

Is the French Burka Ban Compatible with International Human Rights Law Standards?

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Abstract

Banning the burka from the public sphere has been vividly discussed by many public figures in Europe. French and Belgian politicians have managed to secure overwhelming majorities in their parliaments for outlawing the practice of face-veiling. Reasons stated to support this move have included the protection of public security, safety and public order; the enhancement of gender equality and human dignity; the protection of laïcité or secularism; and the protection of the rights and freedoms of others. Even though religious freedom has been mentioned as an issue in question, not much effort has yet gone into analysing the compatibility of the burka ban with international human rights law standards. This article tries to fill that lacuna with a human rights assessment of the French face-veiling ban and all the justifications provided to support it. It concludes that a general ban on covering one's face is incompatible with international human rights standards; what can be justified however, are partial (local, sectoral) bans that are carefully crafted to respond to the local situation, and sanctions against those who force others to dissimulate their face.

Le monde des symboles n'est pas en effet un monde tranquille et réconcilié ; tout symbole est iconoclaste par rapport à un autre, de la même façon que tout symbole livré à lui-même tend à s'épaissir, à se solidifier dans une idolâtrie.¹

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1. Introduction

Vivid discussions on the practice of face-veiling have taken place in Europe in the past few years. The broad media coverage of this phenomenon is particularly interesting in light of statistics showing that there are only a few dozen women wearing the burka and a few thousand women who cover their faces with the niqab.² To qualify these statistics,

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¹ Paul Ricœur, 'La symbolique du mal,' in *Philosophie de la volonté 2: Finitude et culpabilité* (Paris: Seuil, 2009), at 573

² Estimates of full veils for France range from a few hundred to 1,900 (according to the Ministry of the Interior there are 1,630 women wearing the niqab in mainland France, 270 in Réunion and Mayotte, and there is no estimate for the burka). A study by a university in Copenhagen revealed 3 women wearing the burka and 150 to 200 wearing the niqab. Estimates of face veils (predominantly the niqab) in Belgium range from 30 to 270. The data gathered by the Dutch government in 2006 indicated the presence of 50 to 100 fully veiled women on their territory. Assemblée nationale, *Rapport d'information au nom de la Mission d'information sur la pratique du port du voile intégral sur le territoire national (Rapport d'information)*, 26–7, 70–6 & 364. *Regards sur l'actualité* (Oct. 2010), 50 blog of Jean Baubérot: <http://jeanbauberotlaicite.blogspot.com>; Open Societies Foundations, 'Unveiling the Truth: Why 32

it must be admitted right at the outset of this article, that the terminology used in the area of body covering is far from clear and universally accepted. A *burka* is usually understood to be a loose garment covering a woman's entire body, head and face including the eyes; she can see only through a mesh screen. A *niqab* differs in that it leaves the eye area open.³ Both burka and niqab are usually referred to as *full veils*, *face-veils* or *full-face veils* (in French *voile intégral*). Full veils should be distinguished from an ordinary *hijab*, which is a piece of cloth covering the hair, ears and neck, while the face remains uncovered. It is not unusual, however, to use the word *hijab* to refer to any Muslim veil.⁴ Despite the marginal numbers of burka and niqab wearers in Europe, a few skilled politicians and journalists have managed to turn the issue of face-veiling into a front-page story occupying the minds of the European public as well as their political representatives.⁵ Public stakeholders in a few local and national parliaments have tried to turn the public outrage over Muslim headscarves into a law. They have been successful in a few municipalities (regions),⁶ but only France and Belgium have managed to pass a general national law prohibiting not only the burka and the niqab but also other means of dissimulating one's face. Both French and Belgian laws passed smoothly and easily through the legislative process despite heated public discussions. Their politicians showed an extraordinary commitment to stand united against a common enemy called 'the full veil'.

This development poses a number of questions: how was such a smooth passage possible? Is the face-veil really an affront to national and European identities and values? Or is it a token issue, addressed in order to give the public the impression that the politicians are doing something about the hot topics of immigration, Muslims, Arabs,⁷ and the integration of those who are different from the 'traditional inhabitants'? Is the underlying reason for the burka debate itself a simple populist attempt to win favour among the electorate susceptible to voting for 'extreme' parties? And most importantly, is the burka ban compatible with international human rights law standards? Is such a broad limitation on both freedom of expression and freedom of religion a proportionate way of addressing the problems that the burka and the niqab allegedly pose?

This article will argue that a general ban on face-veils in all public spaces cannot be legally justified in contemporary Europe. What can be justified are partial, local or sectoral bans that present a tailored response to specific problems caused by face-veil wearers. In support of this argument, an analysis based on the methodology of the European Court of Human Rights (ECtHR) will be undertaken. This requires first, an investigation into whether the face-veil ban presents an interference with any human

Muslim women wear the full-face veil in France', http://www.soros.org/initiatives/home/articles_publications/publications/unveiling-the-truth-20110411/unveiling-truth-20110411.pdf. Last accessed April 11th 2011. Some of the lower estimates are based on conversations with people working for the NGOs such as the European Network Against Racism.

3 Open Societies Foundations, see n2 above; at 9. An illustrative sketch of both the burka and niqab can be found on http://news.bbc.co.uk/1/shared/spl/hi/pop_ups/05/europe_muslim_veils/html/2.stm. Last accessed April 10th 2011.

4 See The Islamic veil across Europe, BBC News: <http://www.bbc.co.uk/news/world-europe-13038095>, which provides an overview of the most common types of Muslim covering. Last accessed May 8th 2012

5 See Alice Géraud, 'Burqa, petite histoire d'un grand emballement', *Libération*, January 26th 2010.. <http://www.libelyon.fr/info/2010/01/burqa-petite-histoire-dun-grand-emballement.html>. Last accessed April 14th 2011.

6 For an overview see e.g. 'The Islamic veil across Europe', *BBC*, June 15, 2010. <http://news.bbc.co.uk/1/hi/world/europe/5414098.stm>. Last accessed April 20th 2011.

7 Cf. a video called 'La laïcité pour les Nuls' http://www.dailymotion.com/video/xi0vz9_la-laicite-pour-les-nuls_fun. Last accessed April 12, 2011.

right (religious freedom in particular) of a possible applicant; and second, having established an interference, an examination of whether the interference could be necessary in a democratic society, i.e. whether it could pursue a legitimate aim in a proportionate manner. The most commonly invoked justifications in this respect are: public security, safety and order; gender equality and human dignity; secularism and *laïcité*; and protection of the rights and freedoms of others.

It is not easy to perform such an analysis *in abstracto* because the very decision regarding (non-)compliance usually depends on the particularities of a case. Still, the French law on covering one's face in public and the national debate on the burka, Islam, national identity and *laïcité* provide fine details that can serve as a basis for a meaningful analysis.

In assessing the compliance of the burka ban with international human rights law this article will focus predominantly on freedom of religion, on the assumption that this fundamental right is the one most engaged by a ban on full veiling. Such a presupposition is supported by the rhetoric of most burka ban advocates, who are concerned chiefly with Muslim veiling, and only when required to embody the ideas into a law, craft formulations that are general and religiously neutral.⁸ Even if one accepted that freedom of religion was not at stake, general freedom of expression could be invoked by veiled women who want to make a political statement with their veil or who merely desire to express themselves through their dress. One could also maintain that the ban interferes with the right to respect for family and private life, or freedom of movement. It is also possible to challenge the law because of its indirectly discriminatory character (discrimination on the grounds of race, gender and religion). Nonetheless, freedom of religion (possibly in conjunction with a non-discrimination provision) is, it is argued in this article, the most engaged right.

With these contexts in mind, this article proceeds to outline the international human rights standards according to which any legislation on full veiling should be measured (section 2). An assessment of compliance with these standards requires an analysis of whether the ban is prescribed by law (section 3), whether the legislation in question presents an interference with religious freedom (section 4) and whether such interference is necessary in a democratic society (section 5). Following on from the conclusion that a general burka ban is unnecessary, disproportionate and discriminatory, this article unveils some of the underlying reasons for the adoption of the French law, suggesting that fear is a common denominator (section 6).

2. Human rights law standards in question

The legal framework in which any restrictions on face-veiling in Europe need to operate is formed by both international and regional instruments covering freedom of expression, freedom of religion, prohibition of discrimination and other fundamental rights. These documents include the Universal Declaration of Human Rights (UDHR),⁹ the International Covenant on Civil and Political Rights (ICCPR),¹⁰ the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration), and the European Convention on Human Rights (ECHR). The legal framework would not be complete without the case law and interpretive documents issued by the Human Rights Committee (which summarised its

⁸ Assemblée nationale, Rapport de la commission des lois sur le projet de loi interdisant la dissimulation du visage dans l'espace public (no. 2520) (*Rapport Garraud*), at 8.

⁹ See particularly article 18.

¹⁰ See particularly articles 18 and 20.

understanding of religious freedom in the General Comment no. 22¹¹), the European Commission of Human Rights (until 1998) and the ECtHR. A less formal but nevertheless important role is played by the Special Rapporteur on freedom of religion or belief.¹²

This analysis of the legality of face-veil bans uses the assessment methodology developed by the ECtHR, which is suitable not only because it is shared to a certain extent by other institutions considering the compliance of state actions with international human rights law but also because it is derived from extensive case law produced since its inception. The methodology focuses firstly on whether the state interfered with an applicant's right; secondly, whether this interference was prescribed by law; and thirdly whether the interference was necessary in a democratic society, i.e. whether it pursued a legitimate aim and the interference was proportionate to this aim.

To decide whether there has been an interference with an applicant's rights, one must first know what the right to freedom of religion covers. According to the ECtHR, Article 9 of the ECHR primarily protects the sphere of personal beliefs and religious creeds, so-called *forum internum*, which is absolutely inviolable. However in protecting this personal sphere, Article 9 does not always guarantee the right to behave in the public sphere in a way that is dictated by such a belief. The sphere of external manifestation, so-called *forum externum*, is subject to limitations listed in Article 9(2).¹³ The borderline between 'holding religious beliefs' and 'acting upon them' has however, never been clearly drawn by the Court, and has proved rather controversial at times.¹⁴ The absence of a clear-cut distinction and fear of a broad absolute freedom to believe whatever one wants have led the ECtHR to skip the assessment of the *forum internum* in its reasoning and to move straight to interference with the *forum externum* and its possible justifications. Article 9(1) lists four particular forms of manifestations of one's religion or belief: worship, teaching, practice and observance. Although this list is not necessarily a definitive one, the ECtHR usually requires an applicant to be able to demonstrate that there has been an impediment placed upon his or her ability to engage in one of these activities. This demonstration does not need to be a difficult exercise because the ECtHR has interpreted the four forms, and particularly 'practice', quite broadly. Even so, 'practice' does not cover every act motivated or influenced by a religion or a belief.¹⁵ Manifestations of religion or belief may be subject to limitations from two sources. Article 15 of the ECHR allows for a derogation of the state's obligations in time of war or other public emergency threatening the life of the nation, although Article 9 has not yet been derogated. Further limitations are allowed within Article 9(2), which must be both 'prescribed by law' and 'necessary in a democratic society'.

