

# The Multilocal Genesis and Migration of the European Face Veil Bans

*Malthe Hilal-Harvald\**

|                                                        |     |
|--------------------------------------------------------|-----|
| Abstract                                               | 121 |
| I. Introduction                                        | 122 |
| II. Early Legislative Debates                          | 125 |
| III. “Living Together” as a New Legal Principle        | 131 |
| IV. Defending the Principle of “Living Together”       | 140 |
| V. The Migration of the Principle of “Living Together” | 145 |
| VI. Conclusion                                         | 151 |

## Abstract

Since 2010, Europe has seen the enactment of bans on face veils in the public space in several European jurisdictions. The French and Belgian face veil bans have been challenged and upheld in the European Court of Human Rights in three instances. These bans have caused a vast amount of scholarly literature; most of which criticizes the face veil bans for being unjustified restrictions on the freedom of religion. However, the current literature does not account for how this legally questionable but nonetheless politically popular idea could migrate swiftly through multiple different jurisdictions regardless of their Church-State relations. Thus, the objective of this article is to illuminate the migratory dynamics that have led France, Belgium, Austria, the Netherlands, and Denmark to adopt the same legal strategy towards the perceived dangers of the Islamic face veil. By applying the metaphor of migration of constitutional ideas to the legislative histories of the five case studies as well as the links between them, this article demonstrates how the idea of banning face veils cannot be traced back to a single jurisdiction or legal tradition. Rather it has emerged through a vivid cross-jurisdictional and multilocal political and legal discourse. This in turn may explain why the idea of banning face veils could migrate rapidly as soon as it found a legally viable justification, namely the principle of “living together”.

---

\* The author holds an LL.M. from the University of Copenhagen, where he is currently pursuing a Ph.D. degree at the Centre for European and Comparative Legal Studies. The author would like to thank *Adeel Hussain* for his encouragement and initial guidance as well as *Acar Kutay* for his support and suggestions during the writing process.

## I. Introduction

On 31.5.2018, Denmark became the fourth country in Western Europe to pass legislation banning the wearing of face veils in the public space – a so-called “burqa ban”.<sup>1</sup> Less than a month later, the Netherlands introduced a partial – albeit extensive – ditto. After a slow start, similar legislation has proliferated throughout Western Europe during the past eight years;<sup>2</sup> in addition to Denmark and the Netherlands, face veil bans have been enacted in France, Belgium, and Austria, and it is to be expected that a ban will be introduced in Switzerland by referendum in the foreseeable future. Furthermore, the French and Belgian bans have been tried in three instances before the European Court of Human Rights (ECtHR) and have been found compatible with the European Convention on Human Rights (ECHR).

This surge in face veil bans has resulted in copious academic literature, most of which criticizes the bans and their justifications. The critique can be divided into different clusters. One such cluster focuses on the illiberal nature of introducing restrictions on fundamental rights and freedoms without an objectifiable reason.<sup>3</sup> Closely related is the cluster of those who find that face veils may be restricted under certain circumstances, but that the general bans are disproportionate.<sup>4</sup> Finally, another cluster of scholars criti-

---

<sup>1</sup> Note on terminology: In this article, the generic term face veil or Islamic face veil will be used rather than *burqa* or *niqab*, which are both regional types of face veils. The *burqa* is a garment mostly associated with Afghanistan and Pakistan that covers the face entirely with a mesh. The *niqab* has its origin in the Arab world and covers everything but the eyes. The face veil should not be confused with the headscarf or *hijab*, which covers hair and neck, but not the face.

<sup>2</sup> Some Eastern European states have likewise introduced face veil bans. These will not be discussed in this article due to the language barrier.

<sup>3</sup> See for example *M. Hunter-Henin*, *Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom*, ICLQ 61 (2012), 618: “The mere fact that the French State intervenes in matters of religion does not necessarily go against the core features of French secularism, as long as these interventions can be said to strengthen freedom of conscience. One fails to see however how the intervention of the French State to ban the burqa will reinforce freedom of conscience.”

See also *A. Steinbach*, *Das Tragen religiöser Symbole unter der Europäischen Menschenrechtskonvention: Die Burka-Entscheidung des EGMR im Fall S.A.S. gegen Frankreich*, AVR 52 (2014), 430: “Es ist nicht erkennbar, warum im physischen Umgang miteinander andere Regeln gelten sollen nur weil es den mehrheitlichen europäischen soziokulturellen Umgangsformen entspricht, sein Gesicht erkennen zu geben. Im Ergebnis kann hier angesichts des Fehlens der Betroffenheit einer individuellen Rechtsposition schon nicht von einem ‘Recht anderer’ gesprochen werden. Zudem kann ebenso wenig überzeugend behauptet werden, dass die Erkennbarkeit des Gesichts Ausdruck von Toleranz sein soll.”

<sup>4</sup> See for example *E. Brems/J. Vrielink/S. O. Chaib*, *Uncovering French and Belgian Face Covering Bans*, *Journal of Law, Religion & State* 2 (2013), 98: “When the arguments in sup-

cizes the bans for being misguided<sup>5</sup> or simply ineffective.<sup>6</sup> In other words, the bans have been characterized as unjustified, disproportionate, and unnecessary by some of the leading scholars in the field.

However, the current literature does not account for how this seemingly questionable but nonetheless popular legal idea could migrate swiftly through multiple different European jurisdictions that all have religious freedom enshrined in their constitutions.<sup>7</sup> Thus, the objective with this article is to illuminate the murky origins and migratory dynamics that have led multiple European countries to adopt the same legal strategy towards the perceived dangers of the Islamic face veil.

As a framework for this investigation, I use the migration metaphor in comparative constitutional law as developed by *Sujit Choudhry* and others in the seminal anthology “The Migration of Constitutional Ideas”.<sup>8</sup> In her study of the migration of anti-constitutional ideas, *Kim Lane Scheppele* succinctly explains the significance of the migration metaphor as an analytical tool:

“[...] migration opens up the metaphorical field for contemplating greater transformations, different sorts of power relations at different points in the migratory process, and a broader range of connections between the migrant and the context. Migration is an idea that allows consideration of greater flexibility, larger

---

port of the bans are examined closely, it appears that they are unable to justify a general prohibition because such a measure is either not relevant to achieving its objective or because it is not proportionate with it.”

<sup>5</sup> See for example *C. Laborde*, State Paternalism and Religious Dress Code, *I.CON* 10 (2011), 408: “Legal coercion is a blunt instrument and, while paternalistic policies are routinely defended by appeal to high-minded principles, they often backfire and end up undermining, rather than fostering, the practical effectiveness of the principles in question.”

<sup>6</sup> See for example *R. Michaels*, Banning Burqas: The Perspective of Postsecular Comparative Law, *Duke J. Comp. & Int'l L.* 28 (2018), 242: “[T]he ban on face veils appears implausible because it is so purely symbolic, so clearly ineffective at fending off a real danger. Even if political Islam is viewed as a real risk for the Western state, that danger lies with terrorists with bombs and preachers with hate speech, not with women who wear a veil.”

<sup>7</sup> For one of the few examples of a cross-European comparison, see *A. Ferrari/S. Pastorelli* (eds.), *The Burqa Affair Across Europe: Between Public and Private Space*, 2013. The volume provides a number of detailed national studies and some comparative observations. *D. Koussens/O. Roy* (eds.), *Quand la burqa passe à l'ouest: Enjeux éthiques, politiques et juridiques*, 2014, likewise provides both cross-cutting insights and comparative case studies. See also *E. Brems/J. Vrielink/S. O. Chaib* (note 4) for a discussion of the emergence of face veil bans in several European countries (in particular France, Belgium, and the Netherlands). However, given the rapid development since their publication, in particular since the cases before the ECtHR and the crystallization of the legal justification for the bans, these texts are somewhat outdated.

<sup>8</sup> *S. Choudhry* (ed.), *The Migration of Constitutional Ideas*, 2006.

networks of relation, more complicated connections between points of origin and points of destination that occur in the world of legal ideas.”<sup>9</sup>

In this article, it will be argued that in order to comprehend the phenomenon of the face veil ban, we must appreciate the migration metaphor in its full complexity and apply it not only to the spread, but also to the emergence of legal ideas. The argument unfolds in the following order:

Section II explores the origins of the idea that certain types of Islamic garb should be restricted in the public space by law. This idea was propagated by parties on the political far right as well as national conservatives in multiple West European states. The rhetoric surrounding the proposals drew inspiration from French and German legal debates on headscarves. The proposals were formulated as directly discriminatory against Muslim attire and thus not concerned with constitutionality or compliance with the ECHR. For that reason, they did not find broad support from other political parties at the time. However, in France, the center-right government worked more systematically to mobilize and reinterpret republican principles to enhance national unity.

Section III examines how the efforts in this regard produced the first legally workable justification aimed at banning Islamic face veils. By combining the political legitimacy of the so-called *Gerin* report with the legal expertise of the Council of State (*Conseil d'État*), the French government produced a proposal for a general face veil ban justified with a reinterpretation of public policy based on the principle of *fraternité*. I argue that although this justification in one sense was rather specific to France, it was also profoundly influenced by parallel developments in other countries.

Section IV reviews the relevant case law before the ECtHR, particularly focusing on how the legal justifications for the French and Belgian face veil bans were modified and refined to hold up to the scrutiny of the Court. By accepting the principle of “living together” as a legitimate reason for limiting the freedom to manifest one’s religion, the ECtHR not only set a new precedent in its own case law, it also served as a vehicle for the further and faster migration of the face veil ban across Europe.

Section V examines the proliferation of European face veil bans since the ECtHR’s decisions on the French and Belgian bans. By in-depth analyses of the justifications for the Dutch, Austrian and Danish bans, it is demonstrated how the new legal principle of “living together” has migrated both transnationally and supranationally as well as how the justification has become

---

<sup>9</sup> K. L. Scheppele, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*, in: S. Choudhry (note 8), 349.

consolidated in European constitutional law beyond the countries where it was first formulated.

