

Insider Perspectives and the Human Rights Debate on Face Veil Bans¹

Profs. Emmanuelle Bribosia & Isabelle Rorive

Institute for European Studies and Centre Perelman for Legal Philosophy

Université Libre de Bruxelles (ULB)

Summary

The ‘burqa bans’ adopted in Belgium and France and contemplated elsewhere in Europe, have mobilized human rights activists and scholars, who are nearly unanimous in accusing governments and public authorities banning face veiling of violations of religious freedom and discrimination on grounds of religion as well as gender. Yet like the governments banning the face veil, the human rights activists did not have much information at their disposal concerning the experiences of women wearing it. In this paper, the human rights debate about the face veil is revisited, taking into account the insider perspectives of those women.

1. A hard case entangled in a poor democratic process

For years now, the practice of Muslim faith has been at the heart of several globally debated polemics, for instance the 2009 referendum in Switzerland banning the construction of minarets and vehement reactions against a mosque to be built two blocks away from Ground Zero in New York. One of the last controversy concerns the full facial veil, which led several European countries to adopt regulations or legislations commonly known as “burqa bans”. Terminology is not without significance here. The burqa refers to a specific type of dress worn in Afghanistan² which is intrinsically linked to the tyrannical Taliban regime in the Western imaginary world. The face veil commonly present in the West is black, leaves the eyes free and is named niqab by the women wearing it. The latter generally oppose the term burqa not only because it is inappropriate, but also because its use is perceived as a way to link them to negative and violent images of Islam (Brems et al. 2014).

Striking in the nation-wide or local bans in place or in discussion in France³, Belgium⁴, the Netherlands⁵, Italy (Moschel 2013), Germany⁶ and Spain⁷ is the very strong support those

¹ This contribution was presented in a preliminary version at the Workshop on “Illegal covering: Comparative Perspectives on Legal and Social Discourses on Religious Diversity”, held at the International Institute for the Sociology of Law (Onati, Spain), 17-18 May 2012. We are grateful to all the participants for their very fruitful comments on the previous version of this paper and we are especially indebted to prof. Pascale Fournier and prof. Valérie Amiriaux who directed the workshop. The contribution is part of the IUAP project P7/27 on “The Global Integration of Human Rights. Towards a User’s Perspective”, coordinated by Prof. Eva Brems and financed by Belspo.

² Loose garment, often of light blue colour, which covers the body from head to toe with only a net in front of the eyes.

³ Law n° 2010-1192 of 11 October 2010 prohibiting the wearing of clothing covering one's face in public spaces (*loi interdisant la dissimulation du visage dans l'espace public*), *JORF* n°0237, 12 October 2010.

⁴ Law of 1st June 2011 prohibiting the wearing of any clothing totally, or principally, hiding the face (*Loi du 1^{er} juin 2011 visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage*), *Moniteur belge*, 13 July 2011.

bans have received from politicians of mainstream democratic parties while they were often initiated by far-right wing or populist parties. It contrasts sharply with the small amount of persons wearing the integral veil in those countries as illustrated by the empirical findings presented in the first part of this book. Only Denmark (Warburg et al. 2014) and Switzerland⁸ refrained from legislating on the issue partly because of the low numbers of persons concerned. In addition, although human rights activists and many scholars are accusing parliaments and public authorities banning face veiling of human rights violations and of being populist their speech remained often entirely unheard, when not confidently rejected as disconnected from reality.

In this respect, the Belgian case is bewildering. Despite an ongoing political crisis which left Belgium without a Federal Government for 18 months between June 2010 and December 2011, the Federal Parliament passed the so-called “anti-burqa Bill” through the urgency procedure and with almost unanimous approval. Only Eva Brems, professor of human rights at Ghent University and MP for the Flemish Green party, voted against the Bill. Two other MPs linked to the Green parties abstained. All other members of the House of Representatives supported the Bill, which was considered a matter of principle to be handled urgently. Such a “Stalinist vote” (Delgrange 2013) followed a parliamentary procedure where traditional parties blended their draft Bills with the draft of the extreme-right party. No expert or NGO was consulted, no role was assigned to the equality body, i.e. the Centre for Equal Opportunities and Opposition to Racism. Moreover, the Council of State was deprived of its mission to give its opinion as to the respect of fundamental freedoms, and no reliable figures on the phenomenon of the wearing of the burqa – actually, the niqab in Belgium – were available. Criticisms coming from Amnesty International⁹, Human Rights Watch¹⁰, the Human Rights League¹¹ or the former Commissioner for Human Rights of the Council of Europe¹² were received with indifference. Double standards were applied: on the one hand, the hearings which took place before the French National Assembly¹³ justified the fact that

⁵ Bill to introduce a general prohibition to wear face-covering clothing (“*Voorstel van wet tot instelling van een algemeen verbod op het dragen van gelaatsbedekkende kleding*”), 6 February 2012, *Kamerstukken II*, 2011/12, 33165, no. 1-2, and the critical opinion of the Council of State (28 November 2011) which very much doubts whether there are compelling reasons to introduce such a prohibition.

⁶ In Germany, the Government of the Land Hessen has adopted an act prohibiting the wearing of the burka in the public service (M. Mahlmann, “Flash-report – Prohibition of the burka in the Land Hessen”, available at <http://www.non-discrimination.net/content/media/DE-29-2011%20Burqa.pdf>).

⁷ Amnesty International, *Choice and Prejudice: Discriminations against Muslims in Europe*, 24 April 2012, available online <http://www.amnesty.org/fr/library/info/EUR01/002/2012/en>, 98-101.

⁸ In September 2012, the Swiss Senate rejected by 93 votes to 87 an initiative aiming at banning full face veiling from public spaces. Speaking in the name of the majority, one leader of the Centre-right radical party stated that “banning the burqa would be excessive and would encourage tourists from Muslims countries to have negative opinions of the country”. He added that “Today in Switzerland wearing this type of clothing for religious reasons doesn’t pose any problems in daily life and is a rare practice in the Swiss Muslim community” (Swissinfo.ch Swiss news World Wide, 28 September 2012).

⁹ “Amnesty et la loi interdisant le voile intégral en Belgique”, press release, 5 May 2010 (www.amnestyinternational.be).

