

# **S.A.S v France: Supporting ‘Living Together’ or Forced Assimilation**

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## **Abstract**

*The Grand Chamber of the European Court of Human Rights has upheld the French law which prohibits the concealment of one’s face in public places. The law is directed principally at prohibiting Muslim women covering their faces in public spaces in France. The decision of the Strasbourg Court is premised on the French notion of ‘le vivre ensemble’; ‘living together.’ This critical analysis of the judgment contends that the decision is flawed and retrogressive for women’s rights in particular and undermines the socio-cultural rights and freedoms of individuals who belong to minority groups in general. On wider implications of the decision, it is worrisome that the decision appears to pander to dangerous political leanings currently growing in many parts of Europe and beyond. The Court risks promoting forced assimilation policies against minorities in various parts of the world. To illustrate its implications, the article highlights the experience of the Uyghurs, a Turkic ethnic group in Xinjiang Uyghur Autonomous Region of China.*

## **Keywords**

*European Court of Human Rights, burqa ban, ‘living together,’ anti-Muslim prejudice, denialism, Uyghurs*

## **Introduction**

On 11 October 2010, the French government passed a law to ban and criminalise the concealment of faces in public places (*burqa* ban law).<sup>1</sup> Section 1 of the law stated that ‘No one may, in public places, wear clothing that is designed to conceal the face.’ Section 3 provides that any breach of the prohibition of face concealment in public places is punishable by a fine of up to 150 euros. In addition, an order to follow a citizenship course designed to remind the offender of the ‘Republican’ values of equality and respect for human dignity may also be imposed by the courts as a supplement to, or in lieu of the payment of a fine. The *burqa* ban law has been the subject of considerable debate since then, not least because of its implications for the rights of Muslim women in the country.

French Muslims, numbering about 5 million, are the largest ethnic minority in the country and Europe generally. It is thus not surprising that in *S.A.S v. France*,<sup>2</sup> a concerned stakeholder in the debate, a young French Muslim woman found it apposite to file an application on the matter before the European Court of Human Rights (Strasbourg Court) challenging its compatibility with the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).<sup>3</sup>

The next section provides a brief overview of the case followed by a critical examination of the implication of the basis of the Grand Chamber’s decision. The analysis includes a consideration of how the decision potentially promotes forced assimilation policies against minorities in Europe and beyond. To illustrate its implications, I briefly highlight the

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<http://booksandjournals.brillonline.com/content/journals/22131035>

<sup>1</sup> LOI No. 2010-1192 du 11 Octobre 2010 interdisant la dissimulation du visage dans l’espace public; Law No. 2010-1192 of 11 October 2010 ‘prohibiting the concealment of one’s face in public places’.

<sup>2</sup> *S.A.S v. France* Application no. 43835/11; ECHR 191 (2014) 01.07.2014.

<sup>3</sup> 213 U.N.T.S. 222; as amended by various protocols, signed in Rome (Italy) on 4 November 1950 by 12 member states of the Council of Europe and entered into force on 3 September 1953 now ratified by 47 countries.

experience of the Uyghurs, a Turkic ethnic group in Xinjiang Uyghur Autonomous Region (XUAR) of China. The third section examines the nature and implication of denialism which is a significant feature of the arguments of the French and Belgian governments as respondent and intervener in the case respectively. The article concludes that the decision in *S.A.S v France* is retrogressive and should be reconsidered at the earliest opportunity by the Strasbourg Court.

### **The facts, Arguments and Decision: A Brief**

The case was instituted by a female French national who was born in 1990 and lives in France. She is a devout Muslim and wears the *burqa* and *niqab* in accordance with her religious faith, culture and personal convictions. She explained that the *burqa* is a full-body cover including a mesh over the face, whereas the *niqab* is a full-face veil leaving an opening only for the eyes. The applicant also emphasised that no one, whether her husband or any other member of her family had exerted any pressure on her to dress in this manner. Further, the applicant stated that she wore the *niqab* in public and in private, but not ‘systematically’ and she might not wear it, for example, when she visited the doctor, when meeting friends in a public place, or when she wanted to socialise in public. Hence, she was mainly content with wearing the *niqab* when she wished depending on her specific spiritual inclinations at a particular time. At times she feels obliged to wear the *niqab* in public ‘in order to express her religious, personal and cultural faith.’ She did not aim to annoy anyone with her preferences in this manner but to ‘feel at inner peace with herself.’<sup>4</sup>

The Applicant stated that she was disposed to taking off her *niqab* when required for security checks in places like banks or airports. Indeed, she had no issues with showing her face when requested to do so for necessary identity checks.<sup>5</sup> She complained that she is no longer able

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<sup>4</sup> *S.A.S v France* note 2 supra at paragraphs 10-12

<sup>5</sup> *S.A.S v France* note 2 supra at paragraphs 13-14.

to wear the full-face veil in public since the law entered into force on 11 April 2011. She alleged that this amounts to a violation of Articles 3, 8, 9, 10 and 11, taken separately and together with Article 14 of the Convention.

The applicant contended that the interference constituted by the ban could not be said to have the legitimate aim of 'public safety' since it does not relate to specific safety concerns in places of high risk such as airports, but extends to virtually all public places. As to the Government's argument that it sought to 'ensure respect for the minimum requirements of life in society', the applicant stated that the ban failed to consider the culture of minorities which did not necessarily share that philosophy. The ban equally did not take into account the fact that there were other forms of communication apart from visual. There was also no justification for imposing criminal sanctions to prevent people from veiling their faces in public. Further, the argument that the ban was to ensure gender equality was criticised by the applicant as being chauvinistic and paternalistic based on stereotypes.<sup>6</sup>

The French governments conceded that the ban constituted a 'limitation' within Article 9 (2) of the Convention on the freedom to manifest one's religion or beliefs but was justified because it pursued legitimate aims and that it was necessary, in a democratic society, for fulfilling those aims. First, it is intended to secure public safety; to ensure proper identification and prevent fraud. The second aim is the 'protection of the rights and freedoms of others' by ensuring 'respect for the minimum set of values of an open and democratic society'. The face was central to and plays a central role in human interaction, reflecting 'one's shared humanity with the interlocutor'. Covering the face in public places breaks 'the social tie' manifesting a refusal of the principle of 'living together'; '*le vivre ensemble*'.<sup>7</sup>

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<sup>6</sup> S.A.S.v France note 2 supra at paragraph 79-80.

<sup>7</sup> S.A.S.v France note 2 supra at paragraph 81.

Further, the French government argued that the ban sought to protect equality between men and women as the concealment of women's faces in public because of their gender amounted to denying them the right to exist as individuals. The *burqa* it was argued, reserved the expression of women's individuality to the private family space or an exclusively female space. In addition, the ban aimed at upholding respect for human dignity as the women who wore face veils were 'effaced' from the public space which was 'dehumanising' and inconsistent with human dignity.<sup>8</sup>

The salience of the issues raised by the case attracted the attention of Amnesty International, Liberty, Open Society Justice Initiative, ARTICLE 19 and the Human Rights Centre, University of Ghent all of which applied and were granted leave to submit written comments. The Belgian Government was also given leave to take part in the hearing since the country had also taken a cue from the French and enacted a similar law on 1 June 2011.

