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REGULATION OF FACE-VEILING AS RELIGIOUS SYMBOL IN EUROPE AND COHERENT CASE-LAW OF EUROPEAN COURT OF HUMAN RIGHTS

DANIEL BACHO*

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Abstract

In this article, the author deals with recent regulation of religious symbols in Europe with emphasis on the bans on face-coverings. The article reflects recent trends in European society to limit the freedom to manifest religion. The impetus was, above all, the Belgium law enacted in April 2010, which banned covering the face in public. Even if there was reasonable argumentation about the protection of society, there is probably gross violation of rights of Muslim women, who are requested to cover their whole body in public and wear the so-called burqa or niqab. The aim of this article is to confront the legal efforts of some European states to control the exercise of freedom of religion and on the other side, the freedom of religion and its practice. The law may be a mean of crushing religious traditions instead of fulfilling its role to protect these values.

Key words

Discrimination, freedom of religion, freedom to manifest religion, rights of Muslim women, religious symbols, European Court of Human Rights

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1. Introduction

Religious symbols are closely linked to the freedom of religion and its manifestation as one of fundamental human rights recognized by national law of many European countries and as well codified by international law. It continues to remain “particularly controversial right.”¹ One of the most discussed ways of manifesting religion is by covering up parts of the body of Muslim women, as it is entailed in religious traditions. The most orthodox of these rules is the necessity to cover the entire body including the face, in other words to wear the burqa. The burqa is the most discussed ways manifestations beside more liberal hijab and niqab. However, it is disputable if these above-mentioned manifestations could be regarded as religious symbols.

In April 2011 French law, which prohibits covering faces in public places, came into force. The aim of this law is, in terms of legislators, the protection of society against crime in the streets and protecting the rights of women and ethnic minorities. In France there are estimated 2,5 to 3 million Muslim women² and those who according to tradition, veil their bodies from head to toe and are thus outlawed by this act in public. These women face monetary punishment virtually every time they come out in the street.

The aim of this paper is to analyse the conflict of freedom of religion and freedom of its manifestation with protection of the anonymous crime and repression of women's rights. The author confronts the declared objectives of this act and the impacts that may potentially result among the society.

What are the true aims of the French law? Is this effort to push back religious symbols resulting from secularization of society or from its fears of other cultures? Does modern society need national law to regulate the rules of citizens' clothing? Aren't we possibly witnessing discrimination against minorities here?

The author of this paper discusses coherent case law of bodies of international justice with emphasis on European Court of Human Rights and the probability of its possible

¹ Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 309-310 (1993).

² Estimation published in International Religious Freedom Report 2007, Bureau of Democracy, Human Rights, and Labor, U.S. Department of State. Available at: <<http://www.state.gov/g/drl/rls/irf/2007/90175.htm>>

intervention in this matter. The author analyses plausible arguments that could be raised in the proceedings. In the analysis, the author attempts to summarize existing case law in this regard and its connection to the issue.

The author of this article admits that this article is not intended to provide a detailed analysis of Muslim symbols and their significance in Islam. The Muslim symbols are viewed from a legal and human rights perspective of a non-Muslim.

2. Regulation of veiling in Islam

Veiling of women's bodies has not only been a sign of Islam. Certain elements are embedded in Christianity, Judaism or religion of ancient Persia. The obligation of women to cover their faces in public is documented from the 8th century³. This habit was adopted by the Muslim world during its expansion into the former Middle East. The various forms of veiling vary according to which part of the body falls under the term *awrah*, i.e. the part of the body to be covered in accordance with the Quran. In analyzing the issue of veiling it is necessary to distinguish three fundamental concepts of *hijab*, *niqab* and *burqa*.

Hijab covers all parts of the female body except face and hands from the wrist. As can be seen in the illustrations hereunder it is essentially well known Muslim scarf covering the head except the face of the woman.⁴ Apart from legal constraints, in some countries we also observe the social enforcement, when it is considered unacceptable to unveil *awrah* in public.⁵ Niqab is intended to protect female faces from the sight of *namahrams*⁶ in public and free women of worries about their appearance. As it is evident in the illustration below, Niqab is a scarf that covers most of the face except the eyes. It tends to presume that it is an obligation, but the view that regards niqab as only a laudable and pious act seems to be largely applied.⁷

³ Spuler, Bertold. *The Muslim World, A Historical Survey: The Age of the Caliphs*. Trans. F.R.C. Bagley. Leiden: E.J. Brill, 1995; Introduction

⁴ Hijab in the Muslim world is generally recognized and it is also enforced by law in some traditional Islamic countries like Saudi Arabia and Iran.

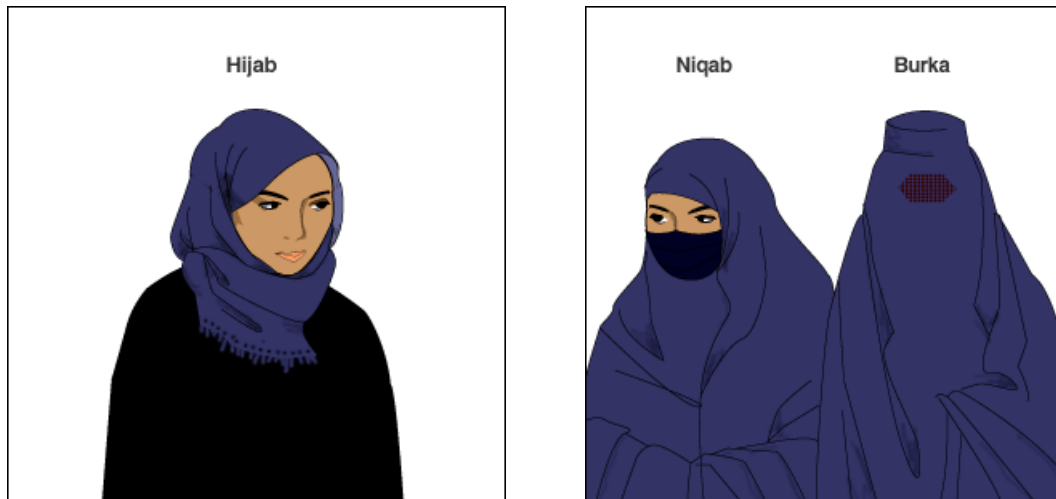
⁵ Historically, there are documented extreme cases of social coercion. During the first Palestinian Intifada in 1987, Muslim women, who in protest against the extremist politics of Hamas took off their scarves, were assaulted verbally and physically. In this case, women were sexually attacked and in most extreme cases the stoning of accused women took place.

⁶ The term *namahram* is explained by using the quote from Quran hereunder in the article.

⁷ This tradition comes from the Muslim teachings about the life of Muhammad, where all the women of the prophet had covered their face.

Burqa, in contrast to the previous two examples, consists of one full piece of clothing covering the female body and the visibility is provided with small reticle or narrow slit at eye level.⁸ This type of veil is used in heavily orthodox Muslim regions and it is also required by the Salafi Muslim movement, which prohibits any exposure of the female body in public.

The above mentioned forms of veiling and their use vary from region to region. The practice of above-mentioned forms varies in validity and degree of covering both in different countries and among the Muslim women therein.⁹ The use also depends on the influence of Islam and its offshoots in the society.¹⁰



[[HTTP://WWW.NOVASCOTIASCOTT.COM/2009/02/05/ISLAM-DOES-NOT-REQUIRE-WOMEN-TO-WEAR-A-VEIL/](http://www.novascotiascott.com/2009/02/05/ISLAM-DOES-NOT-REQUIRE-WOMEN-TO-WEAR-A-VEIL/)]

3. The insight into the Quran

The very definition of the concept of Islamic law, or Sharia, is very problematic. The Islamic law is known to be fragmented into different sources of law and schools of thought. The main source of law and religious text is the Quran holy book or the verbatim word of God complemented by the Sunnah or the testimony of others and tradition about

⁸ Katrin Bennhold, *A Veil Closes France's Door to Citizenship*, N.Y. TIMES, July 19, 2008, at Al, available at <http://www.nytimes.com/2008/07/19/world/europe/19france.html> (discussing the Council of State's June 27 ruling that Silmi's "radical" practice of Islam was incompatible with French values like equality of the sexes").

⁹ Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REv. 743, 750 (2006).