¹⁰ “Questions-réponses sur les restrictions relatives aux symboles religieux en Europe. Contribution au débat sur le rôle de l’Etat en matière de religion et de pratiques traditionnelles”, 21 December 2010 (www.hrw.org).

¹¹ “Interdiction du port du voile intégral: une mauvaise solution à un vrai problème”, 28 March 2010 (www.liguedh.be).

¹² Viewpoint published on the website of the Council of Europe: (http://www.coe.int/t/commissioner/Viewpoints/100308_en.asp).

¹³ The French information mission only interviewed one face-veiled woman after she agreed to put off her veil (National Assembly, “Information Report on the fact-finding mission on the practice of wearing the full veil on national territory” (hereafter, Information Report), 44-45 and 158).

none had to be organised before the Belgian House of Representatives; on the other hand, the opinion of the French Council of State was put aside in the name of the sovereignty of the Belgian State¹⁴.

Our position is certainly not to advocate in favour of the burqa, the niqab or any integral veil, which dehumanise women and lead to self-exclusion. On the one hand, women who are forced to cover themselves deserve strong support and protection. On paper, this has been achieved in Europe: illegal coercion and detention of women are well entrenched in criminal law and they certainly give right to divorce. This is not the main problem. In countries where gender equality is legally implemented, one may ask whether fighting efficiently against violence against women is best achieved through more criminal law. On the other hand, women who authentically choose to veil their face and body endorse a radical posture, often grounded on religion or decency, which might be viewed as a paradox: they conceal themselves but become those very visible¹⁵. Their choice disturbs women’s rights defenders and might even be unbearable for those who are struggling in Islamic countries for more freedom and equality. Today, one cannot ignore that universities in new democracies like Tunisia are facing huge pressures from ultra-conservative Salafists demanding the right for women to wear the niqab and segregated classes¹⁶.

This is, however, not the standpoint of this paper in which we try not to be entangled in a genuine feeling of discomfort towards any kind of face veil. We do not deny that tackling the wearing of the face veil in Western societies is a “hard case”. The question of how one should address what can be seen as regressive behaviour without compromising individual freedoms is challenging. As law professors attached to the democratic process, the rule of law and the respect of fundamental freedoms, we thought that our duty was to look at it dispassionately and to denounce the process at the end of which new offences or administrative sanctions are being enshrined in the law of European countries. We claim that the political process failed to produce an accurate expression of the different interests that should be taken into account (at least in Belgium) and that democratic debates are full of snap judgments (in all countries concerned). This could be seen as anecdotal. Official figures of women wearing the niqab in European countries are very low¹⁷. Their backgrounds are diverse: diplomat’s wives and tourists, recent immigrants who sometimes start to wear the face veil after their arrival on the European territory, nationals who come from a Muslim background or who are converted

¹⁴ Report of the House of Representatives’ Commission for Interior, *Parliamentary Documents of the House of Representatives*, session 2009-2010, Doc. no. 52-2289/5, 22, 26 and 29.

¹⁵ French Human Rights League, “Prise de position de la LDH dans le débat sur le voile integral”, 21 March 2010 (<http://www.ldh-france.org/Prise-de-position-de-la-LDH-dans>). See also D. Bouzar, “La burqa, un signe sectaire et non religieux”, *Le Monde*, 22 June 2009 (http://www.lemonde.fr/idees/article/2009/06/22/la-burqa-un-signe-sectaire-et-non-religieux-par-dounia-bouzar_1209923_3232.html).

¹⁶ Media coverage of the occupation of the Faculty of Literature, Arts and Humanities at the University of Manouba (Tunis) in 2011 are troublesome. See, for instance: Coline Tison, Pierre Creisson & Pierre Tailliez for Camicas Production, *Tunisie : étudiantes contre Salafistes*, in 66minutes, 22 January 2011 (available on youtube).

¹⁷ Amnesty International, *Choice and Prejudice: Discriminations Against Muslims in Europe*, 92, footnote 255. There are only scarce official figures on the number of women wearing face-veils in Europe. In Belgium, the figure most often presented is between 200 and 300 women, which is less than 0,5 % of the Muslim population (Brems et al. 2014). In France, the figures go from 400 to 1900 women (0,1 % of the Muslim women) wearing the face-veil (see Open Society Foundations, “Unveiling the Truth. Why 32 Muslim Women wear the full-face veil in France”, 2011, available online: http://www.opensocietyfoundations.org/sites/default/files/a-unveiling-the-truth-20100510_0.pdf (Hereafter: Unveiling the truth), 1). In the Netherlands, the number is estimated to a maximum of 400 women (0,1 % of the Muslim women) (Moors 2009) and in Denmark the population of niqabis would amount to maximum 100 women corresponding also to about 0,1 % of the Muslim women in Denmark (Warburg et al. 2014).

(Brems et al. 2014)¹⁸. However, there is much more at stake, namely the rest of the Muslim population who, to a large extent, is experiencing discrimination due to stereotypes and negative views.

Against this background, we intend to revisit the legal debate about the face veil taking into account the insider perspectives of those women, as presented in the first part of this book. On the whole, it is surprising that neither public authorities banning the face veil nor human activists advocating against such a process had much information at their disposal relating the experiences of the women concerned.

2. A challenge to human rights

Burqa ban debates are stuffed with human rights rhetoric. Both proponents and opponents of such bans have relied upon the language of human rights to the extent that equally important rights or principles conflict (or seem to conflict) with each other (Tourkochoriti 2012: 799)¹⁹: “On the one hand, such laws and regulations have been justified on the grounds that they protect the dignity and equal rights of women, help preserve public security and reflect national values, such as official secularism [or living together]. On the other hand, such laws have been attacked on the basis that they undermine women’s rights to equal treatment, freedoms of expression and of religion and are counterproductive to their purported aims of promoting integration”²⁰.

Belgium and France are key case studies. These are so far the only countries to have a national legislation banning the full veil. The French one is currently being reviewed by the European Court of Human Rights (ECtHR)²¹. On 6 December 2013, the Belgian Constitutional Court backed the federal law²². Its ruling is fraught with petitions of principle as the Court held that individualization by means of facial recognition is linked to the very “essence” of any individual and that forbidding any cloth, even a religious cloth, preventing such an individualization responds to a pressing social need²³. The purpose of this paper is not to scrutinize the Belgian ruling as such (Christians et al. 2012; Vrieling 2013) but to assess the human rights arguments altogether against the backdrop of the Council of Europe protection system.

