Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans

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Analysis of the justifiability of general burqa bans in public – Comparative study of burqa bans in France, Belgium and concept legislation in the Netherlands – Evaluation of burqa bans in light of the Article 9 ECHR, the right to freedom of religion – Evaluation of grounds for introduction of bans, including public safety, public order and the protection of rights and freedoms of others – Conclusion: general burqa bans difficult to justify in the light of ECHR standards

Introduction

The headlines have been captured in recent years by moves in some European countries to ban the burqa from being worn in public.[1] In particular these moves relate to general bans on wearing the burqa and not to bans for specific situations, such as during identity checks at airports. While specific bans narrowly tailored for a particular situation are generally regarded as uncontroversial, the opposite is true for general bans in public.

The 2010 act of parliament in France which introduces such a general ban, and which has been sanctioned by the country's constitutional court, is precisely a case in point.[2] This act of parliament, and the accompanying judicial decision, raises fundamental questions about the purpose and limits of the law in a democratic

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[1] *See* generally P. van Sasse van Ysselt, 'Over het verbod op het dragen van een gezichtssluier en van andere gelaatsbedekkende kleding' [Bans on Face Veils and Other Garments Concealing the Face], 1 *Tijdschrift voor Religie, Recht en Beleid* (2010) p. 5 at p. 19-24.

[2] Loi No. 2010-1192 du 11 oct. 2010 interdisant la dissimulation du visage dans l'espace public, *Journal Officiel* (JORF) 12 oct. 2010. Further regulation in: Circulaire du 2 mars 2011 relative à la mise en œuvre de la loi no. 2010-1192 du 11 oct. 2010 interdisant la dissimulation du visage dans l'espace public, *JORF* 3 mars 2011.

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society based on fundamental rights. The aim of this contribution is consequently to analyse the introduction of general burqa bans from a comparative and an ECHR perspective. Although the question can be studied from various angles, the focus in this piece rests on the right to freedom of religion, as wearing a burqa is often motivated by religious conviction. Particular attention is paid to the situation in France, as the first country to adopt a general ban, after which the situations in Belgium and the Netherlands will be compared before the justifiability of general bans will be studied mindful of the ECHR's standards.

A brief terminological point on what is meant by a burqa is first in order though. Face-coverings motivated by the Islamic faith among women take on two main styles and are referred to either as a burqa or niqab, variations might also be found depending on the particular culture or region where the practice was originally rooted.[3] To avoid confusion this piece will refer to a ban on women wearing the burqa when referring to any or all of these different styles of face covering.

The case of France

Setting the scene

On 22 June 2009, Nicolas Sarkozy, the French president, stated empathetically that the burqa was not welcome on French soil. Intentions were translated into action, and on 11 May 2010 the National Assembly adopted a motion declaring that the burqa was irreconcilable with the values of the French Republic. So strong was this political sentiment, that 434 of the 435 votes were cast in its favour, with the president of the Assembly choosing to abstain. A report by the Council of State which questioned the legal wisdom of a general ban could not stem the political tide, and on 13 July 2010 the National Assembly voted in favour of a bill effecting such a ban, soon to be affirmed by the Senate on 14 September 2010.[4] The bill was subsequently submitted for constitutional review to the Constitutional Council by the presidents of the National Assembly and Senate, after which the Council pronounced the bill to be constitutional on 7 October 2010. It became law on 11 October 2010 and took effect on 11 April 2011, while according to section 7 of the act the government must draft a report evaluating the act's functioning after eighteen months.

[3] Cf. B.P. Vermeulen et al., 'Overwegingen bij een boerka verbod. Zienswijze van de deskundigen inzake een verbod op gezichtsbedekkende kleding' [Considerations Regarding a Burqa Ban: Views of the Experts on a Ban on Face Coverings] (2006) p. 10-11.

[4] Assemblée nationale, Compte rendu intégral 13 juillet 2010: <www.assemblee-nationale.fr/13/cri/2009-2010-extra/20101016.asp#P366_72922>: Sénat, Compte rendu intégral, No. 82, Senate, 14 sept. 2010, p. 6763.

Although the act of parliament is generally considered to be a law banning the burqa from being worn in public, on the face of it its provisions are framed in a neutral fashion so that it is not aimed at burqas specifically but at face coverings as such.

In motivating the bill, the government made no bones about it that in its opinion the very practice of wearing the burqa in public had to be banned as it was considered to be at odds with fundamental requirements of 'living together' in French society, the essential rules of 'the Republican social contract,' and disregarded 'fraternity' and minimum forms of social interaction necessary for co-existence.[5] Wearing of the burqa was also found to violate the human dignity of the women so clad as well as the public confronted by them, not to mention the equality of the sexes.[6] In some circumstances the practice could also endanger public safety.[7] Many of these arguments were not entirely new, as they can be traced to the 2003 report by the Stasi Commission which questioned the compatibility of Muslim female traditional clothing with fundamental French values and even democracy.[8] Only in 2004 such arguments led to the law on banning religious symbols from being worn in state schools, while in 2009 the attention turned to a general burqa ban.[9] In effecting such a ban, section 1 of the act provides: No one shall, in any public space, wear clothing designed to conceal the face.'

While section 2 clarifies that:

I For the purposes of the application of the foregoing section, the public space shall be composed of the public highway and all premises open to the public or used for the provision of a public service.

II The prohibition set forth in section 1 hereinabove shall not apply if such clothing is prescribed by law or regulations, is justified on medical or professional grounds or is worn in the context of sporting practices, festivities, or artistic or traditional events.

Ensuring the act's observance, section 3 provides that failure to comply with the prohibition will result in a fine, currently set at € 150, which can be given in conjunction with, or instead of, an order to attend a course on citizenship. Section

[5] Assemblée Nationale, 13th Legislature, No. 2520, Projet de loi interdisant la dissimulation du visage dans l'espace public, Exposé des motifs, p. 3.

[6] Assemblée Nationale, *supra* n. 5, p. 3.

[7] Assemblée Nationale, *supra* n. 5, p. 4.

[8] Commission de réflexion sur l'application du principe de laïcité dans la République, *Laïcité et République*, (2004).

[9] Loi No. 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, *Journal Officiel* 17 mars 2004. *See* ECtHR 4 Dec. 2008, Case No. 27058/05, *Dogru* v. *France* para. 30.

4 of the act punishes anyone who forces someone to cover their face by a year's imprisonment and a fine of € 30,000.

At the outset though, it must be made clear that the act does not imply a ban on head veils, women (and men for that matter) are still allowed to cover their heads in public as long as they do not cover their faces in the process.[10] Inescapable though is the consequence that religiously-inspired face coverings are not exempted from the act's provisions and therefore not allowed. While such expressions of religion are not targeted by the act in so many words, it is clear from the events leading up to the ban that this was one of the act's main purposes, if not even its sole purpose. Therefore, for the purpose of this discussion we will focus on the ban as far as it effects religious expression in the public space and in particular in the context of women wearing the burqa.

Enter the French Constitutional Council

In reviewing the constitutionality of the bill before it became law, the Constitutional Council found that the bill did not disproportionately pursue its aims of safeguarding public order and guaranteeing constitutionally protected rights.[11] This point was not so much agued as simply stated.

The Council briefly highlighted that the bill was a response to people covering their face in public, a practice which until recently was of an exceptional nature, but one which parliament now decided had to stop for the sake of public safety and security while the practice failed to comply with minimum requirements of life in society.[12] In addition notice was also taken of the argument that women who cover their face, voluntarily or otherwise, were placed in a situation of exclusion and inferiority which was patently at odds with constitutional values such as liberty and equality.

The Council did insist on one caveat though, namely that the prohibition should not extend to places of worship open to the public, as this would violate the right to freedom of religion.[13] In its last consideration, the Council also found the penalties under the act for wearing a burqa in public, or for forcing someone to do so, constitutional.[14]

Save for the qualification as to what is to be understood under the term public space, the Constitutional Council probably did itself little favour by not considering the merits of the general ban in any meaningful way. Either the Council

[10] *See* E. Brems, 'De hoofddoek als constitutionele kopzorg' [The Headscarf as a Constitutional Headache] 59 *Tijdschrift voor bestuurswetenschappen en publiekrecht* (2004) p. 323.

[11] Decision No. 2010 – 613 DC of 7 Oct. 2010, para. 5.

[12] Decision, *supra* n. 11, para. 4.

[13] Decision, *supra* n. 11, para. 5.

