

# Uncovering French and Belgian Face Covering Bans

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## Abstract

This paper analyses the French and Belgian bans on face covering by taking a close look at the aims they are intended to serve in the eyes of the legislators in the two countries. These stated aims are the basis for a critical assessment of the bans from a human rights perspective. The authors conclude that the reasons proffered for the prohibition can legitimize at most a limited set of contextual bans, not the broad nationwide bans that are in place.

## Keywords

burqa ban; niqab; freedom of religion; face covering bans; women's rights

## 1. Introduction

According to current estimates, the number of Muslims in Europe is between 44.1<sup>1</sup> and 53<sup>2</sup> million. There is no doubt, therefore, that Islam is

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<sup>1</sup> Pew Research Center's Forum on Religion and Public life, *The Future of the Global Muslim Population*, January 2011, [www.pewforum.org](http://www.pewforum.org).

<sup>2</sup> The *Zentralinstitut Islam-Archiv*, which obtained its information from the embassies of European countries in Germany, estimated that the Muslim population in Europe reached

today also a European religion. Nevertheless, the accommodation of its visible expressions and of its practices remains controversial. Debates over bans on Islamic headscarves in schools and in the workplace are by no means settled, but the latest trend is to ban face-covering veils in all public places. Although the numbers of women wearing an Islamic face-veil in Europe is extremely small,<sup>3</sup> “burqa bans”<sup>4</sup> enjoy widespread political and popular support. To date, only France and Belgium have enacted such bans, but bills to the same effect have been tabled in several other countries. Additionally, several countries already dispose of local regulations that limit the wearing of a face veil in public.

The present article analyzes the French and Belgian bans by taking a close look at the aims they are intended to serve in the eyes of the legislators in the two countries (Section 3) and assesses them critically from a human rights perspective (Section 4). But first (Section 2) the article sketches the context in which the bans were adopted.

## 2. Burqa Bills and Regulation throughout Europe

### 2.1. Starting Small: Local Bans

Until 2011, no countrywide face covering bans existed in Europe but in several countries local bans have been in place restricting at least *certain* facial concealments in *certain* contexts. Some of these bans were introduced

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53 million in 2007 (Zentralinstitut Islam-Archiv-Deutschland, “In Europa leben gegenwärtig knapp 53 Millionen Muslime”, 8 May 2007).

<sup>3</sup> In Belgium, France, and the Netherlands—three countries with significant populations of Muslims—the number of women wearing a face veil is estimated to be 200–270, 1900, and 50–400, respectively. In all three cases this does not comprise even 0.5% of the Muslim population of these countries. See *infra* section 4.4 (and references there) and A. Moors, *Gezichtssluiers: draagsters en debatten*, 2009, 29.

<sup>4</sup> The term “burqa ban” is inaccurate for various reasons. First, “burqa” refers to the mostly blue piece of clothing covering the entire female body, including the head, except for a small region around the eyes, which is covered by a concealing net or grille. Such coverings are typical for certain areas in Pakistan and Afghanistan. They are virtually never worn in Western Europe. To the extent that face veils are worn in Western Europe, these veils are generally “niqabs”: face veils which do not cover the eyes but the rest of the face. Second, at least in Belgium and France, the laws that are referred to by this name ban not only the burqa (and niqab) but face covering and concealment in general (apart from a few limited exceptions).

when niqab wearers appeared in local streets; others, which had long been on the books, were rediscovered and applied to the new situation.

Local face covering bans exist in varying degrees in Belgium, the Netherlands, Italy, and Spain. In Belgium the geographic coverage of these local prohibitions appears to be the widest, with virtually all major cities and towns having imposed a prohibition.<sup>5</sup> By contrast, in the Netherlands such local bans are rare. Moreover, the scope, formulation and content of these prohibitions varies. Most bans prohibit all face covering, but some, most notably in Italy, specifically target the Islamic face veil. In addition to general bans, applicable to the entire public territory of the municipality in question, there are also contextual bans restricted to public buildings such as libraries, schools, post offices, hospitals, city hall, etc. These bans do not apply to general public spaces such as streets and parks.<sup>6</sup>

In Belgium two basic categories of local bans can be distinguished. The first category prohibits disguises, masks, and costumes that cover one's face; the second category targets "appearing in public unidentifiably" or "with concealed or covered face by whatever means." The first type dates back to the 19<sup>th</sup> century, with particular reference to festivities and carnivals, and was reinterpreted in 2004 and 2005 to include face veils.<sup>7</sup> The second category was introduced more recently and was drafted explicitly to enable the prohibition of face veils. Municipalities confronted with a situation of women wearing face veils, requested the assistance of superior regional authorities to deal with the issue. In response, the latter offered model provisions enabling municipalities to prohibit face veils should they wish to do so.<sup>8</sup> Generally, several exceptions apply to both types of

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<sup>5</sup> Municipalities with local burqa bans include Ghent, Antwerp, Charleroi, the City of Brussels, Lier, Maaseik, Mechelen, Turnhout, and Verviers.

<sup>6</sup> Additionally, a second type of contextual prohibition against face covering exists occasionally at the local level, applying to public assemblies, demonstrations, and gatherings. Such provisions state, for example, that permission for meetings or assemblies can be subject, among other things, to the condition that "masks and/or disguises that render identification difficult and/or impossible... [are] not allowed" (Leuven, Belgium). This category, however, is not discussed in further detail here because the direct relevance of such provisions to wearing face veils is limited.

<sup>7</sup> At least in *some* towns and municipalities. A small-scale random telephone survey we conducted among some 30 municipalities suggests that in almost half of the municipalities where a prohibition of the first type applies, wearing a face veil is *not* considered to be prohibited under this ban.

<sup>8</sup> Such a model provision was offered in Flanders in 2004 by the administrative services of Home Affairs. It was as follows: "Subject to legal or regulatory provisions to the contrary or subject to written and prior permission by the mayor, it is forbidden, in public or private

provisions, including temporary authorizations by the mayor and exemptions for certain periods, holidays, or situations (e.g., Carnival and Halloween). Some local bans apply “subject to legal or regulatory provisions to the contrary.” The application of these local prohibitions to women wearing face veils has resulted in contradictory case law in Belgium, which was one of the reasons for the enactment of the general prohibition (see Section 2.2.2 below).<sup>9</sup>

In the Netherlands, to the limited extent that local prohibitions hold sway, they are comparable to those prevalent in Belgium. Thus, they tend to be neutral and general, for example, prohibiting “without authorization by the mayor, to appear in a publicly accessible place, while begin masked, disguised, or otherwise unrecognizable.”<sup>10</sup> Despite the absence of case law, the legality and constitutionality of these provisions is widely considered controversial,<sup>11</sup> and therefore the local prohibitions are rare and seldom enforced in practice.

In Italy local bans are found particularly in the north and northeast of the country. Initially, the regulations tended to be general rather than contextual in nature, and municipalities based them on article 5 of the 1975 Public Order Protection Act (POPA). This provision prohibits the use of any means intended to render the identification of a person difficult in spaces open to the public, except for situations and events during which such means may be justified (e.g., sporting events). The Act originated in the 1970s during the so-called Years of Lead (*Anni di piombo*) in Italy, and was aimed at suppressing violent political activism. Since that time the

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domains of the government, to cover one's face so that identification is rendered impossible. This prohibition applies neither to activities with commercial purposes nor to cultural and sporting events determined by the mayor, such as Carnival, processions, organized parades, Saint Nicholas, and Santa Claus. For the purposes of this regulation, ‘face’ is understood to mean the following: the forehead, cheeks, eyes, ears, nose, and chin.” A somewhat different model was offered by the Association of the City and the Municipalities of the Brussels-Capital Region, for the region of Brussels: “Except with prior authorization, it is prohibited to conceal one's face in public by means of grease paint, by wearing a mask, or by any other means.” There are no similar model regulations in Wallonia.

<sup>9</sup> See Police Court Brussels, 26 January 2011, [www.legalworld.be](http://www.legalworld.be); Police Court Tongeren (Maaseik department), 12 June 2006.

<sup>10</sup> Art. 2.4.26 § 1 Municipal Regulations of Maastricht. Other examples of municipalities where such regulations are in effect include: Borsele, Doetinchem, Goedereede, Middelhar nis, Roermond, and Valkenburg (B.P. Vermeulen et al., *Overwegingen bij een boerka verbod [Considerations Concerning a Burqa Ban]*, The Hague, 2006, 55).

<sup>11</sup> The reason being that the Dutch constitution requires a formal law for rights and freedoms to be curtailed (*id.*).