In its ruling on 1 July 2014, the Strasbourg Court unanimously dismissed the technical objections raised by the French government that the applicant had failed to show she was a victim; that the case was *actio popularis*, and neglected to explore or exhaust local remedies before approaching the court. It also declared inadmissible, the Applicant's complaint under Article 3 (the prohibition of inhuman or degrading treatment) and Article 11 (freedom of assembly and association) taken separately and together with Article 14 (prohibition of discrimination) while finding by a majority (15-2) that there was no violation of Articles 8 and 9 of the Convention. To the consternation of observers,<sup>9</sup> the majority decision, affirmed

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<sup>8</sup> *S.A.S.v France* note 2 supra at paragraph 82.

<sup>9</sup> See for instance Saïla Ouald Chaïb 'S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil' *Strasbourg Observers* (3 July 2014) available at: <http://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/> (accessed 7 July 2014); S Berry 'SAS v France: Does Anything Remain of the Right to Manifest Religion?' *EJIL Talk* (2 July 2014) available at: <http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/> (accessed 7 July 2014); E Howard 'S.A.S v France: Living Together or Increased Social Division?' *EJIL Talk* (7 July 2014) available at: <http://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/> (accessed 7 July 2014).

the propriety of the *burqa* ban law (and by implication, that of Belgium) on the basis of a notion of ‘living together’ advanced by the French (and also Belgian) government. The majority decision stated that

under certain conditions the “respect for the minimum requirements of life in society” referred to by the Government – or of “living together”, as stated in the explanatory memorandum accompanying the Bill.... – can be linked to the legitimate aim of the “protection of the rights and freedoms of others”.<sup>10</sup>

### **The New Jurisprudence of ‘Living Together’: Legalising Repression, Sanctioning Assimilation?**

As indicated above, the Strasbourg Court premised its decision on the principle of ‘living together,’ a new concept that is not covered by any provision of the Convention. The majority decision, partly dissented to on this holding by Judges Nußberger and Jäderblom, emphasised that respect for the conditions of ‘living together’ was a legitimate aim for the measure in issue. The majority found that the State had a wide margin of appreciation as regarding a general policy question on which there were significant differences of opinion as that in issue. On this basis, the ban was ‘proportionate to the aim pursued, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others.”’<sup>11</sup> This, despite the judges’ finding that the ban has

a significant negative impact on the situation of women who, like the applicant, *have chosen to wear the full-face veil* for reasons related to their beliefs... they are thus confronted with a complex dilemma, and the ban may have the effect of *isolating them and restricting their autonomy*, as well as *impairing the exercise of their*

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<sup>10</sup> *S.A.S v. France* note 2 supra at paragraph 121.

<sup>11</sup> *S.A.S v. France* note 2 supra at paragraph 157.

*freedom to manifest their beliefs* and their right to respect for their private life. It is also understandable that the women concerned *may perceive the ban as a threat to their identity*.<sup>12</sup>

In any event, as the dissenting joint opinion pointed out, the conception of ‘living together’ as accepted in the majority decision, casts the requirement to make oneself (in this case, the women who prefer to use the veil) available for contact and communication in public places as an obligation imposed against the individual’s will. Surely, as the dissenting opinion further noted in this regard, there is recognition, under the right to private life not to communicate and to avoid contact with others in public places.<sup>13</sup>

More puzzling still, the decision stated the realisation by the judges that the *burqa* ban law risks ‘contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance’ contrary to the State’s obligation ‘to promote tolerance.’<sup>14</sup> Surely, these admissions which are of course common knowledge and not at all remarkable, commend nothing short of a holding contrary to the court’s finding in favour of the full-face veil ban law.

The highlighted foregoing points raise real concerns about serious violations of fundamental rights and freedoms guaranteed by the Convention (and international human rights law) as against at best, a controversial notion of ‘living together’ not at all based on any concrete provision of the Convention. As the majority decision observed, Articles 8 and 9 do not refer expressly to the aim of ‘respect for the minimum set of values of an open and democratic society’ or ‘living together’ as a value.<sup>15</sup> Thus, upholding the ban based on ‘living together’ is a fundamental misdirection in the decision of the case. The problem with the decision, as

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<sup>12</sup> Ibid. at paragraph 146, emphasis added.

<sup>13</sup> *S.A.S v France* note 2 supra at paragraph A8.

<sup>14</sup> *S.A.S v France* note 2 supra at paragraph 149.

<sup>15</sup> *S.A.S v France* note 2 supra at paragraph 114.

succinctly put by the partly dissenting opinion of Judges Nußberger and Jäderblom, is that ‘it sacrifices concrete individual rights guaranteed by the Convention to abstract principles.’<sup>16</sup> Consequently, the aim of the ban ought not to have been held legitimate.

The *burqa* ban law is ostensibly premised on the view that the use of the face veil is at odds with, and ‘a sectarian manifestation of a rejection of the values of the [French] Republic’ values of ‘liberty, equality, fraternity’.<sup>17</sup> Proponents of the law argued that ‘the full-face veil represented a denial of fraternity, constituting the negation of contact with others and a flagrant infringement of the French principle of ‘living together.’<sup>18</sup> The ‘concealment of the face...in public places’ especially by women, the explanatory memorandum to the law stated, negates the ‘fact of belonging to society’ and ‘brings with it a symbolic and dehumanising violence, at odds with the social fabric.’<sup>19</sup> As a result, the government ostensibly passed the law to ‘release women from the subservience of the full-face veil.’<sup>20</sup> It is instructive however that there was no unanimous support for enacting legislation to effect a general and absolute ban on the wearing of a full-face veil in public places nor, for that matter, among the political formations in Parliament.<sup>21</sup>

Relevant key French public institutions opposed a general ban of the full-face veil. Notably, the national human rights commission, *Commission Nationale Consultative des Droits de l’Homme* (CNCDDH) rejected the secularism argument. The CNCDDH emphasised that a general prohibition could be detrimental to women, limiting the access of those who wear the full-face veil to public places as well as stigmatising Muslims. The *Conseil d’Etat* similarly questioned the legal and practical validity of a general ban. It observed that a ban would be contrary to French constitutional law and the rights and freedoms guaranteed by the

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<sup>16</sup> *S.A.S v France* note 2 supra at paragraph A2.

<sup>17</sup> Law No. 2010-1192 note 1 supra, Explanatory Memorandum.

<sup>18</sup> *S.A.S v. France* note 2 supra at paragraph 17.

<sup>19</sup> *S.A.S v. France* note 2 supra at paragraph 25.

<sup>20</sup> *S.A.S v. France* note 2 supra at paragraph 17.

<sup>21</sup> *S.A.S v France* note 2 supra at paragraph 17.