11 General Comment no. 22, UN Doc. CCPR/C/21/Rev.1/Add.4, 1993.

12 The legal framework is already well covered in literature, see Malcolm D. Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Strasbourg: Council of Europe Publishing, 2009); Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997); Carolyn Evans, *Freedom of Religion under the ECHR* (Oxford: Oxford University Press, 2001); Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005); and Anat Scolnicov, *The right to religious freedom in international law: between group rights and individual rights*, (New York: Routledge, 2011).

13 *C. v. the United Kingdom*, no. 10358/83, 15 December 1983, ECtHR; *Porter v. the United Kingdom*, no. 15814/02, 8 April 2003, ECtHR; Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, at 8–9.

14 Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, see n12 above, at 8–9; Evans, *Freedom of Religion under the ECHR*, see n12 above, at 72–6; Gabriël Moens, 'The Action-Belief Dichotomy and Freedom of Religion' (1989) *Sydney Law Review* 12

15 *Arrowsmith v. the United Kingdom*, no. 7050/75, 16 May 1977, ECtHR; Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, see n12 above, at 11–14; Evans, *Religious Liberty and International Law in Europe*, see n12 above, at 304–7.

The ECtHR has identified two requirements that flow from the expression ‘prescribed by law’. Firstly, the law must be adequately accessible: The citizen must be able to find out by reasonable means what legal rules apply to his case. Secondly, the law has to be formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee, to a degree that is reasonable in the circumstances, the consequences a given action may entail.¹⁶

Once it has been determined that a restriction on a manifestation of freedom of religion or belief has been ‘prescribed by law’ it must next be assessed whether it is ‘necessary in a democratic society’. This assessment examines whether the restriction pursues a legitimate aim and whether the nature of the interference is proportionate to the aim. Article 9(2) lists the following legitimate aims: Public safety, the protection of public order, health or morals, and the protection of the rights and freedoms of others. While addressing the necessity of the restriction, the ECtHR assesses such factors as the nature of the right involved, the degree of interference (proportionality), the nature of the public interest and the degree to which it requires protection in the circumstances of the case.¹⁷ The duty to perform a proper assessment lies primarily with the state, which is granted a certain margin of appreciation by the ECtHR. The ECtHR provides the states with this margin, because their authorities are in direct and continuous contact with the current affairs of their countries¹⁸ and because it is impossible to discern a uniform conception throughout Europe of the significance of religion in society. The doctrine of margin of appreciation is designed to enable due attention to be given to the context of a particular case. However, it has also been used in cases when the Court did not want to deal with the core of a problem or to challenge the status quo.¹⁹ This issue is very much linked to determining what is at stake in a particular case because the way of formulating the question shapes the outcome of the decision-making process.

It is therefore possible for future burka cases to escape thorough scrutiny. If the ECtHR asks whether there is a high level of consensus in Europe about the question of veiling, the answer will be negative and it could give France (or any other country) a *carte blanche* to do whatever they may themselves deem appropriate. If, on the other hand, the question is framed as ‘Is there a high level of European consensus on the nation-wide regulation of face-veils?’ the answer must be positive, because France and Belgium are the only European countries to have introduced such a ban. The latter question and conclusion would of course trigger a more detailed assessment of the regulation than the former.

3. The French burka law in context

The French law prohibiting the burka in public areas has probably become the most famous piece of legislation of its kind. It is important to present it in detail, not only because of its (in)famous character, but also because the enactment was preceded by a broad debate, which offers us a number of arguments for and against its compliance with human rights standards, and because France considers itself (and is considered by others) an exemplary secular state with strong rights-based values.

Before describing the political and legal process leading to the adoption of the law, it is necessary to put this series of events into context. Five issues deserve our

16 *Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, § 49, Series A no. 30, ECtHR.

17 *X. and the Church of Scientology v. Sweden*, no. 7805/77, 5 May 1979, ECtHR.

18 *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24, ECtHR.

19 Examples supporting such a view can be found in cases addressing religious freedom in Turkey. *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI; *Kurtulmuş v. Turkey*, no. 65500/01, 24 January 2006, ECtHR; and *Köse and Others v. Turkey* (Dec.), no. 26625/02, ECHR 2006-I.

attention. Firstly, France has witnessed debates about various forms of headscarves for decades, and these discussions have been accompanied by a number of cases before French courts and also before the ECtHR.²⁰ These debates increased when the law on secularity and conspicuous religious symbols in schools was being introduced.²¹ Secondly, French politicians and thinkers tend to link present-day issues with historic events. This means that the context in which face-veils are discussed is not limited to our contemporary era, but extends at least as far back as the French Revolution. Thirdly, there is an important overlap between French politics and academia. Because of this interconnection it is not uncommon for politicians to invoke concepts of prominent thinkers such as Lévinas, Ricœur, Taylor or Rousseau.

A fourth layer of context was created by the debate around national identity. This recurring nation-wide effort to discuss what it means to be French resulted in a large number of panel discussions, articles and media programmes giving a particular voice to those who did not like ‘non-French expressions’ among ‘recently’ arrived inhabitants of France. These ‘non-French others’ have been characterised as a threat to the Republic, its citizens, values and narrative,²² and therefore as individuals to be subjected to citizenship education in the spirit of the Republic and in line with the abstracted notion of national identity. However, the overuse and politicisation of this topic has led a notable portion of the French public to dislike the use of the phrase ‘*l’identité nationale*’.²³

Finally, the French burka debates have been influenced by face-veiling discussions in other European countries. For instance, Belgian lawmakers discussed and voted in a law prohibiting the concealment of one’s face as early as 29 April 2010. However, due to the dissolution of Parliament, this piece of legislation did not make it through and entered into force only on 23 July 2011.²⁴ Similarly, politicians in a number of countries have advocated general face-veil bans (for example in Spain,²⁵ the Netherlands²⁶ and even

20 For an overview of the debates see Bronwyn Winter, *Hijab & the republic: uncovering the French headscarf debate* (New York: Syracuse University Press, 2008), at 129–232.

21 Loi no. 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics. For an analysis of this law and the process leading to its adoption see John R. Bowen, *Why the French don't like headscarves: Islam, the State, and public space* (Princeton: Princeton University Press, 2007).

22 Siobhán Mullally, ‘Civic Integration, Migrant Women and the Veil: at the Limits of Rights?’ *MLR* 74 (2011), at 42–4.

23 ‘VIDEO. Guaino perd son sang-froid face à un élu PS’, *Le Parisien*, February 25, 2012 <http://www.leparisien.fr/election-presidentielle-2012/video-le-coup-de-colere-de-guaino-face-a-un-elu-socialiste-25-02-2012-1877876.php>. Last accessed April 27th 2012. Mounir Belkouch, ‘Le débat sur l’identité nationale est-il désuet en France ?’, *Le nouvel Observateur*, December 27, 2011 <http://leplus.nouvelobs.com/contribution/226049-le-debat-sur-l-identite-nationale-est-il-desuet-en-france.html>. Last accessed April 27th 2012. ‘Débat sur l’identité nationale : Copé capitule définitivement’, *Le Post*, January 4, 2011, http://www.lepost.fr/article/2011/01/04/2359464_debat-sur-l-identite-nationale-cope-capitule-definitivement.html. Last accessed January 14th 2011; ‘Besson relance le débat sur l’identité nationale’, *Le Monde*, October 25, 2009, http://www.lemonde.fr/politique/article/2009/10/25/besson-relance-le-debat-sur-l-identite-nationale_1258628_823448.html. Last accessed January 14th 2011.

24 Jennie Ryan, ‘Belgium burqa ban takes effect’, *Jurist*, July 24, 2011, <http://jurist.org/paperchase/2011/07/belgium-burqa-ban-takes-effect.php>. Last accessed October 22nd 2011.

25 ‘Spanish politicians call for nationwide burka ban’, *Euro Weekly News*, February 7, 2011, <http://www.euroweeklynews.com/2011020785841/news/spain/spanish-politicians-call-for-nationwide-burka-ban.html>. Last accessed February 25th 2011; Olivier Dord, ‘Should the full Islamic veil be banned? European States respond in various ways according to their own national rationale’ (2010) *European Issue* 183 at 4.

26 Sara Webb, ‘Dutch may introduce burqa ban as early as 2011’, *Reuters*, December 16, 2010, <http://uk.reuters.com/article/2010/12/16/uk-dutch-politics-wilders-interview-idUKTRE6BF45W20101216>. Last accessed February 24 2011; Dord, see n25 above; at 3.

the United Kingdom²⁷), but to date veiling restrictions have been introduced only in a few municipalities and regions,²⁸ and even there they have been contested.²⁹

The issue of the burka as worn by French residents appeared for the first time in the French media in summer 2008 in relation to a decision of the *Conseil d'Etat*, the highest judicial authority in the area of administrative law, upholding a refusal of French citizenship to Faiza Silmi on the grounds of a 'deficiency of assimilation' and her 'radical practice of Islam' i.e. the wearing of a face-veil.³⁰ This incident was followed by the first (unsuccessful) proposal of a bill outlawing the face-veil.³¹

However, the process which eventually led to the adoption of the law restricting the covering of one's face only started properly in June 2009, as a result of publicity given to a proposal of André Gerin to establish a parliamentary commission to deal with the practice of face-veiling.³² The proposal was endorsed by Nicolas Sarkozy, who stated in front of parliamentarians that the burka is not welcome in France.³³ His speech was followed the very next day by the appointment of a parliamentary commission (*mission d'information*) to investigate the practice of wearing the full veil on French territory. The commission delivered its report³⁴ on 26 January 2010. The document contained an analysis of full veiling in France (and a few countries of reference) and explained how incompatible this 'radical practice' was with the values of the Republic (liberty, equality, fraternity). Although the report was rather negative about the full veil and one-sided in its choice of arguments presented and persons interviewed (only one face-veiled woman was interviewed after she agreed to unveil herself³⁵), it came up with a number of well-thought out proposals and conclusions; for example the proposal to establish a national institute of Islamic studies and the proposal to initiate a parliamentary commission on Islamophobia.³⁶ Some of the proposals were taken from previous reports, such as that of the Stasi commission³⁷ (this commission, chaired by Bernard Stasi, investigated the application of the principle of *laïcité* in 2003). The Stasi commission presented a number of good recommendations, but the law prohibiting conspicuous religious symbols in

27 See 'MP proposes law to ban wearing burkas and balaclavas' *BBC*, June 30, 2010, <http://www.bbc.co.uk/news/10465209>. Last accessed April 20th 2011.

28 See Karen Meerschaut et al., 'The use of municipal administrative sanctions by the municipalities of Brussels: Is there a need for a regulating role for the Brussels Capital Region?' (19 May 2008) *Brussels Studies* 18, 4–5; Peter Walker, 'Muslim woman fined for wearing burqa in northern Italy', *Guardian*, May 5, 2010, <http://www.guardian.co.uk/world/2010/may/05/woman-fined-burqa-italy>. Last accessed March 10th 2011; Dord, see n25 above.

