

Criminalisation of the Burqa in the UK

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Abstract

In 2010, the French government passed a law banning face coverings in public places. This includes shopping malls, restaurants and schools. Although worded widely, the law was drafted to prevent Muslim women from wearing the Islamic face veil in public. Those who wear it now risk facing a criminal conviction. In February 2014, the House of Commons held a Second Reading of the Face Coverings (Prohibition) Bill that is very similar to the French law. Though it did not complete its passage through Parliament, the Bill signals an intention by some to ban face veils in British streets. This paper will examine the main arguments for and against the policy to criminalise the burqa and how a ban undermines the autonomy and identity of Muslim women. It will argue that a paternalistic law that instructs women what they can (or cannot) wear would be very alien to British culture. Analysis will also be provided on the Grand Chamber's decision in SAS v France (2015) and the potential impact this might have for the UK and human rights law.

Key Words

Criminalisation; Burqa; Article 9; ECHR

Diversity in the UK

The right to practice one's religious beliefs was challenged recently in 2014 by proposals to ban the burqa in public places under the Face Coverings (Prohibition) Bill. The burqa (or more accurately, the niqab) is that garment of clothing that covers all of the face except for the eyes and is worn by Muslim women for a variety of personal and religious reasons. Some feminists argue that women base their decision to wear the burqa on modesty, privacy, morality and non-objectification as a sexual object,¹ while others argue that women who wear the burqa wish to make a strong political statement about their identity as Muslims, or because they are forced to wear it by men.² There are differences in opinion on the symbolic meaning behind the burqa and why women wear it.

There have been calls by MPs to ban the burqa in British streets as it offends against women's rights and demonstrates their subordination.³ However, the danger of such a policy is that it runs counter to British values on diversity, respect and tolerance for others, especially as the UK is not strictly a secular state as the Church of England has an important role to play in public and national life.⁴ The Bill may therefore come as a surprise to some as it is in contrast to the respect for religion evidenced in other UK legislation, including the Equality Act 2010. For example, under s.11 of the Employment Act 1989, Sikh men are

¹ E Wiles, 'Headscarves, Human Rights and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality (2007) 41(3) *Law and Society Review* 699 at 717 and 721-723. See also C Dwyer, 'The Geographies of Veiling: Muslim Women in Britain' (2008) 93(3) *Geography* 140.

² See U. Spohn, 'Sisters in Disagreement: The Dispute Among French Feminists About the "Burqa Ban" and the Causes of Their Disunity' (2013) 12(2) *Journal of Human Rights* 145 at 152-155.

³ See generally E Howard, 'School Bans on the Wearing of Religious Symbols: Examining the Implications of Recent Case Law from the UK' (2009) 41(1) *Religion and Human Rights* 7 at 7-10; and E Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Oxford: Routledge, 2012) at 35-37.

⁴ See generally R Grillo, R Ballard, A Ferrari, A Hoekema, M Maussen and P Shah (eds), *Legal Practice and Cultural Diversity* (Surrey: Ashgate Publishing Ltd, 2009).

exempted from the requirements to wear safety helmets on construction sites if they wear a turban. Under s.1 of the Horses (Protective Headgear for Young Riders) Act 1990, it is a criminal offence for a person to cause or permit a child under the age of 14 to ride a horse on a road unless that child is wearing protective headgear. Regulation 3 of the Horses (Protective Headgear for Young Riders) Regulations 1992, SI 1992/1201, however states s.1 of the 1990 Act does not apply if the child is Sikh and is wearing a turban whilst riding a horse. Likewise, under s.16(1) of the Road Traffic Act 1988, the Secretary of State is permitted to make regulations requiring persons driving or riding motorcycles to wear protective headgear, yet s.16(2) states regulations do not apply to a Sikh man while he is wearing a turban. These provisions demonstrate respect towards religious attire to the extent that concessions to criminal liability are accommodated.

In terms of legal cases, a number of Muslim women have taken steps to enforce their right to wear religious clothing through applications for judicial review in English law. In *R (On the Application of Begum) v Denbigh High School Governors*,⁵ Begum wanted to wear the Jilbaab to school rather than the Shalwar Kameez as directed by the school's uniform policy. The school refused to allow Begum entry into school when she argued the Shalwar Kameez did not comply with the requirements of her religion. The House of Lords held that Begum's Article 9 right had not been violated, ruling that the school was justified in excluding Begum as it had taken steps to create a uniform policy that respected Muslim beliefs, that it did so in an inclusive manner of other religions and that the Shalwar Kameez was acceptable to mainstream Muslim opinion.

While *Begum* appears to deny the right of Muslim women to wear religious clothing, the legal authorities demonstrate that the British schools concerned had considered alternative ways to accommodate the applicants. *Begum* had been specifically reminded that the Shalwar Kameez was acceptable when parents took part in a consultation process. Both *Begum* and the applicant in *X* (a case concerning the burqa) had been assisted by their schools in the writing of applications to other schools that accommodated their religious clothing. Thus, some schools positively accommodate particular religious clothing as part of their school uniform policies, demonstrating tolerance and respect for diversity. It is useful to point out that the UK government itself has not proposed a ban on face veils as the Face Coverings (Prohibition) Bill was a Private Members' Bill. Why then introduce a measure that bans the burqa in public places through the criminal law?

The French Criminal Model

The proposal to ban the burqa in the UK finds its origins in France when, in June 2009, then-President Nicolas Sarkozy stated that the burqa was 'not welcome' in France as it was a sign of subservience. He stated a law was needed to protect women from being coerced into wearing the burqa and that France's traditions included upholding women's human dignity.⁶ On 26 January 2010, André Gerin, the President of the National Assembly, published a

⁵ [2007] 1 AC 100. See also *R (On the Application of X) v Head Teacher and Governors of Y School* [2008] 1 ALL ER 249 and *Azmi v Kirklees MBC* [2007] IRLR 484.