[14] Decision, *supra* n. 11, para. 6.

wholeheartedly agreed with the bill and its constitutional foundations, or chose to show remarkable deference in what is undoubtedly sensitive political territory. Whichever way, the Council has left it unprotected to the criticism that it is not much more than a semi-political organ, something which is not dispelled by the fact that its bench is filled by politically-experienced members. The legitimacy of judicial decisions resorts more so than not in the reasons giving for such decisions, and on this count the Council unfortunately fails.[15]

The Council of State compared

In its brevity, but more importantly its content, the decision by the Constitutional Council stands in stark contrast to the extensive report adopted by the Council of State. First the Council of State pointed to the instances where specific bans on covering one's face are allowed before taking the idea of a general ban to task.[16]

Bans especially aimed at the burqa, in contrast to neutrally formulated laws, came in for special criticism as the Council deemed such bans highly controversial. This is because a ban targeted only at burqas would in all likelihood violate a range of rights, including the rights to personal liberty, privacy, freedom of expression and equality.[17] A targeted ban could only ever be enforced in respect of minors in the interest of human dignity and sex equality or where someone was coerced into wearing the burqa.[18] While the Council was also concerned about the legality of neutrally formulated bans, especially as regards the right to freedom of religion, this variant did provide more scope for instituting a ban. Considering the possible arguments in favour of neutral bans, the Council was not persuaded that public safety, which it treated as a component of public order, could ever be advanced as a reason to ban all face coverings under each and every circumstance in public. Nonetheless, the possibility was foreseen that in principle the very requirements of constituting and living together in a society could justify a ban.[19] However, the Council advised against a ban on this ground as it would necessitate the state giving what it considered a new and positive interpretation to what constitutes public order.[20] Such a prohibition would in effect tell people how to live their lives by enforcing particular conceptions of society, instead of letting people exercise

[15] On judicial legitimacy, *see* G. van der Schyff, *Judicial Review of Legislation: A Comparative Study of the United Kingdom, The Netherlands and South Africa* (Springer 2010) p. 55-58.

[16] Conseil d' Etat, *Etude relative aux possibilités juridiques d'interdiction du port du voile intégral*, 25 March 2010, p. 9-14.

[17] Conseil d'Etat, *supra*, n. 16, p. 17.

[18] Conseil d'Etat, *supra*, n. 16, p. 21, read with p. 39-40.

[19] Conseil d'Etat, *supra*, n. 16, p. 26-27.

[20] Conseil d'Etat, *supra*, n. 16, p. 27.

their freedoms as they see fit and allow state limits only to be imposed where necessary. Such a positive interpretation, the Council found, could not count on sound support in legal literature or case-law of the Constitutional Council, the European Court of Human Rights (hereinafter ECtHR) or of other European countries.[21]

Instead of a general ban the Council suggested that the possibility be created to compel someone to show their face in public as soon as the protection of public order necessitates such action in a particular instance.[22] As examples were mentioned entry to jewellers, banks, sporting events and international conferences.

Banning people from covering their faces also implies a sanction of sorts. Here the Council suggested that where someone acts in contravention of a law on face coverings they be sent to a representative of a mediation organ to discuss the matter, or be required to participate in the activities of such a body in addition to or instead of alternative measures.[23] In the context of women wearing the burqa, this could mean organisations devoted to women's rights, or organisations focused on addressing youth delinquency where a minor commits a crime with their face covered. In the case of someone being forced to wear a burqa the Council called for new and tough measures, but stressed that any sanction should target the coercion exercised and not the wearing of the burqa as such.[24]

Irrespective though of the Council of State's detailed and careful reasoning the Constitutional Council did not refer to that body's report in its decision, apart from contradicting by implication the Council of State's appetite for specific bans in favour of a general burqa bans.

Laïcité and the burqa

Interestingly, the Council of State made it very clear that a ban on wearing burqas in public could not be based on the concept of *laïcité*.[25] But what is the reason for this, and probably also that the term is absent from the decision of the Constitutional Council?

One can say that *laïcité*, variously defined as the separation of the state and religion or state neutrality, is very much part of French civic or constitutional culture and tradition.[26] Defending the secular state in France was an important

[21] Conseil d'Etat, *supra*, n. 16, p. 28.
[22] Conseil d'Etat, *supra*, n. 16, p. 37-39.
[23] Conseil d'Etat, *supra*, n. 16, p. 40.
[24] Conseil d'Etat, *supra*, n. 16, p. 24.
[25] Conseil d'Etat, *supra*, n. 16, p. 17-18.
[26] Also recognised in *Dogru* v. *France*, *supra*, n. 9, para. 72: 'The Court also notes that in France (…) secularism is a constitutional principle, and a founding principle of the Republic (…) the

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consequence of the 1789 Revolution, which saw the Roman Catholic Church's privileged position come crashing down in the face of popular uprisings against traditional forms of authority in society. To this day, France is one of the European states where secularism has been carried furthest. However, the principle has been interpreted differently over time.[27] While in the nineteenth century subsidising religion was considered a prerequisite for realising state neutrality in France, which in effect meant accommodating Catholicism as the country's largest faith, the 1905 Act on the Separation of Churches and the State mandates to this day that the state does not recognise, salary or subsidise any religion.[28]

The separation of church and religion has also come to take on clear constitutional dimensions as section 1(1) of the 1958 Constitution proclaims that France is 'an indivisible, secular, democratic and social Republic.' The 1958 Constitution affirmed and expanded on the 1946 Constitution which guaranteed the right to secular public education in its preamble. Importantly though, the insistence on strict secularism in France is apparently not intended as an attack on religion, instead a secular public domain is seen as a precondition for freedom of religion outside the public domain.[29] However, *laïcité* does not preclude the exercise of religion in public, as bans on religious processions were quickly overturned by the courts, but the principle is primarily aimed at the state and its institutions.[30] If the state is neutral in matters of religion more freedom is left to society to make up its own mind about such matters, one could say.

Viewed against this background it becomes clear that the burqa ban centres not so much on the state having to act according to secularist principles, but is more a question of a religious practice being banned in the interest of protecting public order. This shifts the debate from classic arguments on the separation of religion and state to the justifiability of the state interfering with the expression of religious conviction of ordinary people, thereby explaining why *laïcité* has correctly been lacking from the French debate.

protection of which appears to be of prime importance, in particular in schools.' Idem in ECtHR 4 Dec. 2008, Case No. 31645/04, *Kervanci* v. *France*, para. 72.

[27] Evaluating the various guises of *laïcité*, *see* M. Troper, 'Sovereignty and Laïcité', 30 *Cardozo Law Review* (2009), p. 2561 especially at p. 2568-2570.

[28] 'La République ne reconnaît, ne salarie ni ne subventionne aucun culte', first sentence of Loi du 9 déc. 1905 concernant la séparation des Églises et de l'État, *Journal officiel*, 11 déc. 1905.

[29] A. Nieuwenhuis, 'State and Religion, Schools and Scarves, An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Şahin* v. *Turkey*', 1 *European Constitutional Law Review* (2005) p. 495 at p. 500.

[30] Conseil d'Etat, *supra*, n. 16, p. 18.

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Comparative excursion

The case of Belgium

Since 2004, eleven bills intending to ban the burqa in public have been introduced in the Belgian federal parliament.[31] In 2010 four of these proposals were debated by the Parliamentary Committee on Home Affairs, which amended and accepted one of the proposals.[32] General consensus emerged among the commission's members on the need for a general burqa ban and a motion to approach the Council of State for its advice on the bill was rejected by eleven votes to one.[33] This is quite peculiar, if the commission was so convinced of the soundness of its case why did it choose not to approach the Council of State, or did it fear a similar drumming as the French Council of State delivered to the idea of a general burqa ban in that country?

All four bills were subsequently debated on 29 April 2009 by the Chamber of Representatives, the lower chamber of the federal parliament, which adopted the commission's proposal by 136 votes in favour with two members abstaining and no votes against.[34] The bill was well on its way to becoming law before the federal elections of June 2010 brought an abrupt end to its lightning progress. According to legislative procedure in Belgium, pending bills must be submitted again after an election in order to stand a chance of becoming law, in contrast to the Netherlands for example where pending bills are simply considered by the newly-elected parliament. The bill was duly tabled again and accepted by the Parliamentary Commission on Home Affairs on 26 April 2011.[35] The commission by and large affirmed its earlier position and accepted the bill with unanimity, again bypassing the Council of State.[36] On 28 April 2011 the Chamber of Representatives accepted the bill with only one vote against, the Senate elected not to discuss the bill which meant that it has since passed into law.[37] All this is quite remarkable given that although Flemish and Francophone politicians have been at odds for over a year now in forming a new government, they managed to reach near universal agreement on the need for a burqa ban.

