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# The *Burqa* Ban: Legal Precursors for Denmark, American Experiences and Experiments, and Philosophical and Critical Examinations

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## I. Dr. Anja Matwijkiw

### Research Director's Introduction: A Joint Research Project

The so-called "*Burqa* Ban" that the Danish Parliament adopted on

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Disclaimer: Each individual author is only responsible for the views expressed in his/her section.

31 May of 2018 constitutes the main incentive for this article, which is based on the contributions of six authors – all of whom have written their individual contribution to a section.<sup>1</sup>

Furthermore, the different perspectives that the authors take supplement and/or complement the contents of another article that is published concurrently but separately in this issue of INTERNATIONAL STUDIES JOURNAL, namely *The 2018 Danish “Burqa Ban”*: *Joining a European Trend and Sending a National Message*.

Very briefly, the joint research project that the six authors are participants in accommodate both factually investigative and reflective aspects and contributions. Their various responses to the reality of the Danish *burqa* ban are comprised of legal analysis and assessment at both the national and international levels, and of critical discussion and (theoretical, practical) commentary of a philosophical nature. The collaborative effort is not limited to the 2018 prohibitive measure (*cf.* law L 219) and the political context for the Danish case. As contributors, the authors endeavor to go beyond these factors to, as it were, see the larger picture, with a specific view to distilling important insights that, in turn, may inspire to further responses.

As policymakers belong among the stakeholders whom the authors hope to inspire with their work, they (the authors) have also contributed directly or indirectly to the formulation of a set of general recommendations, in effect, best practices. In some instances, suggestions from individual authors were “merged” into one recommendation for a particular (response) aspect or area. In total, four general recommendations resulted. The contents of these, which the research director (Dr. Anja Matwijkiw) assumes the responsibility for, cover legal doctrine and jurisprudence, informational accuracy, multi-stakeholder representation, and increased oversight.

## II. Dr. Anna Oriolo:

Unveiling Europe for the Sake of “Living Together”: The Lawfulness of the Ban on Concealing Faces in ECtHR and ECJ Case-Law

On January 2018, an Italian judge expelled a Muslim trainee lawyer wearing a *hijab*<sup>2</sup> from the courtroom at the Regional

1. Note that a special issue on the *burqa ban* is being planned; to be published in ISJ (2019).

2. See <<http://www.bbc.co.uk/newsround/24118241>>.

Administrative Court of Emilia Romagna, in compliance with the Italian Code of Civil Procedure. Indeed, Article 129 foresees that “those who take part in hearings must be bareheaded”.

In Italy, the case has reopened the doctrinal and political debate on the question of balancing the individual right to “manifest” freedom of religion against the more general interests of national security, public order, and secularism; a debate previously fueled in 2009 by the European Court of Human Rights’ *Lautsi* Judgment on the presence of Catholic symbols, such as crucifixes, in Italian public school classrooms.<sup>1</sup>

In recent years, a number of other European States have discussed or disputed this question in relation to the ban on concealing faces in some occupations and situations.<sup>2</sup> Undoubtedly, the veiling of women, especially with the use of full-face veils, such as the *burqa* or *niqab*, reflects a traditional interpretation of Islam. This is often perceived as a threat to women’s dignity, and hence incompatible with democratic standards.

However, a general prohibition on wearing full-face veils would deny women, who freely desire to do so, both the right to respect their private life and personal identity, and the freedom to manifest their religion or belief “in worship, teaching, practice and observance”.

For these reasons, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (ECJ) have been called on to examine whether a national legislation introducing a general ban on wearing clothing that covers the face constitutes an ill-advised invasion of individual privacy or may be justified as necessary in a democratic society, particularly for security purposes or where the public or professional functions of individuals require their religious neutrality or seeing their faces.<sup>3</sup>

In the *S.A.S. v. France* case, for example, the ECtHR held that the ban on wearing a full-face veil in public imposed by the French Law of 11 October 2010 did not constitute a violation of the right to respect private and family life, or the right to respect freedom of thought,

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1. ECtHR, Case of *Lautsi and Others v. Italy*, Application no. 30814/06, Grand Chamber, Judgment, 18 March 2011.

2. Resolution 1743 (2010) and Recommendation 1927 (2010) of the Parliamentary Assembly of the Council of Europe on Islam, Islamism, and Islamophobia in Europe.

3. See Global Justice-Decisions of International Courts And Tribunals, in *Global Community YLLJ* (G. Ziccardi Capaldo, General ed.).

conscience, and religion, or the prohibition of discrimination under the 1950 European Convention of Human Rights. The Court emphasized, in particular, that respect for the conditions of “living together” (*le “vivre ensemble”*) was a legitimate aim of this restrictive measure. It added that even if said ban had specific negative effects on Muslim women, who for religious reasons wished to wear the full-face veil in public, the relevant measure had an objective and reasonable justification, especially as the State had “a wide margin of appreciation” as regards general policy questions on which there were significant differences of opinion. In the Grand Chamber’s view “the voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of living together in French society and that the systematic concealment of the face in public places, contrary to the ideal of fraternity, ... falls short of the minimum requirement of civility that is necessary for social interaction”.<sup>1</sup>

Similarly, in the *Belcacemi and Oussar v. Belgium* and *Dakir v. Belgium* cases,<sup>2</sup> the Court upheld the ban on wearing clothing in public that partly or totally covers the face under the Belgian law of 1 June 2011, ruling that the concern to ensure respect of the minimum guarantees of life in society could be regarded as an element of the “protection of the rights and freedoms of others”. On this interpretation, the ban was justifiable in principle solely to the extent that it sought to guarantee the conditions of “living together”. The Court also stressed that the State had a broad margin of discretion to decide whether and to what extent a restriction on the individuals’ right to manifest their religion or convictions was “necessary”. Hence, it is a matter of protecting a condition of interaction between individuals that the State deemed essential to ensure the functioning of a democratic society. The question of whether the full-face veil is acceptable in the Belgian public sphere was thus “a choice of society”.

In the Court’s opinion, the Belgian *burqa* ban is a measure proportionate to the aim pursued, namely, the preservation of the

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1. ECtHR, Case of *S.A.S. v. France*, Application No. 43835/11, Grand Chamber, Judgment, 1 July 2014, paras. 141-142.

2. ECtHR, Case of *Belcacemi and Oussar v. Belgium*, Application No. 37798/13, Grand Chamber, Judgment, 11 July 2017; Case *Dakir v. Belgium*, Application No. 4619/12, Second Section, Judgment, 11 July 2017.

conditions of “living together” as an element of the protection of the rights and freedoms of others. It therefore held that the contested restriction could be regarded as necessary in a democratic society.

Following the approach taken by the ECtHR and the practice of many national courts and institutions, the ECJ in the *G4S Secure Solutions An*<sup>1</sup> and *Bougnaoui and ADDH*<sup>2</sup> cases ruled that wearing a veil was contrary to the companies’ policy of neutrality in their contact with customers.

More precisely, the ECJ examined whether an internal rule of an undertaking that prohibits the visible wearing of any political, philosophical, or religious sign in the workplace could constitute direct discrimination based on religion or belief within the meaning of the European Union directive on equal treatment in employment and occupation.<sup>3</sup> The Court concluded, in particular, that the prohibition against wearing an Islamic headscarf does not constitute direct discrimination based on religion or belief within the meaning of this directive.

By contrast, such prohibition may constitute indirect discrimination if establishing that the apparently neutral obligation it imposes places those adhering to a particular religion or belief at a particular disadvantage.

However, such indirect discrimination may be objectively justified by a legitimate aim, such as the employer’s pursuit of a policy of political, philosophical, and religious neutrality in its relations with its customers, provided that the means of achieving this aim are appropriate and necessary. It is for the competent national judge to verify these conditions.

In the ECJ’s reasoning, in the absence of such a rule, an employer’s willingness to take account of a customer’s wishes to no longer have the services provided by a worker wearing an Islamic headscarf cannot be considered a determining occupational requirement within the meaning of the directive.

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1. ECJ, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, Case C-157-15, Grand Chamber, Judgment, 14 March 2017.
  2. ECJ, *Asma Bougnaoui, Association de defense des droits de l’homme (ADDH) v. Micropole Univers SA*, Case C-188/15, Grand Chamber, Judgment, 14 March 2017.
  3. EU Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

The recent Danish Law L 219 of 31 May 2018 banning garments that cover the face has paved the way for new applications for alleged violations of individual rights, thus presenting Europe with challenges arising from the need to promote, guarantee, and balance diversity and freedom.<sup>1</sup>

The solution that international jurisprudence proposes is a new model of democratic society based on the criterion of “living together”, namely, a community where the concept of “respect” for the “minimum guarantees of life in society” could be considered an element of the protection of the rights and freedoms of others, and hence the legitimate restriction of certain individual rights.

As regards the ECtHR and ECJ, a possible justification for the prohibition of face concealment would thus be the defense of public order according to an entirely new legal definition not confined to the traditional preservation of tranquility, public health, or safety.

More precisely and in summary, from the jurisprudential practice examined, there would appear to be no substantial legal basis to justify a general ban on the full veil as such. Indeed, the prohibition of the full veil alone cannot be founded on the principle of religious neutrality (given the uncertainty of its religious significance), nor on the principle of human dignity (which by its nature implies the protection of freedom of self-determination as a parallel aspect of the human person),<sup>2</sup> nor on the principle of equality of men and women (which would seem inappropriate in cases where this form of public confinement is voluntary or accepted).

As the French *Conseil d’Etat* observed, in view of the substantial uncertainties around the scope of the legal bases that might be envisaged and the legal risks arising therefrom, together with the risk of stigmatizing persons of the Muslim faith, any ban on the full veil itself must be ruled out, taking into consideration the broader question of the concealment of faces in relation to other garments or accessories<sup>3</sup> (helmets, masks, hoods) aiming to prevent others from seeing one’s face.

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1. Living together. Combining diversity and freedom in 21st-century Europe Report of the Group of Eminent Persons of the Council of Europe, *available at* <<https://www.coe.int/t/dg4/highereducation/2011/KYIV%20WEBSITE/Report%20on%20diversity.pdf>>.
  2. ECtHR, *KA and AD v. Belgium*, Application No. 42758/98, 17 February 2005.
  3. Study of possible legal grounds for banning the full veil, Report adopted by the Plenary General Assembly of the Conseil d’Etat, 25 March 2010.

Therefore, in the view of this author, the recent international case-law on the ban on concealing faces in some occupations and situations has led to providing a legal basis to the “non-substantive” notion of public order as a precondition for social interaction.

This non-substantive dimension mainly concerns public morality, respect for the dignity of the human person, but also something entirely separate with the specific function of representing the “minimum requirement for the reciprocal demands and essential guarantees of life in society”, such as respect for pluralism.

As the French *Conseil d’Etat* also explained, when an individual quite fortuitously comes across another (especially in public spaces), “he may neither renounce his membership of society, nor cause it to be denied by concealing his face from the sight of others to the point of being quite unrecognisable. Moreover the same requirements carry the more general implication that marks of distinction betokening inequality, and recognised as such should be prohibited”.<sup>1</sup>

In this perspective, the systematic concealment of the face contravenes the principle of equal membership of society for all, and could hence be legally banned for the sake of “living together”.

### III . Dr. Willie Mack:

#### The Islamic Veils: American Perspectives

##### Preliminary Remarks

According to the American Constitution, federal and state governments are expected to protect individuals’ rights against interference and to defend the republic’s independence against foreign and domestic threats.<sup>2</sup> As a result of the oath to “support and defend”

1. *Id.*

2. Note that the U.S. Supreme Court in *Everson v. Board of Education* 330 U.S. 1 (1947) interpreted First Amendment religious protections as applicable to the states *via* the Fourteenth Amendment, thereby broadening the scope of enforcement. See JOHN T NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT* 1100 (3d ed., 2011); National Archives, *The Constitution of the United States* [hereinafter U.S. Constitution], available at <<https://www.archives.gov/founding-docs/constitution-transcript>> (for examples of rights of individuals, *inter alia*, to life, liberty, and the pursuit of happiness against interference from other individuals and the government itself *per* the Bill of Rights (the first ten amendments to the U.S. Constitution). Note also that the U.S. republic is defined as a nation-state, in which the supreme power is held by the people→

the U.S. Constitution against *all enemies* under Article VI, there is a tension between these two sets of protections.<sup>1</sup> Ostensibly, each nation – like each state in the U.S. – protects that particular individual as well as the public as it sees fit. Accordingly, European governments have banned or placed restrictions on wearing the *burqa* in public spaces. Likewise, American governments have claimed the right to demand that women remove their *burqas* and other veils, but only in selected public spaces. In response to these (allegedly) protective actions, this section will examine (a) different perceptions of the *burqa* within the community at the national level; (b) potential intentions of the Muslim full-face veil wearers; (c) *burqa*-wearing interventions by governmental agencies; and (d) a brief summary of existing rulings on the practice by the courts. One of the outcomes of this examination is to determine whether the interpretations of protections of individual rights for *burqa*-wearers as interpreted by the U.S. Supreme Court (USSC) are better than the interpretations of individual rights as interpreted by the European Court of Human Rights (ECtHR).

