Faculty of Law
University of Ghent

Academic Year 2011-2012

Master Thesis
‘Master in Law’
Hand in by
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THE BELGIAN BURQA-BAN

Unveiled from a human rights perspective
Short Prefatory Note

On the 23th of July 2011 I read in the newspaper that Belgium, after France, was the second country to introduce a ban on the wearing of the burqa. My first reaction was very positive. My intuitive moral and emotional inside told me that banning this despicable symbol forced upon women could only be a good cause. 'Yes!', I thought, 'Let us (at least the State) fix this urgent problem and liberate these women from their walking prisons through banning it in public'. However, I myself soon realized I had never seen any burqa passing on the street myself. Not in Belgium and not in France. A deeper research on the matter, made me realize soon that I was being fooled in many ways by media and politics. In the first place by the so-called motivations of the Belgian law, but also by the content and the effects of the law on individual rights. That is why I took the intellectual challenge, instead of unveiling these women, to unveil the Belgian burqa-ban.

On an academic level I want to thank my Promotor Dirk Voorhoof for his quick responding to my questions and for offering guidelines. Besides, I want to thank Professor Eva Brems for her courses on Islam and Law and the chance to participate in the seminar on Empirical Face Veil Research organized by the Human Rights Centre of Ghent University.

On a personal level I first want to thank my sister for passing on her thesis-experiences to her little sister. Without her analytical insight, positive thinking and mental coaching the road to this Master Thesis would have known more struggles and frustrations. Furthermore, I want to thank my father and my boyfriend for triggering me with hours-long kitchen table discussions on the matter. This made me think outside the box and discover different points of view. Also, I want to thank my friends for keeping me in touch with planet earth and taking me out for lunch or a drink once in a while.

Last, I want to thank my mother for cutting out relevant news articles for one year and a half long. Furthermore, she acquainted me with the beautiful and suitable photograph of Shirin Neshat on the cover of this Master Thesis. Shirin Neshat is a well-known Iranian visual artist. She was named 'Artist of the Decade' by Huffington Post critic G. R. Denson for reflecting through her work 'the ideological war being waged between Islam and the secular world over matters of gender, religion, and democracy'. The impact of her work far transcends the realms of art in reflecting the most vital and far-reaching struggle to assert human rights.'

Marie Haspeslagh, Ghent, 13 May

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BELGIAN BURQA-BAN: UNREASONABLE LIMITATION OR JUSTIFIABLE RESTRICTION?

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Introduction

The Belgian government, in the early summer of 2011, was almost anonymously in favor of a new law that introduces a general ban on the wearing of face-covering clothing in public accessible spaces. Barely used under its official name of 'Law of June 1st 2011 on the introduction of a ban on the wearing of clothing that partly or completely covers the face’, this law was renamed in media and politics as the so-called ‘burqa-ban’. The reason for this is that although the law pretends to be generally applicable, the group most targeted by this law is the one of Muslim women wearing the face covering Islamic veil.

This trend of undertaking legislative measures against the full-face Islamic veil is not only noticeable in Belgium. Next to Belgium, also France knows a similar legislation and also other European countries are not left indifferent towards the appearance of the ‘burqa’ in the public sphere. A sort of anti-burqa consensus is gaining presence in the European Society.

Notwithstanding the fact that the implementation of a general ban on the wearing of the full-face covering Islamic veil in public serves several legitimate aims, it raises serious questions on compatibility with the human rights to be enjoyed in Europe today through the European Convention on Human Rights. A first case concerning the French burqa-ban is on the time of this writing a pending request before the European Court of Human Rights.

For this reason, a hypothetical case on the Belgian burqa-ban before the European Court of Human Rights will be constructed. Reference to previous Court’s case law will endorse our findings. We will follow the reasoning of the European Court of Human Rights in analyzing whether the general ban on the burqa in public spaces is indeed violating certain human rights and if this is the case the question needs to be answered whether the Belgian burqa-ban is a justified restriction. In other words, overall we want to answer the question: “Is the Belgian ban an unreasonable limitation on individual human rights or a justifiable restriction?”

This analysis of the Belgian burqa-ban from a human rights perspective will serve as an example for the other European Countries since this analysis is roughly applicable by analogy on the French ban and other future bans to come.

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2 Also shortened as ECHR
1. To start off, Chapter 1 gives a curtailed notion of the Muslim veiling practices from an Islamic point of view. First, a religious background on the Muslim veiling traditions as a precept of the Islam will be given. Second, the existence of different types of veiling will be sketched in order to clearly comprehend the field of application of this Master Thesis. This Chapter will give us a short religious-historical and social background to the issue and a clear terminological understanding.

2. In Chapter 2, the policies and regulations concerning the burqa in the public sphere in Belgium will be discussed. Firstly, we will give an overview of the regulations on a local level on full-face veiled Muslim woman, before the new law came into force. Secondly, the situation in Belgium since the introduction of the ‘Law of June 1st 2011 on the introduction of a ban on the wearing of clothing that partly or completely covers the face’, will be investigated. Logically, this includes an introduction, explanation and a critical analysis of content and form of the new Law. Thirdly, a brief summation of the most important motives for the new law, distracted from the parliamentary debates, will be given. Finally, the compatibility of the new law with the Belgian constitutional rights will be discussed.

3. Thirdly, this burqa-debate is obviously not only situated in the small country of Belgium, but it stretches out more and more every day over the European countries. It is clear that there is a vivid, sensitive debate going on in Europe. However, the debates and policies of the various members on the appearance of the burqa vary from country to country. On this actual day, there is a general ban on face-covering clothing in the public area applicable in Belgium, but France was officially the first with a nearly similar ban. In the government of the Netherlands a ban on the burqa in public is to be pushed through any day now. But also in Spain, Italy, Denmark and other countries heavy debates on introducing a similar law are taking place. Opposite to this evolution, some European Countries such as England and Sweden have clearly spoken out against the concept of the burqa-ban. Chapter 3 will display an overview of this recent European evolution and will briefly discuss the situation in each of the mentioned countries, in order to place the Belgian Law into a European perspective. Also we will link the recent underlying burqa-debates to the recent European phenomenon of Islamophobia.

4. Fourthly, the general ban restricting the wearing of a burqa in all public accessible spaces introduced by the Belgian Law is to be analyzed from a European human rights perspective, as it raises many questions on compatibility. Since reasoning by analogy can
be roughly made for the French Law and other future laws, we will only discuss the Belgian Law as a European example for other countries. In order to do so, first an introduction on the European human rights framework will be given. This contains an explanation of the European Convention on human rights and the European Court on Human rights that enforces the rights. Next we will construct the hypothetical case of the Belgian ban taken to the Court based on conclusions drawn from the Courts reasoning in previous significant case law. The first major step in the Courts investigation is the question whether the general ban violates certain human rights. Most important is the possible violation of the right to freedom of religion (Article 9 ECHR). But also right to privacy (Article 8 ECHR), right to freedom of expression (Article 10 ECHR) and a combination of freedom of religion with anti-discrimination (Article 14 ECHR) are at stake. In case of an interference with a human right, the second major step is to answer whether the interference with this human right is justified. Therefore the European Court will judge the restriction in the light of three main criterions. First, it will check whether the Belgian burqa-ban is prescribed by law. Second, it will investigate whether the Belgian burqa-ban is pursuing a legitimate aim. Last, the Court will judge whether the inference was necessary in a democratic society.

In the end, this hypothetical case before the European Court in combination with the general information distracted from the previous chapters, will allow us to judge whether the Belgian ban constitutes an unreasonable limitation on the human rights of the European Convention or a justifiable restriction.

However, at some points there will be made some additional references made to other European countries.
Chapter 1: The veil’s role in Islam

Before looking at the Islamic veil from a Western perspective, it is important to understand the Muslim veiling practices from an Islamic point of view. Therefore, first a short background on the Muslim veiling traditions as a precept of the Islamic belief will be sketched. Next a distinction will be made between the different types of Islamic veiling and a specification of the field of application of this disquisition.

1.1 Religious background

The prescriptions and traditions defining the way of living according to the Islam duties are based on two main sources. First the Qur’an (Arabic for recitation) holds the revelations of Allah to the prophet Muhammed. Second is the Hadith (Arabic for report) which are the records on the life of the prophet Muhammed. All Muslim communities mainly base their customary practices on references to the Qu’ran or the Hadith. One of the most visible precepts of the Islam distracted from these sources is the veiling practice for Muslim women. The authority for the Islamic veil is found in the verses Sura 33:59 and Sura 24:31 of the Qu’ran. These verses can be translated in English as:

‘O Prophet, tell your wives and your daughters, and the women of the believers to bring down over themselves part of their outer garments. That is the more suitable that they will be known and not be abused (Sura 33:59).’

‘And tell the believing women to reduce their vision and guard their modesty, and not expose their adornment except that which is apparent; and let them wrap their covers over their chests and not expose their beauty except to their husbands and fathers, or the fathers of their husband, or their sons, or the sons of their husbands, or their brothers, or their brothers’ sons, or their sisters’ sons, or their women, or what their right hands possess, or their male attendants who are incapable, or to children who are not yet aware of women’s nakedness (Sura 24:31).’

As we can read, these verses do not literally mandate that women wear a veil, however they require that women dress ‘modestly’. This requirement on what portions of a woman’s beauty may appear in public and what parts must be covered in order to be modest is interpreted in

\[\text{References}\]

many different ways. Although all members of the Muslim community make reference to the same authoritative texts, a lack of a clear definition has led to various differing interpretations on the requirement of female modesty and how this requirement is elaborated in practice. The interpretation of the verses of the Qu’ran is relative to the culture of which a Muslim originates from. Depending on a more modernist view on the authoritative texts or a more conservative interpretation manner, a certain type of veiling is seen as fulfilling the Islamic duty in the different Muslim community’s. This has led to a variety of veiling practices that are widely differing amongst the Muslim community as a whole. It is important for the field of application of this Master Thesis to make a clear note on these different types of veiling.

1.2 Different types of veiling

First it should be mentioned that from a very progressive and modernist interpretation the wearing of a veil is not necessarily seen as a precept of Islam. From the different existing types of veil there is first the headscarf (hijab), existing out of one piece. The headscarf covers the hair and leaves the face unveiled. The hijab is the most moderate form of Islamic veiling. Second there is the niqab which covers the hair but also the face, except for the eyes. Last and most concealing of the Muslim veils there is the burqa that covers the entire face and body. As explained above, the choice on the type of veiling is depending on the community a Muslim originates from. For example, in Afghanistan the burqa is near universal, while in Turkey a headscarf is more common. These intra-Muslim interpretation debates are complex and are not of importance as this disquisition is focused on Islamic veiling from a Western perspective.

It must already be mentioned that the headscarf falls outside the scope of the Belgian burqa-ban as it does not cover the face. The burqa and niqab on the other hand, both full-face covering veils, are included in the field of application of the Belgian ban. Regulations and case law towards the headscarf will thus only be mentioned when of relevance, but the headscarf in itself falls outside the scope of this disquisition.

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9There can be made a small distinction of the headscarf with the al-amira (a two piece veil), the shayla (long rectangular scarf), the khimar (waist-length cape) and the Iranian Chador. They all have in common that the face remains uncovered and for the sake of this argumentation, when speaking of headscarf, this complete group is covered.
10Also written as ‘burka’ or in dutch as ‘boerka’ but further subsequently written in this Master Thesis as ‘burqa’.
1.3 Conclusion

We can conclude the precepts and the way of living according to Islamic duties are based on the Qu’ran and the Hadith, the main religious sources of Islam. Some verses of the Qu’ran require for a women to dress modest. Different interpretations on this requirement have led to differing Muslim communities with an own interpretation on how to fulfill this Islamic requirement. Out of these different interpretations, different types of veiling came into practice. The full-face covering veils, both burqa and niqab, are falling under the scope of the Belgian Law of June 1st 2011 on face-covering clothing.
Chapter 2 Belgium and the burqa in the public sphere

For a moment it seemed as if Belgium would be the first European country introducing a general law on face-covering clothing in public. However due to the fall of the government on the 7th of May 2010, some delay was caused to the judicial progress. This delay gave France the venture to be the first in the race with its law on face-covering clothing in April 2011. Following the path of France as second, Belgium introduced the Law of June 1st 2011 on the introduction of a ban on the wearing of clothing that partly or completely covers the face which took effect on the 23rd of July 2011. This law, placing a general ban on face-covering clothing in public, mainly has an effect on the group of Muslim women wearing a full-face covering Islamic veil. However, before this general national law got introduced, there were already some local regulations concerning full-face covering clothing in public in Belgium.

First, we will discuss the different forms of local regulations and their impact on the wearing of the full-face covering Islamic veil in specific. Also we will comment their legitimacy through some relevant case law.

Second, an introduction of the ‘Law of June 1st 2011 on the introduction of a ban on the wearing of clothing that partly or completely covers the face’ will be given. This law concerns the addition of a new Article 643bis to the Penal Code and a new Article 119bis to the New Municipality Law. An explanation and a critical analysis of these Articles will be given. Furthermore, it is important to understand why a national general ban on face-covering clothing in public was installed. Therefore, a summation and comment on the main motivations, distracted from the parliamentary debates, will be given. Last, the compatibility of the Law of June 2011 on face-covering clothing with the Constitutional ground rights will be discussed by analyzing two recent cases, brought for the Constitutional Court.

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13Free translation of: Wet van 1 juni 2011 tot instelling van een verbod op het dragen van kleding die het gezicht volledig dan wel grotendeels verbergt. B.S. 13 juli 2011. This law will be subsequently shortened as the ‘Law of June 2011 on face-covering clothing’.
2.1 Regulations before the Law of June 1st 2011 on face-covering clothing

The first judicial measures taken towards face-covering clothing in public, more specifically towards the full-face covering veil, started off on the local level of the municipalities.

2.1.1 Regulations on local level

Before the Law of June 1st 2011 on face-covering clothing, there was no general law banning face-covering clothing in public applicable in Belgium. There was made reference to a circular letter of 1993 concerning a Law on the Police Post15 a few times, in an attempt to conclude for a general ban on face-covering clothing. This circular letter was interpreted in a way that it called for a continuous necessity for individuals to be identifiable and recognizable in public16. However, this letter obliges persons in public, in order to fulfill an identity-control, to be identifiable on the basis of an identity card or another medium and to lift a face-covering piece of clothing when necessary for this identity-control. It is clear that the focus of this circular letter is thus put on a mere ‘identity-control’. A general obligation to be continuously identifiable and recognizable in public could thus not be concluded from this letter.

Even though at that time there was thus no general regulation; a large number of municipalities already had (and still has) a local police law concerning a ban on the wearing of face-covering clothing in public17. The concrete formulation and field of application of these local police laws differs from district to district in nature and scope and other elements such as account of time and place, but still it is possible to distract from them roughly two different types18. Both types have a different impact on Muslim women wearing the full-face covering veil. The first type—mentioned here for the completeness of this disquisition—is the one of police laws that forbid face-covering clothing in specific contexts, such as manifestations and demonstrations. This type will not be further discussed since it is not relevant for the situation of full-face veiled Muslim women19. The second type is the one of more general police laws on face-covering clothing in public that is applicable independent of context and circumstances. From this second type of general police laws could be roughly subtracted two different models20.

15Omzendbrief 2 februari 1993 op Wet van 5 augustus 1992 op het politieambt, B.S. 20 maart 1993. This law is clarifying the competences of the police services.
18However some municipality regulations are based on characteristic of both models.
19The regulations discussed further on in case law are thus of the second type.
The first model focuses on the prohibition of ‘disguise’, ‘masquerade’ and other ‘concealing outfits’ that cover the face (nearly) completely in public. Exceptions are possible when a license, permission or temporary relief of the local government is granted. Also exceptions are made in case of familiar festivities or situations, such as carnival or Halloween\(^{21}\). Some regulations even have a general exception for periods that are accepted by the public opinion for historical, folkloric of religious reasons\(^{22}\). All these first-model police regulations are formulated and interpreted with small differences but they all have the intention to forbid persons to appear in public - in public spaces and on the street- wearing a masque, being disguised or dressed-up. If we look at the impact of these first model-regulations on the full-face veiled Muslim women, there is no clear answer. Some of the local regulations include the wearing of the full-face covering Islamic veil. Others explicitly exclude clothing being worn for religious reasons\(^{23}\).

The second model regards local regulations that forbid persons that are ‘non-identifiable’ or ‘not recognizable’ or ‘cover their face by any garment’. This type of model has a wider field of application than the first model that is limited to disguised, dressed-up persons or persons wearing a masque. This model is thus focused on ‘recognizability’. The exceptions on the second model-regulations are comparable to the ones on the first model-regulations. First, permission or a license of the local government is to be purchased. Second, general exceptions on festivities, such as carnival and Halloween, are foreseen. In addition, also activities with a commercial goal or cultural manifestations are often included, since the general field of application of this model is wider. These second-model local regulations rather focus on the ‘non-identifiable’ persons of whom the face is concealed by any piece of clothing and thus consequently include the full-face covering Islamic veils. One of the first municipalities to introduce a certain regulation was Maaseik. It was one of the first municipalities confronted with a high number of Muslim immigrants and the appearance of full-faced veils in the streets. As major Creemers of Maaseik didn’t know how to deal with this new problem he requested the Flemish Parliament to work out a regulation. That is why-even though every district has its own regulatory power- in 2004 a Flemish Model Regulation\(^{24}\) was introduced under the authority of the Minister of Internal


\(^{22}\)An example would be the Article 78 of the General Police Regulation of the district Asse.

\(^{23}\)Some examples are the Local Police Regulations of districts Luik, Doornik, Beveren. Some of these districts also have no full-face veiled women in their district until today.

Affairs according to this second model. Many municipalities adapted this Model regulation and thus have a similar second-model regulation.

Both these models of police regulations on face-covering clothing in public prescribe an administrative sanction in the form of a fine for the offence of the local regulation. The amount of money differs from district to district although there is a maximum fine set out by Article 119bis, §2, 1° of the New District Law.

We can conclude that, before the Law of June 1st 2011 on face-covering clothing in public was introduced, there were already some general regulations on local level concerning face-covering clothing in public. Depending on the model of the general police law, one focused on masquerades and one focused on identification, the impact on the full-face covering Islamic veil differs from district to district.

It should be mentioned that these local police regulations are still applicable today, parallel with the existence of the Law of July 1st 2011 on face-covering clothing. The new law, through a change of Article 119bis of the New District Law, arranged the concurrent jurisdiction of the new criminal sanction (Article 563bis SW) introduced by the new law and of the sanctions provided by local laws foreseen on municipality level. This makes the local sanctions concurrently applicable with the criminal sanction prescribed by Article 563bis of the Penal Code.

2.1.2 Legitimacy of the local regulations

According to Article 119bis, §2,3° of the New District Law a fine can be challenged at the police court. The first case in which the legitimacy of a local regulation was investigated is a case before the police court of Tongeren on the 12th of June 2006. The outcome of the case was strongly criticized. The second more recent case dealing with a similar situation had a different outcome. This was the case of the 26th of January 2011 before the police court of Brussels.

**Police court Tongeren (Section Maaseik), 12th of June 2006**

A local case situated in the municipality Maaseik in June 2006, was the first case in which a police court questioned the legitimacy of a local regulation on face-covering clothing in public.

The municipality Maaseik is applying a second model-regulation that forbids appearing
‘unidentifiable’ in public, implying a ban on full-face Islamic veiling in public. On the basis of this local regulation a Muslim woman got an administrative fine in April 2005 for appearing in public wearing a niqab. Therefore the Muslim woman lodged an appeal at the Police Court of Maaseik.

First, the applicant claims an interference with her right to freedom of religion as protected by Article 19 of the Constitution and Article 9 of the European Convention on Human Rights. The Court replies by stating that when a religious symbol is interfering with a law or even a local regulation, these last ones prevail. This reasoning by the Court was strongly criticized in jurisprudence since it subordinates the ground right and human right to freedom of religion to a local regulation.

The second argument of the appellant was that she was discriminated against with a reference to case law of the Constitutional Court (Grondwettelijk Hof) on Article 10 and 11 of the Constitution on the arm’s length principle and discrimination. The Court was of the opinion that the regulation in question was applicable to anyone without difference. This reasoning could be criticized as it is clear from the Constitutional Court’s case law that discrimination can also comprise a same treatment of persons in different circumstances. Since the impact of the regulation affects Muslim woman in their right to freedom of religion while most of the citizens falling under the scope of the regulations are not affected in this way, one may say these are different circumstances. In this case an equal treatment is a hidden form of conscious or not conscious discrimination.

The police court of Tongeren eventually put the Muslim woman in the wrong and thus approved the local regulation sanctioning the wearing of a niqab in public. This case is of importance because it was the first case that investigated the legitimacy of a local regulation placing a ban on the wearing of the burqa or niqab in public. This approval was for many districts a motivation to make their own regulation.

*Police court Brussels, 26th of January 2011*

A second and recent case concerns a Muslim woman in the municipality Etterbeek that got fined twice for the wearing of a niqab in public when she was picking up her children at the school.
The woman refused to pay the fines and lodged a successful appeal for the discharge of the fine for reasons of interfering with her right to manifestation of her religion.

The Brussels police court, opposite to the first case, judged the police law in the light of the European Convention on Human Rights. First, the court answered the question whether the wearing of a burqa or a niqab falls under the scope and protection of Article 9 ECHR. Second, with a positive answer on the first question in mind, the police court decided whether the restriction of Article 9 ECHR was justified. The police court concluded a violation of Article 9 ECHR and the administrative fine got annulled.

This case is of great importance because it judges the legitimacy of a general ban on face-covering clothing in public in the light of the European Convention on Human Rights. The police court explained that since there was no general law on the wearing of face-covering clothing introduced at the time of the ruling, it was committed to judge the local police regulation in the light of the European Convention on Human Rights (and the Constitution). Even though it concerns the legitimacy of a local regulation, the reasoning of the police court in this case is of relevance for the legitimacy of the Law of July 1st of 2011 on face-covering clothing. As the main goal of this thesis is to control the legitimacy of the Belgian law in the light of the European Convention on Human Rights, we will refer to this interesting reasoning of the Court in this case when relevant in Chapter 4 on the Belgian burqa-ban unveiled from a European human rights perspective.

2.2 Law of June 1st 2011 on face-covering clothing

After having discussed the regulations on a local level, it is time for the introduction of the Law of June 1st 2011 on the introduction of a ban on the wearing of clothing that completely or mostly covers the face. One may wonder since there were already some local regulations taking care of the burqas and niqabs in the street view, why there was the need for the introduction of a general ban. The motivations, distracted from the Parliamentary debates will be discussed underneath.

First, we will discuss the introduction of the new law. Second, an explanation on the content of the new law will follow. On the one hand this law adds a new Article 563bis to the Penal Code.
that installs a criminal offence. On the other hand it makes some changes to Article 119bis of the New Municipality Law in order to regulate the concurrent jurisdiction of local regulations and the general criminal sanction installed by Article 563bis of the Penal Code. Third, an overview of the motivations distracted from the parliamentary debates will be given. These arguments are legal certainty, the connection with a fundamentalist Islam, the terms of living together in a society, public safety and women’s rights. Last, the compatibility of the general burqa-ban with the Belgian constitutional rights will be explained.

2.2.1 June the 1st 2011: introduction of the general ‘burqa-ban’

The first proposition to create a general ban on face-covering clothing in public was already hand in by the so called right winged party ‘Vlaams Blok’ in 2004. Later, in January 2005, a proposition was hand in to the Flemish Parliament for a decree that focused specifically on the burqa. Between 2007 and 2010 several other propositions were made, not only by the right winged party but by several parties. In April 2010 a quasi-unanimous voting in favor of a general ban was reached in the Chamber and was nearly evoked by the Senate. However, the course of events took a change when the Belgian government took a fall in June 2010 and the proposition fell with it. Eventually, on April the 28th of 2011, a new proposition was made and was voted almost unanimously (129 pro’s, 1 con and 2 neutrals). The Law of June 1st 2011 on the introduction of a ban on the wearing of clothing that completely or mostly covers the face was born.