The legal arguments used to challenge the burqa bans in the light of human rights go far beyond freedom of religion (Barton 2012; Hunter-Henin 2012). The criminalization of the covering of the face when being in areas open to the public could be held in violation of the

¹⁸ Open Society Foundations, “Unveiling the truth”, 37-45.

¹⁹ Report of Asma Jahangir, Special Rapporteur on Freedom of religion or belief, (E/CN.4/2006/5, 9 January 2006, § 52).

²⁰ Article 19, “Legal Comment. Bans on the full face veils and Human Rights. A Freedom of expression perspective”, December 2010 (<http://www.article19.org/data/files/pdfs/publications/bans-on-the-full-face-veil-and-human-rights.pdf>) (hereafter *Legal Comment*).

²¹ Application filed by a Muslim woman before the European Court of Human Rights against the French burqa ban, *S.A.S. v. France*, req. 4383/11, 11 April 2011. See also the written submission by the Human Rights Centre of Ghent University.

²² Belgian Constitutional Court, ruling on annulment no. 145/2012. Samia Belkacemi and Yamina Oussar, two Muslim women wearing a headscarf totally or principally hiding their face, filed a claim for annulment and suspension of the so-called “anti-burqa” Act before the Constitutional Court, on 27 July 2011 (appeal no. 5191). Another action in suspension and annulment was brought by a Belgian atheist woman in September 2011 (appeal n° 5204) and a third action in annulment was brought by the NGO “Justice and Democracy” in November 2011 (appeal n° 5244).

²³ Belgian Constitutional Court, 6 December 2012, case no. 145/2012, § B.21.

right to privacy²⁴, the freedom of religion and the freedom of (and even the freedom to) peaceful assembly. Furthermore, the bans from public facilities, the refusal of service and the risk to be fined and imprisoned could be seen as degrading treatments. And finally, this general ban could be challenged as discriminatory because of its adverse impact on Muslim women.

In the limited scope of this paper, we focus on the two prominent arguments which are freedom of religion and freedom of expression, on the one hand (2.1.) and non-discrimination, on the other hand (2.2.).

2.1. Freedom of religion and freedom of expression

Until now, the international and European case law related to the wearing of religious dresses or symbols have overwhelmingly focused on freedom of religion and belief. In our view, bans of full face veils should be assessed through a more comprehensive framework taking into account freedom of expression (Vrieling 2014)²⁵. This is all the more justified as wearing the full veil does not have one single meaning. As it results from the empirical findings, women who choose to wear the niqab do so for a wide range of different motives and hold it as an expression of their religious, cultural, political or personal identity or beliefs (Bribosia and Rorive 2004: 961-962)²⁶. And applying a different scrutiny on face veil bans depending on its particular meaning in individual cases is unworkable.

In international human rights law, it is generally acknowledged that freedom of expression protects all forms of expression including non-verbal expression such as clothes or symbols²⁷. Regarding freedom of religion, the UN Human Rights Committee stressed that “the observance and practice of religion or belief may include not only ceremonial acts but also such customs as ... the wearing of distinctive clothing or head coverings”²⁸. In the *Ahmet Arslan* case, the ECtHR held that the conviction of members of a religious group - *Aczimendi tarikatı* – who were wearing distinctive clothing (made up of a turban, baggy trousers, a tunic and a stick) in public areas fell within the ambit of freedom of religion as guaranteed by Article 9 ECHR²⁹. According to the ECtHR, the subjective feeling is the relevant factor here. In other words, freedom of religion is at stake when the wearing of a particular garment is inspired by a religion or belief, independently of determining “whether such decisions are in every case taken to fulfil a religious duty”³⁰.

The role of the margin of appreciation before the European Court of Human Rights

Traditionally, the Court underlines the lack of European consensus to yield a wide margin of appreciation to the States “where questions concerning the relationship between State and

²⁴ Full veiled women would be affected by the ban in their possibility to establish a social life, to develop relationships with others outside home, which could impair their autonomy and dignity (ECtHR, *S.A.S. v. France*, application n° 43835/11, Written submissions on behalf of Liberty, 7 May 2012, point 18).

²⁵ Article 19, “Legal Comment”, § 42.

²⁶ Open Society Foundations, “Unveiling the Truth”. Regarding the difficulty to assign one meaning to the wearing of the hidjab, see the dissenting opinion of Judge F. Tulkens in the *Leyla Sahin* case (ECtHR (GC), *Leyla Sahin v. Turkey*, 10 November 2005, § 11).

²⁷ Human Rights Committee, General Comment no. 34, “Freedom of Opinion and Expression”, 2011, § 12.

²⁸ General Comment no. 22, § 4. This statement was shared by the Special Rapporteur on Freedom of religion or belief, Asma Jahangir (Report, E/CN 4/2006/5, 9 January 2006, § 40. See also Human rights Committee, *Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (2004).

²⁹ ECtHR, *Ahmet Arslan v. Turkey*, 23 February 2010.

³⁰ ECtHR (GC), *Leyla Sahin v. Turkey*, 10 November 2005, § 78. For a similar reasoning in relation to the wearing of the niqab, see Tribunal of police of Brussels (Etterbeek), 26 January 2011, *Jurisprudence de Liège, Mons et Bruxelles*, 2011/12, 1066-1074.

religions are at stake” and especially when dealing with issues of religious symbols in educational institutions (Rorive 2009)³¹. One could wonder whether this loose scrutiny test should apply to a dress that can either be religious or political depending on the intent of the woman wearing it³². In any case, even in issues concerning religious symbols, the national margin of appreciation has been narrowed down on some occasions (Brems, Bribosia, Rorive and Van Drooghenbroeck 2012)³³. In the *Ahmet Arslan* case, the Court stressed that a general ban on religious dresses applicable to public areas open to all should be distinguished from regulations on religious symbols in public institutions (schools, universities, etc.) where religious neutrality might take precedence over the right to manifest one’s religion. Such an approach should tighten the margin of appreciation of national authorities banning the face veil in public³⁴.

