

When the European Court of Human Rights encounters the face

A case-note on the *burqa* ban in France

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Abstract

In the hard case *S.A.S. v. France*, the European Court of Human Rights has set limits to a free-choice approach to human rights in general and to religious freedom in particular. In upholding the ban on wearing full-face veils on the basis of the ‘*vivre ensemble*’ principle, the Strasbourg Court has endorsed the French Republican approach to *laïcité*, together with a more socio-ethical concept of human beings based on the face-to-face encounter.

There are instances in which judges prove to be philosophers without knowing it. One could wish that this happened more often when human rights are concerned. There is probably not enough thinking about the philosophy that actually underpins – or should underpin – hard cases in the 21st century. It is assumed that liberalism is the main underlying philosophy in Europe. It praises the multi-faceted individual and values free choice. However, judges should always keep in mind where human rights come from, what conditions their exercise and what their function is in a democratic society.

The *burqa* – also referred to as *niqab* – raises key questions as to the competing concepts of rights and religious freedom in Europe.¹ The answer will vary according to one's point of view. For instance, a strictly liberal approach should not see major problems in wearing the full-face veil as long as it is the result of a free choice. For the libertarians, the *burqa* is most probably an acceptable garment inasmuch as it does not cause any harm to others, or dreadful consequences.² Although they will start with utterly different

¹ On the different aspects of this issue, see D. Koussens, O. Roy (dir.), *Quand la burqa passe à l'Ouest. Enjeux éthiques, politiques et juridiques* (Presses universitaires de Rennes, 2014).

² See in general J. Brennan, *Libertarianism: What Everyone Needs to Know* (Oxford University Press, 2012). For a forerunner of libertarianism, in connection with the so-called harm principle, see J.S. Mill, *On Liberty* (Yale University Press, 2003).

philosophical premises, communitarians³ would also vindicate the *burqa* as the manifestation of the identity of an individual who is part of a specific religious community. Yet, other considerations can lead to a different outcome. Conservatives may consider that the *burqa* runs counter to the traditional values of European societies imbued with Christianity. Republicans⁴ will claim for their part that wearing a religious sign with such connotations challenges the universalistic and emancipatory conception of rights devised by reason; while a feminist conception of rights can lead to opposite outcomes, depending on whether they overlap with the liberal or the Republican stance, that is whether they insist on free choice or on the emancipation of women from tradition.⁵

In its recent *S.A.S. v. France* ruling,⁶ the European Court of Human Rights (ECtHR) seems to have set limits to a free-choice conception of human rights in general and to religious freedom in particular. In upholding the French ban on the *burqa* on the basis of the ‘*vivre ensemble*’ principle, the Strasbourg Court has endorsed the French Republican approach to *laïcité*, together with a more socio-ethical concept of human beings based on the face-to-face encounter. When reading the judgment, one cannot but think of the Jewish philosopher Emmanuel Levinas and of his famous ‘face-to-face encounter’. Levinas was very critical of a society in which people did not properly relate to one another, thus being depersonalised. Before attributing the existence of rights to any individual, one must ensure the existence of the human being as a relational being. The whole human rights edifice in Europe would collapse if this were to be forgotten. Yet, it seems that the majority of the judges in Strasbourg, when deciding *S.A.S. v. France*, were aware of this.

Originating from a country which is known for its adamant adherence to Republican values and more particularly for its radical conception of *laïcité*,⁷ the case led the Strasbourg Court to undertake a thorough examination of the legal *pros* and *cons* of the French Law prohibiting the wearing, in all public places, of clothing designed to conceal the face, better known as the *burqa* ban. It prompted the Court, as was admitted even by those judges who dissented from the majority, to issue quite a balanced ruling. A loose approach to ‘standing’ was adopted, thereby enhancing access to justice by potential victims and enabling the Human Rights Court to deliver a judgment on the merits. Careful consideration of the competing arguments resulted in the recognition of ‘*vivre ensemble*’ as a legitimate aim justifying an interference with freedom of religion, while the existence of the contracting parties’ ‘margin of appreciation’ in religious matters was relied on, in appraising proportionality, in order to declare the ban not disproportionate. Although the margin of appreciation doctrine has often induced the

³ See especially C. Taylor, *Sources of the Self. The Making of the Modern Identity* (Cambridge University Press (C.U.P.), 1989). Also M. Sandel, *Liberalism and the Limits of Justice* (C.U.P. , 1981); M. Walzer, *Spheres of Justice* (Blackwell, 1983).

⁴ See in particular P. Pettit, *Republicanism. A Theory of Freedom and Government* (Clarendon Press, 1997); J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton U.P. , 1975); Q. Skinner, *The Foundations of Modern Political Thought* (C.U.P. , 1978). For the French approach, see C. Nicolet, *L'idée républicaine en France. Essai d'histoire critique (1789-1924)* (Tel Gallimard, 1995); J.F. Spitz, *Le moment républicain en France* (Gallimard, 1995).

