

Does the French law restricting the religious practice of the Islamic full-face veil amount to persecution within the remit of International Refugee Law, or is it a legitimate distinction under International Human Rights Law?

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Section One: The fundamental right to freedom of thought, conscience and religion

The right to freedom of thought, conscience and religion is enshrined internationally under the Universal Declaration of Human Rights (UDHR) and the binding International Covenant of Cultural and Political Rights (ICCPR). At the European level, it is enshrined under the European Convention of Human Rights (ECHR). Article 18 of the UDHR and ICCPR states 'Everyone shall have the right to freedom of thought, conscience and religion', to adopt a religion or belief of his choice as well as the freedom of manifesting it.¹ Although Article 18 (3) of the ICCPR underlines the limitations to the manifestation of this right, such limitations can only be 'prescribed by law, and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'.² This signifies the high threshold needed to secure a strictly interpreted and proportionate limitation on the manifestation of the right.³ The non-derogable status of Article 18 adds to this by cementing the indispensable nature of the right to not be interfered with under International Law.⁴ Further, the United Nations Human Rights Committee (UNHRC) interpreted the scope of Article 18 (1) to include particular actions of practising one's religion; of which one was the custom of distinctive clothing or head coverings.⁵ Article 9 of the ECHR encompasses the same right to freedom of religion.⁶ This is also subject to justified limitations identical to Article 18 (3) under Article 9 (2).⁷ Although not a non-derogable right, Article 9 is a right under which discrimination is always prohibited.⁸

Despite France being a party to the ECHR and ICCPR, its continuous violation and indirect discrimination of the right to freedom of religion is evident. This is obvious under its blanket ban of the full-face veil which targets Niqab-wearing Muslim women.

Section Two: Proving the ban's discriminatory nature

This section will scrutinise the sweeping ban introduced in 2011 under Act No 2010-1192 (the 'Act').⁹ This will encompass a threefold argument in which the legitimate purpose, proportionality, and the consequent principle of legality of the Act will be contested. It will be argued that this supposed 'general' ban indirectly discriminates against those Muslim women who choose to wear the Niqab or any other face covering for religious and customary reasons. In turn, it will be proven that this Act violates the right to manifest an individual's freedom of religion under article 9 ECHR and the equivalent non-derogable right under article 18 ICCPR.¹⁰ Such a conclusion will prompt the argument in section three

¹ Article 18 UDHR 1948; Article 18 (1) ICCPR 1976.

² Article 18 (3) ICCPR.

³ 'CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)' (1993) CCPR/C/21/Rev.1/Add.4.

⁴ Article 4 ICCPR.

⁵ Ibid 6; Article 18 (1993) UN Doc HRI/ GEN/1/ Rev. 5 Apr.26.2001. .

⁶ Article 9 (1) ECHR.

⁷ Article 9 (2); limitations ECHR.

⁸ Article 14 ECHR; protection from discrimination, Article 15 (2) ECHR; non-derogation.

⁹ Ibid 3.

¹⁰ Ibid 2.

which focuses on; why and how such illegitimate discrimination under International Human Rights Law can enter the realm of persecution in International Refugee Law.

In line with the pillars of proportionality and legitimate purpose, we must examine the ban's proportionality in relation to the aims of the legislation and ask; *is this ban proportionate to the aims of the legislation?*

Article 1 of the Act states that 'No one shall, in any public space, wear clothing designed to conceal the face'.¹¹ The pursued aims of Article 1 are explained by the French Government in *S.A.S v France* as follows: '1. equality between men and women, 2. respect for compliance with the minimal requirements of life in society, and 3. the protection of public order'.¹² It is clear from the onset that such vague and abstract objectives cannot warrant a direct infringement of the right to manifest one's religion in the context of a blanket ban.

The State has tried to justify these aims through each of them serving a legitimate purpose. Indeed, the first two aims are recognised as fundamental pillars of the functioning of France's secularist Republic. Secularism is upheld by the notion of '*le vivre ensemble*' or 'living together' in which an open society is required, and the full-face veil allegedly curbs such a requirement. The French government argues that public spaces are the main place in which social interactions take place.¹³ This means that every individual's face *must* be identifiable in such environments for the sake of the minimum degree of trust to be manifested between individuals, and for others not to be allowed to unfairly conceal themselves and impair interactions. In this section, it will be argued that the State's justifications are ambiguous and illogical. One example of the above is the rationalization of upholding gender equality, which is infringed on by the State's law which has the aim and effect of depriving a certain group of women of the right to manifest their core religious beliefs, from which they gain their individual sense of freedom and equality.

