

Feminist Judgment Project and Intersectionality - Banning of Burkas Case

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Hard Case: Banning of Burkas

- There has been a series of administrative and judicial cases on the wearing of the hijab in educational institutions and workplaces in France, Germany, Switzerland, and Turkey.
- The conflicts over wearing burkas and niqabs in public places have arisen as major political and even constitutional issues in France, Belgium, Italy, Norway, and Switzerland.
- French anti-burka law
- Entrenchment of anti-burka provisions in Swiss Constitution

Four Types of Female Coverings in Muslim Communities :

- Hijab (headscarf tied under the chin),
- Burka (a full-body covering including a mesh over the face),
- Niqab (a full-face veil leaving an opening only for the eyes), and
- Burkini (full body swim suit)

Importance of Freedom of Religion

- *Kokkinakis v. Greece, ECtHR, 1993:*
- “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** [...]. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
- While **religious freedom** is primarily a matter of individual conscience, it also **implies**, inter alia, **freedom to "manifest [one's] religion"**. Bearing witness in words and deeds is bound up with the existence of religious convictions”.

Manifestation of [one's] religion by wearing of distinctive clothing

General Comment No. 22, UNCCPR:

- **“The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group”.**

State's Duty to Secure the Exercise of Religious Freedom

Case of Leyla Sahin v. Turkey [GC], ECtHR, 2005:

- “The Court has frequently emphasised the **State’s role as the neutral and impartial organiser of the exercise of various religions,**” as well as that the “State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess [...] the ways in which those beliefs are exercised”.

ARTICLE 9 ECHR

Freedom of thought, conscience and religion

- 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.**

French Anti-Burka Legislation I

Law no. 2010-1192 of 11 October 2010:

- **Section 1**

“No one may, in public places, wear clothing that is designed to conceal the face.”

- **Section 2**

I. - For the purposes of section 1 hereof, ‘public places’ comprise the public highway and any places open to the public or assigned to a public service.

II. - The prohibition provided for in section 1 hereof shall not apply if the clothing is prescribed or authorised by primary or secondary legislation, if it is justified for health or occupational reasons, or if it is worn in the context of sports, festivities or artistic or traditional events.”

- **Section 3**

“Any breach of the prohibition laid down in section 1 hereof shall be punishable by a fine, at the rate applying to second-class petty offences (*contraventions*) [150 euros maximum].

An obligation to follow a citizenship course, as provided at paragraph 8° of Article 131-16 of the Criminal Code, may be imposed in addition to or instead of the payment of a fine.”

French Anti-Burka Legislation II

Criminal Code:

- **Article 225-4-10**

“Any person **who forces one or more other persons to conceal their face**, by threat, duress, coercion, abuse of authority or of office, on account of their gender, shall be liable to imprisonment for one year and a fine of 30,000 euros.

Where the offence is committed against a minor, such punishment shall be increased to two years’ imprisonment and a fine of 60,000 euros.”

Upholding Decision of the French Constitutional Council, 2010

- “Sections 1 and 2 of the statute referred for review are intended to respond to practices, which until recently were of an exceptional nature, consisting in concealing the face in public places. The legislature was of the view that such practices might be dangerous for **public safety** and fail to comply with **the minimum requirements of life in society**. It also found that those **women who concealed their face**, voluntarily or otherwise, **were placed in a situation of exclusion and inferiority** that was patently incompatible with the constitutional principles of liberty and equality”.

S. A. S. c. France [GC], ECtHR, 2014

- 115. The Court accepts that, in adopting the impugned ban, the legislature sought to address questions of “public safety” within the meaning of the second paragraphs of Articles 8 and 9 of the Convention.
- 118. The Court is not convinced by the Government’s submission in so far as it concerns respect for equality between men and women.
- 119. It does not doubt that gender equality might rightly justify an interference with the exercise of certain rights and freedoms enshrined in the Convention [...]. [...] Thus a State Party which, in the name of gender equality, prohibits anyone from forcing women to conceal their face pursues an aim which corresponds to the “protection of the rights and freedoms of others” within the meaning of the second paragraphs of Articles 8 and 9 of the Convention [...]. The Court takes the view, however, that a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.

S. A. S. c. France [GC], ECtHR, 2014

- 121. The Court finds, by contrast, that under certain conditions the “respect for the minimum requirements of life in society” referred to by the Government – or of “living together”, [...] can be linked to the legitimate aim of the “protection of the rights and freedoms of others”.
- 122. The Court takes into account the respondent State’s point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. That being said, in view of the flexibility of the notion of “living together” and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.

The Legitimate Aim for the Blanket Ban on Wearing a Full-Face Veil

- Equality between men and women?
- To prevent danger for the safety of persons and property and to combat identity fraud?
- Ensuring “living together”, through “the observance of the minimum requirements of life in society”, which is understood to be one facet of the “rights and freedoms of others” ?

A possible way out

- Martha Nussbaum examines different arguments in favour of banning veils and refutes all of them, notably the arguments from security, from transparency and civic friendship, from objectification, coercion and health.
- Mahlmann: a burka denies human dignity, specifically, the right to individual personality by rendering individuality invisible.
- Adaptation of the conscientious objection principles.