⁵ A. Phillips, ‘Feminism and Republicanism: Is this a Plausible Alliance?’ (2000) *Journal of Political Philosophy* 8, 279.

⁶ ECtHR 1 July 2014, Case No. 43835/11, *S.A.S. v France*.

⁷ See J. Baubérot, *Laïcité 1905/2005, entre passion et raison* (Seuil, 2004); H. Pena-Ruiz, *Dieu et Marianne. Philosophie de la laïcité* (Presses universitaires de France, 1999). For a legal perspective, Conseil d'Etat, *Un siècle de laïcité* (EDCE La Documentation française, 2004).

Court to relax its otherwise stricter standards, its present invocation was perhaps not required yet, in view of the socio-ethical, non-religious, face-to-face argument.

Liberté, égalité, fraternité and the burqa

Is it permissible, by means of a blanket ban, to prevent a person from wearing an outfit that does not constitute *per se* a threat to public security, yet reflects the identity of this person? *Prima facie*, this seems surprising or even shocking. Why should we need to regulate the dress code of people, as long as it does not present a danger in itself, especially when clothing bears a certain meaning or conveys certain values that are dear to the person? Few people who consider that human rights are paramount would probably grasp fully why a judge would vindicate such a measure, which, because of its absolute nature, looks blatantly at odds with the Convention. When it comes to human rights, the grounds justifying a restriction of those rights are usually listed exhaustively and construed strictly. There will often be another specific, competing, right, which needs to be equally protected, or there will be a threat to public order that needs to be taken into consideration.

In *S.A.S. v. France*, the situation was different. On 1 July 2014, the Grand Chamber of the Court ruled that the French law introducing a blanket ban on wearing any garment covering the face in the public space was not at variance with the Convention. However, there was no clear-cut competing right to safeguard, or risks for public security that could lead to declaring lawful an absolute prohibition.

The debate on the *burqa* entered the political arena in France in 2009 when Nicolas Sarkozy was President of the Republic. Over a few months, several surveys on the opportuneness and legality of a ban were carried out. A Parliamentary report⁸ stressed the emergence of a new phenomenon concerning about 1,900 women in France, namely the wearing of a veil covering not only the full body, but the entire face. The report concluded that wearing such clothing was incompatible with the traditional Republican values enshrined in the motto ‘liberty, equality, fraternity’, by being a sign of the subservience of women, undermining both gender equality and human dignity. However, there was no unanimous support at the time for the imposition of an absolute ban. At the same time, the National Advisory Commission on Human Rights argued⁹ that a ban, if any, should be limited in space and time; while the *Conseil d’Etat* suggested,¹⁰ in its advisory capacity, that the law should not focus solely on the *burqa*, but apply to all garments hiding the face.

Against this backdrop, the Government drafted a Statute providing that:-

‘No one may, in public places, wear clothing that is designed to conceal the face’.

The scope of this ban was quite broad from the very beginning, as the reference to public places encompassed ‘the public highway and any places open to the public or assigned to a public service’. It only does not apply in obvious circumstances, as where this clothing is justified for security or health reasons or worn in the context of sports,

⁸ *Rapport d’information n° 2662 sur la pratique du voile intégral sur le territoire national (Assemblée nationale, 26 January 2010).*

⁹ *Avis sur le port du voile intégral (Commission nationale consultative des droits de l’homme, 21 January 2010).*

¹⁰ *Etude relative aux possibilités juridiques d’interdiction du port du voile intégral (Conseil d’Etat, 25 March 2010).*

festivities or artistic events. In case of non-compliance with this prohibition, the offender has to pay a fine of up to 150 Euros or/and follow a citizenship course. Moreover, any person who forces another to conceal her face is liable to imprisonment for one year and to a fine of 30,000 Euros, the sanctions being even more severe where the offence is committed against a minor.

The explanatory memorandum (*exposé des motifs*) attached to the draft Statute put emphasis on the fact that the wearing of the full-face veil was:-

‘the sectarian manifestation of a rejection of the values of the Republic. Negating the fact of belonging to society for the persons concerned, the concealment of the face in public places brings with it a symbolic and dehumanising violence, at odds with the social fabric (...). It falls short of the minimum requirement of civility that is necessary for social interaction’.

It also contended that the *burqa* violated both gender equality and human dignity, be it the dignity of the person who wears it or the dignity of those who share the same public space.

The Bill was quasi-unanimously adopted and was enacted on 11 October 2010 after the *Conseil constitutionnel* decided to uphold it, in its *ex ante*, abstract review, on the basis of public order only.¹¹ The constitutional judges found indeed that there was no violation of the French Constitution, subject to one reservation. In their decision of 7 October 2010, they took the view that the legislature had lawfully reconciled public order and constitutionally protected rights. However, they made clear that the prohibition should not impede the exercise of religious freedom in places of worship open to the public.

Three years later, on 5 March 2013, the *Cour de cassation*, i.e. the highest court dealing with non-administrative matters in France, had for the first time the chance to examine whether the Law prohibiting the wearing of full-face veils was in compliance with Article 9 of the Convention, addressing freedom of religion.¹² Controversially grounding its ruling on public order and safety only, it held that the French text was compatible with the Convention. In another case, the Court in Strasbourg came to the same conclusion, albeit not merely on the basis of public order.