Theoretically, the protection of gender equality and human dignity could be a legitimate aim under Article 9 ECHR due to language regarding 'the protection of the rights and freedoms of others.'¹⁴ The State has demonstrated that gender equality is not a justified reason for the ban by making assumptions on behalf of 2000 French women that wear it out of choice.¹⁵ Evidence of such misinformed assumptions is inherent in the report of the French Constitutional Council, which was given authority by the Senate to declare if the Act was compliant with the French Constitution.¹⁶ The Council affirmed compliance with the Constitution, by stating that section 1 of the Act, which affirms that the purpose of the Act is 'to protect the Muslim women who were placed in a situation of exclusion and inferiority (by wearing the Niqab)... is compatible with the constitutional principles of liberty and equality'.¹⁷ It can be granted that some women are forced to wear the Niqab against their will and the State may wish to aid them through protective measures. Yet, the contextual problem is that the State is assuming that **all** Muslim women, who wear face coverings such as the Niqab, are under duress rather than accepting that many are expressing themselves out of free choice.¹⁸ The State is subjectively associating 'equality' to how much an individual covers their body and face, the Niqab being a signpost for inequality in modern society.

¹¹ Article 1 *ibid* 13.

¹² *S.A.S. v. France* [2014] ECHR 695, French Government Submissions, page 48, para 116, App. No. 43835/11 (Eur. Ct. H.R. filed July 31, 2013).

¹³ Public spaces are listed under Article 2 of *Act No 2010-1192* as; For the application of Section 1, the public space shall be composed of the public highway and premises open to the public or used for the provision of a public service. 'France: Law Prohibiting The Wearing Of Clothing Concealing One's Face In Public Spaces Found Constitutional | Global Legal Monitor' (*Loc.gov*, 2020) <<https://www.loc.gov/law/foreign-news/article/france-law-prohibiting-the-wearing-of-clothing-concealing-ones-face-in-public-spaces-found-constitutional/>> accessed 12 December 2019. .

¹⁴ Article 9 (2) ECHR; Eva Brems, 'Face Veil Bans in The European Court of Human Rights: The Importance of Empirical Findings' [2014] Ghent University <<https://www.researchgate.net/publication/294291849>> accessed 10 December 2019.

¹⁵ <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2591&context=ilj> page 1017.

¹⁶ Specific Constitutional principles under Article 4 (liberty) and 5 (equality) of the Declaration of the Rights of Man and the Citizen of 1789.

¹⁷ Act no 2010 1192 Section 1: Constitutional council in *S.A.S. v France* page 11.

¹⁸ In the interviews conducted, a significant number of women who wear a face veil showed that it was the result of an autonomous choice; A Moors, 'Face Veiling in The Netherlands: Public Debates and Women's Narratives.' (2014) Cambridge: Cambridge University Press. In E. Brems (Ed.), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge Studies in Law and Society).

With such a sweeping ban, there lies a deeper discriminatory intention that drives more towards subjugation than a solution. This is even more dangerous where violations of religious beliefs are considered lawful. In their report, the Council did not see that the ban contradicts the constitutional principle which states: 'No one shall be harassed on account of his opinions and beliefs, even religious, on condition that their manifestation does not disturb public order as determined by law'.¹⁹ The danger here is that the Niqab is considered a hindrance to the maintenance of public order which supposedly makes the ban necessary. The discriminatory aims and realities of the criminal nature that the ban possesses are glossed over in the name of such 'legitimate purposes'.

However, case law does not find gender equality to serve a legitimate purpose. The European Court of Human Rights in *S.A.S. v France* rejected the State's gender equality argument by stating that a State Party cannot invoke gender equality to ban a practice that is defended by women.²⁰ This is seemingly against the very notion of gender equality and does not equate to a valid limitation of the freedom of religion through any of the requirements.²¹ Despite this, the State has still attempted to put forth a questionable argument under the second aim of the ban; that there are apparent rights of the society which are being inflicted by the public wearing of the full-face veil.

The French State has alleged, on numerous occasions, that the notion of living together which calls for 'the observance of the minimum requirements of life in society', justifies a limitation of Article 9 (1) and Article 18 (1) due to the competing rights and freedoms of others.²² These competing rights have been claimed by the State as the right to interact with any individual and the right to not be disturbed by others wearing full-face veils.²³ France contends that living together in an open society, underpinned by the above-competing rights, is regarded as 'touching upon several rights' such as the right to respect for private life (Article 8 ECHR/ 17 ICCPR) and the right not to be discriminated against (Article 14 ECHR/ 26 ICCPR).²⁴ Assuming that this could be considered a legitimate objective under Articles 9 (2) and 18 (3), these competing rights would be valid only where they fulfil the requirement of being a justified limitation.²⁵

Firstly, although implied in the very general concept of living together, the rights to 'basic interaction' or 'non-disturbance' do not fall directly under any of the fundamental rights and freedoms within the ECHR or the ICCPR. These rights, which are speculative in nature, are rooted loosely in the concept of 'Secularism' and are far from affecting individuals concealing their faces in public spaces.