## II. Early Legislative Debates

The legislative debates on Islamic face veils in Western Europe began when the Belgian far right party *Vlaams Blok* tabled bills in both the Senate (*Senaat/Sénat*) and the Chamber of Representatives (*Kamer van Volksvertegenwoordigers/Chambre des représentants*) in the beginning of 2004.<sup>10</sup> Materially, the two proposals are identical. In the opening paragraph, the drafters refer to the ongoing headscarf controversy in Belgium and abroad,<sup>11</sup> and they call for a clear stance as the one supposedly taken by the German Federal Constitutional Court (FCC) in what has become known as the *Ludin* case.<sup>12</sup> With a majority of five to three, the FCC overturned the decision of the Federal Administrative Court (*Bundesverwaltungsgericht*) and affirmed the applicant's constitutional right to wear a headscarf as a public school teacher.<sup>13</sup> However, the FCC also ruled that the individual states (*Länder*) may adopt legislation limiting the religious appearance of civil servants.<sup>14</sup> Given that the main concern of the dissenting judges was the uncertainty created by the majority,<sup>15</sup> and given that Germany did not opt for a general ban on neither headscarves nor face veils in the public space,<sup>16</sup> the reference to the *Ludin* case appears mildly ironic. Furthermore, it appears that the drafters of the Belgian proposal – deliberately or not – correlate the headscarf with the face veil in order to draw on an existing European political and legal discourse.<sup>17</sup> The proposal was not debated by ei-

<sup>10</sup> Document parlementaire No. 3-463, Sénat 2003-04; Document parlementaire No. 51-880, Chambre 2003-04.

<sup>11</sup> This most likely includes the French *loi du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* (hereinafter “the 2004 Law”) as well as the controversy surrounding its creation.

<sup>12</sup> BVerfG, 24.9.2003 – 2 BvR 1436/02.

<sup>13</sup> BVerfG (note 12), paras. 61 and 72.

<sup>14</sup> BVerfG (note 12), para. 62.

<sup>15</sup> BVerfG (note 12), para. 138.

<sup>16</sup> In fact, the Research Services of the Parliament (*Wissenschaftliche Dienste des Deutschen Bundestages*) found that a general face veil ban would be unconstitutional. See Deutscher Bundestag, WD 3 – 3000 – 112/10.

<sup>17</sup> For details on the French headscarf debate – which has been the most vivid – see for example *J. R. Bowen*, *Why the French Don't Like Headscarves: Islam, the State, and Public Space*, 2007; *B. Winter*, *Hijab & the Republic: Uncovering the French Headscarf Debate*,

ther chamber of the Belgian parliament. However, in the 2007–2010 legislative session, multiple new proposals for introducing a general ban were tabled; several of which referred to “living together” (*vivre ensemble*).<sup>18</sup> Although one proposal was adopted nearly unanimously, it was not enacted due to the resignation of the government and dissolution of both chambers in May 2010.<sup>19</sup>

Inspired by the early developments in Belgium,<sup>20</sup> the Dutch far right parliamentarian *Geert Wilders* brought up the issue of face veils in the House of Representatives (*Tweede Kamer der Staten-Generaal*) on 10.10.2005.<sup>21</sup> However, no action was taken, so on 19.10.2006, *Wilders* again pushed for action against face veils during a longer debate on counterterrorism measures.<sup>22</sup> The government decided to establish a commission of experts to investigate possibilities for banning the face veil, and the minister for foreigners and integration, *Rita Verdonk*, announced the findings to the House of Representatives on 28.11.2006. The commission concluded that directly discriminatory bans against Islamic face veils were not legally tenable, as they would run counter the freedom of religion; on the other hand, general bans on face coverings or spatially and functionally limited bans could be considered. The government proclaimed to work on a bill based on those findings.<sup>23</sup>

However, impatient with the slow pace of government action, *Wilders* together with another lawmaker proposed an amendment to the Dutch penal code specifically banning Islamic face veils in public.<sup>24</sup> *Wilders* provided three arguments for introducing the ban: 1) Face veils are at odds with modernity and the values of a constitutional state; 2) face veils impede the emancipation and integration of women; 3) face veils constitute a security threat. However, no consideration was given to the compatibility of such a ban with the Dutch constitution or the ECHR. Under the subheading “Comparison of law”, it was noted that no foreign national legislator had

---

2008; *C. Laborde*, *Critical Republicanism: The Hijab Controversy and Political Philosophy*, 2008.

<sup>18</sup> Document parlementaire No. 52-433, Chambre 2007-08; Document parlementaire No. 52-799, Chambre 2007-08; Document parlementaire No. 52-2287, Chambre 2009-10; Document parlementaire No. 52-2442, Chambre 2009-10; Document parlementaire No. 52-2495, Chambre 2009-10.

<sup>19</sup> *E. Brems/J. Vrielink/S. O. Chaib* (note 4), 77.

<sup>20</sup> *A. Moors*, *The Dutch and the Face-Veil: The Politics of Discomfort*, *Social Anthropology/Anthropologie Sociale* 17 (2009), 398.

<sup>21</sup> Tweede Kamer, vergaderjaar 2005-2006, 29 754, Nr. 41.

<sup>22</sup> Tweede Kamer, vergaderjaar 2006-2007, 29 754, Nr. 88.

<sup>23</sup> Tweede Kamer (note 22), Nr. 91.

<sup>24</sup> Tweede Kamer, vergaderjaar 2006-2007, 31 108, Nr. 1.

prohibited the wearing of face veils in the public space, but that Belgium had regional bans on face veils, and France and Turkey had partial bans on headscarves.<sup>25</sup>

Around the same time, *Jacques Myard*, a republican member of the French National Assembly (*Assemblée Nationale*), tabled the first proposal for a general face veil ban in France.<sup>26</sup> The proposal was inspired by the 2004 Law<sup>27</sup> and was thus primarily justified by the principle of *laïcité*. The proposal was not debated. Nonetheless, encouraged by a Council of State (*Conseil d'État*) decision that upheld an administrative decision to deny a Muslim woman French citizenship because she would not remove her face veil,<sup>28</sup> *Myard* put forward an almost identical proposal on 23.9.2008.<sup>29</sup> The second proposal was likewise not debated.

In October 2009, the far right Danish People's Party (*Dansk Folkeparti*) proposed a face veil ban in the Danish parliament (*Folketinget*).<sup>30</sup> The drafters referred to an earlier interview with the conservative Minister of Justice, *Brian Mikkelsen*, who had said that a face veil ban would be sound conservative policy.<sup>31</sup> In fact, the conservative spokesperson for integration, *Naser Khader*, had been the first parliamentarian to air the idea of a ban.<sup>32</sup> Other parties were initially favorable to the idea, but withdrew their support when the legal constraints became clear.<sup>33</sup>

Parliamentarians from the Danish People's Party had at various times before the proposal requested information from the Minister of Justice about the exact interpretation of the anti-masking provision in the Danish penal code, the impact of face veils on traffic safety, the number of women in face veil who had given witness testimony in Danish courtrooms, as well as whether women in face veil would fulfill the requirements for receiving unemployment benefits. However, more important for the present argument

<sup>25</sup> Tweede Kamer (note 24), Nr. 3.

<sup>26</sup> Document parlementaire No. 3056, Assemblée nationale, XIIe legislature.

<sup>27</sup> See note 11.

<sup>28</sup> Conseil d'État No. 286798, 27.6.2008. For a detailed analysis of this case and its broader context, see *J. R. Bowen*, How the French State Justifies Controlling Muslim Bodies: From Harm-Based to Values-Based Reasoning, *Social Research* 78 (2011) and *C. Laborde*, Virginité et burqa: des accommodements déraisonnables? Autour des rapports Stasi et Bouchard-Taylor, *La Vie des idées* (2008).

<sup>29</sup> Document parlementaire No. 1121, Assemblée nationale, XIIIe legislature.

<sup>30</sup> Already in 2004, Danish People's Party had proposed a ban for public employees on any religious headgear falling outside the Judeo-Christian culture. The proposal was not adopted. *Beslutningsforslag Nr. B 201, Folketinget 2003-2004, Folketingstidende A.*

<sup>31</sup> *Beslutningsforslag Nr. B 11, Folketinget 2009-2010, Folketingstidende A.*

<sup>32</sup> *Politiken*, K kræver forbud mod burka, 17.8.2009, <<https://politiken.dk>>.

<sup>33</sup> *Information*, Socialdemokraterne skifter mening om burkaforbud, 7.9.2009, <<https://www.information.dk>>.

was the substantial interest in the developments in Belgium, the Netherlands, and France shown by the proponents of a Danish ban.<sup>34</sup> It is clear that the proponents for a general ban were scrambling to find a justification, and they followed the European development closely for that purpose.

As a consequence of these debates, the center-right government appointed a so-called burka commission in August 2009, which among other things was tasked with gathering information from other countries about the use of religiously motivated dress as well as with considering ways of limiting the perceived problem with such dress.<sup>35</sup> Furthermore, although most lawmakers found a general ban incompatible with the Danish constitution and the ECHR, a partial ban on religiously conspicuous clothing for judges and magistrates was introduced,<sup>36</sup> the veil was banned for witnesses testifying in court, and the punishment for forcing someone to wear a veil was expressly tightened.<sup>37</sup>

\*\*\*

The early Dutch, Belgian, and Danish initiatives to ban the face veil were initially fruitless – mainly due to legal constraints. But in France, efforts to overcome such constraints continued. In particular, the center-right administration under President *Nicolas Sarkozy* labored to redefine the constitutional principle of *laïcité*. *Eoin Daly* argues that

“[w]hen considered in conjunction with the officially orchestrated debate on national identity [...], this created an impression of the republican normative lexicon – especially *laïcité* – having been opportunistically re-interpreted in an ethno-nationalist sense by the centre-right as a strategic response to the challenge of the far right”.<sup>38</sup>

<sup>34</sup> Spørgsmål Nr. 665 fra Folketingets Retsudvalg (Alm. del), 2008-09; Spørgsmål Nr. 1310 fra Folketingets Retsudvalg (Alm. del), 2008-09; Spørgsmål Nr. 211 fra Folketingets Udvalg for Udlændinge- og Integrationspolitik (Alm. del), 2011-12.