⁶ See M Hunter-Henin, *Law, Religious and Freedoms and Education in Europe* (Surrey: Ashgate Publishing Ltd, 2011); G Van der Schyff and A Overbeeke, 'Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans' (2011) *European Constitutional Law Review* 424; H Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (New York: OUP, 2012); M Hunter-Henin, 'Why the French Don't Like the Burqa: Laicite, National Identity and Religious Freedom' (2012) *International Comparative Law Quarterly* 613; R Grillo and P Shah, *Reasons to Ban? The Anti-Burqa Movement in Western Europe* (MMG Working Paper 12-05: Max Plank Institute, 2012); A Ferrari and S Pastorelli (eds), *The Burqa Affair Across Europe: Between Public and Private Space* (Surrey: Ashgate Publishing Ltd, 2013); and E Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge: CUP, 2014).

Commission Report on the burqa,⁷ having received cross-party support to examine the issue and whether the wearing of the burqa was due to radicalisation, coercion and whether it flouted the principle of *laïcité* (French secularism). He noted:

...the Report shows with precision how the wearing of the full veil infringes upon three principles that are included in the motto of the Republic: liberty, equality and fraternity. The full veil is an intolerable infringement on the freedom and the dignity of women. It is the denial of gender equality and of a mixed society. Finally, it is the will to exclude women from social life and the rejection of our common will to live together.⁸

Two-hundred and eleven individuals provided evidence to the Commission over a six-month period, including Imams and the Grand Mufti of the Paris Mosque, who testified the burqa was not necessary in Islam. The Commission recommended that the French Parliament make a declaration that the burqa was contrary to Republican values, although the Commission was not unanimous whether the criminal law was necessary to enforce a ban. However, most were in favour of adopting a ban on face coverings in public based on the rationale of maintaining public order and tackling radicalism. The Bill was eventually debated and passed by the French Parliament, receiving the approval of the National Assembly by 335-1 votes and the French Senate by 246-1 votes, with one hundred abstentions reflecting a divided opinion about whether the criminal law should be used to enforce bans on face coverings.

The Conseil d'Etat, France's highest administrative court, later ruled that the ban was legal on 7 October 2010. *La Loi No. 2010-1192* was then passed on 11 October 2010 and came into effect after a transitional period of six months on 12 April 2011, to allow the government to inform people about the ban and the penalties involved if people continued to wear it in public. The preamble to the French Act states: 'France requires faces to remain uncovered in all public spaces; public highways; public transport; shops and shopping centres; educational establishments; post offices; hospitals; clinics; courts; government buildings, etc.' Article 1 states 'No one shall, in any public space, wear clothing designed to conceal the face'. Article 2(I) explains a public place comprises the public highway and all premises open to the public or used for the provision of a public service. This definition is construed widely and includes beaches and cinemas. Article 2(II) explains the ban does not apply if concealment of the face is prescribed or authorised by legislative or regulatory provisions; is authorised to protect the anonymity of an individual concerned; is justified for health reasons or on professional grounds; or is part of sporting, artistic or traditional festivities or events. As some commentators have noted, the effect of this provision is that 'not much is left that could be affected by the law besides the Islamic full-face veil'⁹. While Article 1 is expressed neutrally and the Article 2 exceptions are broad, the 'legislative history reveals that it was enacted with the sole aim of targeting the French minority of Muslim women who wear the full veil'.¹⁰

⁷ *Rapport D'Information Au Nom De La Mission D'Information Sur La Pratique Du Port Du Voile Intégral Sur Le Territoire National* (26 January 2010), available in French at <http://www.assemblee-nationale.fr/13/pdf/rap-info/i2262.pdf> (accessed 19 November 2015).

⁸ *Ibid.* at 13 and 97-107.

⁹ Spohn, above n. 2 at 145-146.

¹⁰ J Adenitire, 'Case Comment – Has the European Court of Human Rights Recognised a Legal Right to Glance at a Smile?' (2015) 131 *Law Quarterly Review* 43 at 43. See also J Adenitire, 'Case Comment – SAS v France: Fidelity to Law and Conscience' (2015) *European Human Rights Law Review* 78.

Article 3 provides a financial penalty for those found guilty of wearing a face covering (approximately €150) or the requirement to attend a citizenship course in lieu, to remind individuals of French values. Article 4 also states that men who force women to wear the burqa will be liable to serve a one year custodial sentence and will be fined €30,000; if a young girl is forced, the punishment is two years' and the fine €60,000. Article 4 attempts to protect women by prosecuting those who coerce women to wear the burqa. There is no exemption under the law if the face is covered on religious grounds. Muslim women in France must now choose whether to remove the burqa so that they may enter the public domain, or stay at home where the ban does not apply. Other European countries are now beginning to debate the burqa, including the UK. While only France and Belgium have banned the burqa to date, a ban in other European countries will inevitably be considered.

The Face Coverings (Prohibition) Bill

The United Kingdom Parliament was presented with the Face Coverings (Prohibition) Bill in 2013 by Phillip Hollobone MP as a Private Member's Bill and it was placed for debate on 28 February 2014. Hollobone, together with Peter Bone and Christopher Chope MPs were the main supporters of the Bill. Hollobone was very clear to state that the Bill '...has absolutely no impact on the hijab or on any kind of Islamic headdress that does not cover the face, but it would proscribe the niqab and the burqa'.¹¹ However, this was not the first time a burqa ban had been proposed. In 2006, Jack Straw, the former Home Secretary, voiced his concerns that he felt uncomfortable talking to Muslim women who wore the burqa during his surgery because it made communication difficult and contributed in his view to separateness. In June 2010, Hollobone had earlier tabled a Private Members' Bill called the Face Coverings (Regulation) Bill which would have outlawed facial coverings in public places. It had been timetabled for a Second Reading on 3 December 2010, but the Bill failed to complete its passage before the end of the Parliamentary session. The latest Face Coverings (Prohibition) Bill was a renewed attempt to ban the burqa in public places.

Like the French law, the Bill aimed to criminalise face coverings in public places and this included schools. Similar penalties were also provided, although the Bill did not provide any custodial sentence as part of its punishment. However, under Clause 1(1) it would be an offence for a person to wear a face covering in a public place without an exemption under Clause 1(3) (e.g. a person may be authorised to wear a face covering under legislative or regulatory provisions; or due to the person's employment; sporting activity; art, leisure or entertainment, etc.). A person guilty under Clause 1 would face a summary conviction in the Magistrates' Court and would receive a fine not exceeding Level One on the standard scale.

