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The justifiability of France's 'burqa ban', considering the limitation clauses of Article 9 of the European Convention on Human Rights under European Public Order

BACHELOR THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

RIGA, 2018

SUMMARY

This thesis analyzes prohibitions on wearing the burqa (commonly referred to as “the burqa ban”) within the context of Article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights. The main objective of this thesis to, considering the rule of law, identify any legal issues with the burqa ban, as well as evaluate the judicial application and the legal intricacies within the limitation clauses enshrined under Article 9(2) of the Convention

The hypothesis states that the judicial application of the case *SAS v France* under Article 9 of the Convention creates substantial challenges regarding the interpretation of necessity clauses as laid out in Article 9(2), specifically within the context of the burqa ban in France and the principle of rule of law. This thesis uses empirical data, authoritative sources and presents theories to test the validity of the judicial application of the Courts decision and its jurisdiction in the application of Article 9 of the Convention. Further, while evaluating the significance of the legal issue, the present research aims to provide an objective legal view of the situation.

The thesis is composed of four chapters, each devoted to a separate aspect. Chapter I explores the legal grounds and judicial application of the burqa ban under Article 9. It refers to competing interests: protection of the right to an individual’s religious autonomy v. protection of the rights and freedoms of other Convention norms. Chapter II analyzes the controversial character on the ban with respect to its application of justifiable interference of Article 9(2) on prohibition on religious dress. Further, it considers the legal controversies of Article 9 of the Convention in relation to the burqa ban. Chapter III analyses legal concepts for justifiable interference as “necessary in a democratic society” which resulted in substantial challenges to the interpretation of Article 9 and its application in the assessment of the *S.A.S. v. France* judgment. Chapter IV turns to the practical application of Article 9 and the doctrine of a margin of appreciation. It evaluates the significance of the burqa ban with respect to legal obligations.

Interpretation of Article 9 and other legal norms is done by applying three interpretation methods: hermeneutic, argumentative and explanatory. This research is further supplemented by analysis of relevant case practice. Additionally, the works of legal academics are used to provide a broader perspective on the matter that contributes to an explanatory debate between competing views about the application of Article 9. Further, the requirement of cumulativeness is also explored. Moreover, the analysis offers an illustration of the legal controversies that have emerges regarding the argument of safeguarding Public Order arguing that it is necessary in a democratic society. One of such controversies is the role of subjectivity when interpreting the burqa ban and Article 9. Due to lack of consistent case law practice, this also means that its application is difficult to determine under the justifiable limitation clause. Finally, this may lead the burqa ban to fall within the scope of the doctrine of the margin of appreciation, which fails to objectively assess the legal liability on burqa ban.

The thesis conclusion partly supports the research hypothesis, stating that Article 9 creates legal intricacies that lead to difficulties of objective interpretation in the weighing process. It has both theoretical (i.e. conceptual) and practical shortcomings, which requires action on the part of the

Court to determine the extent of Article 9 within its case law practice. This is vital in order to preclude uncertainty on limitation clauses on justifiable interference, provided by Article 9. However, it is still upon the State parties to interpret the Convention, and to cooperate within the Court in developing common consensus on domestic legislation at Convention standards.

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INTRODUCTION

Justice denies that the loss of freedom for some is made right by a greater good shared by others.¹

Ever since the European Convention for the Protection of Human Rights and Fundamental freedoms (hereinafter the Convention) came into force, it has served as protector of the protection of human rights.² The Convention, according to its Preamble has established legal steps for collective enforcement of the fundamental freedoms and rights that are laid out in the Universal Declaration of Human Rights.³ It is a binding agreement which aim is to provide supervision of the observance of enshrined human rights law provisions.⁴

The Convention has served as an aspiration to every Contracting Member State, when establishing and developing its national legal system.⁵ Every Member State (MS) has a duty to ensure that national authorities respect and guarantee the rights and freedoms set forth in the Convention in order to maintain European Public Order, and preserve the rule of law.⁶

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms (...)⁷

Further, all the Contracting States are subject to the jurisdiction of the European Court of Human Rights (hereinafter the Court) and according to its judgements shall improve the prerequisites of the Convention, and work as guarantors of the enshrined fundamental rights and freedoms under the Convention.⁸

This paper concerns the fundamental right of freedom to religion or belief. This is a fundamental freedom and right – it is also an important foundation for a democratic society.⁹ The protection of religious freedom in a given society depends on a range of factors, degree of political and societal commitment to the principle of religious freedom, and the legal principles in the national jurisdiction for the protection of religious freedom. However, as emphasized above, the Convention and case-law developed by the Court plays a vital role in its implementation within national legislation.

¹ John Rawls, *A Theory of Justice*, (New York: Oxford University Press, 1999).p3

² *Theory and Practice of The European Convention on Human Rights* , ed. Pieter Van Dijk, Fried Van Hoof, Arjen van Rijn, Leo Zwaak. (Antwerpen ;Oxford : Intersentia, 2006), p. 2

³ United Nations, Universal Declaration of Human Rights, 1948. Available on: <http://www.un.org/en/universal-declaration-human-rights/>. Accessed May 5, 2018

⁴ *Supra* note 2, p .3

⁵ Council of Europe, European Convention for the Protection of Human rights and Fundamental Freedoms,1950 Article 1. Available on: http://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 5, 2018

⁶ *Supra* note 2, p. 23

⁷ Council of Europe, European Convention for the Protection of Human rights and Fundamental Freedoms, 1950, Article53 Available on: http://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 5, 2018

⁸ *Supra* note 2, p .19

⁹ *Supra* note 2, p .736

Article 9 of the Convention establishes the freedom of thought, conscience and religion. Article 9(1) protects the right to freedom of thought, conscience and religion.¹⁰ Further, Article 9(2) protects the right to manifest it through worship, teaching, practice and observance.¹¹ However Article 9(2) includes limitation clauses under certain circumstances.¹² The limitations of Article 9 (2) are required to fall under enshrined legal principles to be justifiable.

A notable debate arises about the limitation clause in Article 9(2). The present research focuses on whether legislation restricting religious freedom is justifiable under the necessity clauses of the European Convention, specifically the prohibition of the religious dress (burqa) under the European Public Order. Such research is relevant as the extent of Article 9 and its limitation clauses for justifiable interference are unclear. Hence, such a situation creates doubts and complex legal controversies about the interpretation and application of Article 9. This concerns both theoretical aspects and practical conflicts of this basic legal principle of human rights law, due to difficulties in determining the precise extent of Article 9, the legitimacy of burqa ban in regard to the Convention.

Public order is strictly governed by domestic national law with a reference to Human Rights Law. The question of Public order becomes complex when the MS has leeway to use broad discretionary power when interpreting the Convention.¹³ This use of broad discretionary power is called “the margin of appreciation¹⁴”. Greer notes that the margin of appreciation refers to “the room for maneuver the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights.”¹⁵

However, a lack of clarity about the extent of Article 9 and too much freedom for national legislation to interpret it, may risk undermining fundamental right and freedom the articles aims to protect. Furthermore, it may potentially undermine the importance of human rights law. In the case study of this thesis, the paper analyzes the situation in France where the burqa ban was adopted. It begs the questions of whether in a multi ethnic Europe one group can be selectively impacted by legislation which is supported with arguments emphasizing the history and traditions

¹⁰ Council of Europe, European Convention for the Protection of Human rights and Fundamental Freedoms, 1950 Article 9. Available on: http://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 5, 2018

¹¹ Council of Europe, European Convention for the Protection of Human rights and Fundamental Freedoms, 1950 Article 9. Available on: http://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 5, 2018

¹² Ben Vermeulen and Marjolein van Roosmalen, “Freedom of thought, conscience and religion”, in *Theory and Practice of The European Convention on Human Rights*, ed. Pieter Van Dijk, Fried Van Hoof, Arjen van Rijn, Leo Zwaak . (Antwerpen ;Oxford : Intersentia, 2006), pp .758-763

¹³*Theory and Practice of The European Convention on Human Rights*, ed. Pieter Van Dijk, Fried Van Hoof, Arjen van Rijn, Leo Zwaak. (Antwerpen ;Oxford : Intersentia, 2006), p.23

¹⁴ Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, Emory International Law Review 15, (2001): p. 451. Donoho calls the doctrine “one of the Court’s primary tools for accommodating diversity, national sovereignty, and the will of domestic majorities, while enforcing effective implementation of rights under the European Convention.” The EC has noted that the substance of the notion of public order “varied on account of national characteristics.” David Harris et al., *Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press, 2009), pp.14-17

¹⁵ Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights*, (Council of Europe, 2000) Available one: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf). Accessed May 1, 2018

of one particular country (France). France interprets the ban as falling under the limitation clause of Article 9 arguing for its right to safeguard public order and determining it as necessary in a democratic society. Moreover, it is important to emphasize that this legislation and its justifications have been accepted by the Court. However, legal controversies and intricacies continue throughout France.

The thesis does not attempt to assess the political and societal commitment to religious freedom made by France. Instead, the thesis aims to present a broad inquiry about the Convention's limitation clauses under Article 9 and in relation to the burqa ban in France. The focus of this thesis is to illustrate the judicial application of the legal principles of limitation clauses on burqa ban, specifically in the context of the ban being defined as necessity under Article 9(2). The analysis places emphasis on the strength of the current forms of legal protection available to religious individuals in France, and the approach of legislation towards the freedom of religion as it is prescribed under the Convention. Examples where contradictions may be present will be discussed. The idea that implied judicial application by France may violate the enshrined right and freedom under the Convention or deviate from its legal obligations due to the necessity clauses may not be fully substantial.

Therefore the illustrated complexity coupled with certain legal controversies of the necessity excuse has become the main reason to choose this research topic. The conditions for the use of necessity argument are regulated in Article 9 of the Convention, which is going to be interpreted, examined and analyzed in this thesis. The purpose of this analysis is to answer on the justifiability of France's 'burqa ban', considering the limitation clauses of Article 9 of the European Convention on Human Rights under European Public Order. It aims to study how Article 9 was interpreted in practice, i.e. in Court proceedings. Most importantly, it seeks to illustrate the limitation clauses unclear extent and difficulties posed by the current judicial application of Article 9 on burqa ban.

The following research hypothesis is proposed: the judicial application of the case *SAS v France* under Article 9 of the Convention creates substantial challenges regarding the interpretation of necessity clauses as laid out in Article 9(2) and considering the principle of the rule of law.

The main argument of the thesis is that reformulation and improvement of the application on the extent of Article 9 is required, as the *SAS v France* case creates great potential for abuse and misdirection of the Convention. This is particularly important as the Convention is an intrinsic value based legal instrument for judicial application rather than a legal instrument that safeguards Public Order. Finally, conclusions will be drawn, summarizing and reflecting on the analysis and partly approving the hypothesis.

1. LAW AND JUDICIAL APPLICATION OF BURQA UNDER ARTICLE 9 OF THE ECHR

Recent legal developments on religion and burqa ban have generated intensive and ongoing debates concerning on legal controversies regarding religious freedoms their judicial application. Discourse concerns secularism¹⁶; principle of equality referring to the Islamic veil¹⁷, and principle of pluralism¹⁸. Wearing of a religious dress (burqa) in public spaces from the human rights perspective is viewed as an example of one's manifestation of religion¹⁹. Accordingly, it falls within the scope of Article 9(2) as a qualified right, that may be subject to restrictions under legal grounds such as "public safety, public order, health, or morals and for the protection of the rights and freedoms of others."²⁰ However, the importance of the right of religious freedom²¹ is that it serves as protector of the very core of individual's identity²². It concerns the deep-rooted beliefs and persuasion formed within one's conscience and is called *forum internum*.²³ This falls beyond the jurisdiction of the state and does not allow any limitations and does not accept any determination on validity of religion or belief.²⁴ In addition, the right to manifest ones religion is called *forum externum*,²⁵ by which all individuals shall be subject to state's jurisdiction with definite assurance of the fundamental right to obtain freedom of thought, conscience and religion.²⁶ The intent of the right of religious freedom is to safeguard and seek protection of human respect, dignity among every individual²⁷ based on The Convention, according to its

¹⁶ Claudia Morini, "Secularism and Freedom of Religion: The Approach of the European Court of Human Rights", *Israel Law Review* 43, no. 3 (2010)

¹⁷ Sally Pei, "Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights", *Yale Law Journal* 122 (2013) Maria Beatrice Berna, "Gender and Culture in the Legislation and Case law of the European Court of Human Rights. The Case of the Islamic Veil", *Law Annals from Titu Maiorescu University* (2014) Erica Howard, "Banning Islamic Veils: Is Gender Equality a Valid Argument", *International Journal of Discrimination and Law* 12 (2012)

¹⁸ Bridgette Dunlap, "Protecting the Space to Be Unveiled: Why France's Full Veil Ban Does Not Violate the European Convention on Human Rights", *Fordham International Law Journal* 35, no. 4 (2012) Myriam Hunter-Henin, "Why the French Don't Like the Burqa Laïcité, National Identity and Religious Freedom", *International and Comparative Law Quarterly* 61, no.3 (2012)

¹⁹ David Harris et al., *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press, 2009), pp.604-605

²⁰ Council of Europe, European Convention for the Protection of Human rights and Fundamental Freedoms, 1950 Article 9(2). Available on: http://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 5, 2018