<sup>35</sup> Statsministeriet, Afrapportering fra arbejdsgruppen om burka, niqab og lignende beklædning (januar 2010), <<http://stm.dk>>. The government simultaneously commissioned a study of the phenomenon from the Institute for Cross-Cultural and Regional Studies at the University of Copenhagen. Institut for Tværkulturelle og Regionale Studier (Københavns Universitet), Rapport om brugen af niqab og burka, 18.1.2010.

<sup>36</sup> Lov Nr. 495 af 12.6.2009 (Dommeres fremtræden i retsmøder), Lovtidende A.

<sup>37</sup> Lov Nr. 651 af 15.6.2010 (Skærpelse af straffen for ulovlig tvang i forbindelse med brug af ansigtstildækkende beklædning samt ansigtstildækkende beklædning under vidneforklaring), Lovtidende A. For a thorough analysis of the legislative history of this law, see *K. S. Mirza, Æresrelaterede forbrydelser: Strafferetlige perspektiver*, 2018, 235 et seq.

<sup>38</sup> *E. Daly, Laïcité and Republicanism During the Sarkozy Presidency*, French Politics 11 (2013), 186.



Agreeing with *Daly, John R. Bowen* characterizes this as “a period when the center right party [sought] to carve out electoral territory from the increasingly popular National Front.”<sup>39</sup>

*Stéphanie Hennette-Vauchez* argues that since the beginning of the 20<sup>th</sup> century, *laïcité* has had a relatively stable interpretation and application, whereby individuals have been given the freedom of religion, and the State has had the duty of neutrality. However, the principle has been reinterpreted to demand neutrality of the individuals and thus curtailing their freedom; to a point where the

“developments have been so sweeping that one might describe the current state of the law as *new laïcité*, so as to underline the actual subversion of the original meaning of the principle”.<sup>40</sup>

A major step in buttressing this reinterpretation was the appointment by the French National Assembly of a fact-finding mission headed by the communist delegate *André Gerin*. The findings of the mission were published on 26.1.2010 in what has become known as the *Gerin* report.<sup>41</sup> The *Gerin* report is a document of 658 pages, divided into three parts with three distinct objectives. The first part argues that the wearing of veils is non-Islamic in its origin, not prescribed by the rules of Islam, but that it nonetheless has become a recent symbol of communitarianist withdrawal from society. The second part seeks to demonstrate that the wearing of face veils contradicts four different fundamental republican values: *laïcité*, liberty, equality, and *fraternité*. The third part concerns the liberation of the women who wear a face veil.

The idea that the State should determine the correct interpretation of certain religious practices contradicts a long tradition of state neutrality and impartiality as enshrined in the *loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat* (hereinafter “the 1905 Law”) and, by extension, the constitution.<sup>42</sup> This tradition of neutrality was invoked by the French government in a ECtHR case about ritual slaughter of animals, where it “emphasised that it was not for the French authorities, bound as they were to respect the principle of secularism, to interfere in a controversy over

<sup>39</sup> *J. R. Bowen* (note 28), 326.

<sup>40</sup> *S. Hennette-Vauchez*. Is French *laïcité* Still Liberal? The Republican Project under Pressure (2004-15), HRLR 17 (2017), 287.

<sup>41</sup> Documents parlementaires No. 2262, Assemblée nationale, XIII<sup>e</sup> législature.

<sup>42</sup> According to *G. Carcassonne/M. Guillaume*, *La Constitution*, 2017, 46, the Conseil constitutionnel décision No. 2012-297 QPC, 21.2.2013, effectively writes the basic principles of the 1905 Law into Art. 1 of the French Constitution.

dogma”.<sup>43</sup> By way of analogy, it is not for the State to decide which type of garments best live up to the religious requirements of modesty. However, as *Jennifer A. Selby* convincingly demonstrates, this is exactly what the authors of the *Gerin* report did, when they “[i]nstead of quantifying the prevalence of the practice, focuse[d] mostly upon a delineation of ‘proper’ Republican or domesticated Islam”.<sup>44</sup>

With the *Gerin* report we also see the first shift from justifying face veil bans with the principle of *laïcité*, as *Myard* had attempted, to justifying it with *fraternité* or a republican conception of “living together” (*vivre ensemble*). This shift is imperative, because it made it possible to formulate the ban in general, non-religious terms, thus avoiding the accusation of religious discrimination. Furthermore, whereas *laïcité* as a principle of governing Church-State relations is only found in a few countries in Europe, “living together” or social cohesion can be repurposed as a legal justification in most societies. This shift in justificatory repertoire ultimately ensured the legal viability of the face veil bans.

When creating the political basis for legislative action, the authors of the *Gerin* report not only drew on (reinterpreted) French republican principles, but also on the experiences and debates of other European countries. An entire section of the report is dedicated to describing the situation in other (mostly European) countries. Just as the very first Belgian proposal, the *Gerin* report refers to the German *Ludin* case and notes that six German states decided to limit the wearing of headscarves in the wake of the FCC decision.<sup>45</sup> With respect to Denmark, the results from the previously mentioned fact-finding commission were included.<sup>46</sup> Furthermore, significant attention is given to Belgium and the Netherlands.<sup>47</sup> It is written in bold types that as in France the current debate in Belgium concerns the constitutionality of forbidding or strictly limiting the use of face veils.<sup>48</sup> However, it is noted that despite several attempts at introducing a general ban, the lack of a clear legal basis has stood in the way.<sup>49</sup> With respect to the Netherlands, the proposals from *Wilders* are discussed, and the *Gerin* report states that the debate on the face veil and *laïcité* in the Netherlands illustrates a gallici-

<sup>43</sup> *Cha'are Shalom Ve Tsedek v. France* [GC], 27.6.2000, Reports of Judgments and Decisions ECtHR 2000-VII, para. 66.

<sup>44</sup> *J. A. Selby*, *Islam in France Reconfigured: Republican Islam in the 2010 Gerin Report*, *Journal of Muslim Minority Affairs* 31 (2011), 388.

<sup>45</sup> *Assemblée nationale* (note 41), 70.

<sup>46</sup> *Assemblée nationale* (note 41), 72.

<sup>47</sup> *Assemblée nationale* (note 41), 73 et seq.

<sup>48</sup> *Assemblée nationale* (note 41), 74.

<sup>49</sup> *Assemblée nationale* (note 41), 75.

zation of Dutch politics;<sup>50</sup> a gratifyingly explicit example of the complex exchange of legal and political ideas that underlie the face veil ban.

### III. “Living Together” as a New Legal Principle

Despite its flaws and incoherences, the *Gerin* report set the political stage for introducing legislative measures. So when the French Prime Minister, *François Fillon*, on 29.1.2010 – only three days after the publication of the *Gerin* report – wrote a mission letter to the Council of State, the message was unambiguous: the Council should provide a legal basis “as wide and effective as possible” for the political decision to ban the wearing of *burqa*, *niqab* and any other kind of full veil as it was deemed contrary to the values of the Republic and a sign of communitarianist withdrawal from society.<sup>51</sup>

On 25.3.2010, the Council of State published its reply to the Prime Minister. The Council of State found that a specific ban on Islamic veils must be ruled out, as it would violate multiple freedoms and rights enshrined in the French constitution and the ECHR and have no firm legal basis.<sup>52</sup> Religious neutrality as a justification for a specific ban was rejected, since neutrality only applies to the State and its civil servants, not to the individual citizen.<sup>53</sup> Human dignity and gender equality were ruled out despite being firmly established in law on the grounds that neither justification would apply to the women who are wearing the face veil voluntarily.<sup>54</sup> Public security was summarily rejected, because the wearing of face veils had never given rise to security threats that could not be mitigated by local or occasional bans.<sup>55</sup> Finally, the Council of State noted that the firmly established principle of non-discrimination would further undermine the legality of a specific ban on Islamic veils regardless of its justification.<sup>56</sup>

Thus, a specific ban on Islamic veils was rejected by the Council of State on the same grounds that similar proposals had been rejected in other countries. The reasoning followed a conventional application of fundamental rights and freedoms. However, given that the Council of State had been

---

<sup>50</sup> Assemblée nationale (note 41), 78.

<sup>51</sup> Conseil d’État, Etude relative aux possibilités juridiques d’interdiction du port du voile integral, Rapport adopté par l’assemblée générale plénière du Conseil d’Etat (25.3.2010), Annex 1. Official English translation.

<sup>52</sup> Conseil d’État (note 51), 19.

<sup>53</sup> Conseil d’État (note 51), 20.

<sup>54</sup> Conseil d’État (note 51), 21 et seq.

<sup>55</sup> Conseil d’État (note 51), 23.

<sup>56</sup> Conseil d’État (note 51), 23.

tasked with finding a way to legally ban the face veil, rather than merely considering whether it was possible under the existing constitutional interpretation, it had to venture further than had previously been the case in other countries. Therefore, the Council of State considered the possibility of a general ban on concealing one's face in the public space. Such a ban would still amount to indirect violation of the freedom to manifest one's religion.<sup>57</sup> As such, it would need a legally firm justification under the French constitution and the ECHR.

While the freedom of belief *in foro interno* is absolute, the freedom to manifest one's religion may be restricted by law according to Art. 1 of the 1905 Law, Art. 10 of the 1789 Declaration of the Rights of the Man and of the Citizen (1789 Declaration),<sup>58</sup> and Art. 9 para. 2 ECHR, but only in the interest of what the Council of State collectively calls public policy (*l'ordre public*).<sup>59</sup> This conflation of the public order and *l'ordre public* is not wholly unproblematic. As *Carolyn Evans* notes in her seminal work on Art. 9 ECHR:

“The importance of not giving too wide an interpretation to the notion of public order is underlined by the French text. Rather than the relatively broad term *ordre public*, that could refer to a wide range of public interests and is used in a number of international instruments, the Convention uses the more restrictive term *la protection de l'ordre*.”<sup>60</sup>

Nevertheless, according to *Herman T. Salton*, the Council of State had in fact since 1905 been careful when restricting the freedom to manifest one's religion, and used public policy “as the last resort and always as an exception to the general rule of religious freedom”.<sup>61</sup> Although the Council of State had not developed an exact doctrine on the matter, one could term this sparing use of restrictions “liberal”; one justified by strict necessity rather than political convenience. This interpretation appears consistent with the intentions of the main drafter of the 1905 Law, namely *Aristide Briand*, who called for a liberal interpretation of the freedom of religion.<sup>62</sup> Even when faced with the question of Islamic headscarves in schools in the 1990s, the

<sup>57</sup> Conseil d'État (note 51), 26.

