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"Living Together" or Living Apart from Religious Freedoms? The European Court of Human Right's Concept of "Living Together" and Its Impact on Religious Freedom

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“LIVING TOGETHER” OR LIVING
APART FROM RELIGIOUS FREEDOMS?
THE EUROPEAN COURT OF HUMAN
RIGHT’S CONCEPT OF “LIVING
TOGETHER” AND ITS IMPACT ON
RELIGIOUS FREEDOM

*Shelby L. Wade**

In the 2014 monumental court decision S.A.S. v. France, the European Court of Human Rights ruled that the French law banning both burqas and niqabs in public spaces was justified. The Court based this justification on the concept of “living together,” stating this newly-created concept allowed limitations on certain rights, such as the freedom of religion. With this decision, the Court vacated precedent which used a balancing test to weigh exceptions, such as national security in very narrow situations, against the limitations on individual freedoms. The new “living together” test is extremely far-fetched, vague, and controversial. This Note discusses the past precedential balancing test the Court followed prior to the decision in S.A.S., and why it is favored against the new “living together” justification. This Note also examines the potential disastrous impacts on personal freedoms the new test may cause, particularly in reference to new face-covering garment cases which may appear before the European Court of Human Rights.

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I. INTRODUCTION

In December 2016, to thunderous applause during her re-election campaign for Chancellor, Angela Merkel called for a ban on Muslim full-face veils in Germany.¹ Merkel declared that the veils are "contrary to integration," and "not acceptable in our country."² Merkel also described the importance of showing faces in communication between persons, which is "essential to our living together."³

Merkel's claims and potential policies seem contrary to international human rights law, such as the European Convention on Human Rights' Article 9, which guarantees "the right to freedom of thought, conscience, and religion."⁴ Merkel's words, however, reflect a recent trend in European countries of instituting bans on Muslim face-coverings, such as the niqab and the burqa.⁵

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1. Lizzie Dearden, *Angela Merkel calls for burqa ban 'wherever legally possible' in Germany*, INDEPENDENT (Dec. 6, 2016, 12:00 GMT), <http://www.independent.co.uk/news/world/europe/germany-burqa-burka-ban-veils-angela-merkel-cdu-muslims-speech-refugee-crisis-elections-term-vote-a7458536.html> [https://perma.cc/G9T7-2JVB].
 2. *Id.*
 3. Tara John, *Angela Merkel, Seeking Re-Election, Calls for Burqa Ban*, TIME (Dec. 6, 2016, 10:08 AM), <http://time.com/4591678/angela-merkel-burqa-ban-cdu-cinference/> [https://perma.cc/C627-UDDD].
 4. *Id.*
 5. *Id.*

Headscarves and face-coverings play a significant role in both religious identity and self-expression for many members of the Muslim community. The niqab covers the entire body, head, and face with an opening left for the eyes.⁶ In contrast, the burqa is a full-body veil, which covers the wearer's entire face and body with a mesh screen over the eyes.⁷ There are numerous styles of Islamic dress which reflect local traditions and different interpretations of Islamic law.⁸ Some women do not wear anything that distinguishes them as Muslim, while others choose to wear the niqab and completely veil their bodies.

The niqab and burqa are banned in numerous European countries, including France, Bulgaria, and Belgium.⁹ Other European countries have introduced bans to their respective legislative bodies.¹⁰ Critics of the bans argue these types of laws not only breed Islamophobia, but also violate many aspects of fundamental freedoms, such as the freedom of religion and freedom of expression, granted by the European Convention on Human Rights.¹¹ The classic justifications for the full-face veil bans often rely on security purposes, stating that the ban prevents anyone from being able to hide their identity in public.¹² Other classic justifications revolve around promoting freedom and rights for women, for instance, French politicians who claim the bans protect the "gender equality" and "dignity" of women.¹³

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6. *A Brief History of the Veil in Islam*, FACING HISTORY AND OURSELVES, <https://www.facinghistory.org/civic-dilemmas/brief-history-veil-islam> (last visited Feb. 19, 2017) [<https://perma.cc/696V-HC9H>].
 7. *Id.*
 8. *Id.*
 9. Siobhan Fenton, *Bulgaria Imposes Burqa Ban – and Will Cut Benefits of Women Who Defy It*, THE INDEPENDENT (Oct. 1 2016), <http://www.independent.co.uk/news/world/europe/bulgaria-burka-ban-benefits-cut-burkini-niqab-a7340601.html> [<https://perma.cc/9CBP-GK52>].
 10. *The Islamic veil across Europe*, BBC (Jan. 31, 2017), <http://www.bbc.com/news/world-europe-13038095> [hereinafter *European Veil Laws*] [<https://perma.cc/5VXR-5QXL>].
 11. Ben McPartland, *Burqa ban five years on- 'We created a monster'*, THE LOCAL (Oct. 12, 2015), <http://www.thelocal.fr/20151012/france-burqa-ban-five-years-on-we-create-a-monster> [<https://perma.cc/8MZ2-95XK>]; see also European Convention on Human Rights, art. 9-10, Nov. 4, 1950, F-67075 Strasbourg cedex, www.echr.coe.int (lays out the specific rights of freedom of religion and expression that must be protected for all persons).
 12. *Id.*
 13. Angelique Chrisafis, *France's burqa ban: women are 'effectively under house arrest'*, THE GUARDIAN (Sept. 19, 2011),

However, one of the most controversial, and potentially most influential justifications for the Muslim full-face veil bans did not come from politicians or officials of a country instituting a ban, but rather the European Court of Human Rights (the "Court" or "ECtHR").¹⁴ In the 2014 European Court of Human Rights case *S.A.S. v. France*, the Court held that a France veil ban was justified based on "respect for the minimum requirements of life in society" or of "living together."¹⁵ According to the Court, wearing a veil compromised the aspect of "living together" in a unified society as the face plays a role in social interaction.¹⁶ The newly-introduced concept of "living together" has been the subject of much criticism and debate, with even the dissenting judges in *S.A.S.* stating the proposition was "far fetched" and "vague."¹⁷

The Court recognized the idea of "living together" as a legitimate justification for limitations on rights guaranteed by the European Court of Human Rights.¹⁸ In some situations, "living together" should take precedence, including situations where national security could potentially be at stake, such as at a security check point.¹⁹ The national security justification is widely accepted, but applies only in narrow circumstances. More controversial and problematic is the extended reach of the "living together" justification sanctioned by the Court in *S.A.S.* With this ruling, the Court has expanded the breadth of full-face veil bans to any public place. This Note suggests that by broadening the scope of where religious garment bans can be implemented, the Court is setting a dangerous precedent where "living together" and assimilation are valued more than one's freedom. This would be an unpredictable move that would have detrimental, long-lasting consequences in the realm of religious freedom. An unexplained, vague justification allows for countries to more frequently limit its citizens' individual rights with underwhelming reasons. As a result, instead of offering a strong,

<https://www.theguardian.com/world/2011/sep/19/battle-for-the-burqa>
[<https://perma.cc/NLJ2-7FXQ>].

