ban/>.

<sup>11</sup> Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 11, 2010 on the Prohibition of Concealing the Face in Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344. Article 1 states: “No one may, in spaces open to the public, wear a garment that has the effect of hiding the face.” Exceptions apply when “clothing [is] prescribed or authorised by legal or regulatory provisions,” when the clothing “is justified by reasons of health or professional motives,” or when the clothing is “part of sports activities, festivities or artistic or traditional manifestations.” *See id.* art. 2, § II. Sanctions consist of fines for the wearer of up to 150 euros and/or participation in a citizenship course. Additionally, the Act penalizes anyone who forces another “through threats, violence, constraint, abuse of authority or power for reason of their gender” to wear face coverings, with a fine of 30,000 euros and one year imprisonment. *Id.* art. 4. The latter penalties can be doubled if the victim is a minor. *Id.* On October 7, 2010, the Constitutional Council upheld the constitutionality of the ban, with only minor reservations. Conseil constitutionnel [CC] [Constitutional Court] decision No. 210-613DC, Oct. 7, 2010 (Fr.). Most notably the Council determined that the ban could not be enforced in places of worship. *Id.* ¶ 5.

<sup>12</sup> Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage [Prohibition on Wearing Clothing Fully or Mostly Covering One’s Face] of June 1, 2011, MONITEUR BELGE [M.B.] [OFFICIAL

effect by referendum in the Swiss canton of Ticino.<sup>13</sup> Proposals for similar nationwide bans have been dismissed—at least temporarily—in Denmark,<sup>14</sup> the Netherlands,<sup>15</sup> Spain,<sup>16</sup> the United

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GAZETTE OF BELGIUM], July 13, 2011, <http://www.staatsblad.be> (Belg.). It inserts an Article 563*bis* into the Belgian Criminal Code. In practical terms and “subject to legal provisions to the contrary,” this provision punishes persons “who appear in places accessible to the public with their faces covered or concealed, in whole or in part, in such a manner that they are not recognisable” with a monetary fine of fifteen to twenty-five euros (increased with the legal surcharge factor, i.e., multiplied by 5.5) and/or a prison sentence of one to seven days. *Id.* An exception applies when face covering is permitted or imposed by “labour regulations or municipal ordinances due to festivities.” *Id.* Moreover, the law continues the application of local bans imposing administrative sanctions. In Belgium, too, the law was unsuccessfully challenged before the Constitutional Court, which like the French Constitutional Council, made only a minor reservation for places of worship. Cour Constitutionnelle [CC] [Constitutional Court] decision no 145/2012, July 13, 2011, MONITEUR BELGE [M.B.] [OFFICIAL GAZETTE OF BELGIUM], Dec. 6, 2012, <http://www.grondwettelijkhof.be> (Belg.).

<sup>13</sup> The referendum in September 2013 obtained a 65.4% majority. Gerhard Lob, *Burka Ban Approved in Italian-Speaking Switzerland*, SWISSINFO.CH (Sept. 22, 2013), [http://www.swissinfo.ch/ita/politica/Il\\_Ticino\\_mette\\_al\\_bando\\_il\\_burqa\\_nella\\_costituzione.html?cid=36936130](http://www.swissinfo.ch/ita/politica/Il_Ticino_mette_al_bando_il_burqa_nella_costituzione.html?cid=36936130). The federal parliament will have to rule on the constitutionality of the rule. *Id.*

<sup>14</sup> In 2009, the Danish Minister of the Interior set up an ad hoc committee to study the desirability of banning face veils in public. They commissioned an empirical study, which showed that the number of face veil wearers in Denmark was very small, and that many were Danish converts. Subsequently, no ban was adopted. *See* Østergaard et al., *supra* note 7.

<sup>15</sup> The Dutch government agreements of 2007 and 2010 announced the introduction of a face-covering ban. Such a bill was introduced in Parliament in early 2012. Yet, after the fall of the cabinet, the new coalition announced in its agreement only a set of functional face-covering bans (in the context of education, health care, and public transportation, as well as for access to government buildings), rather than a general ban. *See* BRUGGEN SLAAN, REGEERAKKOORD (2012), *available at* <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2012/10/29/regeerakkoord/regeerakkoord.pdf>.

In July 2010, Spain’s lower chamber of parliament rejected a bill to ban the wearing of face-covering garments in public. At the regional level, the Catalan Parliament rejected two motions aiming to introduce a face veil ban in public spaces presented by the Popular Party on July 1, 2010 in the Plenary, and on April 5, 2011, in the Commission on Welfare and Immigration. *See* AMNESTY INT’L, CHOICE AND PREJUDICE: DISCRIMINATION AGAINST MUSLIMS

Kingdom,<sup>17</sup> and Switzerland,<sup>18</sup> although they remain pending in Italy.<sup>19</sup>

Judges have occasionally ruled that the application of a local ban on face veils violated fundamental rights.<sup>20</sup> The French

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IN EUROPE 98 n.282 (2012), available at <http://www.amnesty.org/en/library/asset/EUR01/001/2012/en/85bd6054-5273-4765-9385-59e58078678e/eur010012012en.pdf>.

<sup>17</sup> A private member bill to ban face covering in public was discussed in Parliament in the fall of 2013. See George Eaton, *Tory MP's Ban the Burqa Bill Reaches Parliament*, NEWSTATESMAN (Sept. 6, 2013), <http://www.newstatesman.com/politics/2013/09/tory-mps-ban-burqa-bill-reaches-parliament>.

<sup>18</sup> In September 2012, the Swiss Senate rejected by ninety-three to eighty-seven votes an initiative proposed by the canton of Aargau which was aimed at banning full face veiling from public spaces. *Burqa Ban Proposal Thrown Out by Parliament*, SWISSINFO.CH (Sept. 28, 2012), [http://www.swissinfo.ch/eng/swiss\\_news/Burka\\_ban\\_proposal\\_thrown\\_out\\_by\\_parliament.html?cid=33611716](http://www.swissinfo.ch/eng/swiss_news/Burka_ban_proposal_thrown_out_by_parliament.html?cid=33611716). Proposed bans were rejected in the cantonal parliaments of Basel City, Bern, Schwyz, Solothurn, and Fribourg. *Ticino to Vote on Burka Ban*, SWISSINFO.CH (Aug. 12, 2013), [http://www.swissinfo.ch/eng/swiss\\_news/Ticino\\_to\\_vote\\_on\\_burka\\_ban.html?cid=36646320](http://www.swissinfo.ch/eng/swiss_news/Ticino_to_vote_on_burka_ban.html?cid=36646320).

<sup>19</sup> The parliamentary Commission on Constitutional Affairs approved a bill on August 2, 2011 (“Divieto di Indossare gli Indumenti Denominati *Burqa* e *Niqab*”) that would prohibit persons from going in public wearing any garment covering the face, rendering it punishable with fines of 100 to 300 euros. Legge 24 Ottobre 2011, n. 216/3, A.C. 627-A (It.), available at <http://www.camera.it/701?leg=16&file=AC0378C>.

<sup>20</sup> In February 2013, the Supreme Court of Spain overturned a city authority ban in Catalonia on the basis that it limited religious freedom, and that the city lacked the authority to order such a prohibition. S.T.S., Feb. 6, 2013 (R.A.J., No. 4118/2011) (Spain). In Belgium, contradictory case law on the application of local bans to face veils was one of the reasons for the enactment of the general ban. See Politie rechtbank [Pol.] [Police court], Jan. 26, 2011, (Belg.) (on file with author); Politie rechtbank [Pol.] [Police court] Tongeren, June 12, 2006, no. 05A79 (Belg.) (on file with author) (finding no such violation). In Italy, two courts found that the 1975 Public Order Protection Act could not be regarded as grounds for municipalities prohibiting face veils in public space in general. See TAR Trieste, 16 Ottobre 2006, nr. 645; Diritto & Giustizia, n° 44, 2006, 111–13, *Giurisprudenza di merito*, n° 9, 2007; *Giur. it.* 2007, 2423 (It.); Cons. Stato, 19 Giugno 2008, no. 3076, available at <http://religare-database.eu/PDF/PDFwp5Italy/ConsiglioBurqa2008.pdf>; see also Mathias Möschel, *La Burqa en Italie: d'une Politique Locale à une Législation Nationale*, in QUAND LA BURQA PASSE À

*Conseil d'Etat* even advised in a report against the adoption of the nationwide ban since “no incontestable legal basis” could be provided for such a general ban.<sup>21</sup> Similarly, the Dutch Council of State advised against the adoption of a face-covering ban.<sup>22</sup> Such advice has been ignored. Both the French Conseil Constitutionnel<sup>23</sup> and the Belgian Constitutional Court<sup>24</sup> have validated the nationwide bans on face veils. Those courts held that such bans did not violate any fundamental rights, as protected in their respective constitutions and the European Convention on Human Rights (ECHR).