<sup>58</sup> The 1789 Declaration forms a part of the *bloc de constitutionnalité*, which denotes norms of constitutional value that are not in the constitutional text *sensu stricto*. See *G. Burdeau/F. Hamon/M. Troper*, *Droit constitutionnel*, 1991, 414.

<sup>59</sup> Conseil d'État (note 51), 27.

<sup>60</sup> *C. Evans*, *Freedom of Religion Under the European Convention on Human Rights*, 2001, 150.

<sup>61</sup> *H. T. Salton*, *France's Other Enlightenment: Laïcité, Politics and the Role of Religion in French Law*, *Journal of Politics and Law* 5 (2012), 33.

<sup>62</sup> *H. T. Salton* (note 61).

Council of State generally upheld the right of the students to wear religious garb and

“ruled that wearing a headscarf is not automatically *ostentatoire* and that expulsion is permissible only if the student’s action constitutes a threat to public order over and above the mere wearing of the headscarf”.<sup>63</sup>

It was against this background of a generally liberal approach in its previous case law that the Council of State had to formulate a justification for banning face veils. Conventionally, the interest of public policy has two dimensions: a material dimension (tranquility, health, and security) and a non-material dimension (public morals and the respect for human dignity). In order to justify a general ban on face veils, according to the Council of State, one would have to reinterpret the latter dimension to also include “the minimum requirement for the reciprocal demands and essential guarantees of life in society”.<sup>64</sup> However, the Council of State emphasized

“[...] that this conception of public policy [...] has never been developed in legal doctrine or in case law and there would appear to be nothing comparable in the legal systems of our European neighbours. It would therefore be vulnerable to a serious risk of constitutional censure as well as the hazards of conventional law. Virtually all references to public policy in constitutional case law concern its traditional aspects.”<sup>65</sup>

Although the Council of State elaborates on this novel conception of public policy, it repeatedly warns against actually applying it, because of its legal fragility and possible unconstitutionality.

Furthermore, the Council of State outlines the requirements that must be met when restricting a fundamental freedom regardless of the aim, namely necessity, proportionality, sufficient safeguards, as well as consideration of the ECtHR control. With regard to the last requirement, the Council of State opines that “France presents no special characteristics that would justify a more flexible control on the part of the Court”<sup>66</sup> comparable to the status of secularism in the Turkish state, which played a decisive role in the

---

<sup>63</sup> E. T. Beller, The Headscarf Affair: The *Conseil d’État* on the Role of Religion and Culture in French Society, *Tex. Int’l L. J.* 39 (2004), 585. However, this liberal conception of public policy in the case law of the Council of State was circumscribed with the passing of the 2004 Law, which significantly limited the room for interpretation with regard to religious attire in public schools.

<sup>64</sup> *Conseil d’État* (note 51), 29.

<sup>65</sup> *Conseil d’État* (note 51), 31.

<sup>66</sup> *Conseil d’État* (note 51), 36.

case of *Leyla Şahin v. Turkey*.<sup>67</sup> Thus, in the opinion of the Council of State, a general ban on face veils would not only necessitate a break with a tradition of liberal interpretation of religious freedom that has prevailed since 1905, it would also have no basis in the particulars of the Republic.

\*\*\*

When deposited with the National Assembly in May 2010, the bill for what was to become the *loi no. 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public* (hereinafter “the 2010 Law”) contained an explanatory memorandum with a section on the relevant legal debates across Europe. The proposal, which had recently been adopted by the Belgian Chamber of Representatives,<sup>68</sup> was discussed in detail; with a paragraph dedicated to the Belgian argument of the necessity of a ban for the purpose of “living together”:

“The bill is also justified by the impossibility of socializing people whose faces are concealed. The principle of recognition and mutual identification, when human beings are in the public space, is the basis of ‘living together’, because the face embodies, very largely, the identity of the individuals, such that the face – and not the whole body – appears on identity cards, or passports. The fact that wearing a garment, which covers the face, by choice or obligation, is done because of a custom or by political activism, or for so-called religious reasons, does not change anything.”<sup>69</sup>

Nonetheless, the French proposal distinguished itself from other countries by proposing a new legal justification for the ban, namely the new conception of the non-material dimension of public policy.<sup>70</sup> This new conception was argued to make it possible to prohibit actions running directly counter to the values of the social contract, on which the Republic is based, e.g. liberty, equality, and *fraternité*. According to the French government, these values guarantee the cohesion of the nation and reinforces the respect for the dignity of the individual. Furthermore, the values of the social contract ensure the possibility of living together in the French society.<sup>71</sup>

Thus, according to the French government, the wearing of face veils in public space threatens the very foundations of the French social contract, by

<sup>67</sup> *Leyla Şahin v. Turkey* [GC], 10.11.2005, Reports of Judgments and Decisions ECtHR 2005-XI.

<sup>68</sup> See *E. Brems/J. Vrieling/S. O. Chaïb* (note 4).

<sup>69</sup> Documents parlementaires No. 2520, Assemblée nationale, XIIIe legislature, 10. (My translation.)

<sup>70</sup> Assemblée nationale (note 69), 4.

<sup>71</sup> Assemblée nationale (note 69), 5 et seq.

not satisfying the minimum level of civility required for social interaction, and by not only violating the dignity of the individual wearing the veil but also the dignity of others who share the public space and are refused any visual exchange with that person. Finally, it was argued that negating the fact of belonging to the French society was an act of symbolic and dehumanizing violence at odds with the social fabric. Therefore, the wearing of face veils in the public space could be prohibited in the interest of the “non-material” public policy.<sup>72</sup>

This novel conception of public policy was further strengthened by the National Assembly Committee on Legislation in its report on the bill.<sup>73</sup> Under the subheading “A clear constitutional basis: public policy”, the conventional understanding of public policy was reiterated, before the Committee turned to elaborating on the new conception of the non-material dimension. Noting the cautionary tone of the Council of State, the Committee focused on the possibility of interpreting the non-material dimension of public policy as a societal and republican public policy.<sup>74</sup> Indeed, the Committee argued that this conception of public policy was strongly anchored in the French legal tradition and inscribed in the *bloc de constitutionnalité*,<sup>75</sup> according to which it is the prerogative of the legislator to define the rules without which the social life would be impossible.<sup>76</sup> While the aim of the proposed ban was discussed at length, neither its necessity nor its proportionality was considered. The bill was adopted nearly unanimously in the National Assembly on 13.7.2010, before being sent to the Senate (*Sénat*).

The Senate Committee on Legislation also distinguished between the material and non-material dimensions of public policy, quoting the same section of the Council of State report as the National Assembly Committee had done. The Senate Committee emphasized that although the Council of State had recommended not expanding the understanding of public policy, it had not proclaimed such reinterpretation directly unconstitutional. The Committee admitted that this conception could not be found in the text of the Constitution. However, it argued, since it is based on a principle of constitutional value (human dignity), it could justify a general ban.<sup>77</sup> The fact that the potentially opposing value (freedom of religion) also is of constitutional value was not addressed. The bill was adopted unanimously by the Senate on 14.9.2010.

---

<sup>72</sup> Assemblée nationale (note 69), 6 et seq.

<sup>73</sup> Documents parlementaires No. 2648, Assemblée nationale, XIIIe législature.

<sup>74</sup> Assemblée nationale (note 73).

<sup>75</sup> See note 58.

<sup>76</sup> Assemblée nationale (note 73).

<sup>77</sup> Documents parlementaires No. 699, Sénat, 2009-10.

Finally, pursuant to Art. 61 para. 2 of the French constitution, the presidents of the National Assembly and the Senate submitted the law to judicial review *ex ante* by the Constitutional Council (*Conseil constitutionnel*), which in only six paragraphs declared the 2010 Law in conformity with the Constitution.<sup>78</sup> In para. 3, the Council lays down the fundamental rights enshrined in the 1789 Declaration. In the following paragraph, it outlines the reasons given by the parliament for enacting the law, namely that by covering one's face, one "fail to comply with the minimum requirements of life in society". The actual proportionality test is performed in a single sentence:

"In view of the purposes which it is sought to achieve and taking into account the penalty introduced for non-compliance with the rule laid down by law, Parliament has enacted provisions which ensure a conciliation which is not disproportionate between safeguarding public order and guaranteeing constitutionally protected rights."<sup>79</sup>

Thus, the legal reasoning by the Council of State and the warnings about the fragility of the legal justification are not addressed by the Constitutional Council. Instead, the parliamentary arguments are reproduced without scrutiny. This superficial treatment by the Constitutional Council has been thoroughly criticized by *Aurore Gaillet*, who calls it a disappointing judicial decision.<sup>80</sup> Especially the meagre proportionality test performed by the Constitutional Council is criticized for not living up to current standards, which considers not only the relationship between means and the end, but also the necessity of the measures taken, and a careful balancing of the opposed interests. Instead, the Constitutional Council merely checks whether the means are manifestly disproportionate.<sup>81</sup> In addition, *Gaillet* criticizes the Constitutional Council for not delimiting the novel concept of societal public policy,<sup>82</sup> and by virtue of the decision's extreme brevity leaving more questions than answers.<sup>83</sup>

*Gaillet* attributes these juridical shortcomings to the circumstances surrounding the decision. First, the decision was handed down immediately after the parliamentary debate, and the law was submitted to review by its

---

<sup>78</sup> Conseil constitutionnel, Décision No. 2010-613 DC, 7.10.2010. Official English translation.