14. See *S.A.S. v. France*, 2014 Eur. Ct. H.R. 695 (dissent claims that there is no legitimate aim for the ban and the balance between protected rights and sacrificed rights is not correct).
15. *S.A.S.* 2014 Eur. Ct. H.R. at ¶¶ 116, 121.
16. Maxim Ferschtman & Jonathan Birchall, *Case Watch: ECHR Says "Living Together" Justifies Ban on Full-Face Veils*, OPEN SOCIETY FOUNDATIONS (July 1, 2014), <https://www.opensocietyfoundations.org/voices/case-watch-echr-says-living-together-justifies-ban-full-face-veils> [<https://perma.cc/9DSL-QK23>].
17. *S.A.S.* 2014 Eur. Ct. H.R. at dissenting opinion ¶ 5.
18. *S.A.S.* 2014 Eur. Ct. H.R. at ¶¶ 121-22.
19. *S.A.S.* 2014 Eur. Ct. H.R. at ¶ 139.

recognized justification such as national security, countries can institute bans for much simpler reasons - such as simply having a small barrier like a cloth over one's face - to take precedence over one's freedom of religion.

In Part II, this Note will provide a background of current instituted and proposed European religious face-covering bans. Part III will discuss current human rights law, the specific Convention articles which grant the right of religious expression, and how these articles may be overlooked in a "living together" justification. Part IV of this note will discuss the precedential cases regarding religious expression, specifically religious clothing, as well as the quintessential case which introduced the concept of "living together", *S.A.S. v. France*. Part V will discuss cases regarding full-face veils which are currently before the European Court of Human Rights. Part VI addresses the potential future effect the concept of "living together" may have on the cases before the Court. Finally, Part VII addresses the disastrous and troublesome future "living together" has introduced for the Court, unless changes, such as a re-introduction of a balancing test, are implemented.

II. CURRENT INSTITUTED AND PROPOSED EUROPEAN RELIGIOUS FACE-COVERING BANS.

Religious face-covering bans are not a new concept in Europe with Bulgaria, Belgium, and France all having country-wide bans.²⁰ Other countries have either proposed bans that will be instituted in the near future, or have instituted bans that were struck down by their domestic courts.²¹

In April 2011, a French law, No. 2010-1192, was instituted, banning the burqa and the niqab from being worn in public.²² The law passed by a vote of 246 to 1 with about 100 abstentions.²³ The goal of the law was to "prohibit the act of aiming to conceal the face in public."²⁴ The French law inflicts a fine of 150 euros, in addition to or instead of a citizenship course.²⁵ If one forces a woman to wear a niqab or a burqa, the resulting punishment is a year in prison or a

20. Fenton, *supra* note 9.

21. *European Veil Laws*, *supra* note 10.

22. Susan S. M. Edwards, *No Burqas We're French! The Wide Margin of Appreciation and the ECtHR Burqa Ruling*, 26 DENNING L. J. 246, 248 (2014).

23. *French Senate approves burqa ban*, CNN (Sept. 15, 2010), <http://www.cnn.com/2010/WORLD/europe/09/14/france.burqa.ban/> [<https://perma.cc/4P5R-CZ2Z>] [hereinafter *French Senate*].

24. Edwards, *supra* note 22, at 248.

25. French Senate, *supra* note 23.

15,000 euro fine.²⁶ Per data collected in 2015, 1,546 fines have been imposed under the French law.²⁷

Following France, in July 2011, Belgium instituted its own ban of the full Islamic veil in public.²⁸ Offenders of Belgium's law are punished with a 15 to 25 euro fine and a possibility of up to seven days in jail.²⁹ In December 2012, the Belgian Constitutional Court upheld the ban.³⁰ The court stated the ban did not violate fundamental rights because the ban did not cover places of worship.³¹ Also, the court, while acknowledging that the ban interfered with the rights of the applicants who challenged the ban, accepted that the aims of the Belgium government were legitimate.³² These aims included public security and "living together" in society.³³

Bulgaria also enacted a veil ban in 2016. However, under Bulgaria's ban, women not only face fines of up to 770 euros, but also a suspension of social security benefits.³⁴

In November 2016, the Dutch parliament approved plans for a partial burqa ban in places such as government buildings, schools, hospitals, and on public transportation.³⁵ The ban would not apply to those wearing face-coverings on the street, but only for security reasons, or "in specific situations where it is essential for people to be

26. *Id.*

27. *European Veil Laws*, *supra* note 10.

28. *Belgian ban on full face veils comes into force*, BBC (July 23, 2011), <http://www.bbc.com/news/world-europe-14261921> [<https://perma.cc/L9J9-R4KU>].

29. *Belgium's lower house votes to ban burqa*, CNN (April 30, 2010), <http://www.cnn.com/2010/WORLD/europe/04/29/belgium.burqa.ban/> [<https://perma.cc/4R86-AQ8L>].

30. Saira Ouald Chaib, *Belgian Constitutional Court says Ban on Face-coverings does not violate Human Rights*, STRASBOURG OBSERVERS (Dec. 14, 2012), <https://strasbourgobservers.com/2012/12/14/belgian-constitutional-court-ban-on-face-coverings-does-not-violate-human-rights/> [<https://perma.cc/6G6N-T457>].

31. *Id.*

32. *Id.*

33. *Id.*

34. Fenton, *supra* note 9.

35. Harriet Agerholm, *Dutch parliament approves partial burqa ban in public places*, INDEPENDENT (Nov. 29, 2016), <http://www.independent.co.uk/news/world/europe/dutch-burqa-veil-ban-holland-votes-for-partial-restrictions-some-public-places-a7445656.html> [<https://perma.cc/UU8R-HZLY>].

seen."³⁶ The ban would also outlaw all face-coverings, which would include both ski-masks and helmets.³⁷

Spain attempted to institute a nationwide ban on burqas in public places in 2010, but Spain's Parliament rejected the proposal.³⁸ In 2013, the Spanish Supreme Court overturned a municipal ordinance banning the wearing of burqas as unconstitutional as it violated "the fundamental right to the exercise of the freedom of religion, which is guaranteed by the Spanish Constitution."³⁹

In January 2017, Austria became the latest country to make a move toward a full-face veil ban.⁴⁰ Austria's Social Democratic and Austrian People's parties outlined their view of Austria as an "open society that requires open communication." In their view, "[f]ull-face veils in public places are the opposite of that and will be banned."⁴¹ The Austrian government wants to present the state in a "religiously neutral manner" and accordingly, banned all civil servants from wearing Islamic headscarves.⁴²

Public polls conducted in other European countries show a public backing of burqa and niqab bans.⁴³ A poll conducted in Britain in August 2016 showed that 57 percent were in favor of a ban, and just 25 percent disagreed with the idea of a veil ban.⁴⁴ A poll conducted in Germany also in August 2016 found that 81 percent of Germans

36. Agence France-Presse, *Dutch cabinet approves partial ban on Islamic veil in public areas*, THE GUARDIAN (May 22, 2015), <https://www.theguardian.com/world/2015/may/22/netherlands-islamic-veil-niqab-ban-proposal-dutch-cabinet> [<https://perma.cc/8FEG-MQGA>].