However, it is the European Court of Human Rights (“the court”) that will deliver the final word in this matter. As mentioned above, a challenge to the French face-covering ban in the case of *S.A.S. v. France* is currently pending before a Grand Chamber of the Court.<sup>25</sup> A public hearing was held on November 27, 2013,<sup>26</sup> and the court’s judgment is expected sometime this year.

The applicant in *S.A.S. v. France* is a French citizen born in Pakistan who lives in the Paris region.<sup>27</sup> She is a law graduate

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L’OUEST; ENJEUX ETHIQUES, POLITIQUES ET JURIDIQUES (David Koussens & Olivier Roy eds., 2013).

<sup>21</sup> CONSEIL D’ETAT, ETUDE RELATIVE AUX POSSIBILITÉS JURIDIQUES D’INTERDICTION DU PORT DU VOILE INTEGRAL (2010).

<sup>22</sup> Parliamentary document, Feb. 3, 2012, TK 33165, at nr. 2, *available at* <https://zoek.officielebekendmakingen.nl/kst-33165-2.pdf>; the advice of the Council of State, Nov. 28, 2011, TK 33165, at nr. 4, *available at* <https://zoek.officielebekendmakingen.nl/kst-33165-4.pdf>. In the Netherlands, as in Belgium and France, one of the powers of the Council of State is to give advice on proposed legislation, concerning its legality and in particular its conformity with higher law. Such advice, however, is not binding.

<sup>23</sup> *See supra* note 11 and accompanying text.

<sup>24</sup> *See supra* note 12 and accompanying text.

<sup>25</sup> *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R.

<sup>26</sup> *See* Saïla Ouald Chaïb, *S.A.S. v. France: A Short Summary of an Interesting Hearing*, STRASBOURG OBSERVERS (Nov. 29, 2013), <http://strasbourgobservers.com/2013/11/29/s-a-s-v-france-a-short-summary-of-an-interesting-hearing/>.

<sup>27</sup> Witness Statement of the Applicant, Annex 1 to Final Observations, ¶¶ 1–2, *S.A.S. v. France*, Eur. Ct. H.R. (App. No. 43835/11) [hereinafter Witness Statement of the Applicant] (on file with author).

who completed an internship with a law firm in Birmingham, with whom she submitted the case before the European Court of Human Rights.<sup>28</sup> She stated that, before the ban, she had been wearing the face veil on a regular basis since she was 18 years old:

Gradually, I wore my full face veil whenever I passed through public areas, traveled on public transport or visited public buildings (generally three times a week) . . . . Of course, for instance, I would take off my veil if I needed to visit the doctor or keep an official appointment.<sup>29</sup>

Since she submitted the application on the day the ban went into effect, at that point she had not yet been stopped by the police or fined for wearing her veil. However, in a witness statement submitted two years later, she discussed how the ban had negatively affected her life, stating that

as a result of the implementation of Loi no. 2010-1192 I now live under the threat of both state prosecution and public persecution. As a result of the implementation of Loi no. 2010-1192 I am now vilified and attacked on the streets of the Republic I live, effectively reduced to house arrest, virtually ostracized from public life and marginalized.<sup>30</sup>

In that same statement she continues to provide additional information about the negative impact the ban has had on her daily life:

criminalisation, or rather the political scaremongering that preceded it, has incited members of the public to now openly abuse and attack me whenever I drive wearing my veil. Pedestrians and other drivers routinely now spit on

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<sup>28</sup> *Id.* ¶ 15.

<sup>29</sup> *Id.* ¶ 22-23. This is a correction to the statement in the application that “[t]he Applicant does not wear the niqab in public places at all times . . . . As to when the Applicant chooses to wear the niqab in the public place depends very much on her introspective mood, spiritual feelings and whether she wishes to focus on religious matters.” Application ¶ 3, *S.A.S. v. France*, Eur. Ct. H.R. (App. No. 43835/11).

<sup>30</sup> Witness Statement of the Applicant, *supra* note 27, ¶ 6.



my car and shout sexual obscenities and religious bigotry. Consequently, I now feel like a prisoner in my own Republic, as I no longer feel able to leave my house unless it is essential. I leave the house less frequently as a result. I wear my veil with even less frequency when out in public as a result. Indeed, I also feel immense guilt that I am forced to no longer remain faithful to my core religious values.<sup>31</sup>

In addition, the applicant's fear of harassment motivated her request for anonymity,<sup>32</sup> which was granted by the court. Her testimony is consistent with the testimony of other individuals who wear face veils about the impact that the ban has had on their daily lives.<sup>33</sup>

However, in one respect, the applicant is not so representative. At the end of her witness statement, she put forward several "compromise proposals":

Firstly, I would be willing to accept restrictions regarding the visibility of the veil's material, i.e. to wear only veils that were diaphanous "see-through," thus ensuring that my facial features remained essentially visible . . . . Secondly, I would be willing to accept exemptions enabling full face veils to be worn during the fasting periods and festivities of Ramadan and Eid.<sup>34</sup>

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<sup>31</sup> Witness Statement of the Applicant, *supra* note 27, ¶ 26. A car on a public road is not considered part of the "public space" under the French ban, as per an interpretative circular: Circulaire du 2 mars 2011 relative à la mise en œuvre de la loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, JORF n°0052 (Mar. 3, 2011), at 4128.

<sup>32</sup> Application, *supra* note 29, ¶ 1.

<sup>33</sup> In particular, see OPEN SOC'Y JUSTICE INITIATIVE, AFTER THE BAN: THE EXPERIENCES OF 35 WOMEN OF THE FULL-FACE VEIL IN FRANCE (2013) [hereinafter AFTER THE BAN], which was submitted as additional evidence with the Third Party Intervention of Open Society Justice Initiative, S.A.S. v. France, App. No. 43835/11, (Eur. Ct. H.R. filed Oct. 2, 2013), *available at* <http://www.opensocietyfoundations.org/sites/default/files/after-the-ban-experience-full-face-veil-france-20140210.pdf>.

<sup>34</sup> Witness Statement of the Applicant, *supra* note 27, ¶ 33.

It seems unlikely that other individuals who wear face veils in France or Belgium would agree with these proposals. Even though the willingness to compromise may be present (e.g., one Belgian respondent had approached her mayor with a proposal to avoid the color black for her face veil), these options seem to affect the essence of the women's claims, and hence to go beyond a reasonable, compromised solution.

As the European Court of Human Rights is situated on French territory, the face-covering ban prevented the applicant from attending the hearing in her case. The applicant's attorney informed the court that the applicant would like to attend, yet wished for "confirmation from the court that there will be provision for her to wear her full face veil during the proceedings including but not limited to transit to and from the court."<sup>35</sup> The reply stated that the court could not guarantee that the applicant would be able to wear the full face veil while traveling to and from the court. With regard to whether the applicant could wear her face veil during the hearing, the deputy Grand Chamber registrar who signed the reply wrote that:

the President has asked me to draw your attention to the fact that the applicant's request confronts him with a question that is complex and sensitive, since it places the Court in a situation where the answer could be seen by the parties and external observers as an indication of an opinion on the merits of the issues to be examined at the hearing. He invites the applicant to contemplate her request in the light of the foregoing and to inform him . . . if she wishes to maintain it.<sup>36</sup>

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<sup>35</sup> Letter from Sanjeev Sharma, counsel at J.M. Wilson Solicitors LLP, to the president of the Grand Chamber of the European Court of Human Rights (Nov. 11, 2013) (on file with author) ("If she is not permitted to cover her face then her anonymity status becomes redundant. She is in a quandary. She does not wish to find herself in the position of having broken the law by attending Court yet she wishes to exercise her fundamental right to be present at her own hearing.").