²¹ Jim Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights*, (Strasbourg: Council of Europe, 2012), p. 7

²² Renata Uitz, *Freedom of religion: Renata Uitz*. (Strasbourg : Council of Europe, 2007), p. 31

²³ *Theory and Practice of The European Convention on Human Rights*, ed. Pieter Van Dijk, Fried Van Hoof, Arjen van Rijn, Leo Zwaak. (Antwerpen ;Oxford : Intersentia, 2006), p. 541

²⁴ Norman Doe, *Law and Religion in Europe: A Comparative Introduction*, (New York: Oxford University Press, 2011), p. 44

²⁵ Bernadette Rainey, Elizabeth Wicks, and Clare Ovey Jacobs, *White and Ovey, The European Convention on Human Rights*, (Oxford : Oxford University Press 2014), p. 412

²⁶ Council of Europe, European Convention for the Protection of Human rights and Fundamental Freedoms, 1950 Article 9(1). Available on: http://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 5, 2018

²⁷ Parliamentary Assembly Council of Europe, *Resolution 2076: Freedom of Religion and Living Together in a Democratic Society*, 30 September 2015 (33rd Sitting), para.2 Accessed 7 May, 2018 Jill Marshall, "Personal Freedom and Human Rights", *Personal Freedom through Human Rights Law? Autonomy, identity and Integrity under the European Convention on Human Rights*, International Studies in Human Rights 98 ,(Leiden ;Boston : Martinus Nijhoff,2008), p. 13

Preamble. The key goal is to ensure the right to freedom of thought, conscience and religion and to eliminate possible threats on religious freedom with unjust interferences.²⁸

1.1 *SAS v France*: legal grounds and judicial application of burqa ban (Article 9)

Examination of the *SAS v France* judgment²⁹ demonstrates the legal principles which have been interpreted and defined, as well as the legal grounds on which the justification has been built. This also concerns the context of the necessity for opening interpersonal relationships that have served as justifiable interference (commonly referred to as “living together” or “vivre ensemble”) for the prohibition of burqa. The application of the Courts jurisprudence has reached a new level, resembling its collective opinion by upholding the ban on full face veils in public spaces. It shows a perspective of the Courts new judicial application within the expansion of legal grounds for justification by recognizing the principle of “living together”, so called *vivre ensemble*.³⁰ *SAS v France* judgment unravels the religious dress relationship with competing national “public order” interests. The Court’s assertion demonstrates that the principle of “living together” falls under the entrenched legal grounds for justification, according to given limitations as: “for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”³¹ The question emerges whether this approach eradicates the protection of the rights of individual’s autonomous religious freedom or instead expends the notion of “living together” adding intrinsic values of general public interest as a necessity clause for justifiability.

At this point, the pertinent issues on prohibition of religious dress (Islamic veil) carry subsequent complexities. These need to be evaluated through legal principles in lieu of the justifiability and balance with competing interests, in this case - between those whose freedom is to display their conviction through religious dress and the freedom of those who do not want to be confronted by it.

1.1.2 Burqa ban competing interests: protection of the right to individual’s religious autonomy v. protection of the rights and freedoms of others

As the case illustrates, it divides into two differing and withstanding positions. Those who oppose newly conducted judicial application and on the other hand contenders of it. Steinbach³² believes in proposed assumption and highlights that attempts to free the public space from the Islamic veil come at the expense of vanishing the assured protection of the rights of individuals to religious

²⁸ Council of Europe, European Convention on Human Rights, Preamble Available on: http://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 5, 2018

²⁹ *S.A.S. v. France*, no. 43835/11, European Court of Human Rights (hereinafter ECHR), Judgment of 1 July 2014

³⁰ *Human Rights in Culturally Diverse Societies: Guidelines Adopted by The Committee of Ministers and Compilation of Council of Europe Standards*, (Council of Europe, 2016), p.12 Available on: <https://rm.coe.int/guidelines-hr-in-culturally-diverse-societies/168073dced>

³¹ Council of Europe, European Convention for the Protection of Human rights and Fundamental Freedoms, 1950 Article 9. Available on: http://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 5, 2018

³² Armin Steinbach, “Burqas and bans: the wearing of religious symbols under the European Convention of Human Rights”, *Cambridge Journal of International and Comparative Law* 4, no. 1 (2015), pp. 29-52

freedom as guaranteed by the Convention.³³ Sanader³⁴ supports this view, asserting that such a prohibition means a lack of proper protection of freedom of religion for individual believers. When protecting individual's rights of freedom of religion, an individual's right to freedom of religion should be legislated in accordance with the values of the Convention.³⁵ Based on Christoffersen theory on the power balance of the Courts adjudication, it is the prime focus of each State to perform their obligations under the Convention and to ensure the fundamental rights and freedoms to everyone.

Thus France is required to implement implements the Convention in its national jurisdiction. Hence the burqa ban can be seen to mean that France has failed to guarantee the implementation of the Convention in their legal domestic orders, it has deviated from its substantial legal obligations.³⁶ If justifiability has been presented on notion of *vivre ensemble* it would require first and foremost France to provide a purpose for the burqa ban that would align with in order to pertinent the Convention. However, France has not been able to provide legitimate purpose that strikes a balance between *vivre ensemble* and its legitimacy on implementing burqa ban. Yusuf³⁷, reveals throughout his academic research a concertation on justifiability premised on the notion of "living together."³⁸

This view constitutes retrogressive implementation by undermining freedom of religion of individuals. It leads to reversed adjudication between the individual and the constitution of France. Here, arises the main question, when it is necessary to question whether this adjudication falls within the Convention? There are no clear limits on the justifiability from the perspective of competing interests. Thus, the Court in its adjudication has granted to France a constitutional relief. Further, based on the analysis of scholars it can be concluded to be a fundamental misdirection.³⁹ Therefore, the limitation clauses should avoid constitutional relief, especially when the implementation of concepts such as the concept *vivre ensemble*. This is important in order to preserve the coherence and legitimacy of the leading judgements such as *SAS v France*, which illustrates how the goal to safeguard the rights and freedoms of others, and to develop standards in accordance with the values enshrined in the Convention, can be reversed and be shifted away from legal obligations to balance between competing interests.

Within the research of this paper it is important to also look at the significance of the Islamic veil, burqa or any other religious form of dress. Firstly, an individual's choice of dress is particularly

³³ *Ibid.*, p.32

³⁴ Teresa Sanader, "Religious Symbols and Garments in Public Places - A Theory for the Understanding of S.A.S. v France", *The Vienna Journal on International Constitutional Law* 9 (2015)

³⁵ *Ibid.*

³⁶ Jonas Christoffersen and Mikael Rask Madsen, "Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?", in *The European Court of Human Rights between Law and Politics*, (Oxford: Oxford University Press, 2013), p.181

³⁷ Hakeem Yusuf, "S.A.S. v France: Supporting Living Together of Forced Assimilation", *International Human Rights Law Review* 3 (2014)

³⁸ *Ibid.*

³⁹ *Ibid.*, Jonas Christoffersen and Mikael Rask Madsen, "Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?", in *The European Court of Human Rights between Law and Politics*, (Oxford: Oxford University Press, 2013), pp. 182-183

important in creating his or her identity.⁴⁰ Moreover, a choice of dress is particularly important to create identity.⁴¹ Thus Cumper and Lewis⁴², suggest that the guiding principle shall be personal religious autonomy. Namely, they argue in support of a person's freedom to wear garments of their choice no matter of which significance.⁴³ These views represent arguments that fundamental human rights and freedoms must be accorded with utmost protection and limited only when necessary under strict scrutiny. Furthermore, only detailed and carefully scrutinized judicial application can display balance between competing values and rights, therefore resulting into a justified restriction on individual's religious freedom.⁴⁴

However, in France's case it happens to be "naturally" implied to preserve secular nature and public order within peaceful coexistence in the spirit of the notion *vivre ensemble*. Nevertheless, based on legal contradictions about judicial application, a central legal problem has been detected. Hence the concern is about the extent to which such interference can be justified within the rights to manifest one's religion in public, while also considering the principle of proportionality.

The principle of proportionality is at the very center of the frictions concerning the judicial applications of the justifiability of the ban on Islamic veil. This is particularly notable when reconciling the right of personal religious autonomy with state sanctioned curbs on religious dress (burqa). Hence, outward symbolism is being reduced in order to safeguard public order, and to ensure respect of freedom and rights of others.⁴⁵

Cumper and Lewis⁴⁶ claim that by relying on such reasoning, France has used a "slippery slope" line of argumentation.⁴⁷ They state that this approach is dangerous, may put fundamental human rights at harm and adversely affect justice of fundamental rights and freedoms.

Respectively, one may argue that a pluralistic society has to be built on genuine recognition and acceptance of diversity with varied identities, which is essential to achieve social cohesion. Likewise, the concept of democracy includes the individual's autonomy as an essential prerequisite.

On the contrary, Benoune⁴⁸ argues that the implemented ban by France does not concern religion itself.⁴⁹ She believes that the application of this judicial practice is not primarily religious, but

⁴⁰Peter Cumper and Tom Lewis, "Taking Religion Seriously - Human Rights and Hijab in Europe - Some Problems of Adjudication", *Journal of Law and Religion* 24 (2008) Jill Marshall, "Religious Identity", in *Personal Freedom through Human Rights Law?Autonomy,identity and Integrity under the European Convention on Human Rights,*" International Studies in Human Rights 98 (Leiden: Boston, Martinus Nijhoff ,2008), p. 146

⁴¹Peter Cumper and Tom Lewis, "Taking Religion Seriously - Human Rights and Hijab in Europe - Some Problems of Adjudication", *Journal of Law and Religion* 24 (2008): p. 599

⁴² Peter Cumper and Tom Lewis, "Taking Religion Seriously - Human Rights and Hijab in Europe - Some Problems of Adjudication", *Journal of Law and Religion* 24 (2008)

⁴³ *Ibid.*, p.601

⁴⁴ G.Van der Schyff and A. J Overbeeke, "Exercising religious freedom in the public space: a comparative and European Convention analysis of general burqa bans", *European Constitutional Law Review* 7, no. 3 (2011), p. 9 Jonas Christoffersen and Mikael Rask Madsen, "Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?", in *The European Court of Human Rights between Law and Politics*, (Oxford: Oxford University Press,2013) .p.181

⁴⁵Peter Cumper and Tom Lewis, "Taking Religion Seriously - Human Rights and Hijab in Europe - Some Problems of Adjudication", *Journal of Law and Religion* 24 (2008): p. 606

⁴⁶ *Supra* note 42

⁴⁷ *Ibid.*

concerns the social and political climate of a society.⁵⁰ At the same time, it is important to acknowledge one of the most known judgements in relation to religious dress: *Şahin v Turkey*.⁵¹ This case highlights the essence of religious freedom and its indispensable need as “one of the most vital element to make up identity of believers and their conception of life.”⁵² It points out the close correlation between pluralism and democracy.⁵³ Parallels can be drawn with the recently adopted judicial application included in the *SAS v France* judgment. This judgment may be interpreted to mean that a society that adapts a ban on the full full-face veil (burqa) does not adhere to democratic standards because it does not apply and enforce vital guidelines in order to comply and be recognized as democracy.

Golder⁵⁴ is of the same thought and is concerned by the implication of the *SAS v France* judgment.⁵⁵ She expresses concern that the principle of pluralism is undermined and the judicial application of Article 9 is misapplied.⁵⁶ Within this reasoning, the individuals’ religious autonomy should be encouraged by publicly appreciating their identity – placing emphasis on plurality, by providing more favorable conditions for the freedom of religion. This would also encourage social diversity as resembled in the constitution of France, which it is entrenched by its core values: ‘liberty, equality, fraternity,’⁵⁷. Meanwhile, uphold valuable principles, such as tolerance, pluralism and equality within Europe as a whole.⁵⁸

1.1.3 SAS v France justifiability of interference under Art.9 (2) on burqa

When interference with the right to religious freedom occurs, it is important to clarify whether the prohibition to wear Islamic veil in public places falls within the scope of Article 9? If the answer is positive, is it important to evaluate whether the prohibition on Islamic veil has been prescribed by law? Furthermore, the attached purpose has to be genuinely applied in pursuit of the legitimate aim to safeguard public order. Correspondingly, it has to proceed on a solid legal basis. It is needed to evaluate, whether the limitation clause as laid out in Article 9(2) with *necessary in a democratic society* can be justified as a premise for this interference? The main goal of these considerations is to minimize the threat of an illegitimately applied interference, which would be a violation of the fundamental right and freedom as it is prescribed by the Convention.⁵⁹ It is particularly significant to ensure legitimacy so the Court is able to provide the

⁴⁸ Karima Benoune , “Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women’s Equality Under International Law”, *Columbia Journal of Transnational Law* 45, no. 2, (2007)

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, p. 391

⁵¹ *Leyla Şahin v. Turkey*, no. 44774/98, ECHR, Judgement of 10 November 2005

⁵² *Ibid.*, para.104

⁵³ *Ibid.*

⁵⁴ Keith Golder, “Limitations on the Wearing of Religious Dress: An Examination of the Case Law of the European Court of Human Rights”, *UK Law Students Review* 1, no. 1 (2012)

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* p.24

⁵⁷ Article 2 of the French Constitution of 4 October 1958. Available on : <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html> Accessed 27th of April, 2018

⁵⁸ Lisbon Treaty Article 2 on 1 December 2009 Available on : <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty.html> Accessed 7 May, 2018

⁵⁹ Council of Europe, European Convention for the Protection of Human rights and Fundamental Freedoms, 1950 Article 1. Available on: http://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 5, 2018

proper validation of justifiable interference on the right of religious freedom. For interferences to be justified they must conform to the standards of the Convention in order to safeguard against arbitrary interference and to provide an adequate protection.⁶⁰ This concerns two competing categories, namely public interests, referring to the state and the society, versus private interests of the individual – with both categories there is potential of an outcome that may endanger democratic values.