During the Second Reading, many MPs had signaled their disapproval towards a ban and indicated that they would vote against the Bill. Debate had been adjourned until 16 May 2014, but in May Parliament opened for debate for only seven days. In an unprecedented move, Prime Minister David Cameron closed Parliament, giving MPs a nineteen-day break and with the last day of sitting on 14 May 2014. Parliament had been due to rise on 22 May 2014 but the early closure meant that MPs had an extra week's vacation. Various news media argued the government had 'run out of ideas' and this was what prompted the early closure.¹² The effect of the early closure was that no further reading of the Bill took place, and like its predecessor, the Face Coverings (Prohibition) Bill failed to complete its passage before the end of the Parliamentary session.

¹¹ HC Hansard, 28 February 2014 at column 574.

¹² N Nelson, 'David Cameron Closes Parliament and Gives MPs 19-Day Break Because Government Has Run Out of Ideas', *The Mirror*, 10 May 2014.

Should the Burqa be Banned in the UK?

There were a number of reasons put forward to justify a burqa ban in public places during the Parliamentary debate. These generally related to the divergence of Muslim opinion on the burqa; better integration of Muslims into British society; the promotion of equality; and identification and security in order to combat fraud, crime and public disorder.¹³

Divergence of Muslim Opinion

On the instruction within Islamic texts, proponents of a ban argue there is a range of Islamic opinion and that not all Muslims support the burqa or think that it is a strict religious requirement.¹⁴ As there is disagreement about the burqa within Islam itself, there should be a ban because it is not a strict religious requirement observed by all Muslim women. However, those who support a ban provided little evidence from those who actually believe the burqa is an integral part of Islam. Instead, there was an over-reliance on statements by those who supported a ban without recognising other counter-opinions. Here one may refer to the ‘procedural fairness’ argument advanced by Chaib and Brems where citizens attach great importance to the way they are treated by the courts, authorities and law-making institutions. Central to this idea is that laws be ‘valid’ and ‘entitled to be obeyed’ because the decision to draft that law was made fairly.¹⁵ The proposal to ban the burqa in the UK did not support the procedural fairness argument because those responsible for the Bill did not consult with those directly affected, by giving them a clear voice. Muslim groups directly affected had a legitimate expectation that their views would be considered, yet no account of these opinions were expressed by MPs such as Hollobone during the Second Reading, nor was there wider consultation with interested Muslim groups, demonstrating a lack of procedural fairness.

Better Integration of Muslims in Society

An argument in support of a ban relates to integration – Muslim women who wear the burqa alienate themselves from others and exacerbate their differences by separating themselves from society and creating division. Some feel unable to speak and approach those who wear the burqa as it alienates people and hinders communication,¹⁶ and causes Muslim women to segregate themselves ‘from the British way of life’.¹⁷ It was argued that the burqa does not help with integration into British society¹⁸ and this includes women who do not speak English or take advantage to learn English.¹⁹ Members of the deaf community, lawyers and courts may also encounter difficulties if they are unable to see a person’s lips because a person is wearing a burqa and then having to rely on communication through written or other forms.²⁰ In the public sphere, teachers may be unable to teach effectively whilst wearing the burqa,²¹ or may not be seen as ‘good role models’ for schoolchildren because the burqa portrays the unequal treatment of women.²² One cannot also unfairly claim the right to *see* and then the

¹³ See HC Hansard, 28 February 2014 at column 572.

¹⁴ Grillo and Shah, above n. 6 at 19. See also R Grillo and P Shah, ‘The Anti-Burqa Movement in Western Europe’, in Ferrari and Pastorelli, above n. 6 at 197-224.

¹⁵ SO Chaib and E Brems, ‘Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe’ (2013) 2(1) *Journal of Muslims in Europe* 1.

¹⁶ HC Hansard, 28 February 2014 at column 570.

¹⁷ Ibid. at column 580.

¹⁸ Ibid. at column 571.

¹⁹ Ibid. at columns 571 and 572.

²⁰ Ibid. at column 573. See also L Mancini, ‘Burqa, Niqab and Women’s Rights’, in Ferrari and Pastorelli, above n. 6 at 25-36.

²¹ See *Azmi v Kirklees MBC* [2007] IRLR 484.

²² E Howard, ‘Bans on the Wearing of Religious Symbols in British Schools: A Violation of the Right to Non-Discrimination’ (2011) 6(2) *Religion and Human Rights* 127 at 135.

right not to be *seen*.²³ Some have suggested that behind the burqa lies a militant Islam, one that not only obscures facial expressions but one that seeks to ‘hide’ its real intentions – to impose Islamic rule and the pursuit of the Islamification of the West.²⁴

However, a ban may contribute to feelings of discrimination, a lack of respect and the rejection of Muslims – the argument is that a ban may actually harm integration.²⁵ This is supported by the Open Society Foundations Report,²⁶ which highlights that the French burqa ban has only served to marginalise and isolate French Muslim women who wear the burqa – a ban ‘further marginal[ises] an [already] unpopular minority’.²⁷ A burqa ban may be counter-productive because it could make social relations worse by undermining social cohesion and could lead to a strengthened sense of polarisation, leading some to become radicalised. Nor does the integration argument take into account those British women, some well off, and educated and recent converts to Islam, who voluntarily choose to wear the burqa. For these women, the argument about integration is irrelevant as the issue for them focuses on religious freedom to practice one’s own religion.

The Promotion of Equality

A ban may be necessary in order to promote equality as the burqa symbolises subservience, does not promote modernity or equality between the sexes.²⁸ Here, the burqa represents a fundamentalist ideal – an example of the ‘backwardness’ of the ‘Oriental Other’ – demonstrating the patriarchal oppression of women and an assault on their dignity by Muslim men.²⁹ Control is exerted upon women and they must dress and behave modestly; if they do not, they risk facing punishment.³⁰ However, a ban is a coercive measure criminalising an aspect of Muslim women’s personality and identity.³¹ It undermines their human dignity as autonomous individuals and assumes they cannot think for themselves or make individual choices.³² It can also disempower and socially exclude Muslim women by constraining who they are and who they want to be.³³ Human dignity concerns personal characteristics and how individual groups visualise and constitute themselves.³⁴ Human rights are also concerned with preventing treatment that damages a person’s self-respect and moral integrity.³⁵ There is widespread misunderstanding about the burqa – it is not a symbol of fundamentalism, terrorism or oppression but represents a woman’s deeper relationship to God.³⁶ Increasingly, Muslim women are wearing religious clothing out of free will, claiming a right to wear these

²³ Grillo and Shah, above n. 6 at 23.