This law, introducing a general ban on face-covering clothing in public mostly has an impact on the small group of Muslim woman wearing a full-face covering veil. That is why, through debating over the matter in politics and through its reporting in the media, the ‘Law of June 1st 2011 on the introduction of a ban on the wearing of clothing that partly or completely covers the face’ was baptized the ‘burqa-ban’.

We should keep in mind, when hearing or reading the term ‘burqa-ban’ the two following remarks. First of all, the Belgian Law not only forbids the wearing of the burqa, but all face-covering veils, masks or other clothing in general. This includes every piece of clothing that conceals the face of a person. Islamic veils such as niqab or burqa are thus not directly

37In the meantime this party changed its name into ‘Vlaams Belang’.
40136 in favor, 2 abstentions.
41Wetsvoorstel tot instelling van een verbod op het dragen van kleding die het gezicht volledig dan wel grotendeels verbergt, Parl.St. Kamer 2010-11, nr. 53-219/1; HandKamer 2010-11, 28 april 2011, nr. 53-30, 60.
42Also the French Law on face-covering clothing is called the ‘burqa-ban’.
mentioned in the law. This makes the law neutral on the face\textsuperscript{43}. Still it is logical that this law has most effect on Muslim woman that follow the tradition of Islamic full face veiling. A second remark is that the term 'burqa-ban' was put to use, but as we mentioned above, also the niqab is considered to be a full-face veil. It also lives up to the definition of a piece of clothing that covers and conceals the face (nearly) completely. Therefore when speaking of the Belgian burqa-ban, it is also considered to be a niqab-ban.

This law was introduced without legal advice on content, formulation and consequences from the Council of State (Raad van State), the judicial body that amongst others has a legislative department that controls the conformity of law proposals with the Belgian Constitution and international law. This we will be discussed further on\textsuperscript{44}. Furthermore, apart from a lack of legal advice by the Council, it must also be mentioned that no empirical material on the situation of Muslim full-face veiled women in Belgium was collected before the introduction of the law\textsuperscript{45}. On the one hand, in no way the ‘problem’ was identified in ways of grounded statistics, researches or other science-based sources. On the other hand, no dialogue was held with the women in Belgium wearing a full-face veil concerning their motivations and circumstances.

2.2.2 Content of the general ‘burqa-ban’

The Law of June 1st 2011 on face-covering clothing first adds a new Article 563bis to the Penal Code and secondly makes some necessary changes in Article 119bis of the New Municipality Law.

2.2.2.1 Addition of Article 563bis to the Penal Code

Article 2 of the Law of June 1st 2011 face-covering clothing establishes a new penalization, a criminal offence, through the addition of a new Article to the Penal code\textsuperscript{46}. Contrary to the local regulations who installed an administrative sanction, the new law is thus enforceable through a criminal sanction\textsuperscript{47}.

This new Article 563bis of the Penal Code goes as follows:

\begin{itemize}
\item \textsuperscript{43}Although the Parliamentary discussions clearly show that the mentioned face-covering veils were the intended target of the new provision.
\item \textsuperscript{44}See subsection 2.2.4 of this Chapter.
\end{itemize}
With a monetary penalty of fifteen until twenty-five euro and with an imprisonment of one day until seven days or one of these punishments separately, are punished, those who, except for other different regulations, appear in the public accessible spaces with the face completely or partly covered, and as such they are unrecognizable.

The first subsection does not apply on those who appear in public accessible spaces with a partly or completely covered face, so that they are unrecognizable, and this by virtue of labor regulations or a police ordinance on account of festivities.

The first subsection of Article 563bis of the Penal Code punishes persons showing up in public accessible spaces with a fully or partly covered or hidden face that are unrecognizable and non-identifiable. Therefore it imposes a pecuniary penalty of fifteen euro up till twenty-five euro and the addition of imprisonment of one day up till seven days, or one of these punishments exclusively.

The second subsection installs an exception for two categories of persons. When falling under these exceptions a person is excluded from the scope of Article 563bis of the Penal Code. The first category is the one of unrecognizable persons who appear in public accessible spaces with a fully or partly covered or hidden face consistent with labor regulations. The second category is persons that appear in public accessible spaces with a fully or partly hidden face with the permission of a police ordinance on account of festivities.

It is clear that the Islamic veils covering the face completely (burqa and the niqab) fall under the scope of Article 563bis of the Penal Code.

Critical remarks on Article 563bis of the Penal Code

Underneath, some critical remarks on the formulation of Article 563bis of the Penal Code will be summed up.

A first remark is that subsection one of Article 563bis of the Penal Code stretches out for another field of application than the title of the Law of June 1st 2011 on the introduction of a ban on the wearing of clothing that completely or mostly covers the face presumes. First it is to be read from the first subsection of Article 563bis that the face does not necessarily has to be covered completely but also a ‘partly’ covered face is sufficient to fall under its scope. This stands in contrast to the title of the law that speaks of ‘mostly’ covered. Second, the first subsection of Article 563bis does not specify the means of covering or hiding. This is also in contrast with the

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title that specifically mentions the covering by ‘clothing’. One may thus fall under the scope of Article 563bis of the Penal Code by being only partly covered and by other means than clothing. This problem of interpretation leads to an unclear field of application.

A second remark on subsection one of Article 563bis of the Penal Code is on the criterion of ‘recognizability’. The lack of a definition on this ‘recognizability’ leaves room for a broad margin of interpretation. On the one hand, if one reads the Article 563bis of the Penal Code literally, even when a person is partly or completely covered, if he is recognizable, it could be interpreted in a way that a person falls outside the scope of Article 563bis. This way of interpretation was put on the table as an argument in the local case of the police court of the 12th of June 2006 as discussed before. The applicant in question, a Muslim woman, claimed to fulfill the criterion of ‘recognizability’ even though she was wearing the niqab. The woman, who got fined for wearing a burqa in public, claims that she was the only person in the district wearing this garment, which led to the impossibility for her to be unrecognizable. On the other hand this also means that the field of application of Article 563bis can be interpreted in a very broad way. Since the focus is on the aspect of ‘recognizability’, Article 563bis, §1 of the Penal Code is also applicable in many other circumstances apart from the veil that might not be targeted in the first place. The only accepted exceptions are foreseen in Article 563bis, second subsection of the Penal Code. First there are situations where a person in question falls under a labor regulation. For example a street worker wearing too big safety glasses. On the other hand there are the exceptions due to certain festivities such as carnival. However, these exceptions as prescribed in the second paragraph of Article 563bis of the Penal Code are not sufficient enough to cover all circumstances. Some circumstances are not coping with the veil but with other garments or masques that can cover the face partly or completely. This can potentially lead to unforeseen and unwanted criminalization of certain situations, if the law of course is applied correctly and consequently.

These unforeseen situations that could fall under Article 563bis of the Penal Code are described in an evaluation of the department of law-evaluation of the Senate. This committee of law-evaluation was installed in the Senate in January 2010 and its purpose is to check upon the applicability of certain laws by analyzing problems of formulation and interpretation. The department made a selection of situations, apart from the initiate targeted situation of wearing the burka or the niqab, falling under the scope of Article 563bis of the Penal Code if consequently applied. A first category of persons of this selection are the ones dressed up as

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50 See subsection 2.1.3 of this Chapter.
Santa Claus, as an Easter rabbit, as Halloween figures, for carnival and other festivities. As mentioned before, a part of this group will fall under the exception of subsection three of Article 563bis of the Penal Code, which foresees permission prescribed in police laws for certain festivities. Nevertheless this exception will never cover all festivities and some of them will therefore become subject of criminalization under the new Law of June 2011 on face-covering clothing. A great example that occurred in June 2010 illustrates this possible side effect of the new law although the example is situated on local level. In Genk, a youngster of a political party was dressed up as a living pencil as part of a promotion campaign ‘Start to vote’, stimulating young people to vote. Since the youngster was not recognizable in public he got arrested for identification by the police conform to the local police law. A second category is persons being covered for professional reasons. As mentioned before, subsection three of Article 563bis of the Penal Code prescribes exceptions for persons that have the permission under certain labor regulations to appear unrecognizable in public. But there are still situations imaginable that do not fall under the protection of the exception foreseen in the third subsection of Article 563bis of the Penal code. An example would be a beekeeper appearing in public. A third category of persons would be people that cover the face for health reasons, such as a dust mask or a sterilized gauze after a having had surgery. A fourth category being addressed by Article 563bis of the Penal Code would be the one of actors and performers that are playing in the streets in an unrecognizable way. An example here would be a painted or masked living statue. This means on the one hand when applying Article 563bis of the Penal Code in a consequent way, it covers a wider range of circumstances than probably intended. On the other hand, if the law would not be applied in a consequent way but rather focus on the criminalization of the full-face covering Islamic veil in specific, questions on the ‘principle of equality’ and discrimination could rise.

A third remark, also based on an analysis of the department of law-evaluation, is that to fall under the minor offence foreseen in Article 563bis of the Penal Code, the element of ‘intention’ is not a necessary presupposition. For a minor offence it is sufficient to act in a careless or a negligent way. This has as a consequence that even persons appearing in public unrecognizable, without the intention to act in this manner, are a subject of Article 563bis of the Penal Code if applied consequentially. If not applied consequentially and only focusing on women that deliberately wear the burqa or the niqab, the question discrimination rises again.

A last remark made by the department of law-evaluation would be that the interpretation of ‘public accessible spaces’ in Article 563bis of the Penal Code is questionable. Since there is no real definition given, it is unclear which areas of the public life are in practice considered to be subject of Article 635bis of the Penal Code. An analogue interpretation used to define ‘public accessible spaces’ as used in other laws, offers no solution, since there is no consistent definition noticeable. Hospitals, banks, universities, state libraries or even mosques can thus be subject of discussion.

It is clear that the vague formulation of Article 563bis leaves room for different interpretations. If it is applied consequently many persons, apart from Muslim women wearing the burqa, are targeted probably unintended. On the other hand, if the law would not be applied in a consequent way but rather focus on the wearing of the burqa or the niqab, questions on ‘principle of equality’ and discrimination are to be asked.

2.2.2.2 Changes to Article 119bis of the New Municipality Law

Article 3 of the new law handles the concurrent jurisdiction of this Article 563bis SW introduced by the new law and the sanctions provided by the previously discussed local laws foreseen on municipality level.

Paragraph 1 of Article 119bis of the New Municipality Law works out a settlement in which a person in principle can only be subject to administrative fines on local district level if he or she is not subject yet to a law, decree or ordinance of a higher level. In this way there can be kept up with the non bis in idem principle, in order to avoid calling a person to account twice for the same offence. Consequently, this would mean that the criminal sanction prescribed in Article 563bis introduced by the new law would have priority over the local administrative sanctions. Article 119bis, paragraph 2 arranges thus the usage of a sort of ‘cascade system’, where the criminal sanction through Article 563bis SW. in principle has priority over administrative sanctions on local district level.

However, subsection 3 of paragraph 2 of Article 119bis of the New Municipality Law mentions a list of exceptions to this principle, being the Articles 327-330, 398, 448, 461, 463, 526, 534bis, 534ter, 537, 545, 559, 1°, 561, 1°, 563, 2°-3° and with the new law also 563bis of the Penal Code.

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is added to this list. This means that, when it comes to Article 563bis of the Penal Code, an administrative sanction on local level remains possible, of course with a respect for the non bis in idem principle. This arrangement is of importance since the local administrative sanctions that were introduced before the introduction of the Law of June 2011 on face-covering clothing are thus still applicable with the introduction of Article 563bis of the Penal Code.

2.2.3 Motivations on the general ‘burqa-ban’

During the period of proposition of the law, many reasons to install the general ban on face-covering clothing in public were put forward. An analysis of the Parliamentary debates on the proposition of the new law allows us to put forward five main arguments\(^5\). These arguments are legal certainty, the connection with a fundamentalist Islam, public safety, terms of living together in a society and women’s rights. A description of these motivations will be given one by one.

However, before a description of these arguments two short comments should be made. Firstly, it should be noted that these same arguments will be further analyzed and criticized as ‘legitimate aims’ under the analysis of the burqa-ban from a European Human Rights perspective\(^5\). Secondly, it should be mentioned that these arguments are representative for the arguments that are put forward in other European countries debating on the matter. On the seminar on Empirical Face Veil Research\(^6\) these arguments were compared to a ‘flying circus’ around Europe as the countries pick up the same perceived arguments. Therefore it is not necessary to get back on the motivations in Chapter 3 on the burqa in other European countries\(^6\).

2.2.3.1 Legal certainty\(^6\)

A first argument to be found in the parliamentary debates is the one of legal certainty. As we have previously discussed, before the general ban was introduced, there were already regulations on district level. These local regulations have diverging formulations, applications and interpretations, which leads to legal uncertainty\(^6\). A general ban on national level would

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6 [See Chapter 4(4.3.1.2).]

60 Seminar on Empirical Face Veil Research organized by the Human Rights Centre of Ghent University on the 9th of May 2012.

61 A specific argument made by Spain to ban the burqa is that it is unhealthy because it is hot and uncomfortable. Banning all uncomfortable and possibly unhealthy female clothing does clearly not hold water. What about high heels?!

62 [Vrielink, S., Ouald Chair, E., Brems, “Boerkaverbod, Juridische aspecten van lokale en algemene verboden op gezichtsverhulling in België”, Nieuw Juridisch Weekblad 2011, afl. 244, 406, §35.]

construct more clearness and a more solid enforceability\textsuperscript{64}. This argument is not a main argument put forward, but is mentioned for the completeness of this disquisition.

\subsection*{2.2.3.2 The connection with a fundamentalist Islam\textsuperscript{65}}
Before explaining this argument, it is important to notice that this argument is not a general concern on face-covering clothing but shows unblemished that the general ban is specifically aiming at the Muslim veil.

Some are of the opinion that the face-covering veil is a symbol for a fundamentalist Islam that rejects our Western way of shaping society. This would make the general ban a tool in contesting the Islam-fundamentalism that is completely out of line with the democratic society and constitutes a potential danger\textsuperscript{66}. Many advocates of a burqa-ban claim that the burqa is not just a piece of textile with a religious value, but also a symbol for the rejection and condemnation of the Western values and norms to be enjoyed in the liberal, democratic European society that is highly committed to the protection of human rights\textsuperscript{67}. Especially the rejection of gender equality and women’s rights is put forward, which will be discussed as a next motivation\textsuperscript{68}. For these reasons, they claim this visible symbol of rejection should be banned from the public sphere.

\subsection*{2.2.3.3 Terms of ‘living together’ in a society\textsuperscript{69}}
This motivation concerns the desirability that anyone who appears in the ‘public life’ is taking part in the society and thus should be recognizable and open to communication\textsuperscript{70}. In France this is called ‘le vivre ensemble’. These arguments are thus focused on the asocial character of the burqa, which tends to break with the community atmosphere of ‘living together’\textsuperscript{71}. This asocial way of approaching the community life is opposite to the values of a modern, liberal, democratic society concerning a mutual communication\textsuperscript{72}. A person of which the eyes are covered by a veil cannot fully participate in this ‘living together’ as the veil reduces the verbal and non-verbal communication\textsuperscript{73}. After all, the face is the most communicative part of the body. A reference to

\textsuperscript{64}Verslag Commissie \textit{Parl.St.Kamer} 2010-11, nr. 53-219/4, 5 en 6.
\textsuperscript{65}J. VIJELINK, S. OUALD CHAIR, E. BREMS, “Boerkaverbod, Juridische aspecten van lokale en algemene verboden op gezichtsverhulling in België”, \textit{Nieuw Juridisch Weekblad} 2011, afl. 244, 40, §41.
\textsuperscript{68}See subsection 2.2.3.5 of this Chapter.
\textsuperscript{70}J. VIJELINK, S. OUALD CHAIR, E. BREMS, “Boerkaverbod, Juridische aspecten van lokale en algemene verboden op gezichtsverhulling in België”, \textit{Nieuw Juridisch Weekblad} 2011, afl. 244, 411, §56.
\textsuperscript{73}Wetsvoorstel betreffende de uitoefening van vrijheid van gaan en staan op de openbare weg, \textit{Parl.St. Kamer} 2010-2011, nr. 53-754/ 1, 3.
Emmanuel Levinas is made stating that humanity of men is expressed through the face. The wearing of a full-face covering veil simply does not fit in this European society based on mutual respect and communication.

Also mentioned is the that even though nowadays only a few hundred women are wearing a full-face covering veil in public, it is still not an acceptable practice. The appearance of the burqa in Europe is a recent phenomenon that has been growing increasingly in the last years. Therefore an intervention before the burqa gets acclimatized and naturalized in the Western community is necessary.

2.2.3.4 Public safety

If we look at the parliamentary debates on the Law of June 1st 2011 on face-covering clothing in public one of the main motivations is public safety (or security). A person appearing in the public area should be ‘recognizable’ and identifiable for reasons of safety. On the one hand, passing unrecognizable and unidentifiable persons in public areas can lead to a subjective feeling of being unsafe and uncomfortable for other individuals of a society. On the other hand, there is the objective safety that needs to be guaranteed since unrecognizable and unidentifiable people could form a treat to the public safety and security. This objective safety includes specifically traffic situations where there is a safety risk.

Subjective safety.

On the one hand, passing unrecognizable and unidentifiable persons in public areas can lead to a subjective feeling of being unsafe and uncomfortable for other individuals of a society. The confrontation with a burqa or niqab is for some individuals scary. The burqa disturbs the everyday social contact and creates a shady, sinister atmosphere. A subjective safety feeling is focused on the visibility of the face and the facial expressions. The face is the crucial part of the body that makes communication possible. If another person extracts himself from social interaction this could make other disposed people of the community uncomfortable.

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74 Wetsvoorstel tot instelling van een verbod op het dragen van kleding die het gezicht volledig dan wel grotendeels verbergt, ParLSt., Kamer 2010-11, nr. 53-219/1, 6.
76 Wetsvoorstel tot instelling van een verbod op het dragen van kleding die het gezicht volledig dan wel grotendeels verbergt, ParLSt. Kamer 2010-11, nr. 53-219/1, 5 ; Verslag Commissie, ParLSt. Kamer 2010-11, nr.53-219/4, 4.
parliamentary debates of legislature 2007-2010 there was a comparison made to the situation of placing street lanterns in the streets in order to make citizens feel safer\textsuperscript{79}.

Objective safety\textsuperscript{80}
Objective safety considers that the elimination of the full-face covering Islamic veils from the Belgian streets would make identification easier and contribute to public safety. One of the concrete threats summed up to count for ‘objective safety’ in the parliamentary debates is the use of the veil for criminal activities. Apart from a French anecdotal case example of two men robbing a post office in a burqa\textsuperscript{81}, there is no real evidence given for a connection between both. Besides there is claimed that the burqa as a dress would be a hypothetical hiding place for weaponry or other criminal materials. Also the need to avoid identification fraud is put on the table with references made to the need to identify the mothers picking up their children at the school gate out of safety reasons.

One of the specific arguments concerning the legitimate aim of ‘objective safety’ put on the table is ‘traffic safety’\textsuperscript{82}. It is not very clear whether the concern has risen towards the safety of the veiled women who have a limited vision field or whether it feels the need to protect the safety of other citizens who could be distracted while functioning in the traffic. Both views are put forward in the Belgian parliamentary debates.

The first way concerns safety in the way that the wearing of a burqa while driving a vehicle could diminish the field of sight. In order for public safety to be protected there has to be a real and concrete danger. The question whether the burqa and niqab actually disturb the field of sight is difficult to answer. On the one hand, from a logical way of thinking the wearing of a veil, with a gaze in front of your eyes, will definitely be of some disturbance to the vision. On the other hand, there could be made reference to a study claiming to have proven that the wearing the niqab does not influences the sight\textsuperscript{83}. Therefore the study claims any attempt to preclude niqab wearers from driving on safety grounds is not justified. However, this study only discusses the situation of the niqab.


\textsuperscript{81}Verslag Commissie, Parl.St. Kamer 2010-11, nr.53-219/4,7.

\textsuperscript{82}Wetsvoorstel betreffende de uitvoering van een verbod op het dragen van gelaatverhullende gewaden in de openbare ruimte en op openbare plaatsen, Parl.St. Kamer, 2010-11, nr.53-85/1,4.

The second way in which traffic safety as a motivation is to be found in the parliamentary debates concerns the fact that the wearing of the full-face covering veil distracts other participants in the traffic.

2.2.3.5 Woman’s Rights

The last but important motivation for the implementation of a general burqa-ban is that the wearing of a full-face covering veil by Muslim women is to be seen as causing harm to the rights of women. The wearing of the niqab or the burqa is seen as a violation of a woman’s human dignity and gender discrimination. It represents a patriarchal set of values that treats women as subordinate to men. In the parliamentary motivations there is made reference to the burqa and the niqab as a ‘walking prison’ for women. Furthermore it degrades the women to an inhuman object. Also mentioned is the moral behind it that an uncovered woman is a mere lust object to men stands in great contrast to the position of women in the Western society.

Therefore this oppressive garment forms a concern for many politicians and thus a reason to ban the burqa from the public sphere through state action.

It is clear from the parliamentary debates that the motivations show a strong focus on the full-face covering Islamic veil. The full-face veil is clearly the target of the legislation. That is why logically the ban raised questions on the inferences with the ground rights of Muslim women as prescribed in the Belgian Constitution.

2.2.4 Compatibility general burqa-ban with Belgian constitutional ground rights

The application of the Law of June the 1st 2011 on face-covering clothing places a ban on the wearing of the full-face covering Islamic veil in the public area. This ban clearly raises questions on the restriction of the ground rights of Muslim women wearing this garment as prescribed by the Constitutional Law. First of all, there could be an interference with Article 19 of the Constitution on freedom of religion. But also Article 22 (right to privacy), Article 19 (freedom of expression) and Articles 10 and 11 (discrimination) of the Constitution are relevant. That is why soon after its existence the Belgian law was challenged before the Belgian Constitutional Court. First, we will discuss two recent cases that were brought before the Constitutional Court. Second, a part from these findings, it must also be mentioned that the

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Parliament opted to reject the request for an advice on the conformity of the law with the constitution given by the legislative department of the Council of State.

2.2.4.1 Constitutional Court

The first claim brought before the Constitutional Court is the Case of the 5th October 2011. The applicants are two Muslim women challenging the Law of July 1st 2011 on face-covering clothing. The second case, the case of November the 17th 2011 concerns a non-religious woman from Brussels that claims the Law of July 1st 2011 on face-covering clothing interferes with her ground rights.

Constitutional Court, 5th of October 2011

The first case concerning the Law of June 2011 on face-covering clothing, that reached the level of the Belgian Constitutional Court, is the case of October the 5th 2011. A claim for the annulation and suspension of the Law of June 2011 on face-covering clothing was brought by two Muslim women living in Belgium and wearing their full face covering veil out of personal religious affiliations. The first applicant already got fined on the basis of a local police law in the district Etterbeek in 2009 for the wearing of a niqab in the public area. The second applicant already got fined in the district of Sint-Jans-Molenbeek. However, before any investigation on the compatibility of the ban with the ground rights, the Constitutional Court turned down the claim for annulation and hence it follows that also the claim for suspension got rejected as inadmissible. The Constitutional Court quoted Article 20, 1° of the Law of the 6th of January on the Constitutional Court, according to which an annulation can only be applied in cases where serious arguments and a direct application of a law or article lead to a severe, irretrievable disadvantage. Article 22 of the same Law of the 6th of January on the Constitutional Court prescribes that to fulfill Article 20, 1° the request has to mention concrete and precise facts as a prove. This means the existence of a risk of disadvantage, the severity of the disadvantage and the connection between the risk and the application of the law has to be proved. The Constitutional Court was of the opinion that in the actual case there was a lack of evidence of the

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93She lodged an appeal before the Brussels police court where her fine got annulated. See the previous discussed case of the police court 26th of January 2011.
94By the time of this writing, her administrative appeal has not reached a decision yet.
personal severe and irretrievable disadvantage caused by the \textit{Law of 1\textsuperscript{st} of July 2011 on face-covering clothing}\textsuperscript{96}.