29 E.g. the *Tribunal de police* in Brussels ruled against such a ban in Etterbeek because it violated Article 9 of the ECHR as the municipality did not show that the restriction would be necessary for public security; see e.g. Ricardo Gutierrez, 'Un tribunal autorise la burqa en rue', *Le Soir*, January 28, 2011 <http://www.lesoir.be/actualite/belgique/2011-01-28/un-tribunal-autorise-la-burqa-en-rue-818388.php>. Last accessed February 24th 2011.

30 Anastasia Vakulenko, 'Gender Equality as an Essential French Value: The Case of Mme M', (2009) *Human Rights Law Review* 9, 143–50; Open Societies Foundations, See n2 above; at 28.

31 The bill no. 1121 by Jacques Myard is available at: <http://www.assemblee-nationale.fr/13/propositions/pion1121.asp>, Last accessed April 13th 2011.

32 Géraud, 'Burqa, petite histoire d'un grand emballement'. The proposal is available at: <http://www.assemblee-nationale.fr/13/propositions/pion1725.asp>. Last accessed April 14th 2011.

33 Speech is available at http://www.youtube.com/watch?v=hbzdpKi_TSY, Last accessed April 14th 2011.

34 The report of the commission, its minutes and recordings of the interviews are available at: http://www.assemblee-nationale.fr/13/dossiers/voile_integral.asp. Last accessed April 14th 2011.

35 Rapport d'information, see n2 above; at 44–5, 158; Open Societies Foundations, See n2 above; at 20.

36 Rapport d'information, see n2 above; at 134–8.

37 Report is available at: <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics//034000725/0000.pdf>. Last accessed April 24 2012.

schools was the only implemented outcome of their work.

This approach to fixing problems by passing a law and not taking many extra-legal measures seems once again to have been taken by the French decision-makers in the case of the burka ban. It was not however, advocated by the commission on the full veil. Even though the commission examined several possible ways of enacting the burka ban as a law, and the majority of its members favoured the adoption of such a law, they concluded that as a law it would be very fragile and might potentially cause more problems than it solved.³⁸ They therefore recommended an ordinance prohibiting the dissimulation of one's face in contact with public services (the sanction for non-compliance being refusal to deliver the service), and the adoption of a resolution condemning the practice of full veiling.³⁹ They also advised that an opinion be sought from the *Conseil d'Etat* on a possible law prohibiting concealment of one's face in the public space.

The Prime Minister sent a letter to the *Conseil d'Etat* three days after the report had been made public. He asked the high legal officers to study the legal solutions that would enable the most extensive and efficient ban on the wearing of a full veil; at the same time he reminded them of the necessity not to hurt their Muslim compatriots. The Council presented its study on 25 March 2010.⁴⁰

The *Conseil d'Etat* began by analysing existing restrictions on wearing a full veil both in France and in other states that were seen to be in a comparable situation. It found that there were restrictions on wearing the veil in particular contexts, but that there had been no precedent for a general ban. After an analysis of possible grounds for the interdiction, it came to the conclusion that a general ban on wearing a full veil or covering one's face would present substantial legal uncertainties and therefore be an easy target for a challenge before courts; therefore it could not be recommended. Not to discard the whole idea of a burka ban, the Council suggested a prohibition of concealing one's face in certain public places based on public security and safety. Such a ban would be possible only if concealing one's face were to pose a substantial threat to public order. This requirement would be most appropriately met by bans introduced by local authorities (or specialised agencies) in reaction to specific problems. On a general level, the Council recommended the creation of a new sanction for persons breaching the ban: an obligation to meet a representative of a mediation body or to participate in their activities for a certain period of time. The Council also called for more severe sanctions for those who force another person to conceal their face.

The position of *Conseil d'Etat* did not however, prevent the government from presenting a bill envisaging a general ban on the concealment of one's face in public. The bill presented on 19 May 2010 in the name of Prime Minister François Fillon considered any partial ban to be 'insufficient, indirect and not addressing the true problem.'⁴¹ The bill was approved with only a few modifications by the National Assembly on 13 July (335 votes to 1; 339 voting out of 577), by the Senate on 14 September (246 votes to 1; 247 voting out of 343) and on 7 October by the *Conseil Constitutionnel*.⁴² As Anne Levade, a French jurist interviewed by the parliamentary commission, observed: The law came

38 Rapport d'information, see n2 above; at 164–79.

39 This resolution of a symbolic value was adopted by the National Assembly on 11 May 2010; the text is available at: <http://www.assemblee-nationale.fr/13/ta/ta0459.asp>. Last accessed April 14th 2011.

40 The text is available at: <http://www.conseil-etat.fr/cde/fr/rapports-et-etudes/possibilites-juridiques-d-interdiction-du-port-du-voile-integral.html>. Last accessed April 14th 2011.

41 The bill no. 2520 is available at <http://www.assemblee-nationale.fr/13/projets/pl2520.asp>. Last accessed April 14th 2011.

42 For an overview of the legislative process see http://www.assemblee-nationale.fr/13/dossiers/dissimulation_visage_espace_public.asp. Last accessed April 14 2011.

into being in an atypical way, characterised in particular by a broad consensus of politicians who did not want the burka and only disputed about the best scope and formulation of the law to minimise the risk of it being repealed.⁴³

The adopted law⁴⁴ stipulates that no one shall wear a garment purporting to conceal his or her face in a public space. The public space includes places open to the public and places destined to the provision of public services. The law provides an exception for garments prescribed by law, justified by health or professional reasons, or for the purpose of sports, festivals, arts or traditions. Breach of the law shall be punished by a fine of up to €150 or a *stage de citoyenneté* [citizenship course], or both. The law also envisages severe punishments for anyone forcing another to conceal his or her face (a fine of €30,000 and one year of imprisonment; in case of a minor, a €60,000 fine and two years of imprisonment).

The *Conseil Constitutionnel* assessed the constitutionality of the law and came to the conclusion that the measures taken by the legislature were not manifestly disproportionate. The only change it requested was enlarging the scope of exceptions to cover the exercise of religious freedom in places of worship that are open to the public. This exception was further reinforced by the circular of the Minister of the Interior, who asked his subordinates to avoid any intervention in the vicinity of places of worship so that their actions cannot be interpreted as indirectly restricting religious freedom.⁴⁵

The obligation not to cover one's face became applicable on 11 April 2011 while the sanctions for forcing somebody to do so have been applicable since October 2010. The six-month delay was not only supposed to serve educative and preparatory purposes but also should have enabled local authorities to make the practice of face-veiling regress.⁴⁶ As Frédéric Dieu pointed out, the object of the law should have disappeared even before the law entered into force.⁴⁷ Unsurprisingly, such a thing did not happen and it was not until March that the information about its application was made public.⁴⁸

Presented in its context, there can be no doubt that the French law is both accessible and reasonably precise. Therefore an analysis needs to be made of whether the law could interfere with the religious freedom of women wearing a full veil and whether such an interference is necessary in a democratic society.

4. Interference with freedom of religion

Any answer given to the question of interference with religious freedom depends on the reason for wearing a burka, a niqab or any similar headgear. If the reasons for covering one's face are closely related to one's religion, it is obvious that freedom of religion is at stake. On the other hand, if such a practice has nothing to do with religion, freedom of religion cannot be successfully invoked. In practice however, assessing the link between face-veiling and religion is not so straightforward, because there is a plurality of reasons

43 Anne Levade, 'Épilogue d'un débat juridique : l'interdiction de la dissimulation du visage dans l'espace public validée !', (2010) *Semaine juridique : Edition Générale* 43, 1978–1981.

44 Loi no. 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public.

45 Circulaire d'application du 31 mars 2011 de la loi no. 2010-1192 du 11 octobre 2010 posant le principe de l'interdiction de la dissimulation du visage dans l'espace public, no. NOR IOCD1109134C, accessible at: http://www.lefigaro.fr/assets/pdf/voile_circulaire.pdf. Last accessed April 13th 2011.

46 Rapport Garraud, see n8 above ; at 23 & 70.

47 Frédéric Dieu, 'Le droit de dévisager et l'obligation d'être dévisagé: vers une moralisation de l'espace public?' (November 2010) *Semaine juridique : Administrations et collectivités territoriales* 48, § 15.

48 An informative website was launched (www.visage-decouvert.gouv.fr) which also contains a leaflet, a poster and a circular of the PM (Circulaire du 2 mars 2011 relative à la mise en œuvre de la loi).

for wearing a burka or a niqab.⁴⁹ These reasons are not easily classified as ‘religious’ or ‘non-religious’, and it is unclear whether the relevant reasons should be examined on a subjective or an objective basis.

There are Muslims who consider wearing the full veil to be one of the obligations prescribed by Islam. This school of Islam is however, generally seen as marginal, and this tends to result in the light-minded dismissal of the full veil as a religious obligation.⁵⁰ Such an approach is highly questionable because it favours a majority interpretation and denies protection to a minority (dissenters). The result of religious freedom protecting only the mainstream interpretation of a religion can hardly be reconciled with the core human rights principles, including preservation of the pluralism inherent to a democratic society, protection of the most vulnerable and preventing the state from dictating what a person should believe.⁵¹

Those who deny the practice of full veiling the status of a religious obligation claim that it is a mere cultural practice. This sounds plausible; especially if one considers that the burka and the niqab are not spread around all countries with Muslim populations. It is however, not easy to distinguish between culture and religion and in any such attempt one is confronted with the question of who is in the position to decide. This question is reflected in the dilemma of whether a decision-making body should accept a subjective claim that there is a close link between a claimant’s religion and a particular behaviour, or if it should employ some kind of an objective test. On the one hand, human rights law is open to claims based on the harm suffered by an individual, which is always subjective in nature. On the other hand, decision-making bodies need to protect themselves from abusive claims, and therefore cannot accept all subjective statements.

Three typical scenarios of dealing with this dilemma can be distinguished in the relevant case law. The first accepts the subjective claim at face value.⁵² The second compares the subjective claim with a religious authority from the particular religion or its branch (this depends to a large extent on the religious expertise of the decision makers and on which experts are called).⁵³ The third scenario relies merely on an ‘objective’ judgement made by the decision makers.⁵⁴

The ECtHR has in recent times appeared reluctant to question the subjective understanding of the person concerned.⁵⁵ Similarly, the UN Human Rights Committee

49 Reasons provided by the 32 women wearing a niqab in Open Societies Foundations, see n2 above; at 40–1.

50 This ‘argument’ is present throughout the Rapport d’information, see n2 above; see also Rapport Garraud, see n8 above; at 8, 27, 32 & 44–5.

51 *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A, ECtHR; *Serif v. Greece*, no. 38178/97, § 53, ECHR 1999-IX; *Leyla Şahin v. Turkey* [GC]; *Masaev v. Moldova*, no. 6303/05, § 26, 12 May 2009, ECtHR; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 62, ECHR 2000-XI; *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 114–119, ECHR 2001-XII; *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, nos.412/03 and 35677/04, 22 January 2009, ECtHR; Natacha Bach, ‘La promotion avérée du pluralisme idéologique par le Comité des Droits de l’homme’, (2010) *Revue Générale de Droit International Public* 114, at 829–42.