Therefore, it is important to analyze whether the burqa ban in France has applied and is weighted on the basis of factual evidence within the context of justifiability; or, if instead, the legislation of the ban and its judicial application has been misdirected away from the very core of human rights. Reasoning must take into account the fact that under Article 9(2), the right to freedom of religion may be restricted for the protection of “public order” and “protection of the rights and freedoms of others” linked to the protection against public disorder.

1.2 Concluding remarks

Only by weighing all of these above mentioned factors it is possible to discover an adequate response which suits these contradictions about the judicial application of the right to religious freedom and whether the newly implemented law and its judicial implication actually infringes on an individual’s right of religious freedom. This must acknowledge that freedom of religion is a paramount part of any individual, while every individual a core element of a democratic society.

Despite notable achievements in respecting human rights, especially by Western countries, human rights law enforcement on fundamental rights and freedoms may still be misapplied at times. For example, even though Europe has been experiencing a rise of extremist activities, particularly those linked to religious extremism, this alone is not a solid argument to limit human rights. Hence, every intended act shall be proportionate to the legitimate aim pursued as Article 9 serves to strike a balance between the rights of the individual and competing societal aims to preserve public order. Correspondingly when an individual’s conviction is manifested in a way that it is made known to the outer world, the state is entitled to impose limitations only under the necessity clauses of Article 9(2), subject to

- 1) prescribed by law
- 2) legitimate aim
- 3) necessary in a democratic society

⁶⁰ Steven Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, (Council of Europe, 1997), pp. 12-13 Available on: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf) Accessed May 1, 2018

2. APPLICATION OF JUSTIFIABLE INTERFERENCE OF ART. 9(2) ON PROHIBITION ON BURQA

If there are restrictions of the freedom of religion or belief under Article 9(1), then it must align with the limitations of Article 9(2) to be a justifiable interference. It means that prohibition on religious dress shall be prescribed by a law, which contains a legitimate aim. This requires a test that aims to determine whether the prohibition or restricting measure is necessary and that it is proportionate to the aim it strives to achieve.⁶¹

2.1 Prescribed by law

The main idea behind this concept is that a legal rule includes and gives certain authorization to the interference. Correspondingly, in the case of *SAS v France* relevant domestic law authorizes the interference.⁶² In *SAS v France* the legal principles prescribed by law implies that the rule of law serves as valid legal rule and means the burqa ban is a justifiable interference..

The state of France, in this particular case, indicates the legal basis for its act of interference. This is important as otherwise the Court might be reluctant to recognize that national law has been properly interpreted or applied by the French national court. Hence it is important that the measure in question have a solid basis in domestic law. In the case of France, it shows that the adoption of the law which prohibits the concealment of one's face in public places is compliant with the Constitution.⁶³ Further, France argues that such a limitation is prescribed within the Law of 11 October 2010⁶⁴ in its first three sections.⁶⁵ The purpose is stated as:

(...) the Republican values of tolerance and respect for the dignity of the human being and to make them aware of their criminal and civil liability, together with the duties that stem from life in society. It also seeks to further the person's social integration.⁶⁶

In order to justify derogation from the right to religious freedom as in the *SAS* case, it must have a legal basis, which also extends beyond a basis of only domestic law. To achieve complete lawfulness, the derogation shall be imbued with the essential qualities of human rights law under the Convention. Lawful derogation connotes accessibility, foreseeability, certainty, with an understanding that this myriad of concepts is maneuverable depending on specified context of

⁶¹ *Theory and practice of the European Convention on Human Rights*, ed. Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (Cambridge ;Antwerpen ;Portland : Intersentia 2018), p.737

⁶² Decision n° 2010 - 613 DC of October 7th 2010. Act prohibiting the concealing of the face in public. Available on: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en2010_613dc.pdf Accessed March 16, 2018

⁶³ *S.A.S. v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, para. 27

⁶⁴ Loi No. 2010-1192 du Octobre 2010 interdisant la dissimulation du visage dans l'espace public; Law No. 2010-1192 of 1 October 2010 'prohibiting the concealment of one's face in public places' Available on: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-613-dc/decision-n-2010-613-dc-du-07-octobre-2010.49711.html> Accessed 14 March, 2018

⁶⁵ *Supra* note 63, para.28

⁶⁶ *Ibid.*

circumstances.⁶⁷ It is to say, that it may vary from context but derogation has to be carried out with sufficient certainty. When a prohibition, for example the burqa ban, has a clear legal basis those who would prefer to wear the burqa may be convinced of the necessity of the prohibition. This precise balance may be difficult to establish between competing sides in such a sensitive matter. However, the right to freedom of thought, conscience and religion is one of the foundations of a democratic society.⁶⁸ Therefore it is important to discover whether an imposed limitation as legitimate aim applies as a least restrictive measure under the right under Article 9.

2.2 Legal controversies on legitimate aim (public order, gender equality, notion of “vivre ensemble”) under Art.9 on burqa

A legitimate aim refers only to “the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights of others.”⁶⁹ Thus, in the present *SAS case*, the substance of the objectives invoked in this connection by the Government, and strongly disputed by the applicant, call for an in-depth examination under sufficient scrutiny. The applicant took the view that the ban implemented by the Law of 11 October 2010, did not correspond to Article 9(2).⁷⁰ The Government argued that the Law pursued two legitimate aims: public safety and “respect for the minimum set of values of an open and democratic society.”⁷¹ First, regarding public safety that government argued that wearing the burqa might be dangerous for public safety and has the potential of fostering identity fraud.⁷² Second, referring to “respect for the minimum set of values of an open and democratic society”, in order to set a balance within the interest of those who practice a certain religion and those who do not. The purpose of the ban as argued by the Government referred to three values: respect for gender equality, respect for human dignity and respect for the minimum requirements of life in society. With the link, to safeguard Article 9(2) and ensure enshrined “protection of the rights and freedoms of others”.⁷³

2.2.1 Public order

As states in the judgment of the *SAS v France*, the argument for open interpersonal relationships has justified the burqa ban on its merits. Accordingly, when referring on the Courts statement “respect for minimum requirements of live in society or of “living together” can be easily linked to the legitimate aim of the “protection of the rights and freedoms of others.”⁷⁴ However, the argument made by the French government that the notion of living together is not supported by any of the provisions under the Convention is not necessarily true. As dissenting judge highlights, the *vivre ensemble* concept is “far-fetched and vague.”⁷⁵

⁶⁷David Harris et al., *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press, 2009), pp.605-606

⁶⁸*Theory and practice of the European Convention on Human Rights*, ed. Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (Cambridge ;Antwerpen ;Portland : Intersentia 2018), p.735

⁶⁹ Council of Europe, European Convention for the Protection of Human rights and Fundamental Freedoms, 1950 Article 9(2). Available on: http://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 5, 2018

⁷⁰ *S.A.S. v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, para.114

⁷¹ *Ibid.*, para.115

⁷² *Ibid.*

⁷³ *Ibid.*, para.116

⁷⁴ *Ibid.*, para .121

⁷⁵ *Ibid.*, dissenting opinion B5

Presumably, it is a right approach if it prevents danger and possible threats to public order, public safety and it falls under justifiability on legitimate aim protected by the Convention.⁷⁶ Thus, there is a question whether wearing the burqa represents a threat to public safety and public order. As to the individuals concerned, the prohibition compels them to give away the very core of their identity and the way how they manifest their identity and religious convictions outwards.⁷⁷ It is important to discern what lies at the core of the willingness to safeguard public order and ensure public safety, and against what exactly will people be protected.

Against encountering people wearing Islamic veil or against the philosophy which it is linked into it? Acknowledging that French people within their national territory perceive the veil as a “symbol of a form of subservience,”⁷⁸ as well seeing it as “self-confinement of any individual who cuts himself off from others whilst living among them”⁷⁹ and that “is to break social ties and to manifest a refusal of living together.”⁸⁰ However, the applicant clearly points out that none of the members of family have exerted any pressure regarding wearing the burqa emphasizing that for the applicant it doesn’t feel as a barrier for communication or integration, so accordingly its free will of her being a devout Muslim. Namely, the aim of the applicant’s manifestation is to feel and live in inner peace with herself.⁸¹

Some academics support the position of the applicant and claim that the imposed ban is an invasion of an individual’s religious autonomy and raises major concerns on its compatibility with the Convention. Some question how wearing the veil is different from the approved practices mentioned in the Law of concealing the face.⁸² To respond to such questions the French government explains and provides specific examples on how the impact of public order and public safety by wearing Islamic veil differentiates from attires which also conceal the face, for example “dark glasses, or helmets.”⁸³ At the same time, the government also stresses the essential values of the democratic Republic as “liberty, equality, fraternity.”⁸⁴

Considering that Europe consists of religious and cultural diversity, there should be no understandable reason for limitations of practices only because they are distant from French traditions, especially in regarding to such a fundamental right as freedom of religion or belief. Hence, a respectful dialogue among society on issues concerning the freedom of religion is important in order to foster tolerance and protect the dignity of individuals. As well, to foster a sense of “liberty, equality and fraternity”, consequently diminish tension, while trying to interpret the meaning of wearing the burqa.

⁷⁶ *S.A.S v France* (2014)., para .115

⁷⁷ *Ibid.*, para .139

⁷⁸ *Ibid.*, para .17

⁷⁹ *Ibid.*, dissenting opinion B6

⁸⁰ *Ibid.*, para .82

⁸¹ *Ibid.*, para .11-12

⁸² Hakeem Yusuf, “S.A.S. v France: Supporting Living Together of Forced Assimilation”, *International Human Rights Law Review* 3 (2014)

⁸³ *S. A. S v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, dissenting opinion C13

⁸⁴ *Ibid.*, para .17

Interestingly, the Court itself points out that wearing the Islamic veil is perceived as uncommon expression⁸⁵. But on the other hand the Court concludes that it is enshrined in the values of democracy and that pluralism is inherent and indispensable element. Nonetheless, France declares that practice of wearing Islamic veil is breaching the right of others to live in a space of socialization, which is denial of *vivre ensemble*.⁸⁶ However, there is no requirement that an individual should enter into contact with other people, against their own will and people “have right to be an outsider”. As dissenting judges’ state, otherwise shall be enunciated by a corresponding obligation, but would carry incompatibility with the spirit of Human Rights.⁸⁷

Nevertheless, it is true that communication is important within society and that face plays a major role when interacting and trespassing the message to other persons. However, Nussberger⁸⁸ and Jaderblom⁸⁹ note, that this vision cannot be flipped and argue that interaction among society is impossible if the face has been concealed. It has been supported by examples of evidence that are perfectly known and common in European culture. Namely, such activities, for example, skiing, snowboarding, and motorcycling. These practices require full coverage of the face for safety grounds. This serves as clear proof that people can interact without necessarily seeing each other’s face.⁹⁰

Yusuf believes that the prohibition brazenly violates human rights and its implementation is dangerous as it might lead to heightening tension and promote prejudices. Yusuf uses strong expression and calls it a “legalization of cultural genocide.”⁹¹ Meanwhile Vakulenko⁹² stresses that the burqa ban impacts status of the individual.⁹³ Namely, it transforms the status of women who are wearing the Islamic veil.⁹⁴ It can be interpreted as a detrimental practice because of making a mere reformulation of the applicant’s complaint.⁹⁵ It also projects a particular image of an applicant, namely a woman who is a devout Islam. Further, it may be seen as to imply that Islam is a serious threat to “democratic” European values. Thus, Marshall⁹⁶ detects racial tension which causes disorder in France in respect to the burqa. Consequently, he proposes that upholding equality shall mean acknowledging differences amongst people rather than insisting on them to be the same.⁹⁷

⁸⁵ *S. A. S v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, para .85

⁸⁶ *Ibid.*, para .120

⁸⁷ *Ibid.*, dissenting opinion B8

⁸⁸ *Ibid.*, dissenting Judge Nussberger

⁸⁹ *Ibid.*, dissenting Judge Jaderblom

⁹⁰ *Ibid.*, dissenting opinion C9

⁹¹ Hakeem Yusuf, “S.A.S. v France: Supporting Living Together of Forced Assimilation”, *International Human Rights Law Review* 3 (2014): p. 299

⁹² Anastasia Vakulenko, “Islamic Headscarves’ and the European Convention on Human Rights: An Intersectional Perspective”, *Social and Legal Studies* 16 (2007)

⁹³ *Ibid.*

⁹⁴ *Ibid.*, p.184

⁹⁵ *Ibid.*, p.194

⁹⁶ Jill Marshall, “Freedom of Religious Expression and Gender Equality: Şahin v Turkey”, *Modern Law Review* 69, no. 3 (2014): 452-461