Further, under Article 36 of the Siracusa principles, where a conflict between a fundamental Covenant right and an unrecognised right exists, recognition is always given to the Covenant which seeks to protect the most fundamental rights and freedoms.²⁶ This directly means that the interference of these rights is in no way valid within the fundamental right to freedom of religion, especially under its internationally non-derogable nature.

Secondly, contextually speaking, what essentially is a right to interaction? Or a right to not be disturbed? In the *S.A.S. v France* judgment, Judges Nussberger and Jaderblom correctly asserted that; in line with the supposed right to interaction, there is no right to not be shocked or provoked by the different models of religious identity, even those that are very distant from the traditional French lifestyle.²⁷ In essence, this means that the Convention not only protects those manifestations that are 'favourably received as

¹⁹ Article 10, 'France: Declaration Of The Right Of Man And The Citizen' (1789) <<https://www.refworld.org/docid/3ae6b52410.html>> .

²⁰ Ibid 15, page 48 para 119.

²¹ Ibid, para 119; requirements under Art 9 (2) and 18 (3).

²² *Yaker v France, Hebbadt v France* ICCPR Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2747/2016; 'OHCHR | France: Banning The Niqab Violated Two Muslim Women'S Freedom Of Religion - UN Experts' (*Ohchr.org*, 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23750&LangID=E>>.

²³ Ibid; Rights were claimed by the State in the case of *Yaker v France* 'Consideration of the merits' page 11 para 8.10.

²⁴ Article 8 ECHR, Article 17 ICCPR; Article 14 ECHR, Article 26 ICCPR.

²⁵ Ibid 5.

²⁶ Article 36 under section B. Interpretative Principles Relating to Specific Limitation Clauses. 'The Siracusa Principles on The Limitation and Derogation Provisions in The International Covenant on Civil and Political Rights' (1984) <<https://www.refworld.org/docid/4672bc122.html>> .

²⁷ Ibid 15 Page 62 para 7.

inoffensive but also those that offend, shock or disturb'. The same is true for dress codes demonstrating apparent radical opinions.²⁸ Hence, for France to achieve a true definition of an 'open society', it must accept that pluralism, tolerance, and broadmindedness are all facets of such a democratic and secular state.²⁹

Concerning the State's link to the right to private life, it can hardly be argued that an individual has a right to enter into contact with others in public places, against their will.³⁰ Otherwise, such a right would have to be accompanied by a corresponding obligation and this would be incompatible with the spirit of the Convention. Again, the dissenting judges contended that while communication is admittedly essential for life in society, the right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places. Virtually, the right to be an outsider.³¹ Although the majority court did not agree with the differing views presented above, I find only the dissenting judges' arguments to be of substance in the decision. The majority upheld the ban to be non-discriminatory under limited arguments underpinned by the margin of appreciation given to France.³² It must be noted here that in the European Court of Human Rights, a feeling of danger can only serve as a legitimate ground for the restriction of human rights if there is an objective foundation for such a feeling. Thus, a religious practice cannot be prohibited merely on account that a part of the population finds it offensive or even alarming.³³

Moreover, the second aim asserted by the State raises serious proportionality issues. Article 2 (II) of the Act broadly exempts clothing that is worn for health reasons, on professional grounds, or that is part of sporting, artistic or traditional festivities or events, including religious processions, or clothing that is authorized by legislative or regulatory provisions.³⁴ The Human Rights Council rightly contended in *Yaker v France* that the State failed to justify why such competing rights would be 'unfairly obstructed by those wearing the Niqab as a full-face veil, but not by those covering their face in public through the numerous other forms of face veil exempted by the Act'.³⁵ An individual covering their face with a balaclava has the same effect of concealment as a woman covering her face with a Niqab; then how is one accepted as an exception but the other becomes a disturbance that needs to be permanently removed in public? There are no essential or core rights of a democratic society being upheld in this instance and this aim is not necessary nor proportionate within Article 18 (3). What is surprising is that the State knew this reality before the Act was passed. Even despite the National Advisory Commission on Human Rights advice to the State that it does not have the capacity to determine or limit, whether or not a given matter falls within the realm of religion; the French National Assembly paid no heed to this and stated it was necessary for the State, 'to release women from the subservience of the full face veil'.³⁶ At the same time, the State continues to claim that 'the general prohibition is not based on a religious connotation of clothes'.³⁷ The unjustified and uninformed unproportionate aims of the ban pursued by the State have exceeded their margin of appreciation. It is clear that '*the legislative history of the law demonstrates that the intent was to regulate the burqa and niqab, which were specifically identified as the target of the ban*'.³⁸

²⁸ Ibid.

