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S.A.S. v. France: A Margin of Appreciation Gone Too Far

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Note

S.A.S. v. France: A Margin of Appreciation Gone Too Far

NATHANIEL FLEMING

When is it permissible for a government to infringe on the religious rights of its citizenry? When is such infringement necessary for a democracy? This is the central concept underlying the margin of appreciation—a standard utilized by the European Court of Human Rights (ECHR) to determine whether certain human rights violations may be excused as “necessary in a democratic society.” While such an approach certainly has its benefits—particularly considering that the ECHR is an international body seeking to intervene in national politics—it also leaves unresolved the question of the outer limits of such a standard. How far may a nation violate religious rights, and who should determine those limits?

In S.A.S. v. France, the ECHR confronted this very issue and concluded that the French prohibition on the public wearing of full-face veils—popularly described as a “Burqa Ban”—was necessary in a democratic society. The basis for the decision relied upon France’s argument that Muslim women who wear the veil are incapable of socializing with their fellow citizens, which thereby inhibits their ability to fully engage with civic society. In accepting France’s justification, the ECHR had to overlook the wealth of evidence to the contrary in favor of accepting an unsubstantiated and stereotypical belief that veil-wearing Muslim women are not functioning members of a democratic society. At its core, the decision in S.A.S. permitted France to firmly establish majoritarian cultural norms, rooted heavily in Christianity, to the detriment of its Muslim minority population. This was a margin of appreciation gone too far.

This Note aims to highlight numerous critiques of the ECHR’s decision in S.A.S. and examine its aftermath in European politics. As will be seen, the standard set forth by S.A.S. is counter to the very principles upon which the ECHR was established. The court has permitted France to selectively favor the rights of some citizens, rather than the rights of all its citizens. Worse still, S.A.S. has encouraged other European nations to follow in France’s stead, and there is a growing trend in favor of abrogating the religious rights of the Muslim population. If this trend is to stop, the margin of appreciation must change.

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S.A.S. v. France: A Margin of Appreciation Gone Too Far

NATHANIEL FLEMING *

INTRODUCTION

When the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) was created, the drafters sought to establish different standards of review depending on the right that was at issue. While infringing on the rights against torture was absolutely unreasonable, the signatory states were granted more deference in the rights of expression and religion. For the latter rights, the Convention recognized that a state may permissibly infringe upon those rights, so long as the infringement was “necessary in a democratic society.”¹ The European Court of Human Rights (ECHR) later dubbed this concept as the “margin of appreciation.”² While this doctrine has enabled state suppression of certain fundamental rights, logically there must be some limit to the margin of appreciation in order to uphold the Convention and actually protect these rights. However, the 2014 decision in *S.A.S. v. France* suggests otherwise. The margin of appreciation applied by the ECHR in *S.A.S.* authorized France to restrict the religious liberties of Muslim women and ban the veil³ in order to protect the supposed rights of other French citizens to socialize with these women.⁴ This Note considers the aftermath of this decision and challenges whether the ECHR is truly capable of preserving religious freedoms as the margin of appreciation now stands.

Part I discusses the factual history of *S.A.S.*, including the political interests that instituted the ban on the veil, and the holding of the ECHR. This section also examines the aftermath of *S.A.S.* and the spread of similar bans throughout the continent in the four years since the decision. Part II considers three prominent critiques of *S.A.S.*: that French secularism represented in *S.A.S.* violates religious freedom; that the holding in *S.A.S.*

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¹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950.

² *E.g.*, *Handyside v. United Kingdom*, App. No. 5493/72, Eur. Ct. H.R., Judgment of 7 Dec. 1976, ¶ 57.

³ Veil, as used throughout both *S.A.S.* and this Note, is shorthand for both the burqa, which covers the entire face, and the niqab, which covers all but the eyes.

⁴ *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. (2014), ¶ 155 [hereinafter *S.A.S.*].

authorizes forced assimilation of cultural minorities; and that *S.A.S.* emboldens counter-factualism in European politics. Part III examines these critiques to determine the common cause of these issues. Lastly, this Note concludes that the ECHR's application of the margin of appreciation is unsustainable in order to preserve democracy and protect religious liberty.

I. THE HISTORY OF *S.A.S. V. FRANCE*

A. *The Politics Behind a "Burqa Ban"*

The conflict displayed in *S.A.S.* arose five years before the ECHR ultimately decided the issue. In 2009, the Presidents of the National Assembly—the lower house of the French parliament—began developing legislation to restrict the usage of full-face veils.⁵ Although France does not maintain census data of racial or ethnic categories,⁶ the National Assembly reported that only 1900 women wore the veil—90% of whom were under age forty, two-thirds were French nationals, and one-in-four were recent converts to Islam.⁷ The report further claimed that the use of the veil was untethered to actual religious expression and, instead, stemmed from extremist fundamentalist traditions.⁸ Seizing on this notion of extremism, the report concluded that the veil is incompatible with values of the French Republic: liberty, equality, and fraternity.⁹ Ostensibly, the veil denied liberty because it was a form of subservience, negated gender equality, and, most importantly, outright negated contact with others and violated the French ideal of “living together.”¹⁰ Consequently, the report concluded that it was necessary to “release women from the subservience of the full-face veil” and create a ban on wearing the veil.¹¹

Relying on this report, the National Assembly first unanimously adopted a resolution opposing the use of the veil in 2010.¹² While restating many of the core conceits of the report, the resolution prioritized ending gender discrimination and protecting women who were forced to wear the veil.¹³ Soon thereafter, both houses of the French parliament passed a comprehensive ban on the veil with only one vote in opposition.¹⁴ The law boldly proclaimed that “[n]o one may, in public places, wear clothing that is

⁵ *Id.* ¶ 15.

⁶ Alexander Stile, *Can the French Talk About Race?*, *NEW YORKER* (July 11, 2014), <https://www.newyorker.com/news/news-desk/can-the-french-talk-about-race>.

⁷ *S.A.S.*, *supra* note 4, ¶ 16.

⁸ *Id.*

⁹ *Id.* ¶ 17.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* ¶ 24.

¹³ *Id.*

¹⁴ *Id.* ¶ 27.

designed to conceal the face.”¹⁵ If someone violated this law—in other words, if any woman were caught wearing a veil—she would be subject to a citizenship course and a fine.¹⁶ Although a partial ban on the veil was considered, the legislative history reflects a belief that any less restrictive measure would not adequately satisfy the legislative priorities for banning the veil.¹⁷ Moreover, the law included numerous exceptions for health, occupation, sports, and festivities and artistic or traditional events.¹⁸ For instance, this ban would not apply to head coverings during a religious procession.¹⁹ The French constitutional court later added an exemption for wearing full-face coverings in places of worship.²⁰ Lastly, the new law included a new provision to the Criminal Code that would punish anyone who “forces one or more other persons to conceal their face, by threat, duress, coercion, abuse of authority or of office, on account of their gender.”²¹ This punishment included a year of imprisonment and a substantial fine of 30,000 euros.²²

When the French ban went into effect in 2011, few other European nations had comparable bans. Mere months after France’s ban was passed, Belgium passed a comparable law that likewise banned full or substantial face coverings in public.²³ The ECHR describes the Belgian law as a comparably broad blanket ban on any face coverings while in public.²⁴ The legislative history showed the law was even similarly premised on the notion that women who wear the veil are incapable of “living together” with other members of their society.²⁵ The Belgian Constitutional Court ultimately upheld this law.²⁶ In addition, two other European nations attempted similar laws. While the Dutch parliament proposed four separate bans on wearing full-face veils in public, the Dutch constitutional court ultimately struck down each proposal.²⁷ Similarly, in Spain, a number of municipalities attempted citywide bans on full-face veils that were eventually defeated at the Spanish Supreme Court.²⁸ In both Spain and the Netherlands, the

¹⁵ *Id.* ¶ 28 (internal quotation marks omitted); see also *Act No 2010-1192 of 11 October 2010 Prohibiting the Concealing of the Face in Public*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, <https://www.legislationline.org/documents/id/20201> (unofficial translation of the French law, which prohibits concealing the face in public and describes consequences).