⁹⁷ *Ibid.*, p.459 Jill Marshall, “Religious Identity”, in *Personal Freedom through Human Rights Law? Autonomy, identity and Integrity under the European Convention on Human Rights*, International Studies in Human Rights 98 (Leiden: Boston, Martinus Nijhoff, 2008), p.161

These circumstances are likely to cause inequality and unjust discrimination through burqa ban. It rejects a choice of each individual to make for themselves; what they want to be, what they want to do, including what they want to wear. Foremost, not having the burqa ban could help them to build up their own identity and to become an autonomous individual.⁹⁸ Whereas, imposing the ban and alleging it as justifiable interference, means imposing a set of standards and refusing individuality with strident denial of freedom of religious autonomy.⁹⁹ From the perspective of Brems, the burqa ban concerns the Convention and fundamental rights and freedoms. He notes that it is counterproductive as it creates negative consequences for women concerned. Based on Brems theory the burqa ban is disproportionate and violates the Convention with respect to all three of the stated purposes:

(...) (1) they restrict women's rights instead of furthering them; (2) they reduce social interaction; and (3) they expose women to serious safety risks.¹⁰⁰

In the end, what matters is if the reasons pleading for implementing the burqa ban outweigh the reasons against the burqa ban to a sufficient degree. Nevertheless, the justification must be of a global matter rather than locally adjusted, as each individual possesses an inviolability enshrined in the Convention. Specifically, on the right for religious freedom, this cannot be overridden. This acknowledges that France as every other Member State is unified while also consisting of equal citizens.¹⁰¹

Granting all this, when limiting freedom of individual, it is important to consider liberty in the context of a common interest in public order and public safety. It is necessary to recognize Rawls assertion that the disruption of these conditions is a danger for the liberty of all.¹⁰² Furthermore, he emphasizes that liberty of conscience is to be restricted only when a legitimate aim exists and the expectation is that not implementing the restriction will damage the public order.¹⁰³ Overall, the intent of human rights law is to guarantee and develop dignity and freedom of every individual, in an empowering manner of diversity and tolerance, based on the principle of equality.¹⁰⁴

2.2.2 Justifiability through the lens of the notion of “vivre ensemble”

There exists an ongoing concern from different academics, sharing their arguments on the *SAS v France case* on notion of “vivre ensemble” which characterize the ideal French Republic. The notion of *vivre ensemble* brings out legal controversies. This analysis evaluates an adopted concept of *vivre ensemble* as justifiability, being accepted as an indispensable requirement which

⁹⁸ *Supra* note 96, p.460

⁹⁹ *Ibid.*

¹⁰⁰ Eva Brems, “Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings”, 22 *Journal of Law and Policy* 22, no. 2 (2014): p.551

¹⁰¹ *Supra* note 1, p.186

¹⁰² *Supra* note 1, p. 187

¹⁰³ *Ibid.*

¹⁰⁴ Jill Marshall, “The Legal Recognition of Personality: Full Face Veils and Permissible Choices.” *International Journal of Law in Context* 10, no. 1 (2014): p.70

qualifies as legitimate aim in order to safeguard “rights and freedoms of others”¹⁰⁵. Some academics caveats notion of *vivre ensemble* as a legitimate aim.¹⁰⁶ They argue that it goes beyond the enumerated boundaries of Article 9(2), and promotes forced assimilation policies against minorities in Europe and beyond.¹⁰⁷ Taking into account the strong emphasis placed by France on *vivre ensemble* when pleading the case, the question appears to be: if *vivre ensemble* is justified as a proportionate legitimate aim, does this come at the expense of the basic fundamental right of freedom of religion?

Steinbach raises questions about the extent of justifiable interference, analyzing whether the legal basis is or is not absent in this case.¹⁰⁸ Based on the facts provided in the *SAS v France* case, there is no certain link between the burqa ban and concept of *vivre ensemble*. The main argument that appears in the case is that an uncovered face plays an essential role in human interaction. Moreover, due to the established consensus in France, it serves as indispensable element within the society in question. That is to say, that a covered face in public places breaks the social ties and manifests a refusal of the principle of *vivre ensemble*.¹⁰⁹ On this basis, the ban seems to be proportionate to the aim pursued. Namely, the preservation of the conditions of *vivre ensemble* serves as a prerequisite to safeguard the “protection of the rights and freedoms of others.”¹¹⁰

Correspondingly, the Court is therefore able to accept the fact that it may raise a barrier when interacting with others. This implies a understanding that the Islamic veil may distort living together and negatively impact socialization within French society.¹¹¹ Dunlap¹¹² agrees with the position of France and concludes that the burqa ban is reasonable and justifiable.¹¹³ Meaning, that the requirement to uncover the face in public shall benefit lives in France, and shall improve the condition: to live more freely under the notion of *vivre ensemble*.¹¹⁴

¹⁰⁵Armin Steinbach, “Burqas and bans: the wearing of religious symbols under the European Convention of Human Rights”, *Cambridge Journal of International and Comparative Law* 4, no. 1 (2015) Hakeem Yusuf, “S.A.S. v France: Supporting Living Together of Forced Assimilation”, *International Human Rights Law Review* 3 (2014) Bridgette Dunlap, “Protecting the Space to Be Unveiled: Why France's Full Veil Ban Does Not Violate the European Convention on Human Rights”, *Fordham International Law Journal* 35, no. 4 (2012) , Shaira Nanwani, "The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction", *Emory International Law Review* 25 (2011)

¹⁰⁶ Hakeem Yusuf, “S.A.S. v France: Supporting Living Together of Forced Assimilation”, *International Human Rights Law Review* 3 (2014) Jill Marshall, “Conditions for freedom? European human rights law and the Islamic headscarf debate”, *Human Rights Quarterly* 30 (2008): p. 631.

¹⁰⁷ Hakeem Yusuf, “S.A.S. v France: Supporting Living Together of Forced Assimilation”, *International Human Rights Law Review* 3 (2014) Carolyn Evans, “The Islamic Scarf” in the European Court of Human Rights”, *Melbourne Journal of International Law* 7, no. 1 (2006): p. 54

¹⁰⁸ Armin Steinbach, “Burqas and bans: the wearing of religious symbols under the European Convention of Human Rights”, *Cambridge Journal of International and Comparative Law* 4, no. 1 (2015), Anthony Gray, “The Manifestation of Religion Belief through Dress”, *European Journal of Law Reform* 16 (2014): p. 333

¹⁰⁹ *S.A.S. v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, para.81

¹¹⁰ *Ibid.*, para .157

¹¹¹ *Ibid.*, para .122

¹¹² Bridgette Dunlap, “Protecting the Space to Be Unveiled: Why France's Full Veil Ban Does Not Violate the European Convention on Human Rights”, *Fordham International Law Journal* 35, no. 4 (2012)

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, pp.1025-1026

To sum up, the Court in its final judgment declares that the notion of *vivre ensemble* does not breach the Convention. This is in line with the argument presented by the French government that the ban serves a legitimate aim. Nonetheless, some national and international human rights bodies regarded the burqa ban as being disproportionate.¹¹⁵ Dunlap determines throughout her research that the burqa ban itself includes diverse concepts. Providing analyses based on other academic's piece of work, that approved statute of the ban is impermissible violation of right to religious freedom and serves as a product of political opportunism.¹¹⁶ The burqa ban harms fundamental rights and freedoms rather than fostering them. She calls the burqa ban a cynical ploy rather than sincere defense of Republican values.¹¹⁷

Furthermore, the report "On the Wearing of the Full-Face Veil on National Territory"¹¹⁸, prepared by a commission of the National Assembly and deposited on January 2010 is an important document. It provides concrete fact that around 1,900 people wore the Islamic veil in the year 2009. That shows that it is a small proportion considering the total population of France of about sixty-five million, as well as the total number of Muslims living in France.¹¹⁹ The facts of the *SAS v France* leave uncertainty about the notion of *vivre ensemble*. The Court states that the ban can be perceived as justifiable interference "solely in so far as it seeks to guarantee the conditions of "living together".¹²⁰ The highlighted points raise legal concerns about potential for serious violations of fundamental rights and freedoms guaranteed by the Convention. Due to the controversial notion of *vivre ensemble*, which is not based on any concrete provision under Article 9(2) of the Convention?¹²¹

Additionally, upholding the ban based on the French notion of "vivre ensemble" it may be a misdirection. To mention, the dissenting opinion¹²² by Judges Nussberger and Jaderblom: "it sacrifices concrete individual rights guaranteed by the Convention to abstract principles."¹²³ For example, people are able to socialize without necessarily looking into each other's eyes.¹²⁴ Moreover in today's society, in which there are varieties of forms of social interaction, it is not necessarily to see each other's face.¹²⁵

In this context, the Parliamentary Assembly of the Council of Europe (PACE) provides recommendations and emphasizes that all the Member States shall ensure the right to freedom of religion without impediment and without discriminatory grounds. Meaning that in compliance with Article 9 and the rule of law every individual should be able to

¹¹⁵ *S.A.S. v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, para.35-37

¹¹⁶ Bridgette Dunlap, "Protecting the Space to Be Unveiled: Why France's Full Veil Ban Does Not Violate the European Convention on Human Rights", *Fordham International Law Journal* 35, no. 4 (2012): pp.969-970.

¹¹⁷ *Ibid.*, p.1004

¹¹⁸ The conference of Presidents of the National Assembly, Report "on the wearing of the full-face veil on national territory", on 23 June 2009 *S.A.S. v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, para.15-17

¹¹⁹ *S.A.S. v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, para.145

¹²⁰ *Ibid.*, para .142

¹²¹ Hakeem Yusuf, "S.A.S. v France: Supporting Living Together of Forced Assimilation", *International Human Rights Law Review* 3 (2014): p.282

¹²² Steven Greer Steven Greer, *The exceptions to Articles 8 to 11of the European Convention on Human Rights*, (Council of Europe, 1997), pp.8-9

¹²³ *S.A.S. v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, dissenting opinion, para. A2 *Supra* note 121

¹²⁴ *S. A. S v France*, no. 43835/11, ECHR, Judgment of 1 July 2014 (2014), dissenting opinion 2, at para B9

¹²⁵ *Ibid.*, para.96

(...) practice their faith publicly and freely in places of worship designed for that purpose by themselves or in other places accessible to the general public, in accordance with their own rites and customs (...)¹²⁶

Accruing all of the above mentioned facts it seems excessive to respond by imposing a ban. The Court suggests that the notion of “vivre ensemble” principally includes being able to look into each other's eyes to protect “the rights and freedoms of others.”¹²⁷ Hence, it concludes that the notion of *vivre ensemble* is a justifiable interference, which serves as a legitimate aim. Therefore, the judgment of the *SAS v France* seeks a central contention due to the increasing number of Muslims in Europe. The Court must be aware of its monumental influence and the actions must be under strict scrutiny, because the implementation of the burqa ban establishes an influential stance in human rights.¹²⁸

Looking globally, and stepping away from the intrinsic climate of France, there is a relevant argument laid out by the Human Rights Committee in its General Comment 22 of 1993 on Article 18 of the International Covenant on Civil and Political Rights

“That restriction on the freedom of thought, conscience and religion should not be imposed in a discriminatory manner. It noted further that: the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.”¹²⁹

Based on the Human Rights Committees statement, it seems that decision is premised on incompatible necessity clauses within the Convention’s jurisprudence. True, that statement made by the Human Rights Committee may derive from the fact that it is unconstrained by the fact that its decisions are not actually enforceable. However, the Court is responsible of supervision for legitimacy and of how its decision will be received by one of the leading members of the European Union – France. As a result, it is difficult to understand the basis of the decision in *SAS v France* in light of the Convention provisions.¹³⁰ Moreover, there is the risk that the Court is pandering to dangerous political leanings that are currently growing throughout of Europe. The decision in *SAS v France* may signal the Court is lending to siege attitude towards Muslims in Europe, giving weight to anti-Muslim prejudice which has become rigid within Europe in the last one and half decade or so.¹³¹ This may endanger the current situation for the hopes for a truly democratic society across all of Europe.

¹²⁶ Parliamentary Assembly Council of Europe, *Resolution 2076: Freedom of Religion and Living Together in a Democratic Society*, 30 September 2015 (33rd Sitting).para.13.1.1 Accessed 7 may, 2018

¹²⁷Hakeem Yusuf, “S.A.S. v France: Supporting Living Together of Forced Assimilation”, *International Human Rights Law Review* 3 (2014): p.287

¹²⁸Peter Cumper and Tom Lewis, “Taking Religion Seriously - Human Rights and Hijab in Europe - Some Problems of Adjudication”, *Journal of Law and Religion* 24 (2008): p.601.

¹²⁹ UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4,para. 8 Available on: <http://www.refworld.org/docid/453883fb22.html> Accessed 15 May ,2018

¹³⁰ Hakeem Yusuf, “S.A.S. v France: Supporting Living Together of Forced Assimilation”, *International Human Rights Law Review* 3 (2014): p.300.