### The *Burqa*: Different Stakeholder Perceptions

Although the American public may not be ready to ban the *burqa*,<sup>2</sup> certain other stakeholders are ready for such a restrictive measure for various reasons. For example, Jason Spencer, a Republican state lawmaker in Georgia first introduced, in 2017, and then withdrew an amendment to an existing anti-masking law, that would have banned Muslim women from wearing full-face veils in public. He claimed

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←and which has elected representatives and a chief executive (a president) who are responsible to them and who govern according to the law. Its *e pluribus unum* assumption entails multi-ethnicity. In turn, the so-called “melting pot” phenomenon or, as it is now referred to, the “(patchwork) quilt”, generates a commitment to respect different races and different religions. See Itabari Njeri, *Beyond the Melting Pot*, Los Angeles Times, 13 January 1991, available at <[http://articles.latimes.com/1991-01-13/news/vw-1\\_1\\_melting-pot](http://articles.latimes.com/1991-01-13/news/vw-1_1_melting-pot)>.

1. U.S. Constitution, *supra* note 15 [author’s emphasis].
2. Pew Research Center’s Global Attitudes Project, Widespread Support for Banning Full Islamic Veil in Western Europe: Most American Disapprove, 2010 [hereinafter Pew Research Center’s Global Attitudes Project], available at <<http://www.pewglobal.org/2010/07/08/widespread-support-for-banning-full-islamic-veil-in-western-europe>> (for “Sixty-five percent of Americans say they would oppose a *burqa* ban”). Note that a similar project has not been published since 2010.



that although the bill would have “withstood legal scrutiny, it would not have withstood political scrutiny”.<sup>1</sup>

His amendment was introduced within the context of President Donald J. Trump’s campaign promises to restrict Muslims from entering the United States.<sup>2</sup> Furthermore, a divided Supreme Court (5-4) upheld the President’s actualized immigration travel ban against persons originating from predominantly Muslim countries as a legitimate exercise of executive branch authority.<sup>3</sup> In an openly non-neutral response, USSC Justice Sotomayor dissented orally (and indeed rarely) in court for about 20 minutes. Extensively quoting Trump’s promises during and after the 2016 campaign, she also submitted the following opinion:

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1. Lindsey Bever, *After outcry, Georgia lawmaker abandons bill that would have banned Muslims from wearing veils*, The Washington Post, 8 November 2016, available at <[https://www.washingtonpost.com/news/acts-of-faith/wp/2016/11/18/after-outcry-georgia-lawmaker-abandons-bill-that-would-have-banned-muslims-from-wearing-veils/?utm\\_term=.88d1eed6bb2f](https://www.washingtonpost.com/news/acts-of-faith/wp/2016/11/18/after-outcry-georgia-lawmaker-abandons-bill-that-would-have-banned-muslims-from-wearing-veils/?utm_term=.88d1eed6bb2f)>.

The current law in Georgia reads: “A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so”. The proposed amendment would have added the word “she” and various exceptions.

Historically, “Most anti-mask laws were passed... in response to the Ku Klux Klan, whose members used masks to hide their identities as they terrorized their victims... Some 15 [of 50 states] states have anti-masks laws... Supporters of such laws argue that wearing masks embolden people to commit crimes and makes those crimes more frightening to the victims. Opponents argue that (a) anti-masking laws impair freedom of association; (b) masks constitute symbolic speech; and (c) anti-masking laws violate the equal-protection clause of the Fourteenth Amendment because they make exceptions for Halloween masks, masquerade ball masks, and masks worn for medical reasons, but not masks for political acts”. See Robert A Kahn, *Anti-mask Laws*, The First Amendment Encyclopedia, available at <<https://mtsu.edu/first-amendment/article/1169/anti-mask-laws>>.

2. Until we are able to determine and understand this problem (the hatred) and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe in Jihad, and have no sense of reason or respect for human life. See Jeremy Diamond, *Donald Trump: Ban all Muslim travel to U.S.*, CNN, 8 December 2015, available at <<https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html>>.
3. Richard Wolf, *Supreme Court upholds President Trump’s travel ban against majority-Muslim countries*, USA Today, 26 June 2018 available at <<https://www.usatoday.com/story/news/politics/2018/06/26/supreme-court-upholds-president-trump-immigration-travel-ban/701110002>>; USSC, *Trump v. Hawaii* 585 U.S. \_ (2018).

[W]hat began as a policy explicitly calling for a total and complete shutdown of Muslims entering the United States has since morphed into a 'proclamation' putatively based on national-security concerns... But this new window dressing cannot conceal an unassailable fact: the words of the president and his advisers create the strong perception that the proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.<sup>1</sup>

In response to these political and judicial developments, the American public recognizes the complexity of the face veil issue, including its wide range of different symbolisms – from sectarian to secular, from victim to victimizer, from fashion to fanaticism. Some viewpoints are held tenaciously; others are not. Today, observers and commentators may advocate humanism and heterogeneity; tomorrow, they may advocate cultural uniformity. Certainly, together with a media context of negative imagery and reported attacks by extremist Muslims, the restrictive actions of the President and the authorizing rulings of the Supreme Court appear to have contributed to varying American levels of intolerance for Muslim garb in general and for the *burqa* in particular. Based on a sizable minority (35 percent) of the American population in favor of a (complete) *burqa* ban,<sup>2</sup> at least four underlying reasons can be hypothesized:

1. The *burqa* is perceived as a religious symbol divisive to American unity.
2. The *burqa* is assumed to be a political and threatening symbol (*cf.* political Islam).
3. The *burqa* is opposed as an item of personal choice.
4. The *burqa* is regarded as a cause of safety concerns (*cf.* criminal justice safeguards).

Interestingly enough, the *burqa* as a subcultural phenomenon presents itself as an analogy to the hoodie in America. What is more, it seems to have suffered the same fate as this article of clothing. More precisely, a transition from a more neutral to a judgmental response has occurred, one that can be explained in the following way:

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1. *Ibidem.*

2. Pew Research Center's Global Attitudes Project, *supra* note 17.

Before the [Trayvon Martin] incident (2012), there was a cultural understanding that the African-American male wore hoodies as a way to be under the radar, to be ambiguous, but not because of any malicious intent, not because he was up to no good. Because of the pervasive and trenchant racial stereotypes associated with black young people, especially males, their styles are often singled out for criticism, as signs of criminality and misdeeds.<sup>1</sup>

Trayvon Martin was killed by a civilian neighborhood watcher, who inferred a suspicion merely because of the hoodie he was wearing. Imani Perry of Princeton University's Center for African American Studies clarified the hidden premise thusly:

But in truth this is simply another form of stigmatization against the person underneath the clothing, and only superficially has anything to do with the clothing.<sup>2</sup>

If negative perceptions of the *burqa* and their wearers are interpreted as threatening (by analogy to African-American males), the victims of the unfounded (and, *eo ipso*, unfair) perceptions also are at risk of becoming the victims of media headlines like the one reported in 2018, "Muslim Women Wearing Hijabs Assaulted Just Hours After Trump Win".<sup>3</sup>

Similarly, after the September 11, 2001 attack on the World Trade Center in New York, the Islamic face veil became the target of verbal abuse and criticism. In this instance, however, the victimization of the innocent was preceded by actual crimes perpetrated by others, *i.e.*, fellow Muslims.

### **The Question of Intentions: The Muslim Veil Wearers**

Assuming the correctness of the rationale for public viewpoints (*cf.*

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1. Emanuella Grinberg, *Hoodie's evolution from fashion mainstay to symbol of injustice*, CNN, 27 March 2012, available at <<https://www.cnn.com/2012/03/27/living/history-hoodie-trayvon-martin/index.html>>.

2. *Ibidem*.

3. Amanda Sakuma, *Muslim Women Wearing Hijabs Assaulted Just Hours After Trump Win*, NBC News, 10 November 2016, available at <<https://www.nbcnews.com/politics/2016-election/muslim-women-wearing-hijabs-assaulted-just-hours-after-trump-win-n681936>>.

1-4 in the previous paragraph), the question is how these viewpoints relate to the intentions of the Muslim veil wearers, if at all.

When viewpoints of the non-wearing public do not correspond to the intentions of the wearers, the government, representing *burqa*-wearers and non-wearers, must attend impartially to the needs of both groups. Despite the shifting waves of public opinion, the religious rights of women, as persons, are anchored in the First Amendment of the U.S. Constitution (whereby “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”). With certain exceptions (*Davis v. Beason* (1890)), the tendency is to allow the free exercise and expressions of religions.<sup>1</sup> However, one might ask whether *intentions* of the female wearers or the perceived symbolism of *burqa*-wearing matter to the USSC?

To begin to answer, a woman’s choice of veil (partial *versus* full-face and -body) depends upon her religious interpretation of a modesty provision.<sup>2</sup> Because “Islamic garments may be religious, political, or personal signifiers”, the choice to wear a certain type of veil can be motivated by any combination of those three reasons.

Distinct from religious intentions, some *burqa*-wearers may choose to wear it as a symbol of political Islam. Correspondingly, some non-wearers may embrace and view it as part of a trend of expressing one’s political outlook. They have seen feminists, racial supremacists,<sup>3</sup> social justice advocates – protestors of all sorts – wear clothing that

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1. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with *practices*. [Author’s emphasis].

See USSC, *Raynolds v. United States*, 98 U.S. 145 (1879), available at <<http://www.pewforum.org/2007/10/24/a-delicate-balance2>>; USSC, *Davis v. Beason*, 133 U.S. 333 (1890), available at <<https://www.supremecourt.gov>>.

2. Some Muslim women interpret their duty to be modest as the duty to “draw their veils” over their hair only and not over their hands or eyes; and thus, these women would dress modestly by wearing headscarves. Other Muslim women include their face, their hands, and their eyes as part of their beauty. These women wear *burqas* to cover these parts as well. Yet other Muslim women read no obligation to wear religious garb into the 24:31 provision of the Quran. They argue that the absence of a mandate means that women are free to choose for themselves. Muslim scholars have offered equally divergent views regarding the meaning of “modesty”. The interpretation of the provision is “relative to the culture in which Muslims find themselves”. See Shaira Nanwani, *The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?* 25 EMORY INTERNATIONAL LAW 1431 (2011), available at <<http://law.emory.edu/eilr/content/volume-25/issue-3/comments/burqa-ban-limitation-religious-freedom-restriction.html>>.

3. *Supra* note 18 (for the Ku Klux Klan as an example).

express conformity, on one hand, and rebellion on the other. *E.g.*, they have seen celebrities wear black at the 75<sup>th</sup> Golden Globe Award ceremony. Accordingly, various Americans may view the wearing of the veil as an expression that blocks harmony or as a symbol of gender inequality and female oppression, or as an expression of extremism and fanaticism.

Regardless of the varying viewpoints of the American public, the Court's interpretation of the First Amendment protection goes beyond "pure speech" – books, newspapers, leaflets, and rallies. It also protects "symbolic speech" – nonverbal expression the purpose of which is to communicate ideas. In its 1969 decision in *Tinker v. Des Moines*, the USSC recognized the right of public school students to wear black armbands in protest of the Vietnam War. In 1969, in *Brandenburg v. Ohio*, the Court established a new standard, *viz.*, that speech can be suppressed on condition that it is intended, and likely to produce, "imminent lawless action".<sup>1</sup> Otherwise, even speech that advocates violence is protected. The *Brandenburg* standard prevails today. In summary, whether the *burqa*-wearer expresses a political viewpoint, makes some Americans feel uncomfortable, expresses extremism, or advocates violence; *if and only if* its wearing is *intended and likely* to produce *imminent lawless action*, can it be restricted legally by the government.

