

## *SAS v France*: A Critique of France's Veil Ban

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### INTRODUCTION

The recent case of *SAS v France*<sup>1</sup> provided the European Court of Human Rights ('Court') its first opportunity to assess the French legislation<sup>2</sup> prohibiting the wearing of clothing designed to conceal the face in public. Although couched in neutral terms, the history of the legislation and its broad exceptions make it clear that the purpose of the legislation was to outlaw the wearing of the full Islamic veil in public.<sup>3</sup> In cases regarding religious freedom, the Court is often perceived as being overly deferential to national authorities,<sup>4</sup> but with state action here going far beyond the realms of employment<sup>5</sup> and education<sup>6</sup> to which the Court is accustomed, the author hoped that a more nuanced approach would emerge. Despite some positive aspects, however, a close reading of the judgment reveals that her optimism was largely misplaced. Particularly, the author analyses and ultimately rejects the four possible avenues raised in *SAS*<sup>7</sup> for upholding the blanket ban on the veil: public safety; gender equality; human dignity; and finally the troubling concept endorsed by the Court, 'living together' and its rootedness in French culture and *laïcité*.

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<sup>1</sup> *SAS v France* (2015) 60 EHRR 11.

<sup>2</sup> *loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public*, of which Article 1 stipulates '[n]ul ne peut, dans l'espace public, porter une tenue destinée à dissimuler son visage'.

<sup>3</sup> M Hunter-Henin 'Why the French don't like the burqa: *laïcité*, national identity and religious freedom' (2012) 61(3) ICLQ 613, 615.

<sup>4</sup> I Rorive, 'Religious Symbols in the Public Space: in search of a European answer' (2008-2009) 30(6) Cardozo L Rev 2669, 2697.

<sup>5</sup> With regard to employment see: *Stedman v United Kingdom* (1997) 23 EHRR CD168.

<sup>6</sup> For examples on education see: *Leyla Şahin v Turkey* (2007) 44 EHRR 5; *Lautsi v Italy* (2012) 54 EHRR 3.

<sup>7</sup> *SAS* (n 1).

### I. CONTEXT

#### Article 9

In addition to an absolute right to freedom of thought, conscience and religion, Article 9 of the European Convention on Human Rights offers a qualified freedom to manifest one's religion or beliefs. Providing it is done so proportionately and in accordance with law, national authorities can restrict this latter limb in the interests of public safety; the protection of public order, health or morals; or the protection of the rights and freedoms of others.

Although 'religion or beliefs', as referred to in Article 9 of the ECHR, has always been widely interpreted,<sup>8</sup> the Court has historically favoured a restrictive interpretation of 'manifestation'.<sup>9</sup> The strength of this filtering device has reduced over time, and now the applicant need only establish that there is 'a sufficiently close and direct nexus between the act and the underlying belief'.<sup>10</sup> As such, despite uncertainty as to whether it should be seen as an Islamic practice at all,<sup>11</sup> a prohibition on wearing the full veil in public undoubtedly amounts to a prima facie interference with Article 9 rights.

#### Legal Development in France

Despite estimates that Muslims account for less than 8.5 percent of the total population,<sup>12</sup> France is renowned for having an 'obsession'<sup>13</sup> with the influence of Islam, fuelled largely by an intolerant media.<sup>14</sup>

Islamic dress first received widespread media attention in France in 1989 when three schoolgirls refused to remove their headscarves in class, often

<sup>8</sup> *Chappell v UK* (1988) 10 EHRR CD 510.

<sup>9</sup> *Arrowsmith v United Kingdom* (1981) 3 EHRR 218, para 71.

<sup>10</sup> *Eweida v United Kingdom* (2013) 57 EHRR 8, para 82.

<sup>11</sup> 'Egyptian cleric praises France's ban on niqab' *The National* (15 September 2010) <[www.thenational.ae/news/world/africa/egyptian-cleric-praises-frances-ban-on-niqab](http://www.thenational.ae/news/world/africa/egyptian-cleric-praises-frances-ban-on-niqab)> accessed 14 January 2015.

<sup>12</sup> H Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (OUP 2012) 111.

<sup>13</sup> A LeBor, *A Heart Turned East: Among the Muslims of Europe and America* (Thomas Dunne Books 1957) 163.