<sup>79</sup> Conseil constitutionnel (note 78), para. 5.

<sup>80</sup> *A. Gaillet*, La loi interdisant la dissimulation du visage dans l'espace public et les limites du contrôle pratiqué par le conseil constitutionnel, C.N.R.S. Editions (2012), 58.

<sup>81</sup> *A. Gaillet* (note 80), 59 et seq.

<sup>82</sup> *A. Gaillet* (note 80), 62.

<sup>83</sup> *A. Gaillet* (note 80), 58.



proponents, which according to *Gaillet* spills over and creates an assumption that parliamentary consensus can be conflated with constitutionality.<sup>84</sup> Second, since the law was submitted to judicial review *ex ante*, thus lacking a concrete complaint, and before the effects of the law could be observed, the judges could fall back on a very abstract and general balancing of interests.<sup>85</sup> More generally, this style of reasoning in cases relating to minority religions has been criticized by *Éléonore Lépinard*, who writes that

“the French judge, even when judging a specific case *in concreto*, appears to prefer axiological assumptions, which often reflect the dominant norms of the majority, to facts and a material analysis of the effects of minority religious practices.”<sup>86</sup>

Notwithstanding the critique, when the 2010 Law was enacted on 11.10.2010, it was with complete confidence that the restriction on the freedom to manifest one’s religion was not only politically legitimate in the eyes of the majority, but also legally solid. In the course of a few months, the highly fragile legal reinterpretation reluctantly proposed by the Council of State had become a matter of course in the language of the government, the National Assembly, the Senate, and the Constitutional Council.

Although the French 2010 Law was inspired by the developments in other European countries, it was unique in the sense that it was the first general face veil ban in Europe. Given the political framing, this uniqueness led several scholars to argue that the ban was simply a result of French republican tradition. *Peter Baehr* and *Daniel Gordon* argue that “the push to ban the burqa in France principally derives from its brand of republicanism rather than being a product of racism and Islamophobia.”<sup>87</sup> In his praise of the stance taken by the French government, *François-Xavier Millet* writes:

“The Republican agenda in France is to unshackle the rational being and set him free from traditions and, above all, from communities that are not founded on reason and which may imprison him. Religion is, of course, the main enemy, *l’infâme* that had to be crushed according to Voltaire. This justifies the State forcing individuals to emancipate themselves, to become universal citizens stripped of their peculiarities.”<sup>88</sup>

<sup>84</sup> A. *Gaillet* (note 80), 52.

<sup>85</sup> A. *Gaillet* (note 80), 57.

<sup>86</sup> E. *Lépinard*, Writing the Law and The Regulation of Minority Religions: In France and Canada, *Rev. Franc. Sci. Pol.* 64 (2014), 47. Translated from French by *Vicki Whittaker*.

<sup>87</sup> P. *Baehr/D. Gordon*, From the Headscarf to the Burqa: The Role of Social Theorists in Shaping Laws Against the Veil, *Economy and Society* 42 (2013), 249.

<sup>88</sup> F.-X. *Millet*, When the European Court of Human Rights Encounters the Face: A Case-Note on the Burqa Ban in France, *EU Const. L. Rev.* 11 (2015), 422.

In a juxtaposition of French republicanism and Anglo-American liberalism, *Stephane Mechoulan* similarly concludes that “for Republicans, the ban illustrates, as a prophylaxis, the upholding of supra-constitutional values.”<sup>89</sup>

Such arguments may seem convincing in a strictly French context, and – as we shall see – they did indeed play an important role in the decision of the ECtHR in *S.A.S. v. France*. However, in light of the multilocal emergence and later cross-border migration of the face veil ban as well as the explicit break with French legal tradition, the French exceptionalist argument has little explanatory power.

\*\*\*

As it has already been demonstrated, the idea of banning the face veil in Belgium did not come directly from France, but it is fair to say that the legislative process that ultimately led to a ban was heavily inspired by the French 2010 Law.

On 28.9.2010, the bill for the *Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage* (hereinafter “the 2011 Law”) was tabled by five members of the party *Mouvement Réformateur*. Without a preliminary juridical study of the proposed bill, the reasoning in the explanatory memorandum is of a more political nature than in the French case. Different societal models are discussed, stating that the drafters subscribe to a so-called “*interculturalist*” model, where the State ought to ensure certain values, including democracy, fundamental human rights, and the separation of Church and State. In this model, the State should not be indifferent to cultural diversity; in fact, the State should encourage such diversity, as long as all members of society respect the same fundamental values. Thus, according to the drafters, the proposed bill aimed to preserve not only the public policy, but also the very fundamentals of the State.<sup>90</sup> *Michaels* criticizes the drafters for drawing on the same political vocabulary as the French did, despite the significant differences between the two countries:

“[T]he Belgian state is deeply intermingled with Catholicism. And unlike France, the Belgian nation is a recent foundation, and certainly not one in which internal strife, especially between Flemish and Wallons [*sic!*], can be said to have been overcome in favor of a common national identity.”<sup>91</sup>

---

<sup>89</sup> *S. Mechoulan*, *France Bans the Veil: What French Republicanism Has to Say About It*, *B. U. Int'l L. J.* 35 (2017), 282.

<sup>90</sup> Document parlementaire No. 52-2289-1, Chambre 2009-10, 5.

<sup>91</sup> *R. Michaels* (note 6), 242.

Although one can challenge the drafters' claim about separation of Church and State in Belgium, they do not, in fact, claim that Belgium is devoid of internal differences. It is also not fair to say that the concept of "living together" was borrowed wholesale from the French by the Belgian legislators; as it has been demonstrated above, this idea emerged in an exchange among several jurisdictions, only to achieve its *legal* form in France. Contrary to France, Belgium may have a multi-confessional society built on a Catholic foundation,<sup>92</sup> but that does not exclude the possibility of having a conception of "living together" that is hostile to Islamic face veils. If anything, the power of the vague and undefined principle of "living together" is exactly that it is not associated with any particular type of Church-State arrangement.

After its deposition, the proposal was examined by the committee for interior affairs, which decided not to request a legal opinion from the Belgian Council of State (*Conseil d'État/Raad van State*). However, in the plenary debate in the Chamber of Representatives, speaking on behalf of the drafters, *Daniel Bacquelaire* explicitly stated that the justification of public security was chosen strategically in order to make the proposal as "incontestable" as possible. However, he continued, the more fundamental reason for the ban was to preserve the public space, thus echoing the reasoning of the French government, namely that covering the face in public not only violates the dignity of the individual in question but also the dignity of all others sharing the public space. Furthermore, this idea was linked to the protection of public policy and the principle of *fraternité*. One sees clearly the migratory quality of the face veil ban in the references to the legislative history of the French 2010 Law, e.g. the explicit reference to the philosopher *Emmanuel Levinas*,<sup>93</sup> to whom a whole section of the French *Gerin* report was dedicated.<sup>94</sup> Furthermore, the testimony given to the French National Assembly by the scholar *Elisabeth Badinter* was quoted directly in the Belgian parliamentary debate.<sup>95</sup> The bill was adopted nearly unanimously by the Chamber on 28.4.2011. The Senate abstained from examining the bill, which passed into law on 1.6.2011.

Whereas the French 2010 Law had been submitted to the Constitutional Council for judicial review *ex ante* by the legislature, the Belgian 2011 Law was brought to the Constitutional Court (*Cour constitutionnelle/Grond-*

---

<sup>92</sup> See *H. Dumont/X. Delgrange*, *Le principe de pluralisme face à la question du voile Islamique en Belgique*, *Droit et société* 68 (2008).

<sup>93</sup> Document parlementaire, Chambre, Séance plénière 30, 2e Session, 53e Législature.

<sup>94</sup> Assemblée nationale (note 41), 116 et seq.

<sup>95</sup> Document parlementaire (note 90), 6.

*wettelijke Hof*) for judicial review *ex post* by citizens and civil society organizations in five different instances, which were considered jointly by the Court.<sup>96</sup> The Court found the 2011 Law to be compatible with the Belgian constitution. Despite the different circumstances, the Belgian Constitutional Court's review of the 2011 Law has been criticized by Belgian scholars for suffering from some of the same shortcomings as the French Constitutional Council's review of the 2010 Law, in particular that the judges only performed a superficial proportionality test not taking into account the concrete grievances of the women affected by the law.<sup>97</sup> *Xavier Delgrange* and *Mathias El Berhoumi* argue that the near unanimous support by the legislator does not relieve the Constitutional Court from the responsibility to strictly consider validity of the law, and they criticize the Court for not having struck down a law motivated by "moral panic".<sup>98</sup>

#### IV. Defending the Principle of "Living Together"

Both the French and Belgian face veils bans were challenged before the ECtHR. In the case of *S.A.S. v. France*,<sup>99</sup> the applicant complained that the French 2010 Law deprived her of the possibility of wearing face veil in public and thus violated several different of the freedoms enshrined in the ECHR.<sup>100</sup> In the following, I shall focus on Arts. 8 and 9, as the Court found the other alleged violations manifestly ill-founded.<sup>101</sup>

The French government admitted that the general ban introduced by the 2010 Law could be seen as a restriction on the individual freedom, but that it was justified, as it pursued legitimate aims in a democratic society and that it was necessary and proportionate for the fulfillment of those aims.<sup>102</sup> Apart from public safety, those aims were to ensure respect for the minimum set of values of an open and democratic society, including the principle of "living together", the equality between men and women, and the re-

<sup>96</sup> Cour constitutionnelle, l'arrêt No. 145/2012, 6.12.2012.

<sup>97</sup> *S. O. Chaib*, Belgian Constitutional Court Says Ban on Face Coverings Does Not Violate Human Rights, 14.12.2012, <<https://strasbourgobservers.com/>>.

<sup>98</sup> *X. Delgrange/M. E. Berhoumi*, Pour vivre ensemble, vivons dévisagés: le voile intégral sous le regard des juges constitutionnels belge et français, *Revue trimestrielle des droits de l'homme* 99 (2014), 665.