<sup>36</sup> Letter from Johan Callewaert, Deputy Grand Chamber Registrar, to Sanjeev Sharma, counsel at J.M. Wilson Solicitors LLP (Nov. 14, 2013) (on file with author).

As a result of this reply, the applicant did not attend.

In this case, the court accepted third party interventions from the Belgian government, as well as from the Human Rights Centre of Ghent University,<sup>37</sup> the NGO Liberty,<sup>38</sup> Amnesty International, Open Society Justice Initiative (“Open Society”),<sup>39</sup> and the group Article 19.<sup>40</sup> Among the third party interveners, both Open Society and the Human Rights Centre of Ghent University submitted empirical data in addition to legal arguments. In April 2011, when the French ban went into effect, Open Society published data from interviews with 32 women wearing the face veil in France, during which it inquired into their motivations and experiences.<sup>41</sup> This report was added to Open Society’s written submission and was referred to extensively in Liberty’s submission. In addition, and specifically in light of *S.A.S v. France*, Open Society conducted a follow-up

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<sup>37</sup> See Third Party Intervention of the Human Rights Center of Ghent University, *S.A.S. v. France*, App. No. 43835/11, (Eur. Ct. H.R. filed May 15, 2013), available at [http://www.ugent.be/re/publiekrecht/en/department/human-rights/publications/sas.pdf/at\\_download/file](http://www.ugent.be/re/publiekrecht/en/department/human-rights/publications/sas.pdf/at_download/file). In response to the French government’s arguments attempting to undermine the credibility of both the French and Belgian empirical studies, see French Government Submissions in Response to the Third Party Interventions at 6–7, *S.A.S. v. France*, App. No. 43835/11, (Eur. Ct. H.R. filed Sept. 17, 2012), the Ghent University Human Rights Centre exceptionally got permission from the president of the Grand Chamber to submit a reaction, which was submitted on Nov. 24, 2013.

<sup>38</sup> Written Submissions on behalf of Liberty (Intervenor), *S.A.S. v. France*, App. No. 43835/11, (Eur. Ct. H.R. filed May 7, 2012), available at <http://www.liberty-human-rights.org.uk/about/legal/interventions/s.a.s.-v-france-european-court-of-human-rights-2012.pdf>.

<sup>39</sup> Written Comments of the Open Society Justice Initiative, *S.A.S. v. France*, App. No. 43835/11, (Eur. Ct. H.R. filed July 10, 2012), available at <http://www.opensocietyfoundations.org/sites/default/files/sas-france-written-comments-20130423.pdf>.

<sup>40</sup> Third Party Intervention Submissions by Article 19, *S.A.S. v. France*, App. No. 43835/11, (Eur. Ct. H.R. filed 2012), available at [http://www.article19.org/data/files/THIRD\\_PARTY\\_INTERVENTION\\_SUBMISSIONS\\_BY\\_ARTICLE\\_19.pdf](http://www.article19.org/data/files/THIRD_PARTY_INTERVENTION_SUBMISSIONS_BY_ARTICLE_19.pdf).

<sup>41</sup> See OPEN SOC’Y FOUND., UNVEILING THE TRUTH: WHY 32 MUSLIM WOMEN WEAR THE FULL-FACE VEIL IN FRANCE (2011), available at [http://www.opensocietyfoundations.org/sites/default/files/a-unveiling-the-truth-20100510\\_0.pdf](http://www.opensocietyfoundations.org/sites/default/files/a-unveiling-the-truth-20100510_0.pdf).

study, documenting the experiences of individuals who wore face veils after the ban.<sup>42</sup> It received the court's permission to add the report to its submission. In Belgium, the Human Rights Centre at Ghent University conducted similar research by interviewing 27 women, partly before and partly after Belgian's ban on face veils went into effect.<sup>43</sup> The argumentation in the Centre's third party intervention relies strongly on that data. Such data are vital to understanding the legal rationale behind the applicant's case.

## II. RELEVANT PROVISIONS AND LEGAL TEST

The applicant in *S.A.S. v. France* alleges a violation of Articles 3, 8, 9, 10, 11, and 14 of the ECHR.<sup>44</sup> Relying on

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<sup>42</sup> See *AFTER THE BAN*, *supra* note 33, which was submitted as additional evidence for Third Party Intervention of Open Justice Initiative in *S.A.S. v. France*, App. No. 43835/11, 2014 Eur. Ct. H.R. (Oct. 2, 2013).

<sup>43</sup> See *BREMS ET AL., WEARING THE FACE VEIL*, *supra* note 8; *see also* Eva Brems et al., *The Belgian "Burqa Ban" Confronted With Insider Realities, in THE EXPERIENCES OF FACE VEIL WEARERS*, *supra* note 5.

<sup>44</sup> Convention for the Protection of Human Rights and Fundamental Freedoms § 1, art. 9, Nov. 4, 1950, 213 U.N.T.S. 230 [hereinafter ECHR]. The relevant articles are as follows:

### Article 3 ECHR:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

...

### Article 8 ECHR:

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 well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### Article 9 ECHR:

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

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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.

Article 10 ECHR:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 ECHR:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 14 ECHR:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 3, the prohibition of torture and inhuman and degrading treatment, the applicant contends that since it is illegal to wear a garment designed to conceal the face in public places, if she wears her face veil in public she risks incurring a criminal penalty, as well as suffering harassment and discrimination.<sup>45</sup> In addition, under Article 8, which protects the right to privacy in the home and family, the applicant complains that the ban, which prohibits her from dressing as she chooses in public, is a violation of her right to respect for private life.<sup>46</sup> The applicant also claims that Article 9 of the ECHR, which protects manifestation of religion or belief, is violated by the ban on face veils. Effectively, she argues that her inability to wear the full veil in public places denies her the freedom to manifest her religion or belief.<sup>47</sup> Additionally, she contends that the ban violates Article 10, the right to freedom of expression. Specifically, the ban prevents her from wearing in public a garment that expresses her faith, as well as her religious, cultural, and personal identity.<sup>48</sup> Furthermore, she alleges that the ban violates Article 11's freedom of assembly and association, since if she cannot wear her veil, she cannot go into public, and thus cannot associate with others.<sup>49</sup> Finally, she contends that the ban ignores Article 14, which prohibits discrimination based on gender, race, language, religion, or any other status. In particular, the applicant complains that the face covering ban, by its very nature, engenders discrimination based on sex, religion, and ethnic origin against women who, like her, wear the full

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<sup>45</sup> ECHR, Fifth Section, Questions for the Parties, *S.A.S. v. France*, App. No. 43835/11, (Eur. Ct. H.R.) (undated) (on file with author).

<sup>46</sup> ECHR, *supra* note 44. Under the right to protection of private life, the European Court of Human Rights protects a wide range of autonomy-related interests, arguably including dress styles. The (former) European Commission of Human Rights (EComHR) has ruled, for instance, that constraints imposed on a person's choice of mode of dress constitute an interference with private life as ensured by Article 8 of the Convention. *See Kara v. United Kingdom*, Y.B. Eur. Conv. on H.R. (Oct. 22, 1998).