Act has remained dormant until the appearance of face veils has led to its rediscovery.<sup>12</sup> In two cases these local prohibitions gave rise to litigation and case law,<sup>13</sup> which have resulted in the finding that the POPA could not be regarded as grounds for prohibiting face veils in public spaces in general either because the traditional, religious nature of these garments provides a reasonable *justification* for being worn, or because the garment is not *intended* to prevent one from being recognized. This case law made it impossible for municipalities to issue bans targeting face veils specifically, but according to some interpretations, it did not exclude local prohibitions limited to certain places or situations.<sup>14</sup> Since then some municipalities have issued ordinances that amount to more contextual prohibitions of face veils, among others, limited to certain municipal buildings and institutions.<sup>15</sup>

Finally, in Spain a relatively small number of towns and cities in Catalonia, including Barcelona, started in 2010 to pass regulations banning face covering in municipal buildings.<sup>16</sup> The contextual territorial scope of these regulations goes together with a neutral material scope, aimed at all modes of dress that impede identification. One of these bans, issued by the municipality of Lleida,<sup>17</sup> was appealed by a Muslim association claiming that it violated basic rights. The Catalan Superior Court of Justice initially suspended the ordinance, pending its decision on the merits of the case.<sup>18</sup> In June 2011 the court nevertheless upheld the ban, accepting that it was required for identification and security purposes.<sup>19</sup> The Spanish Supreme

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<sup>12</sup> M. Möschel, "Veiled Issues in European Courts", in G. Calvi and N. Fadil (eds), *Politics of Diversity. Sexual and Religious Self-Fashioning in Contemporary and Historical Contexts*, EUI Working Papers, HEC 2011/01, 8-9.

<sup>13</sup> For the first, administrative, case, see: Administrative Tribunal Trieste 16 October 2006, no. 645 (*Giurisprudenza di merito* 2007, 2423); Council of State 19 June 2008, VI Chamber, no. 3076. A second case was handled at the criminal level: Criminal Tribunal of Treviso, Proceeding no. 8533/04 RG MOD.21 (see extensively: M. Möschel, *supra* note 12, 9-10).

<sup>14</sup> *Id.*, 10.

<sup>15</sup> R. Owen, "Italian police fine woman for wearing burqa in public", *The Times*, 5 May 2010.

<sup>16</sup> W. Fautré, "Is the Burqa Compatible with Women's Rights? The 'Burqa issue' in de EU", Paper presented at the conference 'Burqa and Women's Rights' and the European Parliament, Brussels, 10 June 2010. Aside from Barcelona, other municipalities that introduced local bans include Cervera, Cunit, El Vendrell, Figueres, Galapagar, Hospitalet, Manresa, Martorell, Mollet del Vallés, Reus, Roses, Santa Coloma, Tarragona, and Vic.

<sup>17</sup> The city was the first municipality to introduce this type of ban in 2010.

<sup>18</sup> Catalan Superior Court of Justice, 18 January 2011.

<sup>19</sup> Catalan Superior Court of Justice, 9 June 2011.

Court, however, deemed the prohibition unlawful.<sup>20</sup> The Court primarily decided that that the municipality did not have the competence to restrict a fundamental right.<sup>21</sup> Additionally, however the Court assessed whether the justification for the ban was in line with both international standards and Spanish law, concluding that it is not.<sup>22</sup>

## 2.2. *Nationwide Bans: France and Belgium*

The general bans in France and in Belgium are both of a neutral nature in that they are not specifically aimed at face veils but rather at covering one's face in public in general. That being said, the background of the bans as well as the reasons advanced to support them (Section 3 below) unambiguously indicate that in both states the legislators were concerned primarily with the Islamic face veil, the neutral formulation being chosen mainly to avoid claims of direct discrimination.

### 2.2.1. *France*

The first legislative proposal to ban the face veil in France dates from 2006, when Jacques Myard, MP for the Centre-Right UMP, tabled a bill aimed among others at criminalizing the wearing of face veils, claiming that they amounted to a "violation of the dignity of women."<sup>23</sup> The bill was not debated. Following a decision by the Council of State on 27 June 2008, in which a Moroccan woman wearing a face veil was denied the French

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<sup>20</sup> Spanish Supreme Court, 28 February 2013.

<sup>21</sup> According to the Spanish Constitution, the exercise of fundamental rights can only be regulated by parliamentary enacted legislation.

<sup>22</sup> The Court underlined that public order can be invoked to restrict fundamental rights only insofar as there is a genuine threat to it, something which the municipality failed to demonstrate convincingly, according to the Court. Furthermore, the Court rejected the reasoning by the municipality that the ban is necessary since wearing face veils is contrary to Western culture and thus constitutes a threat to the peaceful living together. The Court concludes that this basis for restricting the wearing of the face veil is at odds with the neutrality required of the State vis-à-vis different groups and values. Finally, concerning women's right, the Supreme Court considers that it cannot be assumed that all women wearing face veils are obliged to do so by third persons. The Court therefore considers the general ban to violate the right to freedom of religion, as it is an illegitimate intervention by the public authorities into the private beliefs of individuals. The Court also highlights the negative aspects that the ban could entail in terms of isolation of the targeted group.

<sup>23</sup> Proposition de loi visant à lutter contre les atteintes à la dignité de la femme résultant de certaines pratiques religieuses, Parliamentary documents no. 3056, 4 October 2006.

nationality, Myard reintroduced his bill in September 2008, but again it failed to be debated.<sup>24</sup>

The effective move toward a general ban in France began not long after MP André Gérin and others filed a resolution on 9 June 2009 aimed at establishing a commission of inquiry concerning the face veil on French territory.<sup>25</sup> Not long afterwards, President Nicolas Sarkozy, in a speech on 22 June 2009, stated that such veils were not welcome in France and that legislation was necessary “to protect women from being forced to cover their faces and to uphold France’s secular values.”<sup>26</sup> The French Parliament subsequently initiated an inquiry into the issue, led by André Gérin. The Commission consisted of 32 members, representing all parliamentary groups. It heard witnesses and experts and sent out questionnaires to several French Embassies. The results of these inquiries were published on 26 January 2010. The report concluded that the full veil constituted an infringement of the three principles constitutive of the French Republic: liberty, equality, and brotherhood. More specifically, the report considered the full veil to constitute an infringement on the freedom and the dignity of women (liberty); a denial of gender equality and of a mixed society (equality); and a rejection of “the common will to live together” (brotherhood). Therefore, the majority of the commission recommended that Parliament adopt a resolution declaring the wearing of the full veil to be contrary to the values of the Republic and that a general ban be adopted against the wearing of the full veil in public spaces.

Subsequently, in April 2010, President Sarkozy suggested that Parliament debate a ban. On May 11 Parliament unanimously adopted a resolution declaring the face veil an affront to French values and calling for the practice to be prohibited on French territory.<sup>27</sup> This paved the way for the general ban. The bill leading up to it, which was submitted by the government on May 19, was passed in both houses of Parliament with an overwhelming majority in the summer of 2010.<sup>28</sup> In its subsequent analysis of the ban,

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<sup>24</sup> Proposition de loi visant à lutter contre les atteintes à la dignité de la femme résultant de certaines pratiques religieuses, Parliamentary documents no. 1121, 30 September 2008.

<sup>25</sup> W. Fautré, *supra* note 16.

<sup>26</sup> C. Gabizon, “Sarkozy : ‘la burqa n’est pas la bienvenue’”, *Le Figaro*, 26 June 2009 (our translation).

<sup>27</sup> Résolution réaffirmant la prééminence des valeurs républicaines sur les pratiques communautaristes et condamnant le port du voile intégral comme contraire à ces valeurs, Assemblée nationale, no. 2272.

<sup>28</sup> In the lower house the bill received 335 votes for, 1 against, and 221 abstentions (13 July 2010). In the Senate there were 246 votes for, 1 against, and 100 abstentions (14 September 2010). The advice of the Council of State, however, was rather negative; it estimated that “no

on October 7, 2010 the Constitutional Council (*Conseil Constitutionnel*) declared it to be constitutional, with only minor reservations. Most notably the Council determined that the ban could not be enforced in places of worship.<sup>29</sup>

Act no. 2010-1192 of October 11, 2010 prohibiting the concealment of the face in public came into force on April 11, 2011. It prohibits wearing any kind of face-covering in public places on French territory, stating: “No one may, in spaces open to the public, wear a garment that has the effect of hiding the face” (art. 1).<sup>30</sup> Exceptions apply when “clothing [is] prescribed or authorised by legal or regulatory provisions,” when the clothing “is justified by reasons of health or professional motives,” or when the clothing is “part of sports activities, festivities, or artistic or traditional manifestations” (art. 2, II).

Sanctions amount to fines for the wearer of up to 150 euro, and/or participation in a citizenship course. Additionally, the Act penalizes anyone who forces another “through threats, violence, constraint, abuse of authority or power for reason of their gender” to wear face coverings with a fine of 30,000 euro and one year of imprisonment. The latter penalties can be doubled if the victim is a minor.

### 2.2.2. *Belgium*

In Belgium the face veil issue has been on the political agenda longer than in France. The first proposal dates back to the beginning of 2004 and was submitted by the radical right-wing Vlaams Blok party.<sup>31</sup> At the time it did not lead to parliamentary debate.

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incontestable legal basis” (“aucun fondement juridique incontestable”) could be provided for a general ban, such as the one proposed (Rapport Assemblée générale plénière du Conseil d’Etat, *Etude relative aux possibilités juridiques d’interdiction du port du voile intégral*, 25 March 2010). Cf. *infra* 3.