[31] Parliamentary Papers, Senate 2008-09, No. 4-1460/1; 2009-10, No. 4-1689/1; 2010 SE No. 5-169/1; 2010-11 No. 5-722/1; Parliamentary Papers, Chamber 2007-08, No. 0433/001; 2009-10, No. 2442/001; 2009-10, No. 2289/001; 2009-10, No. 2495/001; SE 2010, No. 0085/001; SE 2010, No. 0219/001; SE 2010, No. 0754/001.

[32] Parliamentary Papers, Chamber 2009-10, No. 2289/005 (Report) and 006 (Text).

[33] Parliamentary Papers, *supra* n. 32, p. 14-16.

[34] Parliamentary Proceedings, Chamber 2009-10, 29 April 2010, No. 152, p. 6.

[35] Parliamentary Papers, Chamber 2010-11, No. 0219/004.

[36] Parliamentary Papers, *supra* n. 35, p. 12.

[37] Parliamentary Proceedings, Chamber 2010-11, 28 April 2011, No. 030, p. 52-76 and p. 98-99.

The law, which amends the criminal code, introduces a ban on clothing that covers the face entirely or in large part. A conviction under the amendment will result in a fine ranging between € 15 to € 25 and/or a prison sentence of seven days.

Apart from advancing public security, the bill's supporters stressed that covering one's face in public hinders the socialisation of people and robs one of an identity.[38] For this support was drawn from the debate in France where similar arguments were stressed. The point was also made that politicians had to take responsibility in promoting common values at the very core of Belgian society, such as social integration, freedom of conscience, freedom of religion, gender equality, democracy and the separation of church and state. To this was added that these values are grounded in the ECHR. Although not stated in so many words, it seems as if the bill's supporters imply that a careful balancing of these values had taken place in coming to the proposal and that it did not violate the Convention. However, the reference to the separation of religion and state is a bit baffling in the context of introducing a general burqa ban. This is because, the separation of religion and the state has very little to do with banning burqas in public, as mentioned above about French *laïcité*.

Important to note is that the constitutionality of the law is currently being challenged before the Belgian Constitutional Court. Apart from the constitutional challenge, ordinary courts must apply international law to matters they have to decide. The fate of the burqa ban in Belgium therefore rests very much in judicial hands given its passing into law. The pertinent question then is whether Belgian judges will show more of an appetite in reviewing such a controversial law than their counterparts in France who took parliament at its word without exercising meaningful review. Interestingly, the Belgian Constitutional Court has a high political content similar to that of the French Constitutional Council, as six of the twelve judges must be former politicians.[39] However, it would be too rash to deduce from this that certain judges would be more inclined to support a ban than others. It seems very much a question of wait and see which way the judicial wind will blow in Belgium.

The case of the Netherlands

A strong tradition of state secularism is not a prerequisite for banning controversial religious expression in public. The Netherlands is an example of a country that has traditionally eschewed a strict separation of religion and state in contrast to France, and Belgium to a certain degree, but where concrete moves are afoot to

[38] Parliamentary Papers, *supra* n. 32, p. 5-6.
[39] Sec. 34(2) (Special) Constitutional Court Law, 6 Feb. 1989.

introduce a general burqa ban.[40] The current debate in the country can be traced to growing doubts about the merits of multiculturalism and coincided with the political rise of Pim Fortuyn on a wave of populism in the 2000s.[41] These doubts about multiculturalism did not come to an end with his assassination in 2002, but were further and radically developed by likeminded politicians, such as Geert Wilders who in 2010 scored notable electoral success from a decidedly anti-Islamic platform.[42] Wilders, who in the past had proposed a tax on 'head rags', his description of the Islamic headscarf, is crucial to the current centre-right minority government of Liberals and Christian Democrats, as the coalition is dependent on his support for an effective parliamentary majority.[43] In return for Wilders' support the government must carry out some of his key policies, such as agreeing to introduce a general burqa ban. Consequently, a bill containing such a ban is being prepared and will be tabled in parliament to the end of 2011.[44]

However, there already are two private member bills pending, respectively from 2007 and 2008, which would introduce bans were they to be enacted. The bills came in the wake of two previous coalitions' intentions to introduce a ban, but which did not materialise into bills.[45] Events were initially spurred on by a motion adopted by parliament on 20 December 2005 which requested the government to introduce a general burqa ban.[46] In October 2006 parliament again requested a ban on the burqa in the public space.[47]

An expert committee was appointed by the government in 2006 to study the feasibility of a ban.[48] In its detailed report the committee indicated that four options were hypothetically possible, namely (i) a general ban aimed only at burqas, (ii) specific bans aimed only at burqas, (iii) a general ban on face coverings

[40] *See* generally S. van Bijsterveld, 'Religion and the Secular State in the Netherlands', in J.H.M. van Erp and L.P.W. van Vliet (eds.), *Netherlands Reports to the Eighteenth International Congress of Comparative Law, Washington 2010* (Intersentia 2011) p. 93; S.C. van Bijsterveld, 'The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the Netherlands', 19 *Emory International Law Review* (2005) p. 929; R. Torfs, 'Church and State in France, Belgium, and the Netherlands: Unexpected Similarities and Hidden Differences', *Brigham Young University Law Review* (1996) p. 946.

[41] Cf. M. Vink, 'Dutch "Multiculturalism" Beyond the Pillarisation Myth', 5 *Political Studies Review* (2007) p. 337.

[42] In 2010, his Freedom Party became the lower house's third largest party.

[43] Parliamentary Proceedings, Second Chamber, 16 Sept. 2009, p. 69.

[44] Parliamentary Papers 2010/11, 32500 VII, No. 83.

[45] Cf. H. van Ooijen, 'Boerka of bivakmuts: verbod in de openbare ruimte? Het wetsvoorstel Wilders en Fritsma en het wetsvoorstel Kamp nader onder de loep genomen' [Burqa or Balaclava: Ban in the Public Space? The Bill Wilders and Fritsma and the Bill Kamp Considered], 33 *NJCM Bulletin* (2008) p. 160.

[46] Parliamentary Papers 2005/06, 29 754 No. 41.

[47] Parliamentary Papers 2006/07, 29 754 No. 88.

[48] Vermeulen et al., *supra* n. 3.

formulated in neutral terms and (iv) specific bans on face coverings formulated in neutral terms.[49] The committee emphasised that the requirements of secularism dictated that the state could not settle the issue whether a religion correctly claims that its adherents must cover their faces or act in a particular manner, such questions are internal to a faith.[50] The role of the state is limited to deciding against the available legal framework if particular religious expressions are acceptable in society. Applying the range of applicable legal norms, including the Netherlands Constitution and the ECHR, the committee reached the conclusion that a ban aimed only at the Islamic faith could not be accepted on the grounds that the rights to freedom of religion and equality would be violated.[51] The possibility was foreseen though that the third variant, a general and neutral ban, in the pursuit of protecting public safety and the rights and freedoms of others, could be legal. The committee ventured that such a ban might not be found to exceed the state's allotted margin of appreciation under the ECHR.[52] Because of a general, if albeit neutral, ban's controversial and problematic nature, the committee instead preferred more context-specific burqa bans. It identified, for example, a need to ensure better security in public transport which would justify a law prohibiting people from covering their faces when using such transport.[53]

Of the private member bills, the 2007 bill, which was introduced by Wilders and another member of his party, reflects the first variant identified by the committee.[54] The bill aims to criminalise specifically the wearing of 'burqas' and 'niqabs' in public on the grounds of protecting public safety and Western values and promoting female emancipation. Failure to comply with the ban will meet a sentence of imprisonment not exceeding a period of twelve days or a fine of up to € 3800. In its report on the bill, the Council of State heavily criticised it for only targeting burqas, as this would result in violations of the rights to freedom of religion and equality as guaranteed both nationally and internationally, thereby confirming the fears of the committee of experts.[55] The Council also doubted whether public safety was threatened to the extent that a general ban had to be introduced, but remarked that a ban aimed only at burqas would not counter the danger presented by people using other facial coverings to hide their identity. The second private member bill was introduced in 2008 by the then Liberal opposition member Henk Kamp who is now the minister for social affairs.[56] The bill, which is

[49] Vermeulen et al., *supra* n. 3, p. 4, 58.
[50] Vermeulen et al., *supra* n. 3, p. 59.
[51] Vermeulen et al., *supra* n. 3, p. 60-63.
[52] Vermeulen et al., *supra* n. 3, p. 63-68.
[53] Vermeulen et al., *supra* n. 3, p. 70-72.
[54] Parliamentary Papers 2007/08, 31108.
[55] Parliamentary Papers 2007/08, 31108, No. 4.
[56] Parliamentary Papers 2007/08, 31 331.

aimed to protect public safety, focuses on the third variant identified by the committee, namely a general ban formulated neutrally.[57] The proposal foresees that the contravention of a ban will be punishable by a fine not exceeding € 3800. The bill has not been sent to the Council of State yet for its views. One can surmise though that the ban promised by the government in the coalition pact will probably take on similar proportions to Kamp's bill given his membership of the government.