¹⁰ While Burqa is almost exclusively the prerogative of western Pakistan and Afghanistan, in Europe we can observe more disengaged rules of clothing represented by relatively liberal hijab.

the words and deeds of the Prophet¹¹. If a solution is not found in these sources of law then the consensus or Islamic tradition shall be used to interpret.¹² These three sources are sometimes supplemented by analogy that can be used by judges and jurists of Islamic law in the process of adjudicating these questions.¹³

Clearly, the Quran deals with traditions of women's clothing¹⁴ and makes the Islamic practice of women's covering religiously and significant.¹⁵ The first substantial passage comes from the book Al-Ahzab, which is part of the Quran:

“O Prophet, tell your wives and your daughters and the women of the believers that they shall lengthen their outer garments. That is more suitable that they will be known and not be abused. And ever is Allah Forgiving and Merciful.¹⁶” [emphasis added]

This verse, obliges women to cover up their bodies, but also shows, albeit marginally, the reasons for such an action. In more detail it is described by selected text of the book Surah contained in Quran:

“And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers . . . ”¹⁷ [emphasis added]

¹¹ Introduction to the Islamic Law. Available here <http://www.mei.edu/Library/IntroductiontoIslam/IntroductiontoIslamIslamicLawSharia/tabid/378/Default.aspx>

¹² Here the customary law of particular Islamic communities plays an important role as well as legal interpretations of Islamic scholars and experts of law.

¹³ The origins and sources of Islamic Law, The University of London, available here: http://www.londoninternational.ac.uk/current_students/programme_resources/laws/subject_guides/islamic/islamic_chpt3.pdf.

¹⁴ While researching the sources of Islamic law, the author managed to identify few passages that, in cases of broad interpretation, could serve as a legal basis for the duty of Muslim women to cover their face.

¹⁵ Adrien Katherine Wing, supra note 7, at 743, 750.

¹⁶ This verse is considered by many scholars as one of the conclusive thoughts distinguishing believing women from others. For example Fadwa El Guindi, *Veil: Modesty, Privacy and Religion*, Oxford, UK: Berg, c1999, p.135.

¹⁷ Holy Quran, Surah, 24:31: *“And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex; and that they should not strike their feet in order to draw attention to their hidden ornaments. And O ye Believers! turn you all together towards Allah, that you may attain Bliss.”*

These underlined phrases are considered to be the source of the obligations of Muslim women to cover up decorative parts of the body, which, according to some¹⁸, may be the face. The interpretation of these terms is inconsistent, and Islamic law is characterized by the lack of any authority unifying the fragmented interpretation of the law.

The aim of this article is not to interpret these concepts in full detail nor analyze to what extent Muslim women are required to cover the body, the face or its parts¹⁹ according to the Islamic tradition. As mentioned above, there are countless approaches to this issue in the Muslim world and even the interpretation of crucial terms seems to be defective. However, what appears to be essential for the subsequent discussion is that the covering up and veiling of Muslim women is inherently a religious tradition practiced since the formation of Islamic tradition and law itself.

4. Regulation of manifestation of religion in Turkey and France

In past few years and especially in recent months we have been able to identify and observe the efforts of some European countries to regulate the use of religious symbols and face-coverings. The reasons for these measures vary. Whether it is the idea of complete secularization of social relations,²⁰ protection from anonymous crime by necessity of personal identification,²¹ protection of women's rights and equality,²² it is, first of all, necessary to analyze whether these grounds are reasonable and sufficient for such a fundamental interference in individual rights and freedoms.

¹⁸ Ayesha (Radhiyallaahu Ánha) Stated that in verse 30 and 31 of Surah An Noor "What has been allowed to be shown is the hands, bangles and rings but the face must be covered. (Quoted in the book *Purdah* P# 195 and in his Tafseer of Quran under the tafseer of Surah An Noor).

¹⁹ For detailed study i.e. A Look at the Wearing of Veils, and Disputes on the Issue, Across the Muslim World, INT'L HERALD TRIB., Oct. 31, 2006, <http://www.iht.com/articles/ap/2006/10/31/africa/MEGENMideastVeilGlance.php>. or Mohamed Baianonie, Imam, Friday Speech Delivered at the Islamic Center of Raleigh, N.C. (15.února 1988), <http://islaml.org/khutub/Hijab.htm>.

²⁰ T. Jeremy Gunn, *Religious Freedom and Larcite: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 420 (2004).

²¹ *France begins ban on niqab and burqa*, Guardian UK, April 11, 2011, Available here <http://www.guardian.co.uk/world/2011/apr/11/france-begins-burqa-niqab-ban>

²² *France Denies Citizenship to Muslim Woman in Body Veil*, USA TODAY, July 16, 2008, <http://www.usatoday.com/news/world/2008-07-16-France-MuslimN.htm>.

This section deals with selected²³ European countries that have been attempting to significantly regulate this issue and at the same time provides an overview of the most fundamental measures enacted by legislative bodies of selected countries.

4.1. Turkey

Turkey represents interesting example of a secular country where the vast majority of the population is Muslim. The situation in Turkey, however, was much more dramatic than in other Muslim secular countries in Asia or Northern Africa.²⁴ The first ban of religious symbols came with the law prohibiting the wearing of the headscarf covering the hair and face for civil servants in 1960. In 1997 this prohibition was extended to broader public at public buildings and even to students at state universities.

It is difficult to estimate what are the reasons for such a strict policy in a country where the Muslim headscarf has always been part of traditional women's clothing. There may be an effort to move closer to European standards as part of the long-term effort to join the European integration structures²⁵. Another reason may be an attempt to imitate the French concept of a secular democratic state *Laïcité* (explained below) with the concept of *Laik*²⁶. Turkey's history, culture and civilisation has been always strongly influenced by Islam and on the other hand the governing elite have attempted for more than 90 years now to impose Western or European standards including behaviour and dressing in public. Turkey has been a long-time included among the so-called "torn countries".^{27,28}

²³ There are of course another countries in the region that have interesting legal background on the issue of this paper. One of them is Tunisia that claims to be a purely secular state, although there is over 98% of the population Muslim. Since 1981, the law prohibited wearing any religious or sectarian symbols in public buildings including the hijab. Since 2006 this ban has been extended to some public places. After the revolution in 2010 there seems to be social tendencies to relax this policy in allowing women to use hijabs and actually men to wear beards while being officially photographed. However, future months and years will show if this was a sign of significant change back to Muslim tradition or just a political one-off measure coming from the euphoria of revolution. One of the few sources on this issue: Elizabeth Shakman Hurd: *The Politics of Secularism in International Relations*. Princeton Studies in International History and Politics Series. Princeton: Princeton University Press, 2007.

²⁴ Ibid

²⁵ Turkey, inter alia, became the signatory party of the European Convention on Human Rights and Fundamental Freedoms.

²⁶ The concept of Laik is defined as the absence of religious involvement in government affairs and vice versa. In its strict and official acceptance, it is the principle of separation of church or religion and state.

²⁷ Political scientist Huntington calls "torn countries" those countries that are seeking to affiliate with another civilisation. See Huntington, Samuel P. (2002) [1997]. "Chapter 9: The Global Politics of Civilizations". *The Clash of Civilizations and the Remaking of World Order* (The Free Press ed.). London: Simon & Schuster. p. 207f.

²⁸ This notion cannot nowadays be deemed completely appropriate regarding the reforms of Turkish system under the governance of the Justice and Development Party led by the Prime Minister Recep Tayyip Erdogan.

The background of secularity in Turkey may be found in the 1920's when the new Turkish Republic was born.²⁹ The former Turkish "Ottoman" Empire suffered from strong dependence of the state on religion³⁰ and thus was very far from the European developing and industrial countries at that time. People were bound by law to dress in accordance with their religious affiliation. Thus the secularism could be with probability the answer of the new government to the former system and the attempt to move the religious influence from the public.

After the revolution the reforms in 1921-23 completely changed the legal background of the position of the Islam in the society. The avalanche of reformist laws sought to create "religious-free"³¹ society based on equality regardless on the belief or religious affiliation.³² The most significant change in this regard was the constitutional amendment after which the Islam was no longer identified as the state religion and the constitutional status was accorded to the principle of secularism.³³ Next reforms were focused on the educational independence on religion and individuals wearing religious attire in public.³⁴ There were two important legal acts relating to dressing and veiling, Law No. 2596, Dress Regulation Act from December 3rd, 1923 banning wearing of religious clothing in places not connected with prayer or religious ceremonies and Law No. 430, The Educational Service Act of March 3, 1924, regulating religious clothing at public schools. Considering that the secular legal order is enforced in a country where approximately 99 per cent³⁵ of citizens are Muslim, there we have vast room for public debate on the headscarves among Muslim women.