¹⁶ *S.A.S.*, *supra* note 4, ¶ 28.

¹⁷ *Id.* ¶ 25.

¹⁸ *Id.* ¶ 28.

¹⁹ *Id.* ¶ 31.

²⁰ *Id.* ¶ 30.

²¹ *Id.* ¶ 29.

²² *Id.*

²³ *Id.* ¶¶ 40–41.

²⁴ *Id.* ¶ 41.

²⁵ *Id.* ¶ 42 (internal quotation marks omitted).

²⁶ *Id.*

²⁷ *Id.* ¶ 49.

²⁸ *Id.* ¶ 43.

constitutional courts rejected the same justifications articulated by France in support of its ban.²⁹ Both courts found no support for the belief that the veil is incompatible with the social order.³⁰ Moreover, the Spanish court added that this ban would have the counterproductive effect of driving veil-wearing women into hiding and intensifying the discrimination against them.³¹

In international law, many organizations also disagreed with the French approach. While the Council of Europe agreed that ending the subjugation of women forced to wear the veil was a sensible goal, it contended that a general prohibition would have negative repercussions.³² Rather than liberating women, the Council of Europe noted that a general ban would likely force women who choose to wear a veil to confine themselves at home.³³ The Commissioner for Human Rights of the Council of Europe concurred, while also noting the dearth of evidence in support of France's contention that the veil undermines democracy.³⁴ The Commissioner even linked the perceptions of the veil to Islamophobia and concluded that these bans undermine multiculturalism, an essential European value.³⁵ Nonetheless, despite opposition to the ban from members of the international community, the French parliament created a new paradigm for the relationship between European Muslims and their nation. With this ban, France laid the groundwork for an inevitable challenge to the ECHR.

B. *The Inevitable Litigation*

Although decided in 2014, the *S.A.S.* litigation began the day that France's ban went into effect in 2011.³⁶ *S.A.S.*, then a twenty-four-year-old French national, was a devout Muslim who personally elected to wear the burqa or niqab at various times.³⁷ *S.A.S.* followed "the Sunni cultural tradition" and ascribed to the belief that "it is customary and respectful for women to wear a full-face veil in public."³⁸ In particular, *S.A.S.* wished to be able to wear her veil in public to express her own faith during religious events, including the month-long observation of Ramadan.³⁹ Alongside her application, *S.A.S.* submitted a statement describing the effects of the ban that she experienced personally. She wrote:

²⁹ *Id.* ¶¶ 47, 51.

³⁰ *Id.*

³¹ *Id.* ¶ 47.

³² *Id.* ¶ 35.

³³ *Id.*

³⁴ *Id.* ¶ 37.

³⁵ *Id.*

³⁶ *Id.* ¶ 1; Steven Erlanger, *France Enforces Ban on Full-Face Veils in Public*, N.Y. TIMES (Apr. 11, 2011), <https://www.nytimes.com/2011/04/12/world/europe/12france.html>.

³⁷ *S.A.S.*, *supra* note 4, ¶¶ 10, 11.

³⁸ *Id.* ¶ 76.

³⁹ *Id.* ¶ 12.

I am now vilified and attacked on the streets of the Republic I love, effectively reduced to house arrest, virtually ostracized from public life and marginalized. . . . [C]riminalisation, or rather the political scaremongering that preceded it, has incited members of the public to now openly abuse and attack me whenever I drive wearing my veil. Pedestrians and other drivers routinely now spit on my car and shout sexual obscenities and religious bigotry. Consequently, I now feel like a prisoner in my own Republic, as I no longer feel able to leave my house unless it is essential. I leave the house less frequently as a result. I wear my veil with even less frequency when out in public as a result. Indeed, I also feel immense guilt that I am forced to no longer remain faithful to my core religious values.⁴⁰

This fear of harassment motivated S.A.S. to remain anonymous⁴¹ when she sued France alleging that France violated her rights to freedom of religion and expression protected by articles 8 and 9 of the European Convention on Human Rights.⁴²

In her arguments, S.A.S. contended that France's assumptions of the veil were entirely baseless and rooted in stereotype.⁴³ Contrary to the beliefs articulated by the French parliament, S.A.S. asserted that "the veil often denoted women's emancipation, self-assertion and participation in society."⁴⁴ To S.A.S., wearing the veil was not about appeasing men, but rather was done to satisfy herself and her own conscience.⁴⁵ Rather than recognize these different perspectives, France adopted a paternalistic approach declaring the implicit values of the religious expression of a minority culture.⁴⁶ Moreover, the purpose of the ban was compromised by its actualization: the law was supposed to protect women from subjugation, yet it created a punishment for the same women it sought to protect.⁴⁷ Lastly, the exceptions provided by the law unfairly favored Christians.⁴⁸ The exceptions, premised in the context of a Christian majority, were written such that they allowed face coverings during common Christian festivities while prohibiting Muslim women from wearing the veil during the month of Ramadan.⁴⁹ Altogether, S.A.S.'s arguments painted the portrait of a nation

⁴⁰ Eva Brems, *S.A.S. v. France: A Reality Check*, 25 NOTTINGHAM L.J. 58, 60–61 (2016).

⁴¹ *Id.* at 61.

⁴² *S.A.S.*, *supra* note 4, ¶ 74.

⁴³ *Id.* ¶ 77.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* ¶ 78.

⁴⁷ *Id.*

⁴⁸ *Id.* ¶ 80.

⁴⁹ *Id.*

so devoted to the values of a Christian majority that it would rather compel assimilation than accept a diversity of cultural beliefs.

Expectedly, France countered S.A.S.'s arguments with a number of reasons to claim that its actions fell within the margin of appreciation accorded by articles 8 and 9.⁵⁰ Drawing on the legislative history, France raised claims that it was merely seeking gender equality or protecting public safety.⁵¹ The ECHR quickly dispatched these claims.⁵² However, France's argument that the veil impaired the ideal of "living together" held greater sway with the court.⁵³ Here, France contended that, as a result of concealing one's face, a person was effectively breaking social ties and refusing to live together with other members of French society.⁵⁴ Thus, it was necessary for France to prohibit full-face coverings when these garments undermined this core notion of French civic engagement.⁵⁵

Ultimately, the ECHR accepted France's notion of "living together" and found no violation of articles 8 or 9.⁵⁶ While incorporating France's argument, the court reasoned that in order to protect this need to live together—recontextualized as "respect for the minimum requirements of life in a society"—France was effectively protecting the rights of others.⁵⁷ Put differently, France was protecting the rights of its non-veil wearing citizens to socialize with women that would otherwise be wearing a veil. Solely under these grounds, the court found that the law was justified to preserve "the right of others to live in a space of socialisation which makes living together easier."⁵⁸ Thus, in accepting the legitimacy of France's "living together" argument, the court swiftly dismissed concerns over the breadth and impact of this ban since it was necessary to uphold a cornerstone of French society.⁵⁹ Indeed, as the court succinctly concluded, "France had a wide margin of appreciation in the present case,"⁶⁰ and could abrogate the religious freedom of S.A.S. in pursuit of its goal.