<sup>14</sup> IH Malik, *Islam and Modernity: Muslims in Europe and the United States* (Pluto Press 2004) 121.

referred to as *Affaire du Foulard* ('the headscarf affair').<sup>15</sup> The matter was dealt with locally until 2003, when the Commission de réflexion sur l'application du principe de *laïcité* was appointed to reconsider religious signs in schools.<sup>16</sup> Its findings were passed into legislation the following year and prevented pupils from wearing signs or dress that overtly manifested a religious affiliation.<sup>17</sup>

Islamic dress remained on the French political agenda, with 82% of the population supporting a ban on wearing the full veil in public.<sup>18</sup> Against this backdrop, conflicting reports were released in January 2010 by the Assemblée Nationale<sup>19</sup> and the Commission nationale consultative des droits de l'homme,<sup>20</sup> with the former favouring a ban and the latter opposing it. The Conseil d'État subsequently carried out a study regarding the legality of the ban, concluding that only a limited ban restricting all face coverings in certain circumstances would have an adequate legal grounding.<sup>21</sup> Nevertheless, following a Resolution adopted by the Assemblée Nationale declaring that 'radical practices undermining dignity and equality between men and women, one of which is the wearing of the full veil, are incompatible with the values of the Republic',<sup>22</sup> legislation prohibiting the wearing of clothing designed to conceal the face in

<sup>15</sup> A Carling, *Globalization and Development: Integration in a Changing World* (IB Tauris 2006) 135.

<sup>16</sup> R Kastoryano, 'French Secularism and Islam: France's headscarf affair' in T Madood, A Triandafyllidou and R Zapata-Barrero (eds), *Multiculturalism, Muslims and Citizenship* (Routledge 2006) 57.

<sup>17</sup> *loi* n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.

<sup>18</sup> 'Widespread Support for Banning Full Islamic Veil in Western Europe' (*Pew Research*, 8 July 2010) <[www.pewglobal.org/2010/07/08/widespread-support-for-banning-full-islamic-veil-in-western-europe/](http://www.pewglobal.org/2010/07/08/widespread-support-for-banning-full-islamic-veil-in-western-europe/)> accessed 14 January 2015.

<sup>19</sup> Assemblée Nationale, 'Rapport d'information au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national' (26 January 2010).

<sup>20</sup> Commission nationale consultative des droits de l'homme, 'Avis sur le port du voile intégral' (21 January 2010).

<sup>21</sup> Conseil d'État, 'Study of Possible Legal Grounds for Banning the Full Veil', Report adopted by the Plenary General Assembly of the Council of the Conseil d'État, 25 March 2010 <<http://www.assemblee-nationale.fr/13/pdf/rap-info/i2262.pdf>> accessed 14 January 2015.

<sup>22</sup> Assemblée Nationale, 'Résolution sur l'attachement au respect des valeurs républicaines face au développement de pratiques radicales qui y portent atteinte' (11 May 2010).

public was passed in July 2010.<sup>23</sup> The Constitutional Council<sup>24</sup> and the Cour de Cassation<sup>25</sup> subsequently ruled that the legislation did not violate Article 9.

### *Laïcité*

The concept of separation of church and state, encapsulated in *laïcité*, has deep roots in the French Constitution and history.<sup>26</sup> *Laïcité* is not a term that translates easily into English, with 'secularism' only partially reflecting its meaning.<sup>27</sup> Laborde expands on this simplistic translation by identifying its three core components: neutrality, autonomy and community.<sup>28</sup> Islamic dress, she argues, is heavily debated in France because it can be perceived as attacking all three elements of this constitutional principle: it encroaches on the neutrality of the public sphere, is seen to represent inequality and heteronomy, and may be symbolic of the breaking up of society.<sup>29</sup>

The European Court of Human Rights relied heavily on *laïcité* to dismiss Article 9 claims brought in regards to the restrictions of religious dress in schools.<sup>30</sup> However, with the Conseil d'État having rejected the possibility of using *laïcité* as a ground to ban the veil,<sup>31</sup> the principle did not feature in the French government's submissions in *SAS*<sup>32</sup> and received no explicit consideration by the Court. The result is that the new legislation is beyond the scope of both the Court's existing jurisprudence on matters of religious dress and the concept of *laïcité* altogether. As such, a critical examination was required to determine its compatibility with Article 9. Unfortunately, such analysis proved not to be forthcoming.