This leads to the conclusion that this case does not answer the question on the compatibility of the ban with the relevant rights of the Belgian Constitution. It is very questionable that a complaint brought by two Muslim women insisting on wearing the veil and being targeted by the law and already receiving fines does not amount the fulfillment of a ‘personal severe and irretrievable disadvantage’. It seems to be the Constitutional Court in this case favors the burqa-ban.

\textit{Constitutional Court, 17\textsuperscript{th} of November 2011}\textsuperscript{97}

The second case concerning the \textit{Law of June 1\textsuperscript{st} 2011 on face-covering clothing}, brought before the Belgian Constitutional Court is the case of November the 17\textsuperscript{th} of 2011. A non-religious woman from Brussels decided to go to the Constitutional Court for a request containing the subject of on the one hand the suspension of \textit{Law of June 1\textsuperscript{st} 2011 on face-covering clothing} and on the other hand the annulation of the \textit{Law of June 1\textsuperscript{st} 2011 on face-covering clothing}. The applicant uses several arguments to support her claim. First, she is of the opinion that the \textit{Law of June 1\textsuperscript{st} 2011 on face-covering clothing} interferes with her right to dress the way she wants, her accessibility to the public sphere, her right to privacy and social relations. Second, she claims that the word “recognizable” in the Article 563bis of the Penal Code is not precise enough, which could lead to a possible sanction for wearing for example oversized glasses, a headscarf or an antibacterial mask. If the \textit{Law of June 1\textsuperscript{st} 2011 on face-covering clothing} would be interpreted in a way that only a ‘complete veil’ is targeted, she finds it important to live in a society that does not discriminate religious minorities. Last she claims that the \textit{Law of June 1\textsuperscript{st} 2011 on face-covering clothing} is antipodal with the rights of the European Convention on Human Rights, such as the freedom of religion as defined in Article 9 ECHR\textsuperscript{98}. The direct application of the law could cause her a severe and irretrievable disadvantage. She notices that a disadvantage that could harm all citizens of a State is also including a personal harm.

The Constitutional Court again turned down the claim for annulation and hence it follows that also the claim for suspension got rejected as inadmissible. The Constitutional Court quoted Article 20, 1\textsuperscript{o} of the \textit{Law of the 6th of January on the Constitutional Court}, according to which an annulation can only be applied in cases where serious arguments and a direct application of a


\textsuperscript{97}Grondwettelijk Hof, 17 november 2011, nr. 2011/179.

\textsuperscript{98}This is also a precious right for non-believers.
law or article lead to a severe, irretrievable disadvantage\textsuperscript{99}. Article 22 of the same \textit{Law of the 6th of January on the Constitutional Court} prescribes that to fulfill Article 20,1\textdegree the request has to mention concrete and precise facts as a prove. The Constitutional Court was of the opinion that in the actual case there was a lack of evidence of this personal severe and irretrievable disadvantage\textsuperscript{100}.

We can conclude the Constitutional Court seems to take the position as advocate of the burqa-ban as both cases were declared inadmissible. We will not further go into the compatibility of the Belgian burqa-ban with the Belgian constitutional ground rights as the focus of this thesis is on the European human rights perspective. The notion of the Constitutional Court in favor of the burqa-ban makes it only more likely an individual will seek relieve at Strasbourg level.

2.2.4.2 Council of State

The Belgian Council of State is a judicial body that amongst others has a legislative department that controls the conformity of law proposals with the Belgian Constitution and international law. However, the mandatory advice of the Belgian Council of state its legislative department was not requested for the burqa-ban\textsuperscript{101}. The request for a referral to the Council of State was rejected\textsuperscript{102}. The parliamentary commission (14 pro’s and 1 abstinence) decided not to ask for advice\textsuperscript{103}. The Commission of Internal Affairs was of the opinion that advice was unnecessary as profound debating on the matter already found place in neighbor country France\textsuperscript{104}. It is very likely the parliament members decided not to request the advice as it had a big chance to be negatively evaluated. The French Council of State also issued a very negative and critical advice on the French burqa-ban\textsuperscript{105}. Also the Council of State of the Netherlands handed out a negative advice on the conformity of a proposal for a ban with the Dutch Constitution and international law\textsuperscript{106}.

\begin{itemize}
\item \textsuperscript{99}Bijzondere wet van 6 Januari 1989 op het Grondwettelijk Hof, \url{www.constcourt.be/nl/basisteksten/basisteksten_wet_01.html}.
\item \textsuperscript{100}“Grondwettelijk Hof schorst boerkaverbod niet”, \url{www.demorgen.be/dm/nl/989/Binnenland/article/detail/1329244/2011/10/05/Grondwettelijk-Hof-schorst-boerkaverbod}.\textsuperscript{101}
\item \textsuperscript{101}C., Mattheeuw, P., De Hert, S., Gutwirth, “Boerkaverbod verdient grondig debat”, Juristenkrant, 15 september 2010, 14.
\item \textsuperscript{102}E., Brem, “Belgium votes ‘burqa’ ban”, Strasbourg Observers, 2 April 2011, \url{http://strasbourgobservers.com/2011/04/28/belgium-votes-burqa-ban/}.
\item \textsuperscript{103}Verslag Commissie Partl st. Kamer 2010-11, nr. 53-219/4, 4.
\item \textsuperscript{104}C., Mattheeuw, P., De Hert, S., Gutwirth, “Boerkaverbod verdient grondig debat”, Juristenkrant, 15 september 2010, 14.
\item \textsuperscript{105}See Chapter 3 (3.1.1); E., Brem, “Belgium votes ‘burqa’ ban”, Strasbourg Observers, \url{http://strasbourgobservers.com/2011/04/28/belgium-votes-burqa-ban/}.
\item \textsuperscript{106}See Chapter 3 (3.2.2)
\end{itemize}
2.3 Conclusion on the Law of June 1st on face-covering clothing

Before the introduction of the Belgian burqa-ban, there were already some local regulations on the level of the municipalities concerning the full-face veil in the public realm. These local regulations are differing in formulation and content (two different types noticeable) and therefore have a different impact on the full-face covering veil. Despite the existence of some local regulations, on the 23th of July 2011 the general Law of June 1st on face-covering clothing took effect. The main importance of this law is that it introduces an Article 563bis to the Penal Code that provides a criminal sanction for the wearing of face-covering clothing in public. Besides the introduction of Article 563bis of the Penal code, it also makes some changes to Article 119bis of the New Municipality Law in order to regulate a concurrent jurisdiction of the existing administrative sanctions of the local regulations and the new criminalization of Article 563bis of the Penal Code.

As regards the judicial process concerning the introduction of the Law of June 1st on face-covering clothing, we can make the accusation of an inconsiderate and superannuated operation. The advice of the Council of State was not requested by the Parliament. The law was thus implemented without legal advice from a powerful and influencing advisory body. But apart from a lack legal advice, it must also be mentioned that no empirical material on the situation of Muslim full-face veiled women in Belgium was organized. In no way the ‘problem’ was identified in ways of grounded statistics, researches or other sources.

As regards formulation, we can conclude Article 563bis of the Penal code, implemented by the Law of June 1st on face-covering clothing, leaves space for problems of interpretation and determining the field of application. If the law is applied consequently, many persons, apart from Muslim women wearing the full-face covering veil, are targeted probably unintended. However it is very clear this general law mainly targets the full face veil. If not applied consequently, questions on the principle of equality and discrimination are to be asked.

The motivations on the installment of such a law, distracted from the parliamentary debates, are legal certainty, the connection with a fundamentalist Islam, terms of living together in a society, public safety and the protection of women’s rights. These motivations are more or less the same in other European countries. It is clear from these arguments that the general law has only the intention to target full-face veiled women and is not that neutral as it looks at first sight.

On the compatibility of the general law with the ground rights of the Belgian convention no answer was given by the Constitutional Court. Two recent cases brought before the Constitutional Court were declared inadmissible for a lack of severe or irretrievable damage.
the advice of the Council of State was not requested also this organ did not speak out on the compatibility with the ground rights of the Constitution.
Chapter 3 The burqa in other European Countries

The confrontation with the Islamic full-face veil in the street view is a challenge not only Belgium is facing. In more and more West-European countries the wearing of the burqa and niqab in public are subject to discussion. The growing anti-burqa sentiment spreading across Europe starts to become visible.

Although all West-European countries are liberal democracies agreeing upon common values such as liberal individualism and freedom, equality and the rule of law, there are differences noticeable in their attitude towards the place of religion in general and more specifically towards the full-face covering Islamic veil107. As already noticeable from the different legislations on the headscarf, every European country has its own attitude. In some countries the wearing of the headscarf in public and state institutions, such as a school, is prohibited. In other countries the headscarf is allowed. In line of these different attitudes towards the headscarf, the appearance of the burqa in the public street view also gives rise to different opinions on how to deal with this phenomenon. Countries their responses thus differ, even though the arguments and motivations are nearly the same everywhere108.

This Chapter 3 on the one hand has as a goal to give a mere idea on the contour of the burqa-debates in Europe and place the Belgian ban into perspective. On the other hand it will remark interesting differences or similarities. This Chapter does not have the ambition to give a detailed informative overview on political and legislative issues of all different Western-European countries. Also, the burqa-debates of course did not start overnight. Therefore we should frame these debates in an over-all noticeable European phenomenon, called ‘Islamophobia’.

It must however be clear that the burqa-debates and the attitude towards Islam in general is a very actual theme that, depending on historical, social, economic and cultural factors, will evolve through time. This overview is in line with any event prior to the beginning of May 2012.

3.1 First ‘Burqa-ban’ in France

3.1.1 Law of October the 11th 2010 on the banning of the concealment of the face in the public space

France was the first country to introduce its general burqa-ban in public on the 11\textsuperscript{th} of April 2011\textsuperscript{109}. The ‘Loi du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public’\textsuperscript{110} was introduced by the French National Assembly and passed through both houses of the French Parliament almost anonymously.

Pursuant to this new French law, also called the ‘burqa-ban’, no one shall, in any public space, wear clothing designed to conceal the face\textsuperscript{111}. The first subsection of Article 2 of this new law gives a definition of public space being ‘the public space shall be composed of the public highway and premises open to the public or used for the provision of a public service’\textsuperscript{112}. Exceptions on the prohibition are prescribed by the second subsection Article 2 of the French law saying that it ‘shall not apply if such clothing is prescribed or authorized by legislative or regulatory provisions, is authorized to protect the anonymity of the person concerned, is justified for health reasons or on professional grounds, or is part of sporting, artistic or traditional festivities or events.’\textsuperscript{113}

Furthermore the French ban installs two punishable offences.

Firstly, according to Article 3, when an individual does not comply with the defined prohibition, this failure ‘shall be punishable by the fine envisaged for offences of the second category. The duty to attend a citizenship course as referred to in 8° of Article 131-16 of the Penal Code may be ordered at the same time as, or instead of, the payment of a fine.’\textsuperscript{114} This means the wearing of clothing designed to conceal one’s face in a public space is punishable by either a fine (with a maximum of 150 €) or a class on the meaning of citizenship or a combination of both.

Secondly, Article 4 of the French law installs another punishable offence: ‘Whosoever shall, by means of threats, duress or constraint, undue influence or misuse of authority, compel another person, by reason of the sex of said person, to conceal their face shall be liable to a punishment of

\textsuperscript{109}Case S.A.S. v. France (43835/11) Muslim woman wearing niqab forbidden to cover her face in areas open to public and banned from public facilities: communicated”, 22 February 2012, http://echrnews.wordpress.com/2012/02/22/sas/.

\textsuperscript{110}Loi \textsuperscript{2010-1192} du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, www.legifrance.gouv.fr.


\textsuperscript{112}Act No \textsuperscript{2010-1192} of 11 October 2010 prohibiting the concealing of the face in public, http://www.ambafrance-ph.org/IMG/pdf/POS00054.pdf, Article 2, 1.

\textsuperscript{113}Act No \textsuperscript{2010-1192} of 11 October 2010 prohibiting the concealing of the face in public, http://www.ambafrance-ph.org/IMG/pdf/POS00054.pdf, Article 2, 11.

one year’s imprisonment and a fine of €30,000. When the offence is committed against a minor, the punishment shall be increased to two years’ imprisonment and a fine of €60,000.”

Contrary to Belgium, the advice of the French Council of State was requested. The Council’s report of 25th of March 2010 ‘found that no incontestable legal basis can be relied upon in support of a ban on wearing the full veil”116. The council of state concluded that the complete ban on full-face covering veils as proposed with the new law would violate both the French Constitution and the European Convention on Human Rights117. Despite this negative advice the law was introduced.

Furthermore, the French Constitutional Court ruled out the law to be in conformity with the French constitution. On the 14th of September 2010, a reference was made by the President of the National Assembly and the President of the Senate to the Constitutional Court for a review. The Constitutional Court in its decision of October the 7th 2010 was of the opinion that ‘in view of the purposes which it is sought to achieve and taking into account the penalty introduced for non-compliance with the rule laid down by law, the Parliament has enacted provisions which ensure a conciliation which is not disproportionate between safeguarding public order and guaranteeing constitutionally protected rights. With this qualification, sections 1 to 3 of the statute referred for review are not unconstitutional.”118

3.1.2 Comparison with the Belgian burqa-ban

Mutatis mutandis the Belgian ban, the French law is formulated in a general way banning the concealment of the face in public spaces and thus not explicitly targeting the full-face Islamic veil. It is nonetheless clear that the law is also aimed at removing the burqa from the French public sphere119.

Opposite to the Belgian law120, subsection 2 of Article 2 of the French Law gives a sort of definition of ‘public accessible spaces’. Furthermore, Article 3 prescribes the duty to follow a citizenship course instead of or in combination with the fine. However, the most important difference with the Belgian law is that it also installs an offence for the persons (husbands, uncles, brothers, etc.) forcing a woman to wear a face-covering veil and punishes this crime with

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120 See Chapter 2 (2.2.2.1), critical remarks on Article 563bis of the Penal Code.
a higher sanction. This is one of the hiatuses in the Belgian Law, where the focus is only put on the women which are in casu the victims. The Belgian government had better looked over the fence in the garden of the French neighbor and taken over this criterion. This way not only the burqa is removed from the street view, but also a part of the possible cultural patriarchal pressure is laid hands on. This could have a positive effect in the situation where a Muslim woman is oppressed and forced to wear the burqa.

3.1.3 'Laïcité' and the Relationship between France and its Muslim Population

France is a country that supports the principle of 'laïcité' which means there is a separation between church and state that protects the freedom of religion (and of non-religion), whose intention is to avoid any discrimination against people on the basis of their religious affiliation or lack thereof. As a laic country it thus attaches great importance to secularity. The traditions of secularity that the modern French State knows today are drawn on their specific history of opposition to the Catholic Church and the post-1789 revolutionary separation of church and state. This means that religion does not have a public role in the life of the State and the State takes a neutral stand. However, instead of taking an 'a-religious' neutral stand and allowing the free exercise and expression of all religions, an anti-religious- also called ‘fundamentalist secularism’ attitude is assumed. This French attitude is reflected in France’s difficulties with the integration of Muslim immigrants into the French society. France has the largest Muslim population in Western Europe. Over the past years, it has dealt with this large Muslim population in a context of heightened security and discrimination. It was for example the first West-European country to prohibit veils in public schools in early 2004 with a law that prohibits the wearing of ‘conspicuous signs of religion’ in state funded schools. The French burqa-ban is a measure in line with this recognized new ‘fundamentalist secularist’ attitude. In the line of this attitude and its state-church relationship, it is not surprising France was the first European country to take legal action against the full-face covering Islamic veil in the public space under the pretense of being ‘neutral’.

3.1.4 French burqa-ban taken to the European Court

On the same day the new French burqa-ban was introduced, the 11th of April, a French Muslim woman decided to file an application to the European Court of Human Rights. The application

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121 Article 1 of the French Constitution reflects the importance of laïcité in France, declaring that France is an indivisible, secular, democratic, and social republic that ensures the equality of all citizens before the law; S., Nanwani, “The burqa ban: an unreasonable limitation on religious freedom or a justifiable restriction?”, Emory International Law Review, www.law.emory.edu/fileadmin/journals/eilr/25/25.3/Nanwani.pdf, 1444.
123 "Case S.A.S. v. France (43835/11) Muslim woman wearing niqab forbidden to cover her face in areas open to public and banned from public facilities: communicated", 22 February 2012, http://echrnews.wordpress.com/2012/02/22/sas/
was hand in on the grounds that the criminalization of the full-face covering Islamic veil in the public sphere constitutes a violation of her right to privacy according to Article 8 ECHR, her freedom of religion according to Article 9 ECHR, her freedom of expression according to Article 10 ECHR and that these policies are discriminatory and thus a violation of Article 14 ECHR. This official request, under the name of S.A.S v. France, was communicated to the French State on the 1st of February 2012.

3.2 Future Burqa-ban in the Netherlands

3.2.1 Law proposal approved by the Government

On this actual day, the Netherlands are not in possession of a general ban on the burqa, but it is very likely they will soon call themselves the third West-European country having one. The Netherlands was the first country in which, in October 2005, a motion was hand in by Geert Wilders in the second Chamber for banning the burqa from the public realm. Geert Wilders is the leader of the right-winged Party for Freedom (PVV) and known for his anti-Muslim propaganda. Later, in July 2007, the first law proposal was handed in again by Geert Wilders. This law proposal was aiming at a specific ban on the burqa and niqab in public spaces through the introduction of a new Article in the Dutch Penal Code. Later on a more general proposal, comparable to the French and Belgian, ban followed on the initiative of the VDD. On this actual day, there is a new law proposal made by the Party for Freedom (PVV) that was approved by the government Kabinet-Rutte in January 2012. However, the proposal still needs the approval of the Parliament. Ironically, in line with the Belgian political history, also the Netherlands are coping with a fall of the government, which could postpone the judicial process.

The law would by analogy to the French and Belgian ban introduce a general ban on face-covering clothing in public accessible areas by introducing a new Article in the Dutch Penal Code. The law proposal seeks to establish a general ban on face-covering clothing in public places but also in other places such as schools and the public transport. Religious buildings or

125“Case S.A.S v. France (43835/11) Muslim woman wearing niqab forbidden to cover her face in areas open to public and banned from public facilities: communicated”, 22 February 2012, http://echrnews.wordpress.com/2012/02/22/sas/.
buildings intended for religious purposes are excluded from the field of application. In this point it thus creates more clarity. Furthermore, similar exceptions are foreseen for clothing that is worn as protection such as during sports and for festivities such as carnival.

3.2.2 Pillarization and a multicultural approach towards Muslim population

The Dutch state-church relation is characterized by a 'consociational democracy' which is marked by pillarization\textsuperscript{131}. This means the society is divided into autonomous pillars mainly being the Catholics, the Protestants, the Socialists and the Liberals but also Islam was integrated in this pillar structure. The Dutch State is a neutral actor towards all these pillars and all have the rights to express themselves in public. This concept of pillarization also includes the manifestation of religion in the public sphere. While the French state-church model is thus strictly secular, the Dutch State is neutral towards all competing ideological pillars in its society. The state is thus more a-religious in a tolerable way than anti-religious. For example the Committee on Equal Treatment found that the hijab was not a threat to the open and tolerant attitudes required by Dutch laws on public education. Due to this structural background Dutch society knows a 'multicultural approach' accepting cultural and religious differences towards the integration of immigrants.

However, a tendency of intolerance and Islamophobia is also noticeable in the Netherlands and the discussion on the burqa-ban is a highly debated issue that is raging on for several years. The political influence of Geert Wilders is contributing to this tendency. Also minister Donner of Internal Affairs spoke of a 'change of direction in which the government will distance itself from the relativism contained in the model of a multicultural society.'\textsuperscript{132}

These characteristics and evolutions of the Dutch society make it difficult to predict whether the law proposal will be pushed through in the end. Not unimportant is the negative advice earlier given by the Council of State in November 2011, that suggested to reconsider the law proposal\textsuperscript{133}. The Council of State is of the opinion that the actual ban as proposed is incompatible with freedom of religion, discriminative and is not necessary in the Dutch democratic society. But the disregard shown by both Belgium and France lawmakers towards the negative advice of their Council of State might influence the Dutch government in doing the same.

\textsuperscript{131}B. Sauer, "Conflicts over values. The issue of Muslim headscarves in Europe", \url{http://birgitsauer.org/onlinetexte/Conflicts%20over%20values-1.pdf} 11.
\textsuperscript{133}"Samenvatting advies wetsvoorstel algemeen verbod gelaatsbedekkende kleding", 28 november 2011, \url{www.raadvanstate.nl}; Advies raad van State wetsvoorstel algemeen verbod op gelaatsbedekkende kledij, \url{www.rijksoverheid.nl}; "Raad van State kritisch over boerkaverbod", 24 januari 2012, \url{http://nos.nl/artikel/333682-rvs-kritisch-over-boerkaverbod.html}. 
3.3 Similar calls to burqa-ban in other European countries

3.3.1 Italy
In Italy the ‘burqa’ has become a political issue as well and even campaigns on banning the burqa were already manifested. Several municipalities already imposed a ban but these were suspended by Regional Administrative Tribunals. In August 2011 a draft law, specifically banning women from wearing face-covering veils in public, was approved by the Constitutional Affairs Committee, an Italian parliamentary commission. This draft law prohibits women from wearing a face-covering garb (burqa-niqab) by expanding the field of application of an old law dating back to 1975, that for security reasons restricts people from wearing face-covering clothing in public, such as a mask.

Opposite to the Belgian and the French general ban, the Italian draft thus specifically focuses on the Islamic veil. The proposal wants to introduce fines from 1000 up to 2000 euro for women wearing the face-covering veil. Besides, inspired by the French law third parties forcing a women to wear this veil can be fined up to 30 000 euro and a prison sentence up to 12 months. However, the draft still needs to be forwarded and approved by the Parliament.

3.3.2 Spain
A proposal on a national general ban on face-covering clothing in public areas introduced by Spain’s conservative Popular Party is currently being discussed in Spain’s Congress. Notwithstanding of this proposal for a general ban, similarly to the Belgian situation of local regulations, a ban against the veil is already introduced in some parts of Catalonia and Andalusia. These are both areas with a high population of Muslim immigrants. But also Barcelona passed such a legislation even though it is limited to municipal buildings and does not cover streets and all public places in general.

3.4 Otherwise disposed countries
Not every country is following the footsteps of Belgium and France. Some countries have clearly spoken out the idea of a general ban on the full-face Islamic veil in the public area.

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135 Law 22 maggio 1975, n.152, Article 5.
3.4.1 Denmark

The burqa-debates have recently raged over Denmark as well. The most interesting remark on Denmark is that this is the first country of which the State actually asked for a grounded empirical research on the ‘problem’ of niqab and burqa wearing women in Denmark 139. This lead to a report, commissioned by the Ministry of Social Affairs and written by researchers at the University of Copenhagen. This empirical report estimates the number of full-face veiled women in Denmark around a maximum of 150140. On the basis of this research a general ban was not implemented since the number of women was so small. Prime Minister Lars Loekke Rasmussen, convinced that the face-covering veil does not have a place in Denmark, mentioned that his government was considering to restrict the wearing of these garments. However, he thus stopped calling for a ban on full-face veils due to ‘legal and other limits’. The results of the research made the big fuss on the burqa in a way ‘mockable’ and the heated discussion had been taken out of the equation.

3.4.2 United Kingdom

Also the United Kingdom has spoken out against the idea of a general burqa-ban in the public sphere. As a reaction to the French burqa-ban Prime Minister Gordon Brown has commented that ‘the UK government does not share France’s view on secularization. In the UK we are comfortable with expressions of belief, be it the wearing of the turban, hijab, crucifix or kippa. This diversity is an important part of our national identity and one of our strengths.’141 Also the Home Office, a Ministerial department of the Government responsible for immigration, security, and order stated that ‘It is not for government to say what people can and cannot wear. Such a proscriptive approach would be out of keeping with our nation’s longstanding record of tolerance. Accordingly we do not support a ban on wearing the burka.’142 We can conclude that it is unlikely the Britain Government will opt for similar legislation.