Justification of the restriction to freedom of religion and expression

During the Belgian and French parliamentary debates, many aims were put forward to sustain the criminal bills: protection of public security, safety and public order, gender equality, human dignity, sociability (*communication*), the ‘living together’ (*vivre-ensemble*), secularism, protection of Muslim women forced to wear the burqa, fight against Islamisation and intolerance towards the Western world, etc. (Barton 2012: 11; Delgrange 2013). Among these, only public security and public order, protection of human dignity and gender equality (under the heading of “protection of rights and freedoms of others”) equate to one of the legitimate aims listed in Articles 9 and 10 ECHR³⁵.

Undoubtedly, the legitimacy of some of the aims pursued in criminalizing face veil is questionable. Can considerations of sociability justifiably circumvent our freedom of religion or our freedom of expression in any public places? To which slippery slope could the ‘living together’ (supposedly ‘pleasant’) argument bring us when applied to justify human rights interference? However, the core of the legal debate is not here. The judicial control of the legitimacy of the aim(s) pursued when limiting freedom of religion or freedom of expression is usually not very strict. The contentious issue relates to the assessment of the “necessity in a democratic society” assessment and the proportionality test.

Are the “burqa bans” necessary and proportionate to achieve public security or public order?

The argument of public security is based on the fact that concealment of one’s face in the public area could disturb prevention and immediate repression of infractions. During the parliamentary debates in France and Belgium, the threat to public security was exemplified

³¹ See, for instance, ECtHR (GC) *Leyla Sahin v. Turkey*, 10 November 2005, § 109.

³² Article 19, “Legal Comment”, § 69.

³³ In this line, see Human Rights Committee, *Singh v. France*, n° 1852/2008, 4 December 2012 (CCPR/C/106/D/1852/2008).

³⁴ See ECtHR, *Vajnai v. Hungary*, 8 July 2008: “when freedom of expression is exercised as political speech [...] limitations are justified only in so far as there exists a clear, pressing and specific social need. Consequently, utmost care must be observed in applying any restrictions, especially when the case involves symbols [red star in a post-communist country] which have multiple meanings. In such situations, the Court perceives a risk that a blanket ban on such symbols may also restrict their use in contexts in which no restriction would be justified” (§ 51).

³⁵ “Living together” could potentially be subsumed in a non-substantial conception of “public order”. For a discussion on this issue, see French Council of State, “*Study of possible legal grounds for banning the full veil*”, Report adopted by the Plenary General Assembly of the Conseil d’Etat, 25 March 2010, 26-29 (hereafter, Study for banning the full veil).

with the risk of the integral veil being used to commit crimes and to hide weapons³⁶. The amalgam between Islamism, violence and the full veil was debated as an obvious fact without relying on any single instance.

Of course, public security may justify specific human rights interferences, in particular in situations such as identity controls or airport security checks. Conversely, the requirement of a general ban of the full veil in all public spaces is highly doubtful. In the *Ahmet* case, the ECtHR found a violation of the freedom of religion and belief, holding in particular that there was no evidence that the applicants had represented a threat to the public order or that they had been involved in inappropriate proselytism during their gathering. This evidence-based approach seems the only one able to prevent a curtailment of human rights based on fear³⁷. Under national and European Human Rights standards, forbidding the full veil could be justified neither by a virtual or unproven risk for public security nor on mere speculation or presumption. The suitable test relates to “an actual threat to public [security] or the sufficiently strong likelihood of one”³⁸. This is in line with the jurisprudence of the ECtHR. In the *Vajnai* case, a criminal offence for the display of a red star that was considered as a totalitarian symbol under Hungarian criminal law was at stake. While assessing the restriction to the freedom of expression, the European Court held that “[a]s regards the aim of preventing disorder; [...] the Government has not referred to any instance where an actual or even remote danger of disorder triggered by the public display of the red star had arisen in Hungary. In the Court's view, the containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a ‘pressing social need’”³⁹.

No evidence of any actual threat is supporting the French or the Belgian legislation.

First, the parliamentary debates focused on the integral veil as being a danger for public security. Other ways of covering one's face (motorcycle helmet, hood, etc.) found only anecdotal reference. This could shed some doubts as to whether the pressing need of identifying people was the real concern of the legislator. Furthermore, it is absolutely not demonstrated that being able to identify someone circulating in any public area at any time is indispensable to guarantee public order or public security. As the French Council of State put it, no link between criminality and the wearing of the integral veil has ever been evidenced: “A general prohibition would therefore be based on artificial preventive considerations, which have never been accepted as such in case law”⁴⁰. The empirical findings confirm this line of reasoning as they show a general willingness of the face veil wearers to identify themselves by showing their faces to persons in authority reducing the relevance of presenting face veiled women as a safety risk (Brems & al. 2014)⁴¹.

³⁶ National Assembly, “Information Report”, 178; *Parliamentary Documents of the House of Representatives*, Session 2009-2010, Report, 9 April 2010, Doc n° 52 2289/005, 8 and 16. See also *Parliamentary Documents of the House of Representatives*, Session 2010-2011, Report, 18 April 2011, Doc n° 53 0219/004, 7.

³⁷ In this sense, see the dissenting opinion of Judge Françoise Tulkens in the *Leyla Sahin* case [2005] in which she underlined that only “indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying th[e] requirement [of a pressing social need] and justifying interference with a right guaranteed by the Convention”.

³⁸ French Council of State, “*Study for banning the full veil*”, 33-34. See also Article 19, “Legal Comment”, § 59.

³⁹ ECtHR, *Vajnai v. Hungary*, 8 July 2008, § 55.

⁴⁰ French Council of State, “*Study for banning the full veil*”, 36.

⁴¹ Nevertheless, one must admit that in some cases Muslim women may be reluctant to identify themselves when asked by the police as illustrated an incident that occurred in Molenbeek (Brussels) in May 2012. Here, a Muslim woman was arrested and brought to the police station by two policewomen after she refused to remove her integral veil during an identity check (“Le contrôle d'une femme portant le niqab provoque des tensions à Molenbeek », *Lalibre.be*, 1 June 2012, 12h53).