Apart from the *burqa*'s multiple symbolisms (to others) and apart from any religious or political intentions, if the wearer chooses to wear it freely, then it expresses a purely personal choice or taste. Yet, there is no evidence that the American government has assessed how many women wear the *burqa* because of external pressure *versus* personal choice. In this regard, Amnesty International submitted a statement to the 55<sup>th</sup> Session of the United Nations Commission on the Status of Women:

Under international human rights law everyone has the rights to freedom of expression... The way people dress can be an important expression of their... personal identity or beliefs. Governments have an obligation to respect, protect and ensure every individual's right to

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1. USSC, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) [hereinafter *Brandenburg v. Ohio*], available at <<https://www.supremecourt.gov>>.

express their beliefs or personal convictions or identity. They must create an environment in which every person can make that choice free of coercion.<sup>1</sup>

The Supreme Court has made clear the weight that it gives to international law:

It is agreed that the Universal Declaration of Human Rights [UDHR] was not viewed as imposing legal obligations on states at the time of its adoption by the General Assembly in 1948.<sup>2</sup>

Furthermore, in *Sosa v. Alvarez-Machain* (2004), the USSC also stated:

Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing... These reasons argue for great caution in adapting the law of nations to private rights... And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.<sup>3</sup>

Generally, under national law, whether a person wears Islamic garments for religious or political reasons, she is protected by the First

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1. Amnesty International, *Women's right to choose their dress, free of coercion*, 2011, available at [https://www.amnesty.nl/content/uploads/2017/02/womens\\_right\\_to\\_dress\\_boerkaverbod\\_3.pdf?x17739](https://www.amnesty.nl/content/uploads/2017/02/womens_right_to_dress_boerkaverbod_3.pdf?x17739).
  2. Hurst Hannum *The UDHR in National and International Law*, 3/2 HEALTH AND HUMAN RIGHTS 145, 147 (2014), available at <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2014/04/16-Hannum.pdf>.  
Hannum adds: "The vast majority of the world's population has no direct domestic or international redress for violations of human rights recognized under international conventions". See *id.*, at 153.
  3. USSC, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), available at <https://www.supremecourt.gov>.

Amendment to the Constitution or Title VII of the Civil Rights Act of 1964.<sup>1</sup> However, Title VII requires employers to accommodate<sup>2</sup> only those religious beliefs that are “sincerely held”. If the wearing of the veil is due to pure choice or convenience, although Article 19 of the UDHR would protect it, the American Constitutional protections may or may not be applicable in non-school or non-private corporate settings.<sup>3</sup> The Supreme Court has made numerous rulings in school and business settings. For example, considering the potential impact of religious garbs in school settings, during the early 1900s, most of the American states had emphasized that the wearing of the headscarf in public schools had the potential to influence young minds

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1. Therefore, whether or not a religious belief is “sincerely held” by an applicant or employee is only relevant to religious accommodation, *not* to claims of disparate treatment or harassment because of religion. In those claims, it is the motivation of the discriminating official, not the actual beliefs of the individual alleging discrimination, that are typically relevant in determining if the discrimination that occurred was because of religion. In general, employers are required by federal law to make exceptions to their usual rules or preferences to permit applicants and employees to observe religious dress and grooming practices. *See* U.S. EEOC, Compliance Manual, Section 12: Religious Discrimination, 22 July 2008, *available at* [https://www.eeoc.gov/policy/docs/religion.html#\\_Toc203359488](https://www.eeoc.gov/policy/docs/religion.html#_Toc203359488); Religious Garb and Grooming in the Workplace; Rights and Responsibilities [hereinafter Rights and Responsibilities], *available at* [https://www.eeoc.gov/eeoc/publications/qa\\_religious\\_garb\\_grooming.cfm](https://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm).
  2. To clarify the meaning of accommodation, the U.S. Equal Employment Opportunity Commission (EEOC) has posted the following on its website:  
A private company may adopt a policy barring any headgear... the employer should consider requests to wear religious headgear on a case-by-case basis to determine whether the identified risks exist in that situation and pose an undue hardship. Relevant facts may include the individual's job, the garb at issue, and the available accommodations. For example, if an individual's religious headgear is or can be worn in a manner that does not inhibit visual identification of the employee, and if temporary removal may be accomplished for security screen[ings] and to address smuggling concerns without undue hardship, the individual can be accommodated.  
*See* U.S. EEOC, Rights and Responsibilities, *supra* note 33, at [https://www.eeoc.gov/eeoc/publications/qa\\_religious\\_garb\\_grooming.cfm](https://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm).
  3. Sample speech limitations include no yelling “Fire!” in a crowded theater, *see* USSC, *Schenk v. United States*, 249 U.S. 47 (1919), *available at* <https://www.supremecourt.gov>; no “fighting words”, *cf.* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), USSC, *ibidem*; no “obscene and appeal to a prurient interest”, *cf.* *Miller v. California*, 413 U.S. 15 (1973), USSC, *ibidem*.  
In addition, there are numerous nudity, decency and school-setting restrictions on the right to wear clothing.

considerably.<sup>1</sup> However currently, only three of the fifty states still ban teachers' religious clothing: Oregon, Pennsylvania, and Nebraska.

To explain more of the complexity of the Court's interpretative process, the distinction between so-called strict and loose constructionists play an important role. In terms of constitutional interpretation, strict constructionists base their approach on the text alone and, therefore, if a right is not written in the Constitution, then it does not exist. Loose constructionists, on the other hand, holds that legal interpretation requires applying knowledge from outside the Constitution's text, such as history, scientific findings, and political circumstances. In this vein, they appeal to the Ninth Amendment, which reads:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

In *Griswold v. Connecticut* (1965), the Court stated, in accordance with loose constructionism:

Though the Constitution does not explicitly protect a general right to privacy, the various guarantees within the Bill of Rights create penumbras, or zones, that establish a right to privacy. Together, the First, Third, Fourth, and Ninth Amendments, create a new constitutional right, the right to privacy in marriage...<sup>2</sup>

Based on *Griswold*, it can be argued that under the Ninth, Fourth,

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1. Virgil C. Blum, *Religious Liberty and the Religious Garb* 22 U. CHIC. L. REV. 875 (1995), available at <<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2885&context=uclev>> ; Caitlin S. Kerr, *Teachers' Religious Garb as an Instrument for Globalization in Education*, 18/1 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 539 (2011) available at <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1453&context=ijgls>> Note that the Supreme Court of Pennsylvania (1894) rejected the contention that the wearing of religious dress in public schools was equivalent to sectarian teaching, and that North Dakota (1936) and Indiana (1940) followed suit as opposed to states which denied teachers the right to wear religious garb, *inter alia*, Missouri (1953), New York (1906), Iowa (1918), New Mexico (1951), Oregon (1923), and Nebraska (1919).
  2. USSC, *Griswold v. Connecticut*, 381 U.S. 479 (1965), available at <<https://www.supremecourt.gov>>.



and First Amendment, another aspect of a *privacy* right could be established. Invoking ethics, additional individual rights may be substantiated and supported, alongside those specifically mentioned in the first eight Constitutional amendments, which should be protected against interference;<sup>1</sup> namely, that females (should) have the right to wear the *burqa* based on a freedom of privacy and of personal expression. As a result, the wearer would be “secure in her person” and be able to express her personal conviction freely. She would be protected against any unwarranted interference. If the *burqa* becomes a true threat, the government will have to defend against it and ban its wearing. The balancing of the reasons of any proposed government ban *versus* the reasons of the individual wearer will be determined by the lower courts initially and finally by the USSC.

Many Americans may perceive full-face veils as a threat to safety. Even so, in *Virginia v. Black* (2003), the Supreme Court distinguished between “threats” and “true threats”:<sup>2</sup>

The First Amendment permits a State to ban “true threats”... which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to an individual or group or individuals... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur.<sup>3</sup>

According to this ruling, unless the wearer *intends* to harm an individual or group or to terrorize them, the mere wearing of a veil will not run afoul of the First Amendment. Even if Americans see the *burqa* as a threat, it may or may not constitute a “true threat”, which would be prohibited.

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1. Anja Matwijkiw & Willie Mack, *Making Sense of the Right to Truth in Educational Ethics: Toward a Theory and Practice that Protect the Fundamental Interests of Adolescent Students*, 2 INTERCULTURAL HUMAN RIGHTS LAW REVIEW 355 (2007).
  2. USSC, *Virginia v. Black*, 538 U.S. 343 (2003) [hereinafter *Virginia v. Black*], available at <<https://supreme.justia.com/cases/federal/us/538/343/case.html>>.
  3. *Ibidem*.

Courts have restricted obscenity and threats against a person's life or body. They have reasoned that morality and social order outweigh unbridled free expression. On issues pertaining to locations outside of schools or of work, it is not known where courts would draw the line that bans Muslim garbs worn for purely personal reasons. For example, if contested, it is not known whether the Court would favor "social harmony" over any "right to privacy".

### **Interventions to *Burqa*-Wearing by Governmental Agencies**

The different impact of different intentions has not been clearly delineated by the USSC, as shown in the previous paragraph.

However, various real-world cases illustrate that when governments do not accommodate in reasonable ways, a negative impact for all stakeholders can be observed, even for wearing a veil or scarf that does not qualify as a full-face covering (*burqa*).

For example, a Muslim woman whose religious practice required that she cover her head in public sued the Orange County Sheriff's Department in California, alleging that her rights were violated when jail officials forced her to remove her headscarf while locked up for about eight hours. The woman in question, Ms. Souhair Khatib, claimed "extreme mental and emotional distress". Although not all Muslims interpret the Quran as mandating the practice, she maintained that headscarves, more precisely, a *hijab*, must be worn in public. Crying, she had managed to convince the deputies to allow her to wear it until she passed the men's cells. In the jail cell, she had removed her headscarf, but replaced it with a vest she had been wearing. She was ordered to take the vest off her head. Experiencing "severe discomfort", "distress", and "humiliation", Ms. Khatib attempted to cover herself by pulling her knees into her chest, as a last resort. She remained in the jail for processing without her *hijab* and in full view of male inmates and deputies. Despite repeated requests, she was not allowed to wear her *hijab* until she was released from the building.<sup>1</sup> As a result, a total of \$85,000 in damages and assorted costs

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1. Anita L. Allen, *Veiled Women in the American Courtroom: Is the Nijab a Barrier to Justice?*, in THE RULE OF LAW AND THE RULE OF GOD (Simeon O. Ilesanmi *et al.*, eds., 2014), available at <[https://scholarship.law.upenn.edu/faculty\\_scholarship/1618](https://scholarship.law.upenn.edu/faculty_scholarship/1618)>; 9th Cir., Souhair Khatib v. County of Orange, No. 08-56423 (2010) [hereinafter Souhair Khatib v. →

were awarded to Ms. Khatib and the law enforcement officers were ordered to undergo relevant training.

Another example is that of an incident in which the city of Long Beach, California, had agreed to pay \$85,000 to settle a federal lawsuit filed by a Muslim woman whose *hijab* was pulled off by a male officer while she was in police custody. She had been detained twenty-four hours without her *hijab*. She cried throughout the entire ordeal and experienced humiliation when she felt that her religious beliefs and personal integrity had been violated.<sup>1</sup>

Together, these two examples suffice to demonstrate that when governments thwart religious intentions and violate religious expressions pertaining to headscarfs, this can have serious legal and financial consequences in the U.S.

In contrast to the protection of personal rights of individuals (*i.e.*, veil wearers), the government also protects the public (*i.e.*, veil wearers and non-wearers), *cf.* *Davis v. Beason* (1890).<sup>2</sup> Whether the federal or any state government has a right to demand that women remove their veils, including their *burqas*, in all public spaces is a debated issue. Despite that, the government has already decided that in courtroom situations, based on security issues, parole violators can be required to remove head coverings.<sup>3</sup> A California court overturned the

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← County of Orange], available at

<<http://cdn.ca9.uscourts.gov/datastore/opinions/2011/03/15/08-56423.pdf>>; Gabriel San Roman, *Local Muslim Woman Wins Hijab Settlement With OC Sheriff's Department*, 14 February 2013, available at <<https://www.ocweekly.com/local-muslim-woman-wins-hijab-settlement-with-oc-sheriffs-department-6455336>>.

1. Veronica Rocha, *Muslim woman awarded \$85,000 after her hijab was forcibly removed by Long Beach police officer*, Los Angeles Times, 10 August 2017, available at <<http://www.latimes.com/local/lanow/la-me-ln-muslim-woman-hijab-removed-settlement-20170810-story.html>>.

