

## SYMPTOMATIC SYMBOLISM: BANNING THE FACE VEIL 'AS A SYMBOL'

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'The burqa is a symbol of women's oppression ... It is worse than the swastika'.<sup>1</sup> A Belgian public intellectual made this statement, as part of his arguments in favour of the country's 'burqa ban'. Similar reasons for banning the face veil have been advanced in both the French and Belgian parliaments, and elsewhere.

Proponents of a ban have claimed, for instance, that face veils (or the practice of wearing them) cannot be regarded as anything other than a symbol that entails a 'debasement of the concepts of humanity and women'.<sup>2</sup> Relatedly, the face veil is often regarded as an emblem or sign that is inextricably associated with misogynist and otherwise anti-democratic regimes such as that of the Taliban in Afghanistan,<sup>3</sup> and

Part of this chapter is based on a text co-authored with Eva Brems and Saïla Ouald Chaib (Brems et al. 2013).

<sup>1</sup> Moral philosopher Etienne Vermeersch quoted in Verschelden (2012). After having been called to account on this statement by the editor of a Jewish magazine, Vermeersch apologized for his statement. He did maintain 'the burqa is a symbol of the oppression of women, and of a whole range of fundamentalist ideas'.

<sup>2</sup> *Parliamentary proceedings*, Belgian Chamber 2010–11, 28 April 2011: 38. See also *Parliamentary report*, Belgian Chamber 2010–11, no. 53–219/4: 19. For France, see e.g. French Parliament, Assemblée nationale, *Rapport d'information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur le projet de loi interdisant la dissimulation du visage*: 15; French Parliament, Assemblée nationale, *Discussion en séance publique, première séance du mercredi 7 juillet 2010*. The theme was also developed by the Gérin commission (France), which described the face-veil as a symbol of sexual apartheid: Gérin (2010: 43 and 109–11).

<sup>3</sup> See e.g. *Parliamentary proceedings*, Belgian Chamber 2010–11, 28 April 2011, no. 53–30: 37 and 46; *Parliamentary report*, Belgian Chamber 2010–11, no. 53–219/4: 5.

more generally with a form of Islam(ism) that is fundamentally at odds with democracy and the rule of law.<sup>4</sup>

Though there are several aspects to these arguments, one resultant claim is that the face veil should be prohibited on account of its being an inherently reprehensible or 'undemocratic' symbol, in and of itself.<sup>5</sup> On this view, the face veil coincides with or embodies worldviews that are incompatible with a democratic society, necessitating or at least justifying the garment's prohibition.

This ground for banning the face veil is investigated in this comment, taking into account the empirical findings presented in this volume. In doing so I will first take a look at banning symbols more generally, identifying some common problems plaguing such prohibitions (section 1). Subsequently, a number of issues specific to banning the face veil 'as a symbol' will be discussed (section 2).

## 1. BANNING SYMBOLS?

In considering whether one can or should ban the face veil because the garment (allegedly) constitutes an undemocratic or otherwise objectionable symbol, comparable to the swastika or other totalitarian emblems, it is useful to first turn to these latter 'comparators'.

In this regard it can be pointed out that bans on symbols, qua symbols, are not very common to begin with. Most countries consider the practice of prohibiting symbols to be at odds with their conceptions of freedom of speech. Illustrative of this is that Germany, during its 2007 EU presidency, unsuccessfully proposed an EU-wide ban on symbols associated with Nazism, as part of efforts to harmonize rules throughout the member states for dealing with racism.<sup>6</sup> When Germany set out its final plans in this regard, it had already withdrawn the prohibition of symbols such as swastikas. During preliminary

<sup>4</sup> *Parliamentary report*, Belgian Chamber 2010–11, no. 53–219/4: 5, 6 and 11; *Parliamentary proceedings*, Belgian Chamber 2010–11, 28 April 2011, no. 53–30: 33, 34, 40 and 43.

<sup>5</sup> *Parliamentary proceedings*, Belgian Chamber 2010–11, 28 April 2011, no. 53–30: 38. See also *Parliamentary report*, Belgian Chamber 2010–11, no. 53–219/4: 19.