While the fifteen-judge majority swiftly glossed over S.A.S.'s arguments, the dissenting opinion accorded far greater weight to S.A.S.'s concerns. When the majority sided with France, it bizarrely claimed that the central purpose of the ban was not "to protect women against a practice

⁵⁰ *Id.* ¶¶ 81, 84.

⁵¹ *Id.* ¶ 82.

⁵² *Id.* ¶¶ 115–18.

⁵³ *See id.* ¶ 82 (expanding on the theory that the veil could break social ties and result in a refusal to conform with the rest of society).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* ¶¶ 157–59.

⁵⁷ *Id.* ¶¶ 121–22.

⁵⁸ *Id.* ¶¶ 122, 142.

⁵⁹ *Id.* ¶¶ 151–52.

⁶⁰ *Id.* ¶ 155.

which was imposed on them.”⁶¹ As the dissent demonstrated, this argument completely ignores the fact that the legislative history *repeatedly* referred to the veil as a “form of subservience” and sought to liberate women from this subjugation.⁶² Moreover, with little justification, the majority ignored S.A.S.’s own positive perception of the veil. Instead, the majority accepted and legitimized the supposed, and unsubstantiated, harmful ideology of the veil ascribed by France.⁶³ Yet, “even assuming that such interpretations of the full-face veil are correct, it has to be stressed that there is no right not to be shocked or provoked by different models of cultural or religious identity, even those that are very different from the traditional French and European lifestyle.”⁶⁴ It is patently contrary to European notions of religious and personal freedom to restrict someone’s attire merely because it demonstrates a radical opinion.⁶⁵

The dissent also found issue with France’s “living together” argument. Without justification, France presumed that it was impossible to communicate with someone wearing a veil.⁶⁶ At the same time, there is a well-recognized right to privacy, which could even be construed as a “right to be an outsider.”⁶⁷ To support France’s argument, the court would effectively recognize a right of someone to contact any other person in a public space regardless of the other person’s will.⁶⁸ Not only is this right illogical, but the underlying assumption is equally irrational: there is no evidence that one cannot communicate with someone whose face is obscured.⁶⁹ It would be ridiculous to claim that someone wearing a helmet, costume, or ski mask cannot speak to another person.⁷⁰ Instead, the dissent singled out the true justification for the ban and the majority’s decision: “selective pluralism and restricted tolerance” to different cultures.⁷¹ When faced with a culture expressing radically different norms, it was simpler to ban the nonconformity to European norms rather than attempt to understand this culture or even S.A.S.’s position on the veil. Thus, the broad margin of appreciation granted to France by the court enabled it to trammel the rights of a religious minority, likely resulting in further exclusion and increased oppression.⁷²

⁶¹ *Id.* ¶ 137.

⁶² *Id.* ¶ 6 (Nussberger, J., and Jäderblom, J., dissenting).

⁶³ *Id.*

⁶⁴ *Id.* ¶ 7.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* ¶ 8.

⁶⁸ *Id.*

⁶⁹ *Id.* ¶ 9.

⁷⁰ *Id.*

⁷¹ *Id.* ¶ 14.

⁷² *See id.* ¶ 21 (arguing that the ban will serve to worsen the exclusion of Muslim women from society).

C. *The Aftermath of S.A.S.*

In the time since *S.A.S.* was decided, the ECHR has decided two similar cases—*Belcacemi & Oussar v. Belgium* and *Dakir v. Belgium*—addressing the Belgian ban referenced in *S.A.S.*⁷³ Both of these cases effectively retread the same arguments presented in *S.A.S.*: an applicant suing for violation of articles 8 and 9 while Belgium claims a legitimate aim in preserving the rights of its citizens to “liv[e] together.”⁷⁴ Applying the same wide margin of appreciation utilized in *S.A.S.*, the court likewise concluded that Belgium’s ban was a permissible intrusion on the freedom of religion.⁷⁵ However, these cases also further expanded the margin of appreciation granted to the right of living together. In *S.A.S.*, the court recognized that “in view of the flexibility of the notion of ‘living together’ and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.”⁷⁶ Alternatively, in the Belgian cases, the court has seemingly discarded this careful examination; instead, the court was satisfied by the bare showing that the Belgian ban was democratically created.⁷⁷ Moreover, while *S.A.S.* addressed the potential harmful social effects on Muslim women,⁷⁸ there was no comparable discussion in either *Dakir* or *Belcacemi*. In total, this suggests an even greater shift in power in favor of the states than was first granted in *S.A.S.* As of now, it seems that a state may pass any restriction on religion so long as it is justified by the need to “live together,” regardless of the social stigma created by the ban.

Indeed, in the years following *S.A.S.*, a number of similar bans have been adopted throughout Europe. In May of 2018, Denmark passed a nation-wide ban on the veil.⁷⁹ Similar to the French ban, the Danish law likewise used neutral language prohibiting any “garment that hides the face.”⁸⁰ Likewise, Austria passed a general prohibition on the veil in October 2017 that mirrored the language used in France’s law.⁸¹ In Switzerland, although its

⁷³ *Dakir v. Belgium*, App. No. 4619/12, Eur. Ct. H.R. (2017), ¶¶ 1, 3 [hereinafter *Dakir*], <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%224619%2F12%22%2C%22itemid%22:%5B%222001-175660%22%5D%7D>; *Belcacemi & Oussar v. Belgium*, App. No. 37798/13, Eur. Ct. H.R. (2017), ¶¶ 1, 3 [hereinafter *Belcacemi*], <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-175141%22%5D%7D>.

⁷⁴ *Dakir*, *supra* note 73, ¶¶ 3, 21; *Belcacemi*, *supra* note 73, ¶¶ 3, 18.

⁷⁵ *Dakir*, *supra* note 73, ¶ 54; *Belcacemi*, *supra* note 73, ¶ 51.

⁷⁶ *S.A.S.*, *supra* note 4, ¶ 122.

⁷⁷ *Dakir*, *supra* note 73, ¶¶ 57–58.

⁷⁸ *E.g.*, *S.A.S.*, *supra* note 4, ¶ 151 (acknowledging that the ban primarily affects Muslim women wishing to wear the full-face veil).

⁷⁹ Martin Selsoe Sorensen & Megan Specia, *Denmark’s Ban on Muslim Face Veil Is Met with Protest*, N.Y. TIMES (Aug. 1, 2018), <https://www.nytimes.com/2018/08/01/world/europe/denmark-ban-muslim-veil.html>.