<sup>47</sup> ECHR, *supra* note 44.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

veil.<sup>50</sup>

It is important to begin with the understanding that Article 3 is an absolute right: once a certain treatment falls under its scope, it is automatically a violation, regardless of its justification. The main legal question is therefore one of a threshold of severity: can the treatment that the applicant complains of be labeled “inhuman” or “degrading?” The idea that the risk of a criminal penalty—in this case a fine—could be considered degrading or inhuman is farfetched. Yet, the claim that the ban exposes women who wear a face veil to harassment raises a relevant issue. The applicant in *S.A.S.* “believes that if she wears the niqab[,] members of the public . . . will request her without proper justification to remove it and will in the process harass and discriminate against her thereby exposing her to degrading treatment.”<sup>51</sup> The research in France and Belgium demonstrates that women who wear a face veil in those countries suffer serious harassment. This research also strongly suggests that such harassment has increased as a result of the bans, with many citizens acting as vigilante policemen.<sup>52</sup> It may legally be possible to hold the French government accountable under Article 3 for not adequately protecting women who wear a face veil. Yet the applicant is making a different point, namely that by introducing the face covering ban, the French state has implicitly, if not explicitly, encouraged aggression against women who wear face veils. Accepting this line of reasoning would be innovative. However, since there is almost no hard evidence linking the aggressions directly to the adoption of the law, it is unlikely that

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<sup>50</sup> *Id.*

<sup>51</sup> Exposé des faits et questions aux parties ¶ 11, *S.A.S. v. France*, App. No. 43835/11 (Eur. Ct. H.R. filed Apr. 11, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110063>.

<sup>52</sup> BREMS ET AL., *WEARING THE FACE VEIL*, *supra* note 8, at 17–21. AFTER THE BAN, *supra* note 33, at 13, reports that the majority of interviewees experience verbal abuse on a regular basis, and that twelve respondents reported physical assaults, such as having their veil pulled off and being violently pushed or spat on. It notes that “the ban and public discourse seems to have implicitly legitimized the abusive treatment of veiled women. With a widespread condemnation of the full-face veil, the women’s testimonies reveal that some members of the public seem to think that the law allows for or legitimizes private enforcement.” *Id.*

the court will be persuaded by this argument.

Under all the other ECHR provisions that are invoked in this case, the court instead engages in a balancing exercise between the right that is at stake and the interest that is invoked by the government as a “legitimate aim” that may justify a proportionate restriction of that right. It is likely that the court will discuss the impact of the ban under Article 9, stating that its reasoning applies *mutatis mutandis* to the claims under Articles 8<sup>53</sup> and 10.<sup>54</sup> The court may dismiss the claim under Article 11.<sup>55</sup> But the court should address the discrimination claim under Article 14 in combination with one or more of the other Articles of ECHR separately.<sup>56</sup> This is because the face covering bans are manifest examples of seemingly neutral legislation that is in fact targeted at a specific group, namely Muslim women who wear a face veil. The European Court of Human Rights recognizes that “a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group,”<sup>57</sup>

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<sup>53</sup> The applicant argues applicability of Article 8 of the ECHR on multiple grounds: (1) the full face veil provides the person wearing it a sense of acute or extended privacy; (2) the matter relates to the applicant’s individual autonomy concerning her identity and dress code; (3) wearing the face veil is related to her ability to interact with others; (4) the exposure to public hostility infringes upon her physical and psychological integrity; and (5) the face veil is a cultural practice of a minority group. *See* Final Observations, *S.A.S. v. France*, App. No. 43835/11, ¶¶ 39–47 (Eur. Ct. H.R. July 4, 2013).

<sup>54</sup> The relevance of freedom of expression for this case was particularly emphasized in the submission by Article 19 before the Grand Chamber, i.e., after the Fifth Sections “questions to the parties,” where it was not included. *See* Third Party Intervention Submissions by Article 19, *supra* note 40.

<sup>55</sup> In this respect, it is noteworthy that before relinquishing jurisdiction to the Grand Chamber, the Fifth Section of the Court sent three questions to the parties, pertaining to their opinion on a positive violation of Articles 8, 9, and 14 only, the latter moreover being restricted to discrimination based on religion or sex. *Exposé des faits et Questions aux parties*, *supra* note 51.

<sup>56</sup> Article 14 of ECHR prohibits discrimination in the exercise of any of the Convention rights, and hence has to be invoked together with another ECHR provision. *See* ECHR, *supra* note 44.

<sup>57</sup> *D.H. v. Czech Republic*, App. No. 57325/00, 2007-IV Eur. Ct. H.R., para. 175, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256> ECtHR.



i.e. the concept of indirect discrimination. This does not require proof of discriminatory intent even though in these cases this proof would not be hard to find.

It is clear that “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.”<sup>58</sup> The effective move towards a general ban on face covering in France began not long after MP André Gérin, along with others, filed a resolution on June 9, 2009 aimed at establishing a commission of inquiry concerning the face veil on French territory.<sup>59</sup> Not long afterwards, President Nicolas Sarkozy, in a speech on June 22, 2009, stated that such veils were not welcome in France and that legislation was necessary “to protect women from being forced to cover their faces and to uphold France’s secular values.”<sup>60</sup> That the ban is aimed at the face veil, despite its neutral language, is furthermore obvious on account of the constant references to the face veil throughout the parliamentary debates. Moreover, the opinion requested by the Prime Minister from the Conseil d’Etat in the early drafting stages concerned the “legal grounds for a ban *on the full veil*.”<sup>61</sup> Clearly the ban was not about the visibility of faces in general, but specifically about the Islamic face veil. In that sense, the applicant is right to state that “this is a case where the discriminatory treatment comes very close to direct discrimination,”<sup>62</sup> on grounds (e.g., sex,<sup>63</sup> religion<sup>64</sup>) for which

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<sup>58</sup> Written Comments of the Open Society Justice Initiative, *supra* note 39, ¶ 6.

<sup>59</sup> Willy Fautré, *Is the Burqa Compatible with Women’s Rights? The “Burqa issue” in the EU*, Paper Presented at the Burqa and Women’s Rights Conference at the European Parliament in Brussels (June 10, 2010), available at <http://strasbourgconsortium.org/document.php?DocumentID=5170>.

<sup>60</sup> Cécilia Gabizon, *Sarkozy: “La Burqa n’est pas la Bienvenue,”* LE FIGARO (June 25, 2009), <http://www.lefigaro.fr/politique/2009/06/23/01002-20090623ARTFIG00055-sarkozy-la-burqa-n-est-pas-la-bienvenue-.php>.

<sup>61</sup> CONSEIL D’ETAT, SECTION DU RAPPORT ET DES ETUDES, *supra* note 21, at 7 (emphasis added).

<sup>62</sup> Final Observations, *supra* note 53, ¶ 141.

<sup>63</sup> *Stec v. United Kingdom*, App. Nos. 65731/01 & 65900/01, 2006-VI Eur. Ct. H.R., ¶ 52, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-73198>.

<sup>64</sup> *Hoffmann v. Austria*, App. No. 12875/87, 1993 Eur. Ct. H.R., para.

the court exercises strict scrutiny.

Regardless, once the applicant has demonstrated that there is a difference in treatment or a disproportionate prejudicial effect, the burden shifts to the government to prove that the difference in treatment pursued a legitimate aim in a proportionate manner. At that point the review of any claim for discrimination would be examined under a similar analysis as that used for Articles 8, 9, 10, or 11 of the ECHR. Under this analysis, an interference with a right can only be justified if it has a legal basis, pursues a legitimate aim from among those listed in the restriction clause,<sup>65</sup> and—most importantly—if there is a reasonable relationship of proportionality between the restrictive measure and that aim. Hence, whether the court conducts its analysis of the ban under the prohibition of discrimination or religious freedom, or both, the focus of the court’s reasoning will be on the examination of whether the ban can be considered proportionate to one or several legitimate aims.

According to the French Government in *S.A.S.*, the “legitimate aim” underlying the face covering ban, involves three policy goals: (1) the protection of public safety; (2) respect for “compliance with the minimal requirements of life in society”; and (3) “equality between men and women and respect for the dignity of the person.”<sup>66</sup>

### III. UNCOVERING IN THE NAME OF “THE MINIMAL REQUIREMENTS OF LIFE IN SOCIETY?”

“Public safety” is explicitly mentioned in Article 9(2) as a

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36, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57825>.