<sup>6</sup> Efforts that eventually resulted in Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Earlier attempts to come to an EU-wide ban failed as well. In 2005, for instance, European Parliament a coalition of German Conservatives, Liberals and Social Democrats in the European Parliament called for a ban on all Nazi symbols. These plans were dropped as well, due to strong opposition from those concerned with civil liberties on the one hand and since it proved impossible for member states to agree on *which* symbols should be banned on the other hand.

discussions, other European countries had proved too wary of such legislation for a Community-wide ban to be achievable. The proposal, when initially launched in the media, also sparked strong opposition from groups and organizations that use the symbol for cultural or religious reasons.

Only in rare cases have European countries introduced general<sup>7</sup> bans on certain symbols. That is the case, most notably, in Germany<sup>8</sup> and Austria<sup>9</sup> for symbols associated with National Socialism, such as the swastika. The post-war criminal codes of both countries render it unlawful to publicly use or display the swastika, other Nazi symbols, and even symbols that can be mistaken as such; thereby establishing – in the words of the German Constitutional Court (Bundesverfassungsgericht) ‘a communicative “taboo”’.<sup>10</sup> Furthermore, and more recently, in some Eastern European countries Communist symbols have been banned, often in combination with symbols associated with National Socialism. Accordingly, in Hungary it is prohibited to publicly display ‘symbols of despotism’, which (expressly) include the swastika, the SS sign, the arrow-cross, the hammer and sickle and the five-pointed

<sup>7</sup> A number of other countries have bans that are limited to specific contexts. For instance, in Latvia ‘racist symbols’ are banned in the context of demonstrations and pickets, whereas in Spain, Portugal and Belgium similar symbols are forbidden in the context of sports events. In Moldova, a ban was enacted in October 2012 prohibiting communist-(era) symbols for political (party) purposes. Additionally, while most countries lack regulation banning symbols, case law has sometimes brought the public display of fascist or other totalitarian symbols under general criminal or anti-racist provisions. See EU Network of Independent Experts on Fundamental Rights (2005: 87–89) (this text is partially outdated, however, due to developments since 2005).

<sup>8</sup> §86a German Criminal Code (*Strafgesetzbuch*) prohibits the use, distribution, production, stocking, importing, etc. of symbols of unconstitutional organisations (or symbols which are so similar as to be mistaken for such symbols). These organizations are, *inter alia*, parties which have been declared to be unconstitutional by the Federal Constitutional Court or parties or organisations of which it has been legally determined – in a manner no longer subject to appeal – that they are substitute organisations of such parties; organisations which have been banned – in a manner no longer subject to appeal – because they are directed against the constitutional order or against the idea of international understanding, or as to which it has been determined – in a manner no longer subject to appeal – that it is a substitute organization of such a banned organization; former National Socialist organizations.

<sup>9</sup> Sections 1 and 3 Insignia Act (Law 84/1960, as amended by Law 117/1980) prohibit the public wearing, displaying, depicting or disseminating of insignia of an organisation that is prohibited in Austria, such as (neo-)Nazi organizations, particularly under Section 12 §1 Association Act (*Vereinsgesetz*). The latter provision prohibits associations if their purpose, name or form of organisation is illicit.

<sup>10</sup> See *inter alia* Bundesverfassungsgericht 1 June 2006, 1 BvR 150/03, §18; Bundesverfassungsgericht 18 May 2009, 2 BvR 2202/08, 2805 (2806) §16: ‘Die Norm errichtet ... so ein kommunikatives “Tabu”’.

red star.<sup>11</sup> Likewise, in Lithuania,<sup>12</sup> and Poland<sup>13</sup> public display of symbols of Nazism and Communism is a criminal offence.

However, as the examples show, such bans tend to be, first, linked to a history within which the relevant symbols are intimately associated with the actual abolition of democracy in the respective regions,<sup>14</sup> and with crimes against humanity and genocide. In this respect, such prohibitions have a very particular history and historicity, and cannot simply be compared to or equated with banning face veils on 'symbolic' grounds.

Moreover, the case-law of the European Court of Human Rights (ECtHR) – which is not particularly known for its protective attitude towards extremist or 'undemocratic' (symbolic or pure) speech<sup>15</sup> – demonstrates that prohibiting symbols is everything but self-evident *even* in such situations. In *Vajnai v. Hungary*, the Court ruled, for example, that the application of the Hungarian ban on communist symbols to someone wearing a red star during a demonstration amounted to a violation of Article 10 of the European Convention on Human Rights (right to freedom of expression). The ECtHR was mindful of the fact that, for many people in Hungary, communist symbols were associated with painful memories of mass violations of human rights committed under the totalitarian Soviet regime, but according to the Court the red star did not *exclusively* represent totalitarian rule. It had and has multiple meanings.<sup>16</sup> Nor had Hungary shown that the use of

<sup>11</sup> Article 269b Hungarian Criminal Code. Display for academic, educational, artistic or journalistic reasons is allowed. See also Decision no. 14/2000 (V.12) of the Constitutional Court, dealing with the constitutionality of Section 269b.