²⁹ The judgment of ECHR *Sahin v. Turkey*, (Eur. Ct. H.R., June 29, 2004), <http://www.echr.coe.int/echr>. Par. 29.

³⁰ Bleiberg, Benjamin D: UNVEILING; THE REAL ISSUE: EVALUATING THE EUROPEAN COURT OF HUMAN RIGHTS' DECISION TO ENFORCE THE TURKISH HEADSCARF BAN IN LEYLA SAHIN v. TURKEY, *Cornell Law Review* (2005), volume 91 , issue 1 , p. 65-66.

³¹ Sahin, supra note 26, at par. 30-31

³² Ibid, at par. 30-32

³³ Sahin, Par. 30 (Eur. Ct. H.R., Nov. 10, 2005); see THE CONST. OF THE REPUBLIC OF TURKEY. art. 2, translated in Sahin, Par. 299 (Eur. Ct. H.R., Nov. 10, 2005) ("The Republic of Turkey is a democratic, secular (*laik*) and social State based on the rule of law, that is respectful of human rights in a spirit of social peace, national solidarity and justice, adheres to the nationalism of Ataturk and is underpinned by the fundamental principles set out in the Preamble.").

³⁴ Lovejoy, C. D., A Glimpse into the Future: What Sahin v. Turkey Means to France's Ban on Ostensibly Religious Symbols in Public Schools: *WISCONSIN INTERNATIONAL LAW JOURNAL* (2006), VOL 24; page 4.

³⁵ Ibid, at page 5 (citing CENT. INTELLIGENCE AGENCY, THE WORLD FACT BOOK 2005, at 554 (2005); cf. Sahin, Par. 27-28, 36 (Eur. Ct. H.R., June 29, 2004).

The debate became significantly strong in the beginning of 1980's with the military coup in 1980 and later revival of traditional women's clothing. Very soon another regulation prescribing the dress at public schools was enacted. The wearing of headscarves by the female members of the staff and students was officially not recommended at the public schools.³⁶ In 1982 the Head Educational Authority officially banned headscarves in class rooms and in 1984 the Supreme Administrative Court upheld this ban stating that: "wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic."³⁷ This statement without doubt represents the relation of the principle of secularism governing the public and political relations to the freedom of religion in Turkey.

The legal position of headscarves significantly changed in 1988 when the Higher Education Act was amended by new section that, above all, permitted wearing of headscarf out of religious conviction.³⁸ This was however swiftly overruled by The Constitutional Court and cancelled as violating the Constitution above all its Article 24.³⁹ The supremacy of the constitutional rule of secularity was thus particularly faced with the ordinary law limited by the scope of this concept.⁴⁰ However, another social tensions in 1990's lead to delivery of two resolutions issued by Istanbul University regulating dress of the students attending the institution. The first resolution issued in 1994 confirmed the application of the rules set down by the Constitutional Court to all students.⁴¹ The later-

³⁶ "female members of staff and students should not wear headscarves in educational institutions" the translation published in Sahin, Par. 36 (Eur. Ct. H.R., Nov. 10, 2005).

³⁷ Sahin, supra note 26, Par. 37.

³⁸ Higher-Education Act, Law No. 2547, transitional sec. 16 (1988), translated in Sahin, Par 38 (Eur. Ct. H.R., Nov. 10, 2005) stating: "*Modern dress or appearance shall be compulsory in the rooms and corridors of institutions of higher education, preparatory schools, laboratories, clinics and multidisciplinary clinics. A veil or headscarf covering the neck and hair may be worn out of religious conviction.*"

³⁹ Sahin, Par 39 (Eur. Ct. H.R., Nov. 10, 2005); see THE CONST. OF THE REPUBLIC OF TURK. arts. 2, 10 & 24, translated in Sahin, Par 29 (Eur. Ct. H.R., Nov. 10, 2005). Article 24, sections (1) & (4), that state: "*Everyone has the right to freedom of conscience, belief and religious conviction. Prayers, worship and religious services shall be conducted freely, provided that they do not violate the provisions of Article 14. No one shall be compelled to participate in prayers, worship or religious services or to reveal his religious beliefs and convictions; nor shall he be censured or prosecuted because of his religious beliefs or convictions...*"

⁴⁰ Bleiberg, supra note 28, page 140.

⁴¹ Translated in Sahin Par. 41 (Eur. Ct. H.R., Nov. 10, 2005):

The rules governing dress in universities are set out in the laws and regulations. The Constitutional Court has delivered a judgment, which prevents religious attire being worn in universities.

This judgment applies to all students of our University and the academic staff, both administrative and otherwise, at all levels. In particular, nurses, midwives, doctors and vets are required to comply with the regulations on dress, as dictated by scientific considerations and the legislation, during health and applied science tutorials (on nursing, laboratory work, surgery and microbiology). Anyone not complying with the rules on dress will be refused access to tutorials.

one issued in 1998 banned students' clothing that "symbolize or manifest any religion, faith, race, or political or ideological persuasion in any institution or department of the Istanbul University, or on any of its premises."⁴²

The Higher Education Act banning the veil was amended in 2008 in favour of students and their right to choose freely whether to wear a headscarf or not. Moreover, the Justice and Development Party of Turkey passed two constitutional amendments in order to lift the headscarf ban in high education.⁴³ However, after massive subsequent protests by secular movements, these amendments were one more time abolished by the Constitutional Court as unconstitutional and in violation of the principle of Laik. The Court, rather awkwardly,⁴⁴ based its judgement upon the case law of the European Court of Human Rights (hereinafter "ECHR") in *Sahin v. Turkey*⁴⁵. In this judgement, the ECHR found the Turkish ban on veils at universities in compliance with the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the Convention"). This and other case law based on the application to the ECHR from Turkish citizens is in very detail discussed in one of the following chapters dedicated to the case-law of ECHR regarding the religious symbols and regulation of wearing the headscarves by Muslim women.

Undoubtedly, wearing headscarf was and still is hot topic in Turkey from the origin of the secular state. Unlike the French notion of secularism (discussed in the next chapter) the secularism in Turkey does not have so strong historical foundation and reason. It appears to be more imposing to the restrictions on the citizens more than on state, especially in regards to the freedom of religion and its manifestation. The state could be accused again in the future of discriminating Muslim women in their right to choose education and consequently, the choice of job while insisting on rules of secularity put in contrast to the influence of religion on people and, above all, the students. In this way, the women (students) who wear the headscarf are banished from schools and discriminated in

⁴² Lovejoy, *supra* note 32, page 5 (citing *Sahin*, Par 41 (Eur. Ct. H.R., Nov. 10, 2005)).

⁴³ Witse, Evren Celik: *The Gordian Knot of Turkish Politics: Regulating Headscarf Use in Public*; *South European Society & Politics*, Volume 13, Number 2, June 2008, pp. 195-215(21).

⁴⁴ Turkey: Constitutional Court Ruling Upholds Headscarf Ban, HUM. R.WATCH, June 5, 2008, <http://www.hrw.org/en/news/2008/06/05/turkey-constitutionalcourt-ruling-upholds-headscarf-ban>.

⁴⁵ Judgement of the ECHR from 24th June 2004, *Sahin v. Turkey* (Application no. 44774/98)

subsequent access to employment in the public sphere⁴⁶. If this could be found discriminatory and to what extent is a topic discussed in the chapter dedicated to ECHR case law.

4.2. France

There are more than 5 million Muslims in France and veiling has been the issue of political and public debates since 2004, when the law prohibiting wearing of symbols expressing religious affiliation in public schools was passed (the so-called “Veil Act”)⁴⁷. This law is based on the French concept of secularism called *Laïcité* that was heavily influenced by the ideas of the Enlightenment. This approach strictly separates religion and public authority, which is, according to *Laïcité*, dogmatic and intolerant⁴⁸.

In France the secularity is well established as a vital aspect of the national identity⁴⁹ and traditionally identified as a progress and reform, whilst its limitations and the opposition were deemed to be right wing or reactionary.⁵⁰ Even if there is no integrated definition,⁵¹ it is mostly deemed to represent proper relationship between religion and the French state,⁵² it is regarded by many as embodiment of tolerance and equality.⁵³

The principle of secularism is embodied in the French Constitution that states: “France shall be an indivisible, secular, democratic and social republic” and in its very same

⁴⁶ In detail: Human Rights Watch, Memorandum from Human Rights Watch to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf 27 (29.06. 2004), http://www.hrw.org/legacy/backgrounder/ecalturkey/2004headscarf_memo.pdf

⁴⁷ Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics

⁴⁸ Dominique Custos, Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004, 54 AM. J. COMP. L. 337, 345-46 (2006).