52 *Abmet Arslan and Others v. Turkey*, no. 41135/98, 23 February 2010, ECtHR, or the approach of Austrian courts in *Otto-Preminger-Institut v. Austria*, 20 September 1994, Series A no. 295-A, ECtHR.

53 The approach of Russian courts in *Jehovah’s Witnesses of Moscow v. Russia*, no. 302/02, 10 June 2010, ECtHR, or of Turkish courts in *Sinan Işık v. Turkey*, no. 21924/05, 2 February 2010, ECtHR.

54 *X. v. United Kingdom*, no. 7291/75, 4 October 1977, ECtHR; *Lautsi v. Italy*, no. 30814/06, 3 November 2009 and 18 March 2011 [GC], ECtHR.

55 Malcolm D. Evans, ‘From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights’, (2010–2011) *Journal of Law and Religion* 26, at 348–9; *Moscow Branch of the Salvation Army v. Russia*, no 72881/01, § 92, ECHR 2006-XI.

accepts an author's choice of clothes in accordance with her or his religion and considers that to prevent a person from wearing religious clothing constitutes an interference with his or her religious freedom.⁵⁶ A case involving a Muslim applicant wearing an unspecified type of veil⁵⁷ makes it reasonable to believe that a general ban on full veils would be considered as an interference with freedom of religion.

A similar conclusion can be reached from the framework of the ECHR, even though the Court was reluctant for a long time to acknowledge that restricting the wearing of headscarves constituted an interference with religious freedom. This reluctance resulted from the judges' understanding that it is difficult to reconcile a headscarf with principles of gender equality, tolerance, non-discrimination etc.⁵⁸ However, in its recent case law, as Carolyn Evans noted, the Court usually assumes without deciding that banning the headscarf is a limitation (restriction) on rights⁵⁹ and focuses the major part of its judicial assessment on the justification of necessity and proportionality of the regulatory measures.

5. Necessity of the ban in a democratic society

Having already introduced the law restricting the wearing of face-veils and the international human rights law framework in which it has to operate, and establishing that bans on face-veils are very likely to interfere with the religious freedom of Muslim women wearing them, next comes the question with which practically all restrictions on freedom of religion stand or fall: Is the ban necessary in a democratic society? The relevant human rights instruments and bodies aim not for mere 'reasonableness' of the interference but for its necessity. For a restriction to pass the 'necessity test' it needs to pursue a legitimate aim and the means used for its implementation must be proportionate.

There are numerous 'reasons' or 'aims' invoked in defence of restricting face-veils in public. The most commonly used can be lumped into the following categories, out of which most public figures pick up bits and pieces to construe their arguments: protection of public security, safety and public order; enhancement of gender equality and human dignity; protection of *laïcité* or secularism; and protection of the rights and freedoms of others.⁶⁰ I will examine them one by one and assess whether an introduction of a general or partial face-veil ban could constitute a proportionate means of their implementation.

5.1 Public security, safety and order

The protection of public security, safety and order was used as the least contestable legal basis for the prohibition of face covering in the public space⁶¹ (even though some consider it a secondary reason).⁶² Moreover, it has been particularly popular with the

56 General Comment no. 22, § 4.

57 *Hudoyberganova v. Uzbekistan*, Communication no. 931/2000, CCPR/C/82/D/931/2000, 18 January 2005.

58 *Dablab v. Switzerland* (Dec.), no. 42393/98, ECHR 2001-V, ECtHR.

59 Carolyn Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010–2011) *Journal of Law and Religion* 26, at 330; *Dogru v. France*, no. 27058/05, § 48, 4 December 2008, ECtHR; *Aktas v. France*, no. 43563/08, 30 June 2009, ECtHR. As for other religious garments: *Abmet Arslan and Others v. Turkey*, §§ 35–6, no. 41135/98, 23 February 2010, ECtHR.

60 *Projet de loi interdisant la dissimulation du visage dans l'espace public*, no. 2520, 19 May 2010; available at: <http://www.assemblee-nationale.fr/13/projets/pl2520.asp>. 3–5, and *Rapport d'information*, see n2 above; at 22.

61 *Rapport Garraud*, see n8 above; at 15.

62 The concept of life in society and equal dignity of women were more important according to Rémy

media. This popularity might be seen as flowing from two sources: the first has to do with the nature of contemporary news presentation, which favours simple shocking stories.⁶³ An image of a fully veiled Arab woman carrying explosives under her loose garment to blow up a hundred of the ‘unfaithful’ fits perfectly into the scheme.⁶⁴ Even more so if the main character is a man disguised in female clothing.⁶⁵ Frequent reporting of stories along this line has substantially contributed to the perception of the full veil as a threat to the European public even though all the relevant reported events took place in non-European countries.

The second lies in the contemporary Western public sphere mind-set in which some forms or circumstances of face covering are inherently interpreted as more threatening than others. Most Westerners expect modern Western clothes to be worn in the streets, including helmets, scarves and other accessories dissimulating one’s face. Such clothing is not of any particular concern except for a few areas with monitored access, such as banks. The situation is very different when a person appears in either a known face covering with sinister cultural connotations (executioner’s hood, bank robber’s balaclava), or a non-Western piece of clothing to which the general public is not accustomed.

The media has oft played upon these interpretations and despite the extensive coverage, it has managed to present the face-veil threat in rather a limited number of scenarios (which have been just repeated or slightly modified). The first is the ‘weapon-under-burka scenario’.⁶⁶ The second raises the issue of the protection of others, particularly children; for instance how can teachers know whether the ‘non-recognisable’ woman is the mother of a particular child?⁶⁷ This problem with identifying face-veiled women can be expanded and applied to all situations when there is a need to identify a person for the delivery of services (transportation, bank and postal transactions, entrance to cinema, purchase of alcohol and tobacco etc.).⁶⁸ The third scenario is rather general: feeling ‘somehow’ threatened by the ‘creature behind a curtain’ when you travel with her on public transport or sit next to her in a waiting room.⁶⁹ Finally, there is a scenario

Schwartz. (October 2010) *Regards sur l’actualité* 364, at 19.

63 See Mariska Kleemans and Paul Hendriks Vettehen, ‘Sensationalism in television news’, in *Meaningful Media: Communication research on the social construction of reality*, ed. R.P. Konig et al. (Nijmegen: Tandem Felix, 2009), at 226–43.

64 See ‘First female “Suicide Bomber” blew herself near a Christian school’, *Christian Today Australia*, December 5, 2007, accessed April 20, 2011 <http://au.christiantoday.com/article/first-female-suicide-bomber-blew-herself-near-a-christian-school/3517.htm>, or ‘Mum hid bomb kit in her burka’, *The Sun*, November 3, 2009 <http://www.thesun.co.uk/sol/homepage/news/2710024/Mum-hid-bomb-kit-in-her-burka.html>. Last accessed April 20th 2011.

65 See ‘Un attentat suicide fait 15 morts au Pakistan’, *Le Point*, October 1, 2007. <http://www.lepoint.fr/archives/article.php/203221>. Last accessed April 20th 2011.

66 See ‘Deux kamikazes en burqa tuent au moins 41 réfugiés au Pakistan’, *Metro*, April 17, 2010. <http://www.metrofrance.com/info/deux-kamikazes-en-burqa-tuent-au-moins-41-refugies-au-pakistan/mjdq!fLhWkVbpRiMQg/>. Last accessed April 20 2011; or ‘Un attentat suicide dans l’ouest de l’Afghanistan fait 18 morts’, *Challenges*, May 15, 2008. http://www.challenges.fr/20080515.REU6001/attentat_suicide_dans_louest_de_lafghanistan_18_morts.html. Last accessed April 20th 2011.

67 See an interview with Jean-François Copé in *Le Figaro*, January 8, 2010. <http://www.lefigaro.fr/politique/2010/01/09/01002-20100109ARTFIG00050—pourq-u-oi-il-faut-une-loi-anti-burqa-.php>. Last accessed April 20th 2011.

68 See ‘Une nouvelle conductrice verbalisée pour port de niqab’, *Metro*, June 3, 2010 <http://www.metrofrance.com/info/une-nouvelle-conductrice-verbalisee-pour-port-de-niqab/mjfe!HQGweXYNHk7j/>. Last accessed April 20 2011; or ‘L’extrême voile’, *L’Express*, November 20, 2003 http://www.lexpress.fr/actualite/societe/religion/l-extreme-voile_494524.html. Last accessed April 20 2011.

69 See ‘Port de la burqa : vers un “islam apaisé et des Lumières”’, *Nouvel Observateur*, June 22, 2009

which considers face-veils to be threatening the whole social order by their mere existence and by the values they represent.⁷⁰ Let us consider the four proposed scenarios one by one.

The ‘weapon-under-burka scenario’ was rejected by the French parliamentary commission because of its discriminatory character. They noted that if this scenario were to be used as the basis for a face-veil ban, the ban would also need to include backpacks, briefcases and cassocks, which would apparently be excessive.⁷¹ It is nevertheless conceivable to use this security argument for specific local bans which do not discriminate against Muslim women and are proportionate to their aim; such cases might include jewellers, banks and other areas with special security regimes. This approach was endorsed by the *Conseil d’Etat*, which advised leaving restrictions on face-veils in such places to the discretion of local authorities, since they are best placed for devising them.⁷²

As for the second scenario, even though the French parliamentary commission considered it important to be identifiable while using public services, it did not go as far as using this argument as a basis for a general ban. The reasoning was quite straightforward: There is not necessarily an obligation to be identifiable at all times in public.⁷³ Similarly, the *Conseil d’Etat* found it justifiable to oblige individuals to have their face uncovered only in certain places where public services are delivered, or where entry is based on identity or age.⁷⁴ Curiously enough, the French authorities included in their reasoning a number of such places where it is quite rare to encounter fully veiled Muslim women (e.g. night clubs and screening of age-restricted films). Still, there are a number of places for which uncovering one’s face could be found necessary, if construed in a narrow, proportionate, non-discriminatory and unintrusive manner. Such limited restriction on face covering would probably be acceptable to many face-veiled women⁷⁵ and would without doubt pass the scrutiny of the ECtHR. The Court found no violation of the ECHR in a case of a Sikh who in order to obtain a new driving licence was required to present a photo without a turban, so as to be identifiable during traffic controls⁷⁶ (even though the argumentation in this case is seriously flawed because a Sikh wears a turban at all times and hence is most identifiable with his turban).⁷⁷ Similarly the Court did not find admissible an application by a veiled Muslim woman who was refused entry to the French consulate in Marrakesh on the grounds that she was not identifiable (even though she offered to take off her veil in the presence of a female officer).⁷⁸

Thirdly, the ‘unease’ associated with fully veiled women present in the public

<http://tempsreel.nouvelobs.com/actualite/politique/20090618.OBS1084/port-de-la-burqa-vers-un-islam-apaise-et-des-lumieres.html>. Last accessed April 20 2011; or ‘La Burka en France ? Je dis non !’, *Le Post*, June 19, 2009 http://www.lepost.fr/article/2009/06/19/1584416_la-burka-en-france-je-dis-non.html. Last accessed April 20 2011.