<sup>12</sup> The ban was introduced in June 2008. When it led to a court ruling in September 2008 that fined a woman in Vilnius 500 litas (€145) for selling souvenirs containing Soviet symbols, Parliament amended the law (in March 2009), in order to prevent other salesmen from incurring such fines. Moreover, courts have been reticent to apply the ban. Most notably, an administrative court in Klaipėda ruled in favour of four (radical right-wing) individuals who, at the national independence parade, displayed posters with photographs of swastikas recovered at ancient archaeological sites. The court concluded that such swastikas should properly be regarded as historical heritage rather than as Nazi symbols (Administrative Court of Klaipėda, 18 May 2010).

<sup>13</sup> Article 256, §2 Polish Criminal Code.

<sup>14</sup> Outside of Europe, the manufacture, use or distribution of the swastika or any Nazi symbol is prohibited in Brazil, since 1989, but only if it is done with the intent to propagate Nazism (art. 20, §1, Federal Statute 7.716/89; as altered by Federal Statute 9.459/97).

<sup>15</sup> See Hare (2009: 78–9); Vrielink (2013: n. 24).

<sup>16</sup> ECtHR, 8 July 2008, *Vajnai v. Hungary*, §52 (arguing that 'this star also still symbolises the international workers' movement, struggling for a fairer society, as well certain lawful political parties active in different Member States'). *Mutatis mutandis*, the same holds true for face-veils, of course; arguably even more so (see section 2 below on the views of the wearers). See also, generally e.g. Hussein (2009: 81–9); Williamson and Khiabany (2010: 89–91).

the star had generated any danger of violence or disorder. Therefore, there was no ‘pressing social need’ for the interference with free speech.<sup>17</sup> In its conclusion, the Court warned against banning symbols, *per se*, in an unequivocal way:

The Court is of course aware that the systematic terror applied to consolidate Communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol that was ubiquitous during the reign of those regimes may create uneasiness among past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression.<sup>18</sup>

Furthermore, even if one were to accept the (faulty) premise that someone who uses or wears a symbol necessarily supports the ideology (allegedly) associated with it, such a form of association seems too weak an affiliation to be legitimately penalized. A symbol does not, in itself, imply further action: it tends to be a passive display of affiliation at most. In the same way that a gang member cannot be punished for gang crimes, merely on account of his having a gang tattoo, carrying or wearing a(n alleged) ‘symbol’ would generally not seem to imply a strong enough form of responsibility to hold someone legally accountable for the regime perceived to underlie such a symbol. As such, when and where such symbols are banned from public life in general, this comes close to sanctioning people for the mere fact of having opinions,<sup>19</sup> thereby threatening the very core of the right to freedom of opinion and expression.

Moreover, bans on symbols tend to raise suspicions of discrimination, both directly (e.g. as to the specific viewpoints they curtail), and indirectly (e.g. as regards the groups that are disparately impacted by such bans). Regarding the latter, Hindu and Falun Gong groups for instance

<sup>17</sup> ECtHR, 8 July 2008, *Vajnai v. Hungary*, §55. See also: Buyse (2011: 133–8).

<sup>18</sup> ECtHR, 8 July 2008, *Vajnai v. Hungary*, §57.

<sup>19</sup> Of course bans on symbols such as the swastika often also have the goal of averting social habituation to them. However, in order for this argument to be relevant or convincing, it would still seem to require that the symbols should pose some direct or indirect danger to public order in and of themselves, and it is hard to see how this is necessarily the case in *every* instance in which a symbol is publicly displayed. Compare: Hörnle (2001: 255) (the author argues that the penalization of behaviour that does not result in any tangible harm (or concrete risks thereof), like the prohibition of symbols, is difficult to reconcile with the general principles underpinning the German criminal law system).

have successfully argued that a general ban on the swastika would discriminate against them as a religious community and interfere with their freedom of religion.<sup>20</sup> Even in Germany, case law has determined that 'religious swastikas' (e.g. on websites and temples) do not therefore fall under the general ban.<sup>21</sup> The relation between face veils as a symbol and a particular (religious) group, i.e. Muslims, is more direct still, which would again seem to render a ban thereof – on 'symbolic' grounds – even more problematic.