3.4.3 Sweden

Also Swedish Prime Minister Fredrik Reinfeldt spoke out against introducing legislation which would ban women from wearing a burqa143. The liberal prime-minister warned that outlawing

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burqas could lead women to shun the streets\textsuperscript{144}. This would make the legislation counter-productive and would lead to women being isolated even more from Swedish society. Furthermore Reinfeldt mentioned the need for a society-wide debate that is not just restricted to the issue of burqas. He said that “most of all it’s important that young girls who move here or are born to parents who come from another country, hear from leading opinion makers that we believe in our own concept of freedom and that it also includes them,” This makes the introduction of a Swedish burqa-ban also in the future not very likely.

3.5 Pan-European Consensus?

On the existence of a consensus concerning a general ban on the full-face covering Islamic veil in Europe, one could make two hypotheses.

On the one hand only two actual legislative initiatives, the French ban and the Belgium ban, are taken on State level. Also, some countries explicitly spoke out against a burqa-ban. This taken together could lead to the conclusion that there is no general consensus on the topic.

On the other hand one cannot deny there is heavily debating concerning a burqa-ban across Europe and many countries are heading in the same direction as advocates of a ban. Two countries already introduced a ban and some are likely to follow. This taken together, could lead the conclusion that there is a general consensus noticeable throughout the European Society in favor of a burqa-ban.

Without any doubt, the eventual existence of a European consensus within the European Society will have an influence on the margin of appreciation the European Court will grant to his Member States\textsuperscript{145}.

3.6 Over-all European phenomenon of ‘Islamophobia’

The burqa-debates raging in Europe cannot be seen apart from an over-all increasing expression of intolerance towards Muslims. Thomas Hammarberg, Human Rights Commissioner of the Council of Europe, said that ‘European countries appear to face another crisis beyond budget deficits-the disintegration of human values. One symptom is the increasing expression of intolerance towards Muslims. Opinion polls in several European countries reflect fear, suspicion and negative opinions of Muslims and Islamic culture. These Islamophobic prejudices are combined with racist attitudes- directed not least against people originating from Turkey, Arab countries and

\textsuperscript{144}\textsuperscript{M., LEIJENDEKKER, “European countries ponder banning the burqa”, 2 April 2010, \url{http://vorige.nrc.nl/international/article2516657.ece/European_countries_ponder_banning_the_burqa}.}

\textsuperscript{145}\textsuperscript{Further explained in Chapter 4 (4.1.3).}
South Asia. Muslims with this background are discriminated against in the labour market and the education system in a number of European Countries.  

The interferences with the right to wear the burqa in public accessible spaces is a part of a bigger amalgam of discriminatory regulations and policies that Muslims are facing today. Muslims also face discrimination concerning school policies, work floor, establishments of places of worship, etc. In addition, the headscarf-debates are framing in this overall tendency.

Discrimination against Muslims is encouraged by stereotypes and negative views that forget to take into account basic demographic and sociological actors and recognize the diversity of Muslim groups. This trend of 'Islamophobia' finds its roots in the terrorist attacks of 9/11, the Madrid and London bombings and the killing of Theo van Gogh. This way a fear for Islam fundamentalism and Islam in general has risen through Europe.

Not unimportant is the role of some political parties and media who carry a big responsibility in the potential reinforcement of these feelings with their messages. To quote W. Said in his book on how media and experts determine how the Western world sees the Islam: "In the end, there is never any simple escape from what some critics have called the interpretative circle. Knowledge of the social world, in short, is always no better than the interpretations on which it is based. All our knowledge of so complex and elusive a phenomenon as Islam comes about through texts, images, experiences that are not direct embodiments of Islam (...) but representations or interpretations of it. In other words, all knowledge of other cultures, societies or religions comes about through an admixture of indirect evidence with the individual scholar's personal situation, which includes time, place, personal gifts, historical situation, as well as the over-all political circumstances." Media sources shaped a negative connection not only between terrorist attacks and a fundamentalist Islam but with the religion Islam as a whole and in this way created fear. This negative image of the Western world on Islam roused this phenomenon of Islamophobia. The burqa-debates lead by media and politics are strengthening these stereotypes and prejudices against Muslims.

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It is good to have this European Islamophobic tendency in mind when discussing the burqa-debates. They could somehow be seen as an Islamophobic attempt to temper Islam by tackling its most visible sign of expression, the burqa.

3.7 Conclusion on burqa in Europe

That the burqa-debates are raging over Europe is clear. However, the reaction through media, politics and legislative initiatives differs from country to country. Next to the Belgian Law, only France also took the leap and introduced its own general burqa-ban, similar to the Belgian ban. Although it is noticeable that other countries, such as the Netherlands may very soon follow the lead of France and Belgium. Next to the Netherlands similar calls are made in Italy and Spain. Some countries such as the United Kingdom, Denmark and Sweden are otherwise disposed and have rejected the idea of a general ban on the burqa in public accessible spaces for different reasons. These burqa-debates should not be seen apart from the increasing trend of European Islamophobia that is noticeable in Europe. Media and politics have a big responsibility in enforcing this tendency.

However, as mentioned in the beginning of this Chapter, the burqa-debates are an actual and constantly evolving phenomenon. It is difficult to predict whether other countries will take legislative measures against the burqa and how their over-all attitude against Muslims and Islam will evolve. Surely the verdict of the European Court in the *SAS v. France* case will have a big influence on the European Member State.
Chapter 4 Belgian burqa-ban unveiled from a European human rights perspective

Previously we discussed the legitimacy of the Belgian ban from a ground rights perspective\textsuperscript{151}. The Constitutional Court in two cases is supportive of the Belgian burqa-ban in a way that it states that there was a lack of serious evidence on the severe and irretrievable disadvantage done by the Law of June 2011 on face-covering clothing on behalf of the applicants. Therefore both cases were declared inadmissible.

In this Chapter we will take it a step further and analyze the Belgian burqa-ban in the light of the European Convention on Human Rights. Many voices shout out loud the concept of a general ban restricting the wearing of the full-face Islamic veil in public. They claim it hits the borders of many human rights and freedoms of an individual enjoyed in Europe today.

At the time of this writing, a first case on the French burqa-ban reached the level of the European Court\textsuperscript{152}. This pending request of \textit{S.A.S. v. France}\textsuperscript{153} concerns a French Muslim woman that claims a violation of her right to privacy according to Article 8 ECHR, her freedom of religion according to Article 9 ECHR, her freedom of expression according to Article 10 ECHR and also claims that these policies are discriminatory and thus a violation of Article 14 ECHR.

Since we still await the procedural results of this pending request at the level of the European Court, we will construct a hypothetical claim brought at the level of the European Court concerning the Belgian burqa-ban. Based on relevant previous case-law we will construct the European Court’s reasoning on the compatibility of the ban with the relevant human rights of the European Convention. This hypothetical case will set an example, as the potential reasoning of the Strasbourg Court in this hypothetical case can be applied roughly by analogy on the French burqa-ban and other future burqa-bans likely to occur in Europe.

\textsuperscript{151}See Chapter 2(2.2.4).
\textsuperscript{152}See Chapter 3(3.1.3).
\textsuperscript{153}ECtHR, \textit{S.A.S. v. France}, No° 43835/11, 11 April 2011.
First, in order to understand the manner in which human rights are to be enjoyed in Europe a general explanation on the European human rights framework will be given. Therefore, on the one hand the concept of the European Convention on Human Rights will be explained. On the other hand the European Court of Human Rights, the judicial body concerned with the enforceability of the human rights of the Convention, will be introduced. The European Court's case law explains the application and interpretation of the human rights foreseen in the European Convention. Also the ‘margin of appreciation’, the own right given to the Member States to decide upon the legitimacy of national regulations, will be explained.

Second, this hypothetical case before the European Court is constructed to answer the question whether the Belgian burqa-ban is compatible with the relevant rights prescribed by the European Convention on Human Rights. Therefore the Court will investigate whether the Belgian burqa-ban constitutes a restriction on certain human rights and if so, whether this restriction is justified.

This will bring us to the conclusion whether the Belgian burqa-ban, imposing a restriction on the right for Muslim women to wear the full-face covering Islamic veil, is an unreasonable limitation or a justified restriction on the rights of the European Convention on Human Rights.

4.1 European human rights framework

To understand the manner in which the human rights are to be enjoyed in Europe today, it is important to have a clear image of the European human rights framework. This consists out of the European Convention on Human Rights and the European Court of Human Rights that watches and enforces these rights.

4.1.1 European Convention on Human Rights

The community of European States are members of the European Convention on Human Rights. This is a treaty, drafted by the Council of Europe in 1950 and contains a list of human rights which protect all citizens of its member states. On the one hand The European Convention on Human Rights is thus a product of an international understanding on the basic rights and obligations for all individuals within the democratic society. It offers the member states a framework to balance the rights of their individuals. It provides a medium to reconcile the various conflicting interests that can be found in a democratic pluralistic state where different points of view co-exist, without differentiating one person, group or conception of the good

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154 Of which the European states discussed in this paper are all a member.
above another\textsuperscript{156}. This makes it possible for all individuals to enjoy their rights and liberties to the fullest extent compatible with the rights of others in society. On the other hand the European Convention also protects the individuals from the state’s interfering activities, such as protecting them from regulations that are incompatible with the human rights\textsuperscript{157}.

\textbf{4.1.2 European Court of Human Rights}

The sole existence of a list of human rights would not contribute to the protection of human rights in practice, if these rights would not be controlled, interpreted, and enforced by a judicial body. Therefore, the European Court of Human Rights interprets and applies the articles designed by the ECHR. It is a common approach to mention the Court’s case law in order to fully understand the content and formulation of the human rights of the European Convention that will be commented later on.

The European Court of Human rights, protecting the human rights of individuals of the Member States from state interferences is part of a subsidiary system\textsuperscript{158}. This means when an individual is of the opinion being harmed by a European State in a positive manner (by state interferes with right of an individual) or a negative manner (state fails to protect the right of an individual) it is first up to the national authorities to protect the rights and freedoms as we find them in the Convention. Practically this means that only after exhausting the power of all the national remedies, an individual can -according to Article 35(1) ECHR\textsuperscript{159}- apply on European level. This means the European Court is not a final Court of appeal or a ‘fourth instance’\textsuperscript{160}. This subsidiarity is explained by the opinion that national authorities are in many cases better placed to make the right assessment whether interferences are necessary to be made and justifiable, since they have a better understanding of the circumstances. Within this system the European Court thus operates as a ‘fail-safe’ to avoid violations of rights and freedoms that escape the scrutiny of the national review organs.

\textbf{4.1.3 Margin of appreciation}

The national courts of course do not have an unfettered discretion but are always subject to the scrutiny of the European Court. However, the European Court still owes a degree of deference to the decisions of a Member State on the implementation of a certain restriction on human rights.


\textsuperscript{159}Article 35 European Convention on Human Rights, \url{http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-4318-b457-5c9014916d7a/0/english_anglais.pdf}.

\textsuperscript{160}“The Margin of appreciation”, Council of Europe, \url{http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp}.  

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This space for maneuver granted to national authorities in fulfilling their obligations under the ECHR is called the ‘margin of appreciation’\textsuperscript{161}. The explanation of the European Court for giving the states a margin of appreciation can be found in the case of \textit{Handyside v. United Kingdom}. The Court says that ‘by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them.’\textsuperscript{162}

This ‘margin of appreciation’ given to the Member States is variable from case to case. The European Court either gives a Member State a wide margin of appreciation which means more latitude in restricting individual’s rights or the Court grants a narrow margin of appreciation which means a stricter scrutiny by the Court on a States’ limitations of human rights\textsuperscript{163}. A very broad margin can eventually serve as a mode to allow Member States to implement national regulations that the European Court actually does not consider to be necessary in a democratic society. A wider margin of appreciation thus more likely leads to a ratification of the state action. However, a wide margin of appreciation does not mean that the state has an unfettered discretion to implement un-proportionate restrictions. The margin of appreciation still is a second order principle and a Member State is constrained by an overarching primary principle that ensures a ‘priority to rights’. This means the Member State enjoys this wide margin only ‘up to a point’.

In determining this extent of deference to the Member States, the European Court is led by two steps. First, the breadth of the margin of appreciation will vary depending on the rights and interests at stake which need to be balanced\textsuperscript{164}. This is process is called interest-weighing. Second, the more consensus in the European Society about a certain topic, the less wide the margin of appreciation of the Member States will be if contrary to this consensus. Interest-weighing and the determination of a European consensus are the two most identifiable factors used to predict the margin of appreciation.

\textsuperscript{161} “The Margin of appreciation”, Council of Europe, \url{http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp}.

\textsuperscript{162} ECtHR, \textit{Handyside v. United Kingdom}, No. 5493/72, 7 December 1976, §48; “The Margin of appreciation”, Council of Europe, \url{http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp}.

\textsuperscript{163} S. \textsc{Nanwani}, “The burqa ban: an unreasonable limitation on religious freedom or a justifiable restriction?”, \textit{Emory International Law Review}, \url{www.law.emory.edu/fileadmin/journals/eilr/25/25.3/Nanwani.pdf} 1468.

Interest-weighing

The Court has to strike the proper balance between the importance of the rights infringed upon and the importance of the infringing restriction in question. The closer the subject of a case involves core values of democracy, the narrower this margin of appreciation will be. This interest-weighing is very dependable on the specific circumstances of a case.

European Consensus

When the interest-weighing in a case brought before the European Court does not really give a clear answer on the suitable margin, a key factor in the analysis of the Court is the existence of a European consensus amongst the Member States. In matters where the Court is of the opinion that there is an overall pan-European consensus on a certain topic, the margin of appreciation given to the states will be small. When there is an absence of a European consensus towards a certain topic, it is more likely the Strasbourg Court will grant a wider margin to a State regulation.

It can be concluded that the combination of on the one hand the balancing of the interests at stake versus the importance of the restriction and on the other hand the existence or absence of a European consensus will both determine the acceptable extent of deference to the Member States.

As this given margin of appreciation is depending on both the nature of the right involved and the existence of a European consensus, this margin will be discussed later on.


166 See subsection 4.3.1.2.
4.2 Compatibility Belgian burqa-ban with the rights of the European Convention

Many human rights analysts are of the opinion that the general ban on the full-face Islamic veil in public spaces is an unjustifiable interference with the rights of the European Convention (especially Article 9 freedom of religion). As we mentioned earlier, the French Council of State gave a negative advice on the French burqa-ban for its incompatibility with the Convention rights. Also Amnesty International clearly spoke out against the concept of the general ban on face-covering clothing. Furthermore, it commented on the Belgian burqa-ban that ‘it would set a dangerous precedent’. Even Thomas Hammarberg, Commissioner for Human Rights of the Council Europe, requested the Member States in August 2010 not to implement certain restrictions for reasons of incompatibility with human rights. It is clear the Law of June 1st 2011 on face-covering clothing in public is vulnerable to strong criticism of human rights-watchers.

That is why we will construct the hypothetical case of the Belgian burqa-ban, the Law of June 1st 2011 on face-covering clothing in public, taken to the European Court. This hypothetical case will serve as a case example for the several other member states of the European Convention that are considering legislation similar to the Belgian or French burqa-ban.

Since we explained above (4.1.2) that the European Court of Human Rights is part of a subsidiary system, we suppose that the future applicant in question already exhausted the accessible Belgian domestic remedies. At the time of this writing, two cases have been filed in the Belgian Constitutional Courts challenging the constitutionality of the Belgian burqa-ban under the applicable provisions of the Belgian Constitution. We discussed these cases before (2.2.4) and both were declared inadmissible. This thesis assumes that an applicant will thus successfully satisfy all procedural requirements and that the European Court will accept the jurisdiction over the case.

This hypothetical case before the European Court is to be constructed to answer the key question being; Is the burqa-ban an unreasonable limitation on human rights of the European convention or is it a justifiable restriction?

167See Chapter 3(3.1).
170Verslag Commissie Parl. St. 2010-11, nr.53-219/4, 15.
First we will check upon the compatibility of the Belgian burqa-ban with freedom of religion as protected by Article 9 ECHR. As the burqa-ban is significantly interfering with freedom of religion, this will be discussed thoroughly.

Second we will investigate the compatibility of the Belgian burqa-ban with other relevant human rights. These being the right to privacy as protected by Article 8 ECHR, the right to freedom of expression as prescribed by Article 10 ECHR and the right to be treated equally and not to be discriminated on the basis of religion as prescribed by Article 14 ECHR in combination with Article 9 ECHR.

4.2.1 Compatibility with freedom of Religion (9 ECHR)?

We can ask ourselves the question whether the restriction of the Law of June 1st 2011 on face-covering clothing in public placed on Muslim women wearing a full-faced veil is compatible with the freedom of religion to be enjoyed in Europe.

This law of general application may not raise any problems for most of the citizens, but it does particularly for those who wish to act otherwise as a result of their religion or belief\(^\text{173}\). Even though the law is applicable to every form of face-covering clothing in public, it is evident that the Law of June 1\(^{st}\) 2011 on face-covering clothing in public mainly has an impact on the full-face covering Islamic veil\(^\text{174}\). The Law of June 1\(^{st}\) 2011 on face-covering clothing in public does not mention Islam, burqa or niqab explicitly. However, from the earlier discussed motivations distracted from the parliamentary debates, the law is obviously drafted to target a particular religious group. Whether the law was designed without prior thought of its impact upon these religious believers or if it was created in the first place to target the Islam-covered up in a ‘general law’ to avoid discrimination- will be discoursed later on. This question falls under the evaluation of compatibility with Article 14 ECHR that protects against discrimination. In any case, it would be insensible to conclude that the burqa-ban does not interfere with the freedom of religion purely based upon its neutral appearance\(^\text{175}\).

In order to check upon the compatibility of the Belgian burqa-ban with Article 9 ECHR on freedom of religion, first a general explanation on this article will be given. We will explain the structural elements of Article 9 ECHR and complete them with relevant case law to clarify the interpretation and application by the Court of Article 9 ECHR. The focus of the interpretation and application will be put on the operation of Article 9 ECHR in the context of the wearing of


\(^{174}\)For the completeness it has to be mentioned that also the Sikh falls under the new law and could be restricted in their right to freedom of religion according to Article 9 ECHR.

religious garments. Also the margin of appreciation regarding cases concerning Article 9 ECHR will be discussed.

Secondly, with this understanding of the general structure of Article 9 ECHR an analysis on the compatibility of the Belgian burqa-ban with Article 9 ECHR will follow (4.3.1.2).

4.2.1.1 General explanation Article 9 ECHR

Article 9 'the right to freedom of thought, conscience and religion' reads:

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

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

Within Article 9 ECHR are enshrined two main elements of freedom of expression177. Article 9(1) ECHR on the one hand deals with the internal element, the ‘forum internum’, being the freedom of an individual of thought, conscience and religion. On the other hand, Article 9(1) ECHR prescribes the external element, the ‘forum externum’, being the freedom to express these religions or beliefs178. This external element then can be subject to certain restrictions if these fulfill the criteria prescribed by Article 9(2) ECHR179.

ARTICLE 9 (1) ECHR: ‘Forum internum’

The first part of Article 9(1), ‘Everyone enjoys the right of freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private’, can be called the internal element. This part protects the freedom of an individual of its own thoughts and conscience and the freedom to join a certain religion180. This right is an absolute right to choose and belief according to your own conception of the good and is therefore absolutely inviolable181. No interference by the state is

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181 Also included in this right is the possibility to change religion or be a non-believer.
allowed with regard to this internal element. In the case of *Kosteski v. the former Yugoslav Republic of Macedonia* the Court mentioned as reason that ‘the notion of the state sitting in judgment on the state of a citizen’s inner and personal beliefs is abhorrent and may snack unhappily of past infamous persecutions.’

**ARTICLE 9 (1) ECHR: ‘Manifestation’ of ‘religion or belief’**

The second part of Article 9(1) ECHR, ‘to manifest his religion or belief, in worship, teaching, practice and observance’, moves beyond the ‘forum internum’ and deals with the acts of persons in accordance with their thoughts, religion, or beliefs. This part is called the external element since it handles the freedom to express to the outside world one’s religion or belief. An example would be the wearing of a Christian cross, praying or not follow a religious food prescription. Only this second element, the aspect of external manifestation, may be subject to limitations as mentioned in Article 9(2) ECHR.

‘Religion’ or ‘Belief’

Before analyzing the concept of ‘manifestation’ a definition and explanation of ‘religion or belief’ needs to be given. What kind of ‘religion’ or ‘belief’ qualifies for Article 9(1) ECHR? In the case of *Arrowsmith v. The United Kingdom* the Court answers the question if the word ‘belief’ is a synonym for ‘religion’. ‘Belief’ extends to the possibility to manifest all forms of thought and conscience, even non-religious beliefs, such as atheism, or those religions not being the mainstream religions. The European Court of Human Rights has a broad inclusive approach which places all forms of belief on an equal footing. The Court does not estimate the religious value of every particular individual form of ‘belief’ in order to be able to apply Article 9 ECHR. However it is clear that the Court recognizes the mainstream religious traditions such as Christianity, Hinduism, Judaism, Sikhism, Buddhism and-relevant for this disquisition-the Islam.

Even though the Court does not evaluate the religious value of a certain ‘belief’, this still does not mean that every form of ‘belief’ will be protected by Article 9(1) ECHR. Some forms of belief are incompatible with the essential Convention values and therefore cannot enjoy protection. For example a belief that upholds certain values of inequality or discrimination towards others such as the belief that homosexuality is improper can thus not be protected under Article 9 ECHR. However, the expression of these ‘opinions or ideas’ incompatible with the Convention values, can still end up being protected by Article 10 ECHR on freedom of expression.

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183 ECtHR, Kosteski v. the Former Yugoslav Republic of Macedonia, No° 55170/0013, April 2006, §39.
184 ECommHR, Arrowsmith v. the United Kingdom, No° 7050/772, October 1978, §69.
This means not just any ‘opinion’ or ‘idea’ is seen as a ‘belief’ falling under the scope of Article 9(1) ECHR. For the protection of an opinion or idea as a manifestation of a religion or belief under Article 9 ECHR there have to be certain characteristics which make it more than an ‘expression’ of an opinion or idea as protected under Article 10 ECHR. The applicability of Article 10 ECHR on the wearing of the burqa will be discussed in the separate section on the compatibility of the burqa-ban with freedom of expression (4.3.2.2).

‘Manifestation’

Once decided a ‘belief’ or ‘religion’ is recognized under Article 9(1) ECHR, it is up to the Court to decide whether a form of action can be categorized as a ‘manifestation’ of a religion or belief or not. To manifest his or her religion means to show certain behavior or activities, which find their origin in a religion or belief. Article 9(1) ECHR describes ‘manifestation’ in four particular forms being to worship, to teach, to practice, to observe[186]. This list of manifestation forms is not an exclusive list. Article 9 ECHR can offer protection to forms of manifestation that are not mentioned in this short illustrative list.

On the form and character of a ‘manifestation’ two questions should be brought forward. The first question is whether the Court is bound to accept the applicant’s ‘subjective’ characterization of his actions in order for it to fall under Article 9(1) ECHR. The second question is whether every form of manifestation motivated or influenced by a religion or belief is per se a manifestation in the sense of Article 9(1) ECHR.

The first question is whether the Court is bound to accept the applicant’s ‘subjective’ characterization of his actions or if there is an objective scrutiny for the Court to be made in order to fall under the definition of ‘manifestation’ and thus within the scope of Article 9(1) ECHR. Can the Court decide whether a certain form of action in a prima facie sense is a manifestation of religion or belief? In the case Valsamis v. Greece[187] the child of two pacifist parents being Jehovah's Witnesses had to go to the national day to commemorate war as a part of an obliged school trip. These pacifist parents felt that their right to freedom of religion was harmed, since their child got expelled from school for not participating. The Court decided in this case that participation of the child on this day did not offend the parents their pacific convictions. This case was knotty since we can ask the question on what basis the Court can determine if an issue is of a religious nature or not. That is why the European Court changed its opinion in later case law as it is not bound by its previous views.