¹³¹ *Ibid.*, p.301

2.2.3 Principle of gender equality

When it comes to the principle of gender equality, it is essential to draw attention to the status of women, in relation to freedom of religion. This particularly concerns the adopted prohibition on wearing the Islamic veil and recognizing that the burqa ban might restrict fundamental rights of an individual. Opponents of the burqa ban states that in the *SAS v France*, the applicant's woman rights have been violated, constituting a discriminative grounds.¹³² Islamic veil plays a role and impacts legal assertions in human rights law. Thus, the harmful presence of extremism leaves imprints when taking "appropriate measures" on burqa ban practice. However, it is necessary to maintain a focus on fundamental human rights and freedoms, in order to run counter intolerance and violation on religious freedom. It is the key objective on alleged judgment against woman and her status in Europe. Especially in the *SAS v France*, the applicant is a woman of devoted Muslim religion which makes her a religious minority in France. Therefore, her fundamental human rights and freedoms must be emphasized.

The paramount objective is to ensure a fundamental freedom and right of Article 9 and, above all, to firmly uphold human rights.¹³³ It is essential to guarantee both freedoms in accordance with the equality principle – firstly, the freedom of religion of those, who voluntarily wish to wear the Islamic veil and display their religious beliefs through attire; secondly, protecting freedom of religion of those who are being forced and coerced to wear or display their beliefs.

Howard¹³⁴ believes that burqa ban legal basis for justifiability is built on prejudices and bias of Islam.¹³⁵ She argues that implementation of the ban is counterproductive and unnecessary as it might have the opposite effect of what the ban tends to accomplish.¹³⁶ She emphasizes that:

(...)the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.¹³⁷

Considering the purpose of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, one can argue that implementing restrictions such as

¹³²Lyon and Debora Spini, "Unveiling the Headscarf Debate", *Feminist Legal Studies* 12, no. 3 (2004): p. 341 Eva Brems, "Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings", *Journal of Law and Policy* 22, no. 2 (2014):

¹³³*Human Rights in Culturally Diverse Societies: Guidelines Adopted by The Committee of Ministers and Compilation of Council of Europe Standards*, (Council of Europe, 2016), p.17 Available on: <https://rm.coe.int/guidelines-hr-in-culturally-diverse-societies/168073dced>

¹³⁴ Erica Howard, "Banning Islamic Veils: Is Gender Equality a Valid Argument", *International Journal of Discrimination and Law* 12 (2012)

¹³⁵*Ibid.*, p.160

¹³⁶*Ibid.* Parliamentary Assembly Council of Europe, *Resolution 1743: Islam, Islamism and Islamophobia in Europe*, 23 June 2010 (23rd Sitting), para.17 Accessed 7 May, 2018

¹³⁷ Convention on the Elimination of All Forms of Discrimination against Women , Article 2, Adopted and opened for signature, ratification and accession by General Assembly Available on: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> Accessed 2 May, 2018 resolution 34/180 of 18 December 1979 , entry into force 3 September 1981, in accordance with article 27(1) Available on : <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> Accessed 5 May ,2018

the burqa ban will result in exclusion rather than inclusion in society. Namely, the chosen strands are misdirected and move towards violation of dignity, humanity, tolerance and diversity.¹³⁸ Correspondingly, the individuals who wear an Islamic veil by their own power to freely choose (as the applicant) are autonomous individuals who are able to decide based on their own freedom. Howard carries out thoughtfully valid perspective of this statement by questioning if the applicant has to be liberated?¹³⁹

The argument of gender equality appears to be invalid and of reverse intention which concludes false liberation of individuals who freely had made up their minds to wear the veil. Independently of the above-mentioned affirmations of the applicant, neither the Court, nor France should question the universal consensus of the fundamental rights and freedoms as enshrined in the Convention. But instead, whenever it's possible to embrace legal assertions that prove that all human rights and freedoms are universally indivisible, interdependent and interrelated within recognition that all human rights are inherent of dignity, respect and are equitable.¹⁴⁰

The resolution of the *SAS v France* should not undermine the value of religious freedom and its recognition as a fundamental right and freedom. Steinbach persistently stresses and emphasizes that *SAS v France* leaves a big question mark on the Courts extent on justifications of interference. Namely, there is no sufficient legal basis to protect universally adhered human rights as should be required.¹⁴¹ Strand¹⁴² believes that unequal treatment has appeared between different religions within a region of Europe.¹⁴³ In the case of France it is one of the countries which seeks to keep away religion from public sphere in it and calls for strict scrutiny to be applied by the Court to avoid inequality and imbalance.¹⁴⁴

Steinbach highlights that implementation of general ban in public sphere is encroaching on individual's freedom to religion and it shall be impermissible, she states that there is no solid evidence of a threat towards public order or safety.¹⁴⁵ However, Strand divides gender equality into two dimensions; structural and individual.¹⁴⁶ The structural dimension consists of an evaluation of the justifiability of the ban considering the necessity clause of the limitations in Article 9(2). The structure relies on its meaning and the customs that lay behind the Islamic veil.

¹³⁸ Erica Howard, "Banning Islamic Veils: Is Gender Equality a Valid Argument", *International Journal of Discrimination and Law* 12 (2012): p.158 Jill Marshall, "Religious Identity", in *Personal Freedom through Human Rights Law? Autonomy, identity and Integrity under the European Convention on Human Rights*, International Studies in Human Rights 98 (Leiden: Boston, Martinus Nijhoff, 2008), p. 145

¹³⁹ Erica Howard, "Banning Islamic Veils: Is Gender Equality a Valid Argument", *International Journal of Discrimination and Law* 12 (2012): p.160.

¹⁴⁰ United Nations, Universal Declaration of Human Rights, Article 1-2, 1948 Available on : <http://www.un.org/en/universal-declaration-human-rights/> Accessed 6 May, 2018

¹⁴¹ Armin Steinbach, "Burqas and bans: the wearing of religious symbols under the European Convention of Human Rights", *Cambridge Journal of International and Comparative Law* 4, no. 1 (2015)

¹⁴² Vibeke Blaker Strand, "Prohibitions against Religious Clothing and Symbols in Public Schools and Universities: Narrowing the Scope by Introducing the Principle of Equal Treatment of Religious Manifestations", *Religion and Human Rights* 10, no. 2 (2015)

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, p.171

¹⁴⁵ *Supra* note 141, pp.39-41

¹⁴⁶ *Supra* note 142

In *SAS v France*, the aim of using the argument of gender equality is to limit religious manifestations. Meanwhile, the individual dimension is used to persuade the aim that every individual, in this case women have the right to equal rights in French society.

Furthermore, the individual dimension consists of the rights and freedoms enunciated in the Convention in Article 9.¹⁴⁷ Thus, in *SAS v France* case, the Court has followed the structural dimension and evaluation based on how this practice goes within French society and what kind of meaning this practice carries in itself and in the public sphere. France emphasizes and raises its concerns on ensuring “respect for the minimum set of values of an open and democratic society” and the “respect for equality between men and women.”¹⁴⁸ However, the Court quashes the stance of France’s position and states that

A State Party cannot invoke gender equality in order to ban a practice that is defended by women-such as the applicant (...) unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms¹⁴⁹

Through this, the Court shows that in this particular case the individualistic dimension of gender equality comes over the structural dimension. This implies that every individual inclusion is essential in French society. Correspondingly, if France has used the principle of gender equality as a prerequisite in order to implement the burqa ban, then France has to provide the Court with concrete documentation to substantiate the necessity for prohibition on Islamic veil and its “symbol.”¹⁵⁰ To conclude, it is not a fair statement to declare illegal religiously motivated customs, namely it is impermissible. Due to the fact that it is a part of French society which should be tolerated and treated within dignity, which means that the burqa ban could be justified only by proportionate legitimate aim and only if imminent threats have been perceived. If not, France is encroaching on individual’s religious autonomy and use of principle of gender equality is inadequate.¹⁵¹

The situation in the *SAS v France* shows that religious dress has weak protection as a religious manifestation under Article 9. The principle of gender equality cannot be used to ban a certain type of religious dress, as the judgment of *SAS v France* shows.¹⁵² Even though, it is a complex and multidimensional issue that varies in wide spectrum of possible restrictions.¹⁵³ Implementing the burqa ban may move France in the opposite direction of what gender equality aims to achieve. As critics and opponents argue, a general ban is precisely the wrong way to “liberate” women and ensure gender equality. It has been perceived as a setback for Muslim women and assertion of their fundamental right to manifest in their daily living in a French society.¹⁵⁴

¹⁴⁷ *Supra* note 142, p.182

¹⁴⁸ *S.A.S. v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, para .116

¹⁴⁹ *Ibid.*, para .119

¹⁵⁰ Vibeke Blaker Strand, “Prohibitions against Religious Clothing and Symbols in Public Schools and Universities: Narrowing the Scope by Introducing the Principle of Equal Treatment of Religious Manifestations”, *Religion and Human Rights* 10, no. 2 (2015): p.187

¹⁵¹ *Ibid.*, pp.165-167

¹⁵² *Leyla Şahin v. Turkey*, no. 44774/98, ECHR, Judgment of 10 November 2005, para.111

¹⁵³ *Theory and practice of the European Convention on Human Rights*. ed. Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (Cambridge ;Antwerpen ;Portland : Intersentia 2018), p.738

¹⁵⁴ Hakeem Yusuf, “S.A.S. v France: Supporting Living Together of Forced Assimilation”, *International Human Rights Law Review* 3 (2014): p.300

2.3 Concluding remarks

It is essential to highlight the notion of *vivre ensemble*, principle of gender equality and public order that serves as legitimate values and principles of France. Correspondingly, in the *SAS v France* it is complex to evaluate references made under legitimate aim for justifiability. It seems that the French approach may risk subjectivity on its stance on the burqa ban, due to the absence of a clear legal basis. Nevertheless, this chapter has formulated the problem within the framework of application on justifiable interference of Art.9 (2) on the burqa ban. The outcome of pros and cons will be confirmed in the next chapter when analyzing the validity of the meaning of those legitimate aims as being necessary for a democratic society, by considering the created conflict with the Convention. Especially considering that a democratic society is a focal point of Human Rights, in which the Convention serves as a basic law to reach sound assertion to safeguard central values of Europe and its European Public Order.

3. DOES BAN ON BURQA PROMOTE INTEGRATION AND CAN IT BE JUSTIFIABLE UNDER LIMITATION CLAUSE BEING “NECESSARY IN A DEMOCRATIC SOCIETY”?

The European Convention on Human Rights should be understood and interpreted in full within its aim. This is important to integrate a stable system that protects human dignity and democracy and the rule of law serves to compliment it. Nonetheless, peaceful co-habitation of different religious groups within society has frequently proved challenging.¹⁵⁵ The history of Europe shares examples of extreme intolerance towards religious groups, for example, the atrocities in Europe during World War II. Therefore, an immediate response to prevent future genocide and other such atrocities was needed. Hence, the European Convention was conceived in the aftermath of World War II.¹⁵⁶

This chapter is dedicated to draw parallels within the *SAS v France*, and analyze conflicting sides for implementing burqa ban and how the law on the burqa ban has left impact on Muslims living in France. The second paragraph of Article 9 specifies that ‘necessity’ cannot be invoked unless the performed act of manifestation shall be interfered 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.

At the same time the first paragraph of Article 9 states that:

Everyone has the right to freedom of thought, conscience and religion; this right includes(...)to manifest his religion or belief, in worship, teaching, practice and observance.

This wording introduces one of the cornerstones of the Article 9 – the balance of interests, which is the prerequisite in a democratic society. In respect to the *SAS v France*, it evaluates and identifies the main issues arising from the principles for justifiability. It illustrates how those principles are interpreted and enforced within the burqa ban. In addition, how does it reflect for those who are against the burqa ban and argue towards an incompatibility linked to a democratic society under the Convention? It is vital to strike a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society”.¹⁵⁷

3.1 Necessary in a democratic society

Clearly, the freedom to manifest one’s beliefs and convictions is extremely important. Although, as concluded previously, it is not unlimited since public order must also be considered. However, the judgment in the *SAS v France* states that the burqa ban is necessary to secure public safety, to prevent identity fraud, protect rights and freedoms of others and provide open and democratic society.¹⁵⁸ Thus, the Court implies that the burqa ban has a negative impact on those who chose to wear the Islamic veil in the spirit of their religious beliefs.

¹⁵⁵ *Supra* note 25, p.434

¹⁵⁶ *Ibid.*

¹⁵⁷ *S.A.S. v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, para.128 *Leyla Şahin v Turkey*, no. 44774/98, Judgment of 10 November 2005, para. 108

¹⁵⁸ *S.A.S. v. France*, no. 43835/11, ECHR, Judgment of 1 July 2014, para.82

As drafted in Article 9, freedom of thought, conscience and religion is one of the foundations of a democratic society, defined by the meaning of the Convention. This freedom is

“one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.”

In a democratic society, in which several religions coexist within the same population, it may be necessary to place limitations on the freedom to manifest one’s religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.¹⁵⁹ Moreover, in order to also ensure each person’s rights and freedoms under jurisdiction of the Convention.¹⁶⁰ Furthermore, France has argued about the status of its democratic society. Based on the grounds of social cohesion and interaction, it supported arguments requiring *vivre ensemble*. France argued that the burqa ban would benefit society, maintain tolerance and enhance openness in a democratic society. Referring to this statement, some academics express difficulty to relate to the legal basis for the ban in light of the Convention, considering the arguments offered by France.¹⁶¹ Meanwhile Vakulenko, shares disappointment, that France is undermining and shaping an individual’s experiences, who mostly are woman. She argues and supports empirical evidence that concludes that the impact of the burqa ban on the status of women is incompatible within a democratic society, as it is aspired within the Convention.¹⁶²

3.1.1 Necessary in a democratic society through the principle of pluralism

Pluralism and democracy must be based on dialogue and a spirit to reach compromise, it entails a differentiating consensus on religious freedom, which shall be justified in order to maintain and promote a stable democratic society.¹⁶³ Highlighting, once again that pluralism is one of the hallmarks of a democratic society.¹⁶⁴ When an individual or groups of religious conviction go against human rights law, it shall be restricted. Thus, it excludes circumstances, where the views of a majority must prevail.