<sup>23</sup> *loi* n° 2010-1192 (n 2).

<sup>24</sup> Conseil Constitutionnel, 'Decision n° 2010 - 613 DC of October 7th 2010'.

<sup>25</sup> Cour de cassation, 'Decision n° 12-808091 of March 5th 2013'.

<sup>26</sup> For example, Article 1 of the French Constitution states that France is a secular republic: '*La France est une République indivisible, laïque, démocratique et sociale.*'

<sup>27</sup> D McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart 2006) 38.

<sup>28</sup> C Laborde, 'On Republican Toleration' (2002) 9(2) *Constellations* 167.

<sup>29</sup> *ibid* 177-178.

<sup>30</sup> *Dogru v France* (2008) 49 EHRR 8; *Aktas v France* App no 43563/08 (ECtHR, 30 June 2006).

<sup>31</sup> Conseil d'État (n 20).

<sup>32</sup> *SAS* (n 1).

## II. THE CASE

The applicant – a ‘devout Muslim’<sup>33</sup> – claimed that the prohibition on wearing the veil in public violated her Convention rights under Articles 3, 8, 9, 10 and 11, separately and taken together with Article 14. Having rejected the preliminary objections of the French government,<sup>34</sup> the Court promptly found her claims under Articles 3 and 11 to be inadmissible.<sup>35</sup>

The Court considered the applicant’s case in relation to Articles 8 and 9 taken together, establishing that there was an interference with both.<sup>36</sup> As in *Abmet Arslan v Turkey*,<sup>37</sup> the analysis that followed was carried out through the lens of Article 9. The Court accepted that the French government sought to address issues of public safety,<sup>38</sup> but concluded that the legislation was a disproportionate response since a duty to identify oneself, if a risk was established, would have been sufficient.<sup>39</sup>

The Court found that the French government’s second submission of ‘respect for the minimum set of values of an open and democratic society’<sup>40</sup> fell within the legitimate aim of ‘the protection of the rights and freedoms of others’.<sup>41</sup> Each subsection of this submission – gender equality, human dignity and “living together” – was addressed in turn. Gender equality was ruled out as a legitimate aim since it cannot be invoked when women defend the practice in

the context of exercising their Convention rights.<sup>42</sup> Human dignity was also rejected on the basis that there was no evidence that women who wear the veil seek to express contempt towards others.<sup>43</sup> However, “living together” was accepted as a legitimate aim, with the Court declaring that wearing the veil in public could be perceived as ‘breaching the right of others to live in a space of socialisation’.<sup>44</sup>

When assessing the proportionality of the legislation as a response to the aim of “living together”, the Court accepted that where a small number of women were involved,<sup>45</sup> the legislation would adversely affect them<sup>46</sup> and that many actors opposed this blanket prohibition.<sup>47</sup> However, by giving weight to the neutral terms of the legislation,<sup>48</sup> the light criminal sanctions involved<sup>49</sup> and France’s wide margin of appreciation,<sup>50</sup> the Court found that the interference with Articles 8 and 9 was proportionate.<sup>51</sup> Consequently, there was no violation of Articles 8 or 9, or Article 14 taken in conjunction with them.<sup>52</sup> Article 10 was considered to raise no separate issues.<sup>53</sup>

The author will now turn to consider possible reasons for the Court’s limitation on the manifestation of religious freedom, in this case, the wearing of the veil.

## III. ANALYSIS

### Public Safety

Before moving on to consider limitations based on ‘protection of the rights and freedoms of others’,<sup>54</sup> it is necessary to briefly consider the Court’s opinion on

<sup>33</sup> *ibid* para 11.

<sup>34</sup> *ibid* paras 53 – 68. Of particular note is the first preliminary objection by the French government: that the applicant was not a ‘victim’. They argued that she had failed to prove she was a Muslim who wished to wear the veil for religious reasons. In particular, they drew attention to the fact she only wore the veil ‘when compelled to do so by her introspective mood, her spiritual feelings or her desire to focus on religious matters’, and would refrain from doing so where it would cause her practical problems (para 53). It is contended that this reflects the government’s fundamental misunderstanding about the role religion plays in the life of believers, as also seen in relation to ‘human dignity’ (below).

