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978-1-107-05830-9 - The Experiences of Face Veil Wearers in Europe and the Law

Edited by Eva Brems

Excerpt

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INTRODUCTION TO THE VOLUME

Eva Brems

1. WHY STUDY FACE VEIL WEARERS?

In Belgium, as in France, legal restrictions on religious dress worn by Muslim women have been on the agenda for over two decades. Yet until a few years ago, this debate was almost exclusively focused on the headscarf. Despite being heavily involved in the debate on headscarf bans both as an academic and as a human rights activist, I hardly spent a thought on the Islamic face veil, until local governments in my country began to ban it. When the federal Parliament started in earnest to talk about a nationwide ban, many in the human rights world were baffled. The issue seemed to fall out of thin air, as the estimated 200 to 300 face veil wearers in Belgium had never caused any noticeable trouble. Even more disturbing was the swift rise of a hardly contested political and societal consensus around the need for a ban. Not only debate was lacking, it seemed that nobody bothered to gain any knowledge about the practice of the face veil, let alone about the views and experiences of the women who wore it. Critical voices were heard only from human rights organizations¹ and from a small number of scholars. At the Human Rights Centre of Ghent University we

¹ At the time of the vote, only Amnesty International (AI) had issued a press release, arguing that the ban would violate religious freedom: Amnesty International, 'Een algemeen verbod op gezichtssluiers is in strijd met de mensenrechten', 21 April 2010. At the time, I was the chair of the Flemish section of AI. The explicit position by the International Secretariat of AI came as a surprise to me and to many in the organization, as this (as well as headscarf bans!) was a topic that AI had not yet worked on before. Later, other human rights organizations would follow, e.g. Human Rights Watch: L. Gerntholtz and G. Van Gulik, 'Beyond the Burqa' (www.hrw.org).

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started with traditional legal research, detailing how and why the proposed ban would violate the European Convention on Human Rights (Vrieliink *et al.* 2011, 2013). Yet disturbed by the lynch mob atmosphere that surrounded the topic and by the absence of any insider perspective, we decided to interview face veil wearers in Belgium. We teamed up with Dr Jogchum Vrieliink at Leuven University, who had experience with field research of this type, aimed at assessing whether legislation realizes its stated purpose. By the time the research was completed, the ban had been adopted. Yet the way the legislative process proceeded² – fast and almost in unison – does not suggest that the availability of our empirical data at the time of deliberation would have persuaded any Members of Parliament to vote differently. The presentation of our results to two Flemish newspaper journalists did however move a small stone in the river, as it resulted in an editorial concluding that the legislator had been wrong.³ A lot more significantly, the Danish experience (see below and Chapter 3 in this volume) – giving up the idea of a ban after learning about empirical reality – shows that empirical data can have an impact on opinion makers and politicians.

This creates some hope at a time when political pressure to ban face veils continues to build in several countries (see below), and as a challenge to the French face veil ban is pending before a Grand Chamber of the European Court of Human Rights.⁴

2. BRINGING INSIDER REALITIES INTO THE FACE VEIL DEBATE

One of the most remarkable aspects pertaining to these bans and debates is the fact that they proceed on the basis of assumptions about women wearing the face veil, that lack any basis in knowledge. At the time the bans in Belgium and France were adopted, no empirical research was available that would document the experiences and

² Although I had not been active in politics before, I was asked to participate in the 2010 elections and was elected to the federal Chamber of Representatives. As such, I participated in the (second round of) discussions and vote on the Belgian face veil ban.

³ Wouter Verschelden, 'Boerkaverbod', *De Morgen*, 26 May 2012, www.demorgen.be/dm/nl/2462/Standpunt/article/detail/1444441/2012/05/26/Boerkaverbod.dhtml

⁴ Application no. 43835/11, *SAS v. France*. The Human Rights Centre of Ghent University introduced a third-party intervention in this case. This is available at www.ugent.be/re/publiek-recht/en/department/human-rights/publications/sas.pdf

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motives of the women concerned. Nor was any effort undertaken to consult those women in the process leading up to the ban (with the exception of one woman who was heard by the French *Gérin* commission at her own request – see below). The bans are thus almost entirely based on outsider experiences and views. The same holds to a large extent for the academic debates on the matter and even for NGO positions.