Secondly, even if they could be held necessary to maintain public security, the French and the Belgian Acts do not pass the proportionality test. In the French Council of State’s words, “[m]easures [infringing upon rights and freedoms] should not be excessive in terms of their geographical, personal and substantive fields of application or in their effects”⁴². Accordingly, “public safety cannot [...] be relied upon as a justification for requiring everybody to have their faces uncovered at all times and in all places”⁴³. Yet, the French ban (public space, except from the places of worships) and the Belgian ban (places accessible to the public) have a particularly broad geographical scope and do not rely on any specific risk to public policy assessment. Actually, such an assessment would better be made at the municipal level⁴⁴. Moreover, in the light of the case-law of the ECtHR, the use of criminal law to sanction the prohibited conduct could also be seen as an aggravating factor⁴⁵. In this respect, the Belgian criminal Act is even less likely to meet the proportionality test because it allows the judge to impose not only a fine, but also a prison sentence for concealing one’s face in public.

It is worth stressing that during the Belgian parliamentary debates, the Flemish Christian Democrats put forward another conception of public security based on the feeling of the general population when encountering a person wearing the full veil⁴⁶. Such feelings of insecurity would validate a general ban. This is close to the concept of non-material public order or morality referred to by some French Academics or Parliamentarians⁴⁷ before the fact-finding mission, discarded altogether by the French Council of State⁴⁸. If the inquiries led in Belgium and France confirm the fact that many people in Belgium and France feel uneasy in front of women wearing the niqab, this does not mean that this uneasiness could be a legitimate ground to prohibit it. In the *Vajnai* case, the ECtHR clearly denied that a subjective conception of security or public order could justify restrictions to freedom of expression. The Court accepted “that the display of a symbol [the red star] which was ubiquitous during the reign of [the communist] regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful”⁴⁹. However, it ruled “that such sentiments, however understandable, cannot alone set the limits of freedom of expression”⁵⁰. In very strong words, the Court went on to state that “a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognized in a democratic society, since that society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto”⁵¹.

Are the burqa bans necessary and proportionate to achieve human dignity and gender equality?

Human dignity and gender equality, which were extensively alluded to during parliamentary debates in France and Belgium, could only be legitimate aims regarding the prohibition of the facial veil. Those aims are absolutely irrelevant to legitimize the general ban of the

⁴² French Council of State, “*Study for banning the full veil*”, 35.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, 37.

⁴⁵ ECtHR, *Vajnai v. Hungary*, 8 July 2008, § 58.

⁴⁶ *Parliamentary Documents of the House of Representatives*, Session 2010-2011, Plenary Assembly, CRIV 53 PLEN 030, 55.

⁴⁷ National Assembly, “Information Report”, 179-180 and 554-559.

⁴⁸ French Council of State, “*Study for banning the full veil*”, 28-29.

⁴⁹ ECtHR, *Vajnai v. Hungary*, 8 July 2008, § 57.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

concealment of one’s face in public. Indeed, the wearing of a helmet or large sunglasses has nothing to do with women’s dignity. Another evidence that those Acts are hardly neutral.

The issue of human dignity and gender equality partly depends on whether women are compelled to wear the integral veil or not⁵². The empirical studies available so far⁵³ show that the vast majority of face veiled women claim to wear it out of a personal and autonomous choice, without alleging any family or social pressure to do so and even sometimes against the will of their relatives (Brems & al., 2014). Actually, the issue of consent, choice and pressure is a tricky one (Ford 2012; Fournier and Jacques 2013) and empirical studies also show that the relationship women develop towards their veil is context-specific. The dichotomy on which legal boxes are built upon (women wearing the facial veil *v.* women not wearing it, full-veiled women with total free will *v.* women forced to wear the full veil) cannot capture the complexity of daily life.

Forcing women to veil themselves is undoubtedly contrary to their dignity and to equality between men and women. According to the Parliamentary Assembly of the Council of Europe, “[n]o woman should be compelled to wear religious apparel by her community or family. Any act of oppression, sequestration or violence constitutes a crime that must be punished by law. Women victims of these crimes, whatever their status, must be protected by member states and benefit from support and rehabilitation measures”⁵⁴. In this respect, it might be argued that the ban of the face veil is aimed at protecting the dignity of those women forced to wear it. Whether a criminally sanctioned blanket ban is likely to achieve this aim remains to be seen. The former Commissioner for Human Rights, Thomas Hammarberg, the Belgian Human Rights League and Human Rights Watch stressed that “rather than help women who are coerced into wearing the veil, a ban would limit, if not eliminate, their ability to seek advice and support. Indeed, the primary impact of legislation of this kind would be to confine these women to their homes, rather than to liberate them”⁵⁵. Testimonies of some women wearing the full veil in Belgium and France show that one of the adverse effects of the legislative bans is that these women avoid, from now on, going out in order to escape from verbal or physical aggressions or from confrontation with the police (Brems et al. 2014). The “anti burqa” Acts seem to have missed their target and to be counter-productive to the promotion of dignity and gender equality⁵⁶.

During parliamentary debates, several French or Belgian MPs underlined the profound incompatibility of women’s full veiling with human dignity (Delgrange 2013)⁵⁷. As the

⁵² *Parliamentary Documents of the House of Representatives*, Session 2009-2010, Report, 9 April 2010, Doc n° 52 2289/005, 27 and 30. See also *Parliamentary Documents of the House of Representatives*, Session 2010-2011, Report, 18 April 2011, Doc n° 53 0219/004, 12.

⁵³ Mainly the one conducted by the University of Ghent, on a sample of 27 women wearing or having worn the full face veil in Belgium (out of approximately 200 to 300 on the Belgian territory) (the results of this study are commented in this book) and the one conducted by the Open Society Institute on a sample of 32 Muslim women wearing the full-face veil in France (*Unveiling the truth*).

⁵⁴ Parliamentary Assembly of the Council of Europe (PACE), Resolution 1743 (2010), *Islam, Islamism and Islamophobia in Europe*, § 15.

⁵⁵ Human Rights Watch, “Belgium: Muslim Veil Ban Would Violate Rights. Parliament Should Reject Bill for Nationwide Restrictions”, 21 April 2010 (www.hrw.org) ; Thomas Hammarberg, “Rulings anywhere that women must wear the burqa should be condemned - but banning such dresses here would be wrong”, (www.commissioner.coe.int); Human Rights League (Ligue des droits de l’homme), “Interdiction du port du voile intégral: une mauvaise solution à un vrai problème”, 28 April 2010, (<http://liguedh.be>).