70 See ‘Voile intégral : accepter “les règles du vivre ensemble”’, *Euronews*, July 13, 2010 <http://fr.euronews.net/2010/07/13/voile-integral-accepter-les-regles-du-vivre-ensemble/>. Last accessed April 20 2011.

71 Rapport d’information, see n2 above; at 176.

72 Etude relative aux possibilités juridiques d’interdiction du port du voile intégral, see n40 above, at 20 & 33.

73 Rapport d’information, see n2 above; at 155–7, 177.

74 Etude relative aux possibilités juridiques d’interdiction du port du voile intégral, see n40 above, at 38.

75 Open Societies Foundations, see n2 above; at 45.

76 *Mann Singh v. France*, no. 24479/07, 13 November 2008, ECtHR.

77 This argument was presented to the Court by the applicant’s lawyers but the Court did not pronounce itself on the matter. See Jaspreet Singh, ‘European Court Says No to Sikh Turban on Driving Licence in France’, *United Sikhs*, November 27, 2008 <http://www.unitedsikhs.org/PressReleases/PRSRLS-27-11-2008-00.htm>. Last accessed January 8 2011.

78 *El Morsli v. France* (dec.), no. 15585/06, 4 March 2008, ECtHR.

space could be understood as touching on morality (*bonnes mœurs, moralité publique*). The French parliamentary commission tried to use this argument as presented by Guy Carcassonne but failed to provide any sound legal reasoning (Carcassonne considered the covering of your face as harming the other by expressing that they are not worthy enough to be allowed to see your face).⁷⁹ The *Conseil d'Etat* considered public morality as part of *l'ordre public non matériel* and concluded that it cannot be used as a basis for a general ban because there is nothing 'immoral' in the practice of full veiling (using the term 'immoral' as defined by its case law).⁸⁰ The 'unease' caused by a sight of a woman in a face-veil might be looked at from the perspective of freedom of expression which protects even expressions that 'offend, shock or disturb' unless they are gratuitously offensive.⁸¹ Given the fact that some fully veiled women treat their head covering as a religious obligation it would be difficult to consider it 'gratuitously offensive' in general. Moreover, the ECtHR requires the national authorities to display particular vigilance in ensuring that national public opinion is not protected at the expense of the assertion of minority views, no matter how unpopular they may be.⁸²

The fourth scenario, in which full veils are considered a threat to life in society (*vivre ensemble dans la société*), is based on quite a broad understanding of public order (so-called 'non-material', 'immaterial' or 'social' public order).⁸³ Such an understanding was partially present in the work of the parliamentary commission and was later fully relied upon by the French government in its bill. Based on this conception, the government tried to claim the right to prohibit any comportment which would go directly against the essential rules of the republican social contract and without which life in society would be impossible.⁸⁴ These 'fundamental requirements' include such concepts as liberty, equality, fraternity, human dignity, *laïcité* or public morality. Accepting such an approach would mean enlarging the scope of the concept of public order so much that it would become meaningless and easy to abuse (parliamentary rapporteur J.P. Garraud understood public order as public or general interest and the Minister of Justice as general or national interest).⁸⁵ It is therefore no surprise that the broad understanding of public order was rejected by the *Conseil d'Etat* as unheard of in the French legal system.⁸⁶

Even though the four scenarios were endorsed by the parliamentarians, they did not receive much support when it came to legal assessment. One of the main reasons is that the threat is rather hypothetical in nature. The *Conseil d'Etat* noted that the full veil had not yet effectively posed any particular problems to public security or troubled the public order, nor had it provoked any violent reactions that would justify its general ban. Such a ban would therefore rest upon an artificial preventive logic that had never been endorsed by its case law.⁸⁷ Similarly, 'mere worries or fears' would not justify interference with a right guaranteed by the ECHR because to prove a 'pressing social need' the state needs to provide indisputable facts and reasons whose legitimacy is beyond doubt.⁸⁸

79 Rapport d'information, see n2 above; at 177–8 & 554–9.

80 Etude relative aux possibilités juridiques d'interdiction du port du voile intégral, see n40 above, at 25.

81 *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, ECtHR; *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 49, Series A no. 295-A, ECtHR.

82 *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, § 148, ECtHR.

83 Etude relative aux possibilités juridiques d'interdiction du port du voile intégral, see n40 above, at 25–8; Rapport Garraud, see n8 above ; at 15–19 & 28–30.

84 Projet de loi interdisant la dissimulation du visage dans l'espace public, see n60 above, at 3–5; Rapport Garraud, see n8 above ; at 15–19.

85 Rapport Garraud, see n8 above ; at 18 & 40.

86 Etude relative aux possibilités juridiques d'interdiction du port du voile intégral, see n40 above, at 26–8.

87 *Ibid.*, at 35–8.

88 This standard was aptly formulated by Françoise Tulkens in her dissenting opinion to *Leyla Şahin v.*

The weakness of the security argument is further supported by the possibility of arguing that the ban on full veils will in fact lower the security shared by French people. The reasons for this argument are manifold. Firstly, the whole discussion about the burka has radicalised the international opposition to France, and resultant violence similar to that following the Danish cartoons or the pastors burning the Qur'an cannot be ruled out. Secondly, the anti-burka movement stigmatises and radicalises Muslims living in France, making them more likely to join extreme movements or resort to violence against those who oppress them. Thirdly, if the al-Qaeda conspiracy theories were true, France would be higher on the 'target list' with the ban than without it.

It is clear from the analysis conducted that basing a general face-veil ban on public security, safety and order is very problematic. Such a ban cannot be considered proportionate to achieving the legitimate aim and is evidently not necessary in any democratic society of contemporary Europe. On the other hand, local and/or partial restrictions on covering one's face could satisfy the proportionality (necessity) test if construed in a narrow and non-discriminatory manner.

5.2 Gender equality and human dignity

An argument for prohibiting face-veils based on gender equality and human dignity is fundamentally different from the argument based on security, safety and order. While the latter deals predominantly with supposed detrimental consequences of full veiling, the former attacks the very nature of it. Human dignity and gender equality provide an absolute argument against full veils. They are used to substantiate the claim that there is something wrong, unequal and inhumane about the practice of covering one's face. It is not difficult however, to realise that this argument must either be flawed, or can be used to prohibit almost anything. This was indeed seen by both the parliamentary commission and the *Conseil d'Etat*. Nevertheless, the French government relied on it,⁸⁹ it is very present in the public discourse and it is also likely to be addressed by the human rights bodies assessing the justifications of the ban.

5.2.1 Gender equality

Pointing out that it is impossible to reconcile the practice of veiling with equality between men and women has been one of the defining features of the debates on the burka and other headscarves. The omnipresence of the gender equality argument is certainly related to a wide acceptance of equality in both international human rights and national constitutional law. In addition, the proliferation of this argument has been facilitated by the space provided by the media and the parliamentary commission to feminists (without necessarily labelling them as such) and to Muslim or immigrant women who managed to 'liberate' themselves from 'masculine and/or religious oppression'.⁹⁰ The argument of gender equality has taken a number of forms. One sees the full veil as a separation between men and women. Another considers the veil to be an indication of an objectification of a woman. A third sees in them an attempt to socially exclude women, to make them disappear from the public space. A fourth way gender equality comes into play is through the assertion that face-veils are imposed on women by men or a paternalistic society. A fifth line of argument attacks the full veil because it

Turkey [GC], § 5, while referring to *Smith and Grady v. the United Kingdom*, nos.33985/96 and 33986/96, § 89, ECHR 1999-VI.

⁸⁹ *Projet de loi interdisant la dissimulation du visage dans l'espace public*, see n60 above.

⁹⁰ Bowen, *Why the French don't like headscarves*, see n21 above; and the profiles of persons interviewed by the French parliamentary commissions.

refuses equal dignity to males and females.⁹¹

Let us deal with these one by one, with the last, equal dignity of males and females, discussed separately in the next subsection because it deserves a more complex elaboration.

The first argument of separation sees in full veils an expression of an apartheid based on gender/sex (*apartheid sexuelle*).⁹² For the proponents of this argument, a full veil symbolises a world of women that is closed and forced – in comparison with a world of men that is open and relational. Any separation between men and women in the French context goes against the principle of *mixité* (coeducation), which has expanded far beyond the domain of school establishments. This principle has a constitutional value in France but no form of European consensus is seen in this respect; therefore if this argument was made before the ECtHR, a margin of appreciation could be granted. It is however, difficult to imagine anybody invoking this principle, except a claimant whose behaviour would be affected by the proposed separation i.e. a woman wearing a face-veil. These women, wearing the face-veil voluntarily, are unlikely to consider invoking this principle against themselves. As observed by the *Conseil d'Etat*, this is a problem common to all gender equality arguments: the principle of equality can be used against another but not against one's own freedom, even if one's behaviour in public can be interpreted as sanctioning an unequal situation (provided that one's physical integrity remains intact).⁹³ This is in direct opposition to the idea of 'liberation against one's will', which is examined below. Another point of weakness in using this argument to support a face-veil ban rests in its discriminatory character, since it would only be used to target Muslim women, and would leave (at least for the time being) other 'gender-segregated communities', such as monastic orders or gentlemen's clubs, at liberty. If, on the other hand, it were used against all places of gender separation at once, it would undoubtedly seem excessive.

The second way in which it is argued that a full veil adversely affects gender equality is through reification of women. It is said that a woman in a burka loses her personality vis-à-vis people in public, that she becomes a generic woman, just a 'thing' that has the same 'packaging' as other women.⁹⁴ Interestingly enough, the same argument is made by women wearing veils: They want to escape the Western way of seeing women predominantly as sexual objects which anybody can contemplate.⁹⁵ If we seriously followed the logic of the objectification argument, it would also be necessary to consider outlawing pornography, prostitution and potentially even the modelling and film industries. This would again for many people be excessive, and the argument therefore cannot be used as a foundation for a general ban simply on face veiling.

The third reproach made to full veils from the position of gender equality is that they make women disappear from the public sphere (this being so even if the woman walks on the streets, because the veil makes a private sphere of a sort around her). A reason for making women disappear from the public in this way lies in the understanding that women are intrinsically dangerous because they bring disorder.⁹⁶ This argument however, ignores two things. Firstly, women in face-veils do not disappear from the

91 An interesting combination of these arguments can be seen in Maud Nathan, 'Voile, niqab et burqa: symboles d'oppression des femmes' *Lutte Ouvrière* no. 2134, June 27, 2009 <http://www.lutte-ouvriere-journal.org/?act=artil&num=2134&id=2>. Last accessed April 26 2011.