⁴⁹ Lifting the veil on secularity - a discussion of law, liberty and religious dress, by R. Stretch; Nottingham law journal (2007), vol. 16, no. 1, p. 67-77.

⁵⁰ M. Evans: The Left, Laïcité and Islam (2001), 45 *Modern and contemporary France*, 8.

⁵¹ One of the most famous attempt to define shall be found in the speech of former French President Jacques Chirac from December 2003: “*laïcité is inscribed in our traditions. It is at the heart of our republican identity ... It is in fidelity to the principle of laïcité, the cornerstone of the Republic, the bundle of our common values of respect, tolerance, and dialogue, to which I call all of the French to rally.*” Available here: http://www.elysee.fr/elysee/elysee.fr/anglais-archives/speeches_anddocuments/2003/speech-by-jacqueschirac-presi- dent of the republic on-respectingthe-principle ofsecularism inthe-republic-excerpts. 2675.html

⁵² T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 420 (2004).

⁵³ *Ibid.*

article provides that: “It shall ensure equality of all citizens before the law, without distinction of origin, race, or religion. It shall respect all beliefs.”⁵⁴

Here the first keystone of conflicts could be traced down, the one connected to the relationship between religion and constitutional identity as well as with the different understandings, uses and driving principles of secularism as a constitutive element of constitutionalism.⁵⁵ Naturally, the French law, including the constitutional order, is subordinated to international obligation laid down in treaties France is a signatory party to.⁵⁶ The Constitution itself makes by its provision⁵⁷ the obligations of international human rights instruments self-executing. However, the beginning of 21st century was marked by the change of common relation of French traditional society to symbols representing foreign religion and traditions.

In March 2004, the law prohibiting public school students to wear any visible religious symbols entered into force⁵⁸. This prohibition applied most apparently to the Muslim headscarves and Jewish skull-cap or yarmulke, since France has the largest representation of these minorities in Europe. In the following months frequent conflicts were taking place, when female students were pointedly keeping their scarves to protest while entering the school. In many cases they were consequently met with pressure to adapt to the rules and take off their scarves. By virtue of this pressure many Muslim students headed voluntarily to private Islamic schools⁵⁹. After several months and more exemplary exclusions or reassignments, the situation calmed down. This could partially be seen as a consequent result of famous judgment of ECHR *Dogru v. France*⁶⁰, where the court held the Veil Act in compliance with the freedom of religion.

At the beginning of May 2010, the French Parliament unanimously issued a resolution,

⁵⁴ 1958 CONST. art. I (*Fr.*) translated at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/la-constitution-du-4-octobre-1958.5071.html> (follow hyperlink for "version anglaise" for .pdf of English translation).

⁵⁵ Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 CARDOZO L. REV. 2629, 3, (2009).

⁵⁶ French Const. art. 55.

⁵⁷ French Const. art. 55. See also Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 373-74 (1991).

⁵⁸ The act states: „At public elementary and secondary school students are prohibited from wearing any religious symbols or clothing, which clearly show their relationship to religion [...]” [translation by the author]

⁵⁹ Jiří Sládek: *Muslimské šátky straší Evropu*, Euroskop Available here: <http://www.euroskop.cz/38/6126/clanek/muslimske-satky-strasi-evropu>.

⁶⁰ Judgement of the ECHR from 4th December 2008, *Dogru v. France* (Application no. 27058/05)

calling for the intolerance of using veils in public, and even called the niqab and burqa an insult to national dignity and equality. During the autumn of 2010 the Parliament drafted a law banning such forms of veiling the face and it was enacted in the end of 2010. The Act on covering the face in public place⁶¹ bans this practice and defines the public place as *all public roads and facilities open to the public or intended for public purpose [translation of the author⁶²]*. The derogation from this rule is possible only under the condition of work, sanitary necessity and in case of sport or artistic performance.

Violation of the prohibition laid down in the Act shall be punished by a fine set for second degree offenses up to 150€ and the obligation to participate in a seminar on citizenship set out in the Criminal Code⁶³ may be in lieu of a fine or in addition to it.

The Conseil d'Etat⁶⁴ declared its opposition to this act and warned against its vulnerability, both by French and international judicial institutions, and pointed out the inconsistency with the constitutionally guaranteed rights⁶⁵. It also rejected Laïcité as constitutional basis for such prohibition and disagreed with the possibility of building a ban on the principles of human dignity and equality, because wearing of clothing is an expression of personal freedom and the principles mentioned above shall not apply to the person itself. The court apparently accepted the public safety as the only reasonable ground for such a prohibition. The question of whether this argument could be accepted by the ECHR as a ground for derogation from human rights protections set out in the Convention is discussed in the chapter dedicated to the Strasbourg test of this prohibition.

The new French legislation has surely been inspired by the Belgium attempt to outlaw the burqas from the streets in 2010.⁶⁶ The grounds on which the legislators justified the law was need for personal identification, protection of religious freedom, democratic values and women rights. The breach of the law was to be punished up to 7 days of

⁶¹ LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public

⁶² LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, Art. 2

⁶³ Paragraph 8 of Article 131-16 of the Criminal Code.

⁶⁴ Conseil d'Etat, is a body of the French national government that provides the executive branch with legal advice and acts as the administrative court of last resort.

⁶⁵ Conseil d'Etat: Étude relative aux possibilités juridiques d'interdiction du port du voile intégral; <http://www.conseil-etat.fr/cde/node.php?articleid=2000>.

⁶⁶ In March 2010, The Lower House of Parliament⁶⁶ adopted a law which was the first of its kind in Europe banning the covering of the face in public nationwide. Concretely, the term “public” included, inter alia, public parks, streets, offices or schools. The exception to this prohibition is the festival period and the parades officially permitted by local authorities. Due to political crisis the law never came into force.

imprisonment.⁶⁷ Apart from the above-mentioned countries, similar efforts to regulate veiling of the face and religious symbols appear as well in other European countries. Religious symbols are banned at schools in the Netherlands, Denmark and some federal states of Germany.

While France and Turkey are secular states there are differences worth to be noted. French notion of secularism came from the revolutionary ideas of freedom of men and state on any religion and belief. The secularity is well established as a vital aspect of national French identity.⁶⁸ On the other side secularity in Turkey has been laid down by law more recently as a result of the new era of industrialization and development of Turkey after the World War I under the Ataturk leadership. Thus the bans on covering the face or head with a headscarf in France have been approved by the vast majority of the society and few have tried to oppose the traditional reasoning based on the foundations of national secular state. Another natural difference is the fact that in France the Muslim community is a minority whilst the society in Turkey is nearly entirely Muslim.⁶⁹

The secularity in Turkey seems to be imposed more on the citizens than on the state. The religion is under control of the state authorities whilst the French traditional secular approach seemed to protect the citizens from the influence of religion at the level of state authorities thus shielding the fundamental human right of them. However the progress and change in this approach in last years that is being discussed in this paper raises serious doubts about its protective character.

5. Protection by international law

No matter what the stated reasons behind the regulation are, one of the main objectives of this paper is to analyze the impact of this regulation on the rights of those who are targeted by it. Undoubtedly it concerns the freedom of religion and its expression. These freedoms are regulated not only by the constitutional order of the majority of respective countries, but also codified by international treaties. The paper is focused on regional European Convention on Human Right and Fundamental Freedoms, however, it is

⁶⁷ It is interesting to note that the number of people affected by this law, i.e. Muslim women wearing the niqab or burqa, is approximately 200.

⁶⁸ R. Stretch: Lifting the veil on secularity - a discussion of law, liberty and religious dress; Nottingham law journal (2007), vol. 16, no. 1, p. 71.

⁶⁹ C Killan, The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair *Gender & Society*, August 2003 17: 569

necessary to mention also some of the major universal treaties of international law and analyse their concept.

5.1. Universal instruments of international law

The basic formulation of the protection of religious freedom is found in Article 18 of the Universal Declaration of Human Rights signed in 1948 (hereinafter "Declaration")⁷⁰. Declaration is certainly among the four most important international legal documents to "universalize [...] the principle of religious freedom."⁷¹ Although the Declaration declares itself to be "the common standard of achievement for all peoples and all nations."⁷² it is non-binding declaration of states forming the system that suffers from lack of the protection of its enumerated rights by imposing a legal obligation.⁷³⁷⁴

Freedom of religion is also regulated in Article 18 of the International Covenant on Civil and Political Rights signed in 1966⁷⁵ (hereinafter "ICCPR") in paragraphs 1 and 2.⁷⁶ The Covenant, unlike the Declaration, goes further in this direction. The paragraphs number 3 and 4 of the same article gives the state an opportunity to derogate from the rights contained in the article under certain conditions. These conditions are:

- The measure shall be in form of legal act
- The measure shall protect public safety, public order, health or morals.