A relaxation of standing rules in favour of potential victims

The applicant in *S.A.S. v. France*, a French Muslim woman aged 21, born in Pakistan, filed a complaint before the European Court of Human Rights only a few months after the enactment of this controversial piece of legislation. She argued that the Law violated her rights deriving from Articles 3 (prohibition of torture and degrading treatments), 8 (right to private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of association) taken together and, separately, from Article 14 (non-discrimination). She claimed that she had the right, as a Muslim woman, to manifest her religion through the wearing of the *burqa* whenever she liked, in order to live up to her faith and follow the precepts of her religion. She argued that it was a free choice on her part, that no one compelled her to wear the full-face veil

¹¹ *Conseil constitutionnel* 7 October 2010, Case N° 2010-613 DC.

¹² *Cour de cassation* 5 March 2013, Case N° 12-808091.

– contrary to what is often claimed – and that she had no objection to taking it off to go through security or identity checks or to socialise with friends.

Though not unprecedented, one of the hallmarks of this case is that the applicant was allowed to bring an action directly to the Strasbourg Court without prior exhaustion of all domestic remedies. In most cases, her claim would have been judged inadmissible. However, the Court decided otherwise, despite the fact that the action had not gone through all possible stages within the French judiciary. In so doing, the Court proved ready to relax its standing rules in order to allow the plaintiff to obtain a judgment on the merits. The plaintiff, who was no actual victim yet a potential one, was indeed in a difficult situation as a consequence of this legislation. Either she would feel forced to comply with the ban and be stripped of a supposedly important element of her identity as Muslim, or she would refuse to comply and be most probably indicted.

Should the Court decide only on concrete cases involving persons to whom the law is applied or should it sometimes rule in the abstract, irrespective of an actual case? The French Government argued that the latter option would amount to an *actio popularis* and involved an abuse of the right of individual application. The Court, for its part, held that the application was admissible, thus showing its leniency when it comes to access to justice and the right to individual application. To reach such a conclusion, the Court relied on several precedents, especially those where homosexuals had managed to take their case directly to the Court without going up the judicial ladder at the domestic level. In the seminal cases *Dudgeon v. UK*¹³ and *Norris v. Ireland*,¹⁴ the Court noted that gays were the potential victims of domestic laws making homosexual acts illegal. They were confronted with a dilemma because of the existence of this very legislation. Either they did not engage in gay sex and, thus, gave up part of their identity together with their right to a private life, or they committed such acts and became therefore liable to prosecution. On account of the law prohibiting the wearing of clothing covering the face, Muslim women were confronted with the same dilemma. Consequently, in order to avoid this situation and to step into the legal discussion as soon as possible, the Court dismissed the Government's objection and recognised the applicant as possessing the quality of 'victim' within the meaning of Article 34 of the Convention. The applicant did not have to exhaust all domestic remedies in order to bring her action before the Human Rights Court. Furthermore, the Court found no abuse of the right of individual application, this argument being cogently dismissed in connection with the issue of 'standing'.

The inclusion of the *vivre ensemble* principle within Article 9 (2) 'protection of the rights and freedoms of others'

After admitting the admissibility of the claim, the Court rejected the arguments based on alleged violation of Articles 3 and 11. These contentions were indeed far-fetched and it is hardly surprising that no violations of those freedoms were found and that these claims were rapidly scrapped. In view of the lack of severity of the sanctions, there was undoubtedly no torture or inhuman treatment there. Nor did the ban involve a breach of freedom of association : it is hard to see the connection between that human right and this case .

¹³ ECtHR 23 September 1981, Case No. 7525/76, *Dudgeon v. UK*.

¹⁴ ECtHR 26 October 1988, Case No. 10581/83, *Norris v. Ireland*.

The Court did find, however, a restriction on the rights to private life, freedom of religion and freedom of expression. As to the first, it held that ‘personal choices as to an individual’s desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life’ (§ 107). However, the Court acknowledged that the case raised issues pertaining mainly to the freedom to manifest one’s religion or beliefs.

It then went on to examine in depth whether these restrictions, which were prescribed by the Law of 11 October 2010, could be held legitimate. After underlining that lawful restrictions were exhaustively and strictly governed by Article 9 (2) of the Convention, the Court carefully examined whether there existed a legitimate aim, which could justify the restriction placed on human rights. By its own admission, the Court is most of the time ‘quite succinct’ (§ 114) when deciding this issue. It usually prefers to dwell on the assessment of proportionality. In the present case, the Court lingered over the identification of the right’s legitimate aim, thereby displaying its uneasiness with such a task here.

The French Government invoked public safety, together with the ‘respect for the minimum set of values of an open and democratic society’. The first of these arguments is able *per se* to justify a great deal of interference with human rights. We previously saw that both the *Conseil constitutionnel* and the *Cour de cassation* upheld the law on this basis only, while its proportionality was not carefully looked at. For its part, the Court accepted it as a valid ground.