<sup>29</sup> The Council stated: “Toutefois l’interdiction de dissimuler son visage dans l’espace public ne saurait, sans porter une atteinte excessive à l’article 10 de la Déclaration de 1789, restreindre l’exercice de la liberté religieuse dans les lieux de culte ouverts au public” [However, the prohibition of concealing one’s face in public spaces may not restrict the exercise of religious freedom in places of worship open to the public, without unduly restricting Article 10 of the Declaration of 1789] (Constitutional Council, 7 October 2010, no. 2010-613 DC, §5).

<sup>30</sup> “Nul ne peut, dans l’espace public, porter une tenue destinée à dissimuler son visage.”

<sup>31</sup> *Parliamentary documents*, Senate 2003-04, no. 3-463/1 (Van dermeersch). Shortly thereafter, delegates of the Vlaams Blok also submitted a proposal to the Chamber: *Parliamentary documents*, Chamber 2003-04, no. 51-880/1 (Van Steenberghe, De Man and Laeremans).



During the 2007–2010 legislative session, various bills were submitted aimed at introducing a general ban. One of these was approved almost unanimously by the plenary Chamber.<sup>32</sup> It appeared briefly that Belgium would become the first European country to have a burqa ban, but the premature fall of the government prevented this from happening: approval by the Senate was precluded by the early dissolution of the chambers on May 7, 2010.

Various legislative proposals were submitted again after the elections. Three of these proposals were combined and discussed.<sup>33</sup> Debates on the matter were accelerated following a Brussels Police Court judgement of January 26, 2011 on the application of a local ban on clothing covering the face (Section 2.1 above). The Brussels ruling meant that the municipality of Etterbeek was not allowed to impose a fine on a woman for wearing a niqab.<sup>34</sup> As a result, the bill ended up being debated expeditiously, and it was approved with an overwhelming majority.<sup>35</sup>

The Act of June 1, 2011 “to institute a prohibition against wearing clothing that covers the face or a large part of it” was published in the *Belgian Official Journal* on July 13 and entered into force ten days later. The Act inserts Article 563*bis* into the Belgian Criminal Code. “Subject to legal provisions to the contrary,” the Article punishes persons “who appear in places accessible to the public with their faces covered or concealed, in whole or in part, in such a manner that they are not recognisable” with a monetary fine of 150 euro<sup>36</sup> and/or a prison sentence of one to seven days. Paragraph two of Article 563*bis* of the Criminal Code specifies that the prohibition contained in the first paragraph shall not apply when face covering is permitted or imposed by “labour regulations or municipal ordinances owing to festivities.” In addition to the main provision, the law also includes a contingency arrangement vis-à-vis municipal administrative sanctions, based on local burqa bans (Section 2.1 above). The arrangement allows continued application of the latter provisions if the public prosecutor decides not to prosecute on the grounds of the general ban, with a strict prohibition against double jeopardy.

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<sup>32</sup> More specifically it concerned 136 votes for, 0 against, and 2 abstentions.

<sup>33</sup> I.e., *Parliamentary documents*, Chamber BZ 2010, no. 53-85/1; *Parliamentary documents*, Chamber 2010-11, no. 53-754/1; *Parliamentary documents*, Chamber BZ 2010, no. 53-219/1-2.

<sup>34</sup> Police Court Brussels, 26 January 2011, [www.legalworld.be](http://www.legalworld.be). The judgement received a great deal of media attention and elicited political reactions calling for a general burqa ban.

<sup>35</sup> In the plenary Chamber there were 129 votes for, 1 against, and 2 abstentions. The Senate opted against discussing the bill at all.

<sup>36</sup> More specifically 15-25 euro, increased with a legal surcharge factor (i.e., multiplied by 6).

Shortly after the prohibition came into effect several parties challenged the Act before the Constitutional Court of Belgium. Applicants argued that the prohibition violated a number of rights and principles, including the principle of legality,<sup>37</sup> the freedom of religion, and the right to non-discrimination. The Court rejected all these arguments on 6 December 2012.<sup>38</sup> The Constitutional Court imposed only a single restriction on the ban, similar to that of the French Constitutional Council (Section 2.2.1 above), prescribing that it may not apply in “places of worship”, as this would unduly restrict the freedom of religion. Otherwise, however, the ban was deemed constitutional.

### 2.3. *Developments Elsewhere*

In addition to the general and local bans already in place, there is a growing movement among the public and politicians in European countries to call for general burqa bans. This is the case in Italy, the Netherlands, Spain, Denmark, Austria, and elsewhere. Progress toward a general ban seems greatest in Italy. After it became apparent that the local bans could not be justified in the light of existing legislation, several bills were tabled since 2007. On August 2, 2011, the parliamentary commission on constitutional affairs approved one of these bills, which would prohibit women from appearing in public wearing any garment that covers their face, rendering this punishable by fines of 100-300 euro. As in France, the ban would also punish individuals who force women to conceal their faces in public, imposing a fine of 30,000 euro and up to 12 months of imprisonment on violators.<sup>39</sup> The bill is awaiting further parliamentary debate.

In the Netherlands, the political debate on the face veil first surfaced in response to local Belgian cases making the news in the Netherlands,<sup>40</sup>

<sup>37</sup> Which requires laws to be clear, ascertainable and sufficiently precise.

<sup>38</sup> Constitutional Court 6 December 2012, no. 145/2012. See, extensively, on the ruling: L. Lauvrysen & E. Brems, “Redding boerkaverbod leidt tot rare kronkels”, *Recht, Religie en Samenleving* 2013 (forthcoming); J. Vrieling, “Het bedekte gelaat van de Belgische Grondwet. Het Belgisch Grondwettelijk Hof en het ‘boerkaverbod’”, *Nederlands Tijdschrift voor de Mensenrechten* 2013, vol. 38, no. 2, 251-267. For brief summaries, see J. Flo & J. Vrieling, “The Constitutionality of the Belgian Burqa Ban”, *openDemocracy.net*, 14 January 2013; S. Ouald Chaib, “Belgian Constitutional Court Says Ban on Face Coverings Does Not Violate Human Rights”, *Strasbourgobservers.com*, 14 December 2012.

<sup>39</sup> “The Burqa, the Law and Other EU Countries”, [www.france24.com](http://www.france24.com).

<sup>40</sup> Prior to this, in 2003, the issue of the face veil had attracted some media attention when a school banned students from wearing it (A. Moors, “The Dutch and the Face-veil: The Politics of Discomfort”, *Social Anthropology/Antropologie Sociale* 2009, no. 4, 396).

which led to a vote on a Parliamentary motion in December 2005, calling for a general ban of “the public use of the burqa in the Netherlands.”<sup>41</sup> Additional motions on the same issue were adopted in October 2006 and in November 2007.<sup>42</sup> Pursuant to the initial motion, in April 2006 the government appointed a commission of legal experts.<sup>43</sup> Their report, published in November 2006, largely cautioned against the introduction of a general ban.<sup>44</sup> Nevertheless, the government announced at that time that a law on face covering would be enacted. This commitment was reaffirmed in the Government Agreement in 2007, without resulting, however, in legislative initiatives by the government. Bills by individual MPs were introduced in July 2007 and in November 2007,<sup>45</sup> but did not lead to parliamentary debate. The subsequent Government Agreement of September 2010 again announced that the government would “submit a bill concerning a general prohibition of face covering garments, such as burqas.”<sup>46</sup> Towards the end of 2011, the government provided more details about its plans,<sup>47</sup> but in the end it did not enact legislation on the issue. The subsequent government agreement of October 2012 envisaged a more limited, ‘contextual’, ban in “education, the health care sector, public transport and government

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<sup>41</sup> *Parliamentary Documents*, Chamber of Representatives, 2005-06, 29 754, no. 41; *Parliamentary Reports*, Chamber of Representatives, 2005-06, no. 36, 2546.

<sup>42</sup> *Parliamentary Documents*, Chamber of Representatives, 2006-07, 29754, nr. 88; *Parliamentary Documents*, Chamber of Representatives, 2006-07, 29754, 30 545, nr. 25.

<sup>43</sup> *Parliamentary Documents*, Chamber of Representatives, 2006-07, 29754, nr. 71.

<sup>44</sup> See: B.P. Vermeulen et al., *Overwegingen bij een boerka verbod* [Considerations Concerning a Burqa Ban], The Hague, 2006.

<sup>45</sup> The former was introduced by right-wing MP, Geert Wilders (and Sietse Fritsma), and it was aimed at a “non-neutral,” general ban of the face veil only, whereas the latter was submitted by Liberal MP, Henk Kamp, and it was aimed at a neutral, general ban. See respectively, *Parliamentary Documents*, Chamber of Representatives, 2006-07, 31 108, nr. 2 (Wilders & Fritsma); *Parliamentary Documents*, Chamber of Representatives, 2007-08, 31 331, nr. 2 (Kamp).

<sup>46</sup> Government Agreement VVD [Liberals] – CDA [Christian Democrats], *Vrijheid en verantwoordelijkheid* [Freedom and responsibility], 29 September 2010, 26. On the Dutch developments until this point see G. van der Schyff & A. Overbeeke, “Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans”, *European Constitutional Law Review* 2011, 7, 432-435.