²⁹ *Authority of Mouvement raélien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012, and *Stoll v. Switzerland* [GC], no. 69698/01, § 101, ECHR 2007-V in which this principle of democracy was affirmed. .

³⁰ Ibid 30, para 8.

³¹ Ibid 15, page 63 para 8.

³² Ibid 28 Para 144-159 The majority asserted that the notion of living together can be pursued as a necessary aim to achieve a democratic society and justify a restriction to the right to freedom of religion. .

³³ *Vajnai v. Hungary*, 2008 Eur. Ct. H.R., para. 57, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87404>. .

³⁴ Article 2 (II) Act No 2010-1192.

³⁵ Ibid 28 page 12 para 8.10.

³⁶ Ibid 15 Commission nationale consultative des droits de l'homme – CNCD. page 5; Resolution of the National Assembly 'on attachment to respect for Republic values at a time when they are being undermined by the development of radical practices' page 7 para 24. .

³⁷ Ibid 28; *State party's response* page 9 para 7.9.

³⁸ Written Comments of the Open Society Justice Initiative, *S.A.S. v. France*, App. No. 43835/11, (Eur. Ct. H.R. filed May 7, 2012), available at <http://www.liberty-human-rights.org.uk/about/legal/interventions/s.a.s.-vfrance-european-court-of-human-rights-2012.pdf>. .

Respectively, the last aim of the ban centres on 'Public safety'. It is explicitly mentioned in Article 9(2) as a legitimate aim that may justify proportionate restrictions of religious freedom.³⁹ The State has misused the claim of upholding public order in trying to justify the full-face veil ban in several cases.⁴⁰ They have contended that 'it must be possible to identify all individuals when necessary, to avert threats to the security of persons... and to combat identity fraud'.⁴¹ Several issues arise here. Firstly, the act is not limited to the contexts the State mentions. The permanency of the ban applying at all times in public and not just 'when necessary' has not been justified. Secondly, the State has failed to demonstrate that the wearing of the face veil has previously amounted to, or amounts to, such a threat to public safety that would validate an absolute prohibition - it being a 'general threat' does not suffice. The HRC highlighted this point in *Yaker* by inquiring to the State why there is no mention of threats as a basis for an objective in the statement of purpose of *Act No. 2010* or in the National Assembly resolution, which preceded the adoption of the Act.⁴²

The so-called lawful interferences under Articles 8 (2) and 9 (2) of the ECHR and 18 (3) ICCPR of the ban have been considered proportional to the legitimate purposes.⁴³ Yet, the existence of previous legislation providing for the uncovering of one's face in public spaces questions the necessity of *Act no 2010*.⁴⁴ In the previous law, public spaces providing for uncovering one's face for specific purposes or at specific times, such as security checks and identity checks, or in specific locations, such as schools and hospitals were required.⁴⁵ Where such law was already present, the State failed to explain in which ways this was not adequate and why an absolute ban had to be introduced. Proportionality wise, the dissenting committee members in *Yaker v France* claimed that the absolute ban was 'necessary due to the several terrorist attacks since the S.A.S. judgment', so the need to quickly identify 'suspects' who travel in Niqabs was now essential.⁴⁶ The State upheld this argument. The fact that an individual wearing a Niqab may be automatically deemed a terrorist suspect till her face is revealed is a form of Islamophobia, effectively terrorizing a piece of clothing.⁴⁷ The legitimate purpose of the ban begins to heavily conflict here. Above, the gender equality aim is said to be protecting Muslim women from being oppressed by their Niqab, yet here the public order aim is protecting everyone else from a Niqab-wearing Muslim woman.⁴⁸ However, when we focus on the Niqab-wearing Muslim woman we realise that this ban obliges her, if she does not wish to risk a criminal penalty, to refrain from wearing the full-face veil in public, while for her doing so is a religious duty. The only way for her to wear the veil is to avoid moving about in public. Consequently, this is an infringement of her right to respect for her private life and expression where she is now expressly prohibited from dressing as she chooses in public.⁴⁹ In turn, this then violates her right to movement to go into public and associate with others.⁵⁰

Such laws run counter to the intended goals of an 'open society' by further marginalising an already subjugated minority. The HRC in *Yaker* agreed with this, contending that more respectful and dignifying measures could have easily been taken to fulfil the public order aim; such as education, awareness-raising against the negative implications of the veil, and enacting a limited ban enforced through appropriate non-criminal sanctions in specific social contexts.⁵¹ However, the reality is that the absoluteness of the ban is in force. With this unqualified nature, the ban is wholly counterproductive

³⁹ Art 9 (2) ECHR.

⁴⁰ Take *Yaker* and *Hebbadt v France* and *SAS v France* for the most relevant examples.