It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs (...) ¹⁶⁵

This means that a balance must be achieved to ensure the fair treatment of people from minorities and avoid any abuse of a dominant position, as democracy requires respect for the principle of pluralism. Therefore, national legislation cannot waive the meaning of the

¹⁵⁹ *S.A.S. v. France*, (2014) para.126 *Kokkinakis v Greece*, no. 14307/88, Judgement of 25 May 1993, para.33

¹⁶⁰ *Supra* note 158, para.126, *Supra* note 152, para.106

¹⁶¹ *Supra* note 37 Shaira Nanwani, "The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction", *Emory International Law Review* 25 (2011)

¹⁶² Anastasia Vakulenko, "Islamic Headscarves' and the European Convention on Human Rights: An Intersectional Perspective", *Social and Legal Studies* 16 (2007): p .184

¹⁶³ *Supra* note 158, para.128

¹⁶⁴ *Supra* note 158, para.124, *Kokkinakis v. Greece* (1993), para.31 *Leyla Şahin v Turkey* (2005), para. 104

¹⁶⁵ Article 1 of the French Constitution of 4 October 1958. Available on : <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html> Accessed 27th of April, 2018

Convention which serves as a legal basis for every State Constitution system. No legislation is able to disfavor a particular religious group, in this case Muslims.¹⁶⁶

The rule of law means that all human beings are equal before law in their rights and freedoms. The rule of law does not permit any type of discrimination against a particular religious group – in the analyzed situation in the *SAS v France* – Muslims who wear the Islamic veil, solely on the grounds being of the adopting a different religious assertion and philosophy than the majority.¹⁶⁷ If understood through these, the link between the rule of law and democracy is essential and correlated.

Moreover, we must also consider the aftermath of the Law in April 2011, after it had entered into force. According to media reports women wearing the face veil became targets of physical and verbal assault which instead of liberating them makes their participation in social life very difficult.¹⁶⁸ Gal-Or¹⁶⁹ confirms the negative impact of the Law and denies that it achieved the results it was proclaimed to achieve.¹⁷⁰ Even though that the *SAS v France* was guided by the well-intentioned imperative decree of protecting an individual– a woman. Based on the Gal-Or's analysis, it can be concluded that *SAS v France* misjudged the values at play, producing consequences that outweigh the original intention of securing gender equality in a democratic society.¹⁷¹

Correspondingly, if the burdens placed on those who wear the Islamic veil are that of pressure, it might amount to a form of isolation within discriminatory characteristics. Furthermore, it affects their ability to adhere to the pattern of religious freedom in their inner choice. That helps to understand the applicant in the *SAS v France* case who claims to be subjected to such a degree of pressure. Therefore lead to incompatibility with the requirements of Article 9(1). However, at the same time, Article 9 rights might be violated by religious portrayals if going against human rights law under the Convention. In that case, a State may legitimately consider it necessary to take measures aimed on alleging it incompatible with the respect for the freedom of thought, conscience and religion of others.

In the wording of the decision it is revealed to be more than just plain wording of a judgment, it raises concerns about the French society's values on religious freedom as outlined in Article 9.

¹⁶⁶ Parliamentary Assembly Council of Europe, *Resolution 1743: Islam, Islamism and Islamophobia in Europe*, 23 June 2010 (23rd Sitting), para.16. Accessed May 7, 2018

¹⁶⁷ Steven Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Human (Council of Europe, 1997), p.14 Available on: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf) Jill Marshall, "Religious Identity", in *Personal Freedom through Human Rights Law? Autonomy, identity and Integrity under the European Convention on Human Rights*, International Studies in Human Rights 98 (Leiden: Boston, Martinus Nijhoff, 2008), p.145

¹⁶⁸ Angelique Chrisafis, 'France's Burqa Ban: Women are Effectively under House Arrest', *The Guardian*, 19 September 2011, Available on: <https://www.theguardian.com/world/2011/sep/19/battle-for-the-burqa> Accessed 24 of April, 2018 Ekaterina Yahyaoui Krivenko, "Islamic Veil and Its Discontents: How Do They Undermine Gender Equality", *The Religion & Human Rights* 7, no. 1 (2012): p.22

¹⁶⁹ Noemi Gal-Or, "Is the Law Empowering Or Patronizing Women - The Dilemma in the French Burqa Decision as the Tip of the Secular Law Iceberg", *Religion and Human Rights* 6 (2011)

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, p.318

These concerns are on the freedom of choice, the principle of gender equality, and principle of pluralism, as well on the human rights and fundamental freedoms as such. In this case it is important to consider the explanation by Evans about how a democratic society shall function when inspired by the Convention.¹⁷² Accordingly, the judgment of the *SAS v France* is projected on the failure of the State to offer the same degree of legal protection against disproportionate violations to freedom of religion or belief as it offers.¹⁷³ And second, interpreted within France socio-political and cultural context, it goes contrary to any legitimate aim. Therefore, it may be understood as the state specifically targeting persons of Islamic faith and Islam.¹⁷⁴

With regard to targeting religious groups of Muslims, within burden of proof about why the judgment on the burqa ban is counterproductive.¹⁷⁵ As it does not include certain legal basis and its arguments are based on bias and assumptions on burqa, which actually eradicates Islam from French society.¹⁷⁶ Taking into consideration, the above mentioned facts, so far the argument on discriminatory grounds by not adhering diversity serves to represent isolation and disproportion to the principle of pluralism.¹⁷⁷ Based on *SAS v France*, there is no empirical evidence or factual proof on possible negative consequences on wearing the burqa, in case on harming the Convention or distorts public order.¹⁷⁸ Further, the viewpoint represented by the Commissioner for Human Rights of the Council of Europe is that the ban exerts improper pressures on individuals and impacts their inner religious belief, which can constitute Islamophobia.¹⁷⁹ Certainly, it shall not be compatible with respect for the Article 9 and the Convention as such, if it may cause such a reaction.

The measure alleged within the meaning of Article 9(2) of the Convention shows that the relevant limitation clause “necessary in a democratic society” shall be reconcilable as it may imply further exclusion of Islam from French society. Meaning that any unjustified interference will have detrimental effect on individuality, denying what an individual considers most important and what is vital for an applicant’s inner religious core as in the *SAS v France*.¹⁸⁰ Therefore, it is essential to safeguard this right through Article 9 as democracy is about plurality, openness and free choice for religious conviction which includes a wide range of opinions and beliefs. As the Court has stated in its first landmark judgment *Kokkinakis v Greece*¹⁸¹ under Article 9:

¹⁷² Malcolm David Evans, *Manual on the Wearing of Religious Symbols in Public Areas*. (Council of Europe, 2009)

¹⁷³ *Ibid.*, pp. 16-17

¹⁷⁴ *Supra* note 169, p.320

¹⁷⁵ Erica Howard, “Banning Islamic Veils: Is Gender Equality a Valid Argument”, 12 *International Journal of Discrimination and Law* 12 (2012): pp.158-159

¹⁷⁶ *Ibid.*

¹⁷⁷ *S. A. S v France* (2014), para 37 Thomas Hammarberg, *Human Rights in Europe: No Grounds for Complacency*, (Council of Europe, 2011), pp.39-43

¹⁷⁸ *S. A. S v France* (2014), para.13 The applicant did not claim that she should be able to keep the burqa on when undergoing a security check, at the bank or in airports, and she agreed to show her face when requested to do so for necessary identity checks.

¹⁷⁹ *S. A. S v France* (2014), para.37 Thomas Hammarberg, Council of Europe. Commissioner for Human Rights, *Human Rights in Europe: No Grounds for Complacency*, Council of Europe, 2011, pp.34-48

¹⁸⁰ Bernadette Rainey, Elizabeth Wicks, and Clare Ovey Jacobs, *White and Ovey: The European Convention on Human Rights*, (Oxford: Oxford University Press 2014), p. 411

¹⁸¹ *Kokkinakis v. Greece*, no. 14307/88, ECHR, Judgement of 25 May 1993

“The pluralism is in-dissociable from a democratic society, which has been won over the centuries, depends on it.”¹⁸²

Consequently, the burqa ban is not necessary in a democratic society, especially if considering the argument to safeguard principle of pluralism. It is important to understand the particular importance of *SAS v France*, where the notion of *vivre ensemble* has emerged and as well the principle of gender equality. Thus, it cannot be considered to constitute a legal basis for the burqa ban’s implementation as a justifiable interference under Article 9(2). Based on this fact, the term *vivre ensemble*, meaning living together, speaks and shares the openness and straightforwardness of pluralism, and tolerance to secularism. In particular, that limitation clause “necessary in a democratic society” should protect the rights and freedoms of others, which without doubt includes a duty to respect every religion and guarantees religious tolerance by implying dignity and respect for the religious beliefs of others.¹⁸³ Especially, taking into account, the French concept of secularism (*laïcité*), which discourages religious influence in the determination of state policies; thus forbidding the French government from becoming involved in religious affairs. Additionally, it prohibits the French government to influence the religious climate in the state.

3.1.2 Necessary in a democratic society and the concept of *laïcité*

Laïcité is a term coined in law that is, primarily, a French idea, and secondarily, a legal concept. It divides the private realm of each individual’s religious autonomy and the state which is neutral shall refrain from any interference in religious matters. Accordingly, all the rights in religious dimension shall be equally secured. Indeed, the aim of the French Law was argued to preserve public safety, gender equality and secularism. Assertion has been connected to the aim to safeguard public order. That is to say, that allowing wearing of the burqa may distort tolerance to religious freedom.¹⁸⁴ The state of France has relied on this notion for justifiability on burqa ban. France tried to implement the justifiable interference with the exercise of the Convention; however it was dismissed, for failure to provide concrete evidence of a breach of public order. Referring to protection of gender equality, the objective was initiated by the assumption that women who wore the burqa were coerced into doing so, but no such evidence was examined through the legislative process.¹⁸⁵ Thus, this raises questions. What about the rights of those wearing the Islamic veil willingly? Whose freedom of religion would ultimately be protected?¹⁸⁶

Furthermore, it is important to acknowledge that secularism in France is one of the prerequisites for democracy.¹⁸⁷ First, it is a guarantor of freedom of religion and of equality before the law. Second, it prevents France from showing a preference for a certain religion or belief.

¹⁸² *Kokkinakis v. Greece* (1993) para.31

¹⁸³ Parliamentary Assembly Council of Europe, *Resolution 2076: Freedom of Religion and Living Together in a Democratic Society*, 30 September 2015 (33rd Sitting), para.6 Accessed 7 may, 2018

¹⁸⁴ *S. A. S v France* (2014), para.103

¹⁸⁵ *Ibid.*

¹⁸⁶ Armin Steinbach, “Burqas and bans: the wearing of religious symbols under the European Convention of Human Rights”, *Cambridge Journal of International and Comparative Law* 4, no. 1 (2015): p.7

¹⁸⁷ Article 1 of the French Constitution of 4 October 1958. Available on : <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html> Accessed 27th of April, 2018

Consequently, the principle of secularism ensures that a State may not invoke religious matters when performing its legislative function.¹⁸⁸ Referring to one of the landmark judgment regarding the burqa ban, *Leyla v Turkey*, it states that only indisputable facts and certain legitimate aims are capable of satisfying the requirements of justifiable interference with a fundamental right guaranteed by Article 9 of the Convention. Moreover, because of the possible interference with a fundamental right, the Court has to accurately establish which interference for the burqa ban has been supported by concrete evidence and not mere affirmations.¹⁸⁹ Moreover, the concept of secularism has its origins in the Declaration of the Rights of Man and of the Citizen of 1789, in Article 10 which provides that:

No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.¹⁹⁰

Thus, a majority cannot show disrespect or employ other means of interfering with religious freedom and their rights, simply because in a French society it does not play a dominant role in the religious climate. In other words, the “right of others”; the majority, cannot be imposed on the minority as a measure of social cohesion and mandatory engagement especially when the minority do not request such engagement or deem it desirable. Therefore, there is no solid legal justification for imposing burqa ban due as the will of the majority considering it is important to protect the minority.¹⁹¹

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, (...), to enjoy their own culture, to profess and practice their own religion (...)¹⁹²

Thus, it is essential to guarantee that the limitations of the burqa ban are compatible within genuine interests of democracy, the principle of secularism and provides evidence of such defense ruled under necessary in a democratic society.