Finally, one can point to the undesirable and counterproductive practical effects that prohibitions of symbols usually have. First, due to their far-reaching nature, general bans on symbols leave little room for (restrictive) interpretations, which tends to yield all kinds of absurd effects. In Germany, the use of Hitler's picture on a postcard was ruled to be unlawful,<sup>22</sup> as was the use of swastikas on a displayed vintage model aeroplane.<sup>23</sup> Even producing and selling *anti*-fascist clothing and buttons, making use of the swastika in order to impugn Nazism (e.g. crossed-out swastikas and swastika's being put into trash cans), initially led to convictions,<sup>24</sup> before being reluctantly reversed by the Federal Supreme Court (Bundesgerichtshof).<sup>25</sup>

A second issue having to do with practical effects, is that the prohibition of symbols often seems to *encourage* rather than discourage the movements associated with these symbols. Criminalization instils resentment and greater determination on the part of those sharing its underlying ideology, as well as rendering that ideology more attractive to (some) outsiders (e.g. since it bestows the wearers of the symbol with an

<sup>20</sup> They likened banning the swastika, on account of its associations with Nazism, to banning the cross simply because the Ku Klux Klan uses burning crosses.

<sup>21</sup> In 2002, for instance, a Falun Gong association received a notice from the Mannheim district court for displaying the Falun emblem on its website. This emblem contains a swastika (as well as several additional swastika-like symbols), although it has a different colour and points in a different direction than the Nazi swastika. In November 2003, the Mannheim district court rendered a verdict of not guilty and declared the display of the Falun emblem legal under German law (Amtsgericht Weinheim, 1 Ds Js 33613/02, 13 November 2003). The public prosecutor appealed the ruling, but in March 2004 the original judgment was upheld (Landgericht Mannheim, 4 Qs 3/04, 1 March 2004).

<sup>22</sup> Oberlandesgericht München, 4 StRR 142/06, 7 August 2006.

<sup>23</sup> Oberlandesgericht München, NSStz-RR 371, 14 July 2005.

<sup>24</sup> See Landesgericht Stuttgart decision 18 KLs 4 Js 63331/05, 29 September 2006; Oberlandesgericht Stuttgart, decision 1 Ws 120/06, 18 May 2006.

<sup>25</sup> Bundesgerichtshof, 3 StR 486/06, 15 March 2007. The court stated that it was 'convinced of the fact that members of extreme-right organizations would never make use of items that make a mockery of their 'sacred' symbols'. The court did add, however, that for the use of these symbols to be legal, the anti-Nazi meaning has to be 'immediately apparent'.

aura of martyrdom, and by turning the associated ideology into ‘forbidden fruit’, by the legal taboo attached to it).<sup>26</sup> Likewise, the empirical research regarding the face veil shows that the introduction of a ban, if anything, *increased* the commitment by the (former) wearers to the garment’s underlying values.<sup>27</sup> Furthermore, there are indications that the wider Muslim community feels stigmatized and singled out by the ban.

## 2. THE FACE VEIL AS A ‘SYMBOL’?

The previous section demonstrates that it is generally problematic to ban symbols, regardless of what type of symbol it concerns. However, it is important to note a number of crucial differences between examples such as swastikas and communist symbols on the one hand and the face veil on the other hand, which make it even more problematic to prohibit the latter as a ‘symbol’.

To begin with, it is *outsiders* who regard and label the face veil as a symbol, and attribute a specific (negative) meaning to it. For the women wearing the veil, it is, in the first place, a religious practice, and a positive one at that. The empirical chapters in this book make abundantly clear that respondents wearing the face veil<sup>28</sup> do not regard it either as a means of proselytism or as a symbol of oppression. Interviewees across all studies describe the decision to start wearing the face veil as a well-considered and free decision in which their personal agency plays a central role. Wearers cover themselves for a variety of motives such as their personal relationship with God; a desire to excel in piety and perfect one’s faith; considerations of chastity and modesty; deflecting sexual attention; and connecting with and maintaining their identity as Muslims in day-to-day life. Many regard it as form of liberation (e.g. from the pressures of fashion and appearance, from the male gaze, etc.).