Yet in recent years, qualitative research into the experiences of women wearing the face veil has been conducted in no fewer than five European countries: France, Belgium, the Netherlands, the United Kingdom and Denmark. The present volume in Part I presents the main findings of this exceptional research. The choice of countries covered in Part I has thus been determined by the availability of empirical research. Some of these research results have not been published before (UK data), or have not been published in English (Netherlands and Denmark data). In all cases, this volume offers an original analysis of the data that has not been published before.

For Part II, a number of legal and social science scholars with expertise in minority rights, discrimination, women's rights and/or Islam were invited to comment on the situation of face veil wearers in Europe today, as well as on the legal bans that affect them, engaging with the results of the empirical research. Building on the lived experiences of face veil wearers, these comments thus situate the face veil issue in the wider debates on the role of religion in the public life of European societies, the marginalization of minority women in societies that otherwise champion women's autonomy, and the marginalization and demonization of Islam in Europe.

In this manner, the book attempts to fill a gap in the current literature discussing face veil bans: the gap of the insider perspective.

As the legal interventions to ban or restrict the wearing of face veils are a central focus, especially in Part II, it is useful to first present an overview of such interventions across Europe. This will be done in the next section. But first a note on terminology. Such legal interventions are widely labelled 'burqa bans'. However this term is inaccurate for various reasons. In the first place, 'burqa' tends to be taken to refer to the (mostly blue) piece of clothing covering the entire female body, including the head, except for a small region around the eyes, which is covered by a concealing net or grille. Such face veils (also called *chadris*) are typical of areas in Pakistan and Afghanistan. They are (virtually) never worn, however, in Western Europe. To the extent that face veils are

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worn here, these generally concern the so-called ‘niqab’: a face veil that may or may not cover the eyes but does cover the rest of the face. A second reason why the reference to ‘burqa bans’ is not entirely correct is that as a rule these bans are – at least formally – not focused on the face veil, but rather prohibit face covering and concealment in general (see below).

3. LEGAL SITUATION IN EUROPE

3.1 Starting small: local bans

Until 2011, no countrywide face-covering bans existed in Europe.⁵ Yet in several countries, local bans were in place restricting at least certain facial concealments in certain contexts. Some were specifically introduced when niqab wearers appeared in local streets, others that had long been on the books were rediscovered and applied to this new situation.

Local face-covering bans exist in Belgium, the Netherlands, Italy and Spain; albeit in varying degrees. In Belgium the ‘geographical coverage’ of these local prohibitions appears to be the widest, with virtually all major cities and towns having a prohibition in place. One category of local Belgian bans prohibits ‘disguises’, ‘masks’ and ‘costumes’ that cover one’s face. These bans date back to the nineteenth century, with festivities and carnival in particular in mind, and was (re)interpreted to include face veils as of 2004 and 2005. A second category was introduced around the latter time, to target face veils specifically. It uses wording such as ‘appearing in public unidentifiably’ or ‘with concealed or covered face’. Municipalities confronted with women wearing face veils had requested the assistance of superior regional authorities in dealing with the issue. In response, the latter proffered model provisions enabling municipalities to prohibit face veils should they wish to do so.⁶ Generally, exceptions apply, for temporary authorizations by the mayor, or for certain periods, holidays or situations (e.g. carnival and Halloween). In Belgium, contradictory case law on the application of local bans to face veils was one of the reasons for the enactment of the general ban.⁷

⁵ See Brems *et al.* (2013); Vrielink *et al.* (2013).

⁶ Such a model provision was drafted in Flanders in 2004, by the administrative services of Home Affairs.