2. It was never intended that the First Article of Amendment to the Constitution, that 'Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof,' should be a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society...

See USSC, *Davis v. Beason*, 133 U.S. 333 (1890), available at

<<https://supreme.justia.com/cases/federal/us/538/343/case.html>>.

3. *Souhair Khatib v. County of Orange*, *supra* note 41; *Allen*, *supra* note 41.

Note that the Supreme Court of Michigan has adopted a rule that provides: "The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder, and (2) to ensure the accurate identification of such person..." See Evidence ProfBlogger, *What Not to Wear, Religious Edition: Supreme Court of Michigan Adopts Rule Allowing*→

government practice; while the Michigan Supreme Court upheld it. However, while in police custody with reasonable accommodations, Muslim women may be allowed to wear their headscarves.<sup>1</sup> In general, depending on which state a headscarf-wearer is located, she may face dissimilar legal consequences.

### Concluding Remarks

In the main, government can limit protected speech by imposing “time, place and manner” restrictions. It cannot punish speech (symbolic or expressive) that advocates violence or violation of the law unless that speech (a) is directed at inciting or producing imminent lawless action and (b) is likely to produce such action. The USSC reasoned that mere advocacy (protected speech) differs from inciting people to commit violence immediately (not-protected speech).<sup>2</sup> In addition, the government cannot punish offensive expression utilized to excite individuals and which is committed as an act of political expression (protected speech), but it can prohibit speech that is intended to intimidate (not-protected speech).<sup>3</sup> Because the Supreme Court has not ruled on *burqa* bans, the current legal consequences for wearers may be inconsistent.

Irrespective of this, some legal experts conclude that:

A law, like the one adopted in France, banning the hijab for students in schools would most likely be considered unconstitutional in the United States.<sup>4</sup>

The conclusion, so it should be emphasized, can also be extended to the new Danish law, namely, law L 219 whereby full-face veils like

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←Judges to Exercise “Reasonable Control over the appearance of Parties and Witnesses”  
Based on *Niqab Case*, 18 June 2009, available at  
<<http://lawprofessors.typepad.com/evidenceprof/2009/06/michigan-611httpwwwgooglecomhostednewsaparticlealeqm5gljakuaz1okb1ordgalldjo93luwd98sm7a81httpcourtsmichigangov.html>>.

1. San Roman, *supra* note 41.
2. *Brandenburg v. Ohio*, *supra* note 29.
3. *Virginia v. Black*, *supra* note 39.
4. Jennifer M. Westerfield, *Behind the Veil: An American Legal Perspective on the European Headscarf Debate*, 54 AM. J. COMP. L., 637, 661-62 (2006).

the *burqa* and the *niqab* are now banned. As long as the Supreme Court adheres to a loose constructionist interpretation of the U.S. Constitution, thereby accommodating the political circumstances, it is more likely than not that a ban will *not* be upheld.

The precarious nature of this state of affairs is, of course, obvious. This is particularly true in the light of the fact that whereas religious and political reasons for veil-wearing are protected by the First Amendment of the U.S. Constitution and Title VII of the Civil Rights Act of 1964, these same protections may be jeopardized by, *inter alia*, an employer who questions the sincerity of the employee's religious belief or practice, in effect, for *his/her own* personal reasons. If so, rights-violations are likely to occur. Furthermore, the scope of protection for personal reasons has not yet been determined by the Court, and the absence of defined limits cannot but make "rights" to *burqa*-wearing precarious. Although the Ninth Amendment of the Constitution arguably protects personal choices of privacy and, with this, veil choices, legal outcomes may or may not support rights. – Nothing can be more precarious than that.

However, *burqa*-wearers still have more protections in America than in Europe where the ECtHR is downplaying those norms of the European Convention of Human Rights that Muslim women depend upon – to protect interests that amount to perceived threats on behalf of the government.

Yet, this conclusion in no way overlooks President Trump's recent immigration travel ban against persons originating from predominantly Muslim countries. His so-called America First policy is as protectionist as Europe's restrictive policies. As a result, banning people from war-related zones indicates a lack of respect for refugees and human rights law. Even so, echoing the *Tinker* case,<sup>1</sup> foreigners do not shed their inalienable human dignity or freedom of expression at the nation's border.

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1. USSC, *Tinker v. Des Moines* 393 U.S. 503 (1969), available at <<https://supreme.justia.com/cases/federal/us/393/503/case.html>>.

#### **IV Dr. Erik Baldwin:**

### **A Critique of the Reasoning in Favor of a General Ban on Muslim Women from Wearing the *Burqa***

#### **Introduction**

In this section, I consider existent legal justification in support of the ban on Muslim women from wearing the *burqa*. Focusing on legal cases in the European Union (EU) and the United States, I argue that it is sometimes permissible to restrict freedom of speech and religious liberty. Granting that the *burqa* ban may be in principle justifiable, I argue that the actual line of reasoning provided by the European Court of Human Rights (ECtHR) is too strong and subject to counterexamples. Wearing the *burqa* is not necessarily contrary to the values of “living together”. Moreover, even if it is, because pluralistic democracies value liberty, Muslim women should be free to wear the *burqa*. If Muslim women are banned from wearing the *burqa* because doing so is fundamentally contrary to “living together”, then, so I argue, it follows that the government should act to coerce people with so-called “anti-social” tendencies to fraternize with others or face punishment or sanctions. Since the latter policy is clearly absurd, Muslim woman should be free to wear the *burqa* in public.

#### **Argument**

The European Convention of Human Rights (ECHR) recognizes the right to respect for private and family life. Under Article 8, it holds that:

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.

The ECHR also recognizes, *cf.* Article 9, freedom of thought, conscience and religion:

1. [T]his 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.<sup>1</sup>

Muslim women consider wearing the *hijab* to be fundamental to their religious practice and to their identity. Rajnaara Akhtar writes:

The Hijab is more than a piece of cloth that covers the hair, neck and chest of a woman, it is an act of worship in response to the Qur'anic commandant that a woman should cover herself in this way so that she can be recognized as a Muslim woman and be protected as such.<sup>2</sup>

“For Muslim women”, so Akhtar concludes, wearing the Hijab, is an act of worship”.<sup>3</sup> This line of reasoning would apply equally to wearing the *burqa*.

Similarly, Rabiha Hannan reports that most Muslim women in Britain choose to cover up as an act of worship. Most of the Muslim women questioned in a focus group study,

... felt their style of dress was overwhelmingly based on what they believed God had asked of them. For many it was... an increased religiosity and spiritual awareness ... that triggered a desire to practice Islam more meticulously and let to them covering themselves ... Their understanding of the dress requirements was

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1. Council of Europe, European Convention on Human Rights, *available at* < [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)>.

2. SAIED R. AMELI & ARZU MERALI, HIJAB, MEANING, IDENTITY, OTHERIZATION AND POLITICS: BRITISH MUSLIM WOMEN 64 (2006).

3. *Ibidem*.

clearly based on what they believed to be Islamic directives in the Qur'an.<sup>1</sup>

She also reports what women choose to cover up for protection from unwanted sexual advances and as a way of asserting their Muslim identity.<sup>2</sup>

Given that wearing the *hijab* and the *burqa* are recognized as acts of worship by Muslims, it would seem that Articles 8 and 9 of the ECHR rather straightforwardly suggest that Muslim women would be free to wear them in private and in public. At first glance, it is difficult to see how it could be that wearing the *hijab* and the *burqa* could be necessary to secure the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others. However, in several cases, including *S.A.S. v. France* (2014), *Belcacemi and Oussar v. Belgium* (2017), and *Dakir v. Belgium* (2017), the ECtHR ruled that banning women from wearing full-face veils, such as the *niqab* and the *burqa*, was legal. Briefly, while the ECtHR recognized that Muslim women have a general right to practice their religion, it upheld the full-face veil ban on grounds that doing so is “necessary in a democratic society” in order to protect “the rights and freedoms of others” and to guarantee the conditions of “living together”.<sup>3</sup>

Specifically, while recognizing that Article 9 on religious freedom implies that Muslim women are free to manifest their religion in public, including worship practices, the ECtHR concluded that Article 9 does not “always guarantee the right to behave in the public sphere in a manner which is dictated by one’s religious beliefs”.<sup>4</sup> The ECtHR argued that given the pluralistic nature of a democratic society, “it may be necessary to place limitations on freedom to manifest one’s

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1. Rabiha Hannan, *An Exploration of the Debates Pertaining to Head Covering and Face Veiling of Women in the British Muslim Context*, in *ISLAM AND THE VEIL: THEORETICAL AND REGIONAL CONTEXTS* 91 (Theodore Gabriel & Rabiha Hannan eds., 2011).

2. *Id.*, at 92-94.

3. James Crisp, *Belgian ban on Muslim full-face veil is legal*, *European Court of Human Rights rules*, The Telegraph, 11 July 2017, available at <<https://www.telegraph.co.uk/news/2017/07/11/belgian-ban-full-face-veil-legal-european-court-human-rights/>>.

4. ECtHR, Case of *S.A.S. v. France*, Application No. 43835/11, Grand Chamber, Judgment, 1 July 2014, para. 125.



religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected".<sup>1</sup>

Before getting into the details of the ECtHR's line of reasoning and considering its merits, it would be helpful to, first, consider a few less controversial cases in order to see how certain limitations on rights could be legally justifiable and appropriate.

Various courts have ruled that freedom of expression is not absolute or without limitation. For example, following the legal opinion of United States Supreme Court Justice Oliver Wendell Holmes on *Schenck v. United States* (1919), certain limitations on the First Amendment right of free speech have been recognized as appropriate. The First Amendment to the United States Constitution reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>2</sup>

In his opinion on *Schenck v. United States* (1919), Justice Holmes argued that even, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic".<sup>3</sup> Because falsely shouting "Fire!" in a crowded theater creates "a clear and present danger", the Supreme Court ruled that laws to curb and prevent such speech are not in conflict with the First Amendment but are appropriate on account of the "clear and present danger" and obvious harms that such unfettered speech would bring about.<sup>4</sup>

Along similar lines, many countries in the EU have laws against hateful, libelous, and defamatory speech. For instance, Article 10 of the ECHR reads:

1. Everyone has the right to freedom of expression. This right shall

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1. *Id.*, at para. 126.

2. National Archives, The Constitution of the United States, available at <<https://www.archives.gov/founding-docs/constitution-transcript>> (for Amendment 1).

3. USSC, *Schenck v. United States* 249 U.S. 47 (1919), available at <<https://www.supremecourt.gov>>.

4. *Ibidem*.

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 prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

For the reasons listed in Article 10 section 2 of the ECHR, “hate speech” has been outlawed in many parts of the EU.<sup>1</sup> For example, Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires all signatories to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”.<sup>2</sup> And Article 20 of the International Covenant on Civil and Political Rights (ICCPR) states, “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.<sup>3</sup>

While hate speech laws have not gone unchallenged, it is not hard to see how placing some limitations on freedom of expression and speech would be justified for the sake of the public good. Thus, reflection on *The Crowded Theater Case* goes to show that the right of freedom of expression is not absolute but subject to legal regulation.

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1. See Council of Europe, *Media, Defamation and Freedom of Expression: A Study of the case law of the ECHR*, 2016, available at <<https://book.coe.int/eur/en/human-rights-and-democracy/7072-freedom-of-expression-and-defamation.html>>.
  2. U.N. General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res. 2106 (XX) (Dec. 21, 1965), art. 4(a), available at <<https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>>.
  3. U.N. General Assembly, *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI) (Dec. 16, 1966), art. 20.

Reflection on other cases suggests that the right to practice one's faith is not absolute either. Consider a case in which a 14-year-old boy is in dire need of a blood transfusion. The child wants to get the transfusion. His parents, being Jehovah's Witnesses, are opposed to the practice for religious reasons and prevent him from receiving one.<sup>1</sup> Arguably, the boy's parents have a right to make decisions for the well-being of their children regarding matters of faith and practice, and it is generally recognized that parents have the right to raise their children in accord with their own religious beliefs and commitments, and freedom to practice religion is among those goods that contribute to overall well-being.