⁷⁰ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). which states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance"

⁷¹ Derek H. Davis, The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 2002 BYU L. REv. 217, 224 (2002).

⁷² Declaration, supra note 25, Pmbl.

⁷³ Carolyn Evans, Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination, 2007 BYU L. REv. 622 (2007).

⁷⁴ However, The Universal Declaration of Human Rights, passed by the United Nations, is undoubtedly the principal basis for global human rights standards, referenced in nearly every international human rights instrument⁷⁴ and therefore it is included in this paper among crucial international treaties.

⁷⁵ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171

⁷⁶ "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." According to some scholars worship under the provision of ICCPR mean typical form of religious prayer and preaching, i.e. freedom of ritual, observance covers procession wearing religious clothing [...] is understood as every form of imparting the substance of a religion or belief.⁷⁶

The ICCPR, unlike the former, repeats and legally sanctions these limitations⁷⁷. United Nations Human Rights Committee recognized that these limitations call for strict interpretation, to prevent the destruction of the right to manifest religion or belief.⁷⁸ As well as it is deedful to examine particular governments' limitation of the rights protected therein and verify whether they are justifiable restrictions under the necessity provisions of ICCPR.⁷⁹ The limitation of necessity is used throughout ICCPR very often thus indicating the restriction on the rights is permissible only when it is essential, i.e. inevitable.⁸⁰

One of the lesser-known international legal acts governing this area is the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief⁸¹ that came into force in 1981 (hereinafter "Declaration 1981"). Mostly considered to represent "the fundamental rights of freedom of religion and belief"⁸² and features "the international community's present understanding of the minimum standard for matters of religious rights."⁸³ It is, however, a solely non-binding declaration. Thus there is no responsibility for the state in violation of its provision. Although it is not binding, 1981 Declaration entails an expectation that state will adhere to its proclamations, as do all U.N. General Assembly declarations.⁸⁴

5.2. Two Components of Freedom of Religion

As it is clear, freedom of religion is not represented solely by the right to believe freely and worship according to its conscience. It could be also viewed as freedom consisting of

⁷⁷ Davis, Kendal. Note. The veil that covered France's eye: the right to freedom of religion and equal treatment in immigration and naturalization proceedings. 10 Nev. L.J. 732-762 (2010), 757

⁷⁸ Peter G. Danchin, Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law, 49 HARV. INT'L L.J. 249, 264 (2008) (quoting *Manoussakis v. Greece*, App. No. 18748/91, 23 Eur. H.R. Rep. 387, 407 (1997)).

⁷⁹ Parker, supra note 29, at 92.

⁸⁰ Alexandre Charles Kiss, Permissible Limitations on Rights, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 290, 308 (Louis Henkin ed., 1981)

⁸¹ Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, art. 1(1), U.N. Doc A/36/684 (Nov. 25, 1981). This Declaration also prohibits discrimination on the basis of religion or belief.

⁸² Donna J. Sullivan, Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination, 82 AM. J. INT'L L. 487, 488 (July 1988).

⁸³ Natan Lerner, The Nature and Minimum Standards of Freedom of Religion or Belief, 2000 BYU L. REV. 905, 921 (2000).

⁸⁴ Davis supra note 32, at 754

two main components: *forum internum* and *forum externum*⁸⁵, where the *forum internum* represents the right to entertain a religious belief of one's choice, emphasizes the individual's ability to profess, maintain, change, have, or adopt a religious belief.⁸⁶, and relates more to one's individual inner faith and conscience. The *forum externum* represents the freedom to "manifest ... religion or belief, in worship, teaching, practice and observance."⁸⁷ All the above-mentioned international legal treaties include both *forum internum* and *forum externum* as integral part of the clause dealing with freedom of religion. The latter component relates clearly to the issue of religious symbols and their exposure, as it is discussed in detail in following section dealing with the provisions of the European Convention on Human Rights and Fundamental Freedoms.

5.3. European Convention

The above-mentioned sources of international law are almost unenforceable by individuals. In the European regional legal system, however, there is a mechanism that provides individuals, subject to certain criteria, a solid chance to claim their rights in case of breach or violation of codified rules. The European Convention on Human Rights and Fundamental Freedoms⁸⁸ requires its signatory states to respect the rules on the protection of human rights enacted therein. In the event of breach, the delinquent state shall be brought to the European Court of Human Rights (hereinfter "ECHR" or "Court").

The ECHR has jurisdiction on all matters concerning the interpretation and application of the Convention and the protocols thereto.⁸⁹ ECHR may, in the case of non-compliance with the Convention, punish the State and establish control over the reparation of the infringement with help of the institutions of the Council of Europe. What more, the signatory member state "undertakes that its domestic law and administrative practices conform to the Convention's articles and, where any violation of human rights is held to exist . . . that it will take positive action to remedy the breach, if necessary by introducing

⁸⁵ Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 COLUM. J. GENDER & L. 199, 211 (2007)

⁸⁶ Bahia G. Tahzib-Lie, Women's Equal Right to Freedom of Religion or Belief: An Important but Neglected Subject, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN 117, 119-123

⁸⁷ Choudhury, *supra* note 26, at 256.

⁸⁸ European Convention on Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (Sept. 3, 1953).

⁸⁹ *Ibid*, Art. 32(1).

corrective legislation in its national Parliament."⁹⁰ Thus limited to interpreting and applying the European Convention, the ECHR can only decide whether a member state's national law is in violation or not; it cannot force the amendment or revocation of a violating law.⁹¹ Due to above-mentioned reasons the author dedicates a major part of this chapter to the rights stated in the Convention.

Article 9 of the Convention, declared by ECHR to be a foundation of democracy, guarantees freedom of conscience, belief, and religion⁹² deals in detail with freedom of thought, conscience and religious belief:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, and to manifest his religion or belief, in worship, teaching, practice and observance."

For the purpose of this article, it is essential to mention the public manifestation of religion as a human right that is entitled to protection. ECHR in its case *Kokkinakis vs. Greece* calls the freedom of religion, in its religious dimension, "one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset to atheists, agnostics, skeptics and the unconcerned."⁹³ As it has been analyzed in the first chapter, the veiling of Muslim women is religious tradition and the right to carry out this tradition in public therefore shall be under the protection of this article. Significant in this regard is to focus on possible exceptions and derogations from these rules and to define the room to manoeuvre, where the States shall apply limitations and thus provides the justifiable limits on the freedom of religious expression.⁹⁴ These exceptions are the subject of the second paragraph of article 9:

"2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of

⁹⁰ Robert Blackburn, *The Institutions and Processes of the Convention*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE ECHR AND ITS MEMBER STATES, 1950-2000*, at 3, 11 (Robert Blackburn & Jorg Polakiewicz eds., 2001))

⁹¹ Davis, *supra* note 32 (citing Kathryn Boustead, *The French Headscarf Law Before the European Court of Human Rights*, 16 J. TRANSNAT'L L. & POL'Y 167, 169 (2007) (citing Sarkozy Takes French Presidency, BBC NEWS, May 6, 2007, <http://news.bbc.co.uk/2/hi/europe/6630797.stm>)).

⁹² Keturah A. Dunne, *Comment, Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms*, 30 CAL. W. INT'L L.J. 117, 111 (1999) (citing *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 17 (1993)).

⁹³ Carolyn Evans & Christopher A. Thomas, *Church-State Relations in the European Court of Human Rights*, 2006 BYU L. REV. 699, 700 (2006) (quoting *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 13 (1993)).