<sup>65</sup> Several provisions of the ECHR are drafted in such a way (similar to other conventions such as the ICCPR), that the first paragraph sets out the scope of the right, whereas the second paragraph contains the conditions for its legitimate restriction. These restriction clauses set out three conditions: the restrictive measure should have a legal basis; it needs a legitimate aim from among those listed in the restriction clause; and it has to be “necessary in a democratic society,” i.e., proportionate with respect to the realization of that aim.

<sup>66</sup> French Government Submissions, *S.A.S. v. France*, App. No. 43835/11 (Eur. Ct. H.R. filed July 31, 2013), *supra* note 37, para. 94.

legitimate aim that may justify proportionate restrictions of religious freedom.<sup>67</sup> Additionally, the protection of equality between men and women and of human dignity could also be a legitimate aim under Article 9 due to language regarding “the protection of the rights and freedoms of others.”<sup>68</sup> Yet, it is not clear that respect for “the minimal requirements of life in society” fits under any of the “legitimate aims” under Article 9.<sup>69</sup> The French Council of State was the first to suggest that this idea of “minimal requirements of life in society” could be legally translated into a novel interpretation of the concept of “public order,” building on the idea of “non-material public order.”<sup>70</sup> The Council of State noted that such a concept had not been developed in French legal doctrine or case law, and was not found in any neighbouring legal system either. Hence, the Council of State considered the concept of non-material public order vulnerable to constitutional challenges and advised against its use. However, French MPs borrowed the new concept, also naming it “social public order,” and built their case for a ban on face coverings largely on that ground. It is, however, far from certain whether the court will agree with this line of reasoning. At the public hearing, one of the judges asked the representative of the French government how she viewed the policy goal of “minimal requirements of life in society” coexisting with the list of legitimate aims in the second paragraph of Article 9 of the ECHR. The representative’s answer referred to “the protection of the rights and freedoms of others.”<sup>71</sup> This answer, however, supposes the existence of a right to see the face of others in a

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<sup>67</sup> See ECHR, *supra* note 44.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> CONSEIL D’ETAT, SECTION DU RAPPORT ET DES ETUDES, *supra* note 21, at 26–27. On the concept of non-material public order in this context, see Rim-Sarah Alouane, *Bas les Masques! Unveiling Muslim Women on Behalf of the Protection of Public Order: Reflections on the Legal Controversies Around a Novel Definition of “Public Order” Used to Ban Full-Face Covering in France*, in THE EXPERIENCES OF FACE VEIL WEARERS, *supra* note 5.

<sup>71</sup> This quote was taken from notes the author took during oral hearing of the Grand Chamber of the European Court of Human Rights in *S.A.S. v. France* in Strasbourg, France, on November 27, 2013.

public space. This is certainly not a legal right.

In the French debates surrounding the face-covering ban, seeing the face of others has been put forward as a moral right. This view is based on the work of the French sociologist Elisabeth Badinter, who was interviewed by the parliamentary commission of inquiry,<sup>72</sup> and of the French philosopher Emmanuel Levinas. The latter's discourse about the "face of the other," as the basis for meeting another person and being morally involved,<sup>73</sup> was interpreted literally (as referring to the actual face of a human being as the crucial building stone for moral relations in a society, rather than the presence of the other in our midst) by the Commission of Inquiry,<sup>74</sup> and by the French government in its arguments in *S.A.S. v. France*.<sup>75</sup> However, the applicant rightly alleges that

the government is treading on dangerous ground when it attempts to justify a legal measure by postmodern philosophy, which by its very nature is highly complex and not capable of clear-cut interpretations, let alone one "correct" interpretation. Arguably, the law prohibiting covering the face in public is not at all in line with the spirit of Levinas' philosophy as his idea of "face-to-face encounter" is centred on inherent respect for the other—the opposite of what the law in question achieves.<sup>76</sup>

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<sup>72</sup> GÉRIN, *supra* note 1, at 118.

<sup>73</sup> See FACE OF THE OTHER AND THE TRACE OF GOD: ESSAYS ON THE PHILOSOPHY OF EMMANUEL LEVINAS (Jeffrey Bloechl, ed., 2000); RICHARD A. COHEN, FACE TO FACE WITH LEVINAS (1986).

<sup>74</sup> GÉRIN, *supra* note 1, at 117–18.

<sup>75</sup> French Government Submissions, *supra* note 37, ¶ 104. In addition, the Belgian government, as well as the French government in its oral arguments, referred to the Belgian philosopher Guy Haarscher. See Third Party Intervention of the Belgian Government at 4, *S.A.S. v. France* (Eur. Ct. H.R. filed Sept. 18, 2013).

<sup>76</sup> Final Observations, *supra* note 53, ¶ 90. It is added, moreover, that [e]ven if one accepts a literalist interpretation of Levinas that it is crucial actually to see the other's face for an ethical obligation towards her to arise, it is still absurd to conclude that that leads to the compulsory uncovering of the face, so

The level of subjectivity and cultural bias inherent in the “minimal requirements of life in society” argument becomes even more apparent in the submissions by the Belgian government, which advance the fact that it is considered respectful to take off sunglasses during conversation, and states without any reference to authority that appearing on the street implies a readiness to be looked at that is an inherent limit to the right to isolation.<sup>77</sup> This

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that such an obligation towards the legally sanctioned person can be created. In other words, even if one accepts the idea that the face has special importance in the western tradition, it is a far cry to enforce uncovering the face by penal sanctions. If the Respondent followed its own logic through, it ought also to introduce a law making touching the other in the public space compulsory, as skin contact is also a feature of Levinasian discourse. The absurdity of the Respondent’s argument is evident and fails to take into account the cultural practices of minorities which does not necessarily subscribe to this philosophical ideology.

*Id.*

<sup>77</sup> Third Party Intervention of the Belgian Government, *supra* note 75, at 6.

A parallel can be drawn: it is today still generally considered more respectful toward others to take off one’s sunglasses in conversation so as to allow real and complete interaction. So many emotions pass through our face and specifically through our eyes. The eyes even promote listening. Trying to interact with respect for others without the classical rituals of greeting and looking (“les rituels classiques du bonjour et du regard”), is not well preparing the field of the relation. The right to isolation has its limits. I can go out on the street and not feel like engaging in a long conversation, but I have be ready to be watched and, ideally, greeted, even by someone who is a stranger to me. The notion of dignity in dressing and social contacts is relatively subjective yet the more a society is multicultural and the more types of religious and philosophical convictions and types of cultural customs coexist, the more persons have to be careful to not show them in a too demonstrative manner on the public street. The vestimentary codes in our societies are the product of a societal consensus, they are the fruit of a balanced compromise between our individual liberty and our codes of interaction in society.

*Id.* (translated by author from French).

view results from translating the philosophical rhetoric into concrete behavioral requirements. The idea being that people who choose to be in public are not allowed to make themselves unavailable for interaction with others or to give such an impression. It also assumes that not showing one's face should automatically be considered as a signal of withdrawal from, or unavailability for, social interaction.<sup>78</sup> Yet, even if one accepts furthering social interaction as a "legitimate aim" that may justify restrictions of fundamental rights as a matter of principle, it appears difficult to justify the necessity of a face-covering ban in all public spaces to further this aim.

First, it is important to consider if wearing a face veil really prevents communication. In an age of mobile phones and online communities, the philosophical claim that someone cannot meet someone else without looking him or her in the face seems detached from reality. Several women interviewed expressed a self-image that included them as open or sociable persons. Many of the women stated that, from their perspective, communication is perfectly possible, even if they recognize that the veil could be experienced as a communicative barrier by those they speak to. Within their familiar environment, especially before the ban, women who wear a face veil participated in a range of social activities involving contact with others at schools, in shops, and administrative offices among others.