Convention. It however also considered that a law could be made to require that face covers do not preclude identification to safeguard public order where it was under threat, or facilitate identification where deemed necessary for access to or movement within certain places.<sup>22</sup>

The tenor of the internal institutional responses indicates sensitivity to the letter and spirit of the Convention, the controversial nature of a ban and an awareness of the counter-productiveness particularly for women who use the veil. It also demonstrates sensitivity to how a ban promotes the spectre of stigmatisation, in this case, anti-Muslim prejudice, a growing issue in France, across Europe and even beyond. The internal institutional responses also find support with external bodies which include the Parliamentary Assembly of the Council of Europe and the Council of Europe Commissioner for Human Rights who similarly opposed a ban as disproportionate and problematic.<sup>23</sup> The latter had stated among others that

Prohibition of the *burqa* and the *niqab* will not liberate oppressed women, but might instead lead to their further exclusion and alienation in European societies. A general ban on such attire constitutes an ill-advised invasion of individual privacy and, depending on its terms, also raises serious questions about whether such legislation is compatible with the European Convention on Human Rights.<sup>24</sup>

Many other informed observers, just like the two dissenting judges in the case,<sup>25</sup> share this view. An empirical research conducted and placed before the court in the case by one of the interveners, the Human Rights Centre, University of Ghent is also instructive in this regard. The research found that respondents who use the face veil in Belgium considered it ‘part of a life project that considers Islam as “a lifestyle”’ and that ‘from their perspective,

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<sup>22</sup> *S.A.S v. France* note 2 supra at paragraph 18-23. Note in this regard that the applicant conceded these concerns as discussed above.

<sup>23</sup> *S.A.S v. France* note 2 supra at paragraph 35-37.

<sup>24</sup> Thomas Hammarberg *Human Rights in Europe: No Grounds for Complacency Viewpoints by Council of Europe Commissioner for Human Rights* (Council of Europe Publishing, Strasbourg 2011) 39.

<sup>25</sup> *S.A.S v France* note 2 supra at paragraph C21-23.

communication is perfectly possible.’ There was no evidence the women distanced themselves from ‘mainstream society’ and they demonstrated ‘a general willingness to identify themselves to the police or other authorities by lowering their veil, thus showing their face.’ In addition the ‘profile that emerges from the studies of women who wear the face veil in Europe, is not one of ‘submissive’ women.’<sup>26</sup>

### ***Dangers of ‘Living Together’***

The basis of the Strasbourg Court notion of ‘living together’ is both questionable and unsettling with wide ranging implications arguably well beyond the court’s contemplation in *S.A.S v France*. In an era of heightened ‘politics of identity,’<sup>27</sup> caution is particularly important in adjudicating the rights of minorities who are rendered vulnerable to forced assimilation policies as will be discussed with reference to the Uyghur of China below. As indicated earlier, the legitimate aim found for the restriction is based on a concept of ‘living together’ which is not covered by any of the provisions of the Convention but urged on it as a French principle. Judges Nußberger and Jäderblom rightly stated that the concept is ‘far-fetched and vague.’<sup>28</sup>

So what does ‘living together’ mean as far as the decision is concerned? The majority did not really provide much guidance but stated that

The Court...can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships,

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<sup>26</sup> Eva Brems and Saïla Ouald Chaib ‘Written Submission by the Human Rights Centre of Ghent University’ 3-4, available at: <https://www.ugent.be/re/publiekrecht/en/departement/human-rights/publications/sas.pdf> (accessed 09 July 2014).

<sup>27</sup> Steven Greer *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press Cambridge 2006) 30-33

<sup>28</sup> *S.A.S v France* note 2 supra at paragraph A5.

which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.<sup>29</sup>

What is fairly clear from this is that the notion of living together involves the need for a minority to succumb to the preferences of a majority. This becomes clearer in the last part of the paragraph where the decision, in apparent reference to the specific facts of the case stated that

The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.<sup>30</sup>

In other words, the ‘right of others’; the majority, is to be imposed on the minority as a measure of social cohesion and mandatory engagement even where the minority do not request such engagement or deem it desirable. There is no solid legal or moral justification for imposing the will (real or imagined) of the majority in the context in focus on the minority. The finding of the Council of State of the Netherlands on the issue that ‘the subjective feeling of insecurity [of the majority or a group] could not justify a blanket ban on the basis of social order or public order’<sup>31</sup> is to the point. To proceed to uphold the *burqa* ban risks the rights and freedoms of minorities. For instance, based on the notion of ‘living together’ it would be valid for the majority to determine at some point that some other innocuous aspects of a religion be banned.

Importantly, the judges conceded the slippery nature of the premise for its decision stating that ‘in view of the flexibility of the notion of “living together” and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned

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<sup>29</sup> *S.A.S v France* note 2 supra at paragraph 122.

<sup>30</sup> *S.A.S v France* note 2 supra at paragraph 52.

<sup>31</sup> *S.A.S v France* note 2 supra at paragraph 122.

limitation.<sup>32</sup> However, nothing further in the majority decision demonstrated any such cautionary approach. And therein lays a missed opportunity and a dangerous validation of forced assimilationist policies against minorities not only in France, Europe, but further afield; potentially in any other jurisdiction. This is important, particularly bearing in mind the influential standing of the Strasbourg Court in the human rights realm.

The ‘evolutive’ or ‘living instrument’ interpretive approach to the Convention by the Strasbourg Court has been based on not just adherence to the letter, but also spirit of the Convention.<sup>33</sup> This interpretive approach is aimed at ensuring the Convention adapts to new situations in the course of time and not just simply what was the socio-political and legal context when the Convention was made in 1950.<sup>34</sup> However, that approach stands in contrast to outright deviation from adherence to the Convention provisions or arguably, negating them as in this case. The decision in *S.A.S v France* engenders uncertainty and more importantly, a fertile socio-political atmosphere for undermining the rights of minorities.

It is a curious proposition to assert, let alone found a critical issue that impugns on the preferences of a group within a notable minority, on the notion that people cannot live successfully in society without looking into each other’s eyes. There are strong normative and empirical objections to such a proposition. The empirical case against the notion of ‘living together’ is relatively easy to articulate. It is simply that there are a number of social activities that involve covering most, if not all parts of the face and in fact, significantly more so in some cases than the face veil. This is a fact recognised even by the French (and Belgian) law which makes express exceptions for them. Specifically, sporting activities like skiing and motor-cycling with helmets are prominent European sports or social activity.

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<sup>32</sup> *S.A.S v France* note 2 supra at paragraph 122.

<sup>33</sup> First formulated in *Tyrer v. the United Kingdom* (application No. 5856/72) 25/04/1978.

<sup>34</sup> N Bratza ‘Living Instrument or Dead Letter – The Future of the European Convention on Human Rights’ (2014) 2 *European Human Rights Law Review* 116; M Dembour *Who Believes in Human Rights? Reflections on the European Convention on Human Rights* (Cambridge University Press 2008) 21; G Letsas *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press Oxford 2007) 59-79.