⁸⁰ *Id.*

⁸¹ Christine Hauser & Liam Stack, *Dutch Lawmakers Approve Partial Ban on Burqas and Niqabs*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/world/europe/netherlands-face-covering-ban.html?module=inline>. A few nations have also passed minor bans that warrant less

federal government opposed such a move, two of its cantons have adopted public bans on the veil.⁸² Most recently, the Dutch parliament—despite earlier pronouncements by its Council of State⁸³—passed a new ban that prohibits face coverings in schools, government offices, and hospitals without limiting their use in public.⁸⁴ The creator of this law celebrated this achievement on Twitter using the hashtags “stopislam” and “deislamize.”⁸⁵

II. INTERPRETING *S.A.S.*

There are multiple modes of interpreting *S.A.S.* and far too many to fully discuss here. Yet, three prominent interpretations reveal a consistent problem with *S.A.S.* First, *S.A.S.* is often derided for representing the ills of secularist policy as it violates religious freedoms. Moreover, this policy even spills into supporting assimilation of religious minorities into the majority—in France, Christianity. Lastly, proponents of *S.A.S.* and bans on the veil ignore these realities and push forward a counter-factualist agenda. These problems stem from a common cause: an excessively broad margin of appreciation that enables France to neglect religious freedoms without any oversight.

A. *Secularism*

An ever-present concern in *S.A.S.* was France’s desire to remain a secular nation and whether, in so doing, France abrogated the religious rights of its citizens. France’s secularist approach to religion is codified within its own Constitution of 1958: “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.”⁸⁶ Generally, the implementation of French secularism is ostensibly founded on the notion that the state acts neutrally towards all religious matters.⁸⁷ While public events are secular, religious denominations are supposed to enjoy legal equality, and non-discrimination laws prevent

discussion. A ban on face coverings while driving, as well as for anyone working in civil service, the military, or for an election, recently went into effect in Germany. *Id.* Bulgaria also now bans the veil in government offices, schools, and cultural institutions. *Id.*

⁸² Michael Shields, *Swiss Canton Becomes Second to Ban Burqas in Public*, REUTERS (Sept. 23, 2018), <https://www.reuters.com/article/us-swiss-burqas/swiss-canton-becomes-second-to-ban-burqas-in-public-idUSKCN1M30J2>.

⁸³ *S.A.S.*, *supra* note 4, ¶ 52.

⁸⁴ Hauser & Stack, *supra* note 81.

⁸⁵ *Id.*; Geert Wilders (@geertwilderspvv), TWITTER (June 27, 2018, 1:46 AM), <https://twitter.com/geertwilderspvv/status/1011893627184930816?lang=en>.

⁸⁶ 1958 CONST. pmb. art. 1 (Fr.).

⁸⁷ Lasia Bloss, *European Law of Religion: Organizational and Institutional Analysis of National Systems and Their Implications for the Future European Integration Process* 21 (N.Y. Univ. Law Sch. Jean Monnet Program, Working Paper No. 13/03, 2003).

differential treatment to individuals based on their beliefs.⁸⁸ As a result, France does not maintain official statistics of religious demographics.⁸⁹ Nonetheless, third party surveyors estimate that 80% of France's population is Roman Catholic.⁹⁰ Muslims constitute the second largest religious group with three million followers (approximately 4.5% of the population).⁹¹ Meanwhile, 6% of the population is unaffiliated and 1% is Jewish.⁹² As one might anticipate from these demographics though, France's implementation of its secularism has often skewed in favor of the majority beliefs to the detriment of the minority.

Despite France's claim to be a secular state, scholars have noted that France's historic roots have bound it to Judeo-Christian traditions resulting in selective application of this secularist policy.⁹³ Because of a historical connection to the Catholic Church, local governments in the Alsace and Moselle regions along with French Guyana maintain formal connections with the Catholic Church.⁹⁴ In these areas, Christian and Jewish denominations are treated as public institutions and receive state subsidies and public funding.⁹⁵ This explicit religious connection in Alsace and Moselle, in particular, is due to the unique history of the region. Under Napoleon's Concordat with the Pope in 1801, Catholicism was established as the national religion of France.⁹⁶ This decree was eventually overturned in 1905 when France enacted a strict separation of church and state, which has since formed the backbone of its secularism policy.⁹⁷ However, in 1905, Alsace and Moselle were part of Germany and the new law did not apply to them.⁹⁸ Although these regions have since become a part of France once again, they have retained their political ties to the Catholic Church; as recent as 2013, the French Constitutional Council reaffirmed the validity of this policy when rejecting a claim that it violated French secularism.⁹⁹ In French tax policy, a number of Christian and Jewish denominations also enjoy tax-exempt status, while other faiths, including Jehovah's Witnesses, are subjected to a 60% tax on all funds they receive.¹⁰⁰

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 21 n.54. Albeit, only 15% of this population regularly attends Sunday church services. *Id.*

⁹¹ *Id.* at 21.

⁹² *Id.* at 21–22.

⁹³ *Id.* at 24–25.

⁹⁴ *Id.* at 24.

⁹⁵ *Id.* at 25.

⁹⁶ *Id.* at 23.

⁹⁷ *Id.* at 22.

⁹⁸ *Id.* at 24–25.

⁹⁹ Guillaume Perrault, *L'Alsace-Moselle Garde le Concordat*, LE FIGARO (Fr.), Feb. 22, 2013, <http://www.lefigaro.fr/politique/2013/02/21/01002-20130221ARTFIG00751-l-alsace-moselle-garde-le-concordat.php>.

¹⁰⁰ Bloss, *supra* note 87, at 22–23.

More recently, in the early 2000s, there was a documented shift in the language describing this principle of secularism from a focus in organizing public life to defending national values from a foreign threat.¹⁰¹ Two French government reports submitted in 2003 declared that “political Islam” was the primary threat to the Republic.¹⁰² Following these reports, right-wing French politicians became fixated on secularism and defending against this supposed threat of Islam.¹⁰³ A few months later, another report was published that posited secularism as essential to maintaining social and political integration.¹⁰⁴ Ultimately, drawing on the conclusions of these reports, then-French President Jacques Chirac established the “Commission Reflecting on the Application of the Principle of Secularism in the Republic.”¹⁰⁵ One signature policy achievement from this commission was the institution of a ban on religious garb in public schools, which resulted in singling out hijab-wearing Muslim students.¹⁰⁶

Consequently, as evident in *S.A.S.*, France’s secularist policy has a tendency to single out Islam and prevent Muslim forms of religious expression. While there is general acceptance for displaying crosses and kippas (or yarmulkes), the wearing of veils and hijabs has often been targeted by bans on religious garb.¹⁰⁷ While Christians and Jews have long lived in France, it was not until the French Muslim population grew substantially that these bans began to emerge.¹⁰⁸ These policies even tend to privilege atheists above all others, since they are not compelled by faith to wear religious garb that might run afoul of the law.¹⁰⁹ Although secularism was not discussed outright in *S.A.S.*, it still permeates France’s “living together” argument.¹¹⁰ In essence, secularism is so fundamental in French society that it is impossible to live together unless someone’s religious garb is stripped from them.¹¹¹ More still, French secularism has led to a hyper-fixation on the perceived ideology of the veil. For years in France, veil-wearing women have been cast as a source of menace and fear.¹¹² Akin to the way that tabloids treat celebrities, Muslim women have been subjected

¹⁰¹ Valérie Amiraux, *Visibility, Transparency and Gossip: How Did the Religion of Some (Muslims) Become the Public Concern of Others?*, 4 CRITICAL RES. ON RELIGION 37, 45 (2016).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Vanja-Ivan Savić, *Still Fighting God in the Public Arena: Does Europe Pursue the Separation of Religion and State Too Devoutly or Is It Saying It Does Without Really Meaning It?*, 2015 BYU L. REV. 679, 703.

¹⁰⁸ *Id.* at 699.

¹⁰⁹ *Id.* at 701.