⁴¹ *Yaker v France Issues and proceedings before the Committee para 8.7.*

⁴² *Ibid*, National Assembly Resolution of 11 May 2010.

⁴³ Article 8 (2) ECHR; *Ibid* 5 and 10.

⁴⁴ As contended by concurring Committee members Ilze Brands Kehris and Sarah Cleveland in *Yaker v France page 16*'.

⁴⁵ *Ibid*.

⁴⁶ Dissent of Judges Manuel and Santo Paos in *Yaker v France Page 20 Annexe IV, para 12*. In the SAS judgment, the majority court had rejected the State's public safety argument. .

⁴⁷ *Ibid* 18; page 517.

⁴⁸ *Leyla Sahin v Turkey* (2004) ECHR 299 (Fourth Section), para 101; see also *Leyla Sahin v Turkey* (2005) ECHR 819, para 108.

⁴⁹ Article 8 ECHR, Article 17 ICCPR; right to respect of private life, Article 10 ECHR, Article 19 (2) ICCPR right to freedom of expression.

⁵⁰ Article 11 ECHR, Article 21 ICCPR; freedom of assembly and association, Article 2. of *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 12 ICCPR; freedom of movement.

⁵¹ *Ibid* 28 Joint opinion of Committee members Ilze Brands Kehris, Sarah Cleveland, Christof Heyns, Marcia V.J. Kran and Yuval Shany (concurring) page 15 para 3.

from the perspective of the targeted Muslim women and the aims it stated by restricting women's rights instead of furthering them and reducing social interaction.⁵²

The Committee in *Yaker* held that the ban was disproportionate and underlined that it 'confined women to their homes, impeding their access to public services... and developed a negative stereotype through criminalizing an innocent form of lawful expression'.⁵³ *Brems* furthers this and rightly contends that at least under the previous legislation, women wearing a face veil were interacting in numerous ordinary ways with society at large. It became evident from her findings that since the ban, this group of women's social interactions has decreased. They are afraid of an encounter with the police as well as the harassment and aggression by strangers.⁵⁴ Hence, instead of an environment of open and increased social interaction, the effect of the ban on this group is a 'deterioration of their social life, their interactions with society at large, and their mobility'.⁵⁵ In turn, Article 14 of the ECHR is severely compromised.⁵⁶

This violation is increased by the criminal sanctions placed upon the ban. Article 3 of the Act underlines the criminal sanction; 'Failure to comply with the prohibition outlined in Article 1 shall be punishable by the fine envisaged for offences of the second category'.⁵⁷ Instantly, this approach treats a face-veiled woman more as a perpetrator of a serious offence rather than a French citizen or victim of abuse who has been forced to wear the Niqab. The argument of the ban protecting women who are being oppressed to wear the veil becomes even more doubtful. This is due to the fact that one year after the ban was implemented, the French Ministry of Interior reported that 299 women had received a fine or warning for wearing the full-face veil, yet there was no mention of any application to men - where the fine is for the protection of those women forced to wear the veil, there is no evidence that such warnings or fines are used to help women who might be victims of abuse.⁵⁸ Hence, the idea of protecting women against the imposition of a face veil cannot justify a face-covering ban under Article 9 or 18.⁵⁹

Lastly, the principle of legality under customary IHRL must be discussed briefly. The ECtHR held in the leading *The Sunday Times v United Kingdom* case that two requirements flow from the expression 'prescribed by law'.⁶⁰ First, 'the law must be adequately accessible'; and second, 'a norm cannot be regarded as "law"'. It is evident that the ban under *Act no 2010* is by no means necessary nor reasonable by criminalising a face veil, neither through its legitimate purposes or its proportionality. The ECtHR recognizes that 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory'.⁶¹ Where this ban has had repressive rather than inclusive measures, ostracizing a group in society, it can be rebutted to be 'prescribed by law'.⁶²

It seems the ban is achieving exactly the opposite of what it intended to achieve. The Committee in *Yaker* noted that fewer than 2,000 women wear the full-face veil in France and that the vast majority of checks under the Act have been performed on women wearing the full-face veil.⁶³ This, along with the evidence presented in this section highlights that the French legislators were not concerned with the impact on women who wear a face veil, but instead with the effect on people who are confronted with women wearing the face veil. People for whom the sight of a face veil is an affront to women's dignity, who do not want to interact with a woman wearing a face veil in shops or on the street, and who feel unsafe when they come across a face veil because they associate it with terrorism and fundamentalist Islam; it is those people whom the ban seeks to protect. With such inherent violations of the rights

⁵² Ibid 18, page 550.

⁵³ HRC in *Yaker* page 13 para 8.16/7; again violations of articles 11 and 12 ECHR come into question. .

⁵⁴ Ibid 18; Such fears have become reality- for recounts on the abuse Niqab wearing Muslim women have faced see pages 524 and 540. .

