

European Issue

n°183

18th october 2010

Should the full Islamic veil be banned?

European States respond in various ways according to their own national rationale

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SUMMARY Can the ban on the wearing of the full Islamic Veil [1] become a specific feature of Human Rights in Europe? The study of the situation in six European Member States reveals the diversity of national response to this issue. Without exploiting the debate this reflects the particular political-legal context in each country and the relations between the States and religion. Amongst the States that support a total ban on the full Islamic Veil France is the only one to date to have passed such a bill. Belgium and the Netherlands are following the same route. Other countries however such as Spain are hesitating. Finally there are States that refuse to ban the niqab and the burqa completely in the name of a particularly respectful perception of religious freedom. Germany, for legal and the UK for political reasons share this position.

1. Originally from the Gulf the niqab is a veil that covers all of the body and the face except the eyes. It is different from the hijab, the traditional Muslim headscarf that covers the hair, the neck and the shoulders but not the face. As for the Afghan burqa, this is a dress which hides the entire body and the face including the eyes which are hidden behind a type of mesh.

2. In a press release on 28th June 2010 the European Commission casts aside any idea of legislation in this area that is a competence of the States. Today only Silvana Koch-Mehrin, Vice-President of the European Parliament and leader of the German Liberals (FDP) has called for a total ban of the full veil in Europe.

3. Recommendation no.1927 23rd June 2010 on 'L'Islam, l'Islamisme et l'Islamophobie en Europe'. (Islam, Islamism and Islamophobia in Europe). The assembly insists however on the need to protect women against the violence they fall victim to. It does however admit limited bans in times and space.

4. See European CHR decision 23rd February 2010, Ahmet Arslan and others c/Turkey, req. n°41135/98 : the Court observes the infringement of the Convention by Turkey in a case involving the wearing of religious dress in a public area.

5. The States concerned are those with a significant Muslim population that are the result of a colonial past and/or economic immigration.

INTRODUCTION After the ban on the death penalty and the respect of social rights is the ban on the full Islamic Veil, as a symbol of women's submission to become a new feature in Europe of Human Rights? Indeed although the number of Muslim women wearing the full veil is still negligible in the States of the European Union the public debate caused by the niqab and the burqa in a secular society is gaining ground in many countries. However the institutions in Brussels have absolutely no intention to legislate on the matter [2]. The Council of Europe shares the same position. Its Parliamentary Assembly has invited its 47 Members "not to adopt a total ban on the full veil or other religious or specific dress." [3]. As for the European Court of Human Rights its jurisprudence effectively protects the freedom of religion. It also recalls in article 9, §2 of the European Convention on Human Rights the freedom to show one's beliefs can be subject to restriction by law if this is "necessary in a democratic society" and corresponds to reasons of public order, public health and the protection of the freedom of others [4]. From this point of view it is up to the European States involved to take a stance with regard to the issue of banning the full veil [5]. In all of the countries studied,

there are limited restrictions of a functional nature (according to professions) and/or sectoral (according to place). With regard to the total ban on the veil there is however no common position. A summary analysis of some examples calls two main remarks to mind. On the one hand the response often given by the State in question as part of a national politico-legal context that defines the place of religion in the society. On the other hand we distinguish *mutatis mutandis* three different positions amongst European countries: those which ban the full veil totally, those who hesitate to do it and those who refuse to make a total ban.

1 – THE STATES THAT SUPPORT A TOTAL BAN

To date France is the first European Union State to have banned the full veil across its entire territory. Belgium has started to move in the same direction. The Netherlands is about to do the same.

1-1. In France, law no. 2010-1192 dated 11th October 2010 now bans the dissimulation of the face in public areas. Although its range is much wider this text primarily targets the wearing of the full veil. This bill

was passed within a context of mistrust with regard to public expression of religious beliefs. From an historical point of view a century of secular Republic and a secular society makes it extremely difficult to tolerate radical displays of religious affiliation. From a legal point of view partial bans already exist in this area. Administrative jurisprudence bans the wearing of any religious symbols by civil servants in the exercise of their work. Since the passing of a law on 15th March 2004 it is also prohibited to wear symbols or dress whereby pupils ostensibly show their religious affiliation in public schools, high schools and colleges [6].