As to the argument based on respect for the minimum set of values in an open and democratic society, the French Government made sub-claims in relation to dignity, gender equality and respect for the minimum requirements of life in society. *Prima facie*, none of them fits within Article 9 (2). The Court admitted, though, that they could be connected with the rather vague ‘protection of the rights and freedoms of others’ that is to be found in that provision.

Starting with equality between men and women, the Court did not find the argument compelling, although it has often been put forward in legal discussion of the *burqa*. The Court stressed that:-

‘a State party cannot invoke gender equality in order to ban a practice that is defended by women in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights’ (§ 119).

Consistently with its free choice approach, the Court did not accept the dignity argument either. It saw in the *burqa* merely ‘the expression of a cultural identity which contributes to the pluralism that is inherent in democracy’, noting also ‘the variability of the notions of virtuousness and decency that are applied to the uncovering of the human body’ (§ 120).

Yet, the Court gave credit to the very last thread of the argument on the minimum requirements of life in society and linked it with the ‘protection of the rights and freedoms of others’ under Article 9 (2). In its submissions, the French Government had emphasised the significance of the face in human interactions:-

‘more so than any other part of the body, the face expresses the existence of the individual as a unique person, and reflects one’s shared humanity with the interlocutor, at the same time as one’s otherness. The effect of concealing one’s face in public places is to break the social tie and to manifest a refusal of the principle of ‘living together’ (le ‘*vivre ensemble*’)’ (§ 82). ‘The possibility of open interpersonal relationships (...) forms an indispensable element of community life within the society in question’ (§ 122).

Therefore, the *burqa* may ‘breach the rights of others to live in a space of socialisation which makes living together easier’.

If we examine the reasoning of the Court on the legitimate aims that can lawfully be pursued, it is somewhat surprising that the Court considered that public order was potentially jeopardised. The *burqa* does not present a danger *per se*. The threat it could represent is merely indirect and because of its supposed radical meaning. Someone could presume that wearing the *burqa* paves the way for terrorist activity or support for religious extremists. The question is, though, whether it is incumbent on a judge to ascertain not only the objective but also the subjective meaning of this garment. Besides, if the *burqa* may be a problem in this respect, what about men with long beards? These could equally be seen as threatening, yet the legislation does not forbid long beards. It remains the case that the Strasbourg Court decided that public order was also at stake in this case. Two factors may help to explain why the Court saw this aim as legitimate here. First, the *Conseil constitutionnel* had upheld the prohibition on the *burqa* on this main, debatable basis. Rejecting it as an unlawful ground could have therefore suggested that the reasoning of the French judges was flawed. At a time of judicial dialogue, it seems wise to avoid confrontations between courts where it is not needed. Secondly, the Court’s judgments on religious freedom often rest on both public order and the protection of the rights of others.¹⁵ Public order is therefore not always self-standing. In view of the thorough assessment of the other claims made by the French Government, it appears that it would not by itself have been enough to justify the limitation of religious freedom.

As to the protection of the rights and freedoms of others, the Court examined whether gender equality, human dignity or the *vivre ensemble* principle could justify the ban on the *burqa*. When it comes to equality between men and women, a great number of scholars and politicians alike consider that the mere fact of wearing the *burqa* bears the meaning of women’s inferiority.¹⁶ This view is so widespread in the public discussion that it is the main argument raised by those who oppose the full-face veil. Again, it is probably not the task of judges to divine the deep meaning of a religious sign, although they should also rely on the work of historians and sociologists when handling such cases, since law does not exist in a vacuum. In dismissing the argument, the Court chose to give instead more weight to a free-choice approach. What seems to have mattered most for the Court is that the applicant claimed that she had always freely decided whether to put on

¹⁵ See, for instance, the *Leyla Sabin v. Turkey* and *Dogru v. France* cases. Providing an analysis of the philosophical motives that led the ECtHR to justify limitations of religious freedom either on public order grounds or/and on that of the protection of the rights of others, see P. G. Danchin, « Islam in the Secular Nomos of the European Court of Human Rights » (2011) 32 *Michigan Journal of International Law* 4, 663.

¹⁶ See R. Debray, *Ce que nous voile le voile. La République et le sacré* (Poche, 2006); A. Finkelkraut, *L’identité malheureuse* (Stock, 2013).

the full-face veil, that no one coerced her into wearing it. It follows from this, in the wake of liberal thinkers, that individuals can therefore possibly consent to their own inequality and even waive their right to autonomy as long as it is their own decision. No matter what is consented to, the mere fact of consenting is paramount for the Court. This approach is in keeping with a liberal version of feminism under which the respect on its own for the will of a woman, irrespective of its content, ensures gender equality.¹⁷ The outcome – as opposed to the reasoning – is also in line with a communitarian stance on the matter. It is, however, unsurprisingly at odds with a Republican version of feminism, which puts emphasis on emancipation from patriarchal traditions, even by coercion, rather than on consent.¹⁸