Furthermore, the fact that wearing the face veil is a religious practice, implies that wearing the Islamic face veil is not only protected by the freedom of speech, but by the freedom of religion as well, and that – in turn – obliges authorities to exercise restraint in advancing or imposing

<sup>26</sup> See e.g. Newman and Rackow (2011: 144–5).

<sup>27</sup> Even though this does not seem to involve the (negative) values that the French and Belgium legislators discern behind the face-veil (see section 2 below).

<sup>28</sup> Or those that used to wear it previously.



their own (negative) interpretations of this practice or 'symbol'.<sup>29</sup> This interpretive restraint entails that governments and courts must – whenever possible – refrain from imposing their own interpretation of religious rules and practices. By labelling a certain religious practice a 'symbol', attributing a negative meaning to it (that is not shared by its practitioners), and subsequently *prohibiting* the practice on the grounds of that meaning, one would seem to violate this core element of freedom of religion. At least, in the absence of there being larger interests or decisive arguments that objectively override or discredit the views advanced by practitioners.<sup>30</sup> If not, then by the same token that the burqa is interpreted (and prohibited) as a symbol of oppression, the crucifix could – viewed with the detachment of an uninformed outsider – be taken (and prohibited) as a sign of veneration of or even incitement to torture and inhumane treatment (compare Roedig 2010).

Of course, one could counter – as some proponents of a ban have done – that the views of the wearers are unrepresentative, misleading or misguided. The former could, to some extent, be the case. One may expect a certain degree of self-selection among the participants in the empirical studies, in the sense that liberated women are more likely (to be able to choose) to participate. However, at the same time, the interviewees in several countries (particularly in the Netherlands, Belgium and Denmark) make up a considerable percentage of the small target group. Furthermore, the researchers have tried, by various means, to ascertain whether certain groups were missing from the population of respondents they managed to reach, but were unable to identify relevant hiatuses. In Belgium, for instance, after inquiring with several NGOs and professionals, the research team was able to learn only of one single woman that, according to a social worker, had been forced to wear the face veil. Despite numerous efforts it turned out to be impossible to interview this woman,<sup>31</sup> but the case seems to stand as a lonely 'exception that proves the rule', in the sense that it draws attention to the apparent rarity of such cases; reinforcing rather than discrediting the established findings.

<sup>29</sup> In that regard it is useful to reiterate that even in Germany, 'religious swastikas' are – in practice – exempt from the general ban (see section 1 above).

<sup>30</sup> Interpretive restraint does not, of course, imply that 'anything goes' in the name of religion; practices that clearly contrary to objective public order and general welfare (e.g. human sacrifice) can naturally be prohibited, positive support of practitioners for these practices notwithstanding.

<sup>31</sup> The woman had been interviewed by a Flemish newspaper (Gijs 2011).



A second reason for not taking the views of veil wearers, as revealed by the empirical research, seriously, has to do with the claim that the research results may be consciously misleading on the part of the respondents. While this is a critique that can be levelled against all interview-based research, it is no doubt true that, in recent years, respondents will have been especially aware of the political relevance of research concerning the face veil, making it quite possible that some of them may have responded accordingly. However, the earliest interviews, by Moors, pre-date the period in which the ban truly became a political issue, and these interviews nonetheless yielded the same results as later research. What can be granted to the critics is that the studies in this volume – like all qualitative small-scale interview studies – do not allow for drawing far-reaching conclusions. No one seems to be doing that though. The only claim, if any, being made is that the findings should be taken on their merits, given the absence both of genuine indications of fraud, and of research results contradicting the findings. In any case, the mere fact that there can be doubts about the motives of respondents cannot reasonably be used in support of a ban.

Finally, some proponents of a ban argue that respondents – while perhaps not consciously trying to mislead the researchers – are nonetheless misguided in that they themselves have internalized their own subjugation, and are suffering from ‘false consciousness’. This issue is dealt with extensively elsewhere in this volume.<sup>32</sup> Here it may suffice to raise the question of whether such an assumption, that fails to seriously engage with the expressed opinions and beliefs of those directly involved, can constitute a credible and legitimate basis for a general ban. In the end, the paternalistic argument – like the ‘symbolic’ argument – seems to have more to do with cultural biases than with rationally informed legislative decision making.

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<sup>32</sup> Additionally, see Brems *et al.* (2013: 85–6 and 94–5).

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