¹¹⁰ *Id.* at 707.

¹¹¹ *Id.*

¹¹² Amiraux, *supra* note 101, at 43.

to intense public scrutiny such that everyone in France can immediately recognize a veil even without ever meeting someone who wears one.¹¹³ Under intense public scrutiny, “[g]ossip circuits” form in which people create their own meaning for the veil.¹¹⁴ Consequently, the French perception of the veil is founded on a “meaning” of the veil deprived of any direct experience with the veil.¹¹⁵ Framing the issue in this light, France is enabled by its secularist policy to restrict the veil and completely disregard the opinions of actual veil-wearers, including S.A.S.¹¹⁶

Furthermore, French secularist policy is rife with contradictions and arbitrary decision making. In order to defend secularism, France is actually forced to define and categorize religious practices, which only serves to further enmesh French politics in religion.¹¹⁷ Clearly, unless France wishes to completely destroy individual freedoms, it must determine what actions have religious connotations, and therefore are prohibited, and which actions are acceptable.¹¹⁸ Of course, this determination is still rooted in the Judeo-Christian traditions of France in which Christian traditions have long been incorporated into the actual functioning of the government.¹¹⁹ France—along with many other nations—employs double standards when interacting with different religions. While France is clearly comfortable in recognizing the multiple denominations of Christianity to the point of excluding certain ones from tax exemptions,¹²⁰ Islam is typically treated as a monolithic religion with only one perspective.¹²¹ Ultimately, to some observers, French secularism is merely pretext to justify institutionalized favoritism of certain beliefs at a significant determinant to religious minorities, particularly Muslims.¹²²

French secularism has also influenced and, at times, impaired its international relationships. Despite a longstanding commitment to human rights, France has been noticeably reticent to adopt international protections for these rights.¹²³ France can claim ownership of the 1789 Declaration of the Rights of Man and the Citizen that contributed to the groundwork of the Convention as well as being a founding member of the Council of Europe; yet, France did not ratify the Convention until 1974 and only accepted

¹¹³ *Id.*

¹¹⁴ *Id.* at 44–45.

¹¹⁵ *Id.* at 44.

¹¹⁶ *Id.*

¹¹⁷ Savić, *supra* note 107, at 698.

¹¹⁸ *Id.* at 698–99.

¹¹⁹ *Id.* at 703; Bloss, *supra* note 87, at 22–24.

¹²⁰ Bloss, *supra* note 87, at 22–23.

¹²¹ See Savić, *supra* note 107, at 704 (discussing European failure to recognize the variations among Islamic denominations).

¹²² *Id.* at 712–13.

¹²³ Hakeem Yusuf, S.A.S. v France: *Supporting ‘Living Together’ or Forced Assimilation?*, 3 INT’L HUM. RTS. L. REV. 277, 289 (2014).

individual petitions beginning in 1981—twenty-eight years after the Convention came into effect.¹²⁴ This reluctance has been attributed to its policy of secularism alongside the brutality inflicted by France during the Algerian war.¹²⁵ Moreover, France was likewise hesitant in ratifying other international human rights agreements, including the International Bill of Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic and Social Rights.¹²⁶ The ECHR’s decision in *S.A.S.* was also not the first foray into international review of France’s secularist policy. The ECHR has previously reviewed, and upheld, similar bans on religious attire in schools in suits brought by Muslim students.¹²⁷ Similar to *S.A.S.*, the ECHR has likewise allowed this policy of secularism to persist under the margin of appreciation.¹²⁸

B. *Forced Assimilation*

National policies, such as the veil ban at issue in *S.A.S.*, also carry the dangerous potential of inflicting a majority culture on every citizen to the extent of eliminating any diversity. Indeed, one perversion of the secularism policy discussed above is that it completely turns state norms of neutrality on their head: rather than the state being responsible for religious neutrality, it is instead incumbent on individual citizens to behave neutrally.¹²⁹ In essence, devout citizens, particularly those of minority religions, must assimilate to whatever standard the nation declares to be neutral and secular. Worse still, the very decision of *S.A.S.* appears to hold that “the ‘right of others’; the majority, is to be imposed on the minority as a measure of social cohesion and mandatory engagement even where the minority do not request such engagement or deem it desirable.”¹³⁰ France’s “living together” argument is not just that it protects the right of socialization; the essence of the argument is that states can impose these social obligations against the will of the individual.¹³¹ Under this reasoning, a state is well within its powers to further enshrine a majority culture while castigating any

¹²⁴ *Id.* Article 25 of the Convention permits individual citizens to file petitions with the ECHR, which is the process by which cases such as *S.A.S.* commence.

¹²⁵ *Id.*

¹²⁶ Elisabeth Lambert Abdelgawad & Anne Weber, *The Reception Process in France and Germany*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 107, 108–11 (Helen Keller & Alec Stone Sweet eds., 2008).

¹²⁷ *E.g.*, *Dogru v. France*, App. No. 27058/05, Eur. Ct. H.R., Judgment of 4 Dec. 2008, ¶¶ 7, 19, 29 (discussing an instance when a student was expelled from school for wearing religious attire during physical education and sports classes).

¹²⁸ *Id.* ¶¶ 70–72.

¹²⁹ Amiraux, *supra* note 101, at 45; *see also* Savić, *supra* note 107, at 700 (discussing how secularism “should impose a particular form of state neutrality”).

¹³⁰ Yusuf, *supra* note 123, at 285.

¹³¹ *Id.* at 282.

nonconformists.¹³² Following *S.A.S.*, a state can just as easily prohibit any other innocuous religious practice simply because the majority finds such practice distasteful.¹³³

The decision in *S.A.S.* thwarts the purposes of the Convention by enabling these types of policies. When enacted, the Convention was supposed to embody longstanding egalitarian principles and prevent cultural subjugation and intolerance.¹³⁴ The Convention was also a direct response to the rise of Nazism and fascism in the first half of the twentieth century.¹³⁵ From its inception, the Convention was thus conceived as a shield against the injustices that a state might inflict upon its people.¹³⁶ As a result of this noble policy, the ECHR gained considerable respect and recognition from both national and international actors.¹³⁷ Yet, now, that supposed shield is being used to batter a religious minority at the behest of a majority. Instead of furthering the purpose of the Convention, the decision in *S.A.S.* could easily further the practices that it was supposed to prevent. Fascism and nationalism are once more on the rise in Europe.¹³⁸ Across the continent, parties such as the British National Party, English Defense League, Austria's Freedom Party, and Germany's Alternative für Deutschland party have garnered considerable strength and advocate similar party goals of the European fascists of the early-twentieth century: under the guise of populism, or helping the common person, these groups articulate a hatred of foreigners and strong desire to impose a national, or majoritarian, culture on the people.¹³⁹ In this context, *S.A.S.* is particularly dangerous. Relying solely on the democratic legitimacy of the state's restriction of religion—as the ECHR continues to do in *S.A.S.* and its progeny¹⁴⁰—cannot be the only consideration employed when determining permissible impairment of legal rights.¹⁴¹ Nazism was a legal entity, supported by the political machinations of Germany, and garnered majority support.¹⁴² Under *S.A.S.*, fascism and Nazism can become a valid policy so long as it is supported by “democratic

¹³² *Id.* at 285.

¹³³ *Id.*

¹³⁴ *Id.* at 289.

¹³⁵ GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 18–20 (2007).

¹³⁶ *Id.*

¹³⁷ *Id.* at 125.