²⁴ *Ibid.*, at 19.

²⁵ Wiles, above n. 1 at 700. See also Amnesty International, *Choice and Prejudice: Discrimination Against Muslims in Europe* (2012), available at <http://www.amnesty.eu/content/assets/REPORT.pdf> (accessed 19 November 2015).

²⁶ Open Society Foundations, *Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France*, Open Society Initiative for Europe (April 2011) at 18, available at <http://www.opensocietyfoundations.org/reports/unveiling-truth-why-32-muslim-women-wear-full-face-veil-france> (accessed 19 November 2015).

²⁷ Adenitire, above n. 10 at 48.

²⁸ Grillo and Shah, above n. 6 at 22.

²⁹ *Ibid.* at 27. See also EW Said, *Orientalism* (London: Penguin, 1985).

³⁰ Spohn, above n. 2 at 151.

³¹ J Marshall, ‘The Legal Recognition of Personality: Full Face Veils and Permissible Choices’ (2014) *International Journal of Law in Context* 64 at 74-75.

³² *Ibid.* at 66-71.

³³ J. Marshall, ‘SAS v France: Burqa Bans and the Control of Empowerment of Identities’ (2015) 15(2) *Human Rights Law Review* 377 at 379.

³⁴ D Feldman, ‘Human Dignity as a Legal Value: Part 1’ (1999) *Public Law* 682 at 684 and 686.

³⁵ *Ibid.* at 686.

³⁶ Wiles, above n.1 at 719-720.

garments in the name of freedom and tolerance in a democratic society.³⁷ While proponents argue the veil offends against human dignity, Muslim women argue it signifies an important aspect of their personality and identity – it does not have a dehumanising effect but rather gives effect to human dignity values.³⁸ As Hunter-Henin describes, ‘[d]enying adults choices in the name of dignity is problematic when autonomy is more and more regarded as an essential component of dignity’.³⁹ A burqa ban overrides these important values through competing public-interest considerations, where Muslim women’s dignity has to give way to somebody else’s autonomy or security.⁴⁰ For those who wear the burqa voluntarily, bans are not necessary to promote equality; conversely bans promote inequality because some women may be deterred from entering public life, education, employment or otherwise be forced to remain indoors, preventing them from taking part in mainstream society.⁴¹ Allowing women to wear their choice of clothing promotes diversity and a tolerant society.⁴² Positive reflections can also be accomplished by allowing women to wear their choice of religious clothing in places like schools, where open discussions can take place between teachers and pupils, teaching children about diversity and empowering other female children to aspire towards becoming teachers also.⁴³ But the real question from a human rights perspective is whether a ban constitutes a violation of Muslim women’s ‘rights’. A ban has the effect of decreasing individual liberties and ‘Muslim women’s capacities for self-determination’.⁴⁴ Under the ECHR, it would appear a ban would violate the rights to freedom of expression and religion for those who voluntarily choose to wear it. The restrictive nature of a ban deters women from pursuing education and employment opportunities, further decreasing their rights, liberties and choices. As a ban fails to recognise Muslim women as individuals with identities that should be respected and listened to,⁴⁵ a burqa ban is a clear violation of Muslim women’s rights.

Identification and Security

A ban is justified because of a growing concern that individuals were going about in public covering their faces and causing alarm and distress. This includes the wearing of balaclavas during demonstrations as well as the burqa. Safety and security is comprised when individuals conceal their faces as they cannot be identified in person and when analysing CCTV footage. Concealment of the face also becomes an issue within those areas that require individuals to reveal their identities, including buses, passport control,⁴⁶ police stations, courts,⁴⁷ banks and petrol stations, where it is necessary for a person to prove their identity.⁴⁸ It was argued that some ‘criminal acts are taking place with men dressed as Islamic women in

³⁷ Howard, above n. 22 at 131.

³⁸ Adenitire, above n. 10 at 46.

³⁹ Hunter-Henin, above n. 6 at 627.

⁴⁰ D Feldman, ‘Human Dignity as a Legal Value: Part 2’ (2000) *Public Law* 61 at 76.

⁴¹ E Howard, ‘Banning Islamic Veils: Is Gender Equality a Valid Argument?’ (2012) 12(3) *International Journal of Discrimination and Law* 147 at 152-158.

⁴² Howard, above n. 22 at 136.

⁴³ Howard, above n. 22 at 42 and 47.

⁴⁴ Spohn, above n. 2 at 146.

⁴⁵ Marshall, above n. 33 at 389.

⁴⁶ One MP said ‘at Heathrow airport I recently saw a woman in a full-face veil come up to passport control and be waved through without having to remove her veil’: HC Hansard, 28 February 2014 at column 579.

⁴⁷ In *R v D(R)*, unreported, 16 September 2013, available at <http://www.judiciary.gov.uk/judgments/thequeenvd/> (accessed 19 November 2015), judge Mr. Peter Murphy at Blackfriars Crown Court ordered a female Muslim defendant to remove her burqa during her trial for witness intimidation for identification purposes and when giving evidence. However, he ruled she was free to wear the burqa at other times (at paras. 81-83 and 86). He also referred to the burqa as ‘the elephant in the courtroom’ (at para.12).