⁹⁴ Davis, *supra* note 32, at 748.

public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” [emphasis added]

Derogation from the obligations deriving from paragraph 1 therefore has three conditions that must be fulfilled cumulatively. Firstly, the condition of the form of law, as a form of due process notice requirement,⁹⁵ secondly, the requirement of necessity in a democratic society, thirdly, the condition of legitimate aims, or in other words, subordination to one of the exceptions that are listed exhaustively in the latter part of the second paragraph.⁹⁶ Although it is vital to examine each concrete limitation applied by the state in particular situation, there are some scholars that don't reckon e.g. the derogation from the right based on public safety⁹⁷ or protection of freedoms of others⁹⁸ to be very convincing. ECHR however has made clear that above-mentioned paragraph 1 of Article 9 places obligations on states' authorities to guarantee the peaceful enjoyment of the Article 9 rights to those who hold such religion or beliefs.⁹⁹ On the other hand ECHR fairly stated that those protected by these provisions "cannot reasonably expect to be exempt from all criticism and must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith."¹⁰⁰ The position of the state imposing limitations on above-mentioned freedoms seems to be far from easy. ECHR called, in this regard, for "very strict scrutiny" because [they] have a direct impact on "the need to secure true religious pluralism", an inherent feature of the "notion of a democratic society."¹⁰¹

Interesting for the scope of this article is that the act, in order to fall under the sphere of the Article 9 has to represent the "direct manifestation of belief".¹⁰² The actions of

⁹⁵ Ibid, at 749.

⁹⁶ Convention, supra clause 43, Art. 9(2) enumerates the limitations of the right as Public safety, public order, health morals, protection of the rights and freedoms of thers.

⁹⁷ Partsch, Karl Josef. "Freedom of Conscience and Expression, and Political Freedoms." In *The International Bill of Rights: The Covenant on Civil and Political Rights*, edited Louis Henkin. New York: Columbia University Press, 1981.

⁹⁸ Peter D. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 *Yale Journal of International Law* at 7 (2008).

⁹⁹ *Otto-Preminger-Institute v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 47 (1994)).

¹⁰⁰ Paul M. Taylor, *The Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression*, 2006 *BYU L. REV.* 811, 826 (2006) (quoting *Otto- Preminger-Institute v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 47 (1994)).

¹⁰¹ Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 *HARV. INT'L L.J.* 249, 264 (2008) (quoting *Manoussakis v. Greece*, App. No. 18748/91, 23 Eur. H.R. Rep. 387, 407 (1997)).

¹⁰² *ECmHR, Pat Arrowsmith vs the United Kingdom*, Judgement of 12 October 1978, D&R 19/5.

individuals not actually expressing the belief concerned, even when being motivated or influenced by it, cannot be protected by Article 9.¹⁰³ In the following text, the author analyzes and connects individual ECHR case-law with the above formula of article 9. The ECHR in several cases has already dealt with government interference in these rights and their compliance with the Convention and it is appropriate to mention the most important of them.

6. Coherent case-law of ECHR

As mentioned in the previous chapter, particular European countries attempted to regulate religious symbols and veiling the face in public and at public buildings. In several cases, these situations have resulted in complaints to the ECHR for alleged violation of Article 9 of the Convention. Arguments of the Court and the parties can serve as a guide for assessing the current French and Belgian regulation and its compliance with the Convention. It could also help to outline the room for consideration of the Court in case of complaint from any of the French or Belgian Muslim women for violations of human rights guaranteed by the Convention.

In the case *Lautsi v. Italy*¹⁰⁴ ECHR dealt with a complaint against the display of crucifixes at Italian schools. Madam Lautsi, the complainant, argued that the display of religious symbols at schools violates freedom of religion in the sense that her child then loses the freedom of choice of religion and thus breaches the rule of secular law.¹⁰⁵ The court in its first decision in November 2009 declared this practice infringing the rights and freedoms protected by the Convention and held that the display of symbols representing particular religion can interfere with the rights of citizens of other beliefs.¹⁰⁶ This ruling has generated a storm of protest in the heavily Christian-oriented countries such as Poland, Ireland and even in Italy itself. The intense debates following the Court's ruling have often been framed as an argument between secularists and those who wish to affirm their societies' religious traditions.¹⁰⁷ Finally, Italy appealed against the judgment

¹⁰³ Niraj Nathwani, *Islamic Headscarves and Human Rights: A Critical Analysis of the Relevant Case Law of the European Court of Human Rights*, 25 NETH. Q. OF HUMAN RIGHTS 224 (2007).

¹⁰⁴ Judgment of ECHR from 18th March 2011, *Lautsi v. Italy* (Application No.30814/069)

¹⁰⁵ *Ibid*, 29.

¹⁰⁶ Judgment of ECHR from 8th November 2009, *Lautsi and others v. Italy* (Application No.30814/069)

¹⁰⁷ *Gabriel Andreescu, Liviu Andreescu. The European Court of HR' Lautsi Decision. Journal for the Study of Religions and Ideologies*, 9, 26 (Summer 2010), 65.

and the case came to the Grand Chamber in the same year. It was officially supported by Slovakia, Poland and Lithuania¹⁰⁸.

On 18th March 2011 the Court radically¹⁰⁹ overturned its decision from 2009 and found the display of crucifix on the walls of public schools in compliance with the Convention. It stated: “[...] *by prescribing the presence of crucifixes in State-schools classrooms - a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity - the regulations confer on the country's majority religion preponderant visibility in the school environment*” but immediately ruled that “*it is not in itself sufficient, however, to denote a process of indoctrination on the respondent State's part and establish a breach of [...] the Convention*”¹¹⁰.

The court also commented on the significance of crucifixes when stated: “[...] *is an essentially passive symbol and [...] cannot be deemed to have an influence on pupils.*”¹¹¹ This case proves that the issue of religious symbols and their display in educational institutions is a hot topic in European countries these years. There is no consensus on the role of crucifix even among the highest administrative and judicial institutions in various European countries¹¹². However the reasoning of the court seems to be feasible, the disparity between both judgments of the ECHR is elusive and demonstrates the delicacy of the issue and it can lead to downtrend in the confidence in the ECHR and the consistency of its case law. However from a legal point of view Italy proved to be covered by margin of appreciation protecting it from being found indoctrinating.¹¹³

¹⁰⁸ The Ministry of foreign affairs of Lithuania spokesperson Ksenija Aleksejeva argued: “Lithuania’s Ministry of Foreign Affairs holds that the use of crucifixes in public in Catholic countries reflects the European Christian tradition and should not be regarded as a restriction on the freedom of religion,” When the cross isn’t a cross, Baltic reports, 13th January 2010. <http://balticreports.com/?p=7933>

¹⁰⁹ The decision was reached by 15 votes to 2 dissents.

¹¹⁰ Judgment of ECHR from 18th March 2011, Lautsi v. Italy (Application No.30814/069) Par. 70-72.

¹¹¹ Ibid, Para 72

¹¹² The Romania’s National Council from Combating discrimination in the Decision 323/2006 ruled on the display of religious symbols at schools: “religious symbols must only be shown during religion lessons or in areas dedicated exclusively to religious education.”

¹¹³ For strict critics of the judgement of ECHR in the case Lautsi see David Pollock. EUROPEAN HUMANIST FEDERATION A CRITIQUE OF THE GRAND CHAMBER JUDGEMENT IN THE CASE OF LAUTSI v. ITALY by Available here: http://www.humanistfederation.eu/index.php?option=com_content&view=article&id=277.

Another case of religious symbols in front of the ECHR was the case *Dahlab v. Switzerland*¹¹⁴, where headscarves at public schools were at stake. The complainant was a teacher of Muslim origin litigating the ban on the wearing of Muslim head scarves in public educational institution at schools in Switzerland. However, the ECHR held the Swiss law in compliance with Article 9 of the Convention. The court considered the Swiss law in accordance with the requirement of necessity in a democratic society and the conditions of the protection of the rights of others and public order, and weighed possible derogation from the prohibition in Article 9. The court found that the Muslim headscarf worn by teachers at a public school could have an impact on pupils and therefore it is appropriate and necessary to regulate the display of religious symbols in educational environment. There is a clear parallel with the judgment at first instance in the case of *Lautsi v. Italy*.

Similar issue faced ECHR in the case *Karaduman*, where the Court upheld laws restricting religious expression at public schools. Unlike in *Dahlab*, the Court here sustained the authority of “institutions of higher education” to take “measures . . . at universities to prevent certain fundamentalist religious movements from exerting pressure on students who did not practice their religion or who belonged to another religion.”¹¹⁵ The most famous case law regarding the headscarf at the universities is the case *Sahin v. Turkey*, that has been already mentioned in the chapter dedicated to the development of situation in Turkey. ECHR here upheld the Turkish law banning headscarves and thus constituted a landmark in the case law concerning headscarves in contrast to human rights that has been followed in many similar subsequent cases. The court stated:

It is worth mentioning that the ruling in *Sahin* was undoubtedly in contrast to previous case-law of the Court on the freedom of religion. While in *Sahin* the Court stated that the headscarves at the universities may have the “proselytising effect” on non-muslim students thus putting a pressure on them, in cases as *Kokkinakis*, *Otto-Preminger Institut v. Austria* or the case *Wingrove v. the United Kingdom* the Court ruled proselytism to be inseparable part of manifestation of one’s religion. The expression of one’s religion, e.g.