One could expect that the Government might have been more successful with the dignity argument. It had been used in the French context with the infamous dwarf-tossing game. On the basis of human dignity, seen as a component of public order, the *Conseil d'Etat* decided to forbid this game, although the dwarves had consented to be tossed and were using their freedom to exercise a profession.¹⁹ Consistently with its free choice approach, the Court did not accept the argument and remained value-neutral, again giving more weight to consent and implicitly accepting that consent may possibly lead to alienation. The Court refused to resort to moral reasoning. It equally refused here also to engage in a debate on the meaning of the *burqa*. Unlike the *Conseil d'Etat* in the dwarf-tossing case, the Court considered that there was nothing intrinsically wrong in wearing the *burqa* that could or should lead to its prohibition. In taking such a stance, the Strasbourg Court denied the absolute value of the dignity principle, which is being used by some courts in the world to defend a certain morality limiting freedoms and individual autonomy.

After setting aside gender equality and dignity, the Court eventually found in the '*vivre ensemble*' principle an aim adequate to justify limits to religious freedom. This requirement to safeguard the '*vivre ensemble*', that is, social – or even national – cohesion (that, incidentally, had been put forward by the Belgian Constitutional Court to save the *burqa* ban),²⁰ implies a straightforward access to the 'other'. In this respect, showing the face is a prerequisite. This argument seems directly drawn from Levinas' *Totality and Infinity*. This is where the Court leaves the strict and arid realm of the law to engage in some kind of ethical reasoning. The human being who has rights under the Convention is a social, relational being. He or she lives in a democratic society where collective deliberation and communication are paramount. In the beginning was the human relation. The face-to-face encounter is the prime condition for human communication, says Levinas.

The assumption of the Court seems to be that one is ill-placed, in a democratic society, to behave like a monad and to claim that each individual is free to decide whether or not he or she likes to engage with others, to be recognized as the Other by the Other(s). Here lies the dramatic shift in the reasoning of the Court. Until this point, it had warily refrained from adopting an axiological, moral value, stance, although its value-neutrality

¹⁷ See S. Hennette-Vauchez, '*La burqa, la femme, l'Etat. Réflexions inquiètes sur un débat actuel*' (2010) *Raison publique* (www.raison-publique.fr/La-burqa-la-femme-et-l-Etat.html, visited 2 April 2015); S. Mancini, 'Patriarchy as the exclusive domain of the other: The veil controversy, false projection and cultural racism' (2012) 10 *I.CON* 2, 411; J. Scott, *The Politics of the Veil* (Princeton University Press, 2010).

¹⁸ See the interview of Elisabeth Badinter published by the newspaper *Libération* on 23 April 2003.

¹⁹ *Conseil d'Etat* 27 October 1995, Case No. 136727, *Commune de Morsang sur Orge*.

²⁰ *Cour constitutionnelle* 6 December 2012, Case N° 145-2012.

indicated a clear preference for a liberal concept of the human being, where free choice was the fundamental and deciding factor. When it came to the face-to-face argument, the Court could not escape. In its assessment of the proportionality of the ban, it made the balance tilt towards a more ethical, but also Republican, concept of rights.

The reliance on the ‘margin of appreciation doctrine’ in religious matters

After deciding that public order and the protection of the freedoms of others were two legitimate aims that could justify interference with freedom of religion, the Court went on to examine whether the measure was necessary in a democratic society. The Court stressed states’ duty of neutrality and impartiality towards religion. It is therefore not the task of states

‘to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed (...). The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other’ (§ 127).

At the same time, the Court emphasized the wide margin of appreciation left to states in sensitive matters, such as the relationship between Church and State where there is arguably no European consensus. As a consequence, the Court held, against all expectations,²¹ that the blanket ban on the wearing in public places of clothing designed to conceal the face was proportionate in so far as it seemed to guarantee the conditions of ‘living together’ and, therefore, the protection of the rights and freedoms of others. The Court was quite prudent in reaching such an outcome. On the one hand, it admitted that it was ‘very concerned’ by legislation that might contribute ‘to the consolidation of stereotypes which affect certain categories of the population and to encourage the expression of intolerance, when it has a duty, on the contrary, to promote tolerance’ (§ 149). On the other, it acknowledged that ‘the role of the domestic policy-maker should be given special weight’ in matters of general policy (§ 154), all the more when states enjoy a significant margin of appreciation. Hence, the Court should display judicial restraint. In view of the lightness of the sanctions attached to the covering of the face and to the need ‘to protect a principle of interaction between individuals, which (...) is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society’ (§ 153), the Court decided, by fifteen votes to two, to uphold the French law.