<sup>35</sup> *ibid* paras 69 – 73.

<sup>36</sup> *ibid* para 107.

<sup>37</sup> *Abmet Arslan and Others v Turkey* App no 41135/98 (ECtHR, 23 February 2010).

<sup>38</sup> *SAS* (n 1) para 115.

<sup>39</sup> *ibid* para 139.

<sup>40</sup> European Convention on Human Rights, Article 9(2).

<sup>41</sup> *ibid* para 117.

<sup>42</sup> *ibid* para 119.

<sup>43</sup> *ibid* para 120.

<sup>44</sup> *ibid* para 122.

<sup>45</sup> *ibid* para 145.

<sup>46</sup> *ibid* para 146.

<sup>47</sup> *ibid* para 147.

<sup>48</sup> *ibid* para 151.

<sup>49</sup> *ibid* para 152.

<sup>50</sup> *ibid* para 155.

<sup>51</sup> *ibid* para 158.

<sup>52</sup> *ibid* para 161.

<sup>53</sup> *ibid* para 163.

<sup>54</sup> ECHR (n 40).

the applicability of public safety. While the Court noted that the intention of the French legislature was to combat identity fraud,<sup>55</sup> it did not find that the ban was 'necessary in a democratic society'.<sup>56</sup> The Court decision that the blanket ban on the veil was a disproportionate reaction to fears for public safety deserves applause. Research suggests that veiled women are happy to identify themselves;<sup>57</sup> justifying the law on this ground would therefore be illogical.

There is one possible caveat to this praise. The Court commented that a different decision may have been reached 'in a context where there [was] a general threat to public safety'.<sup>58</sup> There was no discussion about what this may look like, and no reference to Article 15 to suggest that the Court was referring to a situation in which the State was permitted to derogate from its Article 9 obligations. Against the backdrop of recent terrorist attacks, it may not be unreasonable for the Court to conclude that France is now facing such a threat. However, without evidence that prohibiting face covering would actually improve public safety, the Court is unlikely to have reached a contrary conclusion should SAS<sup>59</sup> have been decided today. Nevertheless, if interpreted broadly in future cases, there is a risk that the Court will condone interferences with religious freedom as a response to the long-term risks of terrorism.

### Gender Equality

The Court's argument that gender equality cannot be invoked in situations where women defend the practice in question in the context of exercising their Convention rights<sup>60</sup> is surely correct since, as McCrea states, 'the right to oppose one's own liberation is as much a right as any other element of freedom of expression and belief'.<sup>61</sup> If the opposite were true, the Convention would not protect individuals' freedom to make decisions for themselves but rather would protect their right to act in the way society considers 'correct', offering no support to minorities who do not adhere to majority norms.

<sup>55</sup> SAS (n 1) para 115.

<sup>56</sup> ECHR (n 40).

<sup>57</sup> Open Society Initiative for Europe, 'Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France' (Open Society Foundations 2011) 13.

<sup>58</sup> SAS (n 1) para 139.

<sup>59</sup> *ibid*.

<sup>60</sup> *ibid* para 119.

<sup>61</sup> R McCrea, 'The Ban on the Veil and European Law' (2013) 13(1) HRLR 57, 59.

Despite reaching the correct substantive outcome, criticism can be levied at the Court for failing to question the underlying assumption that the veil is a 'symbol of subservience'.<sup>62</sup> There has been a welcome movement away from the criticism of Islamic dress famously seen in *Dablab v Switzerland*,<sup>63</sup> but had the Court gone further and explicitly recognised that the veil may be a symbol of female emancipation, it would have provided an alternative view to those who believe they "know" Muslim women are oppressed.<sup>64</sup>

Research suggests that very few women who wear the veil are encouraged to do so by their relatives,<sup>65</sup> and none of the interviewees from France<sup>66</sup> and Belgium<sup>67</sup> reported being coerced into adopting the veil. Even accepting that methodology flaws undermine the statistical validity of the reports' findings, it becomes impossible to maintain that the veil should be seen as necessarily oppressive in all circumstances.<sup>68</sup> If coercion cannot be proved, the presumption must be that women who wear the veil have made that decision autonomously.<sup>69</sup> Any other conclusion is unjustifiably paternalistic and undermines the gender equality it seeks to promote. The Court's argument fails to reflect this.