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[186] ECtHR, Kalaç v. Turkey, No° 20704/92, 1 July 1997, § 27.
In the significant case of Leyla Sahin v. Turkey of 2004 the Court made clear that it does not take a stand in the question whether a certain act of manifestation is a precept of a religion that needs to be fulfilled. Leyla Sahin was a Turkish university student who was denied to wear her headscarf since there was a ban on wearing the Islamic headscarf in all higher-education institutions in Turkey. She believed that by wearing her headscarf, she was obeying a religious precept and thereby 'manifesting' her desire to comply strictly with the duties imposed by the Islamic faith. Her decision to wear the Islamic headscarf was, according to the Court, regarded as 'being motivated or inspired by a religion or belief and this without deciding whether such decisions are in every case taken to fulfill a religious duty.' The Court therefore proceeded on this assumption, that the regulations placing a restriction of place and manner on the right to wear the Islamic headscarf in universities constituted an interference with the applicant’s right to manifest her religion.

In the more recent case of Jakobski v. Poland of 2010, the Court upholds this opinion. Janusz Jakobski is a Mahayana Buddhist and according to his beliefs this religion requires a meat-free diet, which he was refused in prison. On top of this refusal his behavior of passing the meals led to a disciplinary punishment for committing a hunger strike. The European Court decided in this case that there was a violation of the applicant’s right to freedom of religion according to Article 9 ECHR as there was an interference with his right to manifest his religion through the fulfillment of dietary precepts. The applicant’s subjective decision to adhere to a vegetarian diet could be regarded as motivated or inspired by a religion. Furthermore, in line of the State’s duty to remain neutral and impartial, the Strasbourg Court in the case of Manoussakis and Others v. Greece mentions 'the State has no power to assess the legitimacy of religious beliefs or the ways they are expressed.'

As an answer on the first question it may be concluded that it is not up to the European Court or any national body- but to the interpretation of the applicant in question- to decide whether a specific act of manifestation is necessary to fulfill a religious duty. It is thus up to the applicant in question to decide upon the precepts of a certain religion and thus the character of a religious manifestation.

189 This is also the opposite of what the Court remarked earlier on the Islamic headscarf as an act of manifestation of religion in the case of Karaduman v. Turkey: ECtHR, Karaduman v. Turkey, No° 8810/03, 3 May 1993.
193 ECommHR, Manoussakis and Others v. Greece, No° 18748/9, 26 September 1996, §47.
Apart from the fact that the Court does not decide upon the subjective character of a form of manifestation, there should of course not be an overall acceptance of any kind of manifestation. This brings us to the second question whether every form of manifestation motivated or influenced by a religion or belief is per se a manifestation in the sense of Article 9 ECHR. In order to be a manifestation under Article 9(1) ECHR there are two requirements to fulfill. First, a ‘bona fides’ manifestation is required. Second even when the manifestation has a ‘bona fides’ character it still has to be considered as a form of manifestation covered by Article 9(1) ECHR.

First, some actions are not seen as manifestation of the religion or belief in question. In the case *Leela Förderkreis and others v. Germany* the Court states that ‘freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance.’ The decision is thus up to the individual’s personal conviction but then again it has to reach a certain level of seriousness. It is necessary for the applicant to show some real ‘devotion’ to a certain religion in order to avoid taking advantage of a privilege that is available only to followers of a particular religion. A certain ‘bona fides’ manifestation should be the case. In the case *Kosteski v. the Former Yugoslav Republic of Macedonia* an applicant was obliged to prove his status as a practicing Muslim in order to enjoy the right to absent him from work to attend a religious festival. The Court explains that ‘it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when the claim concerns a privilege or entitlement not commonly available.’

Second, once there is a ‘bona fides’ form of manifestation of a certain religion, it still has to be considered as a form of ‘manifestation’ for the purposes of Article 9 ECHR. The manifestation acts have to express the religion or belief concerned. The term ‘practice’ does not purely cover each act which is motivated or influenced by a religion or belief. This can be illustrated with the *Arrowsmith v. the United Kingdom* case where the mere distribution of pacificistic leaflets outside an army-camp by a pacifist was not protected as manifestation under Article 9 ECHR, although the applicant in question pretended the action was inspired by a pacificistic belief.

We can conclude not each mere act which is claimed to be motivated by a religion or a belief is protected under Article 9(1) ECHR. Even though the Court does not take a stand in the question

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195 ECHR, Kosteski v. the Former Yugoslav Republic of Macedonia, No° 55170/00, 13 April 2006, § 39.
197 ECommHR, Arrowsmith v. the United Kingdom, No° 7050/77, October 1978.
whether a certain act of manifestation is a necessary precept of a certain religion or belief, still a 'bona fides' character and an act that is truly motivated by a religion or belief are required.

Although an act of manifestation of a religion or belief is protected under Article 9(1) ECHR, it may still be subject to certain limitations imposed by the State\(^{198}\). In order for these limitations to be justified they have to fulfill the criteria prescribed by Article 9(2) ECHR.

**ARTICLE 9(2) ECHR: ‘Restrictions’**

Article 9(2) Prescribes that ‘Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public order, health or morals, or for the protection of the rights and freedoms of others\(^{199}\)’.

Unlike the ‘forum internum’, the right to manifestation of religion as a ‘forum externum’ is not absolute. This means in some cases a manifestation, although protected under Article 9(1) ECHR might be subject to a certain limitation. This means an interference with the right to freedom of religion by a State through laws or regulations might thus be legitimate. In the case of Leyla Sahin v. Turkey the European Court mentions that ‘In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one’s religion or belief in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.’\(^{200}\) Once it is clear that there is an interference with right of manifestation of religion (Article 9(1) ECHR), the question thus rises whether the restriction is justified according to Article 9(2) ECHR.

In order to respond that question we will take a look at the consideration of the legitimacy of restrictions according to Article 9(2) ECHR. In order for a restriction on freedom of religion to be legitimate it has to fulfill the three following criteria\(^{201}\). First, for an interference to be legitimate it has to be prescribed by law. Second, the restriction has to be in pursuit of the one or more legitimate aims – community reasons or rights of others – as mentioned in Article 9(2) ECHR. Third, the interferences need to be necessary in a democratic society\(^{202}\). Therefore the European Court will examine whether the means used (restriction) are proportional to the legitimate aim pursued. This examination is also called the ‘necessity-test’. An analysis of these three conditions, to be fulfilled in order to achieve a legitimate restrictive state policy or regulation,

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\(^{199}\) Article 9 European Convention on Human Rights, [http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c90149f16d7a/0/englishlangs.pdf](http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c90149f16d7a/0/englishlangs.pdf).

\(^{200}\) ECHR, Leyla Sahin v. Turkey, No° 44774/98, 10 November 2005, §97.


will thus be set out. The European Court analyzes these three criteria in order to judge whether state regulations and policies that interfere with Article 9 ECHR are justified restrictions under Article 9(2) ECHR.

1. **Prescribed by law**

First of all, for an interference of the state with an applicant’s right to freedom of religion to be lawful it has to be *prescribed by law*. This does not mean the sole existence of a domestic law is sufficient. There are two requirements to be fulfilled according to the European Court in the case of *Sunday Times v. the United Kingdom*.

The Court explains that according to the first requirement the law must be adequately *accessible* for citizens. A citizen should be able to have an indication of what is adequate in a certain case and should know which legal rules are applicable in a given situation. According to the second requirement a norm should be *foreseeable*. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if needed with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action on his behalf may cause.

2. **Legitimate aim pursued?**

Next to the first condition of being *prescribed by law*, a restriction has to pursue a *legitimate aim*. This can according to Article 9(2) ECHR be ‘an interest of public order, health or morals or the protection of the rights and freedoms of others’. The Court will investigate the nature of the public interest or the rights of others and decide to which degree protection is necessary in order for it to be a legitimate aim. Normally, it is unlikely the European court would strike down legislation based upon the belief that a certain limitation would not serve a legitimate aim.

3. **Necessary in a democratic society?**

The last criterion to meet in order for a restriction to be justified according to Article 9(2) ECHR is *being necessary in a democratic society*, this in the interests of the legitimate aim pursued.

Freedom of religion - according to the European Court- is one of the ‘foundations’ of a ‘democratic society’ within the meaning of the Convention. It is, according to the Court in the case *Kokkinakis v. Greece* in its religious dimension ‘one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society,

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204 ECommHR, *Sunday Times v. The United Kingdom*, No° 13166/87, 26 April 1979, §49.
which has been dearly won over the centuries, depends on it\textsuperscript{205}. For these reasons, the main question is whether the legitimate aims pursued in a certain case are necessary in a democratic society according to Article 9(2) ECHR. This ‘necessity test’ applied by the European Court implicates assessing whether the laid-up limitations are proportionate to the legitimate aims they pursue. If a restriction succeeds the ‘necessity test’, which means it fulfills the proportionality standard in pursuing its legitimate aim, than the restriction is considered to be necessary in a democratic society.

European Court will execute the ‘necessity test’ and see whether there is a reasonable, proportionate relationship between the means employed and the legitimate objectives pursued by the interference. This standard of proportionality is not expressly included in the European Convention on Human Rights but it is an essential principle in the Courts’ analysis\textsuperscript{206}. Also, there are no concrete guidelines how to assess the proportionality. This means the investigation on the proportionality is not applied in a uniform manner and a level of uncertainty is unavoidable\textsuperscript{207}. Still, based on the most widely accepted explanations of the proportionality principle in the European context, three cumulative criteria can be distracting from the European Court’s case law. Firstly, a proportionate measure (state regulation) has to be pertinent (appropriate and suitable) for attaining its objective\textsuperscript{208}. This includes an evaluation of the relationship between the means employed and the ends that will be accomplished.

Secondly, the measure must be necessary to achieve its intended purposes\textsuperscript{209}. Thus, even if the measure is suitable and is able to accomplish the end, it must also be asked whether it is necessary. Once there is a less restrictive alternative available (a measure capable of accomplishing the same end) one could say that the measure is not necessary to achieve the legitimate aim pursued.


Thirdly, the measure must be proportionate to the objective, which means the burden must not be excessive in comparison to the objective. This third criterion is also described as the *proportionality stricto sensu*\textsuperscript{210}.

This tripartite scheme on proportionality lacks a certain clarity and consistency in terminology and application as the three components are still vaguely and un-precisely formulated. In this way the legal system makes sure core values are encapsulated in vague simple words with broad implications such as ‘proportionality’\textsuperscript{211}. These problems are carried out by complex issues that involve many components that are not easy to articulate by the European Court\textsuperscript{212}. Keeping this in mind, the tripartite scheme is a helpful tool in analyzing the proportionality in a structured way.

4. **Margin of appreciation**

At this point the margin of appreciation towards Article 9 ECHR comes into play. As mentioned before the European Court either gives a Member State a wide margin of appreciation (more latitude in restricting individual’s rights) or a narrow margin of appreciation (stricter scrutiny by the Court on the a States limitations of human rights)\textsuperscript{213}.

In determining this extent of deference to the Member States the European Court is led by two steps. First, the breadth of the margin of appreciation will vary depending on the rights and interests at stake which need to be balanced\textsuperscript{214}. Second, the more *consensus* in the European Society about a certain topic, the less wide the margin of appreciation of the Member States will be if contrary to this consensus.

**Interest-weighing**

Concerning the balance of the right to freedom of religion (9 ECHR), this right is considered to be one of the core values of the convention. ‘As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics,

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skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”

However, it must be mentioned that even when a great importance is attached to Article 9 ECHR, still the context of a case should be taken into account. This means that a different approach by the European Court towards somewhat similar situations is acceptable within the Convention framework. Just because for example a restriction on a religious symbol was upheld in one case one cannot say by analogy that a similar restriction will be upheld in another case with a different context. Reasoning by analogy on the European Court’s decisions in relation to Article 9(2) ECHR should thus be done with extra care.

**European consensus**

In cases concerning Article 9 ECHR, generally a European consensus is not the case. The Court says that ‘it is not possible to discern throughout Europe a uniform conception of the significance of religion in society: even within a single country such conceptions may vary.’

Therefore, even though Article 9 is one of the core values of the convention, generally a relatively broad margin of appreciation operates in particular in relation to Article 9 ECHR. The place of religion knows considerable variation in practice. More specifically the determination of the place of religion in the public sphere often falls under the sovereignty and exclusive competence of each State since there is no real ‘pan-European’ consensus. In the case of Leyla Sahin v. Turkey, on the wearing of the headscarf in university, a stress is put on the importance of the ‘domestic context’ in cases concerning Article 9 ECHR. The European Court mentioned that ‘Where questions concerning the relationship between state and religions are at stake, on which the opinion in a democratic society may reasonably differ widely, the role of the national decision making body must be given special importance.’ This means a certain margin of appreciation will thus recognized since rules in this sphere will vary in form and extent from Member State to Member State.

However, this does not mean the Court cannot decide upon narrowing the margin when a more general consensus on the relationship between the state and the manifestation of religion or

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belief emerges. A *consensus* is not a static overall-all agreement, but evolves with society and in time.
4.2.1.2 Belgian burqa-ban violation of Article 9 ECHR?

After a general explanation on the application and interpretation of Article 9 ECHR by the European Court, we are able to analyze the Belgian burqa-ban in the light of Article 9 ECHR. This makes it possible to answer this significant question: Is the Belgian burqa-ban an unreasonable limitation on religious freedom or a justifiable restriction?

**ARTICLE 9 (1) ECHR 'Forum Internum'**

The choice of Muslim women to adhere to Islam is an unfettered right. The Belgian law cannot and does not interfere with this 'forum internum'.

**ARTICLE 9(1) ECHR 'Manifestation' of 'Religion'**

'Religion'

The first question is whether the Islam qualifies for the definition of 'religion'? As the Islam is one of the mainstream religions it is certainly recognized by the Court. As the Islam knows many different interpretations the question could rise whether the Court only recognizes the mainstream moderate Islam or if it also recognizes the more fundamentalist Islam that sees the burqa as a religious Islamic duty. Next to the mainstream religious traditions, some less known and widespread religions such as for example Jehovah’s Witnesses and the Church of Scientology are also acknowledged by the Court. In the case of *Kimlya and others v. Russia* the Court remarked that it is not its task or the task of the national government to judge in abstracto whether or not a body of beliefs and related practices may be considered a 'religion' within the meaning of Article 9 of the Convention. In the recent case *Jakobski v. Poland* of 2010 the Court also mentioned that 'the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs'.

One could say that the amount of full-face covering wearing Muslim women is a very small group that does not reach more than a couple of hundred women in every country. However, in the case *Cha’are Shalom Ve Tsedek v. France*, an ultra-orthodox Jewish religious group was recognized, even though it only had a small amount of adherents, as being protected under Article 9 ECHR. This means that for the small group of a more 'fundamentalist Islam', that sees the burqa as a religious precept of the Islam, the protection under Article 9(1) ECHR as 'religion' or 'belief' is assured.

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222See Chapter 1 (1.2).
223ECtHR, *Kimlya and others v. Russia*, No° 76836/01 and 32782/03, 1 October 2009, §1-20.
224ECtHR, *Jakobski v. Poland*, No° 18429/06, 7 December 2010, §44.
225ECtHR, *Cha’are Shalom Ve Tsedek v. France*, No° 27417/95, 27 June 2000, §74 and 87.
Even though the Court does not evaluate the religious value of a certain ‘belief’, some forms of belief that are incompatible with the essential Convention values are not protected under Article 9(1) ECHR. One may make the assertion that the burqa is symbolizing gender discrimination and disrespect for women’s rights, values of the religious culture of a fundamentalist Islam, which are incompatible with the essential Convention values and thus not protected under Article 9(1) ECHR. However, this assertion is made from the Western outsider perspective and it is up to the wearer to decide upon the religious value in the first place.

‘Manifestation’

Once decided that the Islam is recognized as a ‘belief’ under Article 9(1) ECHR, it is up to the Court to decide whether the wearing of the full-face covering Islamic veil (burqa and niqab) can be categorized as a manifestation of the Islam.

A religious symbol is an ‘object of religious veneration’ that contributes to the manifestation of a religion in worship, teaching, practice and observance and that has a place in the religious life of an adherent of a certain belief226. This religious symbol can consist of many things such as a picture, a building but also certain types of clothing such as the full-face covering Islamic veil. There is no particular case brought for the European Court that recognizes the wearing of the burqa and niqab explicitly as a ‘manifestation’ of the Islam. Nevertheless, we will construct a hypothetical answer based on the Courts previously mentioned case law.

As explained above, the Court is bound by an applicant’s subjective characterization of his actions and there is no objective scrutiny for the Court to be made in order for a manifestation to fall within the scope of Article 9(1) ECHR227. The Court, in the case of Leyla Sahin v. Turkey, explains that it does not take a stand in the question whether a certain act of manifestation is a precept of a religion that needs to be fulfilled. This means it is up to the individual, not to the state or the Court, to put the label of ‘religious symbol’ on certain manifestations of religion. The individual should determine whether an object is a religious symbol to him. As the European Court says ‘freedom of religion ...excludes any discretion on the part of the state to determine whether religious belief or the means used to express such beliefs are legitimate.’228 The state has to respect the private dimension of freedom of religion or belief and take a neutral and impartial stand and there is no reference point to what the Court should refer in denying or accepting the symbolic significance of an object. In the case of Leyla Sahin v. Turkey the Court assumed the Islamic headscarf was worn by the applicant, motivated or inspired by the Islamic precepts,

227 See subsection 4.2.2.1.
228 In the recent case of Jakobski v. Poland the Court affirms its point of view; ECHR, Jakobski v. Poland, No° 18429/06, 7 December 2010, http://strasbourgconsortium.org.
without deciding whether this way of manifestation is in every case taken to fulfill the Islamic precepts. In this case the veil was the hijab, the normal headscarf, however this reasoning of the Court can be applied by analogy to the wearing of the burqa. Following that point of view, it is thus not up to the Court or any national body to decide whether the wearing of the full-face veil is necessary to fulfill a religious duty. This decision is to be made by the wearer in question. Furthermore the state would breach its characteristics of being neutral and impartial if it would impose its own interpretation of the significance of a symbol at the expense of an individual believer

This means that the often used argument that the Islam does not prescribe the wearing of the burqa or the niqab and that this idea is not generally shared by all moderate Muslims is not sufficient to subtract this form of religious manifestation from the scope of Article 9(1) ECHR. It is thus irrelevant whether there might be Muslims with another point of view. In the parliamentary debates on the Law of June 1st 2011 on face-covering clothing in public this argument returns several times. Also the opinion that in fact the Quran does not prescribe the wearing of a veil, in specific a burqa or niqab, is a common argument. This reasoning of the European Court was also followed by the police court of Brussels in the previously discussed case of the 26th of January 2011. The police court was of the opinion that the applicant did not have to prove that the wearing of the niqab is a general obligation for Muslim women according to Islam.

Even though the Court does not decide upon the subjective character of a form of manifestation, there is no overall acceptance of any kind of manifestation. A first requirement is the manifestation of a ‘bona fides’ character. In the case of the wearing of religious clothing, such as the niqab or the burqa, one may say that the wearing in itself already proves the ‘bona fides’ character of the manifestation. In the case Dahlab v Switzerland, the ECHR supported that the practice of wearing the headscarf ‘indicates allegiance to a particular faith and a desire to behave in accordance with the precepts laid down by that faith.’

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231 Especially towards Islam as we have seen in Chapter 1 different interpretations have led to different Muslim communities.
A second requirement is that even though there is a ‘bona fides’ character, the act of manifestation still has to express the religion or belief concerned. It is clear that the wearing of the burqa or the niqab is a manifestation of Islamic beliefs based on an interpretation of the Qu’ran. Still, it should be investigated whether the religious clothing is worn for religious reasons under Article 9 ECHR or if it is worn for other reasons. Other reasons for the burqa can be ‘political reasons’ such as promoting the visibility of the political Islam or reasons of shaping ‘identity’ and a feeling of ‘social cohesion’. In such a case the scope of Article 9(1) should be reconsidered. However, this discourse would lead us too far. We assume a situation in which a Muslim woman wears the burqa for religious reasons.

We can conclude that the wearing of the full-face covering Islamic veil is falling under the scope of Article 9(1) ECHR as the bona fides ‘manifestation’ of ‘religion’ for the purposes of Article 9(1) ECHR. Therefore the Law of June 1st of 2011, banning the full-face covering Islam veil in public accessible spaces, is an interference with the right to freedom of religion and thus a violation of Article 9 ECHR. This brings us to the next and most important question whether the interference by the Law of June 1st of 2011 on face-covering clothing in public is justified according to Article 9(2) ECHR.

**ARTICLE 9(2) ECHR ‘Restrictions’**

1. **Prescribed by law?**

The interference on the wearing of the burqa and niqab is prescribed by the Law of June 1st 2011 on face-covering clothing in public. The first requirement of accessibility is fulfilled as the law was published in the Belgian Official Journal of Laws (Staatsblad) after it came into force. After ten days of being openly published and accessible it was binding for Belgian citizens. Also Article 563bis of the Penal Code introduced with the new law is easily accessible.

The second requirement of ‘foreseeability’ is depending on the formulation and clearness of the Law of June 1st of 2011. As discussed in before there was concluded that the field of application of the law is not very clear. For some persons, such as partly or completely covered persons (for example big sun glasses and scarf) and persons dressed-up but not falling under the exceptions, one may say the law is not formulated sufficiently as it is not completely clear who falls within the ambit of the law and who doesn’t. But these examples have nothing to do with interference on freedom of religion and are thus not relevant. If we focus on the situation of Muslim women, the full-face covering veil clearly falls under the scope of its field of application.

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236 This would lead us to a protection of ‘opinions’ or ‘ideas’ under Article 10 ECHR.
238 See Chapter 2(2.2.2.1).
Although there could be discussion on the lack of a clear definition of the word ‘recognizability’ in Article 563bis of the Penal Code, which leaves room to a broad margin of interpretation. If one reads the Article 563bis of the Penal Code literally, it could mean that when a person is partly or completely covered but still recognizable, he would fall outside the scope of Article 563bis. This way of interpretation was put on the table as an argument in the local case discussed before police court of Tongeren on the 12th of June 2006. The applicant in question, who got fined for wearing a burqa in public, claims that she was the only person in the district wearing this garment, which led to the impossibility for her to be unrecognizable. But this case example is of course an exceptional situation as there was only one burqa-wearing woman in one city.

A conclusion could be that, except for a clouded formulation of the _Law of June 1st 2011 on face-covering clothing in public_, the restriction on the burqa fulfills the first condition of being prescribed by a foreseeable and accessible law. This brings us to the second condition for the Belgian law to fulfill in order to attain a justifiable restriction on Article 9 ECHR.

2. **Legitimate aim pursued?**

In order to discuss the legitimate aims pursued by the _Law of June 1st 2011 on face-covering clothing in public_ a reference is made to the motivations found in the parliamentary debates as discussed in Chapter 2 (2.2.3). There, a summation of the five main motivations, serving here as legitimate aims, was distracted from the parliamentary debates. The first argument of legal certainty will not be discussed as in itself it is not a main aim pursued. The other arguments of; terms of ‘living together’ in a society, the connection with a fundamentalist Islam, public safety and women’s rights will be discussed one by one on the question whether they represent a legitimate aim according to Article 9(2) ECHR.

‘LIVING TOGETHER’ IN A DEMOCRATIC SOCIETY

It’s logically acceptable that a garment covering the face hinders a mutual and clear communication. The question needs to be asked whether this argument could be seen as a ‘legitimate aim’ according to Article 9(2) ECHR. The European Court clearly emphasized through its case law that one must not forget the relevant question is not whether a certain restriction is ‘reasonable’, but whether it is necessary. This is a very different question which sets a higher threshold of legitimacy. Isn’t it an individual freedom to decide whether to participate in the community life or to show an asocial behavior? This could give rise to questioning the behavior of other ‘asocial’ individuals of the society, such as walking on the street with an iPod.

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239 However, the Commission for Equal Treatment of the Netherlands (CGB), is of the opinion that a sufficient level of communication remains possible while wearing a burqa. CGB, 6 september 2000, oordeel 2000-63, § 4.9.


in the ears. Furthermore, currently in Belgium and the other European countries, the amount of burqa’s in the public street view is very small. In Belgium approximately 200 women wear the burqa. This means the impact on the society climate is marginal242.