⁴⁸ HC Hansard, 28 February 2014 at column 575.

full burqas' and that terrorists can disguise their identities or hide suicide-vests by wearing the burqa.⁴⁹ The burqa is also an issue for those working within administration – civil servants and the judiciary should not be able to throw on the veil as that could threaten public administration and the perception of justice.⁵⁰ These security concerns are valid because there have been a number of reports of criminals committing robberies at stores like Selfridges, London, deceiving staff into thinking they are Muslim women shopping but using the burqa to avoid detection.⁵¹

Small Numbers of Women Wearing the Veil

The French ban itself appears to have produced only a small number of convictions since its introduction,⁵² suggesting that a lot of time and effort has been placed into a law that is not frequently used and affecting only a small number of people. Though the French government estimates this to be about 1,900 Muslim women, the Open Society Foundations estimate the figure to be as low as 400. The Open Society Foundation published a Report on the findings of thirty-two veiled Muslim women in France and concluded many had not been deterred by the law and considered the ban to be an affront to their rights to practice their religion.⁵³ Some women, who have never worn the burqa before, have now started to wear it as a sign of protest, meaning a law-abiding group of people now face criminal conviction and risk being barred from public life. The Open Society Report recognises the heightened psychological and mental health risks these women face; their social anxiety, anguish, fears and distress; and their over-reliance on male relatives for protection, something they never experienced before. The Report highlighted their movements have now been severely restricted and they feel unable to walk in public alone for fear of abuse, attack and their possible arrest. *The Guardian* also reported in 2013 two vigilantes who attacked a pregnant French Muslim woman for wearing the burqa – she sustained serious injuries and was admitted to hospital where she lost her baby.⁵⁴ Islamophobic hate crime already exists against veiled Muslim women in the UK and is considered a 'normal' part of their everyday life.⁵⁵ A ban in the UK is likely to accentuate this hostility.

Economic Considerations

Under the Bill's proposals, although a person who wears a burqa would face a summary conviction in the Magistrates' court and would receive a fine not exceeding Level One on the standard scale, what would be the impact if Muslim women persistently defied the law by continuing to wear it and not pay their fines? It is a part of English tradition to protest against iniquitous laws and a UK ban might cause civil disobedience, as was the case in France, with Muslim women taking a strong stance when protesting against the law. On 9 April 2011, sixty-one people were arrested in Paris for staging a demonstration against the ban; several veiled Muslim women remonstrated outside Notre Dame de Paris when the ban was due to

⁴⁹ Ibid. at column 580.

⁵⁰ Howard, above n. 3 at 30-31. C.f. N Bakht, 'Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms', in Grillo et al, above n. 4 at 115-133.

⁵¹ See 'Selfridges Robbery – Men in Burkas Smash and Grab' at <http://www.bbc.co.uk/news/uk-england-london-22811466> (accessed 19 November 2015).

⁵² See <http://www.opensocietyfoundations.org/litigation/sas-v-france> (accessed 19 November 2015).

⁵³ Open Society Foundations, *Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France*, Open Society Initiative for Europe (April 2011) at 18, available at <http://www.opensocietyfoundations.org/reports/unveiling-truth-why-32-muslim-women-wear-full-face-veil-france> (accessed 19 November 2015).

⁵⁴ *The Guardian*, 21 September 2013.

⁵⁵ I Zempi and N Chakraborti, *Islamophobia, Victimisation and the Veil* (Basingstoke: Palgrave Macmillan, 2014).

come into force; and by the end of September 2011 the police had recorded over one-hundred Muslim women they had stopped under the law. Most notably, high profile protestors such as Hind Ahmas and Najate Nait Ali became the first women to be fined, with the risk that they may have to serve custodial sentences and pay €33,000 for persistently defying the ban and refusing to attend citizenship courses.⁵⁶ The protesters argued the will of the state should not be imposed upon others purely because some do not like the burqa. Although reports vary, over five hundred French Muslim women have been prosecuted under the law.⁵⁷ A UK ban might also cause bitterness and spite and, in terms of leisure and tourism, might deter wealthy Arab tourists from coming to the UK.

Anomalies

The Bill would exempt Christians and allow them to wear clothing concealing the face in public in the context of Christian celebrations (e.g. dressing up as Santa Claus), but Muslim women who wish to wear the burqa in public would remain bound by the ban even during Ramadan. Anomalies will exist where it would also be an offence for a woman to walk to the local mosque in public whilst donning a burqa. A UK ban would not only demonstrate a very paternalistic attitude towards women, it would also demonstrate an intention to punish the very women who MPs claim they are trying to protect. While the imposition of a Level One fine might be considered to be a soft sanction, if wearing a burqa becomes a recurrent practice, the multiple effects of successive penalties must be considered. The law criminalises Muslim women when they do not deserve punishment. No other religious group adheres to face coverings and the Bill singles out Muslim women, directs what they can (or cannot) wear and threatens them with criminal sanctions if they do not comply. Criminalisation is also disproportionate because burqa-wearing women have not caused any physical harm or injury to others except, perhaps, to those whose feelings are ‘offended’ by the burqa.⁵⁸ The criminal justice system should not be burdened with these types of cases.

SAS v France (2015) 60 EHRR 11

The Grand Chamber of the European Court of Human Rights delivered a judgment in *SAS v France* dealing specifically with the French burqa ban. The applicant, a French national born in 1990, lived in France and was a devout Muslim. She wore the burqa in accordance with her religious convictions. The applicant applied to the Court arguing the ban had violated her human rights under Article 3 (inhumane and degrading treatment); Article 8 (privacy); Article 9 (freedom of religion); Article 10 (expression); Article 11 (association); and Article 14 (discrimination) of the ECHR. The French government argued the burqa was a practice at odds with ‘liberty, equality and fraternity’, was a symbol of subservience and flagrantly infringed the principle of ‘living together’.⁵⁹ It also argued legislation was needed to guarantee the protection of women who were victims of duress.⁶⁰

The Court ruled the government did not violate the ECHR, dismissing the applicant’s complaints under Articles 3, 10, and 11 entirely,⁶¹ concentrating instead on Articles 8, 9 and 14 as admissible complaints.⁶² The government argued that there was a need to ensure ‘respect for the minimum set of values of an open democratic society’ which included respect

⁵⁶ *Daily Mail*, 13 December 2011.

⁵⁷ SSM Edwards, ‘No Burqas We’re French! The Wide Margin of Appreciation and the ECtHR Burqa Ruling’ (2014) 26 *Denning Law Journal* 246 at 248.

⁵⁸ Schyff and Overbeeke, above n.6 at 442.