To be more specific the first article of the law dated 11th October 2010 set the general principle whereby *"no one may wear dress designed to dissimulate the face in a public area."* Article 2 of the same law defines public areas as *"streets as well as places open to the public or used for a public service."* Any infringement of this general ban is punishable by a maximum fine of 150€ which can be incremented or be substituted by the obligation to undertake a period of time devoted to citizenship training. In order to foster mediation and education this measure will only enter force six months after the promulgation of the text. The law also makes it a crime to encourage the dissimulation of the face which carries a more serious punishment of up to one year in prison and a fine of 30,000€ maximum. It is applicable immediately. In its decision no. 2010-613 DC dated 7th October 2010, the Constitutional Council declares all of the measures included in the law in line with the Constitution. In his opinion the legislator guarantees *"between the protection of public order and the guarantee of constitutionally protected rights, a conciliation that is clearly not disproportionate."* The Council is however reticent with regard to the interpretation of article 5 of the law: the ban on dissimulating the face in public areas cannot restrict the exercise of religious freedom in places of worship that are open to the public.

The main stages in the adoption of the law of 11th October 2010 after several months of public debate were as follows: in June 2009 the National Assembly created an information committee with regard to the wearing of the full veil within France. Its report, delivered in January 2010 comprised a thorough review of this practice which is said to concern less than 2000 women in France [7].

In conclusion the report unanimously condemned the practice of wearing the full veil declaring it contrary to Republican values. The majority of the committee's members recommended the adoption of a law prohibiting the wearing of the veil in public areas likewise any other dress that masks the face entirely. Speaking for the first time to Parliament at a Congress in Versailles in June 2009 the President of the Republic gave his own feelings on the issue. He said: *"The problem with the burqa is not a religious one – it is an issue of freedom, and dignity for the woman (...) by this I solemnly say that it (the burqa) will not be welcome within this Republic's territory."*

Before the delivery of any draft law the Prime Minister asked the State Council on 29th January 2010 to look into legal solutions that would lead to a ban on wearing the full veil and which would be as comprehensive and as effective as possible. This analysis of the law in force was delivered to the government on 25th March [8]. It concluded that there was a risk of the general ban on dissimulating the face being unconstitutional or unconventional. The State Council therefore advised on limited bans in public areas if specific circumstances endangered public order. Seeking political consensus between the majority and the opposition the National Assembly approved on 11th May 2010 the first resolution with article 34-1 of the Constitution. This purely declaratory text was adopted unanimously and proclaimed the Assembly's attachment to the respect of Republican values given the emergence of radical behaviour which threatens these. It believes that all possible means should be implemented to guarantee the effective protection of women who are subject to violence or pressure and who are notably forced to wear the full veil. Five months later the law was finally adopted by Parliament without the votes of the leftwing opposition which abstained.

1.2. In Belgium the first ban on wearing ostentatious religious symbols emerged locally at the beginning of the years 2000. Some schools did this to ensure that lessons were undertaken correctly and many communities did so, on the grounds of public order. Some regions of the Federal State took even greater steps. In 2004 in Flanders for example the minister for domestic issues and integration sent out a standard regulation

6. Codified in article L. 141-5-1 of the education code.

7. AN, 13th legislature, report no.2232 undertaken on behalf of the information committee on the practice of wearing the full veil within the national territory, \$January 2010: Voile intégral: le refus de la République.

8. State Council, section of the report and studies, Étude relative aux possibilités juridiques d'interdiction du port du voile intégral, a report that was adopted by the general plenary assembly on Thursday 25th March 2010.

on the ban of the full veil in public areas. However because there were many limited bans this damaged the legal security of both those involved as well as the civil servants responsible for applying these police regulations. This is why federal MPs wanted to legislate nationally. Several proposals for a simple resolution and a real law have been delivered to the Chamber of Representatives in Parliament over the last few years without them ever being discussed. Some hope for a total ban on the full veil [9]. Others would limit this to civil servants only.