<sup>99</sup> *S.A.S. v. France* [GC], 1.7.2014, Reports of Judgments and Decisions ECtHR 2014-III.

<sup>100</sup> *S.A.S. v. France* (note 99), paras. 69, 72, and 74.

<sup>101</sup> *S.A.S. v. France* (note 99), paras. 69-73.

<sup>102</sup> *S.A.S. v. France* (note 99), para. 81.

spect for human dignity.<sup>103</sup> Thus, the government, in essence, reiterated its original motivation for the enactment of the 2010 Law.

However, it is worth noting that before the ECtHR, the French government decided to deviate from the legislative history of the 2010 Law by not arguing for a reinterpretation of the non-material dimension of public policy, but instead for linking the principle of “living together” to the “protection of the rights and freedoms of others”. This change in strategy was noted by the Court, which stated that it would not have accepted the justification based on non-material public policy, because the case concerned possible violations of Arts. 8 and 9 ECHR, of which only the latter permits derogations in the interest of public policy.<sup>104</sup>

Given how intertwined the legislative history of the Belgian face veil ban had been with the French, it is not surprising that the Belgian government was given leave to take part in the hearing as a third party intervener.<sup>105</sup> In its intervention, the Belgian government referred to the findings of the Belgian constitutional court, which were also quoted extensively in the ECtHR judgment.<sup>106</sup> The Belgian government was not the only third party intervener from Belgium; also the Human Rights Centre of Ghent University was given leave to submit written comments.<sup>107</sup>

In its assessment, the Court reiterated that

“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”

and for

“it to be compatible with the Convention, a limitation of this freedom must, in particular, pursue an aim that can be linked to one of those listed in this provision”.<sup>108</sup>

The Court accepted that the aim of public safety fell within the wording of Art. 9 para. 2 ECHR,<sup>109</sup> but it found that a general ban as the one in the

<sup>103</sup> *S.A.S. v. France* (note 99), para. 82.

<sup>104</sup> *S.A.S. v. France* (note 99), para. 117. For an in-depth analysis of this particular change in legal strategy, see *E. Erlings*, *The Government Did Not Refer to It: SAS v. France and Ordre Public at the European Court of Human Rights*, *Melbourne Journal of International Law* 16 (2015).

<sup>105</sup> *S.A.S. v. France* (note 99), paras. 86-88.

<sup>106</sup> *S.A.S. v. France* (note 99), paras. 40-42.

<sup>107</sup> *S.A.S. v. France* (note 99), para. 8.

<sup>108</sup> *S.A.S. v. France* (note 99), para. 113.

<sup>109</sup> *S.A.S. v. France* (note 99), para. 115.

2010 Law did not satisfy the requirements of proportionality or necessity if only based on the interest of public safety.<sup>110</sup>

Thus, the core of the Court's deliberations concerned whether the three values, which the French government had claimed that the 2010 Law protected (respect for equality between men and women, respect for human dignity, and the principle of "living together") could be linked to the necessary and proportionate protection of "the rights and freedoms of others". The Court rejected that the first two values could justify a blanket ban,<sup>111</sup> before turning to a discussion of the principle of "living together".

The Court accepted

"that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier",<sup>112</sup>

and that the principle of "living together" thus can be linked to the legitimate aim of protecting the rights and freedoms of others.<sup>113</sup> To reach this conclusion, the Court carefully linked its previous decisions on religious garb to the case at hand, while at the same time emphasizing how face veils distinguish themselves from other types of religiously motivated clothing.<sup>114</sup> Although some scholars warn against being misled by an appearance of continuity,<sup>115</sup> *Esther Erlings* has demonstrated how this subsumption is in fact a confirmation of an emerging trend rather than a sharp break with previous case law.<sup>116</sup>

Nevertheless, "in view of the flexibility of the notion of 'living together' and the resulting risk of abuse",<sup>117</sup> the Court proclaimed to engage in a particularly careful examination of the necessity and proportionality of the limitation.

On the one hand, the Court acknowledged the negative consequences for the women affected by the ban<sup>118</sup> and observed that "a large number of actors, both international and national, in the field of fundamental rights protection [had] found a blanket ban to be disproportionate".<sup>119</sup>

<sup>110</sup> *S.A.S. v. France* (note 99), para. 139.

<sup>111</sup> *S.A.S. v. France* (note 99), paras. 118-120.

<sup>112</sup> *S.A.S. v. France* (note 99), para. 122.

<sup>113</sup> *S.A.S. v. France* (note 99), para. 121.

<sup>114</sup> *S.A.S. v. France* (note 99), paras. 132-136.

<sup>115</sup> *M. Evans*, The Freedom of Religion or Belief in the ECHR since *Kokkinakis*. Or "Quoting *Kokkinakis*", Religion and Human Rights 12 (2017), 98.

<sup>116</sup> *E. Erlings* (note 104), 607 et seq.

<sup>117</sup> *S.A.S. v. France* (note 99), para. 122.

<sup>118</sup> *S.A.S. v. France* (note 99), para. 146.

<sup>119</sup> *S.A.S. v. France* (note 99), para. 147.

On the other hand, the Court emphasized that the face veil ban “is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face”.<sup>120</sup> While it is true that the law is not directly discriminatory, there can be no doubt that the ban from the beginning was expressly aimed at Islamic face veils and the seemingly neutral and general form was only chosen to ensure its legal viability. Paraphrasing *Carolyn Evans*, one could say that the neutral appearance of the face veil ban is deceptive, and this disingenuous neutrality should not be given any particular weight.<sup>121</sup>

Furthermore, the Court noted that the criminal sanctions are relatively light.<sup>122</sup> This reason seems to ignore the broader context. Although the criminal sanction is light as criminal sanctions go, criminalization of an unwanted but harmless conduct is in itself a blunt instrument,<sup>123</sup> considering how many other less intrusive measures that are available to the State.

Be that as it may, the deciding factor in the Court’s reasoning seems to be self-restraint in assessing the balance struck through a democratic process. In other words, France was granted a wide margin of appreciation.<sup>124</sup> Thus, the Court found that the ban on face veils was both proportionate and necessary in a democratic society and that it thus did not constitute a violation of the freedom to manifest one’s religion.<sup>125</sup>

Scholars disagree on how careful this examination of proportionality really was. Whereas *Céline Ruet* finds that the Court “traces a narrow path that allows it to achieve a balance”,<sup>126</sup> other commentators have been more skeptical. *Myriam Hunter-Henin* thoroughly criticizes both the “flawed legal basis” of Court’s decision,<sup>127</sup> its circular reasoning,<sup>128</sup> as well as its “loose proportionality test”,<sup>129</sup> but concludes nonetheless that the decision

<sup>120</sup> *S.A.S. v. France* (note 99), para. 151.

<sup>121</sup> *C. Evans* (note 60), 168.

<sup>122</sup> *S.A.S. v. France* (note 99), para. 152.

<sup>123</sup> *C. Laborde* (note 5).

<sup>124</sup> *S.A.S. v. France* (note 99), paras. 154-155.

<sup>125</sup> *S.A.S. v. France* (note 99), paras. 157-159.

<sup>126</sup> *C. Ruet*, L’interdiction du voile intégral dans l’espace public devant la Cour européenne: la voie étroite d’un équilibre, *La Revue des droits de l’homme* (2014), margin number 23. (My translation.)

<sup>127</sup> *M. Hunter-Henin*, Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*, *Oxford Journal of Law and Religion* 4 (2015), 96 et seq.

<sup>128</sup> *M. Hunter-Henin* (note 127), 118.

<sup>129</sup> *M. Hunter-Henin* (note 127), 117.

“displays a novel balanced fact-sensitive approach to assessing the meanings of religious symbols such as the burqa and the impact of restrictive measures on individuals wishing to wear them”.<sup>130</sup>

As opposed to *Hunter-Henin*, *Melanie Adrian* finds that the ECtHR with *S.A.S. v. France* confirms a decisional trajectory that favors general principles and new vague concepts over “a reasoned adjudication of harm and mindful evaluation of the facts”.<sup>131</sup>

Finally, *Sune Lægaard* argues that since the Court does not clearly determine what the aim of the ban actually is and how important this aim may be, it is impossible to perform a conventional proportionality test. That is why the Court ultimately has to rely on a broad margin of appreciation.<sup>132</sup> This in turn creates a false equivalency between democratic legitimacy and proportionality.<sup>133</sup> In other words, democratic legitimacy in a narrow sense relies on the majority rule, but it is not difficult to imagine that the majority may choose to impose disproportionate measures on minorities. So while democratic legitimacy is an important factor when establishing whether the pursued aim is legitimate, it should be kept entirely separate from the assessment of the proportionality of the measures taken to achieve that aim.

In their separate opinion, the dissenting judges *Angelika Nußberger* and *Helena Jäderblom* also expressed their concern with sacrificing individual rights in the interest of abstract principles. The dissenting judges argue that the principle of “living together” does not fall directly under any of the rights and freedoms guaranteed in the ECHR.<sup>134</sup> Furthermore, they argue that an individual does not have the right to “enter into contact with other people, in public places, against their will”.<sup>135</sup> Finally, they argue that the very exceptions envisaged in the 2010 Law show that it is indeed possible to socialize in the public space without showing one’s face.<sup>136</sup> Consequently, the dissenting judges found it doubtful whether the principle of “living together” constitutes a legitimate aim in the context of the ECHR. In addition, *Nußberger* and *Jäderblom* argued that even if one considered the protection of the principle of “living together” a legitimate aim within the

<sup>130</sup> *M. Hunter-Henin* (note 127), 118.

<sup>131</sup> *M. Adrian*, *The Principled Slope: Religious Freedom and the European Court of Human Rights, Religion, State & Society* 45 (2017), 174.

<sup>132</sup> *S. Lægaard*, *Burqa Ban, Freedom of Religion and “Living Together”*, *Human Rights Review* 16 (2015), 212.

<sup>133</sup> *S. Lægaard* (note 132), 216.

<sup>134</sup> *S.A.S. v. France* (note 99) – Separate Opinion, para. 5.