Also, the wearing of certain carnival costumes involve as much covering of the face as the *burqa* or *niqab*. In this regard, Section 2 of the *burqa* ban law states that the prohibition shall not apply if the clothing is prescribed or authorised by primary or secondary legislation, justified for health or occupational reasons, worn in the context of sports, festivities or artistic or traditional events. Why make exceptions for these activities rather than regard them as anathema to social interaction and ‘living together’? So, anybody could cover their face for work purposes, carnivals and sports. The dissenting opinion notes that in these cases ‘Nobody would claim that ...the minimum requirements of life in society are not respected.’<sup>35</sup> So why should the religious purpose offend a conception of ‘public order’ and notion of ‘living together’? This is especially relevant since neither the French nor the Belgian governments explained or cited any example of how the impact of wearing the *burqa* or veil is different from the approved practices of concealing the face.<sup>36</sup>

The lawmakers considered it appropriate to focus on prohibiting the identity preferences of less than 2,000 women who cover their faces<sup>37</sup> among a Muslim population of five million and an overall population of 65 million.<sup>38</sup> It takes little persuasion with the knowledge of these facts to surmise that the premise of the ban is not the liberation of ‘subjugated women’ or ensuring human interaction. It is settled, in light of the exceptions recognised by the law that we can live together with the faces of some (in this case a negligible minority) covered. Moreover, beyond conjecture about the possibility of ‘living together’ with full-face covers, such covering alongside conventional social interaction is a well-established part of European culture.<sup>39</sup>

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<sup>35</sup> K Wilsher ‘French Muslim Women on Burqa Ban Ruling: ‘All I Want is to Live in Peace’ *Guardian* (Tuesday 1 July 2014); *S.A.S v France* note 2 supra at B9.

<sup>36</sup> *S.A.S v France* note 2 supra at paragraph C13.

<sup>37</sup> *S.A.S v France* note 2 supra at paragraph 16.

<sup>38</sup> *ibid* at paragraph 145.

<sup>39</sup> *S.A.S v France* note 2 supra at paragraph B9.

The normative argument against a general ban of face covering in public places shows how problematic it is. Who determines how various groups in society live together? Consider in the French case (despite France's historical assimilation policy), a diverse and multicultural one which is increasingly representative of many countries in Europe? Or put in another way, how is the concept of 'living together' defined? In this case, the Court suggests it principally includes being able to look into each other's eyes. However, the concept of 'living together' can only constitute an antithesis of fundamental freedoms and human rights in a pluralistic context. Is living together as defined by a majority ethnicity, race or group? Is the meaning subject to the policy of a particular political party's ideology such that the definition will change in most of Europe for instance with the not now so improbable ascendance of far-right wing, so-called 'nationalist' but in reality, typically racist groups/parties like the English Defence League (EDL) and the British National Party (BNP) for instance? The Court thus leaves many pertinent questions unanswered.

This is particularly worrying because the whole notion of 'living together' as indicated above, has no foundation at all in the Convention. The decision in this regard, raises concern on its failure to prioritise the need for a pluralistic approach on issues that obviously border on freedom of thought, conscience and religion. It took the view that it was open to the government of a multicultural, multi-ethnic country like France as a matter of 'choice of society' to limit the operation of pluralism based on conceived 'ground rules of social communication' and principles of 'interaction between individuals.'<sup>40</sup> The majority decision was acutely aware it was supporting what the dissenting opinion aptly described as 'selective pluralism and restricted tolerance'.<sup>41</sup>

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<sup>40</sup> *S.A.S v France* note 2 supra at paragraph 153.

<sup>41</sup> *S.A.S v France* note 2 supra at paragraph C14.

Still on pluralism, the sound approach enunciated by the United Nations Human Rights Committee on freedom of thought, conscience and religion which was considered but not followed by the Strasbourg Court in this case, comes to mind.<sup>42</sup> In its General Comment 22 of 1993 on Article 18 of the International Covenant on Civil and Political Rights, the Human Rights Committee stated that restrictions 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.<sup>43</sup>

True, the progressive approach by the Human Rights Committee may derive from the fact that it is unconstrained by the fact that its decisions are not actually enforceable. The Human Rights Committee is thus not necessarily wary of how its decisions will be received by the State affected by its findings. This is not the exactly the case with the Strasbourg Court which would at least implicitly be conscious of how its decision will be received by one of the leading members of the European Union<sup>44</sup> and as a result, may decide to be deferent in its approach to determining whether a particular state's action amounts to a violation of a Convention right.

There is also the background fact that France in particular was a rather reluctant State party to the Convention. Despite the acclaimed precedent constituted by the 1789 Declaration of the Rights of Man and the Citizen as well as being a founding a member of the Council of

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<sup>42</sup> *S.A.S v France* note 2 supra at paragraph 39.

<sup>43</sup> Paragraph 8, Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

<sup>44</sup> For a comparative discussion of the levels and nature of reception of the Strasbourg Court's jurisprudence and authority, see generally H Keller and A Stone-Sweet (eds.) *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2009).

Europe and signing the Convention way back in 1950, it did not ratify the Convention until 1974. It only finally recognised the jurisdiction of the Strasbourg Court over individual petitions in 1981 with the result that the first case brought against it was decided only in 1986. The reasons for the reluctance on the part of France regarding the application of the Convention include its policy of secularism, the existence of a system of special courts, its well-documented history of brutality and torture during the Algerian War in particular and decolonialisation process in general. The country is also noted for similar reticence to ratifying other international human rights instruments including critical components of the International Bill of Rights; the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights.<sup>45</sup>

Nonetheless, and indeed, taking cognisance of such historical facts, the pluralistic approach enunciated by the Human Rights Committee remains the way forward. After all, there is reason to argue, as analysts have done, that the court is established as a bulwark against totalitarianism in Europe.<sup>46</sup> The *raison detre* of the Convention includes the protection of liberal, egalitarian principles and this includes objecting to any form of cultural subjugation and intolerance as arguably demonstrated by the French (and Belgian) Parliament.

Unwarranted judicial deference risks undermining the authority or relevance of the court and the underlining reason for the Convention. ‘The Court’ as George Letsas rightly noted ‘has earned respect and recognition at both national and international levels.’<sup>47</sup> If there was a basis for considerable deference in the early days of the Strasbourg Court, it has evidently acquired authority with State parties over the previous couple of decades that does not warrant such level of deference at this time. The Strasbourg Court has of course been subject of critique by

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<sup>45</sup> E.L.Abdelgawad and A Weber ‘The Reception Process in France and Germany’ in Keller and Stone note 44 supra at 108-159, 108-111.

<sup>46</sup> See for instance E Bates *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010).

<sup>47</sup> Letsas note 34 supra at paragraph 126.



not only academics but also some judges and politicians in recent times. There have been various ‘bringing rights home’ campaigns by some judges and politicians in few European countries like the United Kingdom, Italy and Germany in response to some of its judgments.<sup>48</sup> Given the nature of its role and its expanded docket, this is only natural. Even national supreme and constitutional courts are subject to some form of critique or the other from similar sources and such are not automatically considered as diminishing their legitimacy.

While it may face challenges and even resistance from States that are considered or regard themselves as having a strong and well-established human rights compliance record, research suggests that the legitimacy of the Strasbourg Court remains firmly established. For instance, a very recent research that involved relevant actors and stakeholders in five countries concludes that they do ‘not suggest that the Court is suffering a foundational legitimacy crisis according to “all things considered” assessments.’<sup>49</sup> Thus the Grand Chamber of the Strasbourg Court would do a real service to promoting the rights of women in particular and minority groups in general, if it aligns itself with the position of the Human Rights Committee.