In June 2009 when an MP of Turkish origin was sworn in fully veiled to the Regional Parliament of Brussels the controversy flared up again. For once they were united and the main Belgian political parties agreed to legislate. On 29th April 2010 the Chamber of Representatives adopted a draft law in plenary session that aimed to ban the wearing of any dress that entirely hid or partly covered the face. This text introduces a new offence into the penal code that concerns "those who enter public places with their face masked or dissimulated totally or in part so that they are not identifiable." Offenders are liable to a fine of 25€ and/or seven days in prison. The text does however exempt those who circulate in public areas with their face hidden "in virtue of work regulations or on a police order during festive occasions." Using its right of inquiry, the Senate, the second Chamber in Parliament, was also due to examine this text. However on 6th May the Federal Parliament, victim to yet another linguistic battle between the Flemish and the Walloons, was dissolved. In this case all drafts and proposals under consideration by the dissolved Chamber are considered null and void. The proposed law against the full veil is therefore now also null and void. Only the approval of a law by the newly elected Chambers will lead to its future consideration. At present however Belgium still has no government after the elections on 13th June last

1.3. In the Netherlands Protestant history and maritime openness to foreign influence explain in the main the religious tolerance that has typified the country for so long. This is why the upcoming ban on the full veil across the entire kingdom will herald a real break from tradition. In reality this can be explained by the coincidence of two phenomena. Due to the present si-

tuation the ban of the niqab and the burqa represents pay-back for the vital support of Geert Wilders' anti-Islamic party to the coalition which will form the next minority government. From a structural point of view the Netherlands has been experiencing serious doubts about its model of society for the last fifteen years.

With regard to the political situation: after three months of discussions the Liberals of the VVD and the Christian Democrats of the CDA announced on 29th September their agreement to form a coalition in Parliament with the support of Geert Wilders' populist party PVV (Freedom Party). The government was formed on 14th October last. Apart from the eradication of the budgetary deficit by 2015 and a toughening up on immigration legislation the tripartite government agreement plans for the total ban on the full veil [10]. The agreement with the PVV that is dividing the Christian Democrats is inevitable in reality because of the influence of its parliamentary group. During the last general elections on 12th June 2010 the number of Freedom Party representatives rose from nine MPs to 24. The total ban on the full veil will bring an end to the position adopted hitherto by all Dutch governments. In effect they promoted a functional, sectoral approach that banned the full veil only in certain areas of work (civil service) and in certain places (schools, public transport) whilst respecting equal treatment for all forms of religion. Locally the community law of 1992 allowed councillors to do the same.

From a more structural point of view the Freedom Party's success in the last general election is the expression of the profound crisis that the Dutch model of society has been experiencing; for a long time was typified by immense tolerance and accepted multiculturalism. Of course Geert Wilders' populism cannot be assimilated to the traditional far rightwing. Liberal and pro-Israel he is the vector mainly of a radical anti-Islamic position that in his opinion is vital for the country's defence. The growing audience enjoyed by his party reflects however a rise in intolerance in the Netherlands since the start of the 2000's. The political assassination of populist leader Pim Fortuyn in 2002 and controversial film maker Theo van Gogh in 2004, the first since the 18th century, are the most emblematic examples of this. In this context the total ban of the full veil is seen as one of the remedies to a deep seated identity crisis.

9. As well as that of the far right Flemish party, *Vlaams Belang* – see proposed law to be inserted in the Penal Code – a measure banning the wearing of dress that dissimulates the face in public areas delivered by Messrs Filip De Man, Bart Laeremans and Bert Schoofs. Chamber, 23 November 2007, doc. 52/0433/1.

10. In 2005, Geert Wilders was the origin of the vote by the Lower Chamber of Parliament on a resolution demanding the government to issue a full ban on the burqa in public areas. He started again in 2007 with a proposed law that was never debated.

2 – THE STATES THAT HESITATE THE SPANISH EXAMPLE

As a religiously neutral State democratic Spain protects the freedom of religion. Article 16 §1 of the Constitution of 1978 hence includes the following: *“Ideological, religious freedom of individuals and communities is guaranteed without any other restrictions in the way these are expressed; apart from those necessary for the upkeep of public order.”* Due to the country’s long standing economic prosperity a strong immigrant population, mainly of Moroccan origin, has established itself in the country in just a few years. Recalling its distant past as a land of Islam (Al Andalus) Spain has committed, under various Socialist governments, to a path of multiculturalism. The serious economic crisis that is now affecting the country modifies this general context somewhat. Questions about the full veil – beyond the conservative opposition – find an echo within public opinion. This issue is part of the tension that forms an undercurrent in Spanish society. We should note the fight of the Catholic Church - which is rather more in favour of the burqa on the grounds of the respect of religious freedom, against the Socialist majority which tends to limit its influence - or the assertion of autonomous communities against the Central State. The latter point makes the ban of the full veil in Spain quite particular.