⁵⁹ (2015) 60 EHRR 11 at [17] and [35].

⁶⁰ *Ibid.* at [17].

⁶¹ *Ibid.* at [69-71], [72-73] and [163].

⁶² *Ibid.* at [74-75] and [109].

for gender equality, human dignity and for the minimum requirements of life in society (i.e. of ‘living together’).⁶³ The Court dismissed the arguments relating to the first two values because the burqa can be reconciled with notions of gender equality and human dignity if women voluntarily choose to wear it.⁶⁴ However, the Court gave emphasis upon the concept of ‘living together’ believing that it was a legitimate aim and that the ban was an appropriate measure to achieve that aim.⁶⁵ Consequently, the Court found the ban could be justified as it sought to guarantee the conditions of ‘living together’.⁶⁶ A person’s face, and open-face communication, plays a significant part in ‘social interaction’ and the Court accepted people may not wish to see others observing practices that call into question open interpersonal relationships.⁶⁷ Appreciating the infringement affected only a small number of women,⁶⁸ and the law had been couched in neutral terms,⁶⁹ the Court agreed it could be ‘deemed incompatible’ within the rules of social communication and of ‘living together’.⁷⁰ It therefore accepted the government’s argument that the burqa breached the rights of others to cohabit harmoniously, noting there was no restriction on the freedom to wear any other item of clothing that did not conceal the face.⁷¹ It also held the penalties involved for breaching the law were among the lightest.⁷² The Court concluded whether individuals should be permitted to wear the burqa is a question for the government as it had a ‘wide margin of appreciation’ and the lack of consensus between states reinforced that conclusion.⁷³ It ruled the ban was proportionate based on the notion of ‘living together’ as an element of the ‘protection of the rights and freedoms of others’.⁷⁴ Such a limitation was also considered ‘necessary in a democratic society’ for both Articles 8 and 9. The Court held (by majority) that there had been no violation of Articles 8, 9 and (unanimously) Article 14.⁷⁵

A Critique of *SAS v France*

The Grand Chamber’s ruling is not surprising because the Court has consistently ruled against Muslim women attempting to rely on Article 9 to enforce their human rights.⁷⁶ However, the decision is likely to surprise those who had predicted that the ban was ‘likely to fall foul of European requirements for lack of proportionality’.⁷⁷ It demonstrates a ‘deep discomfort with the idea that the distinct cultural identity of Muslims is a legitimate thing for [the French] to protect.’⁷⁸ The ruling means the ban will continue and the applicant has no further redress – she must accept the law or remain at home. Adenitire argues the applicant should have been exempt from the ban because it violated the principle of autonomy when

⁶³ Ibid. at [116].

⁶⁴ Ibid. at [120].

⁶⁵ Ibid. at [121].

⁶⁶ Ibid. at [142].

⁶⁷ Ibid. at [87] and [122].

⁶⁸ Ibid. at [145].

⁶⁹ Ibid. at [151].

⁷⁰ Ibid. at [153].

⁷¹ Ibid. at [151].

⁷² Ibid. at [28] and [152].

⁷³ Ibid. at [129] and [154-157].

⁷⁴ Ibid. at [157].

⁷⁵ Ibid. at [158-159] and [162-163].

⁷⁶ See *Karaduman v Turkey* (1993) Application No. 16278/90, 3 May 1993; *Dahlab v Switzerland* (2001) Application No. 42393/98, 15 February 2001; *Kurtulmus v Turkey* (2006) Application No. 65500/01, 24 January 2006; *Köse and Others v Turkey* (2006) Application No. 26625/02, 24 January 2006; *Sahin v Turkey* (2007) 44 EHRR 5; *El Morsli v France* (2008) Application No. 15585/06, 4 March 2008; and *Dogru v France* (2009) 49 EHRR 8.

⁷⁷ Hunter-Henin, above n. 6 at 613.

⁷⁸ Wiles, above n.1 at 730.

individuals are not committed to obey the law for reasons based on religious conscience.⁷⁹ This undermines the very rationale of law because there is an absence of respect – individuals feel they cannot follow the law because they are not treated as autonomous beings but are instead ‘goaded, like animals’.⁸⁰ A person may experience shame, guilt and remorse by not wearing religious clothing and there is a strong argument that Muslim women should have been exempt from the ban. The overall message by the Court is that any practice by a minority group that the majority community do not approve of will not be tolerated – worse still, such differences will be actively ‘eradicated’, ‘erased’ and ‘extinguished’.⁸¹ The decision also paves the way for other European states to press ahead with similar bans. This poses a concern about the overall treatment of Muslims and of their apparent invisibility in Europe. Muslim women seem unable to rely on the ECHR as a living instrument in order to enforce their human rights to religious freedom. While previous decisions have focused on the ‘public order’ issue, the *SAS* decision expands the justifications to restrict religious clothing ‘in favour of living together’.⁸²

‘Living Together’ Not a Legitimate Aim

The Court took a robust view towards the government’s reasons for the ban on the grounds of gender equality, human dignity and public security as it rejected those arguments. Some may therefore argue the decision is balanced and well reasoned, providing a detailed inspection of the government’s reasons for interfering with the applicant’s right. However, the Court concluded the ban pursued the legitimate aim of ‘living together’ within the broad justification of ‘the protection of the rights and freedoms of others’⁸³ even though the concept ‘living together’ is not itself contained within paragraph 2 of either Articles 8 and 9 – it was nevertheless used by the Court to justify the infringement.⁸⁴ The Court itself acknowledged this. Given that the equality, human dignity and public security arguments all failed for not fulfilling a legitimate aim, it seems difficult to understand how the Court then reached the conclusion that the concept of ‘living together’ pursued a legitimate aim.⁸⁵ Steinbach criticises this approach as being unconvincing because it ‘abandons the requirement of rights granting individual protection and instead extends this notion to capture mere sociocultural norms rooted in considerations of the general public interest which...is not covered by the ‘rights of others’ in the sense of Article 9(2)’.⁸⁶ Steinbach further argues that ‘vague notions of behavioural norms of society or considerations related to the general public interest do not qualify’.⁸⁷ The Court further contradicted itself when it stated that it ‘...reiterates that the enumeration of the exceptions to the individual’s freedom to manifest his or her religion or beliefs, as listed in Article 9(2), is exhaustive and that their definition is restrictive...[t]he same approach applies in respect of Article 8’.⁸⁸ If the interpretation is ‘exhaustive’ and ‘restrictive’ why read into paragraph 2 the concept of ‘living together’ and give it a broader

⁷⁹ Adenitire, above n. 10 at 79.