Being defined as a “necessity” in a secular society is understood as an adequate relation of proportionality between the specific and legitimate goals pursued by restriction and the nature of the restrictive measure itself.¹⁹³ It means that the necessity clause for limitation and implementing of the burqa ban has to verify *pressing social need*.¹⁹⁴ Accordingly, referring to the *SAS v France*, France has to ensure clear redress to the Convention in order to maintain European Public order. Nonetheless, fundamental freedoms and rights of every individual must be provided the primary

¹⁸⁸ *Leyla Şahin v Turkey*(2005), para.29

¹⁸⁹ *Ibid.*, dissenting opinion A5

¹⁹⁰ *Dogru v. France*, no. 27058/05, ECHR, Judgement of 4 March 2009, para.18

¹⁹¹ Hakeem Yusuf, “S.A.S. v France: Supporting Living Together of Forced Assimilation”, *International Human Rights Law Review* 3 (2014): p.285 Anthony Gray, “The Manifestation of Religious Beliefs Through Dress : Human Rights and Constitutional Issues”, *European Journal of Law Reform* 16, (2004): p. 352

¹⁹² United Nations, International Covenant on Civil and Political Rights, Adopted by the General Assembly of the United Nations on 19 December 1966, on 23 March 1976. Available on: <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

¹⁹³ David Harris et al., *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*(Oxford University Press, 2009), p. 13 and p. 608

¹⁹⁴ *S. A. S v France* (2014), para.51-52

burden of protection as they fall under the Convention.¹⁹⁵ In order to rule on this latter point, the Court must weigh the requirements of the protection of the rights and liberties of others against the conduct of those who wear the Islamic veil, exercising its supervisory jurisdiction. The Court must take into consideration the current situation in France as a whole. First of all, a distinction has to be made between abstract danger and real possible violation based on evidence or factual occurrences.

Based on *SAS v France* case merits and actual circumstances of the relevant French law on burqa ban, it is likely that the limitation clause and “necessary in a democratic society”, as supported by the French Government, was not fully met. Correspondingly, in the *Dahlab v Switzerland*¹⁹⁶ case it was declared manifestly ill-founded and thus inadmissible. However, the decision affirms that the practice of wearing the burqa is perceived as coerced and imposed on the individuals, therefore appears difficult to reconcile within the democratic values of tolerance, respect for others and, above all, equality and non-discrimination.¹⁹⁷ In the *Leyla v Turkey* assertion was reached for the justification on limitation of the burqa ban, referring to the Turkish context and principle of secularism, whereas the Islamic headscarf had become the symbol of political extremist movements.¹⁹⁸ In regards to that, the applicant’s freedom to manifest religion was restricted in order to defend Turkish secular values, as the Court noted that secularism is the guarantor of democratic values and the principle that freedom of religion is inviolable and the principle that citizens are equal, therefore considered necessary to protect the democratic system in Turkey.¹⁹⁹

Interestingly, almost all cases discussing burqa pursues the same legitimate aims enumerated in article 9(2) of the European Convention on Human Rights, namely the protection of public order and of the rights and freedoms of others.²⁰⁰ Further, the *SAS v France* also follows this continuity, where the applicant’s arguments have been negated but the focal point has been intrinsically underpinned by French societal values and norms. And the practice of wearing the burqa has been perceived as “a practice at odds with the values of the Republic,” and

(...) was an infringement of the principle of liberty, because it was a symbol of a form of subservience and, by its very existence, negated both the principle of gender equality and that of the equal dignity of human beings.²⁰¹

Accordingly, persistent efforts to farther isolate the religious group of Muslims, which definitely amounts in effect to coercion and cannot come within the ambit of neutral provisions, how it is intended to be in plain wording of *SAS v France* judgment.²⁰²

¹⁹⁵ Mark W. Janis, Richard S. Kay, and Anthony W. Bradley, *European Human Rights Law: Text and Materials* (Oxford: Oxford University Press:2008),p. 830

¹⁹⁶ *Dahlab v Switzerland* , no. 42393/98, ECHR, Judgement of 15 February 2001

¹⁹⁷ *Ibid.*, p.13

¹⁹⁸ *Leyla Şahin v Turkey* (2005), para.113

¹⁹⁹ *Ibid.*, para.114, *Dogru v France* (2008), para. 66

²⁰⁰ Ekaterina Yahyaoui Krivenko, “Islamic Veil and Its Discontents: How Do They Undermine Gender Equality”, *The Religion and Human Rights* 7, no. 1 (2012): p.18

²⁰¹ *S. A. S v France* (2014), para.17

²⁰² Anthony Gray, “The Manifestation of Religion Belief through Dress”, *European Journal of Law Reform* 16 (2014): p. 352

Some academics stresses that the Court has missed a very valuable opportunity to contribute to a deeper understanding of the ways in which restrictions imposed on the practice of veiling in European states contribute to further discrimination.²⁰³ Not relying on real concerns on possible restrictions on their freedom, but on the assumptions that Muslims have been forced to wear the burqa. Moreover, this has the potential to cause danger and “berate Muslim women for failing to conform to a Western image of how women should behave.”²⁰⁴

One could say that the Court did not really care about the views and opinions of Muslim women who practice veiling.²⁰⁵ However, France has mentioned the Islamic veil as a practice contrary to the principle of gender equality without any further justification. Hence this contributes to statements associating the burqa with political Islamic extremist movements and placing it in opposition to hallmarks of democracy, and not in line with the principles of tolerance and pluralism.²⁰⁶ Therefore, upholding the ban on the basis of the concept *vivre ensemble*, the Court has endorsed the French Republican approach to *laïcité*, within preponderance to socio-ethical concept, whereas personal autonomy has been weighted against intrusive state acts regulating identity.

Nevertheless, France has its own constitutional legal system; it is being one of the Contracting parties under the Convention that has made its own constitution within the reference to the superior role of the Convention to complement its system. Understanding, the fact that slogan the “Liberty, equality, fraternity”, shall be the motto of the Republic.²⁰⁷ Further, that democracy is the only political model compatible within Convention. Hence, as a democratic society as France must not prioritize other values than those enshrined in the Convention.

3.2 Concluding remarks

In a democratic society national authorities must be limited in their ability to attribute limitation clauses within their interpretation. This implies the existence of *pressing social need* in order to preserve the principle of pluralism, and principle of secularism in France case. This chapter demonstrates within the analysis that burqa ban has wider implications than was presented in the judgment of *SAS v France*. In addition to laws curtailing religious freedom under the specific necessities of the Convention, France justifies curtailing religious freedom under the principle of secularism, and principle of pluralism within its slogan of “liberty, equality, fraternity.” Those principles contain the notion that government and society must be protected from religious

²⁰³ Noemi Gal-Or, “Is the Law Empowering or Patronizing Women - The Dilemma in the French Burqa Decision as the Tip of the Secular Law Iceberg”, *Religion and Human Rights* 6 (2011):p.331, Ekaterina Yahyaoui Krivenko, “Islamic Veil and Its Discontents: How Do They Undermine Gender Equality”, *The Religion & Human Rights* 7, no. 1 (2012) Anthony Gray, “The Manifestation of Religion Belief through Dress”, *European Journal of Law Reform* 16 (2014)

²⁰⁴ Lyon and Debora Spini, “Unveiling the Headscarf Debate”, *Feminist Legal Studies* 12, no. 3 (2004): p.339

²⁰⁵ Ekaterina Yahyaoui Krivenko, “Islamic Veil and Its Discontents: How Do They Undermine Gender Equality”, *The Religion and Human Rights* 7, no. 1 (2012): p.17

²⁰⁶ *Leyla Şahin v Turkey* (2005), para.113, 115, 116

²⁰⁷ Article 2 of Constitution of 4 October 1958 Available on: : <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#TitleI> Accessed 25th of April,2018

overreaching in order to preserve its secular and plural nature, whereas freedom of religion is one of the foundations of a democratic society.

That is to say, that different religions shall co- exist, and France shall allow religions to flourish in society so long as this flourishing does not violate specifically defined limitation clauses. Meaning, that such limitations shall not require a religious believer to be distorted by the limitations imposed. To the extent that the principle of secularism in the *SAS v France* case functions as an exclusionary machinery of religious views, it goes into conflict with the robust principle of pluralism and principle of secularism embraced by the French constitution which was inspired by the Convention. Consequently, the endorsement of such an act is in conflict as it violates the principle of pluralism, as well the principles of democratic society.

Based on all the facts provided, as question still remains: is the burqa ban was necessary in a democratic society? It is important to realize that the restriction clause must be proportionate, which

(...) requires a balancing act under which the Court asks whether the interference with the right is more extensive than is justified by the legitimate aim.²⁰⁸

Namely, whether a limitation on religious freedom is proportionate depends on whether the measures adopted are disproportionate for the defense of the juridical good that has given rise to restriction.²⁰⁹ The principle “necessary in a democratic society” is of great importance due to the fact that this potential limitation clause allows wide discretionary power for the Court when condoning or condemning interferences, meanwhile states aim to pursue justifiability within right and freedom of Article 9 by reference on one of the legitimate purposes in the second paragraph of Article 9. Indeed, the Court being a supranational court within its main goal to review the legal measures adopted in an adjustment between the guarantee of human rights law of the Convention and dignity and respect towards peculiarities of legal order of France, that also shall reflect a certain concept of the protection of European Public order within the determination of the purpose of the Convention.

²⁰⁸ Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (New York: Oxford University Press, 2011), p. 57

²⁰⁹ *Ibid.*, p. 62.

4. THE RELIANCE OF THE MARGIN OF APPRECIATION DOCTRINE

The reliance on the “margin of appreciation” refers to the space for maneuver that the Strasbourg organs are willing to grant national authorities with respect to their fulfillment of the Convention.²¹⁰ When applying the margin of appreciation, we must consider on one side the applicants wish to manifest his/her religious belief which is a fundamental right within a democratic society that needs to tolerate and sustain pluralism, as well as diversity. On the other hand, there is the need for integration and the importance of maintaining public order.

That is to say, that the “margin of appreciation” refers to the flexibility granted to the states in their observance of rights and, in particular, to the application of the various exceptions to the Convention. The aim is to avoid damaging confrontations between the Court and a concrete Member State, while ensuring the balance between its sovereignty and its responsibilities under the Convention.²¹¹ The principles discussed in previous chapters are within a tandem to the application of the margin of appreciation doctrine. Meaning that, it is an essential aspect to consider when evaluating whether the national authorities have overstepped the margin or not.²¹²

These efforts to reach a balance in the *SAS v France* case between competing sides has generated a substantial controversy in Europe. A controversy that, the jurisprudence of the Court has resolved by always accepting the recourse to the margin of appreciation doctrine in favor of the State by approving its restrictions on religious freedom.²¹³ Further, in the *SAS v France* case the state of France has been granted the margin of appreciation, but since it is not unlimited, it should reconcile with the Convention. Further, acknowledgement that the state of France is situated better with respect to a globally accepted human rights law perspective, in order to resolve this controversy. That is due to the lack of consensus in the jurisprudence of the Court with respect to the burqa. Even though the state of France may be in a better position to assess the factual and legal domestic circumstances, the Court has emphasized *a priori* position, being qualified to process interpretation of those conditions on a national level.²¹⁴ As well as to interpret consequences on incoherencies that undermines the Convention principle of effective protection of fundamental freedom and right by Article 9.²¹⁵

Based on the essence of the Convention, indeed it is for the national authorities of the state of France to initiate the assessment of the reality of the pressing social need to ban the burqa. This is implied by the notion of "necessity in a democratic society" in the context of the SAS case. However, the Court is empowered to observe the state of France engagements in its final ruling by concluding about whether a burqa ban is reconcilable with Article 9.

Firstly, relying on the margin of appreciation doctrine, the Court assumed that the political choice of the French principle of secularism could in itself justify interference on religious freedom. It

²¹⁰ Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe, 2000), p. 5

²¹¹ *Ibid.*, p. 10

²¹² These principles can be extracted from *Handyside v The United Kingdom*, no. 5493/72, ECHR, Judgement of 7 December 1976

²¹³ *Dahlab v. Switzerland* (2001), *Leyla Sahin v. Turkey* (2005)

²¹⁴ *Leyla Sahin v. Turkey* (2005), para 110

²¹⁵ *Supra* note 210, p. 15

requires sacrifices from individuals who are willing to wear Islamic veil by their freedom of choice for the sake of safeguarding tolerance and religious harmony, referenced in the interpretation of the *SAS v France* judgment.²¹⁶ All of the legal principles discussed in the previous chapters seem adequate to the Court to conclude in their judgment in favor of France and the burqa ban.

Nevertheless, the ruling has brought intense debate and has been widely criticized. The criticisms include, firstly, that a burqa ban is a display of Islamophobia. That France, by imposing a model of the strict principle of secularism when applying the burqa ban, neither respects pluralism nor existing traditions in Europe that safeguard European public Order, nor Europe's diversity of religion-state relations. Secondly, criticism is brought towards the Court, for exceeding its powers on the competency in the protection of the Convention rights when granting such a wide discretionary power to the state of France in such a sensitive matter as the fundamental right and freedom of Article 9.²¹⁷ Arguments which interpret the applied margin as derogation on values under the Convention, lead to jurisprudence where the principle of effective protection of individual rights is absent.

First, because of the fact, that Muslims are only a minority in population of France.²¹⁸ With a notice that as prescribed by Article 9, religious freedom concerns individual's autonomy, as it is private matter of each individual. Correspondingly, with a reference to *Leyla v Turkey* referring to the domestic situation provided in Turkey and social status of Muslim in the country. We must underline, the state of France shall not be concerned with striving to maintain a democratic system within the principle of pluralism in a comparison with respect to *Leyla v Turkey* context.²¹⁹ Relating to the ban's social context, it renders practical effect highly discriminatory, while the ban on Islamic veil ban in *Leyla v Turkey* does not discriminate against a minority, thus, the burqa ban within the state of France does. Having this in regard, the minority population relies on the Convention to receive ensured protection of their human rights.²²⁰ Second, there is no public order threat referring to burqa possible influence on the political climate in the state of France.