Basing the ban on subsidiarity of the Convention and the wide margin of appreciation is on the facts of the case, also misconceived. It is settled that national authorities have democratic legitimation and are in principle, better placed to evaluate local conditions and needs than an international court. However, as the court also stated in this case, in delimiting the wide

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<sup>48</sup> C. J. Van de Heyning ‘The Natural ‘Home’ of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights’ (2012)30 (1) Yearbook of European Law 128

<sup>49</sup> B Çalı, A Koch and N Bruch ‘The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights’ (2013) 35 (4) Human Rights Quarterly 955, 983. For another study which investigated the reception of the Strasbourg Court’s legitimacy in Belgium, France, Germany, the Netherlands, Sweden and the United Kingdom see J H Gerard and J Fleurens *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law and: A Comparative Analysis* ( Intersentia Cambridge 2014). It found that despite instances of criticism of specific judgments, with the exception of the UK, ‘the overall legitimacy of the Court and its judgments is hardly subject to debate’ (369).

margin of appreciation in a given case, it is obliged to consider what is at stake. This is important since, as the court also noted, the margin of appreciation must be considered along with ‘European supervision’ of the national law and the ‘decisions applying it.’<sup>50</sup> This duty requires it to determine whether the measures taken at national level were justified in principle and proportionate to the aims pursued. On the facts in this case, the Strasbourg court ought to have protected the rights of a negligible minority as what is in issue does not impact negatively on the majority. The court did not find any evidence that shows women who wear the full-face veil seek to express a form of contempt against or offend the dignity of others.<sup>51</sup> It is thus difficult to see how the Court could have upheld the ban.

Related to the foregoing, the court also referred to a notion of ‘choice of society’ which it at least implicitly linked with the principle of democratic legitimacy.<sup>52</sup> The ‘choice of society’ premise in as much it is tied to democracy and democratic legitimacy is suspect on the facts. Adherence to democratic legitimacy as basis for according a wide margin of appreciation to national authorities cannot be absolute. As Letsas has argued, ‘democratic legitimacy’ or for that matter, ‘state consent’ is not the only value consideration to be made in determining valid legal obligations particularly those which implicate human rights.<sup>53</sup> Otherwise fascism or Nazism, based on the actual or ostensible will of the majority will be a valid policy even where they brazenly violate human rights, typically those of the vulnerable or minorities.

In any event, as the partly dissenting joint opinion highlighted, the Strasbourg Court ought to have beneficially drawn on its own precedents that promote pluralism on issues of freedom of expression even where such are deemed ‘radical.’<sup>54</sup> In this regard, and with particular reference to freedom of thought, conscience and religion and their manifestation, the minority

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<sup>50</sup> *S.A.S v France* note 2 supra at paragraph 131.

<sup>51</sup> *S.A.S v France* note 2 supra at paragraph 120.

<sup>52</sup> *S.A.S v France* note 2 supra at paragraph 153-154.

<sup>53</sup> Letsas note 34 supra at 74.

<sup>54</sup> *S.A.S v France* note 2 supra at paragraph B7.

joint opinion finds further support in the first real case that was determined by the court on Article 9 of the Convention; *Kokkinakis v. Greece*.<sup>55</sup> On the ‘general principle’ that underlies Article 9, the court sitting as a chamber stated that the freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention but also ‘precious’ to agnostics, sceptics and atheists. Further,

[T]he *pluralism indissociable from a democratic society*, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to “manifest [one’s] religion”. *Bearing witness in words and deeds is bound up with the existence of religious convictions*.<sup>56</sup>

Despite the reiteration of the significance of religious belief, individual identity and pluralism in the current case, the decision only furthers the Court’s tradition of allowing state parties to the Convention to institute measures that run contrary to all those values. The Strasbourg Court has continued to accord more concern to the interests of states than that of individual applicants faced with measures which burden their ability to practice or manifest their beliefs.<sup>57</sup>

Moreover, the coercive, assimilative element inherent in the ‘living together’ jurisprudence is demonstrated in the basis on which the Strasbourg Court dismissed the claim that the aim of the ban was justified in a democratic society for public safety and prevention of fraud under Articles 8 and 9 of the Convention. The court found the ban disproportionate to such an aim because the women affected by the ban are thereby ‘*obliged to give up completely an element of their identity that they consider important, together with their chosen manner of*

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<sup>55</sup> *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) (1993).

<sup>56</sup> *Kokkinakis v. Greece*, note 57 supra at paragraph 39-40, emphasis added.

<sup>57</sup> C Evans *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press Oxford 2001) 201-210; Erica Howard ‘Protecting Freedom to Manifest One’s Religion or Belief: Strasbourg or Luxembourg?’ (2014) 32 (2) *Netherlands Quarterly of Human Rights* 159.

*manifesting their religion or beliefs.*<sup>58</sup> It rightly stated that public safety needs could be effectively met through such measures as a requirement of removing the veil for identification or investigation purposes. Such measures were not in contention between the parties as indicated earlier. A blanket ban would be proportionate only in a context of general threat to public safety which was not established on the facts. Yet the Strasbourg Court went on soon after to adopt a notion of ‘living together’ to validate the imposition of the *burqa* ban law to further a one-sided version of the principles of social interaction.

### **‘Living Together’: From Women in France to Uyghurs in China**

One of the possible consequences of the decision in *S.A.S. v France* from this new ‘living together’ jurisprudence of the Strasbourg Court is the legalisation and validation of repression and forced assimilation. This is the case for instance in the experience of the Chinese government’s policies toward the Uyghurs, a Turkic ethnic, Muslim majority group in the Xinjiang Uyghur Autonomous Region of the far northwest part of China. The Beijing government has for decades imposed a parallel policy of ‘living together’ termed *minzu tuanjie*; ‘nationality unity’ and *minzu pingdeng* ‘nationality equality’ on the Uyghurs. The otherwise positive sounding policies are nothing but an enforced policy of discrimination against the group.

The government promotes a vision of ethnic unity with the dominant Han Chinese – the majority population of mainland China – as the source and centre of civilisation requiring ‘frontier’ groups to embrace Han culture. The Uyghurs as an ethnic minority have been confronted with policies that espouse a reimagining of reality to the effect that all the 56 ethnic groups in contemporary China had always aspired to forging a single identity and had

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<sup>58</sup> *S.A.S v France* note 2 supra at paragraph 139, emphasis added.

in fact originated from a single group.<sup>59</sup> As an illustration, a 2009 Ministry of Information document purports that

From ancient times until today, many ethnic groups have lived on the territory of Xinjiang. Every ethnic group who has ever laboured, existed, and multiplied in Xinjiang has been a member of the Chinese nation (*zhonghua minzu*)<sup>60</sup>

The government position is that ‘Ethnic unity is the means by which the frontier can be civilised’ and it has been promoting and enforcing the view that ‘ethnic unity is prosperity, ethnic separation is disaster.’<sup>61</sup> The Beijing government’s policy envisages the ‘fading away of ethnicity’ and the ‘fusion’ of all the ethnic groups as key to the success of the country.<sup>62</sup>

The policies have meant repression of Uyghur cultural and religious identity and various rights deprivation against the group. The government in the name of what amounts to ‘living together’ policies have engaged in gross violations of the freedom of association, assembly, rights to conscience, religion and culture. In particular, the Uyghurs have been prevented from manifesting the practice of their religion both in public and private spaces.<sup>63</sup>

In the name of national identity and social cohesion policies closely approximating to notions of ‘living together’ in the new jurisprudence of the Strasbourg court in *S.A.S v France*, the Chinese government has enforced a number of repressive and forced assimilation measures

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<sup>59</sup> D Tobin ‘Competing Communities: Ethnic Unity and Ethnic Boundaries on China’s North- West Frontier’ (2011) 13 (2) *Inner Asia* 7, 10-11

<sup>60</sup> Ministry of Information *Minzu Tuanjie Jiaoyu: Tongsu Duben* [Ethnic Unity Education: Basic Study Guide] (Study Press Beijing 2009) quoted in Tobin note 61 supra at 10.