37. Agerholm, *supra* note 35.

38. Alan Clendinning & Harold Heckle, *Spain parliament rejects burqa ban for now*, NBC NEWS (July 20, 2010), http://www.nbcnews.com/id/38332675/ns/world_news-europe/t/spain-parliament-rejects-burqa-ban-now/ [<https://perma.cc/9C7V-9MVN>].

39. Soeren Kern, *Spain: Supreme Court Overturns Burqa Ban*, GATESTONE INSTITUTE (March 4, 2013), <https://www.gatestoneinstitute.org/3610/spain-burqa-ban> [<https://perma.cc/5L8H-XT3K>].

40. Laura Goehler & Angela Dewan, *Austrian government moves to ban full-face veil*, CNN (Jan. 31, 2017), <http://www.cnn.com/2017/01/31/europe/austria-face-veil-ban/> [<https://perma.cc/ZL3M-83KT>].

41. *Id.*

42. *Id.*

43. James Blitz, *Poll Shows Support in Europe for Burqa Ban*, THE FINANCIAL TIMES (Mar. 1, 2010), <https://www.ft.com/content/e0c0e732-254d-11df-9cdb-00144feab49a> [<https://perma.cc/7HG5-2PH2>].

44. Jon Stone, *British public overwhelmingly support banning the Islamic burqa by two to one*, INDEPENDENT (Aug. 31, 2016), <http://www.independent.co.uk/news/uk/politics/islam-muslim-veil-burka-ban-burkini-poll-uk-britain-france-a7218386.html> [<https://perma.cc/P63Y-XB76>].

approved of either a ban on the burqa.⁴⁵ Of this 81 percent, 51 percent of Germans wanted to see a total ban on the burqa, while only 30 percent approved of a partial ban on the burqa.⁴⁶

III. QUINESSENTIAL HUMAN RIGHTS LAW AND LIMITATIONS.

Several of the core international human rights instruments contain protections against discrimination based on religion and allow the fundamental freedom of expression.⁴⁷ Many of the countries who have either instituted or proposed full-face veil bans are signatories of the European Convention on Human Rights, and have ratified the Convention.⁴⁸ While the Universal Declaration of Human Rights is not a legally binding document, it has heavily influenced the constitutions of many European nations.⁴⁹ As such, European reverence of these important human rights instruments appears sanctimonious in light of the fact that the face-covering bans being enacted across Europe directly contradict many of their core tenants.

The European Convention on Human Rights prohibits "discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, or association with a national minority, among other status."⁵⁰ The Convention also states that "the High Contracting Parties shall secure to everyone in their jurisdiction freedoms" such as "the right to freedom of thought, conscience, and religion" relayed in Article 9 of the Convention.⁵¹ Also secured are the right "to manifest one's

45. Josh Lowe, *Germans Back Burqa Ban, Poll Says*, NEWSWEEK (Aug. 26, 2016), <http://www.newsweek.com/burqa-ban-germany-germans-poll-burkini-angela-merkel-493775> [https://perma.cc/39M9-6PC8].

46. *Id.*

47. Emily Howie, *Protecting the Human Right to Freedom of Expression in International Law*, 20:1 INT'L J. OF SPEECH-LANGUAGE PATHOLOGY 12 (2018).

48. *Chart of signatures and ratifications of Treaty 005*, COUNCIL OF EUROPE (Feb. 20, 2017), https://www.coe.int/en/web/conventions/full-list/conventions/treaty/005/signatures?p_auth=eIfdVOaw;%20https://www.britannica.com/topic/Universal-Declaration-of-Human-Rights [https://perma.cc/C5KN-LTJ9].

49. Nancy Flowers, *A Short History of Human Rights*, UNIV. OF MINNESOTA <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.html> [https://perma.cc/GJ5M-492M] (last visited Feb. 20, 2017).

50. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 [hereinafter *Convention on Human Rights*].

51. *Id.*

religion in worship, teaching, practice, and observation" and "the right to freedom of expression" which is contained in Article 10.

The Human Rights Committee has specifically emphasized "that any specific regulation of clothing to be worn by women in public may involve a violation of a number of rights guaranteed by the [ICCPR] such as: article 26, on non-discrimination;... articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or other right of self-expression; and, lastly, article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim."⁵²

The Universal Declaration of Human Rights states that "everyone is entitled to the rights and freedoms set forth in this Declaration without distinction of any kind" such as race, color, sex, religion, etc.⁵³

Some noteworthy Articles of the Declaration include Article 7, which states "all are equal before the law and are entitled without discrimination to equal protection under the law."⁵⁴ It also states that "[a]ll are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."⁵⁵ Article 8 states "[e]veryone has the right to an effective remedy by the tribunals for acts violating their fundamental rights granted by the constitution or law."⁵⁶ Article 18 declares that "[e]veryone has the right to freedom of thought, conscience, and religion; and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance."⁵⁷ Lastly, Article 19 of the Declaration states that "[e]veryone has the right to freedom of opinion and expression."⁵⁸

Most of the countries which have instituted or attempted to institute full-face veil bans have ratified both the Universal Declaration of Human Rights and the European Convention on Human Rights. Most challenges to the full-face veil bans cite these fundamental human rights instruments.

52. Human Rights Watch, *Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany*, www.hrw.org, [https://perma.cc/RUX4-EU3W] (Feb. 26, 2009).

53. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) at art. 2. [hereinafter *Universal Declaration of Human Rights*].

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

These main international human rights instruments show that individual freedoms are often innate and should not be disturbed.⁵⁹ However, these treaties permit limitations of these freedoms in certain situations. For example, the European Convention on Human Rights, states that the freedoms are subject to "limitations as are prescribed by law and necessary in a democratic society."⁶⁰ In addition, the Universal Declaration of Human Rights also allows limitations which "are determined by law solely for the purpose of securing due recognition and respect of the rights and freedoms of others."⁶¹ The limitations must also meet "the just requirements of morality, public order and the general welfare in a democratic society."⁶²

None of these limitations equate to "living together." The most similar limitation, in which "living together" could potentially fall, is in the Universal Declaration of Human Rights which allows a limitation for "the general welfare in a democratic society."⁶³ However, general welfare generally refers to the ability of a government to provide basic necessities for its citizens, not to ensure a group of citizens removes a cloth covering from their face so socializing with others has no possible barrier.⁶⁴ A government has no plausible way to ensure every single person in a country is comfortable at all times. By disallowing the burqa or niqab, a government may be making one group feel comfortable in socializing, while making those who regularly wear burqas or niqabs uncomfortable.

In order to ensure there is not an abuse of these granted human rights, a balancing of interests can, and should occur. There are certain situations where national interests may override the granting of individual freedoms. However, this should be a very narrowed and specified category granted in rare, compelling circumstances. The approach the Court is taking - granting a ban with no narrow focus or intent - is an abuse of its discretion and of innate human rights.