<sup>47</sup> It emphasised primarily social and “societal” reasons for the ban, arguing that face veils are at odds with Dutch values and practices of openness and interaction. Exceptions to the ban were to include certain festivities (Carnival, etc.), safety clothing, places of religious worship, as well as passengers in transit through the country at airports. The proposed maximum fine consisted of 380 euro. See X, “Boerkaverbod krijgt groen licht” [Burqa Ban Receives Green Light], NOS, 15 September 2011.

buildings”.<sup>48</sup> However, no bills have, as yet, been tabled in order to realise such a ban.

In Spain, the Senate approved by a narrow vote a motion to ban face veils and other face covering garments in June 2010.<sup>49</sup> The Socialist government of Prime Minister Zapatero did not support the motion, favouring educational measures instead.<sup>50</sup> In July 2010, the lower house of parliament in Spain rejected a bill to effectively ban the wearing of face covering garments in public.<sup>51</sup> The government then announced that it would support a contextual ban on people wearing such clothing in government buildings.<sup>52</sup> The February 2013 ruling by the Supreme Court (Section 2.1 above) is however expected by some to prevent broader bans at both the local and the national level.<sup>53</sup>

Debate is widespread in some Nordic countries as well, most notably in Denmark, with strong emphasis on the principle of gender equality. In 2009, a discussion on a ban in public places broke out after the spokesperson of one of the parties in the government coalition stated that he favoured such a ban. The proposal was rejected by the government after the Minister of Justice stated that in his opinion such a law would be unconstitutional and/or incompatible with the European Convention on Human Rights (ECHR). A working group was subsequently established to explore limiting the wearing of face veils without violating constitutional guarantees. Furthermore, in January 2010, the Danish Prime Minister stated that “the burqa and the niqab do not have their place in Danish society... They symbolize a conception of women and of humanity to which we are fundamentally opposed and that we want to fight in Danish society.”<sup>54</sup> Additionally,

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<sup>48</sup> Government Agreement VVD [Liberals] – PvdA [socialists], *Bruggen slaan* [Building bridges], 29 October 2012, 32. The agreement further determines that police can order people to uncover their faces for purposes of identification in the public space in general, and that someone who wears face-covering clothing “does not meet the requirements of receiving for social benefits”.

<sup>49</sup> The vote was 131 for and 129 against.

<sup>50</sup> R. Minder, “Spain’s Senate Votes to Ban Burqa”, *New York Times*, 24 June 2010.

<sup>51</sup> By a vote of 183 for to 162 against, with 2 abstentions.

<sup>52</sup> A. Clendenning & H. Heckle, “Spain Rejects Burqa Ban - For Now”, *Huffington Post*, 20 July 2010.

<sup>53</sup> M. Ferschtman & C. de la Serna, “Case Watch: Spanish Supreme Court Repeals City Burqa Ban”, *Open Society Justice Initiative*, 22 March 2013. Although the Court did emphasize that its ruling would not prejudice the possibility that the Spanish government could seek to amend the Organic Law and implement a burqa ban at the national level.

<sup>54</sup> A. Gérin, *Rapport d’information fait en application de l’article 145 du règlement au nom de la mission d’information sur la pratique du port du voile intégral sur le territoire national*, 26 January 2010, 71-72.

women are already obliged to uncover their faces when using public transport, and the penalty for anyone who forces someone else to cover his or her face has been increased to four years of imprisonment.<sup>55</sup>

Prominent politicians have called to ban face veils in Austria as well. The Conservative Minister of Science and Research, Johannes Hahn, for example, stated in an interview in April 2008 that he favoured a ban on the burqa in public places because such clothing renders video-surveillance systems ineffective. The Minister also saw cultural reasons for a ban, in that he considered facial and bodily expressions (*das Mienenspiel*) to constitute an integral part of communication “in our culture.”<sup>56</sup> Some members of parliament have also recommended a ban. Moreover, the Social Democrat Minister for Women and Public Services, Gabriele Heinisch-Hosek, said in several interviews in December 2009 that she favored a ban on the full veil, at least in public buildings, if the number of women wearing it was to increase, because she considered “the burqa a sign of the submission of women,” which also greatly hindered women from finding jobs. These calls notwithstanding, to date no legislative initiatives have been taken in the country to enact a ban.

In neighbouring Switzerland, the lower house of the Swiss Parliament rejected a proposal to ban face-covering clothing in public, by a narrow margin, on 28 September 2012. The ban would also have applied to Islamic face veils.<sup>57</sup> The lower house, for the time being, left it to the individual *Cantons* (States) to decide whether to ban face covering in public demonstrations. A motion – entitled ‘masks off’ – calling for a ban on face covering had already been considered in 2011. Back then it did pass the lower house of Parliament, only to be rejected by the upper house.<sup>58</sup>

In Germany there is no nation wide ban in place, and there have been relatively few conflicts concerning face veils. Only in the *Land* (State) of Hessen did the Ministry of Interior Affairs promulgate an ordinance on 2 February 2011, which prohibits covering one’s face. Even this ordinance, however, applies only to employees and officials in municipal and regional public offices, and not to the public space.<sup>59</sup>

<sup>55</sup> Law no. 651 of 15 June 2010. See also W. Fautré, *supra* note 16.

<sup>56</sup> Apa/red, “Minister Hahn möchte die Burka verbieten: Für Verbannung aus dem öffentlichen Raum”, *News.at*, 18 April 2008.

<sup>57</sup> The proposal, which had been introduced by the Swiss canton (state) of Aargau.

<sup>58</sup> “Swiss Burqa Ban Bid Rejected In Parliament”, *Huffington Post*, 28 September 2012; “Switzerland: Burqa Ban Voted Down”, *Library of Congress*, 1 October 2012.

<sup>59</sup> This ordinance was introduced after a female employee in the municipality of Frankfurt started wearing a niqab, after returning from maternity leave. After failed negotiations with local authorities concerning the issue, the woman decided to quit her job.

Some other European states appear to be ignoring the matter altogether. This is the case first and foremost in the UK and Ireland, which seems due in part to their legal systems that strongly protect individual rights and tend toward greater accommodation of religious practices, but also because the burqa ban is widely considered to be ‘un-British’ and ‘un-Irish’. The practice does not seem to have given rise to significant public debate in several Central and Eastern European states either, which may be explained by the fact that the practice of wearing such clothing is virtually nonexistent in these regions.<sup>60</sup>

### 3. Stated Reasons for Banning Face Covering

Analysis of parliamentary documents and debates<sup>61</sup> reveals three clusters of arguments being advanced by politicians who propose or support bans on face covering: security (Section 3.1), women’s rights (Section 3.2), and “living together” (*le vivre ensemble*) (Section 3.3). In the discourse of Belgian politicians, the three clusters enjoy more or less equal prominence. The French debate made only occasional reference to security arguments, and dwelt extensively on the concept of *vivre ensemble* which was developed philosophically, politically, and legally.

#### 3.1. Security

The first set of arguments points to various security and safety risks when individuals appear in public places without being recognizable. The arguments concern mostly objective security, with occasional references to subjective security and even traffic safety.

References in the Belgian and French parliamentary debates concerning objective security are similar. It has been suggested in both debates that face covering is linked to identity fraud. The need was mentioned for recognizing or identifying people “for example at the post office for rendering a

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<sup>60</sup> A. Gérin, *supra* note 54, 67-69 and 81-84. At the same time, of course, in most of the countries in which the issue has led to debate (or even legislation), face veils are extremely rare as well.

<sup>61</sup> Belgium: Documents of the 2010-2011 session under the heading 53K0219 on the website of the Chamber of Representatives: [www.dekamer.be](http://www.dekamer.be). France: Documents of the 2009-2010 Extraordinary session under the heading of adopted document 524 at [www.assemblee\\_nationale.fr](http://www.assemblee_nationale.fr).

letter, at the polling station, or while paying in a shop.”<sup>62</sup> Belgian and French MPs also mentioned the case of mothers covered by a face veil fetching their children from school, arguing that one must be certain that the person who collects the child is indeed the mother. The veil was also linked to violent crime. MPs in both countries made reference to a robbery at a post office in France, allegedly committed by two men wearing burqas. In the Belgian debates, there was also mention of a terrorist attack in Pakistan where a person had used a face veil as a disguise. Some Belgian MPs argued further that weapons can be hidden under a burqa. In the security context, the needs for recognisability and identification were generally conflated.

Some Belgian MPs also invoked subjective security, stating that a ban on face covering would have a positive effect on people’s *feeling* of security, comparing a ban on face covering with the provision of street lighting, as a measure that would reduce fear of crime and provide a feeling of security to the public. In the French debate, by contrast, feelings of public unsafety and discomfort at the sight of veiled women were accounted for in the elaborate discourse on *le vivre ensemble* (Section 3.3). Likewise, the assumed link between the face veil and radical Islamic groups was not discussed as a matter of security but as an issue relating to living together (Section 3.3).<sup>63</sup>

Finally, a Belgian MP cited traffic safety among the grounds for the ban. As this argument was not elaborated further, it remained unclear whether it concerned the fear that a veiled woman would not have the minimal visual field required to drive safely,<sup>64</sup> or whether it had to do with the appearance of someone wearing a face veil distracting other users of the road.