92 Rapport d'information, see n2 above; at 107–8.

93 Etude relative aux possibilités juridiques d'interdiction du port du voile intégral, see n40 above, at 20.

94 Rapport d'information, see n2 above; at 108–9.

95 Bowen, *Why the French don't like headscarves*, see n21 above, and Open Societies Foundations, see n2 above.

96 Rapport d'information, see n2 above; at 109–110.

public; they just look different. Secondly, it is not necessarily the veil that makes women disappear from the public sphere but rather its prohibition, because a number of face-veiled women might decide to avoid all public places if the ban was applicable.⁹⁷ The legislator therefore should assess how many women wearing the face-veil might be prevented from participation in public life by the ban. Given the absence of a converse analysis, looking at how many women might be encouraged to participate in public life as a result of the ban, it is difficult to conceive how this limb of the gender argument could justify the necessity for a ban on face-veils.

The fourth criticism of the practice of face-veiling from the perspective of gender equality is through an analysis of power structures. It is asserted that the veil is imposed on women by men, and is a form of oppression. To this it is possible to argue that at least part of the veiling is voluntary. What follows is usually a response that the women who claim to wear the veil voluntarily have internalised the oppressive structures and need to be liberated from them. Even if we assumed that this was true to a large extent, we could not base a general ban on this argument because we could not rule out Muslim women wearing the veil out of genuine will. This argument can however, be used in support of legislation against those who force women to wear a particular form of veil.

A general problem that appears in the process of a thorough scrutiny of gender equality arguments is that these arguments often take the form of unsubstantiated proclamations, possibly accompanied by examples of oppression from non-European countries. This is an effective way of shifting public opinion by manipulating emotions, but it does not provide us with legal arguments. Another problematic aspect common to many formulations of the gender equality argument is a tendency to assign the veil only one meaning. This approach is based on an assumption of being able to distinguish (and impose) the true meaning of such a practice without needing to take into account what the person in question thinks. It is striking that this approach is used in the name of feminism, which has been particularly sensitive to the power structures in our societies.⁹⁸

This approach also ignores the structure of symbols and defies the principle of state neutrality.⁹⁹ In defence of the 'narrow way' of looking at religious symbols it is possible to bring forward several cases of the ECtHR (e.g. *Dablab v. Switzerland* or *Leyla Şahin v. Turkey*); however, at the same time there is a line of thought appreciating the pluralism of meanings inherent to each religious symbol (represented for example by Judge Tulkens in her dissenting opinion to the *Şahin* case and in the reasoning of the decisions in *Lautsi v. Italy*).¹⁰⁰ In this respect it is difficult to predict how the Court would treat the symbolism of a burka.

Another problem visible in the debates on gender equality and face-veiling is a stark absence of any serious analysis of alternative ways of addressing the gender inequality in question. It is difficult to see this approach as compliant with the principle of proportionality, which asks for identification of measures that would achieve the goal with the least possible interference with other fundamental rights and freedoms. It is possible to conclude that gender equality does not offer a sound basis for a complete ban on the wearing of face-veils. This conclusion rests on the absence of a serious search for alternatives, on the rather unclear impacts of such a measure on gender equality, on an inconsistency in the application of this principle on phenomena similar to face-veiling (which can possibly be discriminatory), and on the difficulty of imposing a measure on a

97 Open Societies Foundations, see n2 above; at 73–4.

98 In this context see proclamations of the movement *Ni Putes Ni Soumises* (<http://www.npns.fr>).

99 Paul Ricœur, *Le conflit des interprétations* (Paris: Seuil, 1969).

100 *Lautsi v. Italy*, no.30814/06, 3 November 2009 and 18 March 2011 [GC], ECtHR.

person in the name of gender equality in a situation when that person does not see gender equality to be at stake. Gender equality and an analysis of power structures can nonetheless justify an action (legislative or non-legislative) against those who force others to wear a particular form of (full) veil. This will be further analysed while addressing the protection of the rights and freedoms of others.

5.2.2 Human dignity

The concept of human dignity entered legal discourse at the end of the Second World War through the UN Charter and the Universal Declaration of Human Rights. Ever since, it has been used as a foundation for the human rights system on which people of different cultures, religions and convictions can easily agree.¹⁰¹ Such agreement however, extends only to the utmost importance of human dignity, not to its content and implications.¹⁰²

The way human dignity is understood is to a great extent influenced by the philosophical and religious convictions of a person and by the way one understands concepts such as human being, person or individual. Among numerous approaches, two have played a significant role in the debates on burka bans. The first, paternalistic in its nature, tries to protect women's dignity even against their own will. The second protects an individual's free will as the cornerstone of a human being, of a person. The former is an expression of the society's responsibility to correct its ill-thinking members. The latter relies on liberty that finds its grounds in the creation of man in the image of God, reformation theology and the Renaissance.¹⁰³ The former tries to liberate oppressed human beings from impositions of an ideology (e.g. religion or male dominance) in order to offer them another yoke that they should 'freely' accept (e.g. the values of the French Republic). The latter acknowledges that liberty cannot be imposed. The former emphasises an active role to be played in society and rejects any retreat into oneself (*repli sur soi*). The latter accentuates individual autonomy. The former does not leave much space for an individual to exercise free agency and, if applied in absolute terms, would result in a complete negation of liberty and individual responsibility. The latter is criticised for creating an unlimited freedom to act in contradiction with the interests of a society.

The French parliamentary commission concluded that there is not much support for the paternalistic concept of human dignity in French and Strasbourg case law. This implies that human dignity cannot serve as a basis for a general burka ban. The commission noted that from its interviews with jurists it became apparent that the principle of dignity protects individuals against interferences by third parties and does not allow for the state to judge the dignity of people in order to protect them against themselves.¹⁰⁴ One of those interviewed, Guy Carcassonne - a professor of public law who argued for the ban - stated that the legislature was not qualified to judge the dignity of another without interference with the first principle of the constitution, liberty, for the legislator stops being democratic at the moment when he decides to impose on its

101 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) *European Journal of International Law* 19, 655–724; *C.R. and S.W. v. the United Kingdom*, 22 November 1995, §§ 42 and 44 respectively, Series A, nos.335-B and 335-C, ECtHR.

102 René Simon, 'Le concept de dignité de l'homme en éthique', in *De dignitate hominis: Mélanges offerts à Carlos-Josaphat Pinto de Oliveira à l'occasion de son 65^e anniversaire*, ed. Adrian Holderegger et al. (Fribourg: Editions Universitaires Fribourg Suisse, 1987), at 265–78.

103 See the works of Gregory of Nyssa, Dumitru Stăniloae, Pico della Mirandola or Blaise Pascal. Fraser Watts, 'Human Dignity: Concepts and Experiences,' in *God and Human Dignity*, ed. R. Kendall Soulen et al. (Grand Rapids, Cambridge: Eerdmans, 2006), at 247–62.

104 Rapport d'information, see n2 above; at 112 & 172–5.

citizens what they should do under the cover of dignity.¹⁰⁵ If one accepts this position it is impossible to argue that a general face-veil ban based on human dignity is necessary in a democratic society. If one does not, one should be open to human dignity being used as the grounds for bans on pornography, gambling, alcohol or smoking.

The *Conseil d'Etat*, in its reasoning, acknowledged the existence of two concepts of dignity which can potentially contradict or limit each other: The moral need to protect dignity at the expense of an individual's free will; and the protection of free will as an inherent element of a person. The former it exemplified though a case in which the Council found 'dwarf throwing' contradictory to human dignity.¹⁰⁶ However, the Council favoured the latter conception, noting that it has been far more widely adhered to within the ECtHR's protection of personal autonomy, according to which everyone can base their life on personal convictions and choices (even if these put them physically or morally at danger) as long as they do not harm others. The Council also pointed out that according to the Ministry of the Interior, most face-veils are worn voluntarily. It concluded that human dignity cannot be used to justify the general ban.¹⁰⁷

Nonetheless, the French government did not give up its human dignity justification.¹⁰⁸ It tried to approach it from another side: it asserted that it was not only the dignity of the person who wears a full veil that was at stake, but also the dignity of people who share the public space with them and who perceive themselves as people whom the person in the full veil is trying to protect herself against.¹⁰⁹ This argument stretches the concept of human dignity as far as the protection of public morals and of the rights of others, and should be dealt with under those limbs of justification. Besides that, it is not clear why the human dignity of the public should be more affected by the self-separation of Muslim women than of people who are exempted by the law (policemen, motorcyclists, people wearing anti-pollution masks etc.).

It is possible to conclude that even though the respect for human dignity is at the core of the international human rights system, it cannot be used as a disguise for the arbitrary limitation of fundamental liberties against the will of people concerned. A general ban on face-veils based on human dignity is not only unnecessary in a democratic and pluralistic society but has great potential for driving the society further from its democratic and pluralistic character.

5.3. Secularism and *laïcité*

Laïcité has probably been the most publicly discussed justification for the face-veil ban. It has become a 'mantra' to counter all troubles related to religious symbols in general, and Islamic veils in particular. That is in a way understandable, as the French have considered *laïcité* to be at the heart of their republican identity, and even the ECtHR approved of it as a Convention-compliant notion.¹¹⁰ Despite the public support *laïcité* has, the concept was not really used as a legal justification for the ban. Why is it so?

Before answering this question, it would be beneficial to clarify what *laïcité* is and

105 Rapport d'information, see n2 above; at 554–5.

106 Decision of Conseil d'Etat of Octobre 27, 1995 in the case of Commune de Morsang-sur-Orge.

107 Etude relative aux possibilités juridiques d'interdiction du port du voile intégral, see n40 above, at 19–20; in support of its argument the Council cited *K.A. and A.D. v. Belgium*, nos.42758/98 and 45558/99, 17 February 2005, ECtHR. Similar treatise is in the Rapport d'information, see n2 above; at 172–5.

108 Rapport Garraud, see n8 above; at 40–1.

109 Projet de loi interdisant la dissimulation du visage dans l'espace public, see n60 above, at 4.

110 See the cases against Turkey [particularly *Leyla Şahin* and *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos.41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II] and against France (*Dogru and Kervancı*).

is not. That is not an easy task because the word has many different uses and meanings. It is possible to distinguish three key legal aspects of the concept: respect for freedom of religion and conscience; fighting any domination of religion over the state and civil society (the principle of neutrality of public authorities, separation of politics and transcendence); and equality among religions, beliefs and convictions, including the right not to believe (respect for pluralism, autonomy of religious groups). According to Jean Baubérot it is important to keep all these elements in balance, even though in practice each group tends to emphasise only one of them.¹¹¹ Unsurprisingly that has also happened during the discussions about the burka.