Article 9 of the Convention guarantees in broad terms freedom of thought, conscience and religion, which encompasses the freedom to manifest one’s religion or belief in worship, teaching, practice and observance. The Court has, however, always accepted certain limits, leaving a ‘margin of appreciation’ to states in religious affairs, which are, politically and socially, sensitive matters. This is especially the case in France (and in Turkey), where a radical conception of *laïcité*, imbued with Republican values, still prevails. In these jurisdictions, *laïcité* is more than the mere neutrality of the state towards

²¹ See M. Hunter-Henin, ‘Why the French don’t like the *burqa*: *laïcité*, national identity and religious freedom’ (2012) 61 *International and Comparative Law Quarterly* 3, 613. G. Van der Schyff, A. Overbeeke, ‘Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General *Burqa* Bans’ (2011) 7 *EuConst* 3, 424.

religious beliefs and their public expressions. It generally serves as a limitation of religious freedom that, for some liberal scholars, deeply runs against human rights.²² When it comes to wearing religious symbols, the Court has, for instance, ruled that a teacher in a primary school can be lawfully stopped from wearing a headscarf for the sake of the pupils' own freedom of conscience, together with neutrality in schools.²³ They also held, in cases concerning Turkey, that the headscarf, which covers only the head, not the face, could be prohibited at the university, be it worn by students²⁴ or by professors²⁵ on account of the possible proselytising impact it can have on others.

However, the best precedent for our purpose is the *Abmet Arslan* case,²⁶ where the facts bear some similarity to those in *S.A.S. v. France*. In this case, several Turkish nationals, who were members of a religious group, were arrested when touring the streets of Ankara with the distinctive dress of their group, namely a turban, a tunic and a stick. They were convicted because of their manner of dressing in public areas that were open to everyone. The Court stated again the national margin of appreciation in religious matters, emphasising more particularly the 'importance of the principle of secularism for the democratic system in Turkey'. Nevertheless, it held that the conviction of the applicants on the grounds of their religious costume contravened Article 9 of the Convention, in the absence of any evidence of threat to public order or of their involvement in proselytism. Furthermore, it insisted that they were ordinary citizens who were punished for wearing their traditional dress in public spaces, not in establishments such as schools where there can be a requirement of neutrality. It thus appears that the existence of a margin of appreciation by no means always entails a relaxation of the proportionality test. It even seems that the Court could have used this judgment as a precedent to settle the present case. It failed to do so, however, by distinguishing the two cases. Unlike the situation in *Abmet Arslan*,

'the ban [was] not expressly based on the religious connotation of the clothing in question but solely on the fact that it [concealed] the face' (§ 151).

In the Turkish case, the applicants did not cover their faces. This is, of course, the key difference. The margin of appreciation that states enjoy in religious issues cannot be indefinitely stretched. More importantly, it is not what really matters in *S.A.S.v. France*, since the main reason that the Court decided to uphold the French legislation lay in the need to show one's face not only in a democratic society but in society *tout court*.

'Margin of appreciation' vs. the 'face-to-face' argument

The use here of the argument deriving from the existence of a domestic margin of appreciation in matters where there is supposedly no European consensus is highly debatable.

First, it is debatable because, as the German and Swedish judges pointed out in their joint, partly dissenting, opinion, the issue of the *burqa* seems to have gathered enough

²² See J. Baubérot, *La laïcité falsifiée*, La Découverte, 2012 ; S. Hennette-Vauchez, V. Valentin, *L'affaire Baby Loup ou la nouvelle laïcité* (Exégèses LGDJ-Lextenso, 2014).

²³ ECtHR 15 February 2001, Case No. 42393/98, *Dalhab v. Switzerland*.

²⁴ ECtHR 10 November 2005, Case No. 44774/98, *Leyla Sabin v. Turkey*.

²⁵ ECtHR 24 January 2006, Case No. 65500/01, *Kurtulmus v. Turkey*.

²⁶ ECtHR 23 February 2010, Case No. 41135/98, *Abmet Arslan and Others v. Turkey*.

support in international and comparative law to conclude that there actually was a European consensus not to ban the *burqa*. Such a consensus inevitably narrows down the scope of the states' margin of appreciation so that it should perhaps not have been relied on here.

Secondly, it is debatable because it undermines the compelling socio-ethical argument that the Court had raised earlier. By insisting on the 'face' dimension, the Court implied that *laïcité* could not be the main limitation to wearing conspicuous religious symbols. It downplayed, in a way, the purely religious dimension, as much as did the French legislature itself when prohibiting concealment of the face in general.²⁷ It is even contradictory to rely, in order to save the ban, on the existence of a national margin of appreciation in religious matters and, at the same time, on the socio-ethical argument deriving from the crucial importance of showing one's face. The first argument underlines both the religious and the national dimension of the case, while the second is based on a purely philosophical and 'universalistic' premise. As such, the self-standing socio-ethical argument could even have spared the Court from examining whether the ban, no matter how absolute, was necessary in a democratic society.