In Madrid José Luis Rodríguez Zapatero’s government is dubious about what to do about the niqab and the burqa. Indeed it is divided between two main directions to adopt in its policy: on the one hand the defence of equality between men and women and on the other the respect of cultures and identities which it supports internationally. This discomfort sometimes comes close to the ridiculous. Hence on 20th July 2020 in the name of the respect of difference the majority (PSOE) in the Congress of Deputies, the lower chamber of Parliament rejected a proposed law by the People’s Party (PP) that aimed to ban the full veil in public places. At the same time the government via its Justice Minister Francisco Caamaño declared it wanted to introduce into a law it was preparing on the freedom of religion the possibility of restricting the wearing of the full veil in public places.

11. Article 7, §2 also guarantees that people with parental authority have the right to decide on children’s participation in religious education. Finally the sanctioning of the right to the free expression of his personality (art. 2), of the principle of equality before the law (art. 3, §1), of the freedom of opinion (art.5) and of equality between believers and non-believers (art. 33, §2) complete this constitutional guarantee.

In some autonomous communities however the issue of the full veil arises much more acutely. This is particularly the case in Catalonia which is home to a large community of Moroccan origin. About ten communities including Barcelona have banned the wearing of the full veil *“in areas of the town”* such as markets, libraries and sports centres. The Catalan nationalists and the People’s Party (PP) support this decision. The left is more divided. The issue of the veil is also pending in the regional Catalan Parliament. We witness the exploitation of this societal issue to the benefit of a specific political project: increasing autonomy for Catalonia in Spain. After banning bullfighting, this region, which is wealthy and dynamic, may also ban the wearing of the niqab and the burqa in order to distinguish itself from Madrid.

3 – STATES THAT DO NOT SUPPORT A GENERAL BAN

Germany and the UK are examples of Union States which refuse to envisage a total ban on the full veil. Although they use different approaches these countries share the same idea with regard to the exercise of religion which excludes in principle any intervention on the part of the public powers.

3.1. In Germany religious freedom is the subject of constitutional protection that takes into account all of its main aspects. Article 4 of the Fundamental Law of 1949 thereby places the freedom of belief and conscience, of professing religious or philosophical belief as well as the freedom to worship amongst the fundamental rights which are obligatory to the Federal State (Bund) and the Federal States (Länder) [11]. Also included in the Fundamental Law and according to the jurisprudence of the Federal Constitutional Court there is the principle of the State’s neutrality with regard to religion. The result of this is an organised, institutional dialogue between the public powers and its various components (Bund, Länder and communities) and the legal acknowledged Churches. The public powers cannot however ban a faith, dictate to Churches the way they must be organised or define the way each exercises his/her right to religion. This judicial-political context explains the way in which Germany deals with issues such as the wearing of religious symbols in public areas.

With regard to the traditional Islamic headscarf (hijab) in State schools the issue is dealt with according to the people involved. The wearing of religious dress by pupils of the Muslim faith is not a subject of debate: it is the expression of the freedom of belief guaranteed by the Constitution. The wearing of the veil by teachers can however be banned. In its decision of 24th September 2003 given in the 'Ludin' case the Constitutional Court of Karlsruhe believed that the wearing of the headscarf by a teacher does not directly threaten a State school's neutrality. It believes that it is up to the legislator in each Land to ban or not the wearing of the headscarf by teachers in view of the local situation (composition of the population, religious traditions). Six Länder chose to adopt a law banning teachers from wearing ostentatious signs of religious affiliation [12]. The Länder of Berlin and Hessen extended this ban to all civil servants.