A further complication is that the concept of *laïcité* cannot be easily translated into English (or any other language). It is sometimes used interchangeably with secularism (particularly in literature by non-Francophone authors and in the case law of the ECtHR). These two terms are however, not synonymous and especially not in the French context. Secularism and secularisation are used in reference to loss or absence of influence of religion over the life of an individual or a society, whereas *laïcité* and *laïcisation* are used on the institutional level of state–religion–civil society.¹¹²

Returning to the question of why *laïcité* cannot serve as a justification for restrictions on face-veiling, the answer is quite straightforward. As all the law professors interviewed by the parliamentary commission agreed, the principle of *laïcité* applies only to public institutions (society at large or the public) and not to individuals; individuals are free to manifest their convictions as long as they respect others and public order. Regulation of clothing in the name of *laïcité* is not possible because this does not concern the relationship between public authorities and the individual but relations between individuals. If the French state was allowed to regulate the wearing of religious symbols by pupils, it was only because public schools are classified as institutions of ‘public service’.¹¹³

The *Conseil d’Etat* came to a similar conclusion while referring to a recent decision of the ECtHR in *Abmet Arslan v. Turkey*: the principle of *laïcité* cannot found a general restriction on an expression of religious convictions in the public space and cannot justify an absolute prohibition of the full veil in all public spaces.¹¹⁴ The ECtHR took for granted in its reasoning that ‘ordinary citizens’ (unlike those exercising a public function) cannot be obliged to exercise restraint in public expressions of their religious convictions. It further noted that while religious neutrality might prevail over the freedom to manifest one’s religion within public institutions, it cannot do so in public places accessible to all.¹¹⁵

Given the fact that *laïcité* aims to protect individuals’ religious freedom and state neutrality towards religious communities, it is possible to argue that a general ban on the

111 Interview with Jean Baubérot, (February 2004) *Regards sur l’actualité*, 298, Etat, laïcité, religions, *La documentation Française*; Etude relative aux possibilités juridiques d’interdiction du port du voile intégral, see n40 above, at 18; Conseil d’Etat. *Un siècle de laïcité*; Déclaration universelle sur la laïcité au XXIe siècle, *Le Monde*, December 9, 2005. http://www.lemonde.fr/idees/article_interactif/2005/12/09/declaration-universelle-sur-la-laicite-au-xxie-siecle_718769_3232.html. Last accessed March 4 2012; Jean Baubérot, ‘De la Déclaration universelle sur la laïcité au XXIe siècle’, *Sécularisations et Laïcités*, ed. Haneda Masahi et al. (Tokyo: University of Tokyo Center for Philosophy, 2009), at 51–8.

112 In characterising this distinction I draw on the lectures of Philippe Portier, Valentine Zuber and Jean Baubérot from L’Ecole pratique des hautes études (EPHE). Cf. Jean Baubérot, ‘Sécularisation et laïcisation’, *Sécularisations et Laïcités*, ed. Haneda Masahi et al. (Tokyo: University of Tokyo Center for Philosophy, 2009), at 13–25.

113 Rapport d’information, see n2 above, at 85–93 & 171–2.

114 Etude relative aux possibilités juridiques d’interdiction du port du voile intégral, see n40 above, at 18.

115 *Abmet Arslan and Others v. Turkey*, §§ 48–9.

burka and the niqab is in breach of this principle. According to the principle of neutrality, which is also present in ECtHR case law,¹¹⁶ the state should refrain from making judgements on the legitimacy of a belief. Arguably this is exactly what happened in the report of the parliamentary commission and in a number of speeches by French politicians: they asserted that the practice of face-veiling stems from a minority interpretation within Islam and convened interviewees who would testify to this understanding. It is possible that the majority of Muslims present on French territory do not agree with full veiling, but that does not give the state any more legitimacy or power to suppress it on this basis. It should be doing the very opposite if the proclamations of the ECtHR about the importance of pluralism in democratic society are to be taken seriously. To sum up, it was very wise that the concept of *laïcité* was not relied upon by the French legislators as the official reason for the law. It was lamentable however, that it was used to justify its adoption in the eyes of the public.

5.4. Protection of the rights and freedoms of others

The protection of the rights and freedoms of others allows for quite a broad consideration of conflicting rights and their balancing with freedom of religion in question. In discussions about face-veils, the argument has focused on three main issues: there are mature women who are forced by their spouses or other family members to wear a full veil; children's rights are at stake through forcing minors to wear full veils; and finally, the mere presence of women in full veils could lead to radicalisation and to undue pressure on peers and family members of women who do not wear a veil, or wear just a hijab.

I have already addressed the issue of women who wear a face-veil out of choice. As for the remainder, it is important to note that the extent of forced face-veiling is hardly significant.¹¹⁷ Research conducted by the Open Societies Foundations found that most interviewees adopted the face-veil against their family tradition and against the will of their parents or husbands.¹¹⁸ It is therefore difficult to conclude that the few existing cases would justify an extensive restriction on religious freedom and other liberties. A general ban could hardly be proportionate in this regard, especially as there is legislation in force that could be used to protect the forced women.¹¹⁹ Nevertheless, it is possible to conceive that a legislator would like to introduce particularly strict sanctions for those who impose face-veils on women, as was proposed by the *Conseil d'Etat*.¹²⁰ Such provision on forced veiling was indeed adopted as Article 4 of the French law and can be justified without great difficulty as necessary in a democratic society.

When it comes to children, one could arguably assume that they do not wear any religious clothing out of personal choice (in that case their situation is similar to adult victims of forced veiling). The parliamentary commission was outraged by the image of fully veiled girls. It had to note however, that according to the Minister of the Interior only one per cent of women wearing face-veil are under the age of 18, which means a maximum of nineteen girls in all the territories of France.¹²¹ It is apparent that using this marginal phenomenon as the basis for a general ban would not meet the proportionality criteria. The existence of these cases could however, give rise to actions of non-

116 See *Leyla Şahin v. Turkey* [GC], § 107, and *Metropolitan Church of Bessarabia and Others v. Moldova*, § 116.

117 Philippe Portier, *Regards sur l'actualité*, (October 2010), 364 & 50.

118 Open Societies Foundations, see n2 above; at 14–16 & 49–54.

119 Etude relative aux possibilités juridiques d'interdiction du port du voile intégral, see n40 above, at 13–14.

120 Ibid., at 40.

121 Rapport d'information, see n2 above, at 97–9.

legislative character, such as were proposed by the commission.¹²²

The third line of argument focuses on the protection of people susceptible to pressure from more religiously devout persons. The most vulnerable groups in this respect are children and young people. The need to protect them was asserted by the ECtHR, particularly in *Dablab v. Switzerland* and in the cases involving the educational environment in Turkey.¹²³ The applicability of the latter on our burka scenarios is however, questionable because the Court emphasised that the margin of appreciation granted was very much linked to the particular situation of Turkey, characterised by a presence of radical Islamist movements threatening to cause civil unrest, undermine the rights acquired by women and overthrow the republican system as a whole. It could for instance, be reasonably argued that the principle of pluralism should prevail in France, which is not in danger of a *coup d'état* by radical Islamists, or France could be demanded to substantiate the danger presented by radical Islamists. That could be particularly challenging, illustrated by the fact that none of the thirty-two face-veiled women who were interviewed by the researchers of the Open Societies Foundations started wearing the full-face veil as a result of hearing or directly encountering a 'radical' preacher in a mosque or in a Muslim group¹²⁴ (results of this research need to be interpreted with caution given the small number of interviewees, but no study on a larger sample is available to date).

Even though there is a danger of progressive radicalisation, to which the wearing of the face-veil could contribute, it is difficult to conceive a general face-veil ban as a proportionate reaction. This is especially so in France, where religious headgear is already prohibited in schools and where education to counter radicalism is available. Besides that, a ban on religious practice usually sparks new life into marginal movements (to which French religious history is a long and manifold testimony). It is apparent that not even the protection of the rights and freedom of others is able to provide stable grounds for a general ban on face-veils. The main reason for this lies in the impossibility of proving such an extensive measure necessary and proportionate in a situation where there are numerous other options for protecting the rights of others in a more efficient and less intrusive manner.

5.6. Conclusion: unnecessary, disproportionate and discriminatory

We have seen that a ban on covering one's face to the extent adopted in France is not proportionate to the aims that were presented in support of the law or which appeared in the public discussion. The proponents of the ban did not manage to present a pressing social need for its introduction or substantiate their speculations and assumptions. Moreover, they construed the ban in a way that indirectly discriminates against Muslim women.

This conclusion can be further supported by a review of a set of general criteria for evaluating restrictions and prohibitions on wearing religious symbols that was developed by Asma Jehangir, when she was the Special Rapporteur on freedom of religion or belief. She identified seven 'aggravating indicators' showing legislative and administrative actions that are typically incompatible with international human rights law.¹²⁵ A number of them are present in the French case. Firstly, the restriction leads to

122 Rapport d'information, see n2 above, at 141–2.

123 *Leyla Şahin v. Turkey* and *Köse and Others v. Turkey*.

124 Open Societies Foundations, see n2 above, at 16 & 47–9.

125 Commission on Human Rights, 'Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief, Asma Jehangir' January 9, 2006 E/CN.4/2006/5, § 53.

camouflaged differentiation depending on the religion or belief involved: the formulation of the prohibition is phrased very carefully to sound neutral as it covers more than the burka and the niqab worn by Muslim women but the targeting of Muslims is nonetheless obvious from the preparatory documents and from the provision on punishments for forced covering which is hardly applicable to situations other than religion-inspired clothing. Secondly, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals are based on principles deriving exclusively from a single tradition: French republican ideology, *catbo-laïcité*.¹²⁶ Thirdly, exceptions to the prohibition of wearing religious symbols are tailored to the predominant religion or belief: Roman Catholic or secular persons are hardly affected by the law as the exceptions cover for example, the wearing of the costumes of Father Christmas, dressing up for the carnival or for ‘traditional’ religious processions.¹²⁷ And finally, a religion that prescribes the wearing of religious dress seems to be more deeply affected by a wholesale ban than a different religion or belief that places no particular emphasis on clothing.

Besides being unnecessary, disproportionate and discriminatory, the ban is also very likely to be ineffective. There are indications that some women have been encouraged to wear the full veil by the debate.¹²⁸ The civil society has reacted, as in most cases of an introduction of draconian measures, with ostentatious manifestations of face-veils in the public and by finding ways of circumventing the provisions of the new law. For illustration, there have been suggestions for the niqab wearers to equip themselves with anti-pollution or surgical masks that are exempt from the prohibition.¹²⁹ There was also an association founded with an aim to reimburse fines imposed on women wearing a niqab.¹³⁰ There are also indications that the burka debate has served more as a dividing than unifying factor in French society and that it has contributed to increased verbal and physical abuse of veiled women on the streets of France. For example, out of the thirty-two women interviewed by the Open Societies Foundations, two were physically attacked the day after President Sarkozy’s speech in which he declared the burka not being welcome on the territory of France.¹³¹

6. Law as a response to fear?

As with most social phenomena, the underlying reasons for the legislation are manifold, complex and not easily grasped. Some of them are closely linked to national identity and identity of ‘the others’. Other reasons include political pragmatism that tries to gain political credit at all cost and attempts to divert the public from any inconvenient topics, such as political scandals or the economic crises.¹³² Another set of reasons can be identified in the process of news making for the media. It is beyond the scope of this article to provide a comprehensive analysis of all possible motivations behind the burka ban legislation. Nevertheless it is worth focusing on one that has not been part of the

126 Some French scholars describe the French model as *catbo-laïque*, because it tries to maintain *laïcité* on one hand, and support for Roman Catholicism on the other. I am thankful to Philippe Portier and Jean-Paul Willaime from EPHE for this insight.