For example, one interviewee described her experience as follows, "Me, I talk to everybody, everybody sees me laugh; they answer me in the same tone if they want to. When they don't want to, that's another matter."<sup>79</sup>

Another interviewee also shared the following recollection.

At the time I lived in a neighborhood of old

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<sup>78</sup> Compare with the argument of the Belgian government that "[p]ersons who wear a garment that hides their face completely or mostly send a signal to the majority of those [women] who pass them that they do not want to participate in society in an active manner." *Id.* (translated from French by the author). Note that the way this argument is framed admits that this is a judgment faced by those who are confronted with face veil-wearers, and it is not even claimed that this is the intention of the face veil-wearers themselves.

<sup>79</sup> Interviews by Eva Brems et al. with Belgian niqabis, at nr 4 [hereinafter Interviews with Belgian niqabis] (on file with author).

people . . . . And these people recognized me without any problem and they acted toward me as if they saw whoever else in the street . . . . We were good neighbors, and I remember that when we moved, the old people were even sad because they told us: “Oh, we knew you so well and we knew that we could count on you, that we could ask you something.” There was even an old lady, who lived upstairs where I lived, and whose children did not visit her. And she told me, “it is so good of you, that you come and visit the elderly,” because I visited her from time to time with my children. So it does not stand in the way of anything at all. It is enough to want to accept the difference and to understand that behind that face veil, there is a person who is completely normal.<sup>80</sup>

Similarly, the applicant in *S.A.S. v. France* states:

The most important thing about how I communicate [is] my words and how I follow them up with deeds—not the visibility of my face. My veil compels others to respond to my brains, not my body; to respond to what I say, not how I look when I say it; on my character, not my clothes.<sup>81</sup>

Moreover, many interviewees reported positive contacts when they interacted with people who they had previously been unacquainted with. Several women told stories of how a conversation with an initially suspicious stranger turned into a positive exchange. For example,

In a supermarket, people told me “madam, why do you wear that?” I came closer to a gentleman and told him what the religion says. It is not mandatory but if you do it on your own initiative . . . . He told me “maybe your husband forced you.” I said “you see, I do my shopping all alone, and I drive alone, there is nobody with me.” And he was

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<sup>80</sup> *Id.* at nr 25.

<sup>81</sup> Witness Statement of the Applicant, *supra* note 27, ¶ 20.

satisfied.<sup>82</sup>

The empirical findings thus reveal the erroneous character of one of the main assumptions legislators had for banning the face veil, namely that the face veil indicates a withdrawal from social interaction. At least before the ban, women wearing a face veil were in fact interacting in numerous ordinary ways with society at large. Moreover, it appears that the ban has not increased these women's social interactions. In fact, the ban may have *decreased* these women's social interactions. Many women who choose to wear a face veil are strongly attached to it and continue to wear it despite the ban, meaning that they now avoid going into public except by car. These women are afraid of an encounter with the police as well as of the harassment and aggression by strangers. Hence, instead of increased social interaction, the effect of the ban on these women is a deterioration of their social life, their interactions with society at large, and their mobility.

Women report that the ban has led to women who wear face veils being harassed even more than before, severely limiting their ability to interact with society. A French face veil wearer reports a typical incident of harassment:

Last time I went to Auchan (supermarket EB), a mob formed around me and people were saying "what are you doing here? It's forbidden! You have no right to go out entirely veiled. It's banned, it's illegal. Go back to your country." [I] feel like a monster. Even pedophiles and criminals, are not treated like that . . . . We are seen as less than nothing, not as human beings.<sup>83</sup>

Another woman reports the negative effects of the ban on her life as a mother, "I don't go out at all with my son. At two and a half he's at the age to go to the park, to play outside. It's not something I can do with him because I'm scared."<sup>84</sup>

Even if some women did take off the face veil as a result of the ban,<sup>85</sup> and it did result in their being more easily approached

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<sup>82</sup> Interviews with Belgian niqabis, *supra* note 79, at nr 2.

<sup>83</sup> AFTER THE BAN, *supra* note 33, at 15.

<sup>84</sup> *Id.* at 12.

<sup>85</sup> Among the thirty-five women interviewed in France after the ban, eight



by others in the public sphere,<sup>86</sup> the ban is a disproportionate measure to achieve that effect. The research suggests that the ban is a disproportionate measure to achieve that effect. In practice, women can and do communicate with their faces veiled. As the above interviews have shown, women who wear a face veil do experience positive exchanges. Social integration is a matter of goodwill on both sides and is likely to be better realized by inclusive means rather than ones that are repressive.

#### IV. BANNING IN THE NAME OF SAFETY?

In the public discussion surrounding face-covering bans, the safety argument often concerns subjective feelings of danger that are generated by the sight of a woman who covers her face. In the Belgian Parliament, for instance, the introduction of a face veil ban was compared to placing street lamps in a dark alley in order to reduce the fear of crime and provide a feeling of public security.<sup>87</sup> In our interviews, veiled women recounted experiences of engendering feelings of unease or fear in others. One woman stated, “I understand completely that people are scared. It’s normal, because it’s covered, it’s hidden, you don’t know what’s underneath. At first sight, it’s shocking.” At the same time, these women’s stories also show that it is possible to overcome these feelings and to establish meaningful contacts and relationships with others. These contacts and relationships appear to exist in particular with persons with whom there is regular interaction and who may therefore be assumed to be “used to” the veil. Examples include neighbors, teachers, and shopkeepers. Thus, any feelings of danger do not necessarily accompany contact with veiled women, and as such those feelings can be overcome, it is

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respondents have removed their full-face veil, while twenty-seven continue to wear it despite the ban. *See id.* at 2.

<sup>86</sup> It should be noted, however, that the aggression of the public at large appears to extend to women who dress in a conservative, Islamic manner, even without a face veil. Hence, it is far from certain that those same women, when they take off the face veil yet otherwise keep dressing as they did before, would be more easily approached by members of the public.

<sup>87</sup> Parliament of Belgium, *Hand.* Kamer 2009–10, April 29, 2010, nr. 52-151, 23, available at <http://www.dekamer.be/doc/PCRI/pdf/52/ip151.pdf>.

an issue that might be better addressed by other means than those that are repressive.

Moreover, in the European Court of Human Rights, a feeling of danger can only serve as a ground for the restriction of human rights if there is an objective foundation for such a feeling. Therefore, a religious practice cannot be prohibited merely on account of the fact that a part of the population finds it offensive or even alarming. The court has made this particularly clear in its case law, holding that “a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling—real or imaginary—cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement.”<sup>88</sup> Following this line of reasoning, the argument of subjective safety, in this case with regard to face veils, cannot serve as a justification for restricting human rights.

By contrast, the promotion of objective public safety can be regarded as a legitimate government objective. Yet, any measure must still address an actual safety concern. Restriction of civil liberties—here, the right to freedom of religion and expression—cannot be based on speculation alone. One example of this is in *Arslan v. Turkey*, where members of a religious order were criminally convicted for wearing distinctive religious clothing in public. The court held that the convictions violated their freedom of religion since there was no evidence that the applicants represented a threat to public order, or that they were involved in proselytism.<sup>89</sup>

Even if the ban on face veils did promote public safety, it would still be difficult to reconcile the ban’s broad scope—all public spaces—with the proportionality principle. That principle requires that a measure restricting a fundamental freedom must not burden that freedom any more than necessary to achieve its purpose.<sup>90</sup> In most cases, safety risks can be overcome by

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<sup>88</sup> *Vajnai v. Hungary*, 2008 Eur. Ct. H.R., para. 57, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87404>.

<sup>89</sup> *Arslan v. Turkey*, 2010 Eur. Ct. H.R., para. 50, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97380>.