⁷ See, respectively: Police Court Brussels, 26 January 2011, www.legalworld.be; Police Court Tongeren (Maaseik department), 12 June 2006.

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In the Netherlands such local bans are quite rare. As in Belgium, they tend to be worded in neutral and general terms.⁸ Despite the absence of case law, the legality and constitutionality of these provisions is widely considered controversial,⁹ and as such they hardly seem to be enforced in practice.

In Italy, local bans can be found particularly in the north and north-east of the country. Initially, the regulations tended to be general (rather than contextual) in nature, and municipalities based them on article 5 of the 1975 Public Order Protection Act (POPA), prohibiting any means intended to render the identification of a person difficult in spaces open to the public. The POPA originated in the 1970s during Italy's so-called Years of Lead (*Anni di piombo*), and was aimed at suppressing violent political activism; it had led a dormant existence since that time, until the appearance of face veils led to its 'rediscovery'.¹⁰ In two cases, these local prohibitions gave rise to litigation and case law,¹¹ which basically led to the finding that the POPA could not be regarded as grounds for prohibiting face veils in public space in general, since the traditional, religious nature of these garments either provides a reasonable justification for wearing them, or that the garment at least is not intended to prevent its wearer being recognized. As such, this case law excluded the possibility for municipalities to issue bans specifically targeting face veils. However, according to some interpretations it did not exclude local prohibitions limited to certain places or situations.¹² Since then some municipalities have issued ordinances that amount to more contextual prohibitions of (*inter alia*) face veils, limited to certain municipal buildings and institutions.¹³

Finally, in Spain a relatively small number of towns and cities in Catalonia (including, most notably, Barcelona), started as of 2010 to

⁸ E.g. providing a 'prohibition, without authorization by the Mayor, to appear in a publicly accessible place, while being masked, disguised or otherwise unrecognizable' (Art. 2.4.26 §1 Municipal Regulations of Maastricht). Other examples of municipalities in which such regulations are in place, include: Borsele, Doetinchem, Goedereede, Middelharnis, Roermond and Valkenburg (B.P. Vermeulen *et al.*, *Overwegingen bij een boerka verbod* [Considerations Concerning a Burqa Ban], The Hague, 2006, 55).

⁹ The reasons being that the Dutch constitution requires a formal law in order for rights and freedoms to be curtailed (*ibid.*).

¹⁰ Möschel (2011).

¹¹ For the first (administrative) case, see: Administrative Tribunal Trieste 16 October 2006, no. 645 (*Giurisprudenza di merito* 2007, 2423); Council of State 19 June 2008, VI Chamber, no. 3076. A second case was dealt with at the criminal level: Criminal Tribunal of Trevio, Proceeding no. 8533/04 RG MOD.21 (see extensively Möschel 2011).

¹² Möschel (2011: 10).

¹³ R. Owen, 'Italian police fine woman for wearing burqa in public', *The Times*, 5 May 2010.

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pass regulations banning face covering in municipal buildings.¹⁴ One of these bans, issued by the municipality of Lleida,¹⁵ was appealed by a Muslim association that claimed it violated basic rights. The Catalan Superior Court of Justice upheld the ban, accepting that it was required for identification and security purposes.¹⁶

3.2 Nationwide bans: France and Belgium

The general bans in France and Belgium are both of a ‘neutral’ nature, that is: they are not specifically aimed at face veils, but rather at covering one’s face (in public) in general. That being said, the background of the bans as well as the reasons advanced to support them unambiguously indicate that in both states the legislators were primarily concerned with the Islamic face veil, the neutral drafting being chosen mainly in an attempt to avoid claims of (direct) discrimination.