For these reasons, it is assumable that the European Court would not consider the mere fact of ‘asocial behavior’ in the society as a legitimate aim foreseen under Article 9(2) ECHR, not valuable enough to restrict the freedom of religion. Consequently, we will not examine the third criteria of whether the restriction of burqa-ban is necessary in a democratic society to serve the legitimate aim of ‘living together’ in a democratic society243.

FUNDAMENTALIST ISLAM

The motivation of taking a stance against a fundamentalist Islam rejecting the liberal democratic Western society, serves the legitimate aim of protecting public order (Article9(2) ECHR). The appearance of the burqa in the public sphere threatens the public order in two different ways. A first way is that the full-face covering Islamic veil is linked to extremist political Islamic movements which seek to impose on society as a whole their religious symbols and with it their conception of a society founded on religious precepts and non-modern values. Therefore this symbol of rejection of the democratic society should be removed. A second way is that the burqa, as a symbol of a fundamentalist Islam, has a pressuring or even proselytizing effect on other individuals of the society which might be an impediment of the public order.

First of all, there is no conclusive evidence for an actual connection between the burqa or the niqab and an anti-democratic fundamentalist Islam. In the case of Norwood v. United Kingdom244 the Court clearly took a stand against generalized linkages between religious groups and violence threatening peace and order245. In casu Islam in general was linked to the 9/11 bombings. There is no solid ground for linking the group of Muslim wearing the full-face covering veil to the political fundamentalist form of Islam. Nonetheless, the European Court recognizes in the case of Leyla Sahin v. Turkey that the member states can take stance against such political movements threatening the democratic society. The protection by Turkey of the democratic core values was thus a 'legitimate aim' falling under Article 9(2) ECHR. However, the Turkish circumstances in the case of Leyla Sahin were more stringent and urgent than the situation of most European countries. Turkey was the first Muslim country with a secular system, with a history of Islamic political parties trying to gain power and introduce the Sharia.

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243 It seemed as if the Belgian government didn’t find it necessary either in its spirit of ‘living together’ to communicate with full-face veiled women before introducing a law in the name of liberating them.
244 ECHR, Norwood v. United Kingdom No° 23131/03, 16 November 2004.
Furthermore, one could say the burqa and niqab specifically form a threat to the value of secularism and state neutrality as one of the building bricks of the Belgian State. The consideration of secularity and neutrality underlying a ban on the wearing of a religious symbol such as the burqa or the niqab can count on understanding of the Court when the restriction is set in a context that asks for it. In contrast to other cases concerning religious clothing (headscarf) where a restriction on Article 9 ECHR was accepted, the application field of the Belgian burqa-ban is including the complete public sphere. In the case of Leyla Sahin v. Turkey\textsuperscript{246} a ban was imposed within the university setting. In the case of Dogru v. France\textsuperscript{247} a restriction was imposed merely on the physical education class in secondary school. Also in the case of Dahlab v. Switzerland\textsuperscript{248} the restriction was limited to the performance of the professional duties as a public school teacher being a state representative. The connection here lies within the public nature of their employment as a public servant. As public servants act as representatives of the State when they perform their duties, the rules require their appearance to be neutral in order to preserve the principle of secularism and its corollary, the principle of a neutral public service\textsuperscript{249}. This stands in contrast to the situation of the burqa-ban where it concerns normal citizens in their daily lives\textsuperscript{250}. All three cases are restricted to the sphere of educational institutions that have a higher interest in safeguarding neutrality\textsuperscript{251}. None of these examples comes close to the acceptance of an over-all ban in the public sphere. The Court in the case of Arslan and Others v. Turkey clearly stated that the protection of neutrality does not hold where it concerns a situation of simple citizens expressing their religion in the public space, such as streets and squares\textsuperscript{252}. We can conclude that Belgium- and in its line other European Countries- does not have this sensitive climate based upon historical experiences when it comes to Islam. Therefore, it is not really proven that Belgium witnesses a ‘real pressing social need’ to protect the secular, modern democratic society- the public order- threatened by a fundamentalist (political) Islam. The European Court already affirmed the entitlement of the State to act in order to preserve the integrity and functioning of the democratic structures of the State but therefore always claimed a high threshold for an intervention\textsuperscript{253}. It is thus very unlikely that the European court would consider the fundamentalist Islam as genuinely threatening the Belgian democratic society.

\textsuperscript{246}ECtHR, Leyla Sahin v. Turkey, No° 44774/98, 10 November 2005.
\textsuperscript{247}ECtHR, Dogru v. France, No° 27058/05, 4 December 2008.
\textsuperscript{248}ECtHR, Dahlab v. Switzerland, No° 42393/98, 15 February 2001, \url{http://strasbourgconsortium.org}.
\textsuperscript{249}ECtHR, Kurtulmuş v. Turkey, No° 65500/01, 24 January 2006, \url{http://strasbourgconsortium.org}.
\textsuperscript{250}S. QUALD CHAB, “Het verbod op gezichtsverhullende kledij ontsluierd”, Tijdschrift voor Mensenrechten 2010, nr.2, 12.
\textsuperscript{251}S. QUALD CHAB, “Het verbod op gezichtsverhullende kledij ontsluierd”, Tijdschrift voor Mensenrechten 2010, nr.2, 12.
through the presence of the full-face covering veil. Therefore we can assume, especially due to the fact that there is no grounded connection between a threat to public order and the small amount of Muslim women wearing the burqa or the niqab, the Court would not consider public order to be a legitimate aim.

Second, the Belgian ban wants to serve the legitimate aim of public order by eradicating the provocative or even proselytizing effects of the full-face Islamic veil. The burqa could be considered as a ‘strong external symbol’ and the confrontation with it could constitute a form of pressure and provocation or even proselytism towards other people’s beliefs of whatever nature. In the case of Dahlab v. Switzerland, in which the applicant was a schoolteacher in primary school, the Court stressed the impact of the Islam headscarf as a ‘strong external symbol’ that could have a (pressuring) influence on the children. This remark is roughly applicable by analogy on the situation of the burqa in the public sphere. However, a first important difference is the setting, since this case is set in a class room of a state school. The burqa-ban on the other hand includes the whole public sphere. A second difference is that the Dahlab case is situated around the relationship teacher-children which is more intense than the relationship amongst citizens in the public community. Still the reasoning could be made that the burqa is even a stronger and visible external symbol than an Islamic headscarf which leaves the face uncovered. One may conclude that the burqa has a similar pressuring effect on the other citizens of the modern, democratic society. The State, according to Article 1 ECHR also has the positive obligation to protect the rights of others. Still it is questionable whether the mere act of wearing religious clothing is interfering with the rights of others. In the case of Ahmet Arslan and others v. Turkey the Court clearly states that the mere fact of wearing a religious garment is not sufficient enough to conclude for a proselytizing effect and an interference with the rights and freedoms of others. Furthermore the confrontation and contact with burqa-wearing women in public accessible spaces is of a rare, brief and volatile kind. When following this reasoning of the Court, as the negative impact of the burqa on others does not amount to a pressing social need, the protection of public order does not really amount to a legitimate aim.

The above disquisition leads to the conclusion that firstly the connection between the full-face Islamic veil and a fundamentalist Islam threatening the democratic, secular system, which is in the case of Belgium not proven, will likely not amount to a legitimate aim of protecting the public order. Secondly, also the effect of the burqa as a proselytizing strong external symbol does not

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255This reasoning takes the subjective feeling of unsafety, as will be discussed underneath, thus a step further.
256ECtHR, Ahmet Arslan and Others v. Turkey, No° 41135/98, 23 February 2010, § 31-52.
amount to a protection of the legitimate aim of public order. For this reason third criterion of
being necessary in a democratic society on the proportionality between the burqa-ban and the
legitimate aim of public order will not be further discussed.

PUBLIC SAFETY
As discussed in the motivations on the Belgian burqa-ban\textsuperscript{258} on the one hand there is the
subjective safety put forward and on the other hand the objective safety, including specifically
traffic safety. First we will answer the question whether this subjective feeling amounts to the
legitimate aim of public safety according to Article 9(2) ECHR that could justify a general ban the
full-face covering veil. Second we will discuss whether the objective safety and in specific traffic
safety is considered to be a legitimate aim.

Subjective safety
First, on the subjective feeling of safety the European Court mentions in the case of \textit{Vajnai v.
Hungary} that ‘a legal system which applies restrictions on human rights in order to satisfy the
dictates of public feeling- real or imaginary- cannot be regarded as meeting the pressing social
needs recognized in a democratic society, since that society must remain reasonable in its
judgment.’ \textsuperscript{259} This means that a mere subjective feeling of un-safety by a part of the citizens is
not sufficient for legal interferences. A barking dog on the street causing fear is not a reason to
ban all dogs on the street\textsuperscript{260}. These feelings of being threatened and unsafe living amongst some
persons of a community are often based on prejudices and fear. This fear should specifically be
linked to the recent phenomenon of Islamophobia that spread across Europe in the last decade, as
mentioned before\textsuperscript{261}. The burqa and the niqab, as most visible signs, are easily connected with
this Islam fundamentalism as we discussed above. We can conclude this subjective feeling of
safety fails the description of a legitimate aim since a concern of safety needs to have an
objective ground instead of a subjective feeling. As this argument does not fulfill the description
of a legitimate aim according to Article 9(2) ECHR, it will not be further discussed whether the
burqa-ban is necessary in a democratic society to fulfill the aim of public safety.

Objective safety
Second, objective public safety can be a legitimate interest for a state and to achieve this goal an
interference with human rights can be acceptable. The State has a legitimate interest in ensuring

\textsuperscript{258}See Chapter 2 (2.2.3.4).
\textsuperscript{259}ECtHR, \textit{Vajnai v. Hungary}, No\textdegree{} 33629/06, 8 July 2008, §57.
\textsuperscript{260}However, there is even more sense in that than a subjective fear of the burqa according to my opinion.
\textsuperscript{261}See Chapter 3 (3.6).
general safety for its citizens. Although, there has to be a severe objective ground in order to interfere with human rights for reasons of objective safety. However, the parliamentary debates show no more than some example of a robbery in France by men wearing a burqa. It would be inappropriate to ground a call for objective safety on one case example. General restrictions have to be based on an ‘objectively discernible and specific danger’. In the case *Handyside v. United Kingdom* the Court makes it clear that it is ‘unacceptable to place general restrictions on the display of certain forms or attire simply because sections of the population find them unwelcome or offensive’. To explain this, the Court remarks that the wearing of a religious symbol or attire is not only an exercise of the freedom of religion but also the right to freedom of expression. Freedom of expression is ‘applicable not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the state or any sector of the population’. The compatibility of the burqa-ban with Article 10 ECHR will be discussed later on.

A valuable case of the European Court is the recent case of *Ahmet Arslan and Others v. Turkey* of February 2010. This case concerned a religious group that met in Ankara for a religious ceremony held at a mosque. They toured the streets and squares in their distinctive religious garments (turban, tunic and a stick). On the basis of an anti-terrorism legislation they were convicted for wearing these religious garments in the public area. The applicants in question complained that they had been convicted under criminal law for manifesting their religion protected by Article 9 ECHR. There was no evidence that the applicants represented a threat for the public order and for that reason the European Court considered that the necessity for the disputed restriction was not convincing and thus the interference with the members’ freedom of religion was not based on sufficient reasons. This case concerns a religious garment that does not cover the face, but the reasoning of the Court is applicable by analogy on the Muslim full-face covering veil. It was in no objective way proven that these persons were a threat to the public security. If we apply this reasoning, the same can be said for full-face veiled Muslim women appearing in public spaces. It is clear from the parliamentary motivations there is a lack of evidence of a real and concrete treat to the public safety. Except for some illustrative examples no real concern of public safety is put forward.

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Nonetheless, it is important to keep in mind the European Court has recognized public safety as an important concern of nation-states and is hesitant to interfere in this area of public safety. It is thus not to be excluded the European Court would consider objective public safety as a legitimate aim.

If we look at the more specific legitimate aim of traffic safety, two different ways of being concerned were mentioned.

On the one hand, there is the concern on Muslim veiled women since they would suffer from a diminished sight with a burqa or niqab on. If we start from the first acceptable hypothesis that wearing a full-face covering veil actually diminishes the sight, we could speak of a legitimate aim.

On the other hand, mere ‘distraction’ of other citizens of the society as a safety argument is very questionable since it could give rise to many other participants in traffic with a distracting character. Some examples would be tattooed persons, gothics, nuns and the opposite situation of scarcely dressed woman. Therefore this second approach of traffic safety as a legitimate aim is very questionable.

We can conclude that in general a subjective safety feeling does not amount to a legitimate aim of public safety pursued. Objective safety on the other hand, even though there is no concrete evidence given, could be seen as a legitimate aim. In specific traffic safety for reasons of a diminished sight by the veil is also a legitimate aim.

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PROMOTION OF WOMEN'S RIGHTS AND GENDER EQUALITY

The full veil is the symbol of the repression of women, The burqa is a sign of subservience and therefore banning it is a question of freedom and of women's dignity, Garments such as the burqa are hardly compatible with human dignity, The burqa, or the paranoia of the relation men-women.

As made clear with the above illustrations, the protection of women's rights is not only brought forward by Belgian policy makers, but is generally shared and put forward by all European countries favoring a burqa-ban.

At first sight, the promotion of women’s rights gender equality is considered full under the legitimate aim of promoting morals (Article 9(2) ECHR). The wearing of a full-face covering veil by Muslim woman is a symbol of submission and the inequality of women and men cutting off the women from society. From the perspective of women’s rights the wearing of the full-face covering veil is thus a violation of a woman’s human dignity and a gender discrimination.

In the Leyla Sahin case the European Court recognizes 'gender equality as one of the key principles underlying the European Convention and a legitimate goal to be achieved by Member States of the Council of Europe'. Furthermore in the case of Dahlab v. Switzerland the European Court characterized the headscarf ‘hard to square with the principle of gender equality’. It is certain the Court would reason the same way on an even more explicit garment as the burqa or the niqab. Furthermore it states that ‘It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination.’ Following this reasoning of both cases it is very likely that the European Court would consider the promotion of women’s rights as a legitimate aim.

From this disquisition on the suggested 'legitimate aims' we can conclude the most acceptable motivations brought forward are the one of objective public safety and women's rights and gender equality. That is why we will discuss whether the burqa-ban is 'necessary in a democratic

271ECtHR, Leyla Sahin v. Turkey, No° 44774/98, 10 November 2005, §107
society' in order to fulfill the protection of the objective public safety and the promotion of women's rights.

3. **Necessary in a democratic society?**

As mentioned above we can conclude that the Belgian burqa-ban is prescribed by law and fulfills one or more legitimate aims. The two most acceptable legitimate aims pursued by the Belgian State are on the one hand objective public safety and on the other hand the promotion of gender equality and women's rights. That is why we will discuss whether the nature of the interference by the Belgian State is necessary in a democratic society to fulfill these legitimate aims. Therefore the European Court will apply the 'necessity test' on the case presented.

The European Court will assess whether the measures taken - banning the burqa from the public sphere - are proportionate to the discussed legitimate aims pursued.

**PROPORTIONALITY WITH AIM OF OBJECTIVE PUBLIC SAFETY**

Is a general restriction on all forms of face-covering materials in all public accessible areas proportional to the legitimate aim of objective public safety pursued? As explained before, for the 'necessity test', three criteria will be evaluated by the European Court. These are **pertinence** (suitability), **necessity** (no alternatives) and **proportionality sensu stricto**.

**Pertinence?**

Logically a ban restricting Muslim women from wearing a full-face covering veil in public would improve the identification of these individuals and contribute to public safety. This makes the burqa-ban a pertinent means to achieve the legitimate aim of objective safety.

**Necessity?**

The Belgian burqa-ban is not necessary to achieve its legitimate aim since there are less restrictive alternatives to improve the means of identification and recognizability.

First of all, there are already Belgian police laws that prescribe the obligation to reveal the identity when an identity control is asked by enforcement officers. The identity control measures that are already in place in Belgium address issues of identification in the public sphere. It would be recommendable instead of a general ban to work out these identification

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273 The question should be asked whether measures are necessary at all. According to the Belgian research on the empirical face veil (not published yet) represented at the seminar on Empirical Face veil Research on the 9th of May in Ghent, the large majority of these women has no problem with lifting the veil for an identification control restricted in time.

obligations more strictly and specifically in places where there is indeed a safety risk such as an airport or a prison\textsuperscript{275}.

Second, the Court puts the stress on the fact that interference should have the smallest impact possible to achieve the legitimate aim pursued. It is questionable if this is the case with the \textit{Law of June 1\textsuperscript{st} 2011 on face-covering clothing in public} with its very wide application field. There are a lot of alternative measures to guarantee the public security that have a smaller impact on the freedom of religion of individuals. These being alternatives that would also secure the realization of the interests at stake and that would not involve a greater diminution of the freedom of religion.

In this context it is important to mention that a permanent ‘recognizability’ for reasons of public safety, more than a mere ‘identification control’ restricted in place and time when necessary, is difficult to justify. \textit{El Morsi v. France}\textsuperscript{276} was a case concerning a full-face veiled Muslim woman that felt restricted in her right of freedom of religion according to Article 9 ECHR as she had to lift her veil for reasons of an identification control at the entrance of a consulate. In this case the European Court referred to the case of \textit{Phull v France} and stated that in the case of safety controls through identification control, interference on freedom of religion is acceptable if it is a bordered, limited interference which is restricted in time. The reference to these two cases was also made by the local police court in the case of the 26\textsuperscript{th} of January 2011 as discussed before.

The Court explained that these case examples show necessary restrictions limited in space and time. On the opposite the general police law that fined the woman in question was too spacious since the complete freedom to move in all public accessible spaces was removed.

A general ban on face covering clothing demanding a permanent ‘recognizability’ for reasons of public safety could be seen as a step too far, especially due to the fact that there are already Police laws in place regulating identification.

\textit{Proportionality sensu stricto?}

The Belgian burqa-ban is not proportionate to its legitimate aim of public safety because it demands a permanent identification in all public accessible spaces. This excessive burden is disproportionate compared to the marginal and speculative improvement of the public safety\textsuperscript{277}.

In contrast to other cases concerning religious clothing (headscarf) where a restriction on Article 9 ECHR was accepted, the application field of the Belgian burqa-ban is very wide. In the

\textsuperscript{275}\textsc{S. Ouald Chaib, }“Het verbod op gezichtsverhullende kledij ontsluiert”, \textit{Tijdschrift voor Mensenrechten} 2010, nr.2, 13.

\textsuperscript{276}\textsc{ECtHR, El Morsli v. France, No° 15585/064, 4 March 2008.}

\textsuperscript{277}\textsc{S. Nanwani, }“The burqa ban: an unreasonable limitation on religious freedom or a justifiable restriction?”, \textit{Emory International Law Review}, \texttt{www.law.emory.edu/fileadmin/journals/eilr/25/25.3/Nanwani.pdf}, 1467.
case of Leyla Sahin v. Turkey278 a ban was imposed within the university setting. Also in the case of Dahlab v. Switzerland279 the restriction was limited to the performance of the professional duties as a public school teacher being a state representative. In the case of Dogru v. France280 a restriction was imposed merely on the physical education class in secondary school. None of these examples comes close to the acceptance of an over-all ban in the public sphere.

Also in the recent case (2010) of Ahmet Arslan and others v. Turkey281 the Court makes clear that public areas open to all should be distinguished from public establishments282. The court emphasized ‘that there should be made a clear distinction between wearing religious clothing in public and wearing it in schools and other institutions that can be expected to be religiously neutral. In these cases the religious neutrality might take precedence over the right to manifestation of religion’283. A reference to the case of Ahmet Arslan and Others v. Turkey was also made in the previously discussed local case of the 26th of January 2011 by the Brussels police court. The local regulation of Etterbeek in question served a legitimate aim of ‘public safety’ according to Article 9 (2) ECHR. However, the need to identify individuals at every time and in the entire public space failed the proportionality. It is thus clear that the large impact on freedom of religion is disproportionate to the minimal and speculative interest for public safety.

Furthermore it should also be mentioned that if the legitimate aim pursued is really the identification of citizens in order to contribute to public safety, the Belgian ban should be enforced consequently284. This will have as a consequence that more situations than Muslim women wearing the veil will be subject to a ban. There is no reason to believe that a Muslim women in burqa is implicates a bigger safety risk than a man with a big face-covering beard or the boy with the scarf and the sunglasses. Otherwise questions of discrimination could rise.

We conclude that while the Belgian burqa-can is a pertinent measure, it is not necessary and disproportionate to the legitimate aim of public safety pursued. Therefore, based upon the public safety justification, the Belgian burqa-ban lacks proportionality and is therefore an unnecessary measure in a democratic society.

278 ECtHR, Leyla Sahin v. Turkey, No° 44774/98, 10 November 2005.
279 ECtHR, Dahlab v. Switzerland, No° 42393/98, 15 February 2001,
280 ECtHR, Dogru v. France, No° 27058/05, 4 December 2008.
281 ECtHR, Ahmet Arslan and Others v. Turkey, No° 41135/98, 23 February 2010.
PROPORTIONALITY WITH AIM OF WOMEN'S RIGHTS

Promoting the equality between men and women is considered to be a legitimate aim. Here, we will check upon the proportionality of the means used and the legitimate aim pursued.

In order to do so, it is important to realize that the policy makers of the Belgian legislation started from the point of view that the burqa, as a symbol for submission, implicitly carries with it the assumption of a lack of choice by those who wear this garment. This assumption upholds that when a woman wears a symbol for submission and a patriarchal culture, it logically follows that the woman has not made her own choice. The legitimate aim of protecting and promoting women's rights is thus built on the hypothesis that women wearing it are oppressed victims without will and 'in need of help'285.

Firstly, with the use of European empirical research at our disposal we will try to make up a profile of the woman behind the veil in order to show that coercion and a lack of choice is mostly not the case. Secondly, we will explain why this assumption of a lack of choice is made by many individuals in order to understand it better.

Obedient Muslim housewife or strong devoted Muslima?

The first empirical research on the motivations of Muslim women wearing the full-face veil found place in the Netherlands and was already made public in January 2009. The research of Annelies Moors made up a clear image of the motivations of these women and their position in the society286. Therefore she profoundly interviewed 20 full-face veiled women living in the Netherlands. The Open Society Foundation in France followed with a similar empirical research that interviewed 32 women. As earlier mentioned, also in Denmark made a similar study on niqab-wearing women in Denmark was established287. Very recently also in the United Kingdom and Belgium a similar research was undertaken288. This first of its kind Belgian research on the motives of the full-face veiled women in Belgium wearing the burqa or the niqab was put between the period of September 2010 and September 2011 by the Human Rights Centre of Ghent under the coordination of professor E. Brems289. The study questioned 27 women (of the

288These researches were presented at the seminar on Empirical Face Veil Research that found place in Ghent on the 9th of May 2012 but at the time of this writing, they are not made public yet.
approximately 250 in Belgium) on their motivations to wear the full-face Islamic veil. Unfortunately, no study on the profile of these Muslim women was undertaken before the introduction of the Belgian law. It is very questionable whether a research of that kind would have changed the political game but still it is careless no science-based information on the matter was consulted.

Out of all these European researches, independently organized and taking place in different political, historical and social contexts it is possible to draw up similar conclusions on the factor of oppression and coercion290.

First, to great surprise of many, the European recent studies are all showing that the great majority of these women claim to wear the burqa or the niqab as a personal choice291. This is a personal choice to profess Islam to the greatest extent and to be like the wife of the prophet. This means the main reason put forward in the interviews was a personal religious conviction.

Second, most women are not pressured by their husbands or family to wear this garment. The opposite could even be concluded. The great majority of the interviewed women is the first in the family to wear the burqa or the niqab and sometimes even has troubles of acceptation for this choice. Also husbands are more likely to disapprove the full-face veil and are often scared to be seen as the ‘oppressor’ by other individuals of the society. Many of the women use a ‘feeling of freedom’ or ‘emancipation’ to describe their feeling towards the full-face veil. It is clear a level of determination and assertive behavior is necessary to accept the consequences of a veiled life.