⁵⁶ See the declaration of Eva Brems, Representative of the Flemish Green Party (Groen), *Parliamentary Documents of the House of Representatives*, Session 2010-2011, Report, 18 April 2011, Doc n° 53 0219/004, 16; see also Article 19, “Legal Comment”, § 64.

⁵⁷ French National Assembly, “Information Report”, 113-115.

Parliamentary Assembly of the Council of Europe put it, “the veiling of women, especially full veiling through the *burqa* or the *niqab*, is often perceived as a symbol of the subjugation of women to men, restricting the role of women within society, limiting their professional life and impeding their social and economic activities [and...] that this tradition could be a threat to women’s dignity and freedom”⁵⁸. The idea that Western values are going to save these women, assumed to be of foreign background, is never far away. Again, the issue is much less straightforward in Europe where the empirical findings reported in the first part of the book show that a significant number of full veiled women are converted and do not come from a Muslim background. Known as the Zeal of the Convert phenomenon, such findings led Denmark to renounce to legislate on the matter. Although, the burqa ban was part of an integration initiative approved by the Conservative’s parliamentary group in 2009, the project of such a ban was abandoned after the publication of a report commissioned by the ministry for Social Affairs and written by a research team from the University of Copenhagen. The issue of human dignity and integration could hardly be a crucial one anymore after academics had found that among the approximately 150 women wearing the niqab in Denmark about 70 were converts from a Danish background (Warburg et al. 2014).

The legal question to be addressed is whether, in the name of human dignity and/or gender equality, the State could and/or should act against women who choose to fully veil themselves, so as to protect them against themselves? The issue was not discussed as such in Belgium (Delgrange 2013). One Flemish liberal MP argued in this sense: “The full face veil must be prohibited even if it is worn voluntarily. This is indeed an infringement of the person’s dignity but also of dignity as a matter of principle, generally speaking. This is an insult to the conception of the human person and the woman”⁵⁹. Another French-speaking liberal MP drew a parallel between the burqa ban and the French ban on “dwarf tossing”⁶⁰, judged in conformity with human rights’ requirements by both the French Council of State⁶¹ and the United Nations Human Rights Committee⁶². In their reasoning, dwarf tossing was contrary to human dignity as such and, respect for human dignity being part of public order, the public authorities were allowed to ban it to guarantee public order.

Conversely, in France the issue led to heated and controversial debates. The Report of the National Assembly stated: “it is very difficult to draw from the constitutional principle of dignity that the State could judge of the dignity of the persons and protect them against themselves”. Furthermore, the French Council of State clearly stressed that fundamental principles of protection of human dignity and equality of men and women are not appropriate to justify a general ban of the face veil as they “cannot be applied to persons who have deliberately chosen to wear the full veil”⁶³. The main arguments underlying this statement may be wrapped up into two main points⁶⁴.

⁵⁸ PACE, Resolution 1743 (2010), § 15.

⁵⁹ *Parliamentary Documents of the House of Representatives*, Session 2010-2011, Report, 18 April 2011, Doc n° 53 0219/004, 19. Our translation (« Le vêtement qui couvre le visage doit également être interdit si certains le portent volontairement. C’est en effet une atteinte non seulement à la dignité de la personne, mais également à la dignité de principe, de manière générale. Cela reste une insulte à la conception de la personne humaine et de la femme »).

⁶⁰ *Parliamentary Documents of the House of Representative*, Session 2009-2010, Report, 9 April 2010, Doc n° 52 2289/005, 30.

⁶¹ French Council of State, 27 October 1995, *Commune de Morsang-sur-Orge, Ville d’Aix-en-Provence*, *Revue trimestrielle des droits de l’homme*, 1996, 657-693.

⁶² Human Rights Committee, *Wackenheim v. France*, CCPR/C/75/D/854/1999, 26 July 2002

⁶³ French Council of State, “*Study for banning the full veil*”, 23.

⁶⁴ *Ibid.*, 21-22.

First, as to the principle of protecting the human dignity, the French Council of State underlines the subjective interpretation of what is contrary to the dignity of one’s person, referring to “the different perceptions of the image society projects of the (often naked) female body”⁶⁵. It then recalls the two existing conceptions of dignity “that may contradict or limit each other: that of the collective moral requirement to protect human dignity, perhaps at the expense of freedom of self-determination (...) and that of the protection of freedom of self-determination, as a consubstantial aspect of the human person”⁶⁶. This last interpretation clearly prevails in the European Court of Human Rights’ case-law in which a principle of personal autonomy is deduced from the right to respect for private life and implies “that we should all be able to live according to our convictions and personal choices, even if it means putting ourselves at moral or physical risk, provided we do not harm anybody else”⁶⁷. This conception renders the motive of protecting human dignity to ground a general ban of the full veil highly debatable in the cases of women who have willfully chosen to wear it.

Secondly, the principle of equality between women and men, which was at the core of the debates before the French National Assembly, was presented as manifold: the full-face veil amounted to a mark of “sexual apartheid”, an instrument reducing women to mere objects or a way to remove women from the public space altogether (Barton 2012: 15-18)⁶⁸. Legally speaking, the French Council of State points out that “[w]hile [the gender equality principle] is applicable to others, it is not intended to be applicable to the individual person, i.e. to the person’s exercise of personal freedom, which may in some cases lead to the adoption of a form of behavior that could be interpreted as sanctioning an inferior situation, in the public space like anywhere else, provided there is no violation of physical integrity”⁶⁹.

In cases where people have to be protected against their own will or claimed decision, it is hard to see how criminal sanction may either be appropriate or proportionate. Is it not paradoxical, or even cynical, to pretend freeing women from what some MPs named a “moving prison” by sending them to jail (in the Belgian case)⁷⁰? Moreover, again in the Belgian context, it is astonishing to see that only women are the targets of the new criminal provisions. Contrary to France⁷¹, no offense was provided for to sanction those who force them to veil themselves.

2.2. Non-discrimination

Even if the French and Belgian “burqa bans” are neutral on their face, they could be held indirectly discriminatory on the ground of gender, religion and even race or ethnic origin. The dividing line between religion and race is often blurred and, in the burqa debates around the adoption of the bans, islamophobic and racist statements were not rare (Amiriaux 2011)⁷². The

⁶⁵ *Ibid.*, 22.