59. See *Kant's Social and Political Philosophy*, STANFORD PHILOSOPHICAL ENCYCLOPEDIA (June 1, 2007), <https://plato.stanford.edu/entries/kant-social-political/> [<https://perma.cc/GDN6-L5W9>] ("Kant held that every rational being had both an innate right to freedom and a duty to enter into a civil condition governed by a social contract in order to realize and preserve that freedom.").

60. Convention on Human Rights, *supra* note 50, at art. 9.

61. Universal Declaration of Human Rights, *supra* note 53, at art. 29.

62. *Id.*

63. *Id.*

64. See Definition of General Welfare, THE FREE DICTIONARY, (Mar. 18, 2018), <https://legal-dictionary.thefreedictionary.com/General+Welfare> [<https://perma.cc/7GQR-BXL2>] (defining the general welfare as government concern for the health, peace, and morality of its citizens).

IV. PRECEDENTIAL CASES REGARDING RELIGIOUS EXPRESSION AND THE VACATION OF PRECEDENT IN S.A.S. V. FRANCE.

Numerous cases regarding the display of religious symbols have been brought before the European Court of Human Rights (ECtHR), particularly cases involving face and head coverings. Many cases invoke the fundamental freedoms of religion and expression granted by founding human rights instruments; however, many have failed to ensure freedom in wearing religious garments. There has been victory for religious freedom where the head-covering ban in question is not narrowly-tailored to a specific place, e.g. in a public.⁶⁵ In these cases, the ban is often found too broad and is overruled.⁶⁶ The decisions in these cases before the ECtHR often hinge on the specific location where the covering is being worn.⁶⁷ Two such cases, *Phull v France* and *El Morsli v France*, involve religious coverings worn during security checks.⁶⁸ The ECtHR heard both of these cases prior to France's veil ban.

Phull v France was brought before a Chamber of the European Court of Human Rights in 2005.⁶⁹ Phull was a practicing Sikh and was required to wear a turban. Phull complained that, when going through the security scanner at an airport, he was required to remove his turban.⁷⁰ This was required even after Phull agreed to go through a walk-through scanner and to be checked with a hand-held detector. Phull claimed an infringement of his right to freedom under Article 9 of the European Convention on Human Rights. The Court; however, stated that safety checks are necessary to the public safety and was within the purview of Article 9.⁷¹ Thus, the Court stated that the

65. Ahmet Arslan and Others v. Turkey, App. No. 41135/98, Eur. Ct. H.R. (2010).

66. *See id.* (finding that the burqa ban was not narrowly defined).

67. *See id.* (analyzing where the ban takes effect).

68. Eur. Ct. H.R. Factsheet, Religious Symbols and Clothing (Dec. 2017), available at: https://www.echr.coe.int/Documents/FS_Religious_Symbols_ENG.pdf [<https://perma.cc/WBK5-JDCB>] [hereinafter *Eur. Ct. H.R. Factsheet*].

69. Hilary Khoury, *S.A.S. v. France: The Full-Face Veil as a Threat to Public Safety and the Protection of Others*, 23 TULANE J. OF INT'L. AND COMP. LAW 607, 612 (2015).

70. THE EUROPEAN COURT OF HUMAN RIGHTS AND THE RIGHTS OF MARGINALISED INDIVIDUALS AND MINORITIES IN NATIONAL CONTEXT 88 (Dia Anagnostou & Evangelia Psychogiopoulou, eds., 2010).

71. Khoury, *supra* note 69, at 612.

implementation of such bans in relation to safety checks was within the state's reach to ensure public safety.⁷²

Similarly, *El Morsli v. France*, involved an Islamic woman who refused to remove her veil for purposes of an identity check at a Consulate.⁷³ The applicant also complained of a violation of her right to freedom of religion, specifically Article 9 of the European Convention on Human Rights.⁷⁴ The European Court of Human Rights saw no reason for departing from the rationale in *Phull* regarding security checks.

While both *Phull* and *El Morsli* focused specifically on the removal of religious garb for security purposes, broader reaching cases have also been brought before the ECtHR concerning the wearing of religious symbols or clothing in a public place. The first major case is *Ahmet Arslan and Others v. Turkey*. The applicants in *Ahmet Arslan* are members of a religious group who were arrested for breaking two Turkish laws- one against wearing headgear and the other against wearing religious clothing in public, unless it is for religious ceremonies.⁷⁵ The religious group required a turban, baggy pants, and a tunic to be worn, and the members to carry a stick.⁷⁶ The applicants claimed that their conviction under the Turkish laws violated Article 9 of the European Convention on Human Rights.⁷⁷ In the case, Turkey cited prevention of "acts of provocation, proselytism, and propaganda" to justify these regulations, but had no solid evidence of abuse.⁷⁸ Furthermore, Turkey also claimed the broad restrictions were "necessary in a democratic society."⁷⁹

The European Court of Human Rights found that the Turkish courts and laws did violate the applicants' freedom of religion by limiting their expression of religion through their clothing.⁸⁰ The

72. *Id.*

73. *El Morsli v. France*, App. No. 15585/06 Eur. Ct. H.R. (2008).

74. *El Morsli*, App. No. 15585/06 Eur. Ct. H.R..

75. *Conviction of Group for Wearing Religious Clothing Overturned by European Court of Human Rights*, HARVARD INTL. L. J. (March 3, 2010), <http://www.harvardilj.org/2010/03/conviction-of-group-for-wearing-religious-clothing-overturned-by-european-court-of-human-rights/> [https://perma.cc/XR5U-X2F3] [hereinafter *Conviction Overturned*].

76. *Id.*

77. *Id.*

78. Sally Pei, *Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights*, 122 YALE L. J. 1089, 1095 (2013).

79. *Id.*

80. *Id.*

European Court of Human Rights stated "that it might have accepted that strict maintenance of a secular system was important for Turkey's democracy and public safety, but that Turkish judicial decisions at issue had failed to rely on that justification."⁸¹ Furthermore, the Court highlighted that the applicants "were punished for their religious dress in public areas open to all, versus public establishments where the state's interest in religious neutrality might outweigh an individuals' right to manifest his or her religion."⁸² Thus, the Court held that the ban applied too widely, contrasting to more the limited restrictions in *Phull* or *El Morsli*.⁸³

All of these previous cases involved challenges to either bans of certain religious wear or to being asked to remove a head covering. These cases in particular, *Ahmet*, have led to the reasoning behind one of the most influential cases regarding religious expression: *S.A.S v. France*. The decision in *S.A.S.* set forth the roadmap for future challenges to religious head-covering bans. *S.A.S. v. France* was the first individual complaint, regarding a nationwide full-face veil ban, to reach the European Court of Human Rights.⁸⁴

S.A.S. v. France involved a 24-year-old French citizen who brought a case at the European Court of Human Rights against France's full-face veil law, no. 2010-1192.⁸⁵ S.A.S, a practicing Sunni Muslim, was born in Pakistan, where it is customarily viewed as respectful for women to wear a full-veil in public. She did not wear a niqab in public at all times, but wished to be able to wear it when she chose to do so.⁸⁶ S.A.S. did not claim to want to keep her niqab on at all times, nor was she pressured by her husband or any members of her family to wear her veil.⁸⁷ S.A.S. also stated she would agree to show her face when requested for any necessary security checks.⁸⁸

S.A.S. claimed that the French law, which makes it illegal for anyone to cover their face in a public place, violated several articles in the European Convention on Human Rights,⁸⁹ namely her right: against inhuman or degrading treatment (Article 3), to respect for

81. Conviction Overturned, *supra* note 75.

82. Conviction Overturned, *supra* note 75.

83. Conviction Overturned, *supra* note 75.

84. Ilias Trispiotis, *Two Interpretations of 'Living Together' in European Human Rights Law*, 75 CAMBRIDGE L. J. 580, (2016).