In general, the reliance on security arguments was much less pronounced in the French parliamentary debate than in the Belgian one. The French Minister of Justice even stated in Parliament that “this is not a security issue.”<sup>65</sup> Apparently, the reason behind the French reluctance to rely on

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<sup>62</sup> French Parliament, “Etude d’impact (projet de loi interdisant la dissimulation du visage dans l’espace public”, 7.

<sup>63</sup> Moreover, in the decision of the Conseil Constitutionnel (*supra* note 29) living together and public security are conflated: “considering... that the legislator has estimated that such practices may constitute a danger for public security by ignoring the minimal requirements of societal life” (§ 4).

<sup>64</sup> To the extent that it concerned the first consideration, this may have been prompted by a French argument from April 2010 regarding the fining of a veiled driver: News Wires, “French Police Fine Female Driver for Wearing Full Islamic Veil”, [www.france24.com](http://www.france24.com).

<sup>65</sup> French Parliament, Assemblée nationale, Discussion en séance publique, troisième séance du mardi 6 juillet 2010, 3.

security as a foundation for the ban is to be found in the opinion of the French Council of State according to which security would support only a partial ban, restricted to places exposed to a sufficiently established security risk.<sup>66</sup> An alternative minority bill,<sup>67</sup> which remained within the perimeters established by the Council of State (i.e. proposing a ‘contextual’ ban), was not debated in the French Parliament because the government supported a general ban on grounds of women’s rights (Section 3.2) and especially of a view that face covering is incompatible with French values and society (Section 3.3).

### 3.2. *Women’s Rights*

Political proponents of a ban on face veils in both Belgium and France regard such garments as an infringement on women’s dignity and humanity and as a form of discrimination against women. In the resolution preceding the French bill (Section 2.2.1 above), the protection of women’s equality and dignity is the main motive.<sup>68</sup>

In the Belgian parliamentary debates, the underlying assumption was that women wearing a face-covering veil were most of the time (or always) forced to do so. The hypothesis that women wear face veils of their own free will was hardly considered in the Belgian debates. French MPs, by contrast, relying in particular on the work of the Gérin commission, were more aware that some women choose to wear the face veil but argued that the face veil was a violation of women’s humanity even in those cases.

The Gérin commission set out the case against the face veil based on the structure of the three French Republican principles of *liberté, égalité, and fraternité* (freedom, equality, and brotherhood), a theme that returned in the rhetoric of several MPs. When a woman is forced to cover her face, her freedom is obviously impaired. The Gérin commission did not find evidence of women being forced to wear a face veil, but one testimony stated that there had been cases of girls as young as eight years old wearing a face veil. The commission argued that in such a case there cannot be free

<sup>66</sup> Conseil d’Etat, *supra* note 28, 30–35.

<sup>67</sup> French Parliament, Assemblée nationale, N° 2544, Proposition de loi visant à fixer le champ des interdictions de dissimuler son visage liées aux exigences des services publics, à la prévention des atteintes à l’ordre public.

<sup>68</sup> French Parliament, Assemblée nationale, texte adopté n° 459, Résolution sur l’attachement au respect des valeurs républicaines face au développement de pratiques radicales qui y portent atteinte, §§ 1 and 5.



consent.<sup>69</sup> The Commission suggested also that adult women who claimed to choose the veil may have had to cope with psychological pressure.<sup>70</sup> This was confirmed by the French Minister of Justice, among others: “even when they claim this garment, these women are often in the grip of fundamentalist preachers, or they are victims of violence within the family, or they are being forced to hide their faces by pressures in their environment.”<sup>71</sup> Both French and Belgian MPs used strong metaphors to condemn the face veil, branding it as a “mobile jail,” or a “textile prison”. Some stated that face veils were an indication of “other violent infringements of human rights, such as the right to education, the right to control one’s own body, the right of free movement in public, freedom of speech and freedom of opinion.”<sup>72</sup> Moreover, occasional references were made to the situation of women in places such as Afghanistan, Algeria, Saudi Arabia, and Iran. The MPs presented banning the face veil in France and Belgium as a logical consequence of their disapproval of the obligation imposed on women to cover themselves in these countries, and as an act of solidarity with the women living there.

When the face veil is a free choice, the argument based on *liberté* does not apply, but MPs argued that even in these cases the issue of *égalité* remains entirely valid: “the practice of wearing a face veil attests... to a fundamentally non-egalitarian vision of the relations between men and women.”<sup>73</sup> As a *symbol* of female oppression, the face veil is regarded as an offense to the human dignity, not only of its wearer but of *all* women. Moreover, it is claimed that a woman wearing the face veil affects the dignity of all individuals “who share the public space with her and find themselves treated as persons one needs to protect against by refusing even visual exchange.”<sup>74</sup> In addition to the specific violation of women’s dignity and that of the public at large, MPs claimed that men’s dignity was touched upon as well because men are stigmatised as “avid predators” by the fact of face veils being worn.<sup>75</sup> Therefore, it was irrelevant whether the garment

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<sup>69</sup> A. Gérin, *supra* note 54, 99–100.

<sup>70</sup> *Id.*, 99.

<sup>71</sup> French Parliament, Assemblée nationale, Discussion en séance publique, troisième séance du mardi 6 juillet 2010 (Garraud).

<sup>72</sup> Belgian Chamber 2010–11, no. 53–219/4, 7.

<sup>73</sup> French Parliament, “Etude d’impact (projet de loi interdisant la dissimulation du visage dans l’espace public”, 7.

<sup>74</sup> French Parliament, Assemblée nationale, Projet de loi interdisant la dissimulation du visage dans l’espace public, Exposé des motifs, 4.

<sup>75</sup> French Parliament, Assemblée nationale, Discussion en séance publique, première séance du mercredi 7 juillet 2010, (Dray).

was worn willingly or not: as an inherently reprehensible symbol that by definition entails a “debasement of the concepts of humanity and of women,” it should be banned in any case.<sup>76</sup> The Gérin commission developed this theme extensively, describing the face veil as a marker of sexual apartheid,<sup>77</sup> an instance of objectification of women,<sup>78</sup> and an expression of the desire to see women disappear from the public space.<sup>79</sup> The commission described the situation of women choosing to wear the face veil as “voluntary servitude.”<sup>80</sup> The women’s rights committee of the French Parliament alleged “false consciousness”, claiming that those women “have internalized their own inferiority.”<sup>81</sup> Informed by legal experts that one cannot, legally speaking, infringe upon one’s own dignity, the commission maintained nevertheless that whether worn voluntarily or not, the face veil denies women’s dignity, understood as a moral rather than a legal concept.<sup>82</sup> These themes of the Gérin report echo throughout the debates in the French Parliament.

### 3.3. “Living Together”

The third cluster of arguments involves the alleged antisocial character of wearing a face veil. These arguments were highly conceptualized and much elaborated in the French debate, but less so in the Belgian one. In their simpler and less conceptualized presentation in the Belgian Parliament, however, they may better express the essence of the argument: the fundamental unease of a large majority of people with the idea of a face veil, and the widespread feeling that this garment is undesirable in “our society.” It was argued that the face veil “disrupts” the social environment because members of the general population indicate “that they do not wish to encounter something like that in the street... Everyone has his own reasons for this, but it is a common sentiment in any event.”<sup>83</sup> This ties in with

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<sup>76</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>77</sup> A. Gérin, *supra* note 54, 109.

<sup>78</sup> *Id.*, 110.

<sup>79</sup> *Id.*, 111.

<sup>80</sup> *Id.*, 43.

<sup>81</sup> 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.

<sup>82</sup> A. Gérin, *supra* note 54, 113.

<sup>83</sup> Belgian Chamber 2010-11, *Parliamentary proceedings*, 28 April 2011, no. 53-30, 35.

arguments having to do with communication and interaction. It is presumed that covering the face hinders communication and that a person who covers her face isolates herself from others and from the community. This is considered to be intolerable because the possibility of having interactions between individuals in public life in order to bring about and reinforce social ties in the community is deemed essential. Belgian MPs argued that it would be impossible for a person, of whom only the eyes are visible, to participate in these dynamics of “living in a community” because wearing “face-covering garments largely precludes verbal and non-verbal communication.”<sup>84</sup> The interference with communication arising from this circumstance would “consequently be liable to prejudice public order and lead to social disruption.”<sup>85</sup>

In the French debates the conception of *le vivre ensemble*, a term also used by some French-speaking Belgian MPs, has been given intellectual and political clout, and was eventually translated into a novel legal concept that became the main reason proffered for the ban in the government bill. From the political angle, this theme embodies the principle of *fraternité* and even of the French Republic as such, as expressed in the slogan: “*La République se vit à visage découvert*” (“the Republic is lived with uncovered face”). Intellectual foundations are sought, among others, in the work of the French philosopher, Emmanuel Lévinas, who wrote about the importance of the face in the encounter with another human being.<sup>86</sup> Quoting from his work, the Gérin report concludes that “access to the face as a face is immediately ethical”<sup>87</sup> and that “seeing only the eyes of a woman while the rest of her face is covered... restricts one to addressing that human being as an object.”<sup>88</sup> The sociologist, Elisabeth Badinter, who was interviewed by the Gérin commission, delivered an analysis that was quoted widely by French and even Belgian MPs. She stated that wearing a face veil implies a severing of the social contract, a refusal to integrate, and a rejection of dialogue and of democracy.<sup>89</sup> She accused women wearing a face veil of refusing reciprocity: seeing without being seen is a type of symbolic violence and a source of perverse pleasure in combining power, exhibitionism, and

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<sup>84</sup> Belgian Chamber 2010-11, no. 53-85/1, 3.