⁵⁵ Ibid 18; page 540.

⁵⁶ Article 14 ECHR; prohibition from discrimination (esp. On the basis of religion and sex).

⁵⁷ Ibid 3 Article 3.

⁵⁸ *The Sunday Times v United Kingdom* ECHR April 26, 1979.

⁵⁹ Ibid 18; page 545.

⁶⁰ Ibid 62; para 47.

⁶¹ *D.H. v the Czech Republic*, App. No. 57325/00, 2007-IV Eur. Ct. H.R., para. 175, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256> ECtHR. .

⁶² Ibid 18; page 541.

⁶³ Ibid 28 page 10 para 8.2.

mentioned, specifically Articles 9 and 18 in question, it was not about the visibility of faces in general but specifically the Islamic face veil; 'this is a case where the "indirect" discriminatory treatment comes very close to direct discrimination'.⁶⁴

Section Three: How such discrimination can amount to persecution

It has been proved that *Act no 2010* does not simply qualify as a legitimate distinction under IHRL but amounts to indirect discrimination. This section will demonstrate how such discrimination can enter into the realm of persecution under International Refugee Law. There is evidence of direct discrimination as mentioned above but this will not be discussed in the scope of this paper.⁶⁵

Firstly, it is important to identify what persecution is on the European and International level, respectively relating this to religion-based refugee claims. Particularly relevant to the discriminated group discussed, the 1951 Refugee Convention states that the term 'refugee' shall apply to any person who: 'owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion... is unwilling to avail himself of the protection of that country'.⁶⁶ Under IHRL, specifically in the 1951 Convention, the concept of persecution is not defined.⁶⁷ The UNHCR has stated that the core concept of persecution was deliberately not defined, suggesting that the drafters intended it to be interpreted flexibly so as to encompass the changing forms of persecution - it encompasses human rights abuses or serious harm but not always within a repetitive element. From Article 33 of the 1951 Convention⁶⁸, it can be inferred that a threat to life or physical freedom constitutes persecution, as would other serious violations of basic human rights. 'Serious violations' and 'basic human rights' are neither defined nor identified under IHRL.⁶⁹ IHRL does not help greatly in determining persecution and there is consequently much difficulty with establishing a violation that amounts to persecution on the basis of religion under International law. However, it is understood that any violation of an absolute right would constitute persecution, Article 18 ICCPR being an absolute right.⁷⁰ Also, the freedom of religion exercised by Niqab wearing Muslim Women enters the scope of the internationally 'protected interests' of Article 1A (2) of the Convention. In *Kassatkine v Canada*, the Federal Court stated that 'a law which requires a minority of citizens to breach the principles of their religion is patently persecutory under Article 1 A (2)'.⁷¹ It must be noted that the threshold of persecution under Article 1A (2) of the Convention is very difficult to attain, and not every violation of the right to manifest one's religion or belief will be sufficient to warrant recognition of refugee status.⁷² Yet, discrimination can constitute persecution if there has been a persistent pattern of it which in itself constitutes a: 'severe violation of the prohibition of non-discrimination'⁷³, by seriously restricting the applicant's enjoyment of other human rights - such as the right to practise his or her religion'.⁷⁴ This is known as persecution on 'cumulative grounds' and is the most relevant form of persecution that can be proven in this instance. Being compelled to forsake or conceal one's religious belief, identity, or way of life where this is

⁶⁴ Ibid 15; Final Observations Discrimination on the basis of religion and sex. .

⁶⁵ Ibid.

⁶⁶ Article 1A (2), UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html> .

⁶⁷ Ibid.

⁶⁸ 'Handbook And Guidelines On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees' (2011) HCR/1P/4/ENG/REV. 3., para 51. .

⁶⁹ John Tobin, 'Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution Within Refugee Law' (2012) 44 *Journal of International Law and Politics* 447, 484. .

⁷⁰ 'UNHCR Statement On Religious Persecution And The Interpretation Of Article 9(1) Of The EU Qualification Directive' (2011) C-71/11 & C-99/11 <<https://www.refworld.org/docid/4dfb7a082.html>> accessed 10 December 2019; page 8 para 4.12; Absolute rights are those that can't be restricted or derogated from in times of emergency. .

⁷¹ *Kassatkine v Canada* (1996) 119 FTR 127.

⁷² Article 1A (2) Refugee Convention, UNHCR Handbook para 51; *Fosu v Canada (Minister of Employment & Immigration)* [1994] 90 FTR 182 para 5; *Irripuge v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14764 FC para 44,46,50-51 and 55. .

⁷³ Article 7 ICCPR; prohibition of discrimination; 'Guidelines On International Protection: Religion-Based Refugee Claims Under Article 1A(2) Of The 1951 Convention And/Or The 1967 Protocol Relating To The Status Of Refugees HCR/GIP/04/0628 April 2004' (2004) 16 *International Journal of Refugee Law*. .