85. Sune Lægaard, *Burqa Ban, Freedom of Religion and 'Living Together'*, 16 HUMAN RIGHTS REVIEW 203 (Sept. 2015).

86. Trispiotis, *supra* note 45.

87. *Id.* at 586.

88. S.A.S. 2014 Eur. Ct. H.R. 695 at ¶ 13.

89. Lægaard, *supra* note 85, at 203.

private life (Article 8), to freedom of thought, conscience, and religion (Article 9), to freedom of expression (Article 10), and to freedom of association (Article 11), taken separately and together with Article 14 of the Convention, which is the prohibition of discrimination.⁹⁰

The French government cited both public safety and "ensuring 'respect for the minimum set of values of an open and democratic society' as justification for the ban⁹¹ In the second aim, the French referred to three values - human dignity, gender equality, and the concept of "living together."⁹² For the last concept, France argued that the ban was justified on the basis that "the voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of living together in French society."⁹³ The Court summarized France's arguments as stating that "the face plays a significant role in human interaction: more so than any other part of the body, the face expresses the existence of the individual as a unique person...[t]he effect of concealing one's face in public places is to break the social tie."⁹⁴

The Court accepted that the ban raised an issue regarding the manifestation of one's religion or beliefs, and accepted that the ban constituted a form of interference with the applicant's rights; however, the ban was still surprisingly upheld.⁹⁵

Additionally, the Court acknowledged that public safety was a legitimate aim, as was the concept of "living together."⁹⁶ However, even though the Court acknowledged that a total ban in all public places was disproportionate in order to fulfill the public safety ground, the concept of living together still justified the total ban as proportionate.⁹⁷ The Court upheld the ban because it was justified under French law based on the legitimate aim of "respect for the minimum requirements of life in society."⁹⁸ The Court stated that the "veil concealing the face is perceived by the respondent State as

90. *Id.* at 204.

91. Jill Marshall, *S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities*, 15 HUMAN RIGHTS L. REVIEW 377, 381 (April 2015).

92. *Id.*

93. Lægaard, *supra* note 85, at 204.

94. Eva Brems, *SAS v. France: A Reality Check*, 25 NOTTINGHAM L. J. 58, 67 (2016).

95. S.A.S. 2014 Eur. Ct. H.R. 695 at ¶ 110.

96. Marshall, *supra* note 91, at 378.

97. *Id.* at 382.

98. S.A.S. 2014 Eur. Ct. H.R. at ¶ 121.

breaching the right of others to live in a space of socialization which makes living together easier.”⁹⁹

According to the Court, wearing a veil undermined the term “living together” as the face plays a significant role in social interaction.¹⁰⁰ Thus, the concealment of the face is perceived as problematic because it breaches “the right of others to live in a space of socialization which makes living together easier.”¹⁰¹ A concealed face through the systematic wearing of a burqa or niqab, per the Court, “falls short of the minimum requirement of civility that is necessary for social interaction.”¹⁰² The Court reasoned that the full-face veil ban was instituted to protect social interaction, essential to “pluralism, tolerance, and broadmindedness.”¹⁰³ The Court viewed “living together” as a necessary social need, a need so important that it outweighed the right to wear a full-face veil in public.¹⁰⁴ In balancing the interests at stake, the Court also cited the fact that women could still wear non-face-covering clothing, such as headscarves, and that the 150 Euro fine was small.¹⁰⁵

The murky justification behind the concept of “living together” did not persuade the dissenting judges, who called it “far fetched” and “vague.”¹⁰⁶ Furthermore, the dissenting judges did not find that the majority had shown which precise rights of others could be inferred from this concept of “living together.”¹⁰⁷ The dissenters acknowledged that the face is important to communication, but did not “lead to the conclusion that human interaction is impossible if the full face is not shown.”¹⁰⁸ In turn, they also expressed “that the individual rights

99. *Id.*

100. See Marshall, *supra* note 91, at 384 (discussing the holding of the European Court in *S.A.S.*, in which it sided with the French government and its view of the importance of the face in social interaction).

101. *Id.* at 384-85.

102. *Id.* at 385.

103. Trispiotis, *supra* note 84, at 588.

104. See *S.A.S.* 2014 Eur. Ct. H.R. 695 at ¶ 153-54 (“the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society.”).

105. See *id.* (discussing the sanctions attached to the ban).

106. *S.A.S.* 2014 Eur. Ct. H.R. at dissenting opinion ¶ 5.

107. Marshall, *supra* note 91, at 385.

108. *S.A.S.* 2014 Eur. Ct. H.R. at dissenting opinion ¶ 9.

fostered by the Convention should not give way to ‘abstract principles’ such as living together.”¹⁰⁹

Opponents of the ruling state that the “living together” holding given by the Court makes a “mockery of freedom of expression, religious or otherwise.”¹¹⁰ John Dalhuisen, the Europe and Central Asia Programme Director at Amnesty International, stated that with its ruling, the Court has declared that “discomfort and shock are the price democratic societies must pay precisely to enable ‘living together’.”¹¹¹ The reality is that in forcing people to ‘live together’, this ruling will end up forcing a small minority to live apart, as it effectively obliges women to choose between expressing their religious beliefs and being in public.”¹¹²

V. WHAT EFFECT WILL “LIVING TOGETHER” HAVE ON POST- S.A.S. CASES?

Following the 2014 controversial ruling in *S.A.S. v. France*, two other cases have recently been filed and are pending application before the Belgian government. These two cases, which have been ruled on, could potentially appear before the European Court of Human Rights on appeal.

The first case, *Belkacemi and Oussar v. Belgium* involves two applicants fined for wearing a face-covering. One is a female Belgian national who was fined in Brussels in 2009 for violation of a municipal face-covering ban.¹¹³ She successfully challenged her fine before a police tribunal; however, due to the nationwide Belgian criminal ban, the applicant stated she stopped wearing the face veil because of the fear of being stopped by Belgian police, the stigmatization surrounding the law, and the possibility of fines.¹¹⁴

109. Alexandria Weller, *The Future of “Living Together”: An Analysis of the European Court of Human Right’s S.A.S. v. France*, 41 N.C. J. INTL. L. FORUM 105, 127 (2016).