127 Rapport Garraud, see n8 above, at 55–6.

128 Open Societies Foundations, see n2 above, at 13, 18, 39 & 42.

129 See <http://www.guardian.co.uk/artanddesign/gallery/2010/nov/10/princess-hijab-graffiti-france-metro>, <http://www.youtube.com/watch?v=HJL6AQvjvKQ> or videos filmed by Red Rag Productions <http://www.redragprod.com>. Last accessed April 14th 2011.

130 Association called *Touche pas à ma Constitution*.

131 Open Societies Foundations, see n2 above, at 55–69.

132 Nabila Ramdani, ‘French burqa debate is a smokescreen’, *The Guardian*, July 8, 2010 <http://www.guardian.co.uk/commentisfree/2010/jul/08/france-burqa-ban-sarkozy-political-distraction>. Last accessed April 14th 2011; Open Societies Foundations, see n2 above, at 31.

‘official justification’ of the legislation, but has in my understanding, largely contributed to shaping the burka debate: fear of Muslims, Arabs, North Africans, immigrants, foreign values, fear of ‘the others’, fear of the unknown (what is behind the veil?), and fear of losing one’s position. An assessment of these fears as the driving force of the legislation could shed new light on whether the burka ban was truly necessary in a democratic society.

As we have seen, this culture of fear has been encouraged by politicians and the media. In order to deconstruct it and get to the core of the anti-burka arguments we have to ask questions that go beyond pure legal analysis and possibly beyond the political correctness of our time. Such questions may include: why should good law-obeying citizens yield to the fear imposed on them? What real danger do ‘the others’ pose to individual citizens and to the society at large? Why is it necessary to take legislative measures against them?

Let us start this reflection on fear with the ‘threat’ of otherness, which is currently particularly felt in relation to Muslims. They are perceived as ‘the others’ who threaten the current political, ideological and cultural system. Their otherness is not valued as something enriching, but rather perceived as threatening the established order. As Siobhán Mullally argues, the veiled Muslim woman presents a visible challenge to the state’s coercive powers of surveillance and exclusion. By ‘speaking back’ to dominant cultural norms the Muslim woman challenges the state’s (and Europe’s) project of governance.¹³³ The fear of somebody who is different has, of course, not applied only to Muslims. Groups such as Jews or Romani people have a long experience of being targeted in this way. The issue that has made the fear of Muslims more tangible on the global scale in recent years is the alleged rise of radical Islamism. Indeed, the fear of radical Islamism has flooded all recent public debates and has been reflected in many pieces of legislation and decisions of both the executive and the judicature. Since 9/11 there has been a tendency to link every possible issue to this phenomenon (consider for example, the number of armed conflicts and security measures justified by the War on Terror).¹³⁴ An imaginary enemy has been created: The bad Muslims labelled as terrorists, fundamentalists, Islamists, jihadists, *intégristes*, *communautaristes*, *talibans français* etc.

This kind of labelling and promoting of a black and white paradigm (an ‘us’ vs. ‘them’ rhetoric) presupposes the existence of uniform identities. The debate on French national identity fits perfectly into this picture, pressuring all inhabitants of France to accept French republican values and to follow the traditional French lifestyle. One who does not comply with these standards is not considered French, but ‘the other’ (a member of a monolithic group of troublemakers threatening those who are ‘fully French’). This tendency has led political leaders to feel that they need to show the public how much they have been doing about the problems attributed to these ‘troublemaking others’; which in turn results in a battle to win the votes of those most susceptible to arguments based on national, Christian or other seemingly exclusive identity (see for instance the struggle Sarkozy v. Le Pen, which is arguably behind the whole Islam and burka debate in France).¹³⁵

This political struggle is predominantly concerned with the outcome of the next

133 Siobhán Mullally, ‘Civic Integration, Migrant Women and the Veil’, at 29.

134 Christine Gray, *International Law and the Use of Force* (Oxford: OUP, 2008), at 193–253.

135 Pascal Riché, ‘Sarkozy arpente la France chrétienne avec ses gros sabots’, *Rue 89*, March 4, 2011 <http://www.rue89.com/2011/03/04/sarkozy-arpente-la-france-chretienne-avec-ses-gros-sabots-193336>.

Last accessed March 11th 2011; J. Baubérot, ‘Laïcité positive ou chretienté positive?’, March 4, 2011. <http://jeanbauberotlaicite.blogspot.com/archive/2011/03/04/laicite-positive-ou-chretiente-positive.html>.

Last accessed March 11 2011.

elections. It is therefore understandable that its participants are not really interested in long-term solutions but rather in actions that would win the polls in the short term. The most effective way to achieve this goal is to introduce a symbolic measure. Mere 'symbolic action' such as a declaration of the National Assembly would not however, be enough. It needs to be something that would reasonably convince the general public that the change is being made. For this task there is one obvious candidate: legislation.

Furthermore, there is yet another ground for perceiving Muslims as a threat to the established order. Particularly in France, the so-called neutral position of the public authorities is called into question, since it appears in fact to favour people not practising religion in public, or those practising Christianity (particularly Roman Catholicism).¹³⁶ As previously indicated, French society has managed to evacuate almost all religion from the public sphere. One of the reasons for doing so was the country's experience of religious wars fought not only in the battlefields, but also on the streets through religious symbolism. What was originally a noble idea of neutralising the sphere, where all citizens would be equal, turned into an obsessive fight against any expressions of religious identity. It is no surprise that this attitude became part of what constitutes being French. Although this attitude is concerned with the non-presence of religion in public, it cannot do without it. As Jon Elster puts it, reflecting on Hegel, 'A person whose independence requires the destruction of an external object, depends on that object in his very being and hence cannot without contradiction desire its destruction.'¹³⁷

It is therefore no surprise that the politicians have been giving a helping hand to Muslims and other religious communities but at the same time have kept fighting against public expression of (their) religious identity.¹³⁸ In the debates about the burka, the niqab and other forms of religious garments, they have used religious identities, fear of 'the others' and the language of human rights to achieve their short-term political goals. The forthcoming question is whether the international human rights bodies will accept their discourse with all its consequences for the international protection of human rights, or whether they will manage to unveil it as abusive.

7. Conclusion

This article has analysed legal aspects of the contemporary debate on the prohibition of full veils in Europe, specifically France, which was the first European country to introduce a general face-veil ban. It has shown that the debate has contained a number of extra-legal elements and pseudo-legal arguments that are only vaguely related to the face-veils worn by Muslim women and to fundamental human rights, such as religious freedom. Despite their extra- and pseudo-legal character, they have played a significant role in shaping the legal justifications that were provided during the legislative process and are likely to be used when the burka ban is challenged in the courts.

By deconstructing these justifications and showing their extra-legal, pseudo-legal

136 Pierre Machelon, 'Les relations des cultes avec les pouvoirs publics', France, Ministère de l'intérieur et de l'a ménagement du territoire, 2006 <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics//064000727/0000.pdf>. Last accessed February 19 2012; Michel Troper, 'Sovereignty and laïcité', *Cardozo Law Review* 6 (2009), at 2561-2574.

137 Jon Elster, *Political Psychology* (Cambridge: CUP, 1993), at 80; Cf. Paul Ricœur, *Histoire et Vérité* (Paris: Seuil, 2001), at 270; Emmanuel Lévinas, *Totalité et infini: Essai sur l'extériorité* (Paris: LGF-Livre de Poche, 2009), at 6.

138 Nicolas Sarkozy, 'Respecter ceux qui arrivent, respecter ceux qui accueillent', *Le Monde*, December 8, 2009. http://www.lemonde.fr/idees/article/2009/12/08/m-sarkozy-respecter-ceux-qui-arrivent-respecter-ceux-qui-accueillent_1277422_3232.html. Last accessed December 27 2010; Nicolas Cori, 'Sarkozy drague les protestants', *Libération*, May 28, 2010. <http://www.liberation.fr/politiques/0101638104-religion-sarkozy-drague-les-protestants>. Last accessed April 20 2011.

or self-contradictory nature, this article has aimed to provide legislators and judges with arguments that should be considered when assessing the compliance of any face-veil ban with international human rights standards. Even though such an assessment is conducted in predominantly legal terms, it would also be beneficial to bear in mind the extra-legal issues in order to be able to reject the endorsement of abusive recourse to human rights.

This article is of course limited in its scope and nature, using only one of the possible approaches to examine the burka ban, namely a legal examination relying on the methodology of the ECtHR. One of the greatest limitations of the present article lies in an absence of any reliable data and studies on the phenomenon of face-veiling in Europe. It is rather striking that both the French legislators and the media have relied on extremely scarce data and popular assumptions in shaping policy decisions. It would therefore be highly desirable for more field research to be undertaken if the 'burka debates' are to continue.

In the course of the international human rights law assessment, it has been shown that the French law is very likely to establish an interference with the religious freedom of Muslim women who wear a burka or a niqab. As for the necessity for such interference in a democratic society, the question of justification and proportionality requires a more nuanced answer. A general nation-wide prohibition on covering one's face is almost impossible to justify. France has relied on public safety, security and order in its introduction. If these terms are to be interpreted in their ordinary meaning, they require the presence of a significant threat and not mere worries or fears. However, such a threat has not been substantiated in contemporary France. Nevertheless, the security argument is a workable justification for local or sectoral restrictions if crafted in a way proportionate to the threat.

Some French politicians tried to base the general prohibition on 'an immaterial public order', which is a newly created concept covering other justifications such as gender equality, human dignity and other values deeply shared by the French society at large. This concept is, however, rather vague, impracticable and susceptible to abuse. If it were upheld it could open a Pandora's Box full of ridiculous legislation and litigation. It is necessary to distinguish the ban on wearing face-veils in the public from sanctions imposed on those who force another to cover the face. Most national systems (including France) already have provisions that can be used to sanction forced veiling, and it is not difficult to justify the introduction of measures specifically tailored to such cases. Their justification lies primarily in the protection of rights and freedoms of others and can also rely on the arguments of gender equality, human dignity and liberty. However, the concepts of gender equality, human dignity and liberty cannot be realistically invoked as a justification for interfering with a freely chosen religious practice. Such an approach, arguing that 'the state knows what is best for you' would be at variance with most fundamental freedoms and is usually indefensible before most high courts. Nor is it possible to rely on the principles of secularism and *laïcité*, because these cannot be invoked against ordinary citizens.

In conclusion, a general ban on covering one's face is incompatible with international human rights standards. What can be justified are partial (local, sectoral) bans that are carefully crafted to respond to the local situation, and sanctions against those who force others to dissimulate their face. Even though I have presented the incompatibility of the French burka ban with international human rights standards in clear terms, I am fully aware that when a case involving a French niqab wearer reaches the ECtHR, the judges might decide to sanctify France's position. Such a decision could be based on accepting the arguments of the French government at face value and on granting France a wide margin of appreciation. I would however, strongly discourage such a superficial analysis if Convention values are to be upheld and the arbitrary abuse

of religious communities by populist politicians ended.