⁶⁶ *Ibid.*, 21.

⁶⁷ ECtHR, *KA and AD v Belgium*, 17 February 2005 (No 42758/98). In this case related to sadomasochist practices, the Court held that “[t]he right to engage in sexual relations derived from the right of autonomy over one’s own body, an integral part of the notion of personal autonomy, which could be construed in the sense of the right to make choices about one’s own body. It followed that the criminal law could not in principle be applied in the case of consensual sexual practices, which were a matter of individual free will. Accordingly, there had to be “particularly serious reasons” for an interference by the public authorities in matters of sexuality to be justified for the purposes of Article 8 § 2 of the Convention” (§ 83).

⁶⁸ French National Assembly, “Information Report”, 109-113.

⁶⁹ French Council of State, “*Study for banning the full veil*”, 22-23.

⁷⁰ F. Dubuisson & A. Lagerwall, “Les dangers de la loi ‘anti-burqa’”, *La Libre Belgique*, 12 avril 2011.

⁷¹ Article 4 of the Law n° 2010-1192 of 11 October 2010 prohibiting the the wearing of clothing covering one's face in public spaces.

⁷² Amnesty International, “Choice and Prejudice: Discrimination against Muslims in Europe”, 17.

Parliamentary works of both the French and the Belgian ‘anti burqa’ Acts show that Muslim women wearing the full-face veil were the main targets⁷³. The major parts of the debates were devoted to discussing the incompatibility of the wearing of the full veil with the Belgian and French values and identities. In addition, both Acts have been until now exclusively enforced against Muslim women⁷⁴. This would amount to establishing a *prima facie* case of differential treatment.

The bans could be challenged because of their potential multiple or intersectional disparate impact on Muslim women – as women, as Muslims and as members of a minority ethnic group. Such an impact is well documented in the empirical studies in Belgium and France. In both countries, the full veil controversy, its large media coverage and the adoption of local or national bans have increased the risk for those women to be exposed to “overt forms of discrimination, but also threats or actual physical attacks from individuals outside their community who view the state’s apparent sanctioning of the veil as justification for their behavior” (Brems et al. 2014)⁷⁵. As the Report of the Open Society Foundations “Unveiling the truth” put it, “Interviewees who wore the niqab before and after the controversy were adamant that they had noticed a shift in people’s attitudes illustrated by an increase in the level of abuse the women had received since the full-face veil became a matter for national debate”⁷⁶.

Discrimination on the ground of gender, religion and race – being direct or indirect - is clearly prohibited under the European Convention on Human Rights⁷⁷. The prohibition, enshrined in Article 14 ECHR, must be combined with another provision of the Convention, which could be Article 8 (private life), Article 9 (freedom of religion) and/or Article 10 (freedom of expression). One should bear in mind that gender, religion and race are “suspect” grounds in the ECtHR anti-discrimination case law, which means that “very weighty reasons” are required to justified differences of treatment based on those grounds and that the Court will apply a very strict scrutiny test. Furthermore, the recent case law of the ECtHR focuses on stereotypes, prejudice and history of discrimination to determine the intensity of its control (Gerards 2007: 33-39; Gerards 2012). Stereotypes and prejudice are not far away in the issue of Muslim women wearing the full veil⁷⁸, as the debates surrounding the adoption of the burqa bans have shown. As a matter of legal principle, the non-discrimination venue through a combination of article 14 with freedom of religion or expression is the most suitable one to challenge the French and the Belgian Acts (Pei 2013).

⁷³ In Italy, the burqa bans are even not neutral on their face (Moschel 2013).

⁷⁴ Data on enforcement patterns in France is sparse, but the Ministry of the Interior announced that one year after the law came into force, 354 checks had been conducted, resulting in 299 condemnations. *Loi sur le voile intégral: près de 300 femmes verbalisées en un an*, *Le Monde* (Apr. 4, 2012, 19:55), http://www.lemonde.fr/societe/article/2012/04/10/loi-sur-le-voileintegral-pres-de-300-femmes-verbalisees-en-un-an_1683364_3224.html. “There were no explicit indications as the proportion of those enforcement actions conducted against women wearing burqas. However, an independent organization, *Touche Pas à Ma Constitution*, reported that 367 women had been cited and interrogated, *id.*, suggesting that the vast majority of enforcement actions have been against veiled women” (Pei 2013: footnote 68).

⁷⁵ “Article 19, “Legal Comment”, § 65.

⁷⁶ Open Society Foundations, “Unveiling the truth”, 17.

⁷⁷ ECtHR (GC), *Thlimmenos v. Greece*, 6 April 2000; ECtHR (GC), *D.H and others v. Czech Republic*, 13 November 2007. European Union Agency for Fundamental Rights and European Court of Human Rights, *European Handbook on anti-discrimination law*, 2010, 19-21.

⁷⁸ Thomas Hammarberg. *Human rights’ comment* “European Muslims are stigmatized by populist rhetoric”. October 2010, http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=99; Amnesty International, “Choice and Prejudice: Discrimination against Muslims in Europe”, 4-7.

Whilst we have seen that some of the aims sought to be realized by the burqa bans could be held legitimate, both bans appear highly disproportionate to those aims because either they could be reached through less intrusive means⁷⁹ or they lead to counterproductive results. In this regard, empirical findings show that a significant proportion of women wearing the full veil will not abandon this practice but rather will avoid showing themselves in public except by car. Can we truly pretend that social cohesion and gender equality are better served (Brems & al., 2014)? Moreover, veiled women report being subjected to an increase of verbal – or occasionally physical – aggressions in shops and public spaces since the adoption of local or national burqa bans. In the name of safety, could it be that those Acts put veiled women’s safety at risk (Brems et al. 2014)?