¹³⁸ Yusuf, *supra* note 123, at 287.

¹³⁹ *Id.*; Géraldine Schwarz, *My Family Has a Nazi Past. I See That Ideology Returning Across Europe*, GUARDIAN (Apr. 18, 2018), <https://www.theguardian.com/commentisfree/2018/apr/18/family-nazi-past-ideology-europe-germany-fascism-far-right>.

¹⁴⁰ *Supra* Part I.C.

¹⁴¹ LETSAS, *supra* note 135, at 73.

¹⁴² Yusuf, *supra* note 123, at 291.

legitimacy,” regardless of whether the policy violates essential human rights.¹⁴³

These outcomes are not simply hypothetical either; indeed, the repercussions of a similar Chinese national policy enforcing socialization are already observable and foretell the potential outcomes of France’s “living together” agenda. In the far northwest of China lies the Xinjiang Uyghur Autonomous Region that is home to the Uyghurs, a Turkic ethnic and majority Muslim population.¹⁴⁴ In total, contemporary China has fifty-six officially recognized ethnicities with the Han culture composing the majority of the population in mainland China.¹⁴⁵ Rather than recognize the diversity of ethnicities across its nation, the Chinese government has preferred to reimagine its population as a singular culture and a single identity.¹⁴⁶ A 2009 statement from the Ministry of Information reflects this belief that: “From ancient times until today, many ethnic groups have lived on the territory of Xinjiang. Every ethnic group who has ever laboured, existed, and multiplied in Xinjiang has been a member of the Chinese nation (zhonghua minzu).”¹⁴⁷ This document further claimed that “[e]thnic unity is the means by which the frontier can be civilised,” and “ethnic unity is prosperity, ethnic separation is disaster.”¹⁴⁸ Drawing on these contentions of a single unified national identity, China has long-imposed a policy that is comparable to the French “living together” notion: the *minzu tuanjie* (nationality unity) and *minzu pingdeng* (nationality equality).¹⁴⁹ These policies envisage the “fading away of ethnicity” and the “fusion” of all the ethnic groups as key to the success of the country.¹⁵⁰

China’s policies have particularly impacted the Uyghur population. Under what amounts to the same “living together” justification as argued by France in *S.A.S.*, China has spent decades stifling religious expression of the Uyghurs in an effort to assimilate them into the majority culture.¹⁵¹ Similar to the French veil ban, the Chinese policies expressly define what types of religious expression are socially acceptable.¹⁵² For instance, the Chinese government prevents Muslim parents from teaching their children their religion, prevents adults and children from attending mosques, bans pilgrimages to Mecca, and prevents male Muslim teachers from growing a

¹⁴³ LETSAS, *supra* note 135, at 73; Yusuf, *supra* note 123, at 291.

¹⁴⁴ Yusuf, *supra* note 123, at 292.

¹⁴⁵ *Id.* at 293.

¹⁴⁶ David Tobin, *Competing Communities: Ethnic Unity and Ethnic Boundaries on China’s North-West Frontier*, 13 *INNER ASIA* 7, 10–11 (2011).

¹⁴⁷ *Id.* at 10 (emphasis omitted) (citation omitted).

¹⁴⁸ *Id.* at 11.

¹⁴⁹ Yusuf, *supra* note 123, at 292.

¹⁵⁰ Tobin, *supra* note 146, at 11.

¹⁵¹ Yusuf, *supra* note 123, at 294.

¹⁵² *Id.*

beard.¹⁵³ Worse still, Muslims are frequently prohibited from fasting during Ramadan, which is a central tenet of the Muslim faith.¹⁵⁴ These bans are often premised on the notion of “preventing use of schools and government offices to promote religion” or, in other words, maintaining secularism as a national policy.¹⁵⁵ Most similar to France’s ban on the veil, one report described a similar censure of Muslim attire:

Around the corner from Kashgar’s 572-year-old Id Kah Mosque, a large notice board implores Uyghurs to adopt modern attire. One half of the board is covered in pictures depicting traditional Uyghurs, women in colourful dresses and flowing hair and clean-shaven men. The other half shows rows of men with beards and women in headscarves or face-covering veils, all with a red X over them.¹⁵⁶

In total, the Chinese policies against the Uyghurs plainly seek to eliminate any behavior that deviates from the norms of the majority culture and its traditions.

However, rather than build a strong national community and foster social cohesion as intended, China’s policies towards the Uyghurs have only caused strife and political violence. Among Uyghurs there is a pervasive feeling of a “cultural genocide.”¹⁵⁷ Naturally, this has also fueled feelings of powerlessness and a sense that Beijing will inevitably destroy every aspect of their culture.¹⁵⁸ Much of the resentment felt by the Uyghurs towards Beijing has been expressed through non-violent means.¹⁵⁹ However, some have acted more extremely, choosing to assault Chinese security forces and non-Uyghur settlers in the region with terrible acts of violence.¹⁶⁰ Responding to this violence, the Chinese government has enacted further repression of the Uyghurs in order to root out the “terrorist threat from Muslim Uighurs.”¹⁶¹ In addition to the assimilationist policies, the Uyghurs now also suffer extensive surveillance and censorship.¹⁶² As the conflict

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ AFP, *China Bans Ramadan Fast in Muslim Northwest*, TELEGRAPH (July 3, 2014), <https://www.telegraph.co.uk/news/worldnews/asia/china/10942493/China-bans-Ramadan-fast-in-Muslim-northwest.html>.

¹⁵⁶ Umar Farooq, *Chinese Uighurs Defy Ramadan Ban*, AL JAZEERA ENG. (July 5, 2014), <https://www.aljazeera.com/indepth/features/2014/07/chinese-uyghurs-defy-ramadan-ban-20147471125107552.html>.

¹⁵⁷ Alim A. Seytoff, *China’s Uighurs Claim Cultural “Genocide”*, AL JAZEERA (June 2, 2014), <http://www.aljazeera.com/indepth/opinion/2014/06/china-uyghurs-claim-cultural-gen-20146165946224857.html>.

¹⁵⁸ *Id.*

¹⁵⁹ Yusuf, *supra* note 123, at 295.

¹⁶⁰ *Id.*; Seytoff, *supra* note 157.

¹⁶¹ Seytoff, *supra* note 157.

¹⁶² Yusuf, *supra* note 123, at 295.

stands, Uyghur resentment of the state is at an all-time high and there is growing support for an Uyghur separatist movement.¹⁶³ Yet, at the same time, China continues to restrict the rights of the Uyghurs and is unlikely to alter this policy anytime soon.¹⁶⁴

While the Uyghurs' treatment by the Chinese government is certainly an extreme example, it provides a magnification of the protracted ramifications of the decision in *S.A.S.* The ethnic strife in China did not begin overnight; rather, it is the product of decades of slow-building conflict that is most visible now that the violence and oppression is openly visible to outside observers. Comparatively, France is at a far earlier stage in its treatment of veil-wearing Muslim women. So far there is but one ban that only affects a (supposedly) small portion of the Muslim population. Yet, this one law has already sowed seeds of considerable division and social unrest. *S.A.S.* described that harassment and fear she experienced every time that she wore her veil in public.¹⁶⁵ *S.A.S.*'s experience was not an outlier. Scores of other women likewise reported that they felt intimidated, silenced, and forced into seclusion as a result of this law.¹⁶⁶ Not only does this law codify a legal division between veil-wearing Muslims and the rest of the populace, it also fostered Islamophobic sentiments among the population as well. It is hardly an outlandish conclusion to think that this policy might equally fuel Muslim resentment of the French government. If more anti-Muslim policies follow, it may be only a matter of time until the relationship between France and its Muslim population mirrors the conflict between the Uyghurs and the Chinese government.