<sup>61</sup> Ibid. Tobin note 59 supra at 11.

<sup>62</sup> Tobin note 59 supra 11.

<sup>63</sup> For a discussion of the Chinese policies towards the Uyghur see for instance E W Davis ‘Uyghur Muslim Ethnic Separatism in Xinjiang, China’ (2008) 35 (1) *Asian Affairs: An American Review* 15; M Clarke ‘Widening the Net: China’s Anti-Terror Laws and Human Rights in the Xinjiang Uyghur Autonomous Region’ (2010) 14 (4) *International Journal of Human Rights* 542; S. E. Hess ‘Islam, Local Elites, and China’s Missteps in Integrating the Uyghur Nation’ (2010) 3 *USAK Year Book of International Politics and Law* 407 (noting the contradictory and counter-productive nature of the Chinese government’s efforts in this regard); J.V. Hastings ‘Charting the Course of Uyghur Unrest’ (2011) 208 *The China Quarterly* 893 (who also argues there are other proximate causes apart from Chinese government policy in the region); H Yufan and L Weihua ‘Xinjiang: Increasing Pain in the Heart of China’s Borderland’ (2012) 21(74) *Journal of Contemporary China* 205.

against the Uyghurs for decades. The French policy culminating in the *burqa* ban and the Chinese policies against the Uyghur share the main feature of defining who and, or how religious or cultural practices otherwise defined by the adherent's scriptures or cultural beliefs are to be practiced or what is acceptable.<sup>64</sup> The Chinese government measures have included for instance preventing Muslim parents from teaching their children their religion, preventing adults and children from attending mosques, banning pilgrimages to Makkah and preventing male Muslim teachers from growing a beard.<sup>65</sup>

Further, the government has been prohibiting Muslim adults and students from fasting in the Muslim month of Ramadan; a mandatory act of worship and one of the five pillars of Islam. Media reports on 2 July 2014, incidentally a day after the judgment in *S.A.S v France*, indicated that serving and retired civil servants as well as party officials are required to sign a bond that they would not fast in China. The enforced ban on Muslims fasting by government agencies, schools and even local political party formations, is allegedly 'aimed at protecting students' wellbeing and preventing use of schools and government offices to promote religion.'<sup>66</sup>

Observers have noted that the Chinese governments' policies toward the Uyghur from 1949 has been

framed by the overall goal of integration – that is by the quest to not only consolidate China's territorial control and sovereignty over the region but to absorb, politically,

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<sup>64</sup> Clarke note 63 supra at 545; X Zang 'Major Determinants of Uyghur Ethnic Consciousness in Ürümqi' (2013) 47 (6) *Modern Asian Studies* 2046, 2049-2050.

<sup>65</sup> Yufan and Weihua note 63 supra at 217-219; Zang note 66 supra at 2051.

<sup>66</sup> 'China Bans Ramadan Fast in Muslim Northwest' *Telegraph* (London, 3 July 2014) <http://www.telegraph.co.uk/news/worldnews/asia/china/10942493/China-bans-Ramadan-fast-in-Muslim-northwest.html>

economically and culturally, the various non-Han ethnic groups of Xinjiang into the ‘unitary, multi-ethnic state’ of the PRC.<sup>67</sup>

The attempts to obliterate at least part of Uyghur culture by the Chinese government is poignantly captured in a recent report that shows elements similar to the *burqa* ban in France

Around the corner from Kashgar’s 572-year-old Id Kah Mosque, a large notice board implores Uyghurs to adopt modern attire. One half of the board is covered in pictures depicting traditional Uyghurs, women in colourful dresses and flowing hair and clean-shaven men. The other half shows rows of men with beards and women in headscarves or face-covering veils, all with a red X over them.<sup>68</sup>

The series of ‘integration’ measures which are in reality the imposition of the dominant Hans Chinese socio-economic, political and cultural preferences<sup>69</sup> has generated various responses among the Uyghur in recent decades. Among others, they have led to the development of a feeling of ‘cultural genocide’.<sup>70</sup> The net result of the policies has been the rejection of ‘the Utopian visions of “nationality unity” (*minzu tuanjie*) and “nationality equality” (*minzu pingdeng*) perpetuated in state discourses.’<sup>71</sup> This has been expressed mainly through

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<sup>67</sup> Clarke note 63 supra at 544.

<sup>68</sup> U Farooq ‘Chinese Uighurs Defy Ramadan Ban’ *Al Jazeera English* (5 July 2014) available at: <http://www.aljazeera.com/indepth/features/2014/07/chinese-uyghurs-defy-ramadan-ban-20147471125107552.html> (accessed 7 July 2014). Interestingly, in August 2014, a city in the Xinjiang region also banned people from wearing hijabs, niqabs, burkas, or clothing with the Islamic star and crescent symbol from using local buses. See ‘City in China’s Mainly Muslim Xinjiang Region Bans Big Beards’ available at: <http://www.news.com.au/world/asia/city-in-chinas-mainly-muslim-xinjiang-region-bans-big-beards/story-fnh81fz8-1227015756874> (accessed 6 August 2014).

<sup>69</sup> Hastings note 63 supra at 894-895; Zang note 64 supra at 2052-2053; J.S. Finley ‘“No Rights without Duties”: *Minzu Pingdeng* [Nationality Equality] in Xinjiang since the 1997 Ghulja Disturbances’ (2011) 13 (2) *Inner Asia* 73.

<sup>70</sup> M Clarke ‘China’s “War on Terror” in Xinjiang: Human Security and the Causes of Violent Uighur Separatism’ (2008) 20 (2) *Terrorism and Political Violence* 271, 274; A.A. Seytoff ‘China’s Uighurs Claim Cultural “Genocide”’ *Al Jazeera* 02 June 2014 available at:

<http://www.aljazeera.com/indepth/opinion/2014/06/china-uyghurs-claim-cultural-gen-20146165946224857.html>

<sup>71</sup> J. S. Finley ‘Chinese Oppression in Xinjiang, Middle Eastern Conflicts and Global Islamic Solidarities among the Uyghurs’ (2007) 16 (53) *Journal of Contemporary China* November 627, 628.

symbolic resistance and non-violent means.<sup>72</sup> The policies have also fuelled periodic social unrest and political violence in Xinjiang.<sup>73</sup>

Consequently, the Uyghurs have come under extensive surveillance so much so that they have developed a strong sense of self-censorship as compared with the Hans Chinese. This has led to an increased sense of distrust and resentment towards the State and emergence of a separatist movement in the region.<sup>74</sup> With growing international awareness and concern about extensive repression of the Uyghurs, the Chinese government has described and handled the responses for political and cultural self-determination as terrorism in the aftermath of 9/11.<sup>75</sup>

### **Denialism and its Malcontents**

A significant feature of *S.A.S v France* worth some consideration is the nature and implication of the explicit or implied denials that form an important part of the arguments made both by the French and Belgian governments. The institutional denialism entailed by such denials could have considerable implications. Denialism, has been defined as the ‘refusal to accept an empirically verifiable reality’ either by irrationally withholding ‘validation of a historical experience or event.’<sup>76</sup> It involves using rhetorical devices to suggest the existence of debate where there is none. Denialism thrives through counter-factual claims set up as debates or philosophical arguments. Denialism can be fatal for society.<sup>77</sup>

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<sup>72</sup> Finley note 71 supra.