¹¹⁴ Judgment of the ECHR from 15th February 2001, *Dahlab v. Switzerland* (Complaint No. 42393).

¹¹⁵ Judgment of the ECHR from 3rd June 2008 *Karaduman v. Turkey*, Complaint No. 16278/90

wearing dress and proselytizing itself was considered a right and integral aspect of the religious freedom.¹¹⁶

The judgments of the ECHR discussed above clearly show that religious symbols at state and public institutions such as schools, according to the reasoning the court, could under certain conditions interfere with religious freedom. Any restriction or prohibition is justifiable if it meets the requirements of the second paragraph of Article 9 of the Convention. These institutions should maintain religious neutrality and intervention in this neutrality can be regulated by law. However it is uncertain which religious symbols are considered problematic and which are deemed traditional. In *Dahlab* the ECHR for the first time addressed the role of religious symbols and its significance in relation to religious freedom of the person wearing the symbol and also others that could be influenced by this practice. The Court noted that headscarf as religious symbol “appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality”¹¹⁷ and further adds “the headscarf communicates and perpetuates gender inequality.”¹¹⁸ The Court did so without any reference to the point of view of the applicant, who was autonomous female teacher seeking her rights and demanding freedoms, thus obviously not being an oppressed person.¹¹⁹ This notion therefore cannot be deemed as precedential view of the Court on headscarves as symbol of oppression of women enforced on them.

In the *Dahlab v. Switzerland* case, the Court pointed out the role of secularism in democratic society and thus considered the secularist approach superior to the significance of traditional religious symbols, in this case a headscarf worn by the teacher at public schools. Regardless of the vital role of education in society, it is apparently in collision with the reasoning of the Grand Chamber in *Lautsi v. Italy* that considered the Christian crucifix to be passive symbol and thus not comparable to that of didactic speech or participation in religious activities¹²⁰. What has been discussed in *Dahlab* was turned into general rule in *Sahin* where the Court ruled: “[...] it is the principle of secularism,

¹¹⁶ Haldun Gülalp, 'Secularism and the European Court of Human Rights' (2010) 16 *European Public Law*(Netherlands), p. 467.

¹¹⁷ Ibid 112, 2.

¹¹⁸ Ibid, 1.

¹¹⁹ For detailed debate on this issue see Anastasia Vakulenko: 'Islamic Headscarves' and the European Convention On Human Rights: an Intersectional Perspective *Social & Legal Studies June 2007 16: 183-199*.

¹²⁰ Judgment of ECHR from 18th March 2011, *Lautsi v. Italy* (Application No.30814/069 Par 72).

[...] which is the paramount consideration underlying the ban on the wearing of religious insignia in universities.”¹²¹ This case opened a grand debate over the difference of neutrality of state and secularism that obviously cannot be deemed the same concepts. The role of these concepts in connection with different religious traditions in particular states makes it very difficult, not only for the ECHR, but for every judicial body to decide each and every case concerned.

Another important case is represented in the recent ECHR case of *Arslan v. Turkey*¹²² in February 2010. The complainants were 127 members of religious group Aczimendi Tarik, who marched through the streets of Ankara in 1996, as it is typical for them, in traditional turbans, tunics and carrying black sticks.¹²³ Because there were several incidents happening on the way, these people were detained by police and the authorities brought the allegations against them under anti-terrorism laws¹²⁴. These laws include also regulation of dressing up to traditional religious costumes in public. All of them arrived in the same outfits to the Turkish court and then they were sentenced to two months of imprisonment, what was later commuted to financial penalty. These individuals exhausted all legal domestic remedies and filed a complaint with the ECHR. In the complaint they claimed the original judgment to be in the breach of Article 9 of the Convention.

ECHR held that the petitioners were not convicted for contempt of national court, as proclaimed by Turkish Ministry of Justice, but on the basis of their religious costumes, suits and symbols worn in public.¹²⁵ The clothes are required by religion and so, according to the Court’s decision, the Turkish authorities were in breach of Article 9 protecting religious freedom. Very relevant to this article is the assertion of the court: “[...] *this case concerns punishment for the wearing of particular dress in public areas that were open to all, and not, as in other cases that it had had to judge, regulation of the*

¹²¹ Judgement of the ECHR from 24th June 2004, *Sahin v. Turkey* (Application no. 44774/98), Par. 110

¹²² Judgment of ECHR from 23th February 2010, *Ahmed Arslan and others v. Turkey*, Complaint No. 41135/98

¹²³ This symbolism is referring to the tradition of the prophets, and especially the Prophet Muhammed.

¹²⁴ It is Law No. 671 of 1925 and No. 2596 of 1934 governing the wearing of headscarves and religious dresses in public, outside of religious ceremonies.

¹²⁵ *Ibid* 118, 45.

wearing of religious symbols in public establishments, where religious neutrality might take precedence over the right to manifest one's religion."¹²⁶

The above-mentioned citation by the ECHR served to significantly define the scope of the application of Article 9 of the Convention and thus nailed down the rules specified in its previous judgments.¹²⁷ The ruling clearly stated that the regulation or punishment of dressing in public in accordance to religious traditions is incompatible with the rights guaranteed by the Convention. These restrictions could be upheld as appropriate if they have been shown to fall under the meaning of the exceptions laid down in paragraph 2 of Article 9 of the Convention. Turkey in its defense relied upon general concepts such as democracy and secularism, but the court didn't find them sufficient to justify the punishment.

There are some differences worth noting. While in the *Arslan* case the ECHR refers to protection of human rights in the public open sphere, in the cases of *Dahlab* and *Lautsi* the protection concerned solely institutions that serve the public interest. The Belgian and French ban, on the other hand, outlaws clothing that veils the face, or parts thereof, in all public places and no matter what the social purpose of that place. The case-law discussed above differs from the Belgian and French bans in many more characteristics. For example, the Belgian and French bans did not address the rights of gender equality, women's rights or the relation between veiling of face itself to religious tradition. Regarding the nexus of veiling and religion, however, the ECHR has already indicated what direction it could theoretically take and in the *Dahlab* case ruled that [...] *it appears to be imposed on women by a precept which is laid down in the Koran* [...] ¹²⁸.

¹²⁶ Citation was taken from the Press Release issued by the Registrar of the ECHR 23rd February 2010. <http://www.strasbourgconsortium.org/document.php?DocumentID=4732>.

¹²⁷ Judgement of the ECHR from 25th November 1997 *ZANA v. TURKEY*. (69/1996/688/880). In this case the European Court of Human Rights comes to the conclusion that there was no breach of Article 10 of the European Convention for the protection of human rights and fundamental freedoms. Zana was convicted to several months of imprisonment in Turkey because of the publication of an interview in the newspaper *Cumhuriyet*, in which he said to support the PKK movement, although he disagreed with the massacres. The measure was found necessary in democratic society. Also the judgment of ECHR from 21st January 1999 *Fressoz and Roire v. France* (29183/95).

¹²⁸ Judgment of the ECHR from 15th February 2001, *Dahlab v. Switzerland*, (Complaint No. 42393). Citation taken from Lourdes Peroni: Would a Niwab and burka ban pass the Strasbourg test? <http://strasbourgobservers.com/2010/05/04/burqa-and-niqab-ban/>.

This selection of the ECHR case law serves as a comparative analysis of judgments in which the ECHR addressed similar or identical rights as those potentially threatened by the Belgian and French bans on face coverings. The fact that the case law comes from recent years suggests that there may be a significant struggle for the public sphere¹²⁹ that is taking place, and will continue to intensify, in a number of European countries.

7. Belgian and French regulation and virtual Strasbourg test

This chapter is dedicated to the hypothetical situation of challenge of the Belgian or French regulation in front of the ECHR in respect of its compliance with the Convention. At the beginning, it should be noted that Belgian law, due to political crisis and early elections, did not get to the upper chamber of the Belgian Parliament and therefore has not been approved to the date of publication of this article¹³⁰. All the considerations and arguments mentioned herein therefore refer to a suppositional situation of its approval and complaint against it lodged by injured citizens of one of these countries. The proclaimed reasons and official announcements regarding the anti-burqa acts were almost identical in France and in Belgium. Therefore the discussion in this chapter is dedicated to both of them and thus they are hereunder referred to as the Acts.