Ethics has arguably been at the heart of the Council of Europe since its inception. The Convention was drafted in response to the denial of the humanity of some people during World War II. Today, at the time of 'selfies', the face is probably more than ever what constitutes the humanity of the Other, especially the one being looked at. It triggers the feeling of moral responsibility among individuals. The great French philosopher, Emmanuel Levinas, was very critical of a society in which people would not properly relate to one another, thus being depersonalised. For him, reaching out to 'the Other' necessarily involved a face-to-face encounter. It is through the human face that the original ethical code should be found from which is derived the moral obligation 'Thou Shall Not Kill'. It is through the naked face of the Other that one becomes aware of deep human weakness and the need to establish hospitable connections with the Other. It is through the gaze of the Other that a person discovers his or her own humanity. Not having any access to the face, be it by seeing or by touching it, bars us from entering into meaningful relationships, as this amounts to denying the humanity of the Other.²⁸

Before according the existence of basic rights to any individual, one must make sure of the existence of the human being as a relational being. If this existence derives from interpersonal relationships, rights cannot therefore be granted on a monadic basis, irrespective of the Other, yet as a single unit in connection with the Other. Human rights would not make much sense in the absence of a society made up of the Self and of the Other(s). The whole human rights edifice in Europe would collapse if this were to be forgotten. Without perhaps being fully aware of the consequences for this construct, the two dissenting judges downgraded the socio-ethical argument when supporting 'the right to be an outsider' in society, together with the possibility of establishing social interactions in spite of having one's face covered up. To buttress their point, they, frivolously, referred to skiing and motorcycling with full-face helmets and the wearing of

²⁷ By the same token, the *Conseil constitutionnel* also eschewed mention of the principle of *laïcité* in its ruling on the law (*supra*, n. 11).

²⁸ E. Levinas, *Totality and Infinity. An Essay on Exteriority* (Duquesne University Press, 1969); E. Levinas, *Ethics and Infinity. Conversations with Philippe Nemo* (Duquesne University Press, 1985). See also the entry dedicated to Levinas in the *Stanford Encyclopedia of Philosophy* <www.plato.stanford.edu/entries/levinas/>, visited 22 January 2015. Note that Levinas' experience as a Jew during World War II undoubtedly shaped his view.

costumes in carnival, but also to excessive hairstyles or the wearing of dark glasses or hats. All this can in no way be compared with an ideological symbol that is supposed to be worn at all times in public. Refusing the right to be an outsider is not paternalistic, yet the expression that human rights should not be exploited by its potential enemies. Furthermore, it arguably overlooks the specificity of this ‘hard case’ as a case on radical religious expression.

The specificity of religious freedom

Although the *vivre ensemble* argument was sufficient to support the ban, the fact that the Court put emphasis on the margin of appreciation shows that the religious dimension did not elude the judges, who acknowledged once more that French values were more Republican than liberal, strictly speaking. In addressing freedom of religion in future cases, the Strasbourg Court should also make clear that it is a very specific freedom and one that needs a specific treatment.

First, the fact that *S.A.S. v. France* is a French case has undoubtedly influenced the Court in relaxing its usual liberal approach to the rights that are enshrined in the Convention. It had expressed it quite frankly already when it reasserted its margin of appreciation doctrine, thereby showing that it was ready to interpret Art. 9 of the Convention in the light of the restrictive domestic approach to religious freedom. It also expressed it when emphasising that the will of the policy-maker should be taken into consideration in these sensitive cases. Although courts should not shy away from countering legislative majorities, it is admittedly harder to do so when the legislation under examination has gathered unanimous support. As a consequence, the Court implicitly endorsed the French Republican approach to religious freedom, by accepting that *laïcité* could justify further restrictions to religious freedom than it would otherwise admit. In this respect, Republicanism outweighs liberalism to such an extent that it constrains the choices of individuals and suggests that they are not free to decide whatever they want. It does not seek the just in the first place, but the good. The Republican approach is underpinned by an idealist – as opposed to a realist – conception of human beings. Following a mix of Kant and Rousseau, it posits that human beings are endowed with reason but do not always use it. Their free choice as autonomous individuals does not matter as such.

The Republican agenda in France is to unshackle the rational being and set him free from traditions and, above all, from communities that are not founded on reason and which may imprison him. Religion is of course the main enemy, *l'infâme* that had to be crushed according to Voltaire. This justifies the State forcing individuals to emancipate themselves, to become universal citizens stripped of their peculiarities. One should not forget that the Republic was established against the Roman Catholic Church and the power that it had on bodies and minds. It is therefore understandable that Republican-minded persons should distrust the public expression of religious beliefs, when, behind one's self-assertion, some may be seen to accord priority to the community to which they belong.

Scholars have denounced this expression of state paternalism, or authoritarianism, that has an impact upon the concept of rights.²⁹ In Republican doctrine, rights do not

²⁹ See for instance C. Laborde, « State paternalism and religious dress code » (2012) 10 *I.CON* 2 398.

antedate political deliberation. They are a means for political debate between enlightened citizens, not an end in themselves for the sake of multi-faceted individuals.³⁰ Rights are not natural, but politically constructed. They can therefore be subject to significant restrictions in the name of the common good of the political community.³¹ Although such an approach is not liberal in the classical sense, it is most probably compatible with the very ‘universalistic’ spirit of human rights underlying the Convention. If pluralism appears undermined in the specific set of circumstances of the case, it might end up strengthened, as radical Islam seems to be threatening pluralism. The risk, though, is that the French Republican approach be used to advance less universalistic and more communitarian and conservative agendas. Over the decades, it has indeed turned more national and has paradoxically become what it used to refuse, namely a tradition. The Republican rhetoric might actually hide nowadays a ‘*catbo-laique*’ bias. This is why some scholars have called for a critical republicanism that could, especially, lead to distinguishing between the *burqa* and the *hijab*.³² At any rate, although the Court did not elaborate on freedom of religion in France, the outcome vindicates the French Republican approach.