110. Marshall, *supra* note 91, at 378.

111. *European Court ruling on full-face veils punishes women for expressing their beliefs*, AMNESTY INTERNATIONAL (July 1, 2014), <https://www.amnesty.org/en/latest/news/2014/07/european-court-ruling-full-face-veils-punishes-women-expressing-their-religion/> [<https://perma.cc/P8H3-N2WZ>] [hereinafter *European Court Ruling*].

112. *Id.*

113. See Eva Brems, *Face veils in Strasbourg (bis): the Belgian cases*, STRASBOURG OBSERVERS (Dec. 28, 2015), <https://strasbourgobservers.com/2015/12/28/face-veils-in-strasbourg-bis-the-belgian-cases/> [<https://perma.cc/GS9D-E5NC>] (discussing the case of *Belkacemi and Oussar v. Belgium*).

114. See *id.* (explaining the views of the applicant *Belkacemi* in which she stopped wearing the face veil).

The second applicant in *Belkacemi* is a Moroccan national who lives in Belgium and was fined in Brussels in 2011.¹¹⁵ After the Belgian nationwide ban was adopted, the applicant refused to go out in public without her face veil, and instead stays at home. This decision due to fear of the ban has affected both her private and social life.¹¹⁶

The applicants in *Belkacemi* filed a claim for the suspension and annulment of the burqa ban before the Belgian Constitutional Court on July 27, 2001.¹¹⁷ The applicants invoked articles of the European Convention on Human Rights in support of their claims, particularly the right to respect for private and family life (Article 8) the freedom of thought, conscience and religion (Article 9), and the prohibition of discrimination (Article 14).¹¹⁸ On October 5, 2011, the Belgian Constitutional Court refused to suspend the effect of the challenged burqa act, as the applicants did not demonstrate that the application of the act during the proceedings caused serious irrevocable prejudice.¹¹⁹ Following this decision, subsequent actions were introduced by another Muslim woman, two non-Muslim people, and non-profit organizations.¹²⁰

The Constitutional Court then ruled on the actions for annulment of the burqa ban on December 6, 2012, holding that the Act "met the condition of foreseeability required by the Constitution and the European Convention on Human Rights."¹²¹ The Court also held that the rights to freedom of expression, religion, and to private life are not absolute and limitations are allowed if found to be necessary in a democratic society.¹²² Furthermore, while the Court found the burqa

115. *See id.* (discussing the second applicant in *Belkacemi* and *Oussar v. Belgium*).

116. *See id.* (discussing the fears of the second applicant *Oussar*).

117. *See* Eva Brems, THE EXPERIENCES OF FACE VEIL WEARERS IN EUROPE AND THE LAW 168 (Eva Brems, ed., 2014) (discussing the previous claim of *Belkacemi* and *Oussar* before the Belgian Court).

118. Eur. Ct. H.R. Factsheet, *supra* note 68.

119. *See* EMMANUELLE BRIBOSIA & ISABELLE RORIVE, REPORT ON MEASURES TO COMBAT DISCRIMINATION 32 (European Network of Legal Experts in the Non-discrimination Field, 2013), <http://www.refworld.org/pdfid/540da8064.pdf> [<https://perma.cc/LY32-6E9W>] (discussing the judgment of the Constitutional Court in the case brought by parties *Belkacemi* and *Oussar*).

120. *See id.* (discussing the subsequent actions "for annulment of the 'Anti-burqa' Act" taken by others following the *Belkacemi* and *Oussar* case).

121. *Id.*

122. *See id.* (discussing the holding of the Constitutional Court in the *Belkacemi* and *Oussar* case).

ban interfered with religious freedom, the aims of the act were legitimate and proportionate.¹²³

Another important case questioning the Belgian burqa ban is *Dakir v. Belgium*. *Dakir* involves a Belgian woman and her complaint regarding both municipal and Belgium's nationwide face-veil bans. *Dakir* was communicated to the Belgium on July 9, 2015.¹²⁴ The applicant invoked articles of the European Convention on Human Rights in support of her claims, particularly the right to respect for private and family life (Article 8) the freedom of thought, conscience, and religion (Article 9), and the freedom of expression (Article 10) both in isolation and in combination with the prohibition of discrimination (Article 14).¹²⁵ The Human Rights Centre at Ghent University filed a third party intervention in *Dakir*.¹²⁶ In their intervention, the Centre explored the differences between the French cases, such as *S.A.S. v. France*, and the Belgian cases.¹²⁷

The first major difference between the French and Belgian ban is that both the municipal and nationwide bans include fines, whether administrative or criminal fines.¹²⁸ The second difference is that that Belgian ban, unlike the French ban, does not contain a provision that penalizes another person who forces another to cover her face.¹²⁹ The last major difference between the French and Belgian bans is the process which led to the actual adoption of the bans. In France, the ban is looked at by a collection of expert opinions, and there is an inclusion of advice both on the legality of the ban and its conformity with human rights.¹³⁰ France also includes discussion with both chambers of parliament.¹³¹ Belgian's process of instituting the ban is much simpler and less engaged than the French process.

While there is no record of a specific ruling on the *Dakir* case because the application is still pending, per precedential rulings by

123. *Id.* at 32-33.

124. Eur. Ct. H.R. Factsheet, *supra* note 68 (discussing *Dakir v. Belgium*).

125. *See id.* (discussing *Dakir's* claims under the European Court of Human Rights).

126. Brems, *supra* note 113.

127. Written submission by the Human Rights Centre of Ghent University as Third-Party Interveners, *Fouzia Dakir v. Belgium*, (Application No. 4619/12).

128. Brems, *supra* note 94, at 71 {distinguishing between the French and Belgian face covering cases}.

129. *Id.*

130. *See* Brems, *supra* note 113 (discussing the differences between the Belgian and French face covering bans).

131. *Id.*

the Belgian Constitutional Court, such as in *Belkacemi and Oussar v. Belgium*, the Belgian burqa ban will most likely be upheld.

VI. THE POTENTIAL AFFECT A JUSTIFICATION OF “LIVING TOGETHER” COULD HAVE ON FUTURE FACE-COVERING CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS.

While *S.A.S. v. France* cannot be appealed as it was handed down by the ECtHR’s Grand Chamber, future cases before the Court could still be affected by the *S.A.S* holding.¹³²

As the dissenting judges noted in *S.A.S.*, the Court’s concept of “living together” is extremely vague and general.¹³³ The Court did not take the extra step to clarify what actually constitutes “the rights and freedoms of others” which are outside the scope of rights protected by the Convention.¹³⁴ With cases concerning similar full-face veil bans, the decisions may provide the Court with an opportunity to specify and narrow the meaning of “living together.”

Furthermore, as countries have seen with the ruling in *S.A.S.*, the concept of “living together” may be used as an effective justification for future bans that extend far beyond just face-coverings. As a result, there may be more cases concerning bans on other forms of religious expression seen by the Court where the government cites the “living together” justification. Also, as previously-mentioned, polls conducted in other European countries, such as Britain and Germany, show a shifting public opinion of approval of bans regarding full-face veils. This potential influx of cases may provide the Court with various opportunities to hopefully clarify what “living together” entails.