3.2.1 France

The first legislative proposal to ban the face veil in France dates from 2006, when Jacques Myard – an MP for the centre-right UMP – tabled a bill aimed at, *inter alia*, criminalizing the wearing of face veils, claiming they amounted to a ‘violation of the dignity of women’.¹⁷ The bill was not discussed. In July 2008, the French Conseil d’Etat upheld a decree that denied French citizenship to Ms. Machbour, the Moroccan spouse of a French citizen, on grounds of insufficient assimilation (*défaul d’assimilation*) due to ‘the radical practice of her religion, incompatible with the essential values of the French community, in particular with the principle of sex equality’.¹⁸ Among the different elements that made up that practice or could constitute its radicalism, media comments first, and scientific literature after, drew general attention (and public opinion) to the fact that Ms. Machbour wore a face veil.

In the wake of that debate, Myard reintroduced his bill in September 2008, but it again failed to be debated.¹⁹

¹⁴ W. Fautré, ‘Is the burqa compatible with women’s rights? The “burqa issue” in the EU’, paper presented at the conference Burqa and Women’s Rights and the European Parliament, Brussels, 10 June 2010.

¹⁵ The city was the first municipality to introduce this type of ban in 2010.

¹⁶ Catalan Superior Court of Justice, 9 June 2011.

¹⁷ Proposition de loi visant à lutter contre les atteintes à la dignité de la femme résultant de certaines pratiques religieuses, parliamentary document no. 3056, 4 October 2006.

¹⁸ Conseil d’Etat, 27 juin 2008, Mme Machbour, no. 286798.

¹⁹ Proposition de loi visant à lutter contre les atteintes à la dignité de la femme résultant de certaines pratiques religieuses, parliamentary document no. 1121, 30 September 2008.

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The effective move towards a general ban in France began not long after MP André Gérin, along with others, filed a resolution on 9 June 2009 aimed at establishing a commission of inquiry concerning the face veil on French territory.²⁰ Not long afterwards, President Nicolas Sarkozy, in a speech on 22 June 2009 stated that such veils were not welcome in France, and that legislation was necessary ‘to protect women from being forced to cover their faces and to uphold France’s secular values’.²¹ The French Parliament subsequently initiated an inquiry into the issue, led by the said André Gérin. The commission of inquiry consisted of thirty-two members, representing all parliamentary groups. It heard witnesses and experts, and it sent out questionnaires to several French embassies. The results of these inquiries were published on 26 January 2010. The report concluded that the face veil constituted an infringement of the three principles constitutive of the French Republic: liberty, equality and brotherhood. More specifically, the report considered the face veil to constitute an infringement on the freedom and the dignity of women (liberty); a denial of gender equality and of a mixed society (equality); and a rejection of ‘the common will to live together’ (brotherhood). The majority of the commission therefore recommended, first, that Parliament adopt a resolution declaring that the wearing of the full veil is contrary to the values of the Republic, and that, second, a general ban of the face veil in public spaces be adopted. President Sarkozy subsequently, in April 2010, suggested that Parliament debate a ban. On 11 May Parliament unanimously adopted a resolution declaring the face veil an affront to French values, and calling for the practice to be prohibited on French territory.²² This paved the way for the general ban. The bill leading up to it, which was submitted by the government on 19 May, was passed in both houses of Parliament with an overwhelming majority, in the summer of 2010.²³ Doing so, it overruled the advice of the Council of State that estimated that ‘no incontestable

²⁰ W. Fautré, ‘Is the burqa compatible with women’s rights? The “burqa issue” in the EU’, paper presented at the conference *Burqa and Women’s Rights and the European Parliament*, Brussels, 10 June 2010.

²¹ C. Gabizon, ‘Sarkozy: “la burqa n’est pas la bienvenue”’, *Le Figaro*, 26 June 2009.

²² Résolution réaffirmant la prééminence des valeurs républicaines sur les pratiques communautaristes et condamnant le port du voile intégral comme contraire à ces valeurs, Assemblée nationale, no. 2272.

²³ In the lower house the bill received 335 ayes, only 1 nay and 221 abstentions (13 July 2010). In the Senate there were 246 ayes, 1 nay and 100 abstentions (14 September 2010).