### Human Dignity

As noted by McCrudden, human dignity is renowned for being a poorly defined concept,<sup>70</sup> and thus requires careful consideration by the Court when it is invoked to justify interference with a Convention right. The Court rejected it as a legitimate aim in just five sentences, finding that there was no evidence that women wearing the veil seek to express contempt for others.<sup>71</sup> This conclusion

<sup>62</sup> Assemblée Nationale, 'Rapport d'information' (n 18) 107.

<sup>63</sup> *Dablab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001) para 1.

<sup>64</sup> L Ahmed, *Western Ethnocentrism and Perceptions of the Harem* (1982) 8(3) Fem Stud 521, 522.

<sup>65</sup> Open Society Initiative for Europe (n 53) 15.

<sup>66</sup> *ibid* 14.

<sup>67</sup> E Brems et al, 'Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering' (Universiteit Ghent 2012) 4.

<sup>68</sup> McGoldrick (n 26) 14.

<sup>69</sup> Hunter-Henin (n 3) 625.

<sup>70</sup> C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655.

<sup>71</sup> SAS (n 1) para 120.

is well supported by research,<sup>72</sup> and its acceptance by the Court is to be welcomed. However, in approaching the issue from this perspective, the Court failed to grapple with the French government's submission that wearing the veil is 'necessarily dehumanising and [can] hardly be consistent with human dignity'.<sup>73</sup> This failure is not just 'a little unfortunate':<sup>74</sup> it leaves untouched a damning assertion about Islamic practices.

By engaging with the discussion on the terms the Court ought to have done, it is evident that human dignity arguments cannot support the legislation. As emphasised in *KA and AD v Belgium*,<sup>75</sup> individual autonomy is a critical element of human dignity. By legislating based on the paternalistic idea that officials know better than the women involved their reasons for wearing the veil, respect for individual autonomy disappears. Moreover, the argument can be made that it is the ban on the veil that deprives women of their dignity: as wearing the veil is an outward manifestation of their religion, and thus an integral part of their personality, prohibiting them from wearing it may be dehumanising.<sup>76</sup>

The conclusion that the protection of human dignity is an invalid basis on which to defend the legislation is thus irrefutable. However, for completeness, it should be added that there is no evidence that the legislation would have been capable of restoring any dignity that the women had lost: penalising women for veiling will not liberate them<sup>77</sup> but does risk worsening the oppression of the minority vulnerable to being forced into a highly restrictive domestic life.<sup>78</sup>

## Living Together

### *(1) legitimate Aim*

In order to consider the French government's submission that the legislation helps ensure the observance of the minimum requirements of life in society,<sup>79</sup>

the Court sought to place it within the scope of the legitimate aim 'the protection of the rights and freedoms of others'.<sup>80</sup> It did so by reaching the conclusion that 'the barrier raised against others by a veil concealing the face is perceived... as breaching the right of others to live in a space of socialisation which makes living together easier'.<sup>81</sup> Even setting aside the issue of whether the veil is rightly described in this way, there is a critical flaw in this reasoning: nowhere in the Court's jurisprudence is there reference to a right to socialise in public. Nor did the Court attempt to explain how it could be derived from established rights. Instead, it appears to have turned the illegitimate interest in seeing someone's face into a legal right, which can be balanced against that person's religious freedom.<sup>82</sup> If reapplied in future cases, this has the potential to seriously undermine Convention protection of practices which upset majority sensibilities.

It may be argued that in accepting "living together" as a legitimate aim, the Court has accepted an extension of *laïcité*. The principle has previously been used to demand the neutrality of public officials and public services,<sup>83</sup> but here it appears to have been (implicitly) invoked by the French government to demand the same of private individuals appearing in public. It is doubtful whether *laïcité* can coherently be broadened in this way. At the very least, the Court should have offered an explanation for accepting the French government's submission on this point.