In the event *Belkacemi and Oussar v. Belgium* and *Dakir v. Belgium* are brought before the Court, the concept of “living together” will most certainly be invoked as the basis for the respective Belgian ban. As the *S.A.S.* holding shows, other justifications, such as maintaining public safety and preventing gender discrimination, have been unpersuasive in the past and may be forgone entirely. Thus, more countries, such as Belgium, may capitalize on the justification of “living together” in defense of their bans, particularly for any appeals or cases brought before the Court.¹³⁵

132. *European Court Ruling*, *supra* note 111 (discussing the European Convention of Human Rights Judgment in *S.A.S. v. France*).

133. *S.A.S.* 2014 Eur. Ct. H.R. 695 at dissenting opinion ¶ 5.

134. *S.A.S.* 2014 Eur. Ct. H.R. at dissenting opinion ¶ 5.

135. Weller, *supra* note 109, at 134 (noting the activities of other nations in the wake of the ruling in *S.A.S. v. France* and the trend that may follow).

The introduction of "living together" in the *S.A.S.* is not completely random in light of France's proud legacy as a secular nation or what is more commonly referred to as "laïcité."¹³⁶ Laïcité refers the freedom of citizens and public institutions from the influence of organized religion.¹³⁷ It is based on the belief that France should ignore religious and ethnic differences, and instead promote a unified national identity.¹³⁸ Thus, the Court looks to this portion of France's national identity in introducing the concept of "living together" and in light of this, concluded it was a legitimate aim.¹³⁹

While this justification is traditionally a French concept, the Court, by introducing the notion of "living together," may cause other countries to appropriate a distinctly French concept as well. This could have long-lasting effects on how bans are instituted and written in other countries. Furthermore, if a country is able to conform its ban to the concept of "living together," the ban may be upheld, which would have been highly improbable under the Court's pre-*S.A.S.* jurisprudence. Through the *S.A.S.* decision, the Court has declared that face-covering bans, regardless of whether they fly in the face of international human rights instruments guaranteeing citizens freedoms of religion and expression, can be justified simply because they conceal the face and making discussions apparently more difficult.

The Court is also not accomplishing the goal of making it easier for ethnically and religiously diverse individuals to "live together." By making socializing more comfortable for one side, the Court's ruling may make the other individual, the one who wishes to wear a face-covering, more uncomfortable. For example, in *Belkacemi*, the applicant refused to go out in public without her face veil, and instead stays at home.¹⁴⁰ It would be extremely difficult for the Court to make

136. Elizabeth Winkler, *Is it Time for France to Abandon Laïcité?*, THE NEW REPUBLIC (Jan. 7, 2016), <https://newrepublic.com/article/127179/time-france-abandon-laicite> [<https://perma.cc/U2DZ-VJ8P>].

137. *See id.* (discussing France's strict secularism).

138. Jennifer Heider, *Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights*, 22 INDIANA INT'L. AND COMP. LAW REV. 93, 98-99 (April 1, 2012).

139. *See* Bernard Keenan, *S.A.S. v. France- the French principle of "living together" and the limits of individual human rights*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (July 14, 2014) <http://blogs.lse.ac.uk/humanrights/2014/07/14/s-a-s-v-france/> [<https://perma.cc/JEG6-WXPV>] (noting that "vivre ensemble" is a legitimate aim).

140. *See* Brems, *supra* note 113 (noting the effect of the face veil ban on the applicants in *Belkacemi* and *Oussar v. Belgium*).

an impartial choice on who should have to endure their uncomfortableness.

Courts, while not formally bound to follow previous judgments, “in the interests of legal certainty, foreseeability and equality before the law” that the Court should follow precedents laid down in previously decided cases.¹⁴¹ Most likely, the Court will not overrule such a recent decision, regardless of how controversial that decision was.

The ultimate deciding factor of whether “living together” will make an impact on future European Court of Human Rights cases is the justification employed by the government in defense of their face-covering ban. In this vein, if the government decides to go with a previously rejected justification – public safety or gender equality – the ban will most likely be overturned. However, a truly well-formed argument invoking the notion of “living together,” may succeed in light of *S.A.S.*

VII. “LIVING TOGETHER” – A TROUBLESOME FUTURE FOR RELIGIOUS FREEDOM.

The ECtHR’s intention behind “living together” could have certainly started out as a good faith attempt to strike a balance between widely-held public interests and individual religious freedoms in order to bring about broader societal harmony in Europe. Most of the bans are neutral provisions; they do not mention a specific religion.¹⁴² In an attempt to balance the aforementioned interests, the *S.A.S.* majority noted that France was seeking to protect “a principle of interaction between individuals” which the state views as “essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is not democratic society.”¹⁴³

The ban attempts to make living in a modern, multi-ethnic state more comfortable by taking away the “barrier” a burqa or niqab presents and to facilitate open communication. Proponents argued that the ban would “release women from the subservience of the full-face veil” allowing them to belong to society.¹⁴⁴ Some view the burqa

141. Weller, *supra* note 109 at 139.

142. Shaira Nanwani, *The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction [comments]*, 25 EMORY INTL. L. REV. 1431, 1431 (2011) (explaining the French burqa ban and its background).

143. *S.A.S.* 2014 Eur. Ct. H.R. 695 at ¶ 153.

144. Hakeem Yusuf, *S.A.S. v. France: Supporting ‘Living Together’ or Forced Assimilation*, 3 INTL. HUMAN RIGHTS L. REV. 277, 283 (2014).

and niqab as "a tomb" for the women who wear it.¹⁴⁵ Thus, by banning the burqa, supporters allege they are getting rid of the oppressive garment, which some Muslim women do not have a choice whether to wear.¹⁴⁶ However, this view completely disregards those women, such as S.A.S. who independently choose to wear the burqa, with no external force.¹⁴⁷

The Court's good-faith effort, however, does not ease the integration of Muslims into French society, but rather forces Muslims to assimilate to European culture. The Court's ruling, which essentially states that those who wear religious coverings cannot "live together" with those of a different nationality is an absurd and potentially dangerous conclusion. Instead of protecting the individual freedoms enshrined in various human rights instruments, the Court instituted a new concept with no legal or moral justification. Instead of fostering immigration and community, the Court has chosen to force a minority to surrender to the preferences of the majority.

Assimilation is a concept typically frowned upon. Assimilation reduces the diversity of cultures.¹⁴⁸ Cultures are similar to works of art; similarly the loss of a culture can be a tragedy for the world as a whole, just as a lost work of art is mourned.¹⁴⁹ Minority protections such as the Human Rights Committee's Rights of Minorities exist to protect the survival of minority cultures.¹⁵⁰ However, this ruling by the ECtHR undermines all of the protections groups such as the Human Rights Committee worked toward. By solidifying the idea of "living together" as a real, substantial argument, the court infringes these protections, and instead values cultural neutrality over personal religious expression.