⁷⁴ Ibid 73; paras 53 and 55. .

instigated by the State may itself be a pattern of measures that cumulatively amount to persecution.⁷⁵ The collective forms of ill and degrading treatment under *Act no 2010* can amount to persecution from seriously violating several human rights of full-face veiled Muslim women, and this is specifically true for those rights that are not non-derogable under the ECHR and ICCPR.⁷⁶

In the European Union, member states have agreed on a human rights approach to defining persecution with the adoption of the Qualification Directive (QD).⁷⁷ The wording of Article 9 of the QD leads to a similar interpretation as Article 33 ICCPR above. Article 9 (1) states that acts of persecution must be sufficiently serious to serve as a severe violation of basic human rights or (2) *be an accumulation of various measures... which are as severe*.⁷⁸ It expressly accepts persecution on cumulative grounds and further lists that acts of persecution can take the form of *legal, administrative, police, and/or judicial measures which are in themselves discriminatory or implemented in a discriminatory manner; (c) prosecution or punishment, which is disproportionate or discriminatory*.⁷⁹ The blanket ban satisfies the form of legal persecution and disproportionate prosecution through the discriminatory effects of its legal measures and imbalanced criminal sanctions.

Article 4 (3) (c) of the QD also provides other provisions that are relevant in determining whether an act amounts to persecution; *'the individual position and personal circumstances of the applicant'* are to be taken into account.⁸⁰ A significant factor within this is the individual and personal practice of the religion when determining the seriousness of a violation. The 'core area' of an individual's right to freedom of religion cannot be determined objectively but is self-determined and context specific. Wearing a full-face veil for women is not central to the Islamic religion but is a significant part of Islam **for** the individual women who wear it. This could therefore still constitute persecution on the basis of her individual belief being stripped from her.⁸¹ The UNHCR further states that where a prohibited or punishable behaviour forms part of an applicant's religion, it's likely a well-founded fear of persecution can be confirmed.⁸²

In detail, persecution can be reached through the violation of Articles 9 and 18 from the ban not being necessary under Articles 18 (3) and 9 (2) to protect public order or the rights of others living in France. As a non-derogable right, any threat to Article 18 is presumptively within the ambit of a risk of 'being persecuted' since no justification for the breach is acceptable. Second, the flexibility within the limitations of the right does not mean that the French government can *carte blanche* violate rights allegedly in the name of 'broader interests'.⁸³ The broader interests under the baseless name of 'competing rights' as outlined in section 2 have been severely violating the fundamental rights to privacy, freedom of expression, movement, and assembly of Niqab-wearing Muslim Women.⁸⁴ Essentially rendering a woman confined to her own home because she will be prosecuted if she walks outside, strips her of the basic rights of a citizen's freedom within a State. The applicant in *SAS v France* stated *'...as a result of the implementation of Loi no. 2010- 1192 I now live under the threat of both State prosecution and public persecution... I am now vilified and attacked on the streets of the Republic I live, effectively reduced to house arrest, virtually ostracized from public life and marginalized'*.⁸⁵ If this does not highlight the clear infringements of the basic rights above then the violation of each clause in Article 18 (1) ICCPR will magnify them; *'This right shall include freedom to... either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance'*.⁸⁶ This

⁷⁵ J. M. Lehmann, 'Persecution, Concealment And The Limits Of A Human Rights Approach In (European) Asylum Law - The Case Of Germany V Y And Z In The Court Of Justice Of The European Union' (2014) 26 International Journal of Refugee Law.

⁷⁶ Ibid, para 4.15; rights such as those mentioned in section 2 see *ibid* 56 and 57.

⁷⁷ Council Directive 2004/83/EC Of 29 April 2004 On Minimum Standards For The Qualification And Status Of Third Country Nationals Or Stateless Persons As Refugees Or As Persons Who Otherwise Need International Protection And The Content Of The Protection Granted' (2004) <<https://www.refworld.org/docid/4908758d2.html>> .

⁷⁸ Article 9 (1) (a) and (b) Chapter 3 of the Qualification Directive, Directive 2004/83/EC of 29 April 2004.

⁷⁹ Ibid art 9 (2) (a) (b) (c).

⁸⁰ Ibid 78 para 4.16.

⁸¹ Ibid 78 para 4.2.7.

⁸² Ibid 78 para 4.3.2.

⁸³ *Liu v MIMA* 2001 FCA 257 Aust.Fed.Ct.

⁸⁴ Ibid 53 and 53.

⁸⁵ Ibid 18 Page 524.