By effectively permitting the French government to create its own legitimate aim, the rest of the legal analysis is 'contaminated',<sup>84</sup> since even if the legislation is a proportionate response to "living together", if this aim is not legitimate, it should not be used to justify the interference. Leigh and Hamblen have noted that such an approach risks being overly purist in light of the Court's habit of utilising "the rights and freedoms of others" imprecisely.<sup>85</sup> The better alternative, they contend, is that non-Convention rights should be given less weight in the proportionality assessment.<sup>86</sup>

<sup>72</sup> Brems (n 63) 5.

<sup>73</sup> SAS (n 1) para 82.

<sup>74</sup> J Adenitire, 'Has the European Court of Human Rights recognised a legal right to glance at a smile?' (2015) 131(Jan) LQR 43, 45.

<sup>75</sup> *KA and AD v Belgium* App no 45558/99 (ECtHR, 17 Feb 2005) paras 79-84.

<sup>76</sup> Adenitire (n 70) 46.

<sup>77</sup> Hunter-Henin (n 3) 627.

<sup>78</sup> C Laborde, 'State paternalism and religious dress code' (2012) 10(2) ICON 398, 408.

<sup>79</sup> SAS (n 1) para 82.

<sup>80</sup> ECHR (n 40).

<sup>81</sup> *ibid* para 122.

<sup>82</sup> Adenitire (n 70) 46.

<sup>83</sup> Hunter-Henin (n 3) 617

<sup>84</sup> 'Religion: full-face veil – ban in public places – Islam – women' (2014) 6 EHRLR 647, 652.

<sup>85</sup> I Leigh and A Hamblen, 'Religious Symbols, Conscience and the Rights of Others' (2014) 3(1) Oxford Journal of Law and Religion 2, 16-17.

<sup>86</sup> *ibid*.

*Proportionality*

Even so, the Court's judgment is not redeemed. The Court disregarded any meaningful proportionality assessment in favour of deference to the French authorities. A preliminary issue in this regard is that a narrower margin of appreciation was due: with just two European countries having enacted legislation to ban the public wearing of the veil, the Court's conclusion that there was no consensus on the matter<sup>87</sup> can be fairly described as 'perplexing'.<sup>88</sup> In some states debates continue,<sup>89</sup> and in others the practice is so rare it is not publically discussed,<sup>90</sup> but such observations do not detract from the reality that France's stance is only shared by Belgium.<sup>91</sup>

Even setting aside this issue, it must be remembered that the existence of a margin of appreciation does not prevent the Court from scrutinising the issues at hand. In *Ahmet Arslan*,<sup>92</sup> a close examination of the circumstances led the Court to conclude that despite Turkey's wide margin of appreciation, criminalising the conduct of Aczimendi Tarikatı members for wearing religious dress in public amounted to a violation of Article 9. Having distinguished it on the (weak)<sup>93</sup> basis that it did not involve covering the face,<sup>94</sup> the Court then appeared to forget that granting a margin of appreciation should not equate to granting national authorities carte blanche to violate Convention rights.

Had the Court explored the concept of "living together" adequately, there are at least three reasons to suggest it would have concluded the legislation was disproportionate, even in light of an excessively wide margin of appreciation.

Firstly, wearing the veil is not necessarily incompatible with social interaction. Empirical research suggests that women who wear the veil are not rejecting socialisation by doing so.<sup>95</sup> Drawing quantitative conclusions from this

data should be avoided, but it nevertheless raises the argument that the French government's assertions are based on fallacy rather than fact. If the argument is instead that the majority of the French population feel unable to interact with women who wear the veil, perhaps softer measures to combat the 'deeper issues'<sup>96</sup> underpinning public perceptions would be more appropriate.