⁸⁰ Ibid. at 81.

⁸¹ Edwards, above n. 57 at 255.

⁸² S. Juss, ‘Burqa Bashing and the Charlie Hebdo Cartoons’ (2015) 26(1) *King’s Law Journal* 27 at 34.

⁸³ (2015) 60 EHRR 11 at [117].

⁸⁴ Ibid. at [2], dissenting. Marshall states: ‘The decision in *SAS* relies heavily on a concept largely unheard of in human rights language’ – Marshall, above n. 33 at 378. Steinbach further argues: ‘Surprisingly, there is no analysis by the Court as to how the term ‘freedoms and rights of others’ captures notions about ‘living together’ – A Steinbach, ‘Burqa and Bans: The Wearing of Religious Symbols Under the European Convention of Human Rights’ (2015) 29 *Cambridge Journal of International and Comparative Law* 29 at 32.

⁸⁵ Adenitire, above n. 10 at 46.

⁸⁶ Steinbach, above n. 84 at 44-47.

⁸⁷ Ibid.

⁸⁸ (2015) 60 EHRR 11 at [113].

meaning? The concept is not listed within paragraph 2 and is not a legitimate aim. The dissenting judges themselves criticised the concept calling it a ‘very general concept...far-fetched and vague’.⁸⁹ Even if a wide margin of appreciation is granted to states, this does not allow the Court to create new grounds of justification not contained within the ECHR.⁹⁰

By permitting blanket bans of this nature, the decision could lead to other bans the majority population feel uncomfortable with, including banning sunglasses, hoodies, or heavily-applied make-up – all which can be used to conceal one’s face.⁹¹ Thus, granting European states a wide margin of appreciation might encourage states to further interfere with the Article 9 right in other ways. Worse still, Adenitire argues that the decision seems to have created a ‘legal right’ to socialise in public places without any reference or support from the case law and that a corresponding breach would materialise if a person walking down the street cannot ‘glance at a smile’ (or frown) because she is wearing a burqa.⁹² This is absurd. Adenitire condemns this decision doubting that such a right ‘has ever existed’ requiring people to socialise with one another, especially ‘if its breach is sanctioned by a criminal penalty’. The implications of the decision are wide and it is doubtful whether the Court really understood the impact of its ruling. The *SAS* decision itself has been voted the worst European Court of Human Rights decision in 2014 in a recent poll.⁹³

The Court should have provided a more thorough examination of the issues instead of opting to provide the French government with a wide margin of appreciation. This would have accorded with the dissenting judges who believed it is the Court’s task to ‘protect small minorities against disproportionate interferences’.⁹⁴ By granting a wide margin, the Court simultaneously created a conflict with the other aim of protecting minorities from disproportionate practices of state governments. By accepting the concept of ‘living together’ the Court inadvertently condoned an ‘assimilationist’ policy⁹⁵ which is at odds with the overall philosophy of the ECHR, given that tolerance, broadmindedness and pluralism are concepts repeatedly emphasised in its judgments.⁹⁶ While pluralism, tolerance and broadmindedness were used to trump the lifestyle and religiously inspired choices of the applicant, these values also justify ‘the acceptance of such a religious dress-code and the adoption of an integrationist approach’.⁹⁷ It demonstrates ‘selective pluralism and restricted tolerance’ on the part of the Court when deferring to the French government.⁹⁸ However, one might support the Court’s wide approach in the fact that many European states are still debating the burqa – in other countries there is no issue because no one wears the burqa. Even if one does not agree with the Court’s decision and though the two dissenting judges believed it was difficult for the majority to conclude France should have been accorded with a wide margin of appreciation,⁹⁹ the Court’s behaviour could be viewed as modest. In one sense, it

⁸⁹ Ibid. at [5], dissenting. Marshall states that the decision makes a ‘mockery’ of freedom expression – see Marshall, above n. 33 at 378.

⁹⁰ Steinbach, above n. 84, at 43-44.

⁹¹ E Howard, ‘SAS v France: Living Together or Increased Social Division?’ <http://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/> (accessed 19 November 2015).

⁹² Adenitire, above n. 10 at 46. Juss states something similar: ‘One did not know until this decision that living in Europe entailed with it a legitimate right to peer into the faces of others in public’ – Juss, above n. 82 at 30.

⁹³ See <http://strasbourgobservers.com/2015/02/12/the-results-are-in-poll-on-best-and-worst-ecthr-judgment-of-2014/> (accessed 19 November 2015).

⁹⁴ (2015) 60 EHRR 11 at [20], dissenting.

⁹⁵ S Berry, ‘SAS v France: Does Anything Remain of the Right to Manifest Religion?’ <http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/> (accessed 19 November 2015).

⁹⁶ (2015) 60 EHRR 11 at [13], dissenting.

⁹⁷ Ibid. at [14], dissenting.

⁹⁸ Ibid.

⁹⁹ Ibid. at [16]-[20], dissenting.

has strived to respect a certain range of differences in the legal and political cultures of European states, instead of behaving like a super-power attempting to overrule the democratic process within European states by taking the final decisions for them.