<sup>85</sup> *Id.*, 4. Elsewhere there was mention of a “social bomb at the foundations of shared values” (Belgian Chamber 2010-11, no. 53-219/4, 22).

<sup>86</sup> A. Gérin, *supra* note 54, 117-118. See critically on this interpretation of Lévinas: J. Vrieling, *supra* note 38, at 260.

<sup>87</sup> *Id.*, 117.

<sup>88</sup> *Id.*, 118.

<sup>89</sup> *Id.*, 118.

voyeurism.<sup>90</sup> The Gérin report endorsed these claims, and furthermore labelled the face veil “uncivil”<sup>91</sup> and “a violation of our social code.”<sup>92</sup> Moreover, both French and Belgian MPs linked the rejection of contact in the public space with the rejection of “Western civilisation” or of “our way of living” by radical Islam. The ban on face covering is allegedly a step to combat Islamism or Islamization in general, and to safeguard Western society.

The French Council of State, in its advice, suggested that the idea of living together could potentially be legally translated into a new interpretation of the concept of public order, which may legitimize a general ban on face covering. This new interpretation would build on the idea of “non-material public order” that currently signifies mainly public morality and respect for human dignity. The Council suggested that the new concept may be linked to the idea of *fraternité* and would refer to “a minimal basis of reciprocal requirements and guarantees that are essential for life in society and that... are so fundamental as to serve as conditions for the exercise of other liberties...”<sup>93</sup> This implies that “as soon as an individual is in a public place in the broad sense... he can neither deny his belonging to society nor have it denied by hiding his face.”<sup>94</sup> The Council of State noted that such a concept had not been developed previously in French legal doctrine or case law, and was not found in any neighboring legal system either. Therefore it considered it vulnerable to constitutional challenges and advised against its use. Nevertheless, French MPs adopted the new concept,<sup>95</sup> renamed it “social public order,”<sup>96</sup> and built their case for a ban on face covering mainly on that ground.

### 3.4. Conclusion

Those familiar with the debates on headscarf bans in Belgium and France may be surprised to note that the concepts of state neutrality, secularism,

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<sup>90</sup> *Id.*, 119.

<sup>91</sup> *Id.*, 119–120.

<sup>92</sup> *Id.*, 120.

<sup>93</sup> French Council of State, *supra* note 28, 26.

<sup>94</sup> *Id.*, 27.

<sup>95</sup> French Parliament, Assemblée nationale, rapport fait au nom de la commission des lois constitutionnelles, de la législation et de l’administration générale de la république sur le projet de loi interdisant la dissimulation du visage dans l’espace public, 15–19.

<sup>96</sup> French Parliament, Assemblée nationale, Discussion en séance publique, troisième séance du mardi 6 juillet 2010, 4.

and *laïcité* do not figure in the above account of stated reasons for banning the face veil. When the Gérin commission was created, *laïcité* was a central part of its frame of reference. But after hearing the experts, the commission concluded that these concepts apply in the relationship between individuals and state authorities, but not in private relations. Reluctant to accept this, the Gérin commission concluded that the face veil violated the spirit if not the letter of the principle of *laïcité*, and this in a philosophical rather than a legal sense.<sup>97</sup> In the parliamentary debates references to *laïcité* are scarce.

Of the three foundations used to justify face-covering bans in France and Belgium, only the security argument applies fully to all instances of face covering that renders a person unrecognizable. The living together argument is moot in many cases of face covering beyond the Islamic face veil, and the argument based on women's rights is not pertinent to types of covering that are not gender-specific. Despite manifest efforts by some politicians who participated in the French and Belgian burqa ban debates to suggest that they were not aiming specifically at Islamic dress, even a cursory glance at the parliamentary documents and debates in either country makes it clear that the Islamic face veil was the focal point of legislative action. Both the Belgian and the French statutes risk being highly problematic in their application to cases other than the face veil.

#### 4. Burqa Bans and Human Rights

In this section we focus on the application of the statutes to the face veil and test the stated purposes of each of the statutes against the provisions of the main common fundamental rights framework in Europe, i.e., the European Convention on Human Rights. When the statutes are applied to the Islamic face veil, the central question is whether the prohibitions can be reconciled with freedom of religion, which is protected, among others, by Article 9 of the ECHR.

The issue can also be framed as a question of possible discrimination on the grounds of religion and gender under Article 14 of the ECHR, in combination with Article 9. Despite the facial neutrality of the acts, the parliamentary debates in both countries clearly reveal that one particular group is targeted, namely Muslim women wearing a face veil. Even if this were not

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<sup>97</sup> A. Gérin, *supra* note 54, 93-94.

the case, the acts would still involve disparate impact, based on religion *and* gender, which possibly constitutes indirect discrimination because one can presume that Muslim women who wear face veils will experience a particular disadvantage following such a prohibition, compared with other persons.

In other situations, and in subsidiary order, freedom of speech (Article 10 ECHR) and the right to privacy (Article 8 ECHR) may also be relevant for women wearing face veils. To the extent that conspicuous clothing may be intended as a statement, it can fall within the scope of freedom of speech, as so-called “symbolic speech.” With respect to privacy, the former European Commission of Human Rights (EComHR) has ruled that “constraints imposed on a person’s choice of mode of dress constitute an interference with the private life as ensured by Article 8 para. 1 of the Convention.”<sup>98</sup>

The test applied to determine the legitimacy of restrictions under Articles 10 and 8 of the ECHR and of unequal treatment under Article 14 is roughly the same as the analysis under Article 9. In particular, the restriction must be a proportionate means to achieve a legitimate aim. To avoid repetition of analogous arguments, only the analysis under Article 9 is developed here.

#### *4.1. Freedom of Religion: Scope*

The right to freedom of religion comprises the freedom to practice and express one’s religion both in private and in public.<sup>99</sup> This right does not protect every act motivated or inspired by a religion or belief,<sup>100</sup> but it does protect in principle the performance of religious duties. In the parliamentary debates some MPs did claim, however, that wearing a face veil is not a religious duty and that this point of view is shared by many Muslim women. However, delineating the scope of freedom of religion must be kept separate from theological debates on the prescriptions of specific religions. In keeping with international consensus, the ECtHR refers in this matter to individuals’ personal convictions as to whether a certain religious duty

<sup>98</sup> EComHR, 22 October 1998, *Kara v. the United Kingdom*.

<sup>99</sup> See, e.g. C. Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford, Oxford University Press, 2001, 103 e.v.

<sup>100</sup> EComHR, 12 October 1978, *Arrowsmith v. the United Kingdom*, no. 7050/75. See D.J. Harris, M. O’Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights*, 2009, 433-434 and P. Van Dijk, F. Van Hoof, A. Van Rijn and L. Zwaak (eds.), *Theory and practice of the European Convention on Human Rights*, 2006, 761 e.v.

must be followed,<sup>101</sup> avoiding entanglement in theological issues. When wearing a face veil is said to be inspired by a religious conviction, one can generally conclude that a prohibition amounts to an interference with freedom of religion. Such interference is justified only when it has a legitimate aim<sup>102</sup> and when the interference can be considered proportionate with the objective.

The above analysis of the parliamentary debates yields three potentially legitimate aims that the legislator hopes to achieve by means of the burqa ban: public safety, women's rights, and social interaction as a matter of public order. These are examined below.

#### 4.2. *Banning in the Name of Public Safety: A Matter of Proportionality*

To be considered a legitimate aim to restrict human rights, feelings of unsafety must be objectively founded.<sup>103</sup> Therefore, a religious practice cannot be prohibited merely because a portion of the population finds it offensive or even alarming.<sup>104</sup> According to the ECtHR, “a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling - real or imaginary - cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement.”<sup>105</sup> Moreover, there is the risk that such feelings are founded on motives that do not constitute valid grounds for government policy, for example, because they may be discriminating. Fear of Islam, for instance, is something which the government must take seriously in its policy, but which it cannot treat as a motive for legislative action. Therefore, it appears that a prohibition cannot be legitimately based upon subjective feelings of unsafety that may be caused by people wearing face veils.

By contrast, the requirement of recognizability in order to guarantee objective public safety can be regarded as a legitimate goal. A rights-restrictive measure in the name of safety must, however, be able to achieve its

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<sup>101</sup> See, e.g. ECtHR, 10 November 2005, *Leyla Sahin v. Turkey*, §78; and ECtHR, 7 December 2010, *Jakóbski v. Poland*, §44-45.

<sup>102</sup> The following legitimate aims are allowed under Article 9 ECHR: “public safety... the protection of public order, health or morals or... the protection of the rights and freedoms of others.”

<sup>103</sup> M. Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, Strasbourg, Council of Europe Publishing, 2009, 95.