In a marked contrast to France and Belgium, acts of parliament in the Netherlands cannot be constitutionally reviewed by the judiciary.[58] However, Dutch judges, similar to their counterparts in France and Belgium, are compelled to apply provisions from the ECHR to cases they hear. The question is then whether national judges will fault an act of parliament amounting to a burqa ban with the political mood weighing squarely on the side of such bans. In the case of France it seems doubtful that an ordinary judge will elect to use the Convention to achieve what the Constitutional Council has refused to find on the basis of the Constitution.[59] This perceived reluctance on the part of national courts does not rule out that a test case could easily make its way to the Strasbourg Court, which raises the question what it might make of these bans.

European Convention on Human Rights

The right to freedom of religion

The focus rests on the right to freedom of religion in the ECHR, as the protection of this right is undoubtedly the core human rights issue with burqa bans. The central problem can be formulated as one regarding the extent to which the state may interfere with religious expression in public without violating the right to freedom of religion. Other rights might admittedly be at play, such as those to privacy and equality, but references to such rights will only be made if and where appropriate to understand the right to freedom of religion.

Article 9(1) ECHR guarantees everyone the right to freedom of thought, conscience and religion in public and private, while Article 9(2) provides that any interference with such protection must be prescribed by law, be in the pursuit of a legitimate aim and necessary in a democratic society in order to be justified. [60] This scheme will be applied to general burqa bans below.

[57] Parliamentary Papers 2007/08, 31 331, No. 3, p. 1-2.

[58] *See* Van der Schyff, *supra* n. 15, p. 22-33.

[59] J.-H. Reestman, 'Sign of the Times: het boerkaverbod voor de Franse constitutionele rechter' [The Burqa Ban before French Constitutional Justice], *Nederlands Juristenblad* (2011) p. 152 at p. 153.

[60] *See* generally C. Evans, *Freedom of Religion Under the European Convention on Human Rights* (OUP 2001).

Extent of guarantee and likelihood of interference

In the past the ECtHR has had no difficulty in holding that wearing religious dress is protected by Article 9(1). Most of the cases to date pertain to religious dress in particular institutions, such as a teacher wearing a headscarf in *Dahlab* v. *Switzerland*, or *Leyla Şahin* v. *Turkey* about a student wearing a headscarf to a public university.[61] Only a handful of cases pertain to the public space as such, of which only three concern criminal law.[62] In *Serif* v. *Greece* a man was convicted for appearing in public clad as a mufti, without having the right to do so under Greek law.[63] The Court held that he could rely on Article 9 and that his conviction amounted to an interference with such protection.

More recently in *Arslan* v. *Turkey* a group of men were found in contravention of laws prohibiting religious headgear and dress being worn in public places, such as streets.[64] The men belonged to an Islamic grouping which propagated Shariah law. In following their faith they wore black headbands, harem trousers, tunics and used walking sticks. Again, the Court afforded the men protection under Article 9(1) and identified their convictions as an interference with such protection.[65] By comparison there seems little doubt that were someone to be convicted under a general burqa ban, such as the laws in France and Belgium and that contemplated in the Netherlands, that that would constitute an interference with the right to religious freedom.

Prescribed by law

Article 9(2) requires that an interference be prescribed by law, which means that the interference must have some or other legal basis in domestic law and also be accessible and foreseeable.[66]

Mostly determining whether an interference fits these requirements provides no great difficulty. However, this question is very context dependent and difficult to predict without a concrete set of facts to evaluate. Sometimes though the Court sidesteps the question by finding a law to be wanting on other grounds instead,

[61] ECtHR 15 Feb. 2001, Case No. 42393/98, *Dahlab* v. *Switzerland*. In ECtHR 10 Nov. 2005, Case No. 44774/98, *Leyla Şahin* v. *Turkey*, para. 78, the Court assumed that Art. 9 was relevant.

[62] ECtHR 14 Dec. 1999, Case No. 38178/97, *Serif* v. *Greece*; ECtHR 20 Sept. 2001, Case Nos. 50776/99; 52912/99, *Agga* v. *Greece*; ECtHR 23 Feb. 2010, Case No. 41135/98, *Arslan* v. *Turkey*. *See* A. Overbeeke, 'Annotation ECtHR 23 February 2010, No. 41135/98 (*Arslan* v. *Turkey*)', 11 *European Human Rights Cases*, p. 830.

[63] *Serif* v. *Greece supra* n. 62, paras. 36-39.

[64] *Arslan* v. *Turkey*, *supra* n. 62, para. 7.

[65] *Arslan* v. *Turkey*, *supra* n. 62, para. 35.

[66] ECtHR 29 April 1979, Case No. 6538/74, *Sunday Times* v. *The United Kingdom*, paras. 48-49.

such as in *Arslan* v. *Turkey*, thereby rendering the question of whether a provision was prescribed irrelevant to deciding the complaint.[67] Were it to prove unable though to fault a particular provision and its application on any other grounds, the Court would have to address this question directly.

Legitimate aim

As the range of listed aims in Article 9(2) for which a right may be limited are quite wide, this requirement usually proves the least troublesome to satisfy.[68] The different aims pursued by the legislation and initiatives at issue here can be grouped as pursuing public order, public safety and the protection of the rights and freedoms of others. References in France to the promotion of fraternity and the values of the Republican social contract can be translated as advancing the interests of public order, similar to the Constitutional Council. The same could be said of the protection of Western values in Wilders' bill, given the generous interpretation usually given to the term public order. The Belgian law and Kamp and Wilders' bills are clearly intended to promote public safety. In so far as the emancipation of women is concerned, such as in France, Belgium and Wilders' bill, one can speak of the protection of the rights and freedoms of others. Although where the aim is to uplift the very women who wear the burqa, as in France, one can speak of public order. A comparison with similar cases heard by the ECtHR shows that these aims have featured before in the context of dress codes making their pursuit all the more uncontroversial.[69]

Necessary in a democratic society

What is necessary in a particular case does not speak for itself, but is the product of a balancing or weighing exercise of competing values and rights. Essentially, does an interference go too far? Thereby resulting in the disproportionate pursuit of a legitimate aim, and therefore making it unnecessary and a violation of the Convention.

This question must be answered against the background of a democratic society. The aspirations and norms of such a society must be the guiding light in deciding which interferences can be said to be necessary and which fail to meet this requirement. For example, what is the value of the right to freedom of religion to such a society, and where does this leave its limitation? The Grand Chamber, in

[67] *Arslan* v. *Turkey*, *supra* n. 62, para. 42. Cf. *Serif* v. *Greece*, *supra* n. 62, para. 42; *Agga* v. *Greece*, *supra* n. 62, para. 54.

[68] Van der Schyff, *supra* n. 68, p. 186.

[69] Compare *Serif* v. *Greece*, *supra* n. 62, paras. 43-45; *Agga* v. *Greece*, *supra* n. 62, para. 55; *Arslan* v. *Turkey*, *supra* n. 62, para. 43; *Leyla Şahin* v. *Turkey*, *supra* n. 61, para. 99.

Leyla Şahin, made it clear that Article 9 is one of the foundations of a democratic society:

> This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[70]

Protecting Article 9 is obviously of special importance to the notion of a democratic society. However, the Court is also aware that it is not a court of the fourth instance, and that national authorities are often better placed to judge a matter than a remote bench in Strasbourg.[71] This realisation is translated into leeway afforded states in upholding the Convention, better known as the margin of appreciation.[72]

Margin of appreciation

The wider the margin of appreciation granted a state, the less strict Strasbourg's proportionality analysis usually will be, while the narrower the margin the stricter such analysis becomes.[73] Where the role of religion in society is at stake, the Grand Chamber in *Leyla Şahin*, explained:

> It is not possible to discern throughout Europe a uniform conception of the significance of religion in society (…), and the meaning or impact of the public expression of a religious belief will differ according to time and context (…). Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order (…). Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context (…).[74]

[70] *Leyla Şahin* v. *Turkey*, *supra* n. 61, para. 104.

[71] E.g., ECtHR 25 Nov. 1996, Case No. 17419/90, *Wingrove* v. *The United Kingdom*, para. 58. *See also* S. Greer, 'What's Wrong with the European Convention on Human Rights?', 30 *Human Rights Quarterly* 2008, p. 680.