Regarding this sort of case, Mark Sheldon has argued the following: Given that the child and his parents disagree about what is ultimately in the child's best interests, and given that the state is not in a position to adjudicate the veracity of the parent's claim that abstaining from blood transfusions is in the child's best interests, the state's responsibility is to ensure that people who make decisions about such matters are competent.<sup>2</sup> He notes that people generally accept that parents know what is in the best interests of their children. Because of the significance of the family as a moral institution, its integrity should be maintained and, therefore, the state should be cautious about interfering.<sup>3</sup> On the other hand, Sheldon notes that what is fundamentally at issue here is whether the child is both sufficiently mature and competent to make his own decisions. Specifically, even though the boy is still a minor, it very well may be the case that he is both sufficiently mature and competent to have his own conception of what is conducive to his overall well-being. As such, he would seem to have the right to disagree with his parents about the specific nature of the good for him, particularly when the perceived religious good of

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1. Jehovah's Witnesses don't accept blood transfusions for religious reasons. The Watch Tower Bible and Tract Society of Pennsylvania provide the following justification for their view: Both the Old and New Testaments clearly command us to abstain from blood. (Genesis 9:4; Leviticus 17:10; Deuteronomy 12:23; Acts 15:28, 29) Also, God views blood as representing life. (Leviticus 17:14) So we avoid taking blood not only in obedience to God but also out of respect for him as the Giver of life.

See <<https://www.jw.org/en/jehovahs-witnesses/faq/jehovahs-witnesses-why-no-blood-transfusions>>.

2. Mark Sheldon, *Ethical issues in the forced transfusion of Jehovah's Witness children*, 14(2) JOURNAL OF EMERGENCY MEDICINE 251, 256-257 (1996).

3. *Id.* at 256.

complying with the prohibition on receiving blood transfusions conflicts with the well-documented health benefits of receiving blood transfusions. He might assert that he is an autonomous moral agent and as such has the moral right to receive the blood transfusion and thus choose against his religious good as it is perceived by his parents.<sup>1</sup> This line of reasoning assumes that using ethics as a criterion for lawfulness is appropriate at the national and international level.<sup>2</sup> For these reasons, might a court be morally justified to rule in favor of the boy, effectively overruling and outweighing the legitimate but non-absolute right of parents to make choices about the spiritual wellbeing of their children?

Reflection on The Crowded Theater and The Contested Blood Transfusion cases suggests that perhaps a ban on full-face veils in public places *may* be morally permissible for considerations having to do with substantive justice (*cf.* harm or autonomy). At the very least, reflection on these cases goes to show that the moral and/or legal right that Muslim women have to worship in public by wearing the *burqa* is not absolute and as such is subject to regulation and may even be overruled. Note that laws against yelling “Fire!” in a crowded theater don’t place general limitations on freedom of expression. Similarly, one might argue that while the law prohibits them from wearing the *burqa*, Muslim women are still allowed to manifest their religious beliefs by engaging in various practices and observances in public. For instance, there is no general ban against eating *halal* meat or congregating at the local mosque on Fridays.

However, is banning Muslim women from wearing full-face veils actually justifiable for the reasons cited by the ECtHR? Recall that the ECtHR argued that the full-face veil ban is “necessary” in order to protect “the rights and freedoms of others” so as to guarantee the conditions of “living together”. Recall the justification given: “[I]t may be necessary to place limitations on freedom to manifest one’s religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected”. Essentially,

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1. *See generally id.*

2. For a defense of this view, see Anja Matwijkiw & Bronik Matwijkiw, *The Unapologetic Integration of Ethics: Stakeholder Realignment in the light of Global Law and Shared Governance Doctrine. – Distilling the Essence of Giuliana Ziccardi Capaldo’s Jurisprudential Paradigm-Shift*, 15 GLOBAL COMMUNITY YILJ 885 (2016).

this justification amounts to the claim that since many people living in Denmark and the EU are not Muslims, having various other religious beliefs, or indeed no religious beliefs at all, for Muslim women should wear the *burqa* in public would be contrary to many of these people's interests and beliefs. One underlying assumption appears to be that the fact that non-Muslims may or will be made uncomfortable or offended by seeing women wearing the *burqa* in public is sufficient grounds for banning Muslim women from doing so. Notably, the ECtHR has ruled that other public demonstrations of faith may be banned on the basis of similar lines of reasoning. *E.g.*, *Kurtulmuş v. Turkey* banned the wearing of religious symbols in State schools.

Essentially agreeing with a 2010 ruling by the French *Conseil d'État* "on the possible legal grounds for banning the full veil", the ECtHR ruled that wearing the *burqa* is inconsistent with the fundamental requirements of "living together". Citing the fundamental French values of liberty, equality, and fraternity, the *Conseil d'État* argued:

The voluntary and systematic concealment of the face is problematic because it is simply incompatible with the fundamental requirements of 'living together' in French Society... The systematic concealment of the face in public places, contrary to the ideal of fraternity, also falls short of the minimum requirement of civility that is necessary for social interaction... Lastly, in the case of the full veil [*burqa*], worn only by women, this breach of dignity of the person goes hand in hand with the public manifestation of conspicuous denial of equality between men and women, through which that breach is constituted.<sup>1</sup>

Summed up, the argument goes like this: The values of liberty, equality, and fraternity are essential to "living together" in a pluralistic and democratic society. Wearing the *burqa* is fundamentally inconsistent with "living together". Thus, in order to guarantee the conditions of "living together", banning wearing the *burqa* is legally justifiable.

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1. ECtHR, *supra* note 56, at para. 25.

## Response – Liberal Democracy at Stake

Is this line of argument plausible? One problem with this argument is that *if it is successful*, it would seem to require too much. For instance, in modern society, it's possible for one to get on without much social interaction. One can shop online, work online, and carry on without "living together". Some people enjoy solitude, or have anti-social tendencies, or simply prefer to withdraw from society to some degree or other. According to the line of reasoning offered by the *Conseil d'État* and endorsed by the ECtHR, it would seem to follow that these "anti-social" activities should be discouraged and perhaps even be subject to sanction or punishment. This result is, naturally, absurd. People in a liberal democracy should be allowed to choose to carry on in life without being forced to "live together" with others. Governments should not constrain or coerce "anti-social" people to carry on with others, *etc.* Likewise, it stands to reason that *even if* wearing the *burqa* is contrary to the value of fraternity, governments should be cautious indeed to ban women from wearing them by appealing to the value "living together". On a related note, a truly pluralistic society will allow its citizens some measure of leeway to unpack their own substantive notions of what liberty, equality, and fraternity amount to. Might not there be uniquely Islamic notions of the values? And might it be the case that there is a core region of agreement between traditional French, Danish, *et al.*, understanding of these values? For instance, Muslim women who wear the *burqa* do so not in isolation, but in communities. Isn't there fraternity, then, between Muslims all of whom wear the veil? Must French fraternity require that all people wear the same clothes and engage in the same kinds of practices? The answer, of course, is no. So why couldn't there be room for Muslims to value fraternity but express it differently in a pluralistic society such as France? Is it truly impossible for Muslim women who wear the veil to also be French?

Perhaps the underlying motivation for the ban is that those who want to wear the *burqa* do so because they have non-Western political and religious values and attitudes that threaten Western society and political institutions in some way. For instance, wearing the *burqa* in public may be seen as indicative of Islamization. Emile Nakhleh characterizes Islamization as a process or a sense of growing

awareness among Muslims of the dominance of their Muslim identity over other identities and the realization of the ways in Islam provides Muslims with a comprehensive world view that impacts their daily lives and serves as a guide to their social and political activism.<sup>1</sup> Some see Islamization as a fundamental threat to Western Civilization, and it is often associated with jihadism<sup>2</sup>, which is widely recognized as a transnational threat to democratic institutions within the EU.<sup>3</sup> Islamization is also associated with the implementation of *sharia* councils in the United Kingdom, which some see as a threat to the rule of law, despite the fact that these councils deal only with divorce and family law, finance, and certain business matters, and have no legal statues, no legal binding authority under civil law, and no legal jurisdiction in England and Wales.<sup>4</sup> Islamization, radicalization, and violent *jihad* are all legitimate concerns. The problem, however, is whether there is a strong connection between two relatively independent kinds of actions: namely, cases in which a woman chooses to wear the *burqa* as an act of worship and cases in which a woman chooses to wear the *burqa* for motives that are in line with Islamization, radicalism, or jihadism. Such cases can overlap; for instance, a woman might choose to wear the *burqa* as an act of worship *and* for motives that are in line with Islamization, radicalism, or jihadism. But it would be incorrect and unfair to suppose that all Muslim women who wear the *burqa* in public endorse Islamization, radicalism, or jihadism. At any rate, one should not fallaciously conflate a Danish or French Muslim woman's exercising her religious freedom to worship by wearing the *burqa* in public with her performing an act that is in line with Islamization, radicalism, and/or jihadism. While perhaps, at least in principle, a liberal democracy could be morally justified in banning people from engaging in certain religious practices in

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1. EMILE NAKHLEH, A NECESSARY ENGAGEMENT: REINVENTING AMERICA'S RELATIONS WITH THE MUSLIM WORLD 4 (2008).
  2. E.g., see TONY BLANKLEY, THE WEST'S LAST CHANCE: WILL WE WIN THE CLASH OF CIVILIZATIONS? (2006).
  3. See Ministry of the Interior and Kingdom Relations, *From dawa to jihad: The various threats from radical Islam to the democratic legal order*, March 30, 2005, available at <<https://english.aivd.nl/publications/publications/2005/03/30/from-dawa-to-jihad>>.
  4. The Home Office, *The independent review into the application of sharia law in England and Wales*, February 2018, at 4, (Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty), available at <[www.gov.uk/government/publications](http://www.gov.uk/government/publications)>.

public spaces, the ECtHR has not in fact shown this to be the case with respect to its decision to uphold a *general* ban on Muslim women from wearing the *burqa* in public.

### V. Dr. Ryan Long:

#### Religion and the Democratic Public Sphere

A democratic ideal is that all citizens have equal standing, and show each other equal respect, in the public sphere. The public sphere should be structured to empower the full, free, and equal participation of all citizens.<sup>1</sup> Some arguments for the ban rely on an alleged incompatibility between full-face veils and full participation in the democratic public sphere. These worries come in at least two forms. The first is that being covered physically impedes or prevents full, open participation in the public sphere. The second is that full-face veils express or symbolize something incompatible with democratic values.

The first form of the argument assumes that seeing each other's faces and bodies is essential to full participation in the public sphere. This is then taken as a reason to ban full-face veils. The face is "the foundation for recognition", according to the parliamentary report that provided the justification for Danish law L 219.<sup>2</sup> Unveiled interaction in the public sphere makes it possible to "read signals and feelings", thereby giving rise to a more complete comprehension (in comparison to verbal dialogue with a veiled individual).<sup>3</sup>

Martha Nussbaum argues against this form of argument by giving counterexamples.<sup>4</sup> She discusses the ways various professionals (dentists, American football players, skiers) cover their faces, and how residents of frigid climates often completely cover their faces. She argues that none of this precludes the "transparency and reciprocity" required for full participation in the public sphere. However, one can

1. Elizabeth S. Anderson, *What Is the Point of Equality?* 109/2 ETHICS 287-337 (1999).

2. Ministry of Justice, Forslag (og Bemærkninger) til Lov om Ændring af Straffeloven (Tildækningsforbud) [Proposal (and Commentaries) for Amendment of the Penal Law (Cover Ban)], 11 April 2018, j.nr. 2017-0090-0233, p. 2, available at <<http://www.ft.dk/da/search?msf=&q=tild%C3%A6kningsforbud&as=1>>.

3. *Id.*

4. Martha Nussbaum, *Veiled threats?* New York Times, 11 July 2010, available at <<https://opinionator.blogs.nytimes.com/2010/07/11/veiled-threats/?mtrref=www.google.dk&gwh=ACFCEF4712AA5E279E14D6E8C7F590D2&gwt=pay&assetType=opinion>>.



object that these examples are not analogous to the veil. These examples are for particular purposes and are only worn for a subset of one's time in the public sphere. The full-face veil can be used to demarcate the public and private spheres. If it is always worn in public, it seems meaningfully different from her examples. Nussbaum is correct that completely covered persons in cold climates interact without loss of transparency and reciprocity, and that we can meaningfully interact with professionals who have their faces covered. The question then becomes whether *always* having one's face covered in the public sphere poses a problem for transparency and reciprocity. This question leads into the second form of the public sphere worry – that the full-face veil expresses or symbolizes something antidemocratic.