<sup>135</sup> *S.A.S. v. France* (note 99) – Separate Opinion, para. 8.

<sup>136</sup> *S.A.S. v. France* (note 99) – Separate Opinion, para. 9.



meaning of Art. 9 para. 2 ECHR, the general ban would still be a disproportionate and unnecessary measure to pursue that aim.<sup>137</sup>

Already within three years, the ECtHR was again faced with the question of the compatibility of a face veil ban with the ECHR – this time in the cases concerning the Belgian 2011 Law: *Belcacemi & Oussar v. Belgium* and *Dakir v. Belgium*.<sup>138</sup> Since both decisions relied heavily on the precedent set by *S.A.S. v. France*, there is no reason to reiterate the reasoning of the Court or the critique thereof.

## V. The Migration of the Principle of “Living Together”

The decision by the ECtHR to uphold the national face veil bans led to widespread critique by human rights observers,<sup>139</sup> but was at the same time welcomed by proponents of bans across Europe for providing the needed legal justification,<sup>140</sup> and the introduction of bans proliferated in the wake of the ECtHR decisions.

In 2017, Austria passed legislation banning face veils, and in 2018, Denmark and the Netherlands followed suit. In Switzerland, a civil society organization collected the required 100.000 signatures to demand a referendum on the question within two years from 11.10.2017. In its arguments, the organization explicitly refers to existing and proposed bans across Europe and argues that in enlightened European states, showing one’s face belongs to fundamental values of living together (*Zusammenleben*).<sup>141</sup> The trans-European nature of these developments is further evidenced by the

<sup>137</sup> *S.A.S. v. France* (note 99) – Separate Opinion, paras. 15–24.

<sup>138</sup> *Belcacemi & Oussar v. Belgium*, 11.12.2017, Reports of Judgments and Decisions ECtHR 2017; *Dakir v. Belgium*, 11.12.2017, Reports of Judgments and Decisions ECtHR 2017.

<sup>139</sup> See *E. Brems*, *S.A.S. v. France as a Problematic Precedent*, 9.7.2014, <<https://strasbourgobservers.com>>; *E. Howard*, *S.A.S. v. France: Living Together or Increased Social Division?*, 7.7.2014, <<https://www.ejiltalk.org>>; Human Rights Watch, *France: Face-Veil Ruling Undermines Rights*, 3.7.2014, <<https://www.hrw.org>>; Amnesty International, *European Court Ruling on Full-Face Veils Punishes Women for Expressing Their Beliefs*, 1.7.2014, <<https://www.amnesty.org>>; and Open Society Justice Initiative, *Case Watch: ECHR Says “Living Together” Justifies Ban on Full-Face Veils*, 1.7.2014 <<https://www.opensocietyfoundations.org>>.

<sup>140</sup> See *Berlingske*, *Blåt stempel til forbud mod niqab og burka*, 1.7.2014, <<https://www.berlingske.dk>>; *Tages-Anzeiger*, *Initiative für Schweizer Burkaverbot steht*, 1.7.2014, <<https://www.tagesanzeiger.ch>>; *Die Welt*, *Auch Deutschland sollte die Burka verbieten*, 1.7.2014, <<https://www.welt.de>>; and *Die Presse*, *FPÖ beantragt Burkaverbot für Österreich*, 2.7.2014 <<https://diepresse.com>>.

<sup>141</sup> <<http://www.verhuellungsverbot.ch>>.

European People's Party (EPP) calling for an EU-wide ban on Islamic face veils.<sup>142</sup>

Thus, it appears that the ECtHR served as a vehicle for the further migration of the legal justification for introducing face veil bans by filtering the multifarious and questionable justifications, leaving the principle of “living together” standing as a legally viable justification, which could be applied in any of the ECHR member states. In the context of national courts, *Marian Burchardt*, *Zeynep Yanasmayan*, and *Matthias Koenig* have named this process “the standardization of justificatory repertoires”, and “it is this production of standardized legal templates that prepares the ground for the rapid spread of *burqa* bans”.<sup>143</sup>

Other scholars have surveyed the influence specifically of the ECHR complex on national constitutional law. In the seminal volume “A Europe of Rights: The Impact of the ECHR on National Legal Systems”, *Helen Keller* and *Alec Stone Sweet* argue that the

“ECHR has evolved into a sophisticated legal system whose Court can be expected to exercise substantial influence on the national legal systems of its members”.<sup>144</sup>

*Effie Fokas* goes even further when arguing that when

“addressing some of the most divisive and emotive social issues facing European societies [...], the Court has been setting, from above, the parameters it would like to see for religious pluralism in Europe”.<sup>145</sup>

The reasoning of the ECtHR decisions have thus shaped the national legal debates on face veils since 2017.

That the year 2017, rather than 2014, became the starting point for the new wave of face veil bans might be explained by a certain reluctance to apply the conclusion of *S.A.S. v. France* in other jurisdictions, because of the importance of the margin of appreciation and the emphasis on French political and legal principles. When the Court repeated its reasoning in the cases

---

<sup>142</sup> EPP, For a Cohesive Society: Countering Islamic Extremism, 29.-30.3.2017, <<http://www.epp.eu>>.

<sup>143</sup> *M. Burchardt/Z. Yanasmayan/M. Koenig*, The Judicial Politics of “Burqa Bans” in Belgium and Spain – Socio-Legal Field Dynamics and the Standardization of Justificatory Repertoires, *Law & Social Inquiry* (2017), 6.

<sup>144</sup> *H. Keller/A. S. Sweet*, A Europe of Rights: The Impact of the ECHR on National Legal Systems, 2008, 25.

<sup>145</sup> *E. Fokas*, Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence, *Oxford Journal of Law and Religion* 4 (2015), 73.

against Belgium, which is neither laic nor a republic, the principle of “living together” was proven to have a broader applicability than initially assumed.

\*\*\*

Although the Dutch *Wet gedeeltelijk verbod gezichtsbedekkende kleding* (hereinafter “the Dutch 2018 Law”)<sup>146</sup> is limited to specific – albeit extensive – areas of the public space, it was justified with the same principle of “living together” as the French and Belgian bans. Despite the insistence on the partial nature of the ban, the Dutch face veil ban is categorically similar to the others, since it applies to private citizens in public space, and it is not justified by concrete security concerns or the official function of the individual.

In the explanatory memorandum attached to the bill, the term “living together” (*samenleving*), which in Dutch also translates into “society”, was used six times. Thus, under the heading “The necessity of a partial ban”, it is stated that

“[a] diverse country like the Netherlands where different groups of people live close together can only function if everyone participates and shares the basic principles of living together [or society]”.<sup>147</sup>

However, by limiting the ban to public transportation and buildings, educational institutions, government institutions, and care facilities – leaving out only the street and places of worship – the Dutch government argued that it had struck a fair balance between the principle of “living together” and the freedom to decide on one’s apparel.<sup>148</sup> Furthermore, under the heading “Fundamental rights test”, *S.A.S. v. France* was referred to and the principle of “living together” was invoked four times; concluding that the partial face veil ban would pass the criteria in Art. 9 para. 2 ECHR.

However, the Dutch Council of State (*Raad van State*) did not find the face veil ban sufficiently justified. It noted that the ECtHR case law on subject did not detract from the Dutch State’s obligation to concretely demonstrate the urgent necessity of the ban. The principle of “living together” was barely considered by the Council.<sup>149</sup> Thus, the opinion of the Council of State was consistent with its critique of previously proposed bans:

“It observed that the Government had not stated how the wearing of clothing covering the face was fundamentally incompatible with the “social order”

<sup>146</sup> Tweede Kamer, vergaderjaar 2015–2016, 34 349, Nr. 2.

<sup>147</sup> Tweede Kamer, vergaderjaar 2015–2016, 34 349, Nr. 3.

<sup>148</sup> Tweede Kamer (note 147).

<sup>149</sup> Tweede Kamer, vergaderjaar 2015–2016, 34 349, Nr. 4.

(*maatschappelijke orde*), nor had they demonstrated the existence of a pressing social need (*dringende maatschappelijke behoefte*) justifying a blanket ban, or indicated why the existing regulations enabling specific prohibitions hitherto deemed appropriate were no longer sufficient, or explained why the wearing of such clothing, which might be based on religious grounds, had to be dealt with under criminal law.”<sup>150</sup>

The critique put forward by the Council of State was reiterated by multiple parties in the Committee on Internal Affairs.<sup>151</sup> Nonetheless, the bill was passed in the House of Representatives and was submitted to the Senate.

In the Senate, the *GroenLinks* party questioned the government about the legal justification for the proposed ban and challenged the government’s references to ECtHR case law relating to France and Turkey, arguing that the Dutch democratic model differed significantly from the models of those countries. To these objections, the government replied that it considered it to be the duty of the State in a multicultural society to ensure and enforce the principle of “living together”. It also responded that a concrete assessment of the Dutch circumstances had been made, and that the conclusion was that a face veil ban was necessary and legitimate in the Dutch society.<sup>152</sup> The issue of the legal justification was not discussed further, and the Senate adopted the bill on 26.6.2018.

\*\*\*

In Austria, the idea to ban the face veil had already been aired by the Minister of Interior, *Johannes Hahn*, in an interview in 2008.<sup>153</sup> But as opposed to Denmark and the Netherlands, no legislative attempts had been made to ban the face veil. In fact, at the time when the other countries surveyed in this article had the first legal debates on Islamic face veils, Austria was still described as having “one of the most tolerant regulations concerning the expression of religious beliefs and practices in the public realm in Europe,” and in “contrast to international developments, the liberal legal regulations [had] been clarified and even strengthened during the recent years [...]”<sup>154</sup>

<sup>150</sup> *S.A.S. v. France* (note 99), para. 51.

<sup>151</sup> Tweede Kamer, vergaderjaar 2015-2016, 34 349, Nr. 5.

<sup>152</sup> Eerste Kamer, vergaderjaar 2016-2017, 34 349, B.

<sup>153</sup> Die Presse, Hahn will Burka-Verbot in der Öffentlichkeit, 18.4.2008, <<https://diepresse.com>>.