Violations of Article 8 and 9 Ignored

There is also scope to suggest that there *were* violations of human rights under both Articles 8 and 9. The applicant's ability to wear religious dress was an important part of her core identity that should have been protected by Article 8.¹⁰⁰ The burqa is religious in nature, gender-specific and takes account of a 'whole person whose life is shaped by different structural forces in a particular social historical context'.¹⁰¹ There is a zone of interaction of a person with others in a public context that could fall within the scope of private life and which extends beyond the family circle to include a social dimension.¹⁰² In terms of personal autonomy, the burqa ban violates Article 8 because there exists a 'general right to be left alone, a desire to be allowed to enjoy a particular space, either alone or with others, which the State or others should not be allowed to penetrate'.¹⁰³ Foster notes that this can include the enjoyment of privacy with others, including family and friends – the ban prevents the applicant from socialising with others in public spaces whilst wearing the burqa. The dissenting judges themselves stated that 'the right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places – the right to be an outsider'.¹⁰⁴ This is exhibited in other forms of activity in social life where the face is concealed such as biking, skiing, carnival costumes or surfing the Internet anonymously – common activities that do not require people to show their faces.¹⁰⁵ One could argue the ban violates Article 8 as it affected the ability of the applicant to establish a social life and to develop relationships with others outside the inner circle of the home.¹⁰⁶

The Grand Chamber also made reference to *Ahmet Arslan and Others v Turkey*,¹⁰⁷ where a ban on the wearing of certain religious clothing in public places was also at issue and where there was a violation of Article 9.¹⁰⁸ The Court in *Ahmet* noted there was a difference in banning religious clothing in state schools and public institutions and a difference in banning religious clothing in all public spaces, including roads that are accessible by all.¹⁰⁹ Although precedent does not strictly bind the Court, it usually follows and applies its own precedents in the interests of legal certainty, foreseeability, equality before the law and the proper development of Convention law.¹¹⁰ *Ahmet* would suggest a blanket ban in all public places would not have been acceptable.¹¹¹ However, the Court in *SAS* stated the case 'differs significantly' from *Ahmet* in the 'fact that the full-face Islamic veil has the particularity of

¹⁰⁰ Wiles, above n. 1 at 730-732.

¹⁰¹ A Vakulenko, 'Islamic Headscarves and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 *Social and Legal Studies* 183 at 185-186 and 195-196.

¹⁰² J Marshall, 'Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate' (2008) 30 *Human Rights Quarterly* 631 at 641.

¹⁰³ S Foster, *Human Rights and Civil Liberties* (London: Longman Pearson, 2011, 3rd Edition) at 570. See also D Feldman, 'The Developing Scope of Article 8 of the European Convention on Human Rights' (1997) 3 *European Human Rights Law Review* 265 at 270.

¹⁰⁴ (2015) 60 EHRR 11 at [8], dissenting.

¹⁰⁵ Steinbach, above n. 84 at 47.

¹⁰⁶ See *Niemietz v Germany* (1992) 16 EHRR 97 at [29].

¹⁰⁷ Application No. 41135/98, judgment of 23 February 2010.

¹⁰⁸ *Ibid.* at [52].

¹⁰⁹ *Ibid.* at [49].

¹¹⁰ See *Cossey v UK* (1991) 13 EHRR 622 at [35]; *Chapman v UK* (2001) 33 EHRR 18 at [70]; *Goodwin v UK* (2002) 35 EHRR 18 at [74].

¹¹¹ E Howard, 'Banning Niqabs in Public Places', 6 December 2013, <http://www.ejiltalk.org/banning-niqabs-in-public-spaces/> (accessed 19 November 2015).

entirely concealing the face, with a possible exception of the eyes'.¹¹² This is not a satisfactory explanation of the differences between *Ahmet* and *SAS*, as the two cases do not differ that significantly. Both *Ahmet* and *SAS* concerned the wearing of religious clothing in public places and the threat to public safety was not made out in either case. The Court in *SAS* should have found a violation of Article 9 because the ban specifically targets the burqa, is a disproportionate response to the legitimate aims asserted, the threat to public safety was not made out, the concept of 'living together' is not a listed exception and is not a legitimate aim and the ban is not strictly 'necessary given the small number of women involved'.¹¹³

Conclusion

The Face Coverings (Prohibition) Bill has not yet been recalled for debate in Parliament. That, however, does not mean the Bill has been completely abandoned – given the judgment in *SAS* some MPs may have renewed confidence and may push forward with proposals to ban the burqa. But given the different legal and political culture in the UK (in comparison to France), there is a possibility that the Court will not rule in favour of the UK if a ban was created and a British Muslim applicant sought to challenge a ban as a violation of human rights. But given the consistent refusal to protect Muslim women in the Court's jurisprudence, one is not very optimistic that this will be the case.

However neutral the language of the Bill, a burqa ban denounces those who visibly adhere to their religious beliefs. It undermines their dignity as autonomous individuals and those who voluntarily choose to wear it. Such a paternalistic policy can also damage a woman's self-confidence, self-respect and self-esteem.¹¹⁴ While the author has no objections to any enactment that seeks to protect women from being pressurised into wearing any particular item of clothing, be it the hijab, burqa or short skirts, *SAS* itself concerned an applicant who voluntarily chose to wear the burqa. Yet she was denied protection of the ECHR when it was designed to protect minorities. The criminal law is best advised to prohibit forcing a person to wear a hijab or burqa if the manifestation of women's rights is the desired objective, as opposed to a general ban on face coverings. Such an approach will achieve a delicate balance between providing optimal protection for freedom of religion and optimal protection to protect vulnerable women from coercion.¹¹⁵ The *SAS* decision is likely to upset Muslim women as it will make them feel unwanted by Europe, that they are demanding too much from it and that protection provided by human rights law is impractical, ineffective, theoretical and illusory.¹¹⁶ Not only does the decision demonstrate that human rights law is being used as a restrictive tool,¹¹⁷ the decision itself was wrongly decided as both Articles 8 and 9 should have been interpreted to allow the applicant the right to recognise her identity, individual personality and freedom of choice by wearing the burqa in public places, and to be afforded with the appropriate protection.¹¹⁸

¹¹² (2015) 60 EHRR 11 at [136].

¹¹³ *Ibid.* at [158].

¹¹⁴ Marshall, above n. 31 at 77.

¹¹⁵ J Vrieling, SO Chaib and E Brems, 'The Belgian Burqa Ban: Legal Aspects of Local and General Prohibitions on Covering and Concealing One's Face in Belgium', in A Ferrari and S Pastorelli, above n.6 at 169.

¹¹⁶ An adoption of the words used in *Goodwin v UK* (2002) 35 EHRR 18 at [74].

¹¹⁷ Marshall, above n. 31 at 77.

¹¹⁸ *Ibid.* at 66.