⁸⁶ Ibid 4.

underlines that the rights to freedom of movement, assembly, and expression are enshrined within the manifestation of religion, yet still ignored and further derogated by the State. This derogation is furthered by the Niqab being the only form of full-face veil which has no exceptions under the *Act*. The State has an intention to discriminate against Muslim women by essentially erasing the observance of a Niqab in the French Republic. This is a clear form of degrading treatment under the principles of prohibition of torture.

In *ex parte Khan*, the court found that the claim of two Pakistani men who were committed Christian preachers, who had consequently incurred the displeasure of Muslim employers and physical attacks from Muslim locals, did not amount to persecution on the basis of religion as they did not have a well-founded fear.⁸⁷ The judges held that the two men could 'avoid the risk of persecution' by finding internal protection and moving to another region in Pakistan.⁸⁸ What the court failed to see here is that this position is surely at odds with a central purpose of Refugee law, namely to make it possible for persons within the ambit of a protected interest (religion) to avoid the 'prisoner's dilemma' of either renouncing their identity or facing persecution.⁸⁹ In the same way, France has forced such a dilemma upon Muslim women. The fact that a Muslim woman has no other option but to renounce a fundamental characteristic of her character to 'avoid the risk of persecution' or wear it and face abuse from society or be confined to her home, does not equate to protection. Moreover, the court in *Re Woudneh* held: 'the mere fact of the necessity to conceal your faith would amount to support for the proposition that the applicant had a well-founded fear of persecution on religious grounds'.⁹⁰ To further prove that the ban equates to persecution, we apply the 'reasonable test' as laid out in *LALS v MIMA*.⁹¹ Within this, it was only reasonable for an applicant to avoid the risk of persecution where the concealment of their faith would not require them to retreat from the *physically identifying features* of the group to which they belonged.⁹² Here, the ban is objectively *requiring* Muslim women to remove their greatest fundamental identity with the threat of being prosecuted if not: this fully establishes an objective well-founded fear.

Conclusion

It has been made clear that the ban is infringing on the most fundamental elements of Niqab-wearing Muslim women's identity, marginalising them to the confinement of their own home. Under the claims of gender equality, protection of others in society, and public order, the State has been able to carefully restrict and criminalise the manifestation of the freedom of religion exercised by Muslim women. Evidentially, through discussions under the Refugee Convention and the QD, it has been argued such forms of degrading treatment prove that this law is not simply an act of legitimate distinction but a specific target to the derogation of the freedom of religion exercised by Muslim women.

It falls within the powers of the State to provide a secure environment in which individuals can freely live together in their diversity. This is a pillar of a democratic and secular republic like France. The ban profusely vows to better the view of 'living together', but it seems that it has taken undemocratic and sectarian steps to achieve its goal of 'living without the disturbing sight of the otherness of the minority'.⁹³

To conclude, this severe subjugation and ill-treatment of an innocent group are painfully encapsulated by the applicant in *SAS v France*; '*...criminalisation, or rather the political scaremongering that preceded it, has incited the public to openly abuse and attack me whenever I drive wearing my veil. Pedestrians and other drivers routinely now spit on my car and shout sexual obscenities and religious bigotry. I now feel like a prisoner in my own Republic, as I no longer feel able to leave my house, unless it is essential.*

⁸⁷ *Ex parte Khan* Eng. Dec. No. CO/3988/99 (Eng. QBD) 2000.

⁸⁸ *Ibid* para 67.

⁸⁹ Rodger PG Haines, James C Hathaway, and Michelle Foster, 'Claims to Refugee Status Based On Voluntary But Protected Actions: Discussion Paper No. 1 Advanced Refugee Law Workshop International Association Of Refugee Law Judges Auckland, New Zealand, October 2002' (2002) 15 *International Journal of Refugee Law*. page 434.

⁹⁰ *Re Woudneh and MILGEA* Dec No G86 of 1988, Australian Federal Court. .

⁹¹ *LALS V MIMA* 2000 FCA 211 Australian Federal Court.

⁹² *Ibid* para 59.

⁹³ Eva Brems, 'The European Court of Human Rights and Face Veil Bans' (*E-International Relations*, 2020) <<https://www.e-ir.info/2018/02/21/the-european-court-of-human-rights-and-face-veil-bans/>> accessed 12 December 2019. .

I leave the house less frequently as a result. I wear my veil with even less frequency when out in public as a result. Indeed, I also feel immense guilt that I am forced to no longer remain faithful to my core religious values.⁹⁴

With the sorrowful reality that veiled Muslim women have been reduced to, it is clear that the French law restricting the religious practice of the Islamic full-face veil amounts to persecution on cumulative grounds.

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⁹⁴ Witness Statement of the Applicant, Annex 1 to Final Observations, 1–2, S.A.S. v. France, Eur. Ct. H.R. (App. No. 43835/11).