<sup>104</sup> *Id.*

<sup>105</sup> ECtHR, 8 July 2008, *Vajnai v. Hungary*, §57. See also on this case, Section 4.3 below.

aim. This requirement does not support the argument that weapons can be hidden under the religious garments targeted by the ban. To the extent that one can hide weapons under Islamic clothing, this does not concern face veils, but rather the loose-fitting robes generally worn in combination with them, which are not included under the prohibition. Moreover, the measure must address an actual safety problem. Restriction of civil liberties, in this case primarily the right to freedom of religion, cannot be based on speculation alone. In *Ahmet Arslan et al. v. Turkey*, the ECtHR assessed the criminal conviction of members of a religious order for wearing distinctive religious clothing in public. The court established a violation of the freedom of religion because it found no evidence that the applicants represented a threat to public order or that they were involved in proselytizing: the conviction was deemed not to have been necessary in order to protect public order, safety, and the rights of others.<sup>106</sup>

The relevant question is whether a general prohibition on *all* forms of clothing covering the face *everywhere* in the public space can be considered necessary and proportional to its aim of protecting safety. It appears difficult to reconcile the broad scope of the ban with the proportionality principle, which requires that a measure restricting a fundamental freedom be narrowly tailored and not burden that freedom any more than necessary to achieve its purpose. In most cases, safety risks (for example, the face veil being misused for criminal purposes such as bank robberies) can be overcome by less restrictive measures than a ban, like the obligation to lift the face veil upon a legitimate request. More generally, safety seems to require identifiability rather than permanent recognizability. If one wants to institute a prohibition on face covering based on safety considerations, one should restrict it to places where there are increased safety risks, such as prisons, airports, and the like.<sup>107</sup>

Finally, concerning the traffic safety argument, a prohibition could be legitimate at most in the context of certain traffic situations and not as a general prohibition. Moreover, it still remains to be shown that the prohibition is indeed necessary to guarantee traffic safety.<sup>108</sup> The assumption that a

<sup>106</sup> ECtHR, 23 February 2010, *Ahmet Arslan et al. v. Turkey*, §50.

<sup>107</sup> See in this regard the recommendations by the French Council of State: Rapport Assemblée générale plénière du Conseil d'Etat, *supra* note 28, 37. See also M. Evans, *supra* note 99, 95; A. Moors, *supra* note 40, 406.

<sup>108</sup> In addition, the question may be posed whether one's own car can be regarded as a public place. In France, the government has already explicitly stated that this is not the case. "À l'exception de ceux affectés aux transports en commun, les véhicules qui empruntent les voies publiques sont considérés comme des lieux privés. La dissimulation du visage, par une



veiled woman is unable to see sufficiently to drive safely or to take part in traffic in some other manner is contradicted by research.<sup>109</sup> Regarding the alternative assumption that the *appearance* of someone wearing a face veil can distract other road users: if face veils were to be regarded (and banned) as a distraction, one would also have to prohibit many other conspicuous persons from taking part in traffic, such as punks, Goths, nuns, persons with large, visible tattoos, scantily dressed women, and many others. It would be manifestly untenable to base a (traffic) prohibition on such forms of “distraction.”

#### 4.3. *Banning in the Name of Women’s Rights: A Question of Autonomy*

Protecting gender equality is a legitimate aim that can justify restriction of human rights, provided that such restrictions are relevant and proportionate. To assess this, a distinction can be made between women who are forced to wear a face veil and those who choose to wear it. Research in France, the Netherlands, Denmark and in Belgium itself suggests that a significant number, likely the majority of women wearing face veils, opt to do so.<sup>110</sup> Many in France and Belgium are skeptical of such findings, but in the United Kingdom the stereotype of the oppressed wearers of face veils was already undermined when discussions arose concerning lawyers who were not allowed to wear niqabs while pleading in Court.<sup>111</sup> Moreover, the

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personne se trouvant à bord d’une voiture particulière, n’est donc pas constitutive de la contravention prévue par la loi” [With the exception of those used for public transport, vehicles using public roads are considered to be private places. If a person in a private car hides his/her face, this does not constitute a violation as intended by the law] ([www.visage-decouvert.gouv.fr](http://www.visage-decouvert.gouv.fr)).

<sup>109</sup> For example, Pearce *et al.* conclude in their study that “any attempt to preclude [niqab] wearers from driving on safety grounds is not justified on the basis of the evidence presented here” (E.I. Pearce, G. Walsh, & G.N. Dutton, “Does the Niqab (Veil) Wearer Satisfy the Minimal Visual Field For Driving?”, *Ophthalm. Physiol. Opt.* 2008, 312).

<sup>110</sup> Rapport Assemblée générale plénière du Conseil d’Etat, *supra* note 28, 20; A. Moors, *supra* note 3, 56; Open Society Foundations, *Unveiling the Truth; Why 32 Muslim Women Wear the Full-Face Veil in France*, 2011; M. Warburg, *Rapport om brugen af niqab og burka*, Institut for Tvaerkulturelle og Regionale Studier, 2009; E. Brems et al., “The Belgian ‘Burqa Ban’ Confronted with Insider Realities”, in E. Brems (ed.), *The Face Veil in Europe Inside and Out*, Cambridge: Cambridge University Press, forthcoming; E. Brems, et al., *Wearing the Face Veil in Belgium; Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering*, Ghent: University of Ghent, 2012.

<sup>111</sup> N. Bakht, “Objection Your Honour! Accommodating Niqab-Wearing Women in Courtrooms” in R. Grillo et al. (eds.), *Legal Practice and Cultural Diversity*, Aldershot, Ashgate, 2009, 135–151. See also C. Joppke, *Veil. Mirror of Identity*, Cambridge/Malden, Polity Press,

automatic assumption that women who wear a face veil are forced to do so fails to acknowledge that there are other choices, equally radical or more so, that women or men make for the sake of religion. In the Catholic religion, for example, there is a long tradition of monastic life where young adults undertake to commit their lives to God. This entails several far-reaching restrictions on freedom: abstaining from sexual relations and from a marital and family life, denying oneself elegant clothing, jewellery, and other forms of luxury, subjecting oneself to the authority of the convent's Mother Superior regarding the choice of study and professional career, and living in a homogeneous community of persons of the same gender. In the case of an enclosed convent one also denies oneself all contact with the outside world. By comparison, wearing a face veil is less "rights-restrictive" in some respects. Women wearing niqabs can marry, have sexual relations, and start a family. Moreover, they often wear face veils only for a certain period in their lives,<sup>112</sup> whereas convent life is in principle forever.

With regard to women who wear face veils of their own free will, a prohibition on face covering does not contribute to gender equality. Rather, the opposite is the case because a prohibition restricts the freedom of choice of these women. In this hypothesis, the measure also conflicts with the principle that criminalization should be avoided if it concerns behavior that is (perceived to be) harmful only to the "perpetrator."<sup>113</sup> Accordingly, the ECtHR finds that personal autonomy "can also include the possibility of devoting oneself to activities perceived as being of a nature physically or morally damageable or dangerous to oneself," and that "particularly serious reasons" are required for interference.<sup>114</sup> In other words, one must take someone's personal autonomy into account even when a certain practice is harmful or perceived to be such. When applied to the face veil, this seems to imply that a woman's choice for such clothing is part of her personal autonomy.

By contrast, *forcing* a woman to wear a burqa or niqab amounts to an impermissible oppression of women. It is doubtful, however, whether criminalizing and fining the women in question can be considered an effective

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2009, 81-*et seq.*, where the author cites examples of teachers and doctors who wear niqabs in the UK.

<sup>112</sup> A. Moors, *supra* note 3, 55.

<sup>113</sup> See e.g. J. Feinberg, *Harm to Self (The Moral Limits of the Criminal Law; vol. 3)*, Oxford, Oxford University Press, 1986.

<sup>114</sup> ECtHR, 17 February 2005, *K.A. and A.D. v. Belgium*, §83. See also ECtHR, 29 April 2002, *Pretty v. the United Kingdom*, §66.

measure for combating such oppression. This approach treats the oppressed woman as the perpetrator rather than the victim. There is no reason to assume that a woman who is oppressed in such a manner that she is allowed out of the house only if she wears clothing that covers her face will gain more freedom of movement if a prohibition of such clothing is introduced.<sup>115</sup> By contrast, there is good reason to fear that she may no longer be allowed to go out at all. Therefore, the protection of women against imposed veiling cannot justify a ban on face covering under Article 9 of ECHR. Criminalizing the person who forces another to cover her face, a feature of the French but not the Belgian law, can be considered to be a relevant measure for the protection of women's rights, and does not seem to violate any human right.

The final question concerning women's rights is whether the face veil can be banned as a *symbol* of women's oppression. Prohibiting symbols is almost always at odds with freedom of speech. In rare cases, however, some symbols have been prohibited in some European countries. This is the case in Germany regarding symbols associated with National Socialism, such as the swastika.<sup>116</sup> Moreover, in some Eastern European countries, including Hungary<sup>117</sup> and Poland,<sup>118</sup> certain communist symbols are banned,<sup>119</sup> such as the hammer and sickle and the red star. But as these examples show, such bans tend to be closely linked with a history in which the symbols are intimately associated with the abolition of democracy, crimes against humanity, and genocide. Moreover, the case law of the ECtHR demonstrates that *even* in these situations the justification of prohibiting symbols is not self-evident. In *Vajnai v. Hungary*, the court ruled 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 ECHR. 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 symbol did not represent totalitarian rule *exclusively*. It had and still has multiple meanings.<sup>120</sup> Moreover, Hungary had not

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<sup>115</sup> See also A. Moors, *supra* note 40, 403.