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legal basis' could be provided for a general ban.²⁴ On 7 October 2010, the Constitutional Council upheld the constitutionality of the ban, with only minor reservations. Most notably the Council determined that the ban could not be enforced in places of worship.²⁵

Act no. 2010–1192 of 11 October 2010 prohibiting the concealment of the face in public subsequently came into force on 11 April 2011. It states: 'No one may, in spaces open to the public, wear a garment that has the effect of hiding the face' (art. 1). Exceptions apply when 'clothing [is] prescribed or authorized by legal or regulatory provisions', when the clothing 'is justified by reasons of health or professional motives', or when the clothing is 'part of sports activities, festivities or artistic or traditional manifestations' (art. 2, II).

Sanctions consist in fines for the wearer of up to €150, and/or participation in a citizenship course. Additionally, the Act penalizes anyone who forces another 'through threats, violence, constraint, abuse of authority or power for reason of their gender' to wear face coverings, with a fine of €30,000 and one year's imprisonment. The latter penalties can be doubled if the victim is a minor.

3.2.2 *Belgium*

In Belgium, the face veil issue had been on the political agenda longer than in France. The first proposal dates back to the beginning of 2004, and was submitted by the right-wing extremist Vlaams Blok party.²⁶ At the time, it did not lead to parliamentary discussion.

During the 2007–10 legislature various bills were submitted with the purpose of introducing a general ban. One of these was approved almost unanimously by the plenary Chamber at that time.²⁷ This briefly made it seem as though Belgium were poised to become the first European country to have a 'burqa ban', but the premature fall of the government meant that it did not come to this: the Senate had 'evoked'²⁸ the bill,

²⁴ Rapport Assemblée générale plénière du Conseil d'Etat, Etude relative aux possibilités juridiques d'interdiction du port du voile integral, 25 March 2010.

²⁵ Constitutional Council, 7 October 2010, no. 2010-613 DC, §5.

²⁶ Parliamentary documents, Senate 2003–4, no. 3-463/1 (Van dermeersch) and Chamber 2003–4, no. 51-880/1 (Van Steenberge, De Man and Laeremans).

²⁷ More specifically it concerned 136 ayes, 0 nays and 2 abstentions.

²⁸ The majority of legislative proposals in Belgium are 'optionally bicameral'. Regarding such proposals, the governing principle is that the Chamber of Representatives has the authority to approve a bill autonomously but the Senate has the right to 'evoke' the approved bill and discuss it. This so-called 'right of evocation' must be invoked within a certain term and it requires a minimum number of members.

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and its approval was precluded by early dissolution of the chambers on 7 May 2010.

Various legislative proposals were once again submitted after the elections. Three of these proposals were combined and discussed.²⁹ The bill was approved with an overwhelming majority³⁰ – only by the Chamber of Representatives: the Senate opted against even discussing the bill. A large majority voted against parliamentary hearings on the matter and against the referral of the bill for advice to the Council of State.

The Act of 1 June 2011 ‘to institute a prohibition on wearing clothing that covers the face, or a large part of it’ was published in the *Belgian Official Journal* on 13 July and entered into force ten days later. Concretely, it inserts an Article 563bis into the Belgian Criminal Code. In practical terms and ‘subject to legal provisions to the contrary’, the Article punishes persons ‘who appear in places accessible to the public with their faces covered or concealed, in whole or in part, in such a manner that they are not recognizable’ with a monetary fine of €15 to €25³¹ and/or a prison sentence of one to seven days.³² An exception applies when face covering is permitted or imposed by ‘labour regulations or municipal ordinances due to festivities’. The law moreover enables continued application of local bans imposing administrative sanctions in this field (see above).

In Belgium too, the law was unsuccessfully challenged before the Constitutional Court, which, like the French Constitutional Council made only a minor reservation for places of worship.³³

3.3 Developments elsewhere

In addition to the general and local bans already in place, there is a growing movement among the public and politicians in European countries to call for (general) burqa bans.