145. William Langley, *France's burka ban is a victory for tolerance*, THE TELEGRAPH (Oct. 21, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/france/8444177/BurkaFranceNational-FrontMarine-Le-PenMuslimFadela-AmaraAndre-Gerinhijab.html> [https://perma.cc/QGK8-FTCE].

146. *See id.* ("Large numbers of the women who wear the burka – whether in France, Britain or anywhere else – don't have a choice.").

147. S.A.S. 2014 Eur. Ct. H.R. at ¶ 11.

148. *See* Michael Blake, *Diversity, Survival, and Assimilation*, 12 J. CONTEMP. LEGAL ISSUES 637, 650 (2001-2002) ("The price of acting to preserve a diversity of cultures, it seems, is that diversity within culture may thereby be withered.").

149. *See generally id.* at 642 (explaining the problems with assimilation).

150. *See* U.N. Hum. Rts. Comm., CCPR General Comment No. 23: Article 27 (Rights of Minorities), at 1, CCPR/C/21/Rev.1/Add.5, General Comment No. 23 (April 8, 1994) <http://www.refworld.org/docid/453883fc0.html> [https://perma.cc/5N5A-5893] (explaining that the U.N. Human Rights Committee's establishes rights to minorities including the right to enjoy their own culture and to use their own language, among rights).

This is not to say that freedoms should always take precedence. There are certain circumstances where freedoms can be infringed for overwhelming interests, such as an actual, realized national security threat. The Court had arrived at this conclusion and used a type of balancing test prior to the *S.A.S.* ruling. In situations where the ban was narrowed and specific, like ensuring public safety in airports and Consulates, such as in *Phull* and *El Morsli*, often the state's justification would overrule and override religious freedoms. However, when the ban was too broad, and the state could not limit it to a specific justification, such as in *Ahmet Arslan*, religious freedoms would win out. The ruling in *S.A.S.* destroyed any balancing system the Court had implemented prior. Instead, the Court threw out all of the precedential rulings it had set in place beforehand in favor of introducing and justifying "living together." In the *S.A.S.* ruling, the ECtHR even stated that a total ban in all public places was disproportionate in order to fulfill the public safety ground; however, the concept of living together still justified the total ban as proportionate.¹⁵¹

Therefore, instead of implementing a proportionate, fair balancing system which weighs the rights of both the individual and state, the Court introduced the catch-all "living together" which is heavily in favor of the state. A fair balancing test cannot be done with the concept of "living together" as the concept is so amorphous. Now, instead of community rights only trumping in some cases, and not others, with a well-phrased justification warranting an inclusive society, or preventing an interruption of communication, individual religious rights will continuously be impeded and obstructed by the Court.

However, with its recent rulings, the Court does not seem keen to take this approach, but has instead extended its reach of "living together." The case *Osmanoglu and Kocabas v. Switzerland* involved the refusal of Muslim parents to send their daughters to send their daughters to their enrolled school's mandatory mixed-sex swimming lessons.¹⁵² The school refused to grant the daughters an exception, and a case was brought by the parents of the two Muslim girls.¹⁵³ The ECtHR, while not specifically citing "living together", again expressed this idea of assimilation over personal freedoms. The Court

151. See Marshall, *supra* note 91 at 381-382 ("While a total ban was then analysed as disproportionate on the public safety ground, the majority concluded that the concept of living together justified a total ban as being proportionate and therefore 'necessary in a democratic society'").

152. Press Release, Eur. Ct. H.R. *Osmanoglu and Kocabaş v. Switzerland* (Jan. 10, 2017) <http://hudoc.echr.coe.int/eng-press?i=003-5592122-7062572> [<https://perma.cc/2KQ9-EPFB>].

153. *Id.*

emphasized "that school played a special role in the process of social integration."¹⁵⁴ Thus, the children's "successful social integration" took precedence over the "applicants' private interest."¹⁵⁵

While other analyses of *S.A.S. v. France* have suggested that the Court's "living together" justification is unlikely to be used by the Court in future cases,¹⁵⁶ this latest ruling proves the opposite. Instead of limiting the use of "living together," the court has used an inclusive society as justification in realms outside of religious garments. This recent ruling should be worrisome; it shows that the Court will not only continue to justify "living together," but broaden it to other areas than its initial use.

The broadness may also cross over to other religious garments in other religions. Most of the uses and challenges which have appeared before the ECtHR involve Muslims and the niqab or burqa. However, there is nothing preventing this justification from being used against other displays of religious symbols; in the past, the ECtHR has heard cases on the visible display of cross necklaces.¹⁵⁷ This was before the *S.A.S.* ruling; however, post-*S.A.S.*, as long as a country could provide a vague "living together" justification, and a ban could be implemented.

This is the extremely incorrect route for the Court to head. For fairness purposes, and to prevent one interest from superseding another, the Court needs to reintroduce a balancing test, as well as narrow down exactly what "living together" entails. Without discussion and guidelines, this overly broad and vague term may destroy all the work religious freedom activists have fought so hard to procure. Without a return to a balancing test, the bar to a justification that the Court will approve is substantially low, and states will use that to their advantage again and again.

VIII. CONCLUSION

The concept of "living together" as a fairly new concept, but is still significantly undeveloped. While the concept will play a huge role in the actual decision of future Court decisions, the decision itself may also allow a little insight into what the concept of "living together" actually means.

154. *Id.*

155. *Id.*

156. *See generally* Weller, *supra* note 109, at 133-142 (citing France's unique culture and the European Court of Human Rights' lack of stare decisis as reasons why "living together" is unlikely to be used in future cases).

157. *British Airways Christian Employee Nadia Eweida Wins Case*, BBC (Jan. 15, 2013), <http://www.bbc.com/news/uk-21025332> [<https://perma.cc/G636-PE5W>].

Another effect that remains to be seen is how the concept of “living together” will affect international human rights law. As the Court’s ruling in *S.A.S.* shows, while human rights are preached to be nearly irrevocable rights, there are certain justifications and reasoning which can outweigh these individual rights guaranteed. Whether continued rulings on the path of *S.A.S.* will have lasting effects on the protection of human rights in Europe will certainly be interesting to see.

As the public opinion polls have shown, bans subjecting those who wear articles of religious expression, particularly burqas and niqabs may be on an increase.¹⁵⁸ With an increased number of bans, it surely follows that an increased number of complaints will occur as well. This is an issue that could have profound consequences on the freedom of religious expressions, certainly in Europe. Most likely an issue like this may also extend outside of the range of burqas and niqabs, but affect other religions as well. If the Court does not make a stand, and narrow its definition of “living together,” many European citizens may have to learn how to live apart from their freedom of expression.

158. See generally Stone, *supra* note 44 (“Research... found a huge proportion of the public had no qualms about telling women what to wear, with 57 per cent in favour of a ban and just 25 per cent against.”); see also Lowe, *supra* note 45 (“The poll... found that 81 percent of Germans backed a full or partial ban on the burqa, a full-cover religious garment worn by some Muslim women.”).