<sup>73</sup> Clarke note 70 supra.

<sup>74</sup> Ross Anthony ‘Exceptionally Equal: Emergency States and the Production of Enemies in the Xinjiang Uyghur Autonomous Region’ (2011) 13 (2) Inner Asia 57

<sup>75</sup> Davis note 63 supra at 17-22; Yufan and Weihua note 63 supra at 208-209; Clarke note 63 supra at 550-555; Clarke note 70 supra.

<sup>76</sup> Paul O’Shea *A Cross Too Heavy: Eugenio Pacelli: Politics and the Jews of Europe, 1917-1943* (Rosenberg New South Wales 2008).

<sup>77</sup> P Diethelm and M McKee ‘Denialism: What is it and how should Scientists Respond?’ (2009) 19 (1) European Journal of Public Health 2.



There are two aspects of the denialism evident in the case made by the two governments. First is that the full face concealment ban does not target Muslim women. The second is on the empirical evidence of three independent research conducted in Belgium, France and the Netherlands which showed that a *burqa* ban was counter-productive as it led to women concerned avoiding going out leading to their isolation, deterioration of their social lives and autonomy and even increased experiences of aggression against them.

The denial by both governments on the first point is overt and directed at dissipating the strong charge of discrimination the ban entails. The applicant had argued among others that the ban as constructed was without doubt targeted at the *burqa* worn by Muslim women and thus amounted to discrimination in breach of Article 14. The exception of full-face covers in the context of ‘festivities or artistic or traditional events’ conferred an advantage on the Christian majority who are allowed to wear clothes that concealed the face in public during ‘Christian festivities or celebrations (Catholic religious processions, carnivals or rituals, such as dressing up as Santa Claus).’ Conversely, Muslim women who wished to wear the full-face veil in public were prohibited from doing so ‘even during the month of Ramadan.’<sup>78</sup>

France rejected the claim by asserting that the prohibition applied irrespective of religion and sex.<sup>79</sup> Belgium similarly maintained that the full-face veil ban ‘applied to any person who wore items concealing the face in public, whether a man or a woman, and whether for a religious or any other reason’.<sup>80</sup> Yet, in virtually all other instances involving covering of the face by any reasonable number of people or group, the law recognised either explicit or implicit exemption from the general ban. Rather counterintuitively, both governments even inverted the argument that the *burqa* ban could lead to exclusion of those who desire to cover their faces from society and thereby enlarge the scope for their assumed ‘dehumanised’

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<sup>78</sup> *S.A.S v France* note 2 supra paragraph 83.

<sup>79</sup> *Ibid*, paragraph 85.

<sup>80</sup> *Ibid*, paragraph 88.

status. On this, counsel for Belgium stated that if women stayed away from the public sphere as a result of the ban, this was a matter of ‘choice and not of an illegitimate constraint imposed on them by the Law.’<sup>81</sup> The French government had similarly posited that since the applicant wore the *burqa* ‘only voluntarily and occasionally’ it was ‘futile’ to maintain that the full-face cover ban could dissuade her and presumably, any other woman, from leaving their home.’<sup>82</sup>

The second point of denial as mentioned earlier is that the *burqa* ban does not harm Muslim women who prefer to wear it. It is interesting to observe in this regard how the French government sought to discredit three discrete empirical research projects that found that a *burqa* ban left women who wore it worse off as they are forced to choose between either to jettison their religious convictions or stay away from public places including schools and hospitals as well as increased attacks on them. The French government asserted that the research was only of a ‘small sample’ and suggested the method adopted ‘was not very reliable,’ provided only a ‘partial view of reality’ and that their ‘scientific relevance had to be viewed with caution’. Nitpicking research findings is one of the typical approaches adopted by denialists.<sup>83</sup>

It is interesting that the French government neglected to present any research findings, theoretical or empirical to evidence the ‘reality’ of its own claims. The findings in question, it must be borne in mind, emanated from research conducted after the bans in France and Belgium. The two governments had the opportunity both before and after the ban to research into the basis of the ban which were publicly contested at all relevant times. Why should it not be inferred that these omissions were due to the fact that the French (and the Belgian) government was aware the ‘reality’ was different from their suppositions?

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<sup>81</sup> Ibid, paragraph 88.

<sup>82</sup> Ibid.

<sup>83</sup> Diethelm and McKee note 77 supra at 3.

The French (and Belgian) government's denials run contrary not only to the claims of the applicant, but also the virtual consensus in the separate submissions of the interveners on these two points. For instance, on the first point, Open Society Justice Initiative, in terms very similar to the other independent interveners emphasised that while the French and Belgian laws were 'neutral in their wording, their legislative history showed that the intent was to target specifically the *niqab* and the *burqa*.'<sup>84</sup> Relating to the second point, ARTICLE 19 stated that a ban 'might lead to the confinement of the women concerned in the home and to their exclusion from public life and marginalisation, and might expose Muslim women to physical violence and verbal attacks.'<sup>85</sup> Further, it is a matter of public record that the debate leading up to the *burqa* ban contributed to increased stigmatisation and violence against Muslims (particularly, but not only women) mainly in France but also other parts of Europe. No other group identified with covering their faces suffered any such stigmatisation or attacks. So, how can such notorious facts be debated by unsupported assertions?

In view of the probable consequences of denialism, it is regrettable that the Strasbourg Court, though not without some equivocation, associated itself with the denials in this case. It serves the record well though that the minority dissociated itself from this part of the decision finding rather that 'the prohibition targets a dress-code closely linked to religious faith, culture and personal convictions'.<sup>86</sup>

It is possible to identify parallels of denialism between the *liberalism* of the French government and the authoritarian Chinese government's attitude towards the Uyghurs of Xinjiang. Like the foregoing denialist narrative on the targeting and nature of the impact of the *burqa* ban on Muslim women in France (and Belgium), a denialist narrative is at the core

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<sup>84</sup> *S.A.S v France* note 2 supra paragraph 102; see also paragraph 99 where Liberty 'emphasised that, even though the French and Belgian Laws were neutral in their wording, their legislative history showed that the intent was to target specifically the niqab and the burqa.'

<sup>85</sup> *S.A.S v France* note 2 supra paragraph 93.

<sup>86</sup> *S.A.S v France* note 2 supra at paragraph C17.

of the Chinese government's policies of 'national unity' and 'ethnic equality' policies that have attracted opposition in Xinjiang. Consider for instance that the very reference to 'frontier' groups belies the 'ancient' ethnic unity narrative just as the ethnographic evidence. It is a fact that the Xinjiang province was so renamed by the Chinese government only after it incorporated it; the word 'Xinjiang' which means 'new province' is reflective of this reality. More importantly, the underlying premise of unicity of ethnic origins of the nationality policies means the effacement of minority culture, religion and values; typically like the 'choice of society' argument upheld by the Strasbourg Court.