This expressivist worry itself takes several forms. The first is that the full-face veil is worn because of patriarchal coercion and is therefore a symbol of the subjugation of women. Suppose that is true. It does not obviously follow that a ban furthers the values of the democratic public sphere. There could still be some women who wear the full-face veil autonomously. If so, the ban would violate their freedom of expression and/or religion. The ban would also express a condemnation of these women's choices. Second, as Nussbaum argues, many sartorial choices are the product of coercion or oppressive social norms, so without further argument about the expressive content of the veil there is not an adequate reason to single it out while *not banning* many other things. Also, if the real problem is coercion, it would seem the proper ban would be on coercing women to wear the veil, not on wearing the veil itself. A law criminalizing such coercion would support the values of the democratic public sphere. A ban on the veil instead attempts to defend the democratic public sphere via a constraint on liberty. It also is unclear how those who are thought to be coercing women to wear the veil would respond to the ban. Would they engage in further abuse, or prevent these already coerced women from participating in the public sphere at all?

The second form of the expressivist worry is that never revealing one's face in public is incompatible with equal standing and participation in the public sphere. So if the veil is something that one will always wear in the public sphere, this expresses a refusal to fully engage with one's fellow citizens. In the debate on the Danish law,

Preben Bang Henriksen (Venstre (V)) stated that “It is important in our society that we can meet face to face in a trustworthy relationship, a trust that is essentially based on the ability to read facial expressions”.<sup>1</sup> Surely the ability to read facial expressions can augment transparency, reciprocity, and trust, but it is not clear that it is essential. That requires further argument. If one can still communicate in the public sphere, perhaps adequate transparency, reciprocity, and trust are possible.

The third form of the worry is that the full-face veil expresses some form of antidemocratic worldview, either religious, traditional, and/or political. The veil is thought to be worn by those who want to construct a parallel society, who reject gender equality, or have other forms of antidemocratic values. (There are, of course, also nationalist and ethnocentric versions of the symbolic worry.) Bang Henriksen stressed integration as a reason in favor of the Danish *burqa* ban. He believes that this would hinder the creation of a parallel society.

Suppose those who argue that the veil expresses anti-democratic values are correct. The unanswered question is why this particular form of antidemocratic expression should be banned. In most democracies one has the liberty to wear clothing with antidemocratic slogans, to wave antidemocratic flags, *etc.* Exceptions to this typically require special circumstances or some type of emergency. Nussbaum discusses Turkey’s ban of veiling as a response to unveiled women being abused in the public sphere. Germany has stronger restrictions on expression than most democracies for historical reasons. Yet in general, one is free to wear or display anti-democratic symbols, statements, and flags in the democratic public sphere. If the full-face

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1. Folketinget [National Parliament], 1. Behandling af Lovforslag nr. L 219: Forslag til Lov om Ændring af Straffeloven (Tildækningsforbud) [1. Reading of L 219: Proposal for Amendment of the Penal Law (Cover Ban)], 19 April 2018 (as presented by Danish Minister of Justice on 4 April, 2017), *available at* <<http://www.ft.dk/samling/20171/lovforslag/l219/beh1/forhandling.htm#speak0>>; National Parliament, Preben Bang Henriksen, *available at* <[https://www.ft.dk/da/medlemmer/folketingetsmedlemmer/preben-bang-henriksen-\(v\)](https://www.ft.dk/da/medlemmer/folketingetsmedlemmer/preben-bang-henriksen-(v))>. Note that V is a Danish political party with historical roots in the emancipation and equality of the peasantry and a millennium vision of a “Future in freedom and community” where the latter entails a policy of increased European integration. Concerning freedom, the program of V prescribes that “the human thrives best in freedom [and] under [individual] responsibility. Freedom means the absence of coercion...” See Venstre, *available at* <<https://www.venstre.dk/>>; <<https://www.venstre.dk/partiet/skoleweb/liberal-politik>>.

veil is essentially tied up with oppression and gender inequality, then that can be countered in the public sphere through discourse and by striving for equality of opportunity for women.

It is not clear that a constraint on liberty is necessary to answer this alleged challenge to the democratic public sphere. When such constraints lack adequate justification, or are inconsistent with the treatment of similar conduct, or are not the response to a genuine emergency, they can allow fear or animus or authoritarian impulses to restrict freedoms. Even if the objections that the veil physically prevents open interaction or expresses anti-democratic values are compelling, we lack convincing evidence that this justifies a ban.

## VI. Dr. Bronik Matwijkiw:

### The Emperor's New Clothes: Denmark and *Burqa*-Wearing Women

Part of the reasoning behind the so-called *burqa* ban appears to depend on the Danish MPs *cum* legislators' misunderstood view of Islam as a religion. In particular, this seems to be the case when they announce that their intention is to curtail and combat what they describe as "political Islam".<sup>1</sup>

Political Islam supposedly captures the following meanings and situations, namely that some Muslims plan to commit violent acts of terrorism and/or try to undermine Western institutions. The latter is conceptualized in terms of a "rejection of Danish values".<sup>2</sup> However,

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1. In a 2010 CNN interview, MP Naser Khader (Conservative People's Party (K)) stated that the "the burqa and niqab have no place in Western Europe" and that the relevant dress code is an integral part of political Islam. Furthermore, MP Martin Henriksen (Danish People's Party (DK)) insisted that "Islam is not just a religion, it is also an ideological and social-political movement". Finally, the Danish Minister of Justice Søren Pape Poulsen (K) declared the *burqa* "incompatible" with the values of the Danish society. See Tom Evans, *Burqa becomes focus of tense debate in Europe*, CNN, 3 February 2010 available at <<http://edition.cnn.com/2010/WORLD/europe/02/03/europe.burqa/index.html>>; Ritzau, *Khader: Danskerne er imod politisk Islam*, Berlingske, 3 February 2010, available at <<https://www.b.dk/politiko/khader-danskerne-er-imod-politisk-islam>>; Danish Ministry of Justice, *Tildækningsforbud skal øge respect for fællesskabet og bekæmpe parallelsamfund*, 6 February 2018, available at <<http://www.justitsministeriet.dk/nyt-og-presse/pressemeddelelser/2018/tildækningsforbud-skal-øge-respekt-fællesskabet-og-bekæmpe>>.

2. Danish Ministry of Justice, Forslag (og Bemærkninger) til Lov om Ændring af→

it is absurd to suggest that a woman who wears a *burqa* signals or indicates (simply by virtue of wearing the relevant full-face veil) that she may be involved in a future (9/11 style) attack. It is likely that the said woman is skeptical or critical towards various Western institutions and their underpinning values, but this response does *not* introduce a sharp and significant distinction between her and Danish citizens who are in partial or total disagreement with the political system in Denmark. To assume otherwise is erroneous and, concerning *burqa*-wearers, serious stereotyping.

In the Muslim part of the world, there are different views of the relationship between religion and politics, regardless of women's dress code. Admittedly, the founder of Islam, Muhammad (571-632 AD), was both a prophet and a reformer, both a religious leader and an administrator, both a politician and a military leader. This does not mean that a Muslim country does not or cannot separate religious authority and political control, (*cf.* policy and law). Certainly, Turkey is one example of a secular state, founded on the state (politics) *versus* religion idea or, stronger still, ideal.<sup>1</sup> The Islamic state that enforces *shari'ah* integrates (as opposed to separates) the two areas, although experts argue that Islamic tradition and Islamic principles historically support the "non-Islamic" state phenomenon.<sup>2</sup> Thus, law based on civic reasons and, more generally, human rights constitute the *burqa*-wearers' stakes in the Danish controversy.

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←Straffeloven (Tildækningsforbud) [Proposal (and Commentaries) for Amendment of the Penal Law (Cover Ban)], 11 April 2018, 2, *available at* <<http://www.ft.dk/da/search?msf=&q=tild%C3%A6kningsforbud&as=1>>.

1. Turkey declines to sponsor any state religion (unlike Denmark which has not disestablished the Lutheran Church of Denmark), in compliance with the Constitution of 1928. The list of countries that recognize Islam as their official religion encompasses states with Sunni Islam (*e.g.*, Somalia and Pakistan) and Shi'a Islam (*e.g.*, Iran). These do not separate religion and state politics. Examples of other countries that, according to researchers, "favor Islam" without naming it as their official religion, are Sudan and Syria. *See* Sarah Eekhoff Zykstra, *Pew: Islamic Is Most Official But Christianity Is Most Favored Worldwide*, CT, 3 October 2017, *available at* <<https://www.christianitytoday.com/news/2017/october/pew-islam-most-official-state-religion-christianity-favored.html>>.

France is listed as a country that officially endorses a separation of church and state while introducing a (new) "category" that strictly blurs the separation with restrictions on religious practices, such as the ban on face coverings in public. *See id*; Humeyra Pamuk, *Turkey lifts generations-old ban on Islamic head scarf*, Reuters, 8 October 2013, *available at* <<https://www.reuters.com/article/us-turkey-headscarf-ban-idUSBRE99708720131008>>.

2. ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'AH (2010).

As it happens, the Danish MPs *cum* legislators' sweeping generalizations may be pragmatically effective to the extent that the *burqa* is politicized in the wake of these.<sup>1</sup> Upon reflection, the strategy also helps to raise a key question: Why do Danish legislators more or less tacitly emphasize (Danish) nationality when they refer to ideas that characterize liberal democracy, such as transparency and openness? Instead of describing the *burqa*-wearers' rejection of the ideas, as they perceive them, the Danish legislators describe the wearing of the *burqa per se* as a rejection of Danish values, thereby interjecting their own automatic "logic" on behalf of the people they represent. In other words, they suggest that all or most Danes share the same values and, by extension, all or most Danes are also assumed to consent to a particular interpretation of particular garments.

Furthermore, it follows that, if the wearers of particular garments do not agree with values that are described as Danish, they cannot join or come to belong to the Danish people. Since the Danish MPs *cum* legislators believe that it is *not* Danish to wear the *burqa*, the female wearers have to be stripped of it, in effect, to speed up the socialization process that they, *i.e.*, the Danish legislators also perceive as an "integration" into the mainstream society.<sup>2</sup>

At the *meta*-level of analysis, it is possible to ascertain that value incompatibility, according to Danish value politics, points to "proper form" – the idea that this must and, *mutatis mutandis*, should be made the criterion for appropriateness (*cf.* formalism) as The Supreme Danish Value.<sup>3</sup> Very briefly, formalism issues non-negotiable prescriptions applicable to, *inter alia*, one's appearance, communication, interaction, and even for one's thoughts and beliefs. The emphasis on proper form over substance has the immediate effect of rendering rational argument irrelevant, just as the resulting "Law of

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1. *Supra* note 79.

2. Part of the Danish government's reasoning consists in the belief that law L 219 will "promote and facilitate social interaction and coexistence, which is crucial in society, because it contributes to letting people in Denmark meet one another in a proper way – with trust and respect, face to face". See Danish Ministry of Justice, Draft – Proposal for Penal Law (Cover Ban), available at <[http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2018/lovforslag\\_tildaekningsforbud.pdf](http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2018/lovforslag_tildaekningsforbud.pdf)>.

3. AKSEL SANDEMOSE, A FUGITIVE CROSSES HIS TRACKS I-II, I-30, I-197 77 (4th ed., 1968) (1933) [Eng. transl.1936].

Jante” operates on the basis of aversions towards deviance from and non-conformity with the norms (read: Danish values) and, in the final analysis, the culturally underlying “millimeter-democracy” that translates equality into sameness.<sup>1</sup> By extension, the concept of the Danish people implies that individuals in “the public space” (should) look and behave in a uniform way while, at the same time, being allowed to wear the *burqa* behind closed doors and drawn curtains.

Interestingly enough, the private-public distinction has historically worked against the liberation of women and their rights, especially in the opinion of feminists; and in 2018 women are, once again, at a serious risk of being relegated to the home sphere – a reactionary outcome that feminists link with a gender-specific and patriarchic, if not, misogynistic response. However, if Muslim women are not “just like the Danish women”, then that *is* the problem. The hope, so it seems, is that differences can be made invisible (by law-making) as long as they, *i.e.*, the Danish MPs *cum* legislators describe them as a rejection of Danish values.

In turn, such a game-changer functions to cement the “status” of asylum-seekers, refugees and immigrants in general who are not recognized as real Danes, but, at the most, as Danes with a different ethnic background. The prominent Danish politician Bertel Haarder once said at a meeting in Copenhagen that Denmark “is a tribe – not a country”.<sup>2</sup> At the point in time, Haarder saw this as a problem in the light of the efforts of the European Union to create a community of shared values across borders, to insert the Social Cohesion Glue between the Member States. Today, seventeen years after the interview, a growing number of people want the borders closed because of the refugee crisis in Europe. The *burqa* ban, law L 219, is a symbol of the “awakening” of the Danish people, *i.e.*, the nationalist feelings that threaten (to undermine) international cooperation.