[72] Y. Arai-Takahashi, *The Margin of Appreciation Doctrine in the Jurisprudence of the ECHR* (Intersentia 2002) p. 1-2. *See also* H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (Kluwer 1996) p. 13.

[73] F. Matscher, 'Methods of Interpretation', in R.St.J. MacDonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) p. 79; Arai-Takahashi, *supra* n. 72, p. 14-15; Van der Schyff, *supra* n. 68, p. 221-222. A wide margin of appreciation may never mean the absence of European supervision, *see* ECtHR 23 Sept. 1998, Case No. 24662/98, *Lehideux and Isorni* v. *France*, para. 51.

[74] *Leyla Şahin* v. *Turkey*, *supra* n. 61, para. 109.

The position of the Grand Chamber is echoed in two similar cases, namely *Dogru* v. *France* and *Kervanci* v. *France*, about Muslim girls wearing headscarves during physical education lessons at school.[75] More recently the Grand Chamber, in *Lautsi* v. *Italy*, was again willing to recognise a wide margin of appreciation in a matter that concerned the question whether state-sanctioned religious symbols could be tolerated in public schools, thereby overruling the Chamber which opted for a very narrow margin in securing state neutrality in education.[76] It would be exaggerated though to simply assume a wide margin of appreciation in all cases related to freedom of religion, as this would contradict Article 9 being a bedrock of the ideal society. Ultimately, any decision must turn on the application of these principles to the pertinent facts.[77]

A comparison reveals that in *Leyla Şahin* v. *Turkey*, *Dogru* v. *France*, *Kervanci* v. *France* and *Lautsi* v. *Italy* the facts related to the state exercising authority in public institutions. In Turkey this meant enforcing secularism in public institutions devoted to higher education, in France safeguarding the secular character in public schools was at stake and in Italy it meant mandating the presence of crucifixes in state-run class rooms. Substantively opposite scenarios in their approach to religion, but both accepted in the context of the margin of appreciation. Synthesised, these cases produce the maxim that the state's room to regulate religion in public institutions is covered by a generous margin of appreciation. *A contrario* this means that where a space's connection with the state is more remote, the smaller the margin of appreciation should become.[78] Essentially, one is dealing with the distinction between the notions of state and society.[79] A free society can only exist if it is not collapsed in the state, otherwise freedom would be synonymous with the will of the state. However, the Convention mandates that the limitation of its guarantees is to be guided by what constitutes a *democratic society*.[80] While important, the state is to operate in the normative confines of such a society, thereby highlighting the necessary reality of counter-majoritarianism.[81]

[75] *Dogru* v. *France*, *supra* n. 9, para. 63; *Kervanci* v. *France*, *supra* n. 26, para. 63. Followed in ECtHR 30 June 2009, Case No. 43563/08, *Aktas* v. *France*; ECtHR 30 June 2009, Case No. 14308/08, *Bayrak* v. *France*; ECtHR 30 June 2009, Case No. 18527/08, *Gamaleddyn* v. *France*; ECtHR 30 June 2009, Case No. 29134/08, *Ghazal* v. *France*; ECtHR 30 June 2009, Case No. 25463/08, *J. Singh* v. *France*; ECtHR 30 June 2009, Case No. 27561/08, *R. Singh* v. *France*.

[76] ECtHR 18 March 2011, Case No. 30814/06, *Lautsi* v. *Italy*, paras. 68-70.

[77] Compare ECtHR 31 July 2000, Case No. 35765/97, *A.D.T.* v. *The United Kingdom*, para. 36.

[78] Affirmed expressly in *Arslan* v. *Turkey*, *supra* n. 62, para. 49.

[79] *See* further E.-W. Böckenförde, *State, Society and Liberty: Studies in Political Theory and Constitutional Law* (Berg 1991) p. 155-157.

[80] On elements of a democratic society, *see* Van der Schyff, *supra* n. 68, p. 198-211.

[81] ECtHR 29 April 1999, Case Nos. 25088/94; 28331/95; 28443/95, *Chassagnou* v. *France*, para. 112.

A free society must be protected and not simply brushed aside in the interests of the state. While a wide margin of appreciation might be the starting point in matters where the state and its domain proper are at issue, such as with regards to the civil service for example, the opposite rings true where the heart of society is touched. The result is that no *a priori* discretion in favour of the state applies which in effect needs to be overturned by the applicant, instead strict scrutiny should be exercised by the Court, which calls for rebuttal by the state. A high standard of review also diminishes the importance to be attached to any common standards across Europe. Were more countries to adopt burqa bans this fact cannot of its own justify such measures, as this would force a wide margin of appreciation through sheer numbers and contradict the idea of strict scrutiny.

Burqa bans in context

The logic developed above means that regulating the wearing of burqas in public institutions is likely to be embraced by a wide margin of appreciation, but that a ban on wearing them in public would have to be justified to a much higher degree by the state. This is also supported in *Arslan* v. *Turkey*. While the Chamber in this case accepted the Grand Chamber's general principles on religious freedom in *Leyla Şahin* v. *Turkey*, it noted that public institutions were not concerned, but the public space such as roads.[82] This meant that less weight had to be accorded the will of the 'national decision-making body' in deciding whether convicting people for wearing religious dress in public was a violation of Article 9, in clear contrast with *Leyla Şahin* where particular weight was accorded the law effecting a comparable ban in state universities. The primacy of the democratic will in regulating religious freedom in *Arslan* was not as self-evident as it had been in *Leyla Şahin*. In *Arslan* the Court took a closer look at whether the aspirations of the majority were reconcilable with those of the democratic society, while in *Leyla Şahin* it was more eager to presume this.

Another factor relates to the persons affected by the interference. In *Arslan*, special notice was taken of the fact that ordinary people were convicted under the law, which meant that the state could expect less of such people than of teachers, as in *Dahlab* v. *Switzerland*, or civil servants, as in *Rekvényi* v. *Hungary*.[83] Ordinary people restricted in the choice of what they wear in public, therefore have a stronger case against the state than those in positions of authority. However, even in cases of people of authority such as someone imitating a state-appointed mufti in *Serif* v. *Greece*, the Court is reluctant to allow a state to convict someone

[82] *Arslan* v. *Turkey*, *supra* n. 62, para. 49.

[83] *Arslan* v. *Turkey*, *supra* n. 62, para. 48; *Dahlab* v. *Switzerland*, *supra* n. 61; ECtHR 20 May 1999, Case No. 25390/94, *Rekvényi* v. *Hungary* para. 43. *See also* ECtHR 24 Jan. 2006, Case No. 65500/01, *Kurtulmuş* v. *Turkey*.

for disregarding a state-sanctioned dress code in public.[84] The complaint of 'ordinary people' restricted in how they clad themselves in public according to religious dictates is therefore particularly strong.

Extent of the interference

The further an interference cuts into a right, the more convincing its justification ought to be, especially in the context of burqa bans as explained above.[85] Two main approaches can be distinguished, namely bans that affect all face coverings in public, with the implicit consequence that they also amount to burqa bans, and bans singularly aimed at burqas. The French and Belgian legislation and Kamp's bill in the Netherlands prescribe to the first approach, as they advance neutrally formulated bans. Wilders' bill on the other hand, is very much aimed at religious face coverings by wanting to ban the burqa as such.

There is no question that the extent of the interference with the right to religious freedom is the most severe in the case of Wilders' proposal, as it only targets the exercise of religion and in particular Islamic face coverings. The French and Dutch Councils of State, as well as the Dutch expert committee, all dismissed the legality of such specific bans.[86] The ECtHR is likely to affirm this position. By singling out a religion for such a ban serious questions arise about the probable violation of the right to equality. A bill such as that by Wilders will in all likelihood be judged by applying Article 14, the right to non-discrimination, together with the right to religious freedom in Article 9. Selecting a specific religion can then only survive non-discrimination law upon it being proved to be proportional, something about which serious doubts exist. For instance, how can the supposed threat to people's safety by face-coverings be countered by targeting only those worn out of religious conviction while exempting other reasons? Proportionality, and hence equality, is clearly violated in such a case. While neutrally formulated bans are undoubtedly more sophisticated than Wilders' proposal, they still go quite far in restricting religious freedom.

This is because wearing burqas in public is banned under all circumstances, which in effect nullifies a woman's freedom in the public space. By comparison, context specific bans applicable to all face coverings are likely to pass muster more easily. A survey of case-law supports this view as the Court favours states in cases where someone has to confirm their identity or follow safety precautions in a specific situation. In *Phull* v. *France* it was held that security checks at airports were

[84] *Serif* v. *Greece*, *supra* n. 62, para. 33.