The Strasbourg Court's decision in *S.A.S v France* has a real potential of legalising cultural genocide by those who are a majority or hold the reins of political power against national ethnic minorities or emigrant populations. And this is why the decision is a dangerous one that ought to be confined to its facts and indeed, set aside by the Grand Chamber at the earliest opportunity. Already, there are indications that other countries like the United Kingdom will follow the way of France and Belgium even while the case was awaiting judgment at the Strasbourg Court. In September 2013, Jeremy Browne, Minister in the Home Office of the United Kingdom, declared the need for 'a national debate about whether the state should step in to protect young women from having the veil "imposed" on them.' Some Conservative Party members of Parliament had earlier made calls for government to consider a ban just like in France.<sup>87</sup>

The reported call for debate on the use of the veil is ominous coming from a Liberal Democrat party member in light of the background fact that the 'explanatory memorandum' to the French law castigated the United Kingdom for allowing the use of the face-veil in public. The issue here is not the appropriateness of debate on issues of public interest; that is

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<sup>87</sup> S Swinford and C Hope 'Britain Needs "National Debate" about Banning Muslim Girls from Wearing Veils in Public' *The Telegraph* (13 September 2013).

even if it is conceded that the veil is such a matter. The problem is that with the benefit of the record of the French experience and the recent history of previous such ‘debates’ and ‘consultations’ directed at, or mainly relating to issues affecting migrants, ethnic minorities and particularly Muslims in the United Kingdom and elsewhere in Europe, the results of such calls are predictable; a ‘living together’ notion of the *S.A.S v France* type. Such moves usually heighten tensions and promote prejudice, a sense of siege and stigmatisation which do not move the targeted communities toward, but rather push them further from ‘integration.’ Just like the decades of ‘national-identity’ measures have done to the Uyghur Muslims of China’s Xinjiang region.

The decision that Muslim women cannot wear their face veils can only exacerbate anti-Muslim prejudice. Those who use the hijab have already been subject of abuse that has increased in various parts of Europe due in part to the stereotyping of Muslims as violent extremists.<sup>88</sup> In the United Kingdom for instance, research continue to affirm the gross and increasing incidents of hate crimes against them. Reports indicate that while hate crimes are generally on a downward trend, hate-crimes against Muslims have moved in the opposite direction; rather taking an upward swing.<sup>89</sup>

## Conclusion

‘People can socialise without necessarily looking into each other’s eyes.’<sup>90</sup> It is indeed a fact that ‘in today’s society there were many forms of social interaction in which people did not have to see each other’s face.’<sup>91</sup> For all of its growing popularity for instance, many of the forms of social media involve people socialising and interacting without seeing each other’s

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<sup>88</sup> I Awan ‘Islamophobia and Twitter: A Typology of Online Hate against Muslims on Social Media’ (2014) 6 (2) Policy and Internet 133.

<sup>89</sup> M Feldman and M Littler ‘Tell MAMA Reporting 2013/14: Anti-Muslim Overview, Analysis and “Cumulative Extremism”’ available at: <http://tellmamauk.org/wp-content/uploads/2014/07/finalreport.pdf> (accessed 7 July 2014).

<sup>90</sup> *S.A.S v France* note 2 supra at paragraph B9.

<sup>91</sup> *S.A.S v France* note 2 supra at paragraph 96.

faces and certainly from tens of thousands of miles in not a few cases. This is why, absent judicial validation of targeted discrimination of a minority whose values and culture are held in contempt, it is difficult to understand the basis of the decision in *S.A.S v France* in light of the Convention provisions. In that regard, the decision is a poster child of a clearly dangerous judgment. This is not the least because it is the final decision of what is easily the most influential human rights court globally. It is certainly a setback for Muslim women who have maintained that the use of the *niqab*, contrary to the view held in some quarters, is a liberating item of clothing, a matter of conscience, an issue of choice and assertion of a fundamental right of expression. The main argument of those who support the ban has been that the use of the *niqab* represents a subjugation of women. Critiques of this position have argued a general ban is precisely the wrong way to ‘liberate’ women and ensure gender equality.

The Strasbourg Court had actually set out a fairly balanced jurisprudence in the early part of the decision, rejecting the public order claims of the French government as mainly disproportionate and unfounded. However, to the consternation of analysts concerned about the continuous erosion of the rights and freedoms of immigrants and minority groups, the Grand Chamber crossed the line from sound jurisprudence in *S.A.S v France*.<sup>92</sup> The decision is premised on a flawed and retrogressive jurisprudence for women’s rights in particular. It also undermines the socio-cultural rights and freedoms of individuals who belong to minority groups.

The Strasbourg Court missed an important opportunity to contribute to stemming dangerous politics in upholding the *burqa* ban. This can only be ominous in what is considered an age of human rights which has also witnessed an increasingly illiberal and siege attitude toward minorities, especially Muslims in Europe. More worrisome is the risk that the Strasbourg

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<sup>92</sup>See for instance Chaib note 9 supra.

Court is pandering to dangerous political leanings currently growing in many parts of Europe. The decision in *S.A.S v France* signals the Strasbourg Court is lending, even if unwittingly, institutional weight to anti-Muslim prejudice which has become rife in the Europe in the last one and half decade or so. And this can only be dangerous for our hopes for a truly liberal society.

Shami Chakrabarti, director of Liberty, a UK-based human rights group, in an interview she granted the London-based *Guardian* newspaper after the judgment, eloquently conveyed the view of many who have aired concern that the face veil ban is the product of a sinister agenda that is antithetical to all liberal values. The ban, she noted ‘has nothing to do with gender equality and everything to do with rising racism in Western Europe.’ As she queried, ‘How do you liberate women by criminalising their clothing?’ She also raised a further pertinent question: ‘if you disapprove of the [*burqa*] wearer’s choices, how does banishing her from public engagement promote liberal attitudes?’<sup>93</sup> There is an important need for the Strasbourg Court to ponder these questions and retrace its steps.

The *burqa* ban law alerts us to the possibility of a convergence of the social policies of two nominally different regimes of France and China. This is interesting in light of the recognition that China operates what is generally recognised as an authoritarian system while France is considered a liberal democratic one. The parallels between the two are brought to the fore by closer examination of situation of minorities in the two countries who are both incidentally from the same religious community. The actions of the Chinese government based on policies of ‘nationality unity,’ and ‘nationality equality’ which share prominent features with the notions of ‘living together’ and ‘choice of society’ arguments upheld in *S.A.S v France* have legalised repression and policies of forced assimilation with predictable results; resistance and political violence.

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<sup>93</sup> Wilsher note 35 supra.

The denialist dimension apparent in the Strasbourg Court's decision in *S.A.S v France* should not be missed. Denialism presents fundamental problems for those experiencing discrimination and repression as it impacts negatively on the prospects for abatement or redress of the suffering of victims. The implication for victims, perpetrators and society at large can be dire. One of the common products of denial in such situations is the possibility of frustrations being harnessed for violence. There are various examples of this both in terms of individual and group violence arising from personal or institutional denial as the experience of group violence in France (from ethnic migrant communities) and China (in Xinjiang) demonstrate.