Undoubtedly, talk about “Danish values” and, more generally, “the Danish people” also refer to a commitment to Denmark’s protestant

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1. On Sandemose’s premises, the Danish millimeter-democracy functions like a ruler that measures and then cuts everybody down to the same size, meaning that people who try to “rise above” the average and typical (*cum* proper form) of being and co-existing are met with retaliatory measures, in particular, non-recognition and exclusion from the group. *See id.*, I-111.

2. Staff Writer, *Danmark er en stamme – ikke et land*, DR, 21 January 2002, available at <<https://www.dr.dk/nyheder/indland/danmark-er-en-stamme-ikke-et-land>>.

version of Christianity. In other words, the *burqa* represents a “rejection” of this commitment. Although Danes often see themselves as atheists, they nevertheless conform to certain protestant rituals or ceremonies at special occasions, such as weddings, funerals or, for that matter, the so-called “confirmation” (ritual) of their faith. From a religious perspective, their way of life reflects “bad faith” – an attempt to believe and behave *as if* they are Christians when, in fact, they are not.<sup>1</sup> The Danish philosopher Søren Kierkegaard even accuses the Danes of hypocrisy because they tend to make Christianity an outward as opposed to an inner spiritual experience that sincerely commits them to God.<sup>2</sup> The German philosopher Ludwig Feuerbach addresses a similar factor. Furthermore, in Feuerbach’s discussion of religion, the emphasis is on Christianity and not Islam or other religions. Like Kierkegaard, Feuerbach takes a Western perspective. However, and contrary to Kierkegaard, Feuerbach adopts a materialist approach to the issue of religion.<sup>3</sup> For the same reason, Feuerbach focuses attention on what the concept of God means in a social context, how religion develops historically and, with this, on comprehension (rather than hypocrisy). For example, people pray to God because they want God the omniscient and omnipotent to intervene in a situation that they (believe they) cannot handle or change themselves. Feuerbach’s point is that *not* God, but our own species possesses the knowledge and power needed to accomplish things we cannot even dream of doing individually. Hence, the concept of God represents humanity in an alienated form. The implied comprehension problem and failure emerges because humanity is just an idea, something abstract. In the real world, we do not see “humanity” but only “countless, separate,

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1. On Sandemose’s premises, bad faith is an integral part of formalism. See SANDEMOSE, *supra* note 85, at 62; Jesper B. Pedersen, *Forsker: Danmark er verdens mindst religiøse land*, Århus Stiftstidende, 29 July 2013, available at <<https://stiften.dk/aarhus/Forsker-Danmark-er-verdens-mindst-religioese-land/artikel/167025>> (for Denmark as “the least religious country in the world”); Carsten H. Nielsen, *Præst: Kulturkristne danskere vil være kristne og ateister på same tid*, Kristendom.dk, 6 March 2014, <available at <https://www.kristendom.dk/kommentaren/pr%C3%A6st-kulturkristne-danskere-vil-v%C3%A6re-kristne-og-ateister-p%C3%A5-samme-tid>> (for “Danish cultural Christians” as non-religious Protestants).
  2. See generally SØREN KIERKEGAARD, ØIEBLIKKET 1-10 [THE MOMENT in English] (1964) (1855)
  3. LUDWIG A. FEUERBACH, DAS WESEN DES CHRISTENTUMS (1841), cited in DANIEL BRUDNEY, MARX’S ATTEMPT TO LEAVE PHILOSOPHY (1998) [hereinafter BRUDNEY].

limited individuals”.<sup>1</sup> Notwithstanding, Feuerbach insists that religion will disappear once people understand the anthropomorphic qualities and properties of God and, equipped with this comprehension, come to realize that God is a projection, more precisely, a reflection of our self-consciousness. Although perhaps a paradox, people still pray to God – instead of drawing the consequence of their life form *cum* potential liberation and empowerment (through an epistemological analogy to Maslow’s self-recognition and -realization).

Assuming that the women who wear the *burqa* believe that it is their religious duty to wear the garment in question, it seems inconsistent to prohibit them from wearing it if the Danes believe in religious freedom. As a matter of fact, religious freedom is granted as a constitutional right in Denmark. This is probably one reason why the Danish MPs *cum* legislators link their mandatory dress code to “political Islam”. If their dress code is more about “political extremism” than religion, the *burqa* is not protected by the Danish Constitution. Furthermore, if the *burqa* signals or is indicative of the idea that terrorist acts may be justified for religious reasons, the Danish MPs *cum* legislators have a duty to protect the Danish people against the implied threat. However, the prohibition itself does not seem to remove any threat. It is not the *burqa*, but the mindset of a particular individual that may cause a potential security issue. If the “protection of the rights and freedoms of others” is invoked and the ban is construed as justifiable to the extent that it strives to guarantee the conditions of “living together”, the Danish version of these French and Belgian premises (*cf. S.A.S. v. France, Belkacemi/Oussar v. Belgium*, and *Dakir v. Belgium*) seem to narrow the desired outcome so much that the reference to “respect for the community” boils down to the simple, in one sense at least, demand that “we must be able to see each other” (*cf. face-recognition as the basis for transparency and trust*).<sup>2</sup> After all, the idea of human rights, which Denmark is also

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1. *Id.*, at 36.

2. Staff Writer, *Denmark passes ban on niqabs and burkas*, BBC News, 31 May 2018, available at <<https://www.bbc.com/news/world-europe-44319921>>; Danish Ministry of Justice, *supra* note 80, at 2; ECtHR, *S.A.S. v. France*, Application No. 43835/11, Grand Chamber, Judgment, 1 July 2014, paras. 141-142 (for (civility, fraternity and respect as conditions of) “living together” (*le “vivre ensemble”*) as a legitimate goal of the restrictive measure and the incompatibility between systematic concealment of the face in public places and social interaction). 2 ECtHR, *Belkacemi and Oussar v. Belgium*, Application →



bound by in international treaties, is to avoid the kind of situation where a society's choice or, the choice of anybody in power, can sacrifice The Other on the altar of social utility. The relevant rights are protections of human beings as against fellow human beings or "Man's Inhumanity to Man".<sup>1</sup> Thus, by confirming the broad discretion on behalf of the Member State, the European Court of Human Rights opted for optimal relativity as regards the functioning of a democratic society (including interaction, dialogue, and communication, as stressed by Denmark) at the expense of the freedom of a minority of already vulnerable Muslims.

Apparently the Danish MPs *cum* legislators do not want to officially state that God is just another name for our species in the course of emphasizing that they are concerned about the Danish values, and not the *burqa*-wearers' religious alienation or oppression. They evade the religious issue, and seem to do so for several reasons: (1) they do not want the 2018 *burqa* ban repealed as unconstitutional, (2) they want a secularized society, and (3) they do not want to address the issue from different perspectives.

The first reason (*cf.* 1) is particularly important on the basis of the materialism-secularism constellation. If Feuerbach's theory is applied to Muslim women, a kind of cultural "shock and awe" effect occurs. The premises cannot be disclosed; for the idea of using law is tantamount to inflicting an untimely "social death" on behalf of women who have a different background – and that is intolerance.<sup>2</sup> The second reason (*cf.* 2) reflects the modern radicalization of Danish politics.<sup>3</sup> In 1999, the founder of the Danish People's Party (DK), Ms.

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←No. 37798/13, Grand Chamber, Judgment, 11 July 2017; *Dakir v. Belgium*, Application No. 4619/12, Judgment, 11 July 2017.

1. MAN'S INHUMANITY TO MAN (L.C. Vohah & Michael Bohlander eds., 2003); ROBERT BURNS, POEMS AND SONGS, Harvard Classics Vol. 6 (2015) (1784).
2. On the premises of materialism, the evolutionary process, which is partially determined by the economic conditions, cannot be expedited by law or other measures or means. This introduces an inconsistency on behalf of a secular state like Denmark. According to Feuerbach – and especially given the Danish MPs *cum* legislators' belief in liberal democracy, the right thing to do is to promote an open discussion where all parties submit to rational arguments. – This is the recommendation.
3. C. J. Werleman defines the prohibitive measure itself (*i.e.*, the *burqa* ban of right-wing legislators) as "**a form of secular extremism, no more, or no less insidious or threatening than religious forms of extremism**". See C. J. Werleman, *Denmark's burqa ban: A lurch towards secular extremism*, *The New Arab*, 6 June 2018, available at <<https://www.alaraby.co.uk/english/comment/2018/6/6/denmarks-burqa-ban-a-lurch-towards-secular-extremism>>.

Pia Kjærsgaard, proposed that an immigrant family should be expelled from Denmark if second or third generation members had committed serial acts of serious criminality. The now former Prime Minister Poul Nyrup Rasmussen replied that DK would never be “house trained”, thereby dismissing the idea of policymaking.<sup>1</sup> Today, in 2018, Ms. Kjærsgaard is the Speaker of the House (since 2015), a position the prestige of which is surpassed only by Queen Margrethe II. Furthermore, Nyrup Rasmussen’s Social Democratic Party (SD) supports, together with the current VLAK-coalition government, the anti-foreigner agenda of DK, which abstained from forming a government in 2015 despite its successful election.<sup>2</sup>

As regards the third reason (*cf.* 3), it is regrettable that the Danish MPs *cum* legislators do not tolerate or even care about how women who wear the *burqa* or the *niqab* see things. Admittedly, they believe that the relevant Muslim women are victims of negative social control. However, the women do not agree. They perceive the state as a hostile force. For some of them, their dress code is part of their relationship with God. They also want protection against sexual objectification. The “Me Too” movement seems to confirm such a need in Western countries. The Danish MPs *cum* legislators have a right, of course, to disagree with this. However, this raises another key question: If the women are victims of a male dominated culture that imposes the *burqa/niqab* irrespective of their own preferences, will a ban on their dress code change that situation?

However sincerely held the belief in oppression may be, it is ill-founded in the sense that it is naïve to suggest that a society can fight gender inequality and other forms of injustice solely with the use of legislative means and measures. To strengthen their argument, as it were, they also claim that *burqa*-wearers will never be able to find employment in Denmark, as a direct consequence of the full-face veil. Even if true, it is not possible to derive a license to judge. And, *who* is to judge which clothes people *should* wear? In a liberal democracy, the government is *not* supposed to regulate people’s (choice and view

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1. Office of the Danish State, Prime Minister’s Parliamentary Opening Speech in 1999, available at <[http://www.stm.dk/\\_p\\_7628.html](http://www.stm.dk/_p_7628.html)>.
  2. Sine R. Lund, *DK: Derfor gik vi ikke i regering*, Altinget, 5 August 2015, available at <<https://www.altinget.dk/artikel/df-derfor-gik-vi-ikke-i-regering>> (for DK’s political power calculation).

of) clothes, fashion, *etc.* A (liberal) appeal to other-regarding harm, freedom, autonomy or, more generally, the rights of others misfires *unless* the nature and scope of the injury, damage or loss they stand to suffer warrants limits. As a principle, it holds that reciprocal stakes in important interests deserve to be protected. Be that as it may, the so-called choice of society does not support reciprocity, but instead subtracts from this.<sup>1</sup>

In the light of this, the Big Question is: Do the *burqa*-wearers pose a threat to democracy, as alleged by various Danish MPs *cum* legislators, or do they pose a threat to their nationalist feelings?

Law L 219 may end the wearing of full-face veils like the *burqa*. If so, Muslim women are going to be proven right in that it will hold (for them) that “I cannot be a believer. Or that I am not allowed to practice my faith”.<sup>2</sup> Critically, however, *burqa*-wearers have no revolutionary potential in the sense that they are *not capable* of mobilizing the Danes to turn against the current political institutions, which revolve around the idea of national pride and/or revival. The *burqa*-wearers, so it seems to follow, are a political scapegoat. In turn, the new law is a sign of a moral and political crisis. If anything, it constitutes a threat to liberal democracy *camouflaged* as a defense of values. In the words of Islamic scholar Tariq Ramadan:

By banning the burqa, banning the way people are dressing, we are against our own values... In fact, we are nurturing fear, and we are not having a constructive debate. Islam is a European religion, and it's part of society.<sup>3</sup>

1. The same trend can be ascertained in the case of other restrictive measures that Denmark has recently introduced for immigrants in general. See Staff Writer, *Is this Europe's most drastic move yet against 'migrant ghettos'?*, The World Weekly, 9 March 2018, available at <<https://www.theworldweekly.com/reader/view/16044/is-this-europes-most-dramatic-move-yet-against-migrant-ghettos>>.