C. Counter-Factualism

The decision in *S.A.S.* enables another common facet in fascist regimes: a distaste for concrete evidence in favor of legislating based on cultural biases. As mentioned in Part I, the French parliament enacted the veil ban under the guidance of a report detailing the commonality of the veil and its religious significance. To add further detail, this was a 658-page report that consulted 200 witnesses and experts and even sent questionnaires to numerous French embassies.¹⁶⁷ However, the creators of this report never intended to interview *any* veil-wearing women, and only interviewed a single veil-wearer after she requested to be heard.¹⁶⁸ In other words, France passed a law to regulate the behavior of an entire religion when it had little

¹⁶³ *Id.* at 295–96.

¹⁶⁴ *Id.*

¹⁶⁵ *S.A.S.*, *supra* note 4, ¶¶ 12, 69.

¹⁶⁶ Brems, *supra* note 40, at 68.

¹⁶⁷ Eva Brems, *Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings*, 22 J.L. & POL'Y 517, 518 (2014).

¹⁶⁸ *Id.*

information as to why these practices were observed. Moreover, both France and the ECHR conveniently disregarded substantial empirical evidence that undermined France's policy. Prior to the ban, empirical research demonstrated that veil-wearing women led "average" lives and routinely engaged in common social activities, including "contact with others at school (picking up children), in shops, [and in] administrative offices."¹⁶⁹ While other non-veil-wearers perceived a barrier to communication, there was no evidence that these women were actively secluding themselves from socialization.¹⁷⁰ Instead, the evidence submitted to the ECHR *by France itself* demonstrates that the ban impaired the social participation of these women.¹⁷¹ Likewise, another report submitted to the court demonstrated that "[t]he ban and public discourse seems to have implicitly legitimized the abusive treatment of veiled women."¹⁷² Ultimately, there was no evidentiary support for the ban and, instead, both France and the ECHR opted to rely on baseless assumptions of the meaning of the veil.

Had France or the ECHR considered the experiences of people who actually wear the veil, they would have been exposed to perspectives that are very different from those reflected in the legislative history of the ban. Eva Brems, a professor of human rights law, conducted a number of interviews with French women who wear the veil, which reveal a narrative contrary to the presumptions employed by France.¹⁷³ One woman recalled that, prior to the ban:

At the time I lived in a neighborhood of old people And these people recognized me without any problem and they acted toward me as if they saw whoever else in the street We were good neighbors, and I remember that when we moved, the old people were even sad because they told us: "Oh, we knew you so well and we knew that we could count on you, that we could ask you something."¹⁷⁴

Some women even recalled that their social interactions helped to remedy negative biases:

In a supermarket, people told me "madam, why do you wear that?" I came closer to a gentleman and told him what the religion says. It is not mandatory but if you do it on your own initiative He told me "maybe your husband forced you."

¹⁶⁹ Brems, *supra* note 40, at 67.

¹⁷⁰ *Id.*

¹⁷¹ *S.A.S.*, *supra* note 4, ¶ 146; Brems, *supra* note 40, at 68.

¹⁷² Brems, *supra* note 40, at 69.

¹⁷³ Brems, *supra* note 167, at 517, 539–41.

¹⁷⁴ *Id.* at 539.

I said “you see, I do my shopping all alone, and I drive alone, there is nobody with me.” And he was satisfied.¹⁷⁵

However, the experiences of these women changed drastically after the ban was enacted. One woman with a two-and-a-half-year-old son is too afraid to accompany him when he goes to play in the park.¹⁷⁶ Another described her harassment:

Last time I went to Auchan (supermarket EB), a mob formed around me and people were saying “what are you doing here? It’s forbidden! You have no right to go out entirely veiled. It’s banned, it’s illegal. Go back to your country.” [I] feel like a monster. Even pedophiles and criminals, are not treated like that We are seen as less than nothing, not as human beings.¹⁷⁷

Once again, the experience of veil-wearers demonstrates the counter-productive effect of the ban on veils.

Importantly, the legislative history also neglected to consider the personal meanings that veil-wearers attribute to the veil. One woman described the veil as “[m]y veil is my chastity, it is my behavior, it is my politeness, it is my respect.”¹⁷⁸ Another woman found herself empowered by the veil: “A woman who is completely veiled, for me she is a woman with strength, with enormous self-confidence. . . . You need it very much.”¹⁷⁹ Several women rejected the claim that they only wear the veil because a man has forced them to do so. “It’s really, really humiliating and degrading for the personality of a Muslim girl, to hear someone say morning and evening ‘it’s the men who submit you, it’s the men who oblige you.’”¹⁸⁰ Brems’s interviews revealed that most veil-wearers only see the veil as a symbol—a sign of religious devotion—and that the veil is unrelated to behavior or gender relations.¹⁸¹ Indeed, the interviewees displayed varied and nuanced stances on gender equality. One woman expressed that: “I do not want to be equal to a man, I want to remain a woman, I don’t want to do the work of a woman and a mother and do the work of a man on top of that.”¹⁸² Meanwhile, a different woman offered a comparative experience:

I went to Egypt and met women with a burqa who were lawyers, doctors. I also want to be like that, to achieve

¹⁷⁵ *Id.* at 540.

¹⁷⁶ *Id.* at 541.

¹⁷⁷ *Id.* at 540–41 (alteration in original).

¹⁷⁸ *Id.* at 545.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 549.

¹⁸¹ *Id.* at 550.

¹⁸² *Id.*

something more. I can study, I can work, I can do the same things as any other woman or man. . . . At my house, we are two to vacuum, two to prepare meals, two to bathe the children, two to change the diapers, two to do the shopping, two to babysit.¹⁸³

Overall, many veil-wearers would prefer not to be forced to choose between expressing their religious devotion or pursuing a career and life outside of the household.¹⁸⁴

Finally, there is an inherent illogic in the construction of the French ban, along with similar bans. Notably, the exceptions to the ban are irrational when the law is solely justified by the need to protect the rights of socialization. These exceptions allow full-face coverings for sport, work, and festivals.¹⁸⁵ Yet if socialization is so important that a woman must be forced to change her clothing whenever she goes out into public, there is no reason why these exceptions should exist because they are also the bane of social interaction.¹⁸⁶ Furthermore, the rationale for the ban was similarly untethered from logical justification. While a state may certainly impose certain requirements on its populace given solid legal or moral justification—e.g., prohibiting murder or requiring jury service—there is no similar justification for arbitrarily inflicting the norms of a majority culture on religious minorities.¹⁸⁷ As the Council of State in the Netherlands rightly noted, the only justification for this policy lies in “the subjective insecurity” of the cultural majority.¹⁸⁸

III. *S.A.S.* AND THE WIDE MARGIN OF APPRECIATION

While there is certainly a myriad of problems presented by the ECHR’s decision in *S.A.S.*, each of the aforementioned dilemmas stems from a common cause: the wide margin of appreciation employed by the court. Oftentimes, the critiques of *S.A.S.* fixate on how France’s actions go well beyond the norm and clearly abrogate fundamental freedoms. Yet, these actions are only possible because of a lack of international oversight. The ECHR abdicated its duty to protect religious liberty and enabled France’s bad actions. Indeed, this margin of appreciation standard is likely primarily responsible for the spread of these bans, which will only further exacerbate the problems noted in the critiques.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 550–51.