Whereas, referring to *Leyla v Turkey*, the burqa carries a political matter that distorts public order within a legitimate aim to restrict religious freedom. Therefore, in the *SAS v France* case the burqa lacks the political "symbolism" that it has in the case of *Leyla v Turkey*.²²¹ Third, by implementing a complete burqa ban, the state of France wrongly assumes that all women are forced to wear the burqa and risks to an inevitably conflict within the protection of rights and freedoms of those whose choice is to veil themselves. Further, it risks undermining the potency of

²¹⁶Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe, 2000), p. 26

²¹⁷ Dominic McGoldrick, "Religion in the European Public Square and in European Public Life—Crucifixes in the Classroom?", *Human Rights Law Review* 11, no.3 (2011): pp. 470-475)

²¹⁸ *S. A. S v France* (2014), para.16

²¹⁹ *Leyla Şahin v Turkey* (2005), para.5

²²⁰Jennifer Heider, "Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights", *Indiana International and Comparative Law Review* 22, no, 1 (2012): p.115

²²¹ *Supra* note 219, para.10

the Convention.²²² The prohibition on religious freedom by adopting a burqa ban targets a dress-code (burqa) that is closely linked to religious inner faith, culture and personal convictions and, undoubtedly an intimate right related to one's personality.²²³ As well, referring to the third statement, there exists an ongoing debate, whether it is incumbent on a Court to ascertain and support not only the objective but also the subjective meaning of this garment in France.²²⁴

The doubt has been detected within the evaluation process towards the judgment, due to the large number of actors, both international and national, in the field of fundamental rights protection that have found a blanket ban to be disproportionate with respect to a legitimate aim.²²⁵ On the one hand, it concerns the burqa ban legislation which might contribute to narrow the interpretation on the Islamic veil, affecting those whose religious conviction is to wear the veil. Consequently, it can encourage intolerance when the state of France has a duty to promote tolerance.²²⁶ Accordingly, it is not the duty of France to:

(...) assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed (...) The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.²²⁷

On the other hand the Court acknowledged that the role of domestic circumstances within the state of France shall be provided special weight based on France's democratic legitimation to evaluate local needs and conditions.²²⁸ The *SAS v France* case is based on politically and socially sensitive matters as have been analyzed in the previous chapters,²²⁹ where a strict conception of *laïcité* prevails, thus imbued with Republican values.²³⁰ The applied jurisdiction of the state of France on burqa ban serve as a limitation on religious freedom that for some academics deeply distorts the essence of human rights under the Convention.²³¹ For some others²³², they argue that the whole human rights system would collapse, if the burqa ban would not come into force. Further, open interpersonal relations would be forgotten, due to the effect on the Islamic veil within the social context and intercommunication.²³³

²²² *S. A. S v France* (2014), para.145-146

²²³ *Ibid.*, dissenting opinion para.17

²²⁴ François-Xavier Millet, "When the European Court of Human Rights encounters the face: A case-note on the burqa ban in France European Court of Human Rights, Judgment of 1 July 2014, Case No. 43835/11, S.A.S. v France", *European Constitutional Law Review* 11, no. 2 (2015): p. 415

²²⁵ *S. A. S v France* (2014).para.147 For example, of the French National Advisory Commission on Human Rights para.18-19, non-governmental organizations such as the third-party interveners, the Parliamentary Assembly of the Council of Europe para.35-36, and the Commissioner for Human Rights of the Council of Europe para.37

²²⁶ *Ibid.*, para.149

²²⁷ *Ibid.*, para.127

²²⁸ *Ibid.*, para.129,para.154

²²⁹ Chapter 2 and 3

²³⁰ *Supra* note 224, p.417

²³¹ Shaira Nanwani, "The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction", *Emory International Law Review* 25 (2011) Jill Marshall, "Human Rights and the Legal Regulation of Dress", *Nottingham Law Journal* 25 (2016) Keith Golder, "Limitations on the Wearing of Religious Dress: An Examination of the Case Law of the European Court of Human Rights", *UK Law Students Review* 1, no. 1 (2012)

²³² Bridgette Dunlap, "Protecting the Space to Be Unveiled: Why France's Full Veil Ban Does Not Violate the European Convention on Human Rights", *Fordham International Law Journal* 35, no. 4 (2012)

²³³ *Supra* note 224,p. 419

Importantly, in the Courts awareness of the fact that the impugned ban mainly affects Muslim women who wish to wear the full-face veil, stating that the ban is not expressly based on the religious connotation of Islamic veil but solely on the fact by itself that it conceals the face.²³⁴ As Levinas stresses, the criticism is of a society in which people would not properly relate to one another. For him, being depersonalized is impermissible through a humanity that includes ethical code, derived as the moral obligation of humanity.²³⁵ Indeed, this argument was plausibly illustrated based on the account of public safety on the matters of the security risk posed by the burqa, with respect to the fact that face coverings might hinder the identification of individuals, therefore distort the French public order.²³⁶ As it has been emphasized in the previous concepts about why the French authorities give that much weight to the burqa ban, which indicates:

(...)[t]he voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of ‘living together’ in French society (...)²³⁷

Moreover, the Court is able to accept that a State may find it essential to give particular weight in this connection to the interaction between individuals and may consider this to be adversely affected by the fact that some conceal their faces in public places, by stressing out:

(...)[t]he systematic concealment of the face in public places, contrary to the ideal of fraternity, ... falls short of the minimum requirement of civility that is necessary for social interaction²³⁸

Accordingly, the Court finds that the impugned ban can be regarded as justifiable interference in its principle as it seeks to guarantee the conditions of *vivre ensemble*.²³⁹ In Europe, human rights prize is the freestanding religious autonomy of an individual. This is bound upon the hallmarks of a democratic society, pluralism, tolerance and broadmindedness. Moreover, as interpreted in the *SAS v France*, the Islamic veil illustrates its conviction outwards and carries opinion that could be at odds with European values and which might in turn, in the long term, be against the essence of a democratic society in Europe.²⁴⁰ Based on these factual and legal prerequisites the existence of such a society was therefore a “necessity.”

4.1. Concluding remarks on the principle of margin of appreciation

The doctrine of the “margin of appreciation” serves as a decisive legal tool in the *SAS v France* case. It goes hand in hand with a supervision of the Court. Meaning, that the Court plays a role as supervisory not as a European Supreme Court. Automatically it is directly linked and dependent

²³⁴ *S. A. S v France* (2014), para.151

²³⁵ Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* (Duquesne University Press, 1969)

²³⁶ *Ibid.*, p.11 Emmanuel Levinas, *Ethics and Infinity: Conversations with Philippe Nemo* (Duquesne University Press, 1985)

²³⁷ Sofie G. Syed, “The Implications of France’s Anti-Veil Laws” *Harvard Journal of Law and Gender* 40 (2017): p.321

²³⁸ *S. A. S v France* (2014), para.25

²³⁹ *Ibid.*, para.142

²⁴⁰ François-Xavier Millet, “When the European Court of Human Rights encounters the face: A case-note on the burqa ban in France European Court of Human Rights, Judgment of 1 July 2014, Case No. 43835/11, S.A.S. v France”, *European Constitutional Law Review* 11, no. 2 (2015): pp.421-422.

on the enforcement of Contracting Member States, in this case France. It shall act within its limited mandate where the Court considers whether the state of France has taken reasonable and proportionate measures to safeguard rights under Article 9.²⁴¹

The margin of appreciation has been employed to permit the state of France to respond to its own necessities and standards to maintain a stable national climate, while ensuring enjoyment of the full deliverance of religious freedom within France under the Convention²⁴². When the Court applied the doctrine of margin of appreciation it was required to distinguish between dignity and tolerance that is undoubtedly a vital. Thus, the applied margin of appreciation in *SAS v France* concludes to be a blind assumption without sound legitimate aim, such as the blatant acceptance of customs from the side of the state of France to guarantee public order of the State. Further, the arguments drawn from comparative and human rights law as such militate against adopting the burqa ban.

While it is legitimate to take into account the specific context in France, referring to the strong and unifying tradition of the values of the French Republic to safeguard public order. As well, the overwhelming principle of *vivre ensemble*, gender equality and strict secularism that led to the adoption of the burqa ban. Nonetheless, it is still a duty of the Court to ensure protection through article 9(1), against disproportionate interferences, that may run contradictory to human rights.²⁴³ The French constitution is viewed as an aspiration of human rights law which serves as the “principal basis for global human rights standards.”²⁴⁴

Therefore, the Court shall ensure that applied margin of appreciation upholds the Convention with respect to France's obligation to uphold the right of freedom of religion in the context of the Convention to ensure public order. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure mutual tolerance between opposing groups.²⁴⁵ That is to say, European jurisdiction has accorded significantly high level of discretionary power when regulating religious freedom by paving the way and supporting the Court's newly applied approach under which the state of France's intrinsic behavioral social norms may be used to ban burqa.²⁴⁶

Therefore, a cursory interpretation of the Convention for the protection of Human Rights and fundamental freedom under Article 9 suggests that Contracting parties under the Convention have agreed on broad and quite vague qualifications on limitation clauses. Hence, while it offers rights from the one hand, it withdraws them on the other. It is identifiable that the margin of

²⁴¹David Harris et al., *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press, 2009), pp 10-12.

²⁴² Tom Lewis, “What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation”, *International and Comparative Law Quarterly* 56, no.2 (2007)

²⁴³ *S. A. S v France* (2014), dissenting opinion, para.20

²⁴⁴ Jennifer Heider, “Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights”, *Indiana International and Comparative Law Review* 22, no, 1 (2012): p.104

²⁴⁵ *Leyla Şahin v Turkey*(2005), para.107

²⁴⁶ Armin Steinbach, “Burqas and bans: the wearing of religious symbols under the European Convention of Human Rights”, *Cambridge Journal of International and Comparative Law* 4, no. 1 (2015), p.29

appreciation doctrine and supervision of the Court lacks clarity between intra and trans-national legal processes. On the one hand unclear determination of the extent to strike a balance between the demands for pluralism, national sovereignty and national identity, on the other hand, common consensus on religious freedom within Europe. It leaves impacts on European public order standards and for the transfer of power from the national states to the supranational institutions. Which is in fact faithful to the tenets of those documents and the jurisprudence applied interpreting them.²⁴⁷

²⁴⁷ M. Todd Parker, "The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR", *Duke Journal Of Comparative and International Law* 17:91 (2006): p.104

CONCLUSION

The analysis offered in this Thesis shows that Article 9 has both theoretical and practical intricacies. From the theoretical point of view, the first paragraph of Article 9 states the right, while the second paragraph of Article 9 permits the State to interfere in individual's right to religious freedom under a set of conditions established:

- *prescribed by law*
- required to meet legitimate aims;
- *necessary in a democratic society.*

The term “necessary” implies a balance between competing parties and the interpretation of the phrase *necessary in a democratic society* achieved with the doctrine of the margin of appreciation to safeguard the European Public order. All these concepts of limitation clauses for justifiability encompass the tensions created by the discrepancy between the individuals and the society. That is to say, that Article 9 lacks a clear determination of solid conceptual basis. The second paragraph of Article 9 is constructed based on rather indistinct concepts and includes the limitation clauses. Moreover, Article 9(1) failed to concretize the extent of protecting everyone's right to freedom of thought, conscience and religion. That resulted in a dilemma that has created conceptual tensions within Article 9, such as the individual religious autonomy versus rights and freedoms of others.

Hence in practice, Article 9 can be difficult to apply. This is largely due to the fact that in terminology and extent Article 9 is open to subjectivity. While there is a need to balance competing rights, with respect to the Convention in a particular the *SAS v France*, the Court is required to interpret each separate concept contained in the Article 9(2) and the possible provisions for justifiable interference. Article 9 appears to have a normative rather than truly adjusting character. It fails to take into account the difficulty existing in applying the margin of appreciation to reach a just judgment that would promote European Public order. Further, balance has to be struck between protection of religious autonomy of individuals, and the rights and freedoms of others. The judgment in the *SAS v France* has inclined to rely on the margin of appreciation by granting the state of France wide discretionary power.

Therefore, the balancing of competing rights with respect to the margin of appreciation is positive but difficult to apply. As the analysis provided in this Thesis has shown, Article 9 has unclear formulation of its extent. It carries legal controversies and applies principles that include contradictory aspects and leave conflicting debates unresolved, and in this way, distorts European Public order. It seeks to eliminate arbitrary practice, by restraining the State within European supervision. However, the abstract term of Public order as well as the possible effects of the outcome of the *SAS v France* case are not given due consideration.

Therefore, if the doctrine of the margin of appreciation has been applied disproportionately, due to the lack of firm provisions, it can seriously undermine the stability of the Convention that serves as aspiration for each Contracting Member State in developing the legal principles for its own national legal system with respect to Human Rights Law. Above all, the Convention has to

be respected, regardless of procedural obstacles. Even in cases in which moral or ethical issues of great sensitivity are at stake, including religious freedom, the Court leaves a wide margin of appreciation for the Member State, so it has to be treated with utmost cautiousness to avoid misdirection of Human Rights Law and not to distort values that maintain European public order.

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