With regard to the full Islamic Veil the question of banning this practice in public areas does not even come into question since it remains the habit of an extremely small minority in Germany. "It would be inappropriate and for that reason undesirable," said German Interior Minister Thomas de Maizière in an interview in the daily Leipziger Volkszeitung in May 2010. This general ban in the religious sphere would above all be contrary to the Fundamental Law. However this does not prevent the temporary ban of this dress on grounds of public order. Hence Germany like France [13], has established legislation that bans demonstrators in a public place and in other circumstance from being dressed in such a way as to prevent their identification. Only limited restrictions in time and space with regard to wearing the niqab are therefore possible in a reunited Germany.

3.2. In the UK the presence of the Church of England and Scotland [14] is perfectly compatible with the existence of extensive religious freedom to which the subjects of Her Gracious Majesty are historically attached. Indeed the UK is the every example of a traditionally liberal Anglo-Saxon society in which the State's intervention in people's private lives is difficult to imagine. Immigrant populations from the Commonwealth and elsewhere enjoy the utmost religious freedom. Hence wearing the traditional hijab by Muslim women is admitted in public areas, schools for example and in the

exercise of a great number of professions – notably policemen. This raises no debate whatsoever.

The practice, however marginal, of the full veil has been the source of some questions though. In 2006 Labour Minister Jack Straw confessed to the local press that he was considerably ill at ease when he received totally veiled women in his constituency office. He suggested they reveal their face whilst guaranteeing them the presence of a female member of his staff during the interview. The following year the government published two texts that were in no way compulsory to help professionals who faced problems caused by the wearing of the full veil in courts and schools [15]. These documents do not dismiss the possibility for a local ban on the veil and requesting women to remove it in certain situations.

Debate over the full veil rose to the surface again in 2009 after the announcement of the French Parliament's examination of a draft law banning it in public areas. With this as an example Conservative MP Philip Hollobone delivered a proposed law at the House of Commons to ban the dissimulation of the face. In The Daily Telegraph, he declared in March 2010 that the burqa was a serious offence to the British way of life. According to a YouGov survey for TV channel Five, published in July 2010 67% of those interviewed supported the ban on the full veil in public areas. This ban has no chance however of being adopted by Parliament. The British government rejects the very idea of legislating on this. In an interview in the press Damian Green, the Minister for Immigration explains quite clearly: "Telling people what they can and can't wear, if they're just walking down the street, is a rather un-British thing to do" [16] As for Prime Minister David Cameron, according to his spokesperson, he is also against any legislative ban on wearing the full veil. Could it be that on this sensitive issue there is a rift between British public opinion and the political classes?

To conclude this rapid analysis of the position of some EU Member States on the total ban of the full veil three remarks might be put forward.

Firstly there are two notions of the relation between State and individual within our European societies. The first, more interventionist, accepts that the State may impose – in an effort to foster coherence and even

12. Concerned are the Länder of Baden-Württemberg, Bremen, Bavaria, Lower Saxony, North Rhine Westphalia and Saarland.

13. See. Decision no. 2009-724 19th June 2009 relative to the incrimination of the illicit dissimulation of the face during events in public areas (JO of 20th June 2009).

14. This is the Anglican Church in England and the Presbyterian Church in Scotland.

15. On the one hand this is a code of good conduct and on the other a circular relative to school uniform, see Sénat, Le port de la burqa dans les lieux publics, Studies in Comparative Legislation no.201, October 2009, p. 21.

16. Sunday Telegraph, July 2010.

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unity of the whole and even in an area as intimate as religious freedom – the way its citizens behave. France evidently defends a society of integration. The second – more liberal in a political sense of the term – rejects the idea that the State may intervene with regard to religion – a domain in which the individual is the only master of his acts and freedom. The UK consistently embodies this idea of a tolerant society. This observation is not new: it does however deserve to be recalled and thought about.

Secondly the national approach to the issue of the full veil may lead to its use to the benefit of causes that

have no direct relation with religious freedom or the values of “*living together*”. In Spain the issue is used by some autonomous regions as part of their battle against the Central State. In the Netherlands the ban is seen by those supporting anti-Islamic populism as an antidote to the identity crisis which the country is experiencing. Even in France the adoption of the ban on the full veil is not neutral with the electoral deadline looming on the horizon of 2012.

Lastly it now seems accepted that France is not the only European democracy to have totally banned the niqab and the burqa.

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