We can conclude empirical research shows that the great majority of the women deciding to wear the full-face veil chose this out of free will and religious motivations. Especially when knowing in every questioned group of women there was a part of converts without Muslim background.

One could question the representative value of these investigations; this is why the distinction between the hypothesis of women that are forced to wear the veil and women that wear it voluntarily will still be made for the necessity test.

290From now on where relevant, there will be made reference to conclusions to these European empirical researches when relevant.
Assumption of lack of choice

This Western point of view that the burqa is *per se* oppressive is explained by the liberal ideology that a modern European State subscribes. As R. M. Unger would say in *Knowledge and Politics* liberalism 'offers the vantage point from which to grasp the entire condition of modern thought'. This liberal theory starts from fundamental postulates about the nature of man as a rational, autonomous and atomized individual. The best society is one that gives primacy to individuals, with the above nature, to make their own choices according to their- as John Rawls would say in *Political Liberalism* - own conceptions of the good. These conceptions of the good are a person's religious, philosophical, political or moral beliefs, which guide all aspects of life and may be based on metaphysical foundations. It contains conceptions on what is of value in human life, ideals of personal character, as well as ideals of friendship or familial and associational relationships and more. In order to let citizens choose their own conception of the good in consistency with the liberty of others, there is the need for a societal arrangement, represented by the 'State', that does not presuppose any particular conception of the good. Any social arrangement (State) that would be constructed on the basis of a particular conception of the good would fail to respect persons as being capable of choice. This means that each individual, in order to be liberated to pursue its conception of the good as a free rational being, the state must not make preferences on a certain form of the 'good life' as the individual must pursue this for themselves. On the one hand it is thus up to the state to guarantee the rights of the individual and on the other hand it must not make preferences on any conception of the good as the individuals have the capacity to choose for themselves in their own best interests their way of living the good life. In line of this short liberal theory, the assumption is made that an individual choosing to wear a symbol of submission in a societal arrangement where it is free to choose its own conception of the good, is logically forced to do so and should be 'helped'.

One of the main critiques on this liberal Rawls-reasoning could be that the liberal idea that an individual free to choose its own conception of the good would never choose values that restrict its own right to self-determination (the wearing of a symbol of suppression) is already biased in itself. This notion of the individual as an autonomous human being that is capable of making

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choices in abstraction from their culture is criticized by multicultural theorists\(^\text{299}\). All individuals are born different types of groups, such as family and ethnic community, and these groups make up their identities. In this way it is not possible for an individual to make a 'choice' in abstraction from these groups that shape his identity\(^\text{300}\). There is always a social context to a choice. Heiner Beliefeldt, UN Special Rapporteur on freedom of religion or belief, speaks on this matter that 'Information about religions and beliefs should always include the crucial insight that religions as a social reality- are not monolithic. This message is particularly important, because it helps to construct existing notions of a collective mentality that is stereotypically, and often negatively, ascribed to all followers of various religions or beliefs. In extreme cases, such ascription of a collective mentality may amount to 'de-personalized' perceptions of human beings, possibly with devastating dehumanizing repercussions.'\(^\text{301}\)

After unmasking the false assumption of mere coerced women through empirical evidence and a philosophical insight in our liberal Western way of thinking, we can evaluate the promotion of women's rights as a legitimate aim in a correct manner. It is thus important to make two different hypotheses\(^\text{302}\). The first hypothesis concerns the 'obedient Muslim housewife' and the second hypothesis deals with the 'strong devoted Muslima'.

**‘obedient Muslim housewife’**

The first hypothesis starts from the situation where a Muslim woman is coerced of her will by the patriarchal forces of her husband and forced to wear the full-face Islamic veil symbolizing submission. From a liberal European point of view these women are clearly harmed in their human dignity and gender rights. The Islamic religion and its characteristics fail to address modernity in due time and to integrate the culture of human rights\(^\text{303}\). The protection of women's rights, from the perspective of the first hypothesis, is one of the most valuable arguments put on the table in the Belgian parliamentary debates in order to defend the introduction of the new Law. Only taken into consideration the first hypothesis, it seems rather acceptable to defend a ban on the burqa as the most visible symbol of gender discrimination, which is not tolerable in a liberal, modern democratic society. This is a society promoting gender equality, individual freedom and human dignity. However, it is highly difficult to maintain that


all women who wear the burqa are forced in the sense of patriarchal coercion as we explained above.

‘strong devoted Muslima’

The second and most important hypothesis deals with the situation of a Muslim woman that freely decides to wear a full-faced veil even though this symbolizes submission. As explained this hypothesis is often forgotten by debaters because of the implicitly made assumption of a lack of choice or even ignored out of political interest. Beforehand the introduction of the Belgian law, no decent research on the motives of burqa-wearing women was prepared or made reference too. This second hypothesis of veiled Muslim women deciding for their own religious convictions to wear the burqa or niqab, truly represents the question of intersectionality between freedom of religion and women’s rights\textsuperscript{304}.

Once we are aware of these two different hypotheses, a discussion on the proportionality through the tripartite test is the next step in this analysis.

\textit{Pertinence}\textsuperscript{305}

Pertinence concerns the question whether explicitly banning the full-face veil in public will contribute to the protection of Muslim women’s rights in practice. In other words, are the means used - a general ban - suitable to not serve their legitimate aim? In order to discuss this first criterion it is important to approach it from both explained hypotheses.

‘obedient Muslim housewife’

Seen from the perspective of the ‘obedient Muslim housewife’, it is still very questionable whether explicitly banning the full-face veil in public (means) will contribute to the protection of these women in practice (legitimate aim).

At first sight ‘liberating’ these oppressed women from a ‘walking prison’ seems to serve a legitimate aim. However, simply banning this visible symbol of gender discrimination is just cutting down a tip of the iceberg. To oblige this group of oppressed woman to take of their veils in public will possibly lead to more social isolation. Also it is very likely their oppressive Islamic husbands will force their woman to stay home. A man that previously forced his women to cover the face because of religious and cultural views will logically respond in forcing his women to stay home completely. It is a vicious circle since if these women cannot appear in public


anymore, pick up their kids, go to the shop, etc., they are even more depending on their husbands and ‘captured’ at home. Thomas Hammarberg, Commissioner of Human Rights of the Council of Europe, explicitly advised the Member not to implement a general burqa-ban with a reference to the argument that a ban would not improve these women’s emancipation. He says that a ban ‘would further stigmatize these women and lead to their alienation from the majority society. Banning women dressed in the burqa/niqab from public institutions like hospitals or government offices may only result in them avoiding such places entirely. This is not liberation.’ In addition, the Parliamentary Assembly of the Council of Europe created a resolution in 2010 in which they claim ‘a general prohibition might have the adverse effect of generating family and community pressure on Muslim women to stay at home and confine themselves to contacts with other women. Muslim women could be further excluded if they were to leave educational institutions, stay away from public places and abandon work outside their communities, in order not to break with their family tradition. Therefore, the Assembly calls on member states to develop targeted policies intended to raise Muslim women’s awareness of their rights, help them to take part in public life and offer them equal opportunities to pursue a professional life and gain social and economic independence. In this respect, the education of young Muslim women as well as of their parents and families is crucial. It is especially necessary to remove all forms of discrimination against girls and to develop education on gender equality, without stereotypes and at all levels of the education system.’ Furthermore, a report of the NGO Open Society Foundations, exposed a year after the introduction of the French burqa-ban, claims the situation of Muslim women has not improved. One might even conclude the contrary. The report reveals that since the debate on the face veil began in 2009 a large number of the women wearing the niqab have experienced a significant increase of verbal and sometimes physical abuse and as a direct result have preferred to limit their time spent outside the home. Apart from the sanction implemented by the law, a second indirect sanction imposed the ‘victims’ is that they are being singled out even more. Aldo, according to The Collective Against Islamophobia a growing number of all Muslim women in general in France are victims of

physical or verbal assault\textsuperscript{311}. Recent statistics from their 2011 annual report shows that 94\% of victims of anti-Muslim physical and verbal abuse are women, and over 84\% of all reported Islamophobic acts are targeted at women. This means the law as an adverse, polarizing and stigmatizing effect instead of protecting these women. Not only towards these women, but in general towards Islam.

A real improvement of these women’s situation will only be accomplished by supporting the process of emancipation, not by punishing women in a repressive way by handing out a fine as prescribed in new Article 563bis of the Penal Code. It is a very paradoxal regulation to criminalize the victim. It is very unlikely the ‘victim’ in question would be helped by receiving a punishment. On this point as earlier mentioned, the French burqa-ban seems more capable of protecting the rights of women. The ban also prescribes an administrative fine for the person forcing another to wear the burqa. This high fine targets husbands and brothers, the true ‘perpetrator’\textsuperscript{312}. A true way to emancipate these women is would support them in creating opportunities to be independent, to be educated and make them aware of Western values including the human rights and gender equality.

‘strong devoted Muslima’

Seen from perspective of the second hypothesis it is even more unlikely a ban could support women’s rights. Instead it interferes with the right to freely choose to wear the veil. For women who freely decide to wear the burqa, a certain ban operates as a paternalist measure which ironically suppresses their freedom instead of vindicating women’s rights\textsuperscript{313}. Two common counterarguments on the restriction on rights of Muslim women in the situation of the second hypothesis will be explained underneath.

The biggest counterargument on the free choice of Muslim women in the situation of the second hypothesis is that the burqa, as symbol for oppression of women and the violation of women’s right, has to be forbidden in any case. The burqa is per definition interfering with women’s rights and thus forbidden in any case, apart from the fact that a woman decides voluntarily to wear it. This argument was also put on the table in the Belgian Parliamentary debates. Underneath two comments on this argument will follow.


\textsuperscript{312}Art. 4, Loi n° 2010- 1192 du 11 octobre 2010 disant la dissimulation du visage dans l’espace public.

Comment from viewpoint of cultural relativism

A first comment on this argument of the burqa as a symbol for submission and objectification of women is from the viewpoint of cultural relativism. Cultural relativism upholds that a moral or ethical system varies from culture to culture and that all cultures are equally valid. This has as a consequence that no system is really better than the other and that no culture can judge the morals and norms that form the social context of another. This means a strict cultural relativist point of view would justify any behavior and any perception of morality that a culture stands for. This theory applied on the burqa-case would mean that the Western liberal democratic society cannot describe the burqa as oppressive or sexist, because this judgment is biased with our own liberal moral standards of sexism.

There is certainly some value to the mind set of cultural relativism, but this notion of placing all cultures on a level playing field would lead to an 'ostrich policy' since this would have as a consequence that religions and cultures can never be blamed for any of their morals or practices even when they for example consist out of racist, homophobic views or thus patriarchal views. Also feminists, such as M. Nussbaum and S. M. Okin, but also Islamic feminists such as F. Mernissi, have their trepidations on a cultural relativist reasoning on the wearing of the burqa. They are of the opinion that the liberal state should not accommodate and give room to these religious and cultural traditions that infringe upon women's rights, their freedom, autonomy and choice. In this way 'multiculturalism' would be a backlash for women's equality and place in the society. Therefore one should ask the question why, even though practices have been conserved for centuries, what is the value of conserving them? Isn't it better to start from the point of view that every culture has flaws and all societies can learn from each other and be changed for the better? Slavery as a dehumanizing practice once was an accepted phenomenon according to societies' morals back in the days. It is a good thing the moral of this cultural practice was put into question. This might follow form my own biased liberal perspective, but it should be possible to think progressive and see that one culture can be more enlightened than another, given the fact that some cultures and religions, as such Islam, unquestioningly attach themselves to practices of the past, while other cultures have critically

examined their practices and have made room for individual rights and freedoms\(^{319}\). It is easy to defend the burqa from the perspective of the individual right on freedom of religion and the pretense of choice. However, one cannot ignore the fact that the burqa is linked to a patriarchal culture that under scribes values that go against the values of a democratic society and human rights. The verses of the *Qu’ran* prescribing for a women to dress modest, are clearly stating that a women should be dressed this way in order to be protected from men and not be a mere lust object\(^{320}\). Also, it cannot be denied Islamic states do not guarantee a same level of human rights. The *Cairo Declaration of Human Rights in Islam*, subscribed by the 56 member states of the *Organization of the Islamic Conference*, adopts the Articles of the Universal Declaration of Human Rights (similar to the ECHR) but adds in Article 24 that *‘all the rights and freedoms stipulated in this Declaration are subject to the Islamic Sharia’*. This deviation from the Declaration and thus also from the ECHR clearly shows the Islamic human rights are not of a same level as the European human rights\(^ {321}\).

However, the emphasis should be laid on the fact that this questioning and self-critic should be undertaken by the Muslim society in itself and not through repressive sanctions of a state organ attacking the burqa. Let it be clear that this critical process of evaluating one’s culture does not give the State implement a regulation such as the burqa-ban.

**Comment on power of the State**

Second, the argument of the burqa as a symbol of inequality and a second class citizenship towards men is that has to be forbidden, is a dangerous argument since it gives the state power to decide upon the right of self-determination (choose their own conception of the good) of its citizens. When opening this door, many forms of actions that voluntary limit the own individual rights and freedoms, especially in the manifestation of radical religious feelings, could be put into consideration. An example would be the personal choice to join a ‘locked monastery’. This sort of devotion is not just wearing a ‘walking prison’ but voluntarily going to prison. Furthermore, the European Court, in the case of *K.A and A.D. v Belgium* made clear that personal autonomy can include the possibility for actions that are seen as having a physical or morality regrettable or dangerous nature\(^{322}\). This remark, applied on the burqa-case, would mean that if woman chooses freely to wear a burqa, even when this is a symbol of gender discrimination, this is her personal right. Second, if the burqa as a symbol for male domination and objectifying women should be forbidden, M. Nussbaum puts the attention on the fact that *‘society is suffused*
with symbols of male supremacy that treat women as objects. She makes reference to pornography, tight jeans, magazines that treat women as objects, and the comparison of the ‘walking prison’ of plastic surgery. All these practices are also undertaken to fulfill male norm of female beauty.

The second counterargument on the second hypothesis of the ‘strong devoted Muslima’ is the false consciousness-argument. This argument upholds that the Muslim women who claim to choose to wear the burqa are in reality the product of a false consciousness and are so internalized in the patriarchal character of their culture that they have no sense of their free will. From this perspective, even when a woman claims to have a different subjective understanding of the wearing of the burqa, she is merely expressing the views of patriarchy. That is the outcome of indoctrination of the woman by making her believe there is only one version of the truth (Islam) and that the cultural practices that come with it should not be questioned. Also E. Vermeersch, is also of the opinion that, even though he does not question the honesty of women claiming to choose for a burqa, these women are indoctrinated by their parents as a child, by their religion teachers and imams.

However, this would mean the perspectives of the women who wear the burqa voluntarily are delegitimized in favor of those who are (self) represented as emancipated. From the point of view of a cultural relativist, as previously enlightened, it could be questioned whether on the basis of this false consciousness-argument the Western politicians can reclaim legitimacy in speaking for women of other cultures and races. On this matter B. Parekh remarks ‘If some of them (Muslim women) do not share the feminist view, should we say that they are indoctrinated victims of culturally generated ‘false consciousness’, and in need of liberation?’ There is some sense in the false consciousness-argument, but it should be clear this does not give the right to the state to coerce the rights of an individual. Especially not with a criminal sanction. This process of questioning and critiquing the one’s own culture and own choice should be left to the individual in question. Apart from interviewing full-face veiled women on their motives, it would be recommended to have constructive and critical dialogues with these women on the image the burqa represents in our liberal democratic state and the values of equality that come with it.

Furthermore, even if we claim the legitimacy of Western politicians in speaking for women of other cultures and races by adhering to the false consciousness-argument, it is still dubious that forcing a 'liberation' through simply banning the burqa as a symbol of sexist discrimination will have any positive effect. As mentioned above, a ban that punishes Muslim women will not emancipate and liberate them. F. Fanon argues that 'liberation' cannot be given but that is must be grasped by a struggle for power of the subjugated. It is only through this struggle that identity is shaped and self-respect is to be restored. Also M. Nussbaum claims on this matter that ‘The way to deal with sexism, in this case as in all, is by persuasion and example, not be removing liberty.’

In general, we can conclude that the Belgian burqa-ban is not suitable and thus not capable to promote the protection of women’s rights. It is not suitable for women forced to wear the garment and it is not for women who freely choose to wear it.

**Necessity**

Apart from suitability, to be a necessary measure, the burqa-ban and, more specifically its implementation of a criminal sanction (Article 563bis of the Penal Code) should be the least restrictive alternative to promote gender equality. There are many less restrictive alternatives to be implemented for promoting gender equality. The use of criminal law should be used as an ‘ultimum remedium’. This means no other alternatives should be available to reach the pursued goal. This is clearly not the case for the situation of full-face veiled women. R. Foqué and ‘t Hart formed a ‘relational legal theory’ in which criminal law has two interdependent roles to fulfill. One the one hand, there is the ‘instrumental role’ of reacting against violations of rights and freedoms and securing a safe society. On the other hand there is the ‘role of safeguarding legal rights’ of individuals from the abusive use of power by the State. These roles are interdependent and thus to be balanced. Nowadays, a trend is noticeable using criminal law mainly to serve this first instrumental role. This comes down to using criminal law as a mere toolbox to directly reach a mere policy objective. A criminal sanction is implemented without taking into account

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the human rights, ground rights and other principles. This means the rights of individuals are made subordinate to the set-up policy objectives of the state. The consequences of this unprecedented use of criminal law as a mere instrument, is that the protection of the individual against the power of the state thus diminishes instead of being safeguarded. In the long run this could lead to a State being too powerful and the ‘democratic state’ evolving to a ‘dictate of the majority’ deciding upon the level of safeguarding of the legal rights of individuals. The question thus needs to be asked whether the use of a criminal in order to fulfill the objective of the promotion of women's rights respects the limits of the use of criminal law in its instrumental role and fulfills its role safeguarding the legal rights of individuals. Clearly, the mere instrumental use of a criminal sanction on the wearing of the burqa in order to achieve protection of women’s rights goes a step too far and is certainly not necessary. It frames in this recent evolution towards the use of criminal law as a mere instrumental toolbox to achieve a policy objective and does not consider a policy based on alternative mediums. Therefore the Belgian burqa-ban fails the second criterion of proportionality.

A few examples of alternative measures are the counseling and mediation with women wearing the burqa and their families to get a better understanding of their motives, notifying the competent authorities of any minor wearing a full-face covering veil, the teaching of gender equality through the educational system and introducing legislation that makes psychological violence between husbands a criminal offence. These alternatives are less restrictive and more likely to address problems of gender inequality.

Proportional

The burden caused by an infringement on freedom of religion is clearly more excessive in cases where the means used do not even address the legitimate aim. It is defendable that the infringement upon the freedom to manifest religion is not very excessive. First of all, only a very small part of the Muslim population is targeted by the burqa-ban. Second, women restricted in their right to wear the full-face veil have alternative forms of modest veils that are allowed in the public area and thus free to observe the other aspects of their religion.
Still, as the ban is over-inclusive (also forces women who freely choose a full-face veil) and does not directly address the problems of gender equality, it is excessive in relation to its legitimate aim pursued.

We can conclude first the Belgian ban on the burqa in public area does not has the capacity to reach the goal of promoting gender equality and women’s rights and is thus not pertinent. Not from the perspective of both hypotheses (obedient Muslim housewife- strong devoted Muslima). Second, there are other less restrictive alternatives imaginable than a criminal sanction which makes the burqa-ban definitely unnecessary. Third, the general ban is arguably excessive relative to the aim of promoting gender equality. We can conclude that the burqa-ban also fails the ‘necessity test’ in order to achieve women’s rights as a legitimate aim. Moreover, it has a counterproductive and stigmatizing effect.

4. Margin of appreciation
The tripartite-test on proportionality concerning the Belgian burqa-ban suggested that the ban is not proportional to both legitimate aims pursued (public safety and women's rights) and thus fails being necessary in a democratic society.

However, the final decision of the European Court is less based on proportionality than it is on the willingness of the Court to defer to the used means that the authorities of the Member State have chosen to adopt. This thus depends on the decision of the Court whether to grant a wide or narrow margin of appreciation to the Belgian state on restricting the freedom of religion of individuals according to Article 9(2)336. In other words, the decision of the Court on the whether the Belgian burqa-ban is necessary in a democratic society will be influenced by the determination regarding the margin of appreciation that should be granted to Belgium.

As explained above, in determining this extent of deference Belgium the European Court is following two steps. The first step is balancing the interests at stake, these being the rights infringed upon against the importance of the restriction337. The second step is the existing European consensus on a general burqa-ban.

Interest- Weighing

The European Court generally grants the Member States a wide margin of appreciation where a restriction pursues the legitimate aim of public safety or promotes morality. ON the promotion of morality, the old but still relevant case of Handyside v. the United Kingdom examined the limits of the margin of appreciation in the context of promoting public morals as a legitimate aim. Even though this case concerns Article 10 ECHR, the Court recognized the promotion of morals as a legitimate aim. The Court said that the requirements of morals vary from time to time and from place to place, especially in our era, which is characterized by a rapid and far reaching evolution of opinions on the subject. Therefore State authorities are better to judge than an international Court because of their ‘direct and continuous contact with the vital forces of their countries.’

Since the two main motivations of the Belgian burqa-ban are the aim of public safety and promoting women’s rights and gender equality, it is possible the European Court will give a wide margin of appreciation to Belgium regardless of its proportionality flaws. However, on the other hand the European Court also grants a narrow margin of appreciation in cases where a restriction of the core freedoms finds place. This is the case for Article 9 ECHR.

The European Court can approach Article 9 ECHR from two different perspectives. First, the Court can approach Article 9 ECHR from the perspective of an individual, an individual that challenges State actions in relation to his personal enjoyment of a particular aspect of his freedom of religion. From this perspective it is clear the burqa-ban affects and violates the personal right to freedom of religion of Muslim women deciding to wear the full-face veil.

Second, one should be aware that some cases considered from the perspective of the ‘individual’ should in reality best be viewed from a more community-oriented point of view. What can be really at stake is the general attitude of the State towards a particular form of religion or belief in casu the Islam. In principle it is the State’s duty to act in a neutral fashion both between religions and non-religious groups. The case Hasan and Chaush was the first Case in

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339. ECtHR, Handyside v. The United Kingdom, No° 5493/72, 7 December 1976, §48.
which the Court explained that freedom of religion entails such an obligation for the state\textsuperscript{342}. It was of the opinion that when a state exercises its regulatory powers in the sphere of religious practice, and in its relations with the diverse denominations and beliefs, the state must remain neutral and impartial\textsuperscript{343}. In the case of Metropolitan Church of Bessarabia v. Moldova the Court says that ‘in exercising its regulatory power in this sphere and in its relations with the various religious, denominations and beliefs the State has a duty to remain neutral and impartial.’\textsuperscript{344}

This means that the State should have no power to assess the legitimacy of religions or beliefs and the way they are expressed\textsuperscript{345}. However, freedom of religion has to be seen and understood in the broader context of the democratic society. ‘Freedom of thought, conscience, and religion is one of the foundations of a democratic society. In democratic societies it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.’\textsuperscript{346} However, one should keep in mind although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position\textsuperscript{347}.

This means in some cases the State has to take a step beyond being merely neutral and impartial towards both religious groups and non-religious and religious groups. This is where the State has to deal with ‘positive obligations’ of being a ‘neutral and impartial organizer of the exercise of various religions, beliefs and faiths, this being conductive to public order, religious harmony and tolerance in a democratic society.’\textsuperscript{348}

The Strasbourg Court in determining this balance of interests says it thus ‘must have regards to what is at stake’\textsuperscript{349}. For example, in the Leyla Sahin v. Turkey case where a university student was forbidden to wear her headscarf, the applicant argued that she was simply seeking to follow the dictates of her religious beliefs and expressly declared that ‘she was not seeking a legal recognition of a right for all women to wear the Islamic headscarf in all places. But the Court in this case had to look at the bigger picture and see that what was really ‘at stake’ here was the


\textsuperscript{343}ECtHR, Hasan and Chauch v. Bulgaria, No°30985/9,26 October 2000, §62.