Developments towards a general country-wide ban, in the wake of France and Belgium, seem to have progressed most in Italy. After it

²⁹ I.e.: Parliamentary documents, Chamber BZ 2010, no. 53-85/1; Parliamentary documents, Chamber 2010–11, no. 53-754/1; Parliamentary documents, Chamber BZ 2010, no. 53-219/1–2.

³⁰ In the plenary Chamber, there were 129 ayes, 1 nay and 2 abstentions.

³¹ Increased with the legal surcharge factor (i.e. multiplied by 5.5).

³² This is a theoretical option. In the extremely unlikely event that a judge would pronounce a prison sentence rather than a fine, it would not be executed, as is the case for all prison sentences under six months in Belgium.

³³ Belgian Constitutional Court, 6 December 2012, no. 145/2012.

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became apparent that the local bans could not be justified in the light of existing legislation, a number of draft laws have been tabled since 2007. The parliamentary commission on constitutional affairs approved one of these bills on 2 August 2011. This draft law would prohibit persons from being in public wearing any garment that covers the face, punishable with fines of €100 to €300. As in France, the ban would also punish individuals who force others to conceal their faces in public, with fines of €30,000 and up to twelve months in prison.³⁴ The bill remains pending.

In the Netherlands, the political discussion on the face veil first surfaced in response to local Belgian cases making the news in the Netherlands,³⁵ which led to a parliamentary motion being voted in December 2005, calling for a general ban of 'the public use of the burqa in the Netherlands'.³⁶ Additional motions on the issue, were adopted in October 2006 and November 2007.³⁷ In April 2006, the government – in pursuance to the initial motion – appointed a commission of (legal) experts.³⁸ Their report, published in November 2006, largely cautioned against the introduction of a general ban.³⁹ Nonetheless, the government at that point announced that a law on face covering would be enacted. This commitment was reaffirmed (*inter alia*) in the 2007 Government Agreement, without giving rise to legislative initiatives by government however. Bills by individual MPs were introduced in July 2007 and in November 2007,⁴⁰ but neither of these led to parliamentary debate. The subsequent Government Agreement of September 2010 again announced that the government would 'submit a

³⁴ Anonymous, 'The burqa, the law and other EU countries', www.france24.com; House of Representatives, Commission for Constitutional Affairs, draft law aimed at prohibiting the wearing of full-face veils such as the burka and the niqab. ('Divieto di indossare gli indumenti denominati burqa e niqab'), AC no. 627-A, 24 October 2011, www.camera.it/701?leg=16&file=AC0378C; see Möschel (2014).

³⁵ Prior to this, in 2003, the issue of the face veil had attracted some media attention when a school banned students from wearing it (Moors 2009: 396).

³⁶ Parliamentary documents, Chamber of Representatives, 2005–6, 29 754, no. 41; *Parliamentary Reports*, Chamber of Representatives, 2005–6, no. 36, 2546.

³⁷ Parliamentary documents, Chamber of Representatives, 2006–7, 29754, no. 88; Parliamentary documents, Chamber of Representatives, 2006–7, 29754, 30 545, no. 25.

³⁸ Parliamentary documents, Chamber of Representatives, 2006–7, 29754, no. 71.

³⁹ See: B. P. Vermeulen *et al.*, *Overwegingen bij een boerkaverbod* [Considerations Concerning a Burqa Ban], The Hague, 2006.

⁴⁰ The former was introduced by right-wing MP Geert Wilders (and Sietse Fritsma), and it was aimed at a 'non-neutral', general ban of the face veil only, while the latter was submitted by Liberal MP Henk Kamp, and it was aimed at a neutral, general ban. See respectively: parliamentary documents, Chamber of Representatives, 2006–7, 31 108, no. 2 (Wilders and Fritsma); Parliamentary documents, Chamber of Representatives, 2007–8, 31 331, no. 2 (Kamp).