Secondly, religious freedom is arguably very specific compared to other beliefs; and courts should take this into account to a much greater extent. Freedom of religion is, with freedom of speech, a very specific freedom. Both are often problematic because they can be seen as threatening the values of a society and the State itself. One should remember that the modern liberal State appeared as a reaction to religious wars. Therefore, states may legitimately treat religious freedom differently from other human rights. It cannot merely be seen as an individual right. It is also, if not mainly, a group right, or more precisely the right of an individual who is part of a – religious – community. It thus implies certain social values. The debate should not, therefore, be confined to learned discussion between upholders of individual rights and those supporting national values, but should shift to what it is in reality, namely a debate on the potentially illiberal, non-emancipatory values of a specific group of people *versus* liberal values. It too often looks as if it has been forgotten that religious freedom can equally be seen from a Republican, a liberal and a communitarian perspective. If the radical Republican view prevailing in France seems to be fundamentally at odds with any public expression of religious beliefs, the communitarian construction may often clash with the liberal. This is particularly the case when it comes to radical Islam. Not only is it unfamiliar with the liberal separation of Church and State, but it praises the community (the *Ummah*), which stretches well beyond the states. This shows that, in particular when Islam is concerned, religious freedom is a very specific type of freedom that deserves particular attention on the part of judges, above all at a time of rising religious fundamentalism.

Conclusion

³⁰ See C. R. Sunstein, « Beyond the Republican Revival ? » (1998) 97 *Yale Law Journal*, 1539.

³¹ The US Republican approach differs from the French, inasmuch as it aims at reconciling the natural rights philosophy with the concept of the common good. While France is a « rational » Republic, the United States is a natural rights Republic. See I. Tourkochoriti, « The Burqa Ban : Divergent Approaches to Freedom of Religion in France and in the USA » (2012) 20 *William and Mary Bill of Rights Journal* 3, 791.

³² See C. Laborde, *Critical Republicanism. The Hijab Controversy in Political Philosophy*, Oxford U.P., 2008. Also Laborde, 2012, *supra* n. 28.

Independently of the socio-ethical argument that makes of the face the condition of human rights, one should not forget the connection between rights and values, the latter being the boundaries of the former.³³ The philosophy of human rights is underpinned by a set of values that are connected with the choices of society. In Europe, human rights prize the freestanding individual. However, this freestanding individual is bound up with a democratic society of which the hallmarks are pluralism, tolerance and broadmindedness, to use the Court's own words. The existence of such a society is therefore a prerequisite. It is highly debatable, then, whether the Court should ever be willing to uphold individuals' rights when they imply radical opinions that could be at odds with European values and which might turn, in the long term, against the very existence of a democratic society in Europe and its hallmarks.

Imagine, for instance, a future case where a plaintiff indulging in polygamy might ask for recognition of this status on the basis of his right to private life, together with freedom of religion if polygamy happens to be connected with his religion. One might object that this would conflict with gender equality. Yet this is a value judgment that the Court refrained from here. What if the wives consented to it? The Court could hardly investigate the reasons that led them to share their husband. It could just reiterate that 'a State cannot invoke gender equality in order to ban a practice that is defended by women (...) unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights'. Thus, the rejection of polygamy would not be warranted on the basis of others' competing rights or public order. It would be grounded on social values, at the expense of the rights of polygamous men.

Perhaps all this will change one day, together with changes of values and of society. Not so long ago, gay rights were hardly recognised, because of the supposed threat to society and the assault on morality that they were said to represent. Nowadays, same-sex marriages are increasingly being introduced in Western democracies. There is no longer, as the Court puts it, a 'pressing social need' to curb homosexuality seen as deviant behaviour. Society has changed and gays are increasingly seen as people deserving full and equal consideration. They can therefore successfully claim the recognition of rights for themselves. Who knows whether radical religious opinions will not be equally accepted as a source of rights in the near future, be it because a liberal – or a communitarian – instead of a socio-ethical approach to rights is embraced, or because these opinions become the values of society? All believers might then wish to meditate upon Emmanuel Levinas' words:-

'The dimension of the divine opens forth from the human face'.³⁴

³³ See J.H.H. Weiler, 'Fundamental rights and fundamental boundaries : on the conflict of standards and values in the protection of human rights in the European legal space', in *The Constitution of Europe* (Cambridge University Press, 1999), p. 102.

³⁴ Levinas 1969, *supra*, p. 78, n. 28.