[85] ECtHR 13 Feb. 2003, Case Nos. 41340/98; 41342/98; 41343/98; 41344/98, *Refah Partisi* v. *Turkey* para. 100.

[86] Conseil d'Etat, *supra*, n. 16, p. 17-21; Parliamentary Papers, *supra* n. 55, p. 7; Vermeulen et al., *supra* n. 3. p. 15.

not in themselves restrictions of someone's freedom of movement and that requiring someone during a check to remove a turban worn for religious purposes fell within the state's margin of appreciation.[87] The fact that the state only exercised this power on occasion strengthened its case against the applicant. In contrast, a general burqa ban does not amount to an occasional measure, from which can be concluded that such a ban increases the severity of the interference and hence the state's onus of proof.

Another factor regarding the extent of the interference is its sanction.[88] To date all three countries approach the banning of face coverings as a problem of criminal law. The imposition of fines is chosen throughout. In addition or instead of a € 150 fine, the French law allows someone in violation of the ban to be compelled to follow a citizenship course. The Belgian law allows a prison sentence of up to seven days in addition to, or instead of, a fine ranging from € 15 to 25, while Wilders' bill foresees a prison sentence of a maximum of twelve days or a fine of up to € 3800. The proposal by Kamp is the only one to allow solely for the imposition of a fine, which could also run to € 3800. It is logical to conclude that the heavier the fine imposed, the severer will be the interference with religious freedom, more so where it concerns prison sentences. However, irrespective even of the nature of the criminal sanction, the very fact that a law criminalises people for the public venting of their religious, or for that matter nonreligious, convictions is a serious matter. In testing the proportionality of such an interference particular attention must be paid to the reason for such a measure to decide whether it is ultimately fit for purpose. This was also commented on by the French and Dutch Councils of State, the latter for example questioned the wisdom of a heavy a measure as criminal law in the quest for female emancipation.[89] One might even ponder whether the criminal law route does not produce a 'chilling effect' in discouraging people from publicly manifesting the right to freedom of religion as such, for fear of attracting unwanted attention from the state. In cases where the criminal law has led to an interference with the right to freedom of expression, the Court has been very wary of measures which would dampen people from exercising their rights in future, holding that such measures must be justified by an overriding public interest.[90] The lack of a generous margin of appreciation in the context of burqa bans might warrant the Court to consider similar effects on the right to religious freedom, which would require the state to defend its position to a greater degree.

[87] ECtHR 11 Jan. 2005, Case No. 35753/03, *Phull* v. *France*.

[88] *See* ECtHR 8 July 1999, Case No. 24919/94, *Gerger* v. *Turkey*, para. 51, on the nature and severity of penalties.

[89] Conseil d'Etat, *supra*, n. 16, p. 39-40; Parliamentary Papers, *supra* n. 55, p. 2.

[90] ECtHR 27 March 1996, Case No. 14788/90, *Goodwin* v. *The United Kingdom*, para. 39.

Moreover, were an interference with Article 9 to be taken together with other rights, such as those to privacy, the onus on the state increases even further. It could be argued that adhering to a religious prescript forms part of someone's core identity, which is essentially a matter of personal development thereby attracting protection from the right to private and family life in Article 8.[91] A comparison can be made with *Dudgeon* v. *The United Kingdom* where a law criminalising certain homosexual acts was judged in the light of the far-reaching effect it had on the applicant's right to manifest his identity.[92] Adding another right to the equation is likely not only to confirm the severity of the interference with Article 9, but easily could add another dimension strengthening the applicant's case against that of the state.[93]

While the case against general burqa bans seems quite strong, a definite decision can only be reached after having weighed the reasons for such bans against the exercise of the right to freedom of religion and the extent of the interference with the right's protection. This exercise is attempted below.

Public order

Does the protection of public order provide sufficient weight in justifying a general burqa? Public order for the sake of this discussion cannot be translated to preventing offence from being caused, or preventing people from being disturbed. Drawing inspiration from the right to freedom of expression in Article 10 ECHR, one can say that a democratic society should be tolerant of religious expression not only when it is favourably received or inoffensive, but also when it offends, shocks or disturbs the state or any sector of the population.[94] The notion of the public order cannot be equated with satisfying the general mood or accommodating a common taste.[95] This is accentuated by the fact, as explained already, that there is no wide margin of appreciation which a state can rely on to interfere with religious freedom when wanting to institute general burqa bans. This means that any majority must proceed with great caution when interfering with the free exercise of rights by members of society who do not conform to such a majority. However, this caution may not be taken to mean that society may run wild as the absence of any control will damage society itself. A democratic society supposes

[91] ECtHR 28 Jan. 2003, Case No. 44647/98, *Peck* v. *The United Kingdom*, para. 57.

[92] ECtHR 22 Oct. 1981, Case No. 7525/76, *Dudgeon* v. *The United Kingdom*, para. 52.

[93] Although the Court sometimes proves reluctant to accept an accumulation of rights, considering in ECtHR 10 July 2003, Case No. 44179/98, *Murphy* v. *Ireland*, para. 61, only Art. 9 and not also Art. 10 because Art. 9 captured the essence of the complaint. However, in *Refah Partisi* v. *Turkey*, *supra* n. 85, paras. 90-100, notice was taken of Art. 9 together with Art. 11 in assessing a political party's dissolution.

[94] ECtHR 7 Dec. 1976, Case No. 5493/72, *Handyside* v. *The United Kingdom*, para. 49.

[95] Or for preserving *tranquillité publique* in the words of the Conseil d'Etat, *supra*, n. 16, p. 30.

freedom within the confines and possibilities presented by a community based on the rule of law, as opposed to a society of wild freedom akin to anarchy.[96]

The law then is to be used as an instrument with which to ensure that society coheres and functions properly. This consideration comes to the fore in the debates on introducing a general burqa ban. Politicians worry that the very fibre of society will be endangered were people to cover their faces in public. In France and Belgium for example, it was argued that a society can only come to life when there exists a social bond between its members.[97] In order to create and solidify such a bond, members of society need to be able to interact with each other, which in turn requires people to be able to recognise each other. Wearing the burqa would then prevent such interaction, which would not only isolate women who choose to cover their faces, but also loosen the most fundamental bonds of society. The legislature in France cast this debate as protecting the basis of fraternity and the 'Republican social pact', while in the Netherlands the wish expressed in Wilders' bill to protect Western values comes close to this argument to the extent that covering one's face in public undermines a core tenet of society.

Protecting the very fibre of society is without doubt a legitimate aim to pursue under public order. This was also recognised by the French Council of State, at least in principle.[98] However, as explained, the Council feared that protecting society in this way would mean that a positive interpretation of what constitutes public order should be accepted. Instead of following a negative notion of public order, by for example combating fraud, one shifts to a notion of how society should function ideally. Freedom is then no longer left to ordinary people to exercise as they choose, but is given a positive interpretation by the state. In other words, freedom is quantified and defined in an authoritative manner, instead of signalling the absence of state interference with free choice. According to the Council of State though, the republican tradition of *fraternité* or brotherly citizenship could very well support such a ground. However, this is where the Council's enthusiasm stranded, as it advised against using public order in this way to effect a general burqa ban. The body feared that there existed too little precedent for such a positive interpretation and that the aim of preserving public order could be abused by the state in enforcing its own blueprint for society.

The logic of distinguishing between positive and negative conceptions of public order is a confusing one because it creates the impression that a positive interpretation is something novel in human rights law, which is not the case. If by

[96] Cf. Van der Schyff, *supra* n. 68, p. 210-211.

[97] E.g., the French Minister of Justice argued that: '(…) le port volontaire du voile intégral revient à se retrancher de la société nationale, à rejeter l'esprit même de la République, fondée sur le désir de vivre ensemble', Parliamentary Proceedings, Senate, 14 Sept. 2010, p. 6732. On Belgium, *see* Parliamentary Papers, *supra* n. 32, p. 6-7.

[98] Conseil d'Etat, *supra*, n. 16, p. 26.

analogy a march is banned, surely that is negative in the sense that the march cannot take place, but also positive in the sense that a particular notion of what public order is, or ought to be, is affirmed. The positive interpretation feared by the Council of State is according to this view inherent in protecting public order. However, what the Council probably meant becomes clearer when one considers that the Council did not oppose all bans on the wearing of the burqa, but opposed a general ban, while recognising the need to ban burqas in specific contexts.[99] Put differently, the positive interpretation feared by the Council relates to extinguishing a particular freedom, thereby allowing only one conception of public order to prevail under all circumstances. Public order then acts not as a shield against exercising a particular freedom, but is used to quash a freedom in its entirety. Chiefly the Council's doubts pertain to the extent of the limitation, which it feared goes too far by banning burqas outright in public. On this interpretation the notion of a positive interpretation as to what constitutes public order is not as novel as the Council deemed it to be. The mere fact that an interference can be considered to give a positive interpretation to public order is not the real problem. The crux of the matter relates to the extent of the interference with the right to religious freedom in giving such a positive interpretation. In essence, is the extent of an interference so radical that the democratic state becomes a synonym for the democratic society? Such a radical turn of events would require very compelling evidence of its necessity.