One of the most debated questions here is whether the Acts represent discrimination of Muslim minority, since covering the face as a religious symbol appearing almost exclusively in Islam. As regards direct discrimination, it is apparent that the addressees of the acts are all citizens without distinction of origin or religion, and thus the objectives of the Acts does not beforehand make a specific group of people or its activity illegal. A more complex situation relates to indirect discrimination.

Although at first glance the law doesn't seem to discriminate, it could ultimately represent a disadvantage for Muslim women who come out to the street with a veil covering the face. These women are faced with the difficult choice of whether to obey the law or their faith. Here the situation comes to a conflict of applicable legislation and religious traditions, where the woman leaving her home in traditional dress regularly

¹²⁹ The term "fight for public sphere" is translated by the author of this paper from Czech term "boj o verejny prostor" mentioned by the author in Daniel Bartoň: S turbany a holemi proti demokracii a laickosti? <http://www.christnet.cz/magazin/clanek.asp?clanek=3437>.

¹³⁰ Based on the proclamation in Belgian media before the election, it seems that there has been broad political consensus regarding the necessity of the ban. E.g. Unveiled-Belgium's burka ban; <http://www.euranet.eu/eng/Today/News/English-News/Unveiled-Belgium-s-burka-ban>

comes into breach of the law and if prosecuted for that, this situation will ultimately involve indirect discrimination on the basis of faith or religion. In the opposite situation, if the woman decides not to infringe the law and stays at home, whether for her belief or pressure religious community, this may again imply indirect discrimination. A state that use this kind regulation to attempt to protect the rights of Muslim women thus may consequently restrict freedom of movement of its own citizens and contribute to a large degree to further alienation of the Muslim community, which seems in direct conflict with the intended objectives of the Act.

As mentioned above, Belgian and French legislators have used several reasons in pursuing the public about the need to enact the ban. Among others, it was the defense of democratic values, as well as identification of person in public and protection of the rights of women.

The first of these arguments can be regarded as the least successful. Supporters of the ban accent the need to protect the values Belgian and French democracies are based upon. However, it has not been specified what which values, according to legislators, it shall be. Which democratic values have the legislators taken up to protect? Shall it be freedom of speech, freedom of religion or equality before the law? This argument may in deeper knowledge of the situation tempt to believe that the terms as democracy and democratic principles have become a kind of cliché, or, with greater skepticism, the hostage for carriage of hidden objectives. In the event of proceeding at the ECHR, the defending government would have to show up and present their cards with the explanation which democratic values are at stake and whether they can be subsumed under the legitimate objectives and conditions necessary to justify the derogation from freedoms protected by the Convention. The defending state would inevitably need to prove the condition of necessity in a democratic society, as set out in the second paragraph of Article 9 of the Convention.

Justification based on the need to identify people in public seems much stronger than the aforementioned. The tight connection with the protection of public order and public safety makes this justification more suitable for subordination under legitimate reasons for lawful derogation from the provisions of the Convention. Identification of people in public is indeed necessary and its aggravation would be undoubtedly a threat to public

order and in effect to the public safety. This reasoning would go through detailed discussion and profound examination of the Court.

The ECHR would as well need to deal with the definition of the threat caused by covered face and its boundaries. But the question still remains, whether this argument would pass the test of necessity and proportionality, in other words, the appropriateness of the measure face to face to the objectives used for the Court's established interpretation of the Convention. Judges of the Court would need to answer the question whether a ban on covering the face, which will in Belgium case affect about 200 Muslim women, represents a threat to public safety and whether it was possible to find other and more suitable measures to protect these values instead¹³¹. The defending government would have to come with solid arguments relating to the protection of public order in the country and attempt to manage what Turkey didn't in case of *Arslan v. Turkey*, persuade the Court of the necessity and desirability of the ban. However the Court would most probably challenge the ineligibility of country-wide model when the ban applies generally regardless on the importance of public safety at particular places as banks or administrative public buildings or during particular situation with higher need of personal identification as civil wedding or official acts with authorities. Unconditionality of the ban may, without precise argumentation, cause its disapproval by the Court.

The final argument relating to the protection of women's rights is questionable as well. As already mentioned in the analysis of the public policy argument, there are concerns if the measure will in the consequence mean the suppression of the rights, it originally aimed to protect. There is also the question, if it may be much more suitable to socially integrate Muslim women by creation of job opportunities and education not only of the minority but also the majority of the society. However the French law aims to protect women compelled to veil their faces by enacting the punishment of up to one year of imprisonment for *everybody who would force or abuse the other person to wear clothing covering the face*¹³². The credit of this provision is obvious and it could be strong

¹³¹ Eg. in New Zealand the lawmakers came with the distinction between forms of face-covering on the basis of religious necessity. This distinction strains face-veiling threatening the public security away from practice of Muslim women wearing the burqa or niqab as a result of a tradition. More in David Griffiths: Pluralism and The Law: New Zealand accommodates the burka, Otago Law Review (2006) Vol. 11 No.2

¹³² LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, Art. 2

argument in favour of this regulation. It doesn't, however, deprive the law of indirect discriminatory nature in the situation when the women wear niqap or burqa voluntarily and as a result of religious upbringing. Generally speaking, any act of state power shall not protect its citizens from their own and free decision and action.

It is doubtful whether the Western democracies such as Belgium and France have the right to impose their concept of dignity upon a minority culture that doesn't share it nor is it ready to protect it. There was no significant lobby of any organization protecting Muslim women before the adoption of this law, nor of any of association or movements representing their rights. Again there comes the question of substantial assessment of necessity and proportionality of this regulation in relation to its potential consequences on the Muslim minority.

In case of a complaint being longed and found admissible, the ECHR would face a serious challenge to consider the situation, which becomes more and more relevant in recent years. According to recent developments, it is possible that there will be very soon similar regulation adopted in another European country and the complaint will come from its citizen.

8. The Conclusion

Afro-American comedian Bert Williams [1874-1922], said one day: "Being black is not a shame, but it is a huge handicap." At present, we could paraphrase him saying: "Being a Muslim woman is not a shame. It is a handicap."

In recent years tensions have been rising between the non-Muslim majority and Muslim minority in Europe. We will not be far from the truth claiming that the attempts of some countries to regulate face-veiling, both at public institutions, as well as in the streets, represent de facto suppression of manifestations of Islam and is aimed to win points among the majority of society fearing the growing influence of Muslim population in Europe.

One of the aims of this article is to appraise the reader of historical and religious background of veiling and wearing religious symbols in Islam and European countries.

Historical and theological excursus serves as a basis for understanding the religious tradition and, consequently, apprehending the attempts of European states to regulate religious symbols. Whether are these attempts more or less successful, they always face the problem of virtual non-compliance with human rights' concept of freedom of religion and expression. Part of this article deals with sources these rights are based on, and formally review the case-law of the ECHR as the international institutions with the mandate to apply and enforce standards of human rights on the signatory states of the Convention. The fundamental ideas and definitions contained in the judgments of the ECHR may serve as the basis for future decisions in this matter.

A substantial part of the article is devoted to analysis of potential impact of the Belgian and French law banning burqa in public on the on human rights and freedoms in these countries. The paper analyzes arguments that could be raised by the parties and the Court during prospective proceeding on a complaint for non-compliance of this law with rights protected by the Convention. The author tries to equally assess to what extent is the wearing of religious symbols and clothes covering the face protected by various international human rights instruments and discussed what may be legitimate reasons to regulate them.

Supporters of the ban often argue that the ban protects women rights and freedoms and promote the integration of Muslim women in society. But it is questionable whether it is possible to legally ban traditional clothing to achieve these goals. There are serious concerns whether on the contrary these measures will not mean more repression of their rights and greater alienation from major society. The question is whether the goal of a democratic state is to reduce the cultural differences of minorities or whether to protect them. One of the foundations of democracy is equality before the law that appears to be at risk. In this context, women who choose to cover their faces in public areas in its discretion, or by religious tradition, should enjoy the same protection as women who use their freedom not to cover them. The French law seems to aim to protect the women who are forced to wear niqab or burqa. This provision goes further in protection of Muslim women. However, it doesn't relive the act of discriminatory character.

It is necessary to bear in mind the right of the state to restrict these freedoms in order to protect legitimate public order or safety. However the state or any other authority has not

the right to protect its citizens from their free decision and action. It is a matter of practice, whether we manage to find a balance of these values and the future of similar legislation in the European countries. It is clouded if the European Court of Human Rights will play an important and decisive role in this social process.

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