<sup>116</sup> §86a German Criminal Code.

<sup>117</sup> Article 269b Hungarian Criminal Code.

<sup>118</sup> Article 256 Polish Criminal Code.

<sup>119</sup> Often in combination with those related to National Socialism.

<sup>120</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 [as] certain

shown that the use of the red star resulted in any danger of violence or disorder, and therefore there was no “pressing social need” for interfering with free speech.<sup>121</sup> Furthermore, several crucial differences between the above examples and the face veil serve to add to the fact that prohibiting the latter as a symbol cannot be regarded as proportionate. First, Islamic face veils are related to freedom of religion in addition to freedom of speech. Moreover, it is outsiders who regard and brand face veils as a symbol. For the women who wear them, it is first and foremost a religious practice, meaning that they tend not to agree with the negative meanings attributed to the symbol.<sup>122</sup> It may be argued that attributing a meaning not shared by the practitioners to a religious practice, and subsequently prohibiting the practice on the grounds of that meaning, violates the freedom of religion.

#### 4.4. *Is Uncovering in the Name of Social Interaction Required for Public Order?*

The arguments under the heading of “living together” (*le vivre ensemble*) concern the expediency that everyone appearing in public must be recognizable and available for communication. The French ban in particular relies strongly on this argument, turning it into a requirement of public order. Whether this argument can justify a general face covering ban under the ECHR, however, is highly questionable.

First, one can ask how preclusive of communication wearing a face veil really is. In an age of mobile phones and online communities, the philosophical claim that one cannot communicate with another without looking into his or her face seems detached from reality. Furthermore, the Dutch Equal Treatment Commission (ETC) points out in its opinions that

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lawful political parties active in different Member States”). *Mutatis mutandis*, the same is true even more for face veils. In this sense, see, e.g., S. Hussein, “Looking In or Looking Out? Stories On the Multiple Meanings of Veiling”, T. Dreher and C. Ho (eds.), *Beyond the Hijab Debates: New Conversations on Gender, Race and Religion*, Newcastle upon Tyne, Cambridge Scholars Publishing, 2009, 81–89; M. Williamson and G. Khiabany, “UK: the Veil and the Politics of Racism”, *Race & Class* 2010, in particular 89–91 (on the “multiple meanings of veiling”) See extensively on the issue of banning face veils for “symbolic” reasons J. Vrielink, “Symptomatic Symbolism. Banning the burqa ‘as a symbol’”, in E. Brems (ed.), *The Face Veil in Europe Inside and Out*, Cambridge, Cambridge University Press (forthcoming).

<sup>121</sup> ECtHR, 8 July 2008, *Vajnai v. Hungary*, §55.

<sup>122</sup> In this regard see, for example, R. Aslan, *No God But God: The Origins, Evolution, and Future of Islam*, London, Arrow Books, 2006, 73.

“adequate communication remains possible” despite a face veil: “Eye movement is - after all - clearly visible, and other body language is also not (completely) hindered by the chador.”<sup>123</sup>

More important is the question whether recognizability and communication may always be required for social purposes. In the French debate in particular a person setting herself apart from social interaction is treated as a crime against society. One can dispute, however, whether reinforcing social cohesion is covered under “public order” in the sense of Article 9 para. 2, i.e., whether it is a legitimate ground for restricting human rights. Is it not a matter of personal freedom whether or not one wants to have contact with other people in public? Some people take on a surly and inapproachable attitude when waiting at the bus stop. Others demonstratively open a newspaper in front of their face when another person is seated next to them on the park bench. Appearing in the street with headphones or earphones attached to an iPod<sup>124</sup> is another means of effectively precluding contact, as is hiding behind caps and scarves in order to be able to quietly reflect without being distracted. In short, a considerable number of people choose to adopt either sporadically or on a permanent basis an attitude of being unavailable for communication and interaction in public. There are also many people who cover or conceal a large part of their face, often including their eyes (which remain fully visible in a niqab) by sunglasses, headgear, or haircuts when they appear in public. A government that for the sake of promoting social contact compels people to be recognizable and approachable adopts a particularly moralistic attitude and would thereby seem to use criminal law for improper purposes. It is, in any case, an established liberal democratic principle that criminal law should not be used in order to regulate morality when no significant harm is involved.<sup>125</sup>

But even if one were to accept the legitimacy of this aim, it would not seem to justify the far-reaching restrictions of human rights that the prohibition entails, i.e., being generally applicable in all public places and linked

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<sup>123</sup> ETC, 6 September 2000, opinion 2000-63, §4.9. But see also: ETC, 20 March 2003, opinion 2003-40.

<sup>124</sup> This does not concern the road safety discussion regarding headphones and MP3 players, but refers purely to the way in which they affect the opportunity to communicate. Regarding the former issue, see, e.g., Belgian Road Safety Observatory, *MP3 players and traffic safety 'state of the art'*, Brussels, Belgian Road Safety Institute, 2009.

<sup>125</sup> See extensively on harm and morality and the criminal law: J. Feinberg, *Harm to Others (The Moral Limits of the Criminal Law; vol. 1)*, Oxford, Oxford University Press, 1984; J. Feinberg, *Offense to Others (The Moral Limits of the Criminal Law; vol. 2)*, Oxford, Oxford University Press, 1985.

to penal sanctions. If one wishes to promote the objective of optimally “living in a community”, many less restrictive measures are available to achieve the requisite changes in mentality and behavior, such as educational and persuasive strategies, which are preferable to repressive means.

Finally, it is important to emphasise that only a small number of women wear face veils. Estimates vary, but fluctuate between 200 and 270 women in Belgium<sup>126</sup> and around 1,900 in France.<sup>127</sup> This suggests that the possible threat to the social climate that these women allegedly pose is extremely limited.

## 5. Conclusion

Burqa bans in public places affect relatively few women but raise fundamental legal questions. When the arguments in support of the bans are examined closely, it appears that they are unable to justify a general prohibition because such a measure is either not relevant to achieving its objective or because it is not proportionate with it. This conclusion is underlined by the fact that many leading international human rights actors have condemned the bans. Amnesty International already did so in April 2010, issuing a statement that a general prohibition on face veils is contrary to freedom of speech and religion,<sup>128</sup> and it has since reiterated this point on several occasions. Human Rights Watch,<sup>129</sup> Thomas Hammarberg and Nils Muižnieks (the consecutive Commissioners for Human Rights of the Council of Europe),<sup>130</sup> also spoke out against a ban, and a unanimous

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<sup>126</sup> The number of 270 is based on statements made by representatives of the *Centre d'Action Laïque* during the hearings that took place on November 13, 2009 of the Gérin extraordinary parliamentary commission that examined the French legislative proposal (A. Gérin, *Rapport d'information fait en application de l'article 145 du règlement au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national*, 26 January 2010, 74). By contrast, the Centre for Equal Opportunities estimates that there are approximately 200 women wearing face veils in Belgium (J. De Wit, “Kamer keurt boerkaverbod goed”, *Gazet van Antwerpen*, 2 April 2010). There are no official figures on the precise number of women wearing face veils.

<sup>127</sup> A. Gérin, *supra* note 54, 29.

<sup>128</sup> Amnesty International, “Bans on Full Face Veils Would Violate International Human Rights Law”, 21 April 2010.

<sup>129</sup> L. Gerntholtz and G. van Gulik, “Beyond the Burqa” ([www.hrw.org](http://www.hrw.org)).

<sup>130</sup> T. Hammarberg, “‘Rulings anywhere that women must wear the burqa should be condemned - but banning such dresses here would be wrong’, says Commissioner Hammarberg”, *Viewpoint*, 8 March 2010 ([www.coe.int](http://www.coe.int)).

resolution against a general prohibition was passed in the Parliamentary Assembly of the Council of Europe.<sup>131</sup>

In conclusion, it is possible that the burqa bans will not pass scrutiny by the ECtHR. The reasons offered for the restriction seem to be sufficient to legitimize at most a limited set of contextual bans, in times and places where actual safety risks are involved.<sup>132</sup> But there is reason to doubt that safety concerns are at the heart of the matter for those supporting burqa bans. The crucial theme appears to be the one that is expressed in the French and Belgian debates as “living together”, which amounts to a conflict surrounding minority integration. Even if one were to agree with the idea that successful integration requires niqab wearers to lay off their face covering, it is difficult to see how forcing this change of dress by means of the criminal law would be consistent with basic democratic rights and principles.

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<sup>131</sup> Resolution 1743 of the Parliamentary Assembly of the Council of Europe (23 June 2010), §16-17. See also Recommendation 1927 of the Council of Europe Parliamentary Assembly, “Islam, Islamism and Islamophobia in Europe”.

<sup>132</sup> In addition, it would be defensible from a human rights standpoint to criminalize compelling or forcing a person to cover his or her face.