A comparison with *Arslan* v. *Turkey* shows that the Court is unwilling to allow the state to define the exercise of religious freedom in a way that extinguishes the right from being exercised at all. Regard must be had to the particular facts though before simply transplanting the decision in *Arslan* to the question of general burqa bans. A factor which might be important is that in *Arslan* the convicted men did not cover their faces, as opposed to women who wear the burqa. Taking this difference into account, a general burqa ban could arguably be conceivable upon the state showing the importance for social interaction of being able to identify everyone's face in public at all times. The state would have to convince the Court that not only is this desirable, but that otherwise the very fabric of society would come undone without such a ban.[100] The burden on the state is quite pressing to say the least, which raises the question when the burden of proof will be met. Here *Arslan* provides fertile ground for comparison. Of importance is the fact that the convicted men constituted part of a very small minority in Turkey

[99] Conseil d'Etat, *supra*, n. 16, p. 37-38.

[100] A. Moors, 'The Dutch and the Face-veil: The Politics of Discomfort', 17 *Social Anthropology* (2009), p. 393 at p. 405 questions whether burqas are really such a practical impediment to effective communication.

and were viewed as something of a curiosity.[101] In other words, they did not endanger public order in any noteworthy way. The reality that by comparison a relatively small number of women choose to wear the burqa might put the actual threat to the very fibre of a state's public order into context.[102] In sum, the ability to see someone's face in public can convincingly be said to be an important precept of what constitutes a society. However, a general burqa ban under criminal penalty probably overshoots its mark given the small number of people concerned and the minimal danger the infraction poses to society's continued existence. Serious measures should not only be founded on serious concerns, but also real concerns.

Public safety

Although a laudable aim, protecting public safety begs the question whether it is really necessary to be so drastic as to ban all face coverings in public for this reason? Being able to identify someone is undeniably conducive to a sense of safety, but would a tailor made ban for specific situations not suffice, while still leaving enough room for religious choice to be exercised? In other words, is public safety under threat to an extent that justifies a right, which as we have seen is quite important, from being nullified? A democratic society, one should not forget, needs to be protected, which is quite something different than a state enforcing secularism. While a state may pursue secularism in appropriate contexts, it must also ensure religious plurality and not eliminate such plurality from society, which would in effect happen under a general ban. Considered national opinion, apart from political opinion then, seems to be on the side of the argument that public safety is not so pressing a social need as to support general burqa bans. The French Council of State was quite firm in rejecting the public safety argument, while the Dutch Council of State noted the lack of evidence in this regard and commented that a general ban could only be justified with the *rechtsstaat* being in real danger.[103] Given the fact that a state enjoys little or no margin of appreciation in the matter of banning burqas in public, the lack of evidence might be a worrying factor. How can a far-reaching measure be justified without there being convincing empirical or other evidence before a court, or legislature for that matter? For instance, in *Arslan* v. *Turkey* the Court noted that the men convicted for contravening the

[101] *Arslan* v. *Turkey*, *supra* n. 62, para. 51.

[102] E.g., the 2010 Garraud Report estimates the number of burqa-clad women in France at 1900, Parliamentary Papers, National Assembly, 13th Legislature, No. 2648, p. 9. The estimate for the Netherlands is four hundred, Moors, *supra* n. 100, p. 393.

[103] In France public safety was only considered a strong ground for specific bans, and not a general ban, *see* Conseil d'Etat, *supra*, n. 16, p. 30. For the Netherlands, *see* Parliamentary Papers, *supra* n. 55, p. 5.

legal dress code did not pose any threat to the public, this meant that their convictions simply for the sake of wearing what they chose was not proportional in a democratic society.[104] It seems inevitable that the more expansive a ban is, the greater the possibility becomes that personal circumstances will be evaluated as in *Arslan*, in order for Article 9 not to be disabled totally.

Were a state to prove though that public safety is indeed a pressing social need warranting a general ban, it would seem appropriate that criminal law is chosen to satisfy that need. However, questions can then put as to the specific sanction chosen to enforce a ban. In this regard one can wonder whether fines of up to € 3800, as are foreseen in the Netherlands, might not be excessive, not to mention the threat of prison for only having worn the burqa. Perhaps such penalties can only ever be justified if someone did in actual fact pose a threat to public safety, instead of simply ordaining sweeping measures which will apply irrespective of personal circumstances.

Rights and freedoms of others

As the core purpose of the right to freedom of religion is to protect the integrity of someone's conscience, it follows that coercion cannot be tolerated in forcing someone to wear a burqa against their will. The fact then that French law makes it a crime to force someone to cover their face is in principle compatible with a democratic society, a point which the Council of State also did not hesitate in making.[105] So much is at least above controversy. But what about those women who choose to wear the burqa in public?

Can the case be made that sex equality and the emancipation of women, purposes advanced in favour of a general ban in all three countries, justify all women from being forced not to wear the burqa? In doing so one would be protecting the rights and freedoms of others, in particular women who choose not to follow the practice. But when can it be said that other women deserve protection against the mere public sight of women in burqa, even under threat of jail? For this ground to be convincing, the burqa is to be understood as a powerful symbol, much like the Islamic headscarf in *Dahlab* v. *Switzerland*, which justifies action by the state in the interest of those women who choose not to cover their faces.[106] A comparison can also be made with *Leyla Şahin* v. *Turkey* where the Grand Chamber agreed that the applicant could be prevented from wearing a headscarf to university in the interest of other women who chose not to do so.[107] However, in an apparent contradiction, the Grand Chamber in *Lautsi* v. *Italy* was very reluctant

[104] *Arslan* v. *Turkey*, *supra* n. 62, paras. 50-51.
[105] On this type of pressure, *see* Conseil d'Etat, *supra*, n. 16, p. 39-40.
[106] *Dahlab* v. *Switzerland*, *supra* n. 61.
[107] *Leyla Şahin* v. *Turkey*, *supra* n. 61, para. 115.

to accept that the mere display of crucifixes in public schoolrooms could be considered tantamount to indoctrinating pupils, thereby correcting the Chamber which readily accepted that such symbols have a powerful and unjustified effect on pupils.[108] More evidence had to be provided by the applicant in order for the Grand Chamber to find a violation of the right to freedom of education.[109] But on closer inspection the contradiction is indeed only apparent and not real. All three these cases have in common a court very accommodating of the state's appraisal on whether a symbol does or does not have a powerful effect on those people who come in contact with it. The common denominator in these cases is the wide margin of appreciation enjoyed by the state, which tipped the scales in favour of its views. But, as explained, the applicant is to enjoy the benefit of the doubt in relation to general burqa bans and the state held to a narrow margin of appreciation and hence strict proportionality. Consequently, a particular heavy onus rests on the state to prove that the simple fact that someone wears a burqa in public is enough to have it banned for the sake of others. That this might be a high mountain to climb is borne out of *Arslan* v. *Turkey*, where the Court found that ordinary people could not be required to be discrete as to how they choose to dress in public.[110]

All this does not mean that sex equality or emancipation are trivial matters, but it forces one to consider the extent to which the state may pursue these aims. On this, the French Council of State took the view that sex equality, and human dignity which can also be brought under the rights and freedoms of others, are vertical duties that bind the state more than it allows the state to launch action.[111] As a general observation, this seems to be correct, as social engineering, even when carried out with the best of intentions, might lead to unforeseen and unacceptable consequences. Caution is best heeded in such matters. This is not only the case where the state acts to protect the rights and freedom of others, but also where it acts to emancipate the very women who choose to wear the burqa, as the French law foresees for example.[112] Women are then protected against themselves for the sake of their own emancipation, sex equality or human dignity as public order values, and not simply in the interest of their fellow women. But defining and enforcing what constitutes public order in an extensive a way as to ban burqas from ever being worn in public, raises the concern that the state might be too zealous in its pursuit of values such as emancipation.

[108] *Lautsi* v. *Italy, supra* n. 76, para. 71.
[109] *Lautsi* v. *Italy, supra* n. 76, para. 66.
[110] *Arslan* v. *Turkey*, *supra* n. 62, para. 48.
[111] Conseil d'Etat, *supra*, n. 16, p. 20.
[112] *See* for instance the proposal's 'Exposé des motifs', *supra* n. 5, p. 5-6.