<sup>90</sup> See *supra* note 52–55 and accompanying text for an explanation of the test applied by the European Court of Human Rights.

measures less restrictive than a ban, such as the obligation to lift the face veil upon a legitimate request. Public safety only requires the ability to identify someone when needed rather than permanent recognizability. Among our interviewees, we found that women were in general willing to identify themselves to police or other authorities by lowering their veils. Many interviewees explicitly stated that they would be willing to identify themselves to male as well as female officials. The applicant in *S.A.S. v. France* is no exception. In her application to the court, she confirmed her willingness “to show her face when a security check is required” as well as “to lift her veil when requested to do so for necessary identity checks.”<sup>91</sup> Hence, the risk that the face veil poses for objective safety in the general public sphere appears exaggerated, if not unfounded. This provides support that the ban is too broad and disproportionate to be justified as a safety measure.

#### V. BANNING FACE VEILS IN THE NAME OF WOMEN’S RIGHTS?

During the parliamentary debates concerning the French and Belgian legal bans the discourse emphasizing women’s rights and women’s dignity was abundant. Strong language was used, branding the face veil as a “mobile jail,” a “textile prison,” or the “shroud of freedom.”<sup>92</sup> The underlying assumption of this argument is that women wearing a face veil are (mostly or always) forced to do so. In its submission in *S.A.S. v. France*, the French government stated that

to consider that women, for the sole reason that they are women, must hide their faces in public

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<sup>91</sup> Application, *supra* note 29, ¶ 4. See also Witness Statement of Applicant, *supra* note 27, ¶ 30 (“Of course, I accept that—at specific times, locations, contexts—legitimate public safety issues do require those wearing full face veils to satisfy security identity checks. At an airport or bank, for instance, or during heightened localized security threats, I accept that security identity checks (i.e., lifting my veil to reveal my face) are entirely justified and reasonable.”).

<sup>92</sup> Belgian Parliamentary Documents, *Parl. St. Kamer* 2010-11, nr. 53-219/4, 5, 9, 13, 14 & 21, available at <http://www.dekamer.be/FLWB/PDF/53/0219/53K0219004.pdf>.

space, is to deny them the right to exist as individuals in this space and to reserve the expression of their individuality to the private family space, since only the men of the family have the right to see their face, or to an exclusively female space. Only men, according to such a view, are entitled to such public individual existence. Hence there is an absolute, publicly asserted, negation of equality between men and women.<sup>93</sup>

Yet, all available empirical research demonstrates that this central assumption is erroneous. While the research does not allow a conclusion as toward whether or not (and if so, how many) women are being forced to wear a face veil,<sup>94</sup> it does clearly show that for a significant number of women who wear a face veil, the face veil is the result of an autonomous choice.<sup>95</sup> All interviewees describe the decision to start wearing the face veil as a well-considered and free decision, a personal trajectory of deepening and perfecting one's faith. One woman describes her trajectory this way: "I wore my veil first on the inside before I wore it on the outside. For me, the veil on the inside is the first thing. My veil is my chastity, it is my behavior, it is my politeness, it is my respect."<sup>96</sup>

Another woman expresses how she sees herself and others who decide to wear a face veil: "A woman who is completely

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<sup>93</sup> French Government Observations in Reply to Application ¶¶ 86–88, *S.A.S. v. France* (Eur. Ct. H.R. May 29, 2012) (translated by the author from French).

<sup>94</sup> In its submissions in *S.A.S. v. France*, the French government refers to the testimony of Sihem Habchi, chair of the organization Ni Putes Ni Soumises, who describes the testimony of a woman named Karima about the domestic violence she suffered from her husband, including her being forced to wear a face veil. See French Government Submissions in Response to the Third Party Interventions at 7, *supra* note 37. This is the only concrete example in the debates that we found. In the Belgian study, explicit efforts were undertaken to identify similar cases, yet none were found. See BREMS ET AL., WEARING THE FACE VEIL, *supra* note 8.

<sup>95</sup> See THE EXPERIENCES OF FACE VEIL WEARERS, *supra* note 5, for reports on empirical research from Belgium, the Netherlands, France, the United Kingdom, and Denmark.

<sup>96</sup> Focus group discussion with Belgian niqabis (on file with author).

veiled, for me she is a woman with strength, with enormous self-confidence . . . . You need it very much.”<sup>97</sup>

In France and Belgium, nearly all women who choose to wear a veil were confronted with strong negative reactions from their relatives and friends, sometimes even their husbands. There is no evidence, in either France or Belgium, of pressure from husbands or relatives to wear a face veil; while there is recorded pressure from husbands and relatives to *not* wear a face veil.

By contrast, *forcing* a woman to wear a burqa or niqab amounts to an impermissible oppression of women, a type of domestic violence. It is doubtful whether criminalizing and fining the women in question can be considered a relevant measure to combat this oppression. This approach treats the oppressed woman as a perpetrator rather than as a victim.<sup>98</sup> Hence, the idea of protecting women against the imposition of a face veil cannot justify a face-covering ban under Article 9 of the ECHR.

Overall, a woman’s agency appears as a strong and determining factor in her journey toward the face veil. These women generally see themselves, and each other, as “strong” women.<sup>99</sup> They experience the ban as a denial of their autonomy and hence as anti-emancipatory. The applicant in *S.A.S. v. France* stated this view eloquently:

To be clear, neither my faith nor any man is dictating to me what I can wear in public: *only* the State is dictating that to me. Neither my faith nor any man is restricting my liberty to choose my own clothing: *only* the State is restricting that

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<sup>97</sup> Interviews with Belgian niqabis, *supra* note 79, at nr. 19.

<sup>98</sup> While the Belgian ban only criminalizes the person who covers her face, the French law creates a separate offense for forcing another to cover her face. Yet, that provision does not appear to be applied in practice. One year after the ban was implemented, the French Ministry of Interior reported that 299 women had received a fine or warning wearing the full-face veil, yet there was no mention of any application to men. *See* Written Comments of the Open Society Justice Initiative, *supra* note 39, ¶ 12. Moreover, there is no evidence (nor even any claim in that sense by the French government in *S.A.S.*) that such warnings or fines are used to help women who might be victims of abuse.

<sup>99</sup> *See also* Witness Statement of the Applicant, *supra* note 27, ¶ 15 (“I am a strong, independent Muslim woman.”).

liberty. Neither my faith nor any man is compelling me to obey clothing restrictions under specific threat of punishment: *only* the State would punish me if I failed to comply with its clothing restrictions.<sup>100</sup>

It should be noted that the court has ruled that personal autonomy “can also include the possibility of devoting oneself to activities perceived as being of a nature physically or morally damageable or dangerous to oneself,” and that “particularly serious reasons” are required for state interference.<sup>101</sup> Hence, to the extent that the face veil is chosen freely, a ban based on the protection of women’s autonomy does not make sense. Moreover, research completed after the French ban went into effect shows that the ban has made women more dependent on their husbands because they go out less, either to avoid a fine because they cover their faces or, if they stopped using a face veil, because they feel uncomfortable.<sup>102</sup> The French government rejects the relevance of free choice in this debate, stating that the face veil “effaces persons from public space,” and that “regardless [of] whether this effacement is desired or suffered, it is necessarily dehumanizing and can therefore hardly be regarded as consistent with human dignity.”<sup>103</sup> The government also suggests those women who wear a face veil suffer false consciousness,<sup>104</sup> having internalized an oppressive rule.<sup>105</sup> The French government’s former claim, as the *S.A.S. v. France* applicant discusses, is “an abstract assumption based on stereotyping and chauvinistic logic that does not survive scrutiny.”<sup>106</sup> Their latter claim is “deeply paternalistic and

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<sup>100</sup> *Id.* ¶ 14 (emphasis added).

<sup>101</sup> *K.A. & A.D. v. Belgium*, Eur. Ct. H.R. (Feb. 17, 2005), para. 83. See also *Pretty v. United Kingdom*, 2002 Eur. Ct. H.R., para. 66, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60448>.

<sup>102</sup> *AFTER THE BAN*, *supra* note 33, at 8.

<sup>103</sup> French Government Observations in Reply to Application, *supra* note 93, ¶ 92 (translated by the author from French).

<sup>104</sup> The term “false consciousness” denotes the inability of members of subordinated groups to recognize their subordination, on account of their interiorization of the views and values that support this subordination.