2. Ritzau, *Niqab-klædt kvinde: Burkaforbud er social kontrol fra staten*, Jyllands-Posten, 4 June 2018, available at <<https://jyllands-posten.dk/politik/ECE10489443/niqabklaedt-kvinde-burkaforbud-er-social-kontrol-fra-staten>>; Kvinder i Dialog, available at <<http://www.kvinderialog.dk>> and <[https://iphone.facebook.com/kvinderialog/?\\_\\_tn\\_\\_=CH-R](https://iphone.facebook.com/kvinderialog/?__tn__=CH-R)> (for the new grassroots movement in Denmark Women in Dialogue that consists of both *burqa/niqab*-wearers and non-wearers who agree that the Danish ban constitutes a strategy of “discrimination, criminalization and oppression” and who are committed to the activist goal of protest and demonstration, especially on 1 August 2018 where the ban enters into force. One of the slogans of Women in Dialogue is “No to liberal hypocrisy”).

3. Evans, *supra* note 79.

“The Emperor’s New Clothes”, written by H. C. Andersen’s in 1837, captures the absurdity of the situation. In this fairy tale, the Emperor wants his subjects to admire his new clothes in a public procession, but then the weavers report that only intelligent people will be able to see them. However, nobody can see the Emperor’s new clothes. And nobody wants to be perceived, *per* Feuerbach’s terminology, as an intellectual imbecile either.<sup>1</sup> Then a child exclaims: “But he hasn’t got anything on!” The Emperor understands that they have all been deceived and swindled, and therefore he continues *as if* he did wear his new clothes... and his noblemen hold the train that is not even there.<sup>2</sup>

The morale of the fairy tale is: Too much control and pressure from MPs *cum* legislatures can turn people into involuntary H. C. Andersen-type of simpletons.

## VII. Dr. Anja Matwijkiw (Research Director):

### A Set of Recommendations

All the authors have one end-goal in common, namely to inform about various important perspectives while *at the same time* opening up for parameters for (more) fruitful, constructive and (if need be) critical debate in the future. As for this, the strategy adopted consists in an attempt to present a set of recommendations that may function to minimize any polarization effect or enhance the quality of the debate, or both.

Below, the research director for the research project defines four recommendations in total; all of which flow directly from the project itself. If implemented, the four recommendations negate attempts to reduce the distinction, as applied by Giuliana Ziccardi Capaldo in the area of international law and international relations, between “controllers and the controlled” to a separation (ideology), thereby also avoiding the (illiberal) Right is Might philosophy this entails.<sup>3</sup>

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1. BRUDNEY, *supra* note 90, at 44.

2. H. C. Andersen Centre, *available at* [http://www.andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes\\_e.html](http://www.andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes_e.html).

3. See Giuliana Ziccardi Capaldo, *The Law of the Global Community: An Integrated System to Enforce “Public” International Law*, 1 GLOBAL COMMUNITY YILJ 71, 75, 77, 104, 115, 119 (2001).

The recommendations accommodate author input from individual contributors.<sup>1</sup> Furthermore, they are intended as a holistic tool for conflict-resolution. In particular, the tool targets discrepancies between, on the one hand, ethics and critical thinking and, on the other hand, real-world phenomena, processes or procedures that may jeopardize the overarching goal of preventing a reduction of right to might.

The format of the recommendations includes a general recommendation, a specific context for the recommendation, and a rationale. While the general recommendation is the guideline, the specific context for the recommendation briefly explains the larger situation, challenge or controversy that gave rise to it, whereas the rationale helps to capture the more subtle and, invoking M. Cherif Bassiouni's method, "deep theory" aspect/s of the situation, challenge or controversy.<sup>2</sup>

### **I. General Recommendation:**

To avoid methods of conceptualization that may introduce interpretative arbitrariness, thereby obstructing justice as well as clarity.

### **Specific Context for the Recommendation:**

The way that pluralism has been interpreted gives rise to a need for enhanced awareness of the premises for defining the meaning and scope of central terms and/or positions that play an important role in a democratic society.

*S.A.S. v. France, Belkacemi/Oussar v. Belgium, and Dakir v. Belgium* serve as examples. These demonstrate that *de jure* "pluralism" may be modified through the introduction of various sub-distinctions between respectively ideological-political pluralism, cultural pluralism and religious pluralism; and with the outcome of making "religious pluralism" the *least pluralist* position on comparison.

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1. The names of individual contributors are on file with the research director, who assumes the full and sole responsibility for the recommendations. However, a special thank you should be extended to, respectively, Dr. Baldwin for recommendation III and Dr. Mack for recommendation IV.

2. Anja Matwijkiw & Bronik Matwijkiw, *A Modern Perspective on International Criminal Law: Accountability as a Meta-Right*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI* 68 (Leila N. Sadat & Michael P. Scharf eds., 2008).

### **The Rationale:**

If the premises of terms and/or positions that, so far, have informed and guided argument and reasoning are changed sufficiently, the implications may be far-reaching, so far-reaching that a new position may result (which requires a new name). In the case of pluralism, this can be illustrated by the fact that pluralism, traditionally and typically, have operated as a position which – like its counterpart in ethics, “relativism” – requires tolerance for the ways and beliefs and, more generally, values of other groups without (i) censoring *their* values in the process of confirming the underpinning equality of different and mutually exclusive outlooks, and (ii) without making some aspect of a normative area more or less pluralist or, for that matter, relativist, on comparison. As for (i), the test of pluralism and, for that matter, relativism is value incompatibility. However, in the event that a legal case changes this *conditio sine qua non* for definition (sufficiently) and, as a consequence of rule-application, in effect, changes the accompanying scope for tolerance premise (sufficiently), a review of the premises for the position *per se* should take place.

### **II. General Recommendation:**

To secure fact-finding that accords with the current society’s actual state of affairs and developmental stage.

#### **Specific Context for the Recommendation:**

The Danish MPs *cum* legislators responsible for the adoption of law L 219 (*cf.* Cover Ban of 31 May 2018) make it hold as a premise that Danish values preclude the *burqa* (*cf.* incompatibility) which, in turn, is viewed as an integral part of political Islam.

If Islam is treated as a non-Western phenomenon although experts list Islam as a European religion, a value-fact problem emerges, one that conflates “is” and “ought”, description and prescription.

### **The Rationale:**

Rigorous and accurate research is needed for the purpose of providing a

descriptive analysis, which can be distinguished, *qua* fact-finding, from an evaluative

assessment. In the case at hand, the information is outdated and, consequently, it distorts the truth defined as a value and a right. In the context of law at the international level, the right to truth has been ascribed status as a special right on behalf of victims of serious human rights violations. More precisely, the right to truth functions as an accountability-securing measure (*cf.* justice).

The empirical truth that is involved in fact-finding should be checked by professional researchers, who have the necessary expertise to examine and determine the origin and credibility of sources and data, thereby also testing the empirical/factual basis of any claims or statements which are made and which function to guide other people's opinions.

In particular, in a so-called Fake News era, information is controversial in the sense that values or prescriptions (*cf.* evaluative assessment) may entirely replace facts (*cf.* descriptive analysis), and the area of politics serves as a paradigm example of this unethical practice. Given that information may also be non-descriptive by virtue of being descriptively inadequate, a recommendation for fact-finding should include full coverage. Descriptive analysis should encompass, as a minimum, the affected stakeholders, thereby also securing a balanced information-gathering method.

### **III. General Recommendation:**

To accommodate otherness that is consistent with shared values – despite claims to the opposite effect. In many instances, there is common ground between incompatible conceptualizations and the values *per se*.

#### **Specific Context for the Recommendation:**

The reasoning of the French *Conseil d'État* and ECtHR to uphold the *burqa* ban did not accommodate all key aspects of the multi-stakeholder reality, in accordance with the values that are assumed to constitute foundation stones and, *ipso facto*, grounds for representation.

### The Rationale:

While it is reasonable to expect that people show some measure of respect for the fundamental values of the country they live in, *inter alia*, equality, liberty and fraternity, the courts (both in the EU and in the US) should consider the various levels of values, including their nature and status, as well as their interpretation in a variety of (stakeholder) contexts. Values may be expressed differently by people from different religious, ethnic, and cultural backgrounds, but the incompatible conceptualizations that follow may also be anchored in what amounts to shared values. Thus, values may both serve to *separate* (alienate, marginalize, *etc.*) and *unite* people living within a (nation) state or union of (nation) states – depending on the line of reasoning that is provided.

One implication of the reasoning of the French *Conseil d'État* and ECtHR would require the state to coerce so-called “anti-social” people with the threat of sanction or punishment to fraternize with others. Critically, it could be objected that banning women from wearing the *burqa* and forcing “anti-social” people to fraternize are relevantly disanalogous, meaning that the *burqa* ban is contrary to “living together” whereas enforced fraternity is a measure that is geared towards “living together”.<sup>1</sup> That aside, even on the assumption that fraternity is a fundamental value of a pluralistic liberal democracy, for a state or government to force certain stakeholders to give up their form of (co-)existence, *however non-violent in fact* discords with another fundamental value, namely liberty.

### IV. General Recommendation:

That courts, especially the United States Supreme Court (USSC), should carefully and *self-critically* consider the intent and impact (in connection with the current examination of words and authority) of presidential proclamations in the area of refugees, thereby instituting procedures and criteria that are analogous to the strict scrutiny tests that apply to so-called suspect classification, *e.g.*, race.<sup>2</sup>

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1. I owe this insight to Dr. Baldwin.

2. I credit Dr. Mack for this point of view.



### Specific Context for Recommendation:

That the USSC did not convincingly avoid the appearance of a politically biased interpretation when it ruled in the *Trump v. Hawaii* travel ban case in April of 2018.

### Rationale:

A slippery slope – from travel to *burqa* ban in America – is a probability, which must be addressed. At the present point in time, there is a legal vacuum. The scope of protections for *burqa*-wearers for personal reasons has not yet been determined by the USSC, and the absence of defined limits cannot but make “rights” to *burqa*-wearing precarious. The same is true of international refugee law, which the U.S. Congress has otherwise ratified. The international obligations pertaining to, *inter alia*, family unification, are not adhered to in a consistent manner, especially in cases concerning refugees from Muslim countries.

A formal set of procedures and criteria and, more importantly, a consistent implementation of these would eliminate the harmful effects of all undemocratic measures and techniques of subterfuge in the hands of (real-)politicians and government officials.

*Qua* recommendations for legal doctrine and jurisprudence, informational accuracy, multi-stakeholder representation, and increased oversight, implementation would require the cooperation of experts from law and the humanities,<sup>1</sup> especially since critical thinking skills are necessary to analyze and assess premises and implications that go beyond legal norms and rule-application as such. By virtue of the fact that the separation of law and ethics, an otherwise traditional feature of legal positivism, is rejected in progressive jurisprudential approaches that seek to raise the bar for the procedural and substantive aspects of law at the national and international levels, the collaboration in question has to be. To the extent that a philosophy of law-and-ethics together serves as an anti-dote to the Right is Might

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1. For the centrality of humanistic values in (global) justice, see M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* (2011); Anja Matwijkiw & Bronik Matwijkiw, *The Value Question and Legal Doctrine: The Inescapability of Ethics*, in (special issue) *ETHICS & INTERNATIONAL CRIMINAL LAW* (Anja Matwijkiw ed.), 16/2 *INTERNATIONAL CRIMINAL LAW REVIEW* 323 (2016).

philosophy that stems from political absolutism (*cf.* rulers/controllers *versus* the ruled/controlled), liberalism is assumed as a component, thereby also establishing democracy as a liberal system as opposed to an illiberal regime. It follows that freedom is a very special interest or stake. Consequently, restrictions of rights that protect it must and indeed should be considered accordingly. The fact that there is a European trend to do the opposite does not serve to justify a measure on behalf of a particular country. At best, the step of “jumping on the bandwagon” can be construed as an opportunistic response on behalf of MPs who disagree with multi-stakeholder integration that transcends conservative or reactionary interpretations of national values; at worst, it is a signal of the closed society that historically has resulted in totalitarianism.