Consequently, the same criticism can also be levelled at the state as was done in discussing public order above. Namely that the state should not want to, nor be allowed, to project its will in an absolute fashion on society, otherwise what would remain of someone's freedom to express their religious convictions, or other rights, as they choose? Or, in the reasoning of the French Council of State, the state should be particularly guarded in giving positive interpretations to what public order should entail precisely under all circumstances.

This is reinforced once one considers the efficacy and proportionality of general burqa bans in the interest of emancipating women. As the only Belgian parliamentarian to vote against the burqa ban in that country noted, women cannot be freed by simply prohibiting them from activities that hinder their emancipation.[113] Also, the state in fact punishes unemancipated women for not being emancipated. This can be seen as adding insult to injury, as women who are already at a disadvantage for want of emancipation are now targeted by the state in an effort to force emancipation. An unforeseen consequence might simply be that women who feel themselves duty-bound to wear the burqa will choose to say at home.[114] On the other hand, the freedom of women who do not wear the burqa is so protected, as they are no longer confronted by the sight of women who do, but one can wonder whether emancipation is really advanced in a proportional manner for both groups of women in this way. Add to this the fact that these aims are to be achieved through an instrument as blunt as the criminal law and doubts become difficult to dispel. One might even wonder whether in the context of general burqa bans the law has not reached its limits as to what is reasonably achievable in society. Essentially, what can and cannot be achieved through legal means becomes part of the equation. This is first and foremost a question to be answered by the democratically-elected legislature, but if a given choice leads to a severe interference with someone's rights, as is the case with general burqa bans, the state must be called to argue its corner in a convincing manner. This promises not to be clear-cut in the field of advancing values such as emancipation, sex equality and human dignity in the public space.

Less restrictive means

The Strasbourg Court is not generally in the habit of holding that an interference with a right may only stand upon proof being adduced that less restrictive means are not available with which to satisfy the legitimate aim pursued.[115] Sometimes

[113] Parliamentary Proceedings, Chamber, 28 April 2011, CRIV 53 PLEN 030, p. 44.

[114] A fear expressed by the Dutch Council of State, *see* Parliamentary Papers, *supra* n. 55, p. 2.

[115] E.g., in ECtHR21 February 1986, Case No. 8793/79, *James* v. *The United Kingdom*, para. 51, it was held that: 'The availability of alternative solutions does not in itself render the (…) legislation unjustified (…).' While in ECtHR 30 March 1989, Case No. 10461/83, *Chappell* v. *The*

the Court only asks whether a state considered less restrictive means in achieving its aim, without mandating that such measures also be adopted. However, since the 1990s the Court has shown a willingness to not only enquire about less restrictive alternatives, but also requires states to indeed choose such alternatives where possible.[116] Nowhere is this more apt than in relation to general burqa bans. This is because the narrower a state's margin of appreciation is, the more the Court should pay attention to the road less travelled in evaluating the merits of an interference. How else can the Court ensure that an interference was really necessary in supplanting a high level of protection afforded the right to religious freedom? Drawing inspiration from Eva Brems' analysis of maximising the protection of rights one could argue that the higher the level of protection to be afforded the bearer of a particular right, the greater the need becomes to decide whether a less restrictive interference is not more suitable in a given situation.[117]

This is borne also out of the discussion thus far. In order to institute a general burqa ban one first needs to be sure that specific bans are not up to advancing the state's legitimate aims in choosing for a general ban. With apparently a lack of evidence, it seems somewhat hasty to opt for a general ban in protecting public safety, while this cause is pursuable through specific bans. As the Dutch expert committee opined, one should first investigate whether threats to public safety cannot be countered sufficiently through specific bans before opting for the heavier general ban. Also, the nature of the sanction may not be forgotten. While public safety may be protected through criminal law means, the equation becomes a little bit skewed in wanting to protect the rights and freedoms of others and public order in a similar fashion, especially where someone can be sent to jail for exercising her right to religious freedom in public. Might it not be wiser to advance sex equality and emancipation through public campaigns or education instead of fining or imprisoning those who do not conform? Here the French example of requiring offenders to attend citizenship courses, or the like, proves interesting.

Also, will a public order not cohere better if debate about controversial practices is allowed and stimulated, instead of banning such practices absolutely, especially when questions persist about the amount of hard evidence to support a total ban? As to burqas, the art of persuasion might be the best remedy in confronting the matter. The point is not that the practice of wearing the burqa is to be ignored, welcomed or encouraged, but simply that the issue is to be addressed in a proportional way without the state exercising its might too quickly and too extensively without having explored the reasonable alternatives.

United Kingdom, para. 65, it a house search was found proportionate, even though the national court considered its conduct excessive.

[116] Van der Schyff, *supra* n. 68, p. 232-234; Arai-Takahashi, *supra* n. 72, p. 130.

[117] E. Brems, 'Human Rights: Minimum and Maximum Perspectives', 9 *Human Rights Law Review* (2009) p. 349 at p. 359-365.

Gathering storm clouds

This contribution has tried to give a critical prognosis of what could happen when general burqa bans have to be reviewed in light of the right to freedom of religion in the ECHR. On the basis of the analysis it can be concluded that such bans will have great difficulty in satisfying the fundamental rights norms guaranteed in the Convention. For the most part, such bans seem to be disproportionate by interfering with religious freedom to an extent that is difficult to justify, thereby ignoring that any limitation of right must always be the exception and not the rule.[118] Rights may not be rendered illusory through limitation.[119] In the case of general burqa bans an important component of the right to freedom of religion, namely the right to express one's religious convictions in public, indeed risks becoming illusory, which is all the more reason for states to rethink their approach to the question.

Apart from the central issue of whether general burqa bans can be considered compatible with ECHR norms, the debate regarding such bans reaffirms the continuous importance of and need for the judicial review of legislation. Although judicial review brings a number of problems with it, such as composing benches and deciding the extent of a court's competences, it adds another dimension to protecting people's rights which differs from that already provided by legislatures. While parliamentarians focus on realising as much of their election manifestos before having to face voters again, the courts can take a critical view of matters from a correct distance.[120] Both these functions, on the one hand concerned parliamentarians who seize the initiative and drive things forward and on the other seasoned judges who review the manner chosen to achieve legislative aims, are complementary and cannot be sidelined in any self-respecting democracy.[121]

Highlighting the importance of the judicial function is particularly apt given the current political climate across Europe, which at times seems to embrace populism over considered advice in enacting legislation on sensitive topics. A debate, for example, has been ranging in the Netherlands as to the merits of the ECtHR's decisions with some parliamentarians and commentators criticising the Court for intruding on electoral democracy.[122] While critical debate is certainly

[118] *See Refah Partisi* v. *Turkey*, *supra* n. 85, para. 100; Van der Schyff, *supra* n. 68, p. 169-172.

[119] ECtHR 30 Jan. 1998, Case No. 19392/92, *United Communist Party of Turkey* v. *Turkey*, para. 33.

[120] *See* R. Pound, *The Formative Era of American Law* (Little Brown 1938) p. 51.

[121] Similarly, E. Hirsch Ballin, 'De rechtsstaat: wachten op een nieuwe dageraad?' [The Rechtsstaat: Waiting for a New Dawn?] *Nederlands Juristenblad* (2011) p. 71, who argues that democracy cannot exist without constitutional constraints.

[122] For a critical summary, *see* J. Gerards, 'Waar gaat het debat over het Europees Hof voor de Rechten van de Mens nu eigenlijk over?' [What Is the Debate Concerning the ECtHR Really about?], *Nederlands Juristenblad* (2011) p. 608. *See also* T. Zwart, 'Een steviger opstelling tegenover het Europees Hof voor de Rechten van de Mens Bevordert de Rechtsstaat' [A Firmer Stance Against the ECtHR Will Benefit the Rechtsstaat], *Nederlands Juristenblad* (2011) p. 343.

the lifeblood which keeps any democracy from stagnating, whether it concerns religious freedom or any other right, care must be taken not to pander to popular political views simply for the sake of doing so while brushing aside the merits of a case. Admittedly this also applies to the courts, as illustrated by the poor motivation of the French Constitutional Council, but parliamentarians are to be particularly careful in this regard too, because *representing* voters' views is more sophisticated than simply *copying* voters' views. This is because representation implies adding structure and depth to public debate and not mere reproduction such as is the case with binding referendums. Consequently, parliamentarians ought to consider whether they are true to the foundations of their own calling, before next commenting on the state of the neighbours' lawn.

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