Secondly, the legislation could work against the French ideal of "living together". Given that most women choose to wear the veil after careful consideration,<sup>97</sup> it is unlikely that their initial reaction to being banned from doing so will be to continue in their normal routines unveiled.<sup>98</sup> Instead, they may minimise the time they spend in public places – a possibility supported by research<sup>99</sup> – thus reducing social integration and increasing marginalisation.<sup>100</sup>

Thirdly, it is plausible that Islamophobia - broadly defined as 'an ideology, similar in theory, function and purpose to racism... that sustains and perpetuates negatively evaluated meaning about Muslims and Islam'<sup>101</sup> – has been fuelled by the legislation, undermining notions of an integrated, harmonious society. Empirical research suggests this to be true,<sup>102</sup> and such a response would not be entirely unexpected: by saying there is something wrong with the veil, the French government has given members of the public who share this opinion a sense of justification for acting against women who wear it. Islamophobic attacks understandably trigger feelings of humiliation, isolation and embarrassment,<sup>103</sup> and there is evidence that they cause victims to question their national identities.<sup>104</sup> Thus, if the legislation exacerbates Islamophobia, it will have done the opposite of fostering the claimed intention of a pluralistic society.<sup>105</sup>

As the legislation is incapable of meeting the (il)legitimate aim of "living together", as demonstrated above, it should not have been found to be a

<sup>87</sup> SAS (n 1) para 156.

<sup>88</sup> Adenitire (n 70) 47.

<sup>89</sup> Hunter-Henin (n 3) 613. In addition to the UK, European states in which banning the veil is regularly discussed include Italy, the Netherlands, Spain and Switzerland.

<sup>90</sup> Adenitire (n 70) 47. European states in which there is no public discussion on the veil because the practice is so rare include: Bulgaria, Czech Republic, Hungary, Latvia and Romania,

<sup>91</sup> Code pénal art 563bis.

<sup>92</sup> *Ahmet Arslan* (n 36).

<sup>93</sup> Hunter-Henin (n 3) 636.

<sup>94</sup> SAS (n 1) para 136.

<sup>95</sup> Open Society Initiative for Europe (n 53) 13.

<sup>96</sup> McGoldrick (n 26) 12.

<sup>97</sup> Open Society Initiative for Europe (n 53) 4.

<sup>98</sup> S Ouald Chaib and E Brems, 'Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe' (2013) 2(1) Journal of Muslims in Europe 1, 8-9.

<sup>99</sup> Brems (n 63) 36.

<sup>100</sup> Hunter-Henin (n 3) 624; Adenitire (n 70) 48.

<sup>101</sup> C Allen, *Islamophobia* (Ashgate 2010) 190.

<sup>102</sup> Open Society Initiative for Europe (n 53) 17.

<sup>103</sup> C Allen, 'Exploring the Impact of Islamophobia on Visible Muslim Women Victims: A British Case Study' (2014) 3(2) Journal of Muslims in Europe 137, 152.

<sup>104</sup> Commission on British Muslims and Islamophobia, *Islamophobia: a challenge for us all* (The Runnymede Trust 1997) 12.

<sup>105</sup> SAS (n 1) para 153.

proportionate response. The Court's failure to engage with proportionality may not have surprised all commentators,<sup>106</sup> but it ultimately led to a decision that this author suggests is substantively incorrect.

## CONCLUSION

There is undoubtedly truth in Resnick's assertion that 'there is no magic solution to the dilemma that liberal democratic societies face when it comes to reconciling shared citizenship... with respect for cultural diversity',<sup>107</sup> and with 82% of its citizens supporting a ban on the veil,<sup>108</sup> one can be forgiven for feeling some sympathy for the French government.

However, setting aside the political debate, it is clear that the *SAS*<sup>109</sup> judgment is deeply flawed: the Court avoided evaluating assertions that the veil is necessarily oppressive to women and violates their dignity; appears to have invented a right to socialise in public places; and failed to realise the legislation is incapable of furthering the "living together" ideal. As such, not only has it put an 'outstanding arrow in the bow of advocates of the ban',<sup>110</sup> elsewhere in Europe, the Court has undermined the protection offered to minority groups and raised the question: can we now prohibit all socially shocking concepts?<sup>111</sup>

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<sup>106</sup> McCrea (n 57) 67.

<sup>107</sup> P Resnick, 'Republicanism, Multiculturalism and Liberalism' (2004) 5(Summer/Fall) *Inroads* 77, 77.

<sup>108</sup> Pew Research (n 17).

<sup>109</sup> *SAS* (n 1).

<sup>110</sup> Adenitire (n 70) 44.

<sup>111</sup> D Koussens, 'Sous l'affaire de la burqa... quel visage de la laïcité Française?' (2009) 41(2) *Sociologie et Sociétés* 327, 328.