¹⁸⁵ *S.A.S.*, *supra* note 4, ¶¶ 28, 31.

¹⁸⁶ *Yusuf*, *supra* note 123, at 286–87.

¹⁸⁷ *Id.* at 285.

¹⁸⁸ *S.A.S.*, *supra* note 4, ¶¶ 6, 122.

Under the margin of appreciation, the ECHR has empowered France's secularist policy. Implicit in the decision in *S.A.S.* is the notion that French society is so steeped with notions of secularism that this policy must be allowed to continue. Put differently, the court has effectively declared that secularism is a core French value.¹⁸⁹ Without critical evaluation, the court has enshrined French secularism. Yet, this ignores ample evidence that French secularism is actually biased by its historic Judeo-Christian roots.¹⁹⁰ Given the continued affirmation of this policy by the court,¹⁹¹ it is highly unlikely that it will ever engage in the critical evaluation necessary to realize the faults of French secularism.

Likewise, the wide margin of appreciation has emboldened assimilationist and nationalist movements that seek to create a single national culture. When *S.A.S.* was decided, only two European nations had enacted bans on the veil.¹⁹² Currently, however, eight nations employ some variation of a veil ban, and more are likely to follow.¹⁹³ Even in the United Kingdom, which France has derided as too liberal in its acceptance of the veil,¹⁹⁴ a recent poll revealed that a majority of people support a burqa ban.¹⁹⁵ Without international oversight, the hyper-fixation on eliminating the veil is likely to continue. These nations have become obsessed with the perception that the veil somehow impairs a person's ability to integrate into the society.¹⁹⁶ It is also incredibly easy to justify these bans to the ECHR. Under the wide margin of appreciation, nations are allowed to impose the social norms of the majority culture upon any divergent minority group. Furthermore, as evident in the court's recent decisions in favor of Belgium's ban on the veil, the margin of appreciation allows these bans simply upon a showing that the nation followed its normal legislative procedure.¹⁹⁷ In effect, should a nation descend into fascism and wish to annihilate a religious minority, there is little that the court could do under this margin of appreciation standard if the legislature approved of the transition to fascism.¹⁹⁸ Without oversight, there is little standing in the way of a European nation treating its Muslim population the same way that the Chinese treat the Uyghurs.

¹⁸⁹ Savić, *supra* note 107, at 679.

¹⁹⁰ *Supra* Part II.A.

¹⁹¹ The ECHR has routinely affirmed this policy in *Dogru*, *S.A.S.*, and the recent Belgian cases.

¹⁹² *S.A.S.*, *supra* note 4, ¶ 40.

¹⁹³ *Supra* Part I.C.

¹⁹⁴ *S.A.S.*, *supra* note 4, ¶ 16.

¹⁹⁵ *The Islamic Veil Across Europe*, BBC NEWS (May 31, 2018), <https://www.bbc.com/news/world-europe-13038095>.

¹⁹⁶ Amiraux, *supra* note 101, at 47.

¹⁹⁷ *Dakir*, *supra* note 73, ¶¶ 57–58.

¹⁹⁸ Yusuf, *supra* note 123, at 291.

Furthermore, when enacting these bans, there is little need to rely on any empirical evidence—or even actual evidence—to support claims that the veils inhibit social interaction. The ECHR’s margin of appreciation is so broad that the court just accepts at face value the claim that the veil impairs the wearer’s ability to communicate. The court decided this despite clear evidence to the contrary.¹⁹⁹ In fact, the margin of appreciation granted to France’s principle of living together is more permissive than other standards in this regard. When the court dismissed the claim that the veil impairs gender equality, it reflected that there was no concrete support to this claim.²⁰⁰ However, that same rigor was not applied to analyzing the dearth of evidence in support of the “living together” argument. As a result, under this lenient margin of appreciation standard, there is no protection against capricious state action that is untethered from reality.

CONCLUSION

The margin of appreciation is a conflict inherent to the construction of the Convention. It simultaneously declares a right to religious expression and accords nations the ability to abrogate that freedom, albeit under certain circumstances. In order for both to coexist, there must be a balance; the interests of the states must be balanced against the religious interests of *all* the citizens. *S.A.S.* disrupts the traditional balance of the margin of appreciation. The ECHR enabled France to privilege the interests of some of its citizens above the rights of veil-wearing women. Indeed, this favoritism is already apparent in French secularism. While Judeo-Christian traditions often remain acceptable under this policy, Islamic customs are frequently targeted and rebuked; the policy itself even appears to stem from bald Islamophobia. Likewise, the court’s margin of appreciation standard found it equally palatable that France openly sought to root out minority cultures in order to impose a unified national identity. Perhaps most disturbing is the near-complete abandonment of judicial review of these policies. The court has seemingly no interest in reviewing the factual basis, or lack thereof, of veil bans. So long as these religious restrictions pass through legislative bodies, the *S.A.S.* margin of appreciation requires no further inquiry to find the law permissible. Through this standard, the court has effectively ceded its authority in preventing religious discrimination.

The threat posed by anti-Muslim policies now gaining strength in Europe is not mere conjecture. The current fate of the Uyghur population in China reveals the danger lurking in Europe’s future should these policies continue. Under policies resembling French secularism and the “living together” argument, the Chinese government has enacted a cultural genocide against the Uyghurs. If France can force Muslim women to remove their

¹⁹⁹ Brems, *supra* note 40, at 68.

²⁰⁰ *S.A.S.*, *supra* note 4, ¶ 119; Brems, *supra* note 40, at 64.

veils without repercussion, it is hardly a stretch of the imagination to consider that France could also force Muslim men to shave, restrict access to Mosques, or even prohibit celebration of Ramadan, as China has done. Moreover, as China has experienced, these policies have encouraged acts of terror and violence against civilians. Rather than unify the country, these policies have created a deep schism between the Uyghurs and the rest of China. For the same reasons, continuing towards this claimed goal of “living together,” or forced assimilation, as it is better described, is likely to end in the same result for France.

The threat posed by these policies is especially salient at this moment in time given the rise in nationalism and fascism in Europe. In recent years, parties such as the British National Party, the English Defense League, Austria’s Freedom Party, and Germany’s Alternative für Deutschland have gained strength in their respective countries. Many of these parties articulate a desire for a single national culture, typically one that is white and Christian. While these parties have not gained majority support per se, some of these views have garnered majority support. A majority of the United Kingdom supports a ban on the veil. Moreover, as demonstrated in this Note, France’s veil ban, despite a troubling desire to mandate cultural norms, garnered near-unanimous support in the French parliament. Should these nationalist parties gain actual majority support, they could easily enact further restrictions to enforce cultural norms and progress further towards the current crisis of the Uyghurs in China.

Now, Europe is not destined to treat its Muslim population the same as China. Unlike China, there is a dedicated system designed to prevent such human rights abuses: the European Court of Human Rights. However, in order to prevent this, the court actually needs to perform as intended and conduct oversight of these policies. Without the court, there is nothing stopping these nations and the growing nationalist movements therein from following China’s example. The margin of appreciation applied in *S.A.S.* is simply too broad to uphold the purposes of the Convention. If article 9 is to have any value going forward, this standard must change.