<sup>154</sup> *N. Gresch/L. Hadj-Abdou/S. Rosenberger/B. Sauer*, Tu felix Austria? The Headscarf and the Politics of “Non-Issues”, *Social Politics* (2008), 412.

However, this was to change in 2017, when the bill for the *Bundesgesetz über das Verbot der Verhüllung des Gesichts in der Öffentlichkeit* (*Anti-Gesichtsverhüllungsgesetz – AGesVG*) (hereinafter “the 2017 Law”) was tabled. The 2017 Law states its aim directly in its first article: to promote integration by strengthening the participation (*Teilhabe*) in society and ensuring peaceful coexistence or “living together” (*friedliches Zusammenleben*). We thus see an explicit mention of the principle of “living together” in the legal text.

In the explanatory memorandum attached to the bill, the explanation given for this particular aim is nearly identical to the claims of the French and Belgian governments before the ECtHR, but the Austrian government also attempts to link the new legal justification of “living together” to the country’s own legal tradition by referring to two cases from the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*) and the Constitutional Court (*Verfassungsgerichtshof*).<sup>155</sup>

Whereas the administrative case concerns the ordinary definition of the concept of nuisance in the form of noise,<sup>156</sup> the constitutional case is more closely connected with the subject at hand, as it concerns the question of ritual slaughter of animals.<sup>157</sup> In the latter case from 17.12.1998, the Constitutional Court had to interpret the Austrian Animal Protection Law (*Tierschutzgesetz*) in light of the freedom to manifest one’s religion as guaranteed by the Art. 9 ECHR and Art. 63 Treaty of Saint-Germain-en-Laye.<sup>158</sup> Therefore, the Court had to determine whether the prohibition of mistreating animals could justify the legal sanctions that the authorities had imposed on the applicant who had taken part in the (Islamic) ritual slaughter of animals. The Court stated that only religious manifestations, which disturb the public order, could be limited. By public order, the Court understood provisions that are essential to the functional cohabitation of people in the State. Although the Court recognized that animal welfare was a concern of many citizens, it found that contraposed with the individual freedom to manifest one’s religion, the latter interest should be given more weight. Thus, the Court concluded that ritual slaughter could not be seen as a threat to the public order. Furthermore, it could also not be seen as incompatible with “public morals” (*gute Sitten*). The sanctions against the applicant were therefore deemed unconstitutional.

---

<sup>155</sup> 1586 der Beilagen XXV. Gesetzgebungsperiode, Regierungsvorlage, Erläuterungen.

<sup>156</sup> Verwaltungsgerichtshof, 1192/47, Sammlungsnummer 543 A/1948, 25.10.1948.

<sup>157</sup> Verfassungsgerichtshof, B3028/97, Sammlungsnummer 15394, 17.12.1998.

<sup>158</sup> Staatsvertrag von Saint-Germain-en-Laye, 10.9.1919.

Thus, the case law referred to by the Austrian government – when read in its entirety – does not necessarily support the restrictive approach to religious freedom necessary to ban the face veil. However, by selectively quoting these two court decisions, the Austrian government merged the concept of public order (*öffentlichen Ordnung*) with the principle of “living together” (*Zusammenleben*), thus reaching the same legal justification that initially allowed France and Belgium to uphold their face veil bans. Whereas the French government explicitly decided to part from established case law in order to ban the face veil, the Austrian government did so implicitly, but nonetheless manifestly.

In the National Council (*Nationalrat*) and the Federal Council (*Bundesrat*), the bill was proposed along with other legislative initiatives aimed at the integration of immigrants. Thus, the parliamentary debate in both chambers ranged widely, and the legal reasoning behind the bill was not elaborated on. The bill was adopted by both chambers on 16.5.2017 and 1.6.2017 respectively.<sup>159</sup>

\*\*\*

In the years since the first unsuccessful attempt to introduce a face veil ban, the Danish People’s Party and other proponents of a Danish face veil ban followed the development in Europe closely. The idea slowly gained traction among lawmakers around the center of the political spectrum, and several statements and bills were made against – real or imagined – parallel societies. So, on 11.4.2018, the Danish center-right government proposed a bill to amend the criminal code as to include a general ban on wearing face veils (*Tildækningsforbud*, hereinafter “the Danish 2018 Law”).

As with all other successful face veil bans, the Danish law is formulated as a general ban on covering the face in public spaces without legitimate reason, but from the preparatory work it is clear that the objective of the 2018 Law is to ban Islamic face veils, including *burqa* and *niqab*. The bill came after years of public and parliamentary debates on the subject, and the question was linked by the drafters to the supposed existence of parallel societies within the Danish state.<sup>160</sup> Simultaneously, the development in other European countries and the case law from the ECtHR had been followed closely. Thus, the justification for the ban given in the explanatory memorandum to the bill was very similar to the previous examples:

<sup>159</sup> 179. Sitzung des Nationalrates der Republik Österreich, XXV. Gesetzgebungsperiode, 16.5.2017; 868. Sitzung des Bundesrates der Republik Österreich, 1.6.2017.

<sup>160</sup> The definition and existence of parallel societies in Denmark is heavily debated. See *M. Barse*, Parallelsamfund er noget, politikerne har opfundet, 20.2.2018, <<https://videnskab.dk>>.

“With this bill the Government wishes to make clear that according to the view of the Government, it is not compatible with the values and cohesion in the Danish society or with the respect for our community to keep the face concealed in the public space. [...] Such things wear down the cohesion in Denmark and can contribute to creating the frame for parallel societies with its own norms and rules. Furthermore, the covering of the face may be a visible expression of existing parallel societies in Denmark.”<sup>161</sup>

The Danish ban was justified with the same terminology as the French, Belgian, Dutch, and Austrian bans had been; the underlying premise being that the face veil expresses an opposition to the values and cohesion of society. The Danish reference to parallel societies is the equivalent of the French concern with communitarianism.

In the explanatory memorandum, one section was specifically dedicated to the question of the law’s compatibility with the Danish constitution and the ECHR. It was noted that the Danish constitution only protects the actual worshipping, but not other religiously inspired actions. Thus, the ban could not be considered unconstitutional, provided that it did not apply to places of worship. As to the compatibility with the ECHR, the government explicitly referred to the ECtHR case law discussed above and concluded that the objective of promoting social interaction and coexistence (*sameksistens*) were considered to be legitimate aims in the context of Arts. 8, 9, and 10 ECHR. No concrete assessment of necessity and proportionality was made. The bill passed into law on 8.6.2018.<sup>162</sup>

## VI. Conclusion

The timing of the latest bans indicates a strong influence from the ECtHR. The latest wave of face veil bans came just after the Court twice re-affirmed its heavily criticized position in *S.A.S. v. France* in 2017. Also the choice of legal justifications point to the influence of the ECtHR; whereas earlier (proposed) bans had drawn on multiple justifications, including gender equality, security, secularism etc., the post-2017 bans focused almost exclusively on the principle of “living together” or more generally on social cohesion as a justification. Thus, we have seen how the ECtHR played a crucial role in standardizing a legal justification that could migrate faster across different jurisdictions.

---

<sup>161</sup> Lovforslag Nr. L 219, Folketinget 2017-2018, Folketingstidende A. (My translation.)

<sup>162</sup> Lov Nr. 717 af 8.6.2018 (Tildækningsforbud), Lovtidende A.

However, the legacy of the ECtHR alone cannot explain the spread of the face veil ban. First of all, as opposed to for example the United Nations Security Council,<sup>163</sup> the ECtHR cannot oblige the member states to introduce certain legislation. Furthermore, to several countries, the face veil ban was not a new idea; in fact, we have seen that Belgium, the Netherlands, and Denmark considered the idea years before the French 2010 Law, let alone the ECtHR cases. We have also seen that when formulating both the political and legal legitimization of its ban, France was acutely aware of these other debates in Europe. Furthermore, the example from Switzerland has shown that the push for banning the face veil may also come from the grassroots far removed from supranational institutions.<sup>164</sup>

In addition, it is not only the judicial standardization of the justificatory repertoire that allowed quick migration. Also the very genesis of the legal idea has a bearing on its migratory quality. As it has been demonstrated, it was the monumental shift away from the French principle of *laïcité* to the more general principle of “living together” that gave the idea of banning face veils a viable legal justification. This justification could in turn be utilized by states that for a while had had the political will to ban the face veil but needed a legal foundation.

Finally, by looking further back than to the first successful ban, this article has demonstrated how the migratory aspect cannot be separated from the multilocal genesis of the face veil ban and its justification as a legal idea. This is illustrated by the fact that the very first legislative proposal to ban the face veil was tabled in Belgium, but the drafters nonetheless used rhetoric from the French 2004 Law and referred to the *Ludin* case from Germany – a country that, ironically, to date has not introduced a general, national ban on face veils. In contrast to the countries that adopted face veil bans in the wake of the relevant ECtHR decisions, it is worth noting that Germany’s stance on the question remains unchanged faced with these decisions.<sup>165</sup>

These findings also have theoretical implications. To fully capture the phenomenon, we must go beyond the previous uses of the migration metaphor in comparative constitutional law. In the case of the face veil bans, the migration has not been either transnational or supranational. It is helpful to divide the course of migration into different phases: In the first phase – which can be called the creative phase or the genesis phase – the legal justification was a product of a multilocal cross-border exchange of political and

---

<sup>163</sup> See *K. L. Scheppele* (note 9).

<sup>164</sup> For thorough analysis of how ECtHR case law interacts with national grassroots organizations, see *E. Fokas* (note 145).

<sup>165</sup> Deutscher Bundestag, WD 3 – 3000 – 302/14, 15.



legal concepts. In the second phase – which may be termed the distillation phase – this new legal idea was further polished through trial-and-error processes at the courts; in particular the ECtHR was active in sorting out the weak justifications and focusing on the only legally viable one. In the third phase – the truly migratory phase – the legal idea can live out its migratory potential and be applied in all jurisdictions with the political will to ban the face veil.

ZaöRV 79 (2019)