* *
*

In this paper, we argued that a general ban on face veils in all public spaces fails to meet human rights law standards and that the empirical findings presented in the first part of the book are unraveling many parts of the public discourse upon which State intervention was based. Beyond France and Belgium, it is striking to note how the full veil becomes the “common enemy” of politicians in countries such as the Netherlands, Italy, Spain and even some parts of Germany. Politicians are waving national as well as European identities and values. They forget that human rights are at the core of these values and that being forced to be free is not part of the game. With the rise of extreme-right wing parties in Europe and the financial and economic crisis in the background, the burqa bans appear to take a symbolic significance: politicians are showing to their electorate that they are doing “something” about immigration, integration and the Muslim question. The fact that a substantial amount of fully veiled women are converted is totally overlooked. In Denmark, however, this was enough to stop a national ban. This is obviously not to say that sectorial bans which present a tailored response to a specific situation should be rejected altogether. All kinds of legal norms are already regulating the wearing of the face veil in European countries (school and public services regulations, hospital policies, anti-discrimination law, ...). One could say that the impact of a general ban is therefore marginal. The final point we want to make here is that it actually goes far beyond the issue of the face veil and has a detrimental effect on the whole Muslim community in Europe. It would probably reinforce racism and prejudice and might make some Muslim women more dependent on the patriarchal sectors of their community. In the end, it might just produce more burqas.

As the French Human Rights League put it: “Wearing the full veil could be a “voluntary thralldom, as many testimonies attest. In this case, freedom may not be imposed through coercion but rather result from education, social conditions and personal choice: one cannot emancipate people against their own free will; one might only provide them with the conditions for their emancipation”⁸⁰. The issue of consent is a complex one. Muslim women who veil themselves (most of the time, occasionally, in specific situations,...) have to navigate through their community, family and personal relationships, which are ridden with power relations. To tackle such a tricky issue, public authorities have to rely on scientific data, not on common sense or prejudice, and take human rights and the democratic process seriously.

⁷⁹ ECtHR, *S.A.S. v. France*, application n° 43835/11, Written submissions on behalf of Liberty, 7 May 2012, point 32.

⁸⁰ French Human Rights League, “Prise de position de la Ligue des droits de l’homme dans le débat sur le voile intégral” (http://www.ldh-france.org/IMG/pdf/Voile_integral.pdf).

References

- Amiraux, V., “Burqa Bashing: Does Religion Stand for Race in the EU? ”, paper presented at the *Russell Sage Conference*, NYC 9-10 December 2011.
- Barton, D., “Is the French Burka Ban Compatible with International Human Rights Law Standards?”, *Essex Human Rights Review*, 9 (2012), 1-27.
- Brems, E., Bribosia, E., Rorive, I. and Van Drooghenbroeck, S., “Le port de signes religieux dans l’espace public : Vérité à Strasbourg, erreur à Genève?”, *Journal des tribunaux*, 2012, 602-603.
- Brems, E., Janssens, Y., Lecoyer, K., Ouald Chaib, S., Vandersteen, V. and Vrielink, J., “The Belgian ‘Burqa Ban’ Confronted with Insiders Realities”, [in this book](#).
- Bribosia, E. and Rorive, I., “Le voile à l’école: une Europe divisée”, *Revue trimestrielle des droits de l’homme*, 2004, 951-983.
- Christians, L.L., Minette, S. and Wattier, S., “Le visage du sujet de droit ; la burqa entre religion et sécurité”, *Journal des tribunaux*, 2013, 242-245.
- Delgrange, X., “Quand la burqa passe à l’Ouest, la Belgique perd-elle le Nord?”, in O. Roy & D. Koussens (eds), *Quand la burqa passe à l’Ouest. Enjeux éthiques, politiques et juridiques*, Presses universitaires de Rennes, coll. Sciences religieuses, 2013, in press.
- Ford, R.F., « Headscarves, Hairstyles and Culture as a Civil Right: a critique », text published as a part of the 2010-2011 guest professor program organized by Sciences-Po and the French-American Foundation on the theme of “Equal Opportunity.” and discussed at the Workshop on “Illegal covering: Comparative Perspectives on Legal and Social Discourses on Religious Diversity”, held at the International Institute for the Sociology of Law (Onati, Spain), 2012.
- Fournier, P., and Jacques, E., “Voiles/Voiler”, in E. Bribosia and I. Rorive (eds), *L’accommodement de la diversité religieuse. Regards croisés – Canada/Europe/Belgique*, Bruxelles, PIE Peter Lang, 2013, to be published.
- Gerards, J., “Discrimination grounds”, in M. Bell, D. Schieck & L. Waddington (eds.), *Non-Discrimination Law*, Oxford and Portland, Oregon, Hart Publishing, 2007, 33-184.
- Gerards, J., “The Discrimination Grounds of Article 14 of the European Convention on Human Rights », *Human Rights Law Review*, (2013) 13 (1), 99-124,
- Hunter-Henin, M., “Why the French don’t like the burqa: laïcité, national identity and religious freedom”, *International and Comparative Law Quarterly*, 61 (2012), 613-639.
- Moors, A., “Gezichtssluiers. Draagsters en Debatten”, Amsterdam School for Social Science Research, 2009.
- Moschel, M., “La burqa en Italie: d’une politique locale à une législation nationale”, in O. Roy & D. Koussens (eds), *Quand la burqa passe à l’Ouest. Enjeux éthiques, politiques et juridiques*, Presses universitaires de Rennes, coll. Sciences religieuses (in press).
- Pei, S., “Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights », *Yale Law Journal*, 122 (2013), 1089-1102.
- Rorive, I., “Religious Symbols in the Public Space: In Search of a European answer”, *Cardozo Law Review*, 30 (2009), 2669-2698
- Tourkochorit, I., “The burqa ban: Divergent approaches to freedom of religion in France and in the U.S.A.”, *William and Mary Bill of Rights Journal*, 20 (2012), 791-852.
- Vrielink, J., “De Grondwet aan het gezicht onttrokken. Het Grondwettelijk Hof en het 'boerkaverbod””, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 2013, 250-260.
- Vrielink, J., “Torn apart? The face-veil between bannable symbol and protected symbolic speech”, [in this book](#).

© E. Bribosia and Isabelle Rorive: “Insider Perspectives and the Human Rights Debate on Face Veil Bans”, in E. Brems (dir.), *The Experiences of Face Veil Wearers in Europe and the Law*, coll. Cambridge Studies in Law and Society, Cambridge University Press, 2014, p. 163-183

- Warburg, M., Schepeleern Johansen, B. and Ostergaard, K., “Counting Niqabs and Burqas in Denmark: Methodological Aspects of Quantifying Rare and Elusive Religious Subcultures”, [in this book](#).