\textsuperscript{344}ECtHR, Metropolitan Church of Bessarabia v. Moldova, No° 45701/99, 13 December 2001, § 116.

\textsuperscript{345}ECtHR, Manoussakis and Others v. Greece, No° 18748/9, 26 September 1996, § 47.


\textsuperscript{347}ECtHR, Chassagnou and Others v. France, No° 25088/94, 28331/95 and 28443/95, 29 April 1999, § 112.

\textsuperscript{348}ECtHR, Refah Partisi and Others v. Turkey, No° 41340/98, 41342/98, 41343/98, 41344/98, 13 February 2003, §91.

need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism. However, one must take the context of a case into consideration. The historical struggle for a secularist society in Turkey makes such values more worth protecting through state intervention. Belgium and in its line other European countries do not share this tensed relationship with Islam based on historical events.

It is clear the balance to be made on the different interest is a subjective case-to-case assignment for the European court. In other words, the balance to be made between these competing interests reveals little on the eventual breadth of the margin of appreciation the Court would grant to Belgium. That is why we will take a look at the European consensus.

**European Consensus**

In cases where the interest-weighing reveals little, the European Court will investigate whether a European consensus on the topic is existing.

One cannot deny the growing existence of a European consensus amongst the Member States in the law and practice, concerning the banning of the burqa in the public space. This European consensus was already discussed in Chapter 3. There was explicated that even though this European Human Rights analysis is focused on the Belgian burqa-ban, Belgium is not the only country introducing a burqa-ban in public.

Apart from Belgium, we have discussed the comparable French burqa-ban that came into force even before the Belgian ban. These two European countries are- as of the day of this writing- the only Member States with an effectively implemented regulation. Next to the low number of real legislation concerning the burqa-ban, some countries such as England and Denmark explicitly disapproved and rejected regulation on that matter.

On the one hand this lack of similar legislation could have as a consequence that the European Court will grant a narrower margin of appreciation to the Belgian State as there is no general consensus on the restriction.

On the other hand it is also likely many European States, such as the Netherlands, will follow the example of Belgium and France soon. Several countries are condemning the veiling practice and considering a general ban on the burqa even though they have not adopted a resolution yet. This highly present public debate could serve as an evidence for a unified and shared 'European

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consensus’ and thus widen the margin of appreciation of the Belgian State accordingly as its restriction is in line with this consensus351.

It should however be remarked that the existence of a European consensus is a evaluating concept and is dependable on the historical, political and societal spirit of its time. Therefore, it could be expected the general consensus on a burqa-ban will be more explicitly present in de future.

4.2.1.3 Conclusion: Belgian burqa-ban violation of Article 9 ECHR?
After a general introduction on the European legal framework and an explanation on the application and interpretation of Article 9 ECHR based on previous Courts case-law, we elaborated on the first question whether the wearing of the full-face Islamic veil is protected under Article 9(1) ECHR. We came to the conclusion that the wearing of the burqa or the niqab, as a 'bona fides' manifestation of the Islamic belief, falls under the scope of protection of Article 9(1)ECHR.

A positive answer on the first question brought us to the second question whether the restriction on the freedom of religion imposed by the Belgian burqa-ban (also the French ban and future bans) is justified according to Article 9(2) ECHR. Therefore we investigated the three conditions as prescribed by Article 9(2) ECHR: a restriction needs to be prescribed by law, has to fulfill a legitimate aim and needs to be necessary in a democratic society. We came to the conclusion that the laid-up restrictions by the Belgian burqa-ban are fulfilling the first condition of being prescribed by law and the second condition of pursuing some legitimate aims. In order to discuss the legitimate aims pursued by the Belgian law, we referred to the motivations distracted from the parliamentary debates as summed up in Chapter 2(2.2.3).

The first aim pursued concerned 'living together’ in a democratic society where communication and openness are values. However the mere fact of ‘asocial behavior’ of an individual in the society will probably not amount to a legitimate aim worthy of placing restrictions, according to the Court's case-law.

The second aim pursued concerned the connection with a fundamentalist Islam that rejects Western liberal and secularist values. However, there is no conclusive evidence for a linkage between the full-face veil and an anti-democratic fundamentalist Islam that constitutes a danger to the public order. Also the proselytizing effect the burqa could constitute as a strong external symbol is probably not amounting to a social pressing need as the contact with in the public

space is of a brief and volatile character. Also here it is more unlikely the European Court would consider this a legitimate aim.

The third aim of public safety pursued had to be split up in a subjective safety and an objective safety. The subjective safety feeling of being confronted with a burqa in the streets does not constitute a pressing social need that asks for legal interferences according to previous case-law of the Court. However, objective safety, even though there is no real evidence put forward by the parliament is recognized by the Court as an important concern of nation-states. For this reason, we concluded objective safety to be seen as a legitimate aim.

The last legitimate aim concerned the promotion of women’s rights, strongly put forward by the parliamentary debates. As the European Court considers gender equality as one of the key principles underlying the Convention, it is very likely the could would consider it to be a legitimate aim.

The two most important and convincing legitimate aims, being the protection of objective public safety and the promotion of women’s rights we further investigated on the third criterion of being necessary in a democratic society. In order to be necessary the means used (Belgian ban) have to be proportionate to these legitimate aims pursued. This means they have to be \textit{pertinent} (suitable), \textit{necessary} (no alternatives) and \textit{proportionate sensu stricto}.

Firstly, we applied the tripartite test on the legitimate aim of objective public order. The legitimate aim of protecting objective public safety is \textit{pertinent} as these women would are identifiable. However, there are existing laws on identification of individuals and a range of alternatives that would not include the complete public realm are imaginable, which means the law is not \textit{necessary}. Also, the law is not \textit{proportional sensu stricto} as it demands a permanent identification in all public accessible spaces to achieve a marginal and speculative improvement of public safety. This means the Belgian ban, in order to pursue objective public safety, lacks proportionality and is thus not necessary in a democratic society.

Second, we applied the tripartite test on the legitimate aim of the protection of women’s rights. Before applying this tripartite test in a correct manner, the distinction between two hypotheses was made: the one of ‘the obedient Muslim housewife’ and the one of the ‘strong devoted Muslima’. The Belgian ban was is to be found not \textit{pertinent}. One the one hand, not for ‘the obedient Muslim housewife’ as it has a result they only more isolated. Simply banning the burqa is just treating a symptom and not the disease. The ban even has a counterproductive effect as it stigmatizes these women in society. On the other hand, the burqa-ban is no \textit{pertinent} measure either for the ‘strong devoted Muslim housewife’, since these women freely choose to wear the
burqa or the niqab. The Belgian ban is also not necessary, as a criminal sanction should be used as an ‘ultimum remedium’ and there are a lot of other measures imaginable to promote the protection of these women's rights. Logically, it follows the Belgian is not proportionate sensu stricto. This means the Belgian ban, in order to pursue the protection of women's rights, lacks proportionality and is thus not necessary in a democratic society.

We can conclude, the Belgian burqa-ban in pursuing both these legitimate aims is characterized by proportionality flaws and thus not necessary in a democratic society. Still, it is possible depending on the margin of appreciation granted by the European Court, the restriction is justified and therefore to be found no violation of Article 9 ECHR.

This margin depends on the interest-weighing and the existence of a European Consensus. The balance between the core convention value of freedom of religion and the protection of public safety and promotion of morals does not really give a clear answer on the breadth of the margin. Also, the European consensus is not predicting a clear answer on the margin of appreciation. The verdict of the European Court in S.A.S v. France will give a definite answer and will offer guidance for all Member States on how to deal with the full-face Islamic veil.
4.2.2 Compatibility with other relevant human rights?

Except for Article 9 ECHR, also the question on compatibility of Belgian burqa-ban with other human rights of the European Convention raises. For the completeness of this disquisition it is necessary to mention the Belgian burqa-ban also forms a restriction on other human rights protected by the European Convention on human rights\(^{352}\).

Firstly, the ban interferes with the right to privacy of an individual as protected under Article 8 ECHR. Second it restricts the freedom of expression as protected under Article 10 ECHR. Last, the burqa-ban is considered to be a discriminative measure according to Article 14 ECHR in combination with Article 9 ECHR. These are, in addition to Article 9 ECHR, also the claimed rights in the pending case of S.A.S v France before the European Court.

That is why we will discuss the compatibility of the burqa-ban with these Articles of the Convention. However, in contrast to the discussion of Article 9 ECHR, we will restrict the discussion to the explanation whether the Belgian ban constitutes a restriction of these rights. The reasoning whether the restriction is justified will not be further commented. The reason for this, is that the analysis made on the justification of the restriction on the freedom of religion according to Article 9(2) ECHR is applicable by analogy on these other human rights (Article 8(2) ECHR, 10(2) ECHR and 14 ECHR in combination with Article 9 ECHR). As we explained into great detail, a restriction (burqa-ban) has to be prescribed by law, has to pursue a legitimate aim and has to be necessary in a democratic society. We have discussed this thoroughly and profoundly in the question on the justification of the restricting ban on Article 9 ECHR, and wish to avoid a repetition of an analogue reasoning\(^{353}\). This review will be thus limited to a general explanation of Article 8, 9, 10 and 14 ECHR and why they are applicable in the case of the burqa-ban.

4.2.2.1 Right to privacy (Article 8 ECHR)?

Next to Article 9 ECHR, also Article 8 of the European Convention is restricted by the Belgian burqa-ban. Article 8 ECHR concerns the ‘right to respect for private and family life’ of an individual. We will explain why the wearing of a garment as the full-face covering Islamic veil is protected under Article 8(1) ECHR.

Article 8 ECHR concerning the ‘right to respect for private and family life’ is also built up according to the classical human rights structure and goes as follows:


1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.  

In the case Kara v. the United Kingdom a British citizen, being a bisexual male transvestite, was insisting on wearing female clothing on the work floor. In this case the European Court is of the opinion that "constraints imposed on a person’s choice of mode of dress constitute an interference with the private life as ensured by Article 8 paragraph one of the Convention". This reasoning of the Court suggests that the choice to wear a certain type of clothing such as the modest burqa or the niqab is falling under the protection of Article 8(1) ECHR. Thomas Hammarberg is of also the opinion that 'a general ban on such attire constitutes an ill-advised invasion of individual privacy'.

4.2.2.2 Freedom of expression (Article 10 ECHR)?

Apart from Articles 8 and 9 ECHR, the Belgian burqa-ban is also a restriction on the right to freedom of expression under Article 10 ECHR. This article reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing

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354 Article 8 European Convention On Human Rights, [http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-431b-b457-5c90149167a0/0/englishanglais.pdf](http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-431b-b457-5c90149167a0/0/englishanglais.pdf)
the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'\textsuperscript{357}

In the case of Kara v. the United Kingdom, the Commission finds that 'the right to freedom of expression may include the right for a person to express his ideas through the way he dresses.'\textsuperscript{358}

The burqa is apart from the manifestation of a religious belief, also protected under the expression of 'opinions' or 'ideas'. The European Court remarks that the wearing of a religious symbol or attire is not only an exercise of the freedom of religion but thus also the right to freedom of expression. This form of expression is a symbolic speech which describes actions that purposefully and discernibly sent out a particular message or statement to those watching it without using spoken or written words (pure speech). A certain type of clothing, the burqa, is thus used to make a statement and protected under Article 10 ECHR. Even when this statement concerns an acceptance of the inferior position of women or an anti-democratic modern society statement. Freedom of expression is 'applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the state or any sector of the population.'\textsuperscript{359}

Therefore the wearing of the burqa is falling under the scope of Article 10(1) ECHR.

Even though we will not discuss the burqa-ban as a restriction under Article 10(2) ECHR, it should be mentioned that a restriction on a symbol is very difficult to justify. The wearing of the burqa be seen as a 'symbol' for a second class citizenship of women expressing inequality of women to men.\textsuperscript{360} In the parliamentary debates some say this is why, apart from both hypotheses of women deciding to wear it or not, this symbol should be forbidden in any case.\textsuperscript{361}

However, only in rare cases when there are symbols closely connected to sensitive historical events, such as genocide or war the European Court recognizes a restriction on the freedom of expression according to 10(2) ECHR. An example is the swastika-symbol that is forbidden to display in Germany. These situations are not comparable to the burqa seen as a symbol of submission of women. In the case of Vajnaj v. Hungary a ban on an individual who was wearing a red star during a demonstration was declared a violation of Article 10 ECHR. The Court explained that this symbol, although closely connected to a soviet history, could have different understandings. This reasoning applied to the burqa-case would make it unlikely the Court.


\textsuperscript{359} ECtHR, Handyside v. United Kingdom, No° 5493/72, 7 December 1976, §49.

\textsuperscript{360} J. VRIELINK, S. OUALD CHAIB, E. BREMS, "Boerkaverbod, Juridische aspecten van lokale en algemene verboden op gezichtsverhulling in België", Nieuw Juridisch Weekblad 2011, afl.244, 407, §44.

\textsuperscript{361} Verslag Commissie, Parl.Stukken nr.53-219/4, 6.
would recognize this as a symbol meeting a ‘pressing social need’. After all, the meaning of the symbol as representing ‘submission of women’ stems from a Western point of view. The women wearing the burqa are not necessarily sending out this message. For most Muslim women, the wearing of the burqa is a religious precept in the first place. And as we previously discussed under Article 9 ECHR it is not up to the European Court or any national body to decide upon the subjective character of a religious precept. Moreover the Court mentions in the case of *Vajnaj v. Hungary* that ‘such sentiments alone however understandable cannot alone set the limits of freedom of expression’\(^{362}\). The possible signal of ‘submission of women’ sent out by the burqa as a symbol does not amount to more than a mere negative sentiment.

4.2.2.3 Discrimination (Article 9 ECHR in combination with Article 14 ECHR)?

Although the Belgian *Law of June 1st 2011 on face-covering clothing* is formulated in a general manner on all face-covering clothing, it is obviously clear from the parliamentary debates that it is targeting Islamic full-face covering veil\(^{363}\). This means that this law might be neutral on the face but in reality a discrimination on the basis of religion is the case.

Article 14 ECHR stands for the principle of non-discrimination. Article 14 ECHR provides that: *(The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or status).*\(^{364}\)

Article 14 of the Convention has no independent existence and therefore works solely in relation to the enjoyment of the rights and freedoms safeguarded in its provision\(^{365}\). Therefore Article 14 ECHR should be seen in relation to Article 9 ECHR: a discrimination of a part of the Muslim community on the ground of religion.

There should be awareness of the fact that it is not necessary for there to be an actual breach of the other Convention provision (Article 9 ECHR) in order to have a breach of Article 14ECHR. Pretend the contrary would restrict the action of Article 14 ECHR to a sole addition of a second violation to the first rather than widen the scope of protection\(^{366}\). As the European court says in the case *Abdulaziz, Cabales and Balkandali v. the United Kingdom* ‘Although the application of Article 14 does not necessarily presuppose a breach of those provisions- and to this extent is

\(^{362}\)ECtHR, *Vajnaj v. Hungary*, No 33629/06, 8 July 2008, §52.


autonomous- there can be no room for its application unless the facts at issue will fall within the ambit of one or more of the latter.'

As discussed before, the facts at issue, being the implementation of a general ban on the full-face covering Islamic veil, fall within the scope of Article 9 ECHR. This means the discriminative character of the Belgian burqa-ban falls within the ambit of Article 9 ECHR. The discriminative character of the Belgian burqa-ban works in both a direct and an indirect manner.

In a direct manner the Law of June 1st 2011 on face-covering clothing is discriminative, as it is very clear from the parliamentary debates that the law only targets the Muslim women wearing the full-face veil. Therefore, it got named the 'burqa-ban'. The Law of June 1st 2011 on face-covering clothing could thus be seen as a direct discriminative regulation. If the law is would be really focused on eliminating all face-covering clothing from the public sphere, it is very obscure that nearly any form of face-covering clothing that is not the religious Islamic veil escapes the field of application through the exception clauses.

Also in an indirect manner the Law of June 1st 2011 on face-covering clothing could be discriminative. This reasoning starts from the point of view that the Belgian law is indeed 'neutral' and implements a general law on all face-covering clothing in public. At first sight this law is generally applicable to every citizen without any distinction and or difference in treatment. It does not mention the burqa or niqab explicitly in the Law. However, this brings us to the 'positive obligations' concerning non-discrimination in the enjoyment of freedom of religion. In the Leyla Sahin v. Turkey case the applicant pointed out that the right not to be discriminated against in the enjoyment of the rights guaranteed by the Convention was also violated when Stated fails to treat differently persons whose situations are significantly different, this by treating them equally. She was of the opinion that Muslim students were in a different position than non-Muslim students and thus had to be treated differently. Therefore she made reference to the case of Thlimmenos v. Greece where the applicant, a Jehovah's Witness, was convicted because he refused to wear a military uniform and serve the army. Later on when he participated examinations to become a Chartered Accountant he was refused on the basis of a general rule that refutes persons with a criminal conviction. In casu the State had failed to make a distinction between criminal convictions on the basis of manifestation of religion and criminal convictions on another basis. The Court pointed out that 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when

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367 ECtHR, Abdulaziz, Cabales and Balkandali v. the United Kingdom, No° 9214/80, 9473/81 and 9474/81, 28 May 1985, §71.
States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."\(^{370}\)

A general ban on the wearing of face-covering clothing clearly encloses the burqa and the niqab with a religious significance to some but not to all. Non-Muslim or modest Muslim believers are not affected by the general ban while some Muslim women are hindered to practice their religion. This creates a situation of different individuals that consequently ask for a different treatment. The Belgian State is thus responsible for a failure to treat differently persons whose situations are significantly different and therefore indirect discrimination - in casu on the base of religion - occurs\(^{371}\). It is even clear that the State not only fails but even has the intention to treat persons whose situation is significantly different the same way.

A second question to be asked is whether this form of discrimination, direct (banning a religious symbol of particular religious group) or indirect difference in treatment (same treatment for different individuals) is justified? The discriminatory treatment is justified if it has an objective and reasonable justification which means if it is prescribed by law, pursues a legitimate aim and is not necessary in a democratic society. This brings us again the reasoning by analogy on the restriction on Article 9 ECHR. However, the facts of the burqa-ban suggest not only that there is a violation of freedom of religion (Article 9 ECHR) but that this violation is also discriminatory in nature and gives rise to a violation of Article 14 ECHR (in conjunction with Article 9 ECHR)\(^{372}\). We can likely conclude both a violation of Article 9 ECHR and a discriminatory treatment.

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\(^{370}\)ECtHR, Thlimmenos v. Greece, No° 34369/97, 6 April 2010, §44.


4.3 General conclusion on compatibility Belgian burqa-ban with ECHR

We can conclude the Belgian burqa-ban (and with it the French burqa-ban and other future bans) from the perspective of European human rights interferes with the right to freedom of religion, the freedom of privacy, the freedom of expression and above all is a discriminative policy. An answer on whether the European Court of Human Rights will judge this state policy to be a justified restriction and whether it grants a wide or narrow margin of appreciation towards the Belgian State is given solely on the basis of assumptions which find their roots in previous relevant Court's case-law. These assumptions according to many human rights watchers would likely turn out to declare the ban not proportional to its legitimate aims and thus not proportional. However, a prediction on the margin of appreciation remains rash and hypothetical.

Belgian burqa-ban: Unreasonable limitation or justifiable restriction?

The main question that we wanted to answer in this Master Thesis was whether the Belgian burqa-ban is an unreasonable limitation on the human rights prescribed by the European Convention or a justifiable restriction.

Therefore, we started by explaining that the requirement for a Muslim woman to wear the full-face covering veil stems from a conservative interpretation of the verses of the Qu’ran which prescribes women to dress modestly. This practice is thus commonly shared through the Muslim community where different types of veiling are seen as fulfilling the Islamic duty. The two types of veiling targeted by the Belgian law are the niqab and the burqa since they cover the face completely.

Before the introduction of the Law of June 1st 2011 on face-covering clothing, there were already some regulations on a local level concerning the full-face covering veil. These local regulations know differences in formulation and content and their impact on the situation of full-face veiled women is differing from municipality to municipality. Then along came the introduction of the Law of June the 1st 2001 on face-covering clothing without requesting preliminary legal advice and empirical research on the matter. As regards its formulation, this Law of June 1st on face-covering clothing constitutes problems of interpretation and of determining the field of application. The main motivations of the Parliament were the connection with a fundamentalist Islam, terms of living together in a democratic society, public safety and the protection and promotion of women’s rights. On the compatibility of the Belgian Ban with the ground rights of the constitution, the Constitutional Court did not take a stand. It declared two cases on the Belgian ban inadmissible for a lack of serious and irretrievable damage.

It is important to place the Belgian burqa-ban in a European context since the burqa-debates are also raging over other European countries. France was the first to introduce its burqa-ban. Other countries such as the Netherlands, Spain and Italy are heavily debating on the issue but until today haven’t taken any general legislative measures. However, Denmark, the United Kingdom and Sweden clearly spoke against the concept of a general ban. The differences in reaction to the burqa in the public space in the European countries could be declared by many factors such as the state-church relationship and the actual empowered politicians. However, the most pertinent question that reoccurs in the different debates is whether a ban in the public realm would constitute an infringement on the human rights of the European Convention.

In order to unravel the main question of this Master Thesis on whether the burqa-ban constitutes a restriction on the human rights of the European Convention and whether this
restriction is justified according to the European Court of Human Rights, we simulated the case of the Belgian burqa ban taken to the European court.

We first came to the conclusion that the wearing of the burqa is protected under the freedom of religion (and also under privacy and freedom of expression). After that conclusion, we checked upon the fulfillment of the three conditions to constitute a justified restriction. The burqa-ban is prescribed by law and definitely fulfills certain legitimate aims. However, the two solidest legitimate aims of objective public safety and the protection of women's rights did not fulfill the third condition of being necessary in a democratic society as they lacked proportionality.

However, depending on the interest-weighing and the existence of a European consensus on the place of the burqa in the European public sphere, the European Court can still grant a wide margin of appreciation and approve of this national legislation. Whether the Belgian ban constitutes an unreasonable limitation or a justifiable restriction is thus up to the European Court to decide.

The fulfillment of the necessity test, concerning the proportionality of the legitimate aim of the protection of women's rights, gave some valuable insights. It made clear that simply making the burqa disappear from the public street view with a repressive sanction could even have a counterproductive effect instead of fulfilling its aims. On the one hand, women who claim to wear the burqa because they are oppressed, would certainly not be helped by a criminal punishment and likely stay even more at home. On the other hand, women who choose to wear the veil (which according to the many recent empirical researches constitutes the vast majority of the cases) should on her own terms come to the conclusion that the burqa is a despicable patriarchal symbol.

Furthermore, the law stigmatizes these women even more and with it also the Islam in general. Especially when taking into consideration the recent trend of Islamophobia that is present in Belgium and the European countries. It is thus very regrettable the Belgian government installed a certain legislative measure.

As a consequence of the above insights, my opinion is that whatever the decision of the European Court will be, one should realize this decision will not solve the underlying problem of growing Islamophobia present in the Western society, of which the decisions by nation states to install a burqa-ban is a mere symptom. Instead of using means of repressive criminal sanctions that have a counterproductive and stigmatizing effect, we have to address these problems of intercultural tension from a broader constructive community view point. The mere use of laws won't create social harmony and won't cure the diseases of an unhealthy community.
This means dialogue and discussion should be stimulated with the Muslim community in order to diminish polarization. Furthermore, reinforcement of civic education should make young Muslim women aware of gender equality and liberal values. Also, the Islamic teachers, imams, Muslim parents, Muslim organizations and individual Muslims that all together shape the Muslim community, should take up their responsibilities. They should encourage adhering to a form of religious manifestation of Islam and the values that come with it, that does not provoke conflict with the embedded norms and values of a liberal democratic society. One could call it a modern ‘European Islam’. It is very easy to hide despicable values of gender inequality behind the pretense of so called individual freedom of religion. Stimulate a modern European form of Islam is the only way to truly liberate the oppressed Muslim women from their patriarchal culture.
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