<sup>105</sup> *Id.* ¶ 105.

<sup>106</sup> Final Observations, *supra* note 53, ¶ 95.

selective as it assumes that non-Muslim French women are not subjected to cultural influences in their personal choices.”<sup>107</sup>

However, the focus on women’s autonomy is not all there is to say about the face veil from a gender or feminist perspective.<sup>108</sup> From a more radical feminist angle, a practice that makes women—yet not men cover up—whether voluntarily or not, is an expression of male dominance.<sup>109</sup> Yet this is just one of many “cultural” expressions of patriarchy. In the same sphere, mainstream French and Belgian culture makes women—yet not men—go to great lengths to be pretty. Applying make-up, shaving armpits and legs, and wearing uncomfortably high heels are just some of the expressions of French and Belgian women’s submission to patriarchy. Eradicating all such expressions is a valuable feminist project,<sup>110</sup> but this is manifestly not the French or Belgian government’s project. If it were, it would be difficult to justify an exclusive focus on face veils<sup>111</sup> while other equally patriarchal practices, that are immensely more widespread, remain unchallenged. Hence, this line of reasoning cannot justify the ban under the auspice of the protection of women’s rights.

In addition, a close reading of the parliamentary debates surrounding face veil bans reveals that the women’s rights argument is not necessarily focused on the rights of women who

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<sup>107</sup> S.A.S Response to the French Government’s Submissions ¶ 30, in *S.A.S. v. France* (Eur. Ct. H.R. filed on May 29, 2012) (“Western ideas of feminine sexuality and fashion are assumed to be unproblematic for gender equality, despite the feminist tradition that has long challenged such ideas as oppressive. The law banning face covering purports to promote gender equality, but does so in an ill-informed and discriminatory way.”).

<sup>108</sup> See Dolores Morondo Taramundi, *Women’s Oppression and Face Veil Bans: A Feminist Assessment*, in *THE EXPERIENCES OF FACE VEIL WEARERS*, *supra* note 5.

<sup>109</sup> Taramundi defines a radical feminist perspective as “a form of critical theory originating in the second-wave, whose interest lies mainly with social power structures, and in particular, with patriarchy or sex-gender systems.” *Id.* at 1 n.1.

<sup>110</sup> Yet, it might be doubted if criminal law is an appropriate way to realize such a project.

<sup>111</sup> It is estimated that around 1,900 women wear the face veil in France; in Belgium, between 200 and 270 women. See GÉRIN, *supra* note 1, at 29, 74. This is less than 0.5% of the Muslim minority in these countries.

wear face veils. Instead, the argument is that the rights of all women would be offended by the use of the face veil. The French government in *S.A.S. v. France* states, “[t]he entire concealing of the face also affects the dignity of the persons who share the public space with the fully veiled person and who are treated as person from whom one has to protect oneself by refusing all exchange, including visual exchange.”<sup>112</sup> In legal terms, the question becomes, whether the face veil can be banned as a *symbol* of women’s oppression or lack of respect for human dignity. Prohibiting symbols is virtually always at odds with freedom of speech. In *Vajnai v. Hungary*,<sup>113</sup> the European Court of Human Rights ruled that the application of the Hungarian ban on communist symbols to someone wearing a red star during a demonstration violated Article 10 of the ECHR. The court was mindful of the fact that for many Hungarians, communist symbols are associated with painful memories<sup>114</sup> but stated, however, that the symbol did not *exclusively* represent totalitarian rule,<sup>115</sup> nor had the Hungarian government shown that the use of the star had generated any danger of violence or disorder, or that there was a “pressing social need” for the interference with free speech.<sup>116</sup> To the extent that the face veil can be analyzed as a symbol, the same reasoning should apply and thus any ban should be struck down.

Moreover, the empirical findings reveal another major problem with this line of reasoning—namely that such an analysis involves a strictly outsider interpretation of the face veil as a symbol carrying a message. However, as the interviews with women who wear a face veil show, those women do not intend to reject the outside world or to send any message. While most interpretations consider the face veil as a message to the world saying that “women should cover themselves,” or even that “women should be submitted to men,” the women themselves do

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<sup>112</sup> French Government Observations in Reply to Application, *supra* note 93, ¶ 93.

<sup>113</sup> *Vajnai v. Hungary*, 2008 Eur. Ct. H.R., para. 57, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87404>.

<sup>114</sup> *Id.* at para. 55.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*



not see it that way. Yet, those women who wear a face veil are well aware of these interpretations, and find them a source of major frustration. One woman stated: “It’s really, really humiliating and degrading for the personality of a Muslim girl, to hear someone say morning and evening ‘it’s the men who submit you, it’s the men who oblige you . . . .’”<sup>117</sup> Another interviewee reported, “That is really something I want for myself. For me.”<sup>118</sup>

For these women, the veil is not a message to the outside world. It is a very personal thing—a choice they make for themselves concerning their relationship to God. Proselytizing is far from these women’s minds. If there is a message, it is certainly not a normative one, in that it is not about telling others how to behave. Nor is it a message about gender relations, but instead about religion. If the face veil is a symbol at all, for the women wearing the face veil it is a symbol of religious devotion. At most, the veil could be considered a symbol of chastity. But chastity to gender inequality is a stretch.

We further analyzed our interviews from a gender perspective. There was a wide variety of views on gender relations ranging from very conservative to quite progressive. For example, one woman expressed her view in this manner, “I do not want to be equal to a man, I want to remain a woman, I don’t want to do the work of a woman and a mother and do the work of a man on top of that.”<sup>119</sup>

Yet, other women saw things differently, as illustrated by the following quotes:

I went to Egypt and met women with a burqa who were lawyers, doctors. I also want to be like that, to achieve something more. I can study, I can work, I can do the same things as any other woman or man.<sup>120</sup>

. . .

At my house, we are two to vacuum, two to

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<sup>117</sup> Interviews with Belgian niqabis, *supra* note 79, at nr. 21.

<sup>118</sup> *Id.* at nr. 11.

<sup>119</sup> *Id.* at nr. 5.

<sup>120</sup> Focus group discussion with Belgian niqabis, *supra* note 96.

prepare meals, two to bathe the children, two to change the diapers, two to do the shopping, two to babysit.<sup>121</sup>

A large majority of our interviewees were housewives. For some women, the life of a housewife is the expression of a commitment to traditional gender roles. Yet, there are others for whom the life of a housewife is not their first choice; they dream of a society in which they would not have to choose between a career and a face veil. Some women who wear a face veil express assertive emancipated views against traditional role patterns and against unequal gender practices in the Muslim community. Clearly, the face veil is not an indicator of its wearer's approval of male dominance, let alone of its promotion. With such a gap between insider and outsider interpretations, it appears that the face veil is not truly a symbol at all. Instead, for some, it is an excuse to engage in textbook prejudice and stigmatization.

#### CONCLUSION

From the perspective of the women concerned, bans on face veils are counterproductive with respect to all three of the stated purposes for the ban: (1) they restrict women's rights instead of furthering them; (2) they reduce social interaction; and (3) they expose women to serious safety risks. The French and Belgian legislators were not concerned with the impact on face veil wearing women, but rather with the effect on people who are confronted with women wearing the face veil. People for whom the sight of a face veil is an affront to women's dignity, who do not want to interact with a woman wearing a face veil in shops or on the street, and who feel unsafe when they come across a face veil because they associate it with terrorism and fundamentalist Islam—it is those people whom the ban seeks to protect.

Will the *S.A.S. v. France* judgment force European states to withdraw their face veil bans? If the European Court of Human Rights takes empirical reality seriously, it cannot uphold the bans. Yet the risk remains that the European Court of Human Rights cannot bring itself to look through the eyes of such a very

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<sup>121</sup> *Id.*

different Other, and that it will simply accept the French state's justifications based on widely shared assumptions and majority concerns—much like the French Constitutional Council and the Belgian Constitutional Court already have done.