

The Ban on the Veil and European Law

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Abstract

This article argues that the fate of veil bans under European law is uncertain. It shows that European commitments to free speech and freedom of religion cannot accommodate an absolute ban justified solely on grounds of the offensiveness of the veil. However, a ban that applies to public face-covering in general (rather than a ban that only targets the veil), that relates to the specific (though admittedly broad) context of social life and that provides some exceptions allowing the veil to be worn in specific religious or expressive contexts, has a reasonable chance of being upheld by European courts despite the significant infringement of personal autonomy it would involve.

Keywords: ban on Islamic veil – freedom of religion – freedom of expression – European law – Articles 9 and 10 European Convention on Human Rights

1. Introduction

Following on the 2004 restriction of religious symbols in public schools, in 2010 the French legislature passed a law prohibiting the wearing of garments that conceal the face in public spaces.¹ As Laborde notes, the legislation defines *public space* ‘in the most extensive way possible, as referring to any space

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1 *Loi interdisant la dissimulation du visage dans l'espace public* (Law 1192 of 2010 of 11 October 2010). The Law provides exemptions for face coverings worn in some limited contexts such as religious buildings, cultural or religious festivals or processions, coverings that are medically necessary or for health and safety reasons such as motorcycle helmets.

outside the home'.² As the long list of exemptions,³ coupled with the absence of a general religious exemption shows, this legislation is quite clearly motivated by a desire to restrict the wearing of the full-face veil by Muslim women. It and similar laws in other European states are, without doubt, influenced by xenophobia and other discriminatory motives. However, such familiar and unworthy impulses are only part of the story of such laws. Legislation of this kind is also representative of something more complex and is also supported by many who are sincere in their egalitarianism and their commitment to tolerance and liberalism. Conflict on the issue of public veiling represents an important instance of a broader struggle to define and apply boundaries to religion's role and influence in European societies at a time when established boundaries are being challenged by greater religious diversity. The more muscular religiosity of many members of communities of immigrant origin, particularly those communities with roots in mainly Muslim societies, is raising complex and difficult issues for European states. As Roy notes, many Europeans feel 'threatened by the emergence of communities not bound by old compromises painstakingly worked out between cathos and laiques'.⁴ They are reacting by seeking to define more strictly the boundaries of the settlement between law, society and faith, boundaries which have to date been a matter of cultural convention rather than legal rule in many European states. Thus, as cultural consensus breaks down, the law moves in to replace cultural norms with legal rules.⁵ Matters are complicated by the fact that this is happening against a background of widespread hostility to migration and severe discrimination against some minority populations. These developments, particularly attempts to change a cultural reticence to publicly express faith into a legal obligation to refrain from religious expression in certain circumstances, have brought major challenges for European human rights law, most notably in relation to the wearing of religious dress.⁶

- 2 Laborde, 'State Paternalism and Religious Dress' (2012) 10 *International Journal of Constitutional Law* 398.
- 3 Constitutional Council decision of 7 October 2010, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-613-dc/decision-n-2010-613-dc-du-07-octobre-2010.49711.html> [last accessed 9 July 2012].
- 4 Roy, *Secularism Confronts Islam* (New York: Columbia University Press, 2007, translated by Holoch) at 6.
- 5 See McCrea, 'De Facto Secularism in a Diversifying Religious Environment: The Changing Relationship between State and Religion in Europe' (forthcoming, copy on file with the author).
- 6 Increasing regulation of religious, mainly Muslim, dress in Europe has been the subject of intense debate and a significant academic literature in recent years. For a comparative account of laws in relation to the Islamic headscarf, see McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart Publishing, 2006). For a qualified criticism of the ban on ostentatious religious symbols in French public schools, see Laborde, *Critical Republicanism* (Oxford/New York: Oxford University Press, 2008). For a defence of this ban, see Weil, 'Why French *laïcité* Is Liberal' (2009) 30 *Cardozo Law Review* 2699.

This article addresses one of the key sites of conflict in this area, the relationship between national laws prohibiting public face-veiling and European human legal norms. I will analyse the legal situation in relation to those women who *voluntarily* wear a veil that covers their face entirely (the burqa) or leaves a small slit for the eyes (the niqab). I will use the generic term 'veil' to describe these garments. Though much of the debate has focused on the question of women being forced to dress in particular ways, I will not address specifically the situation of women who are forced to wear the veil. While it may be an uncomfortable truth for many, there are women who choose to wear it.⁷ While many may see the veil as a garment representative of oppressive and misogynist attitudes, even if this description is correct, this does not end matters. The right to oppose one's own liberation is as much of a right as any other element of freedom of expression and belief. History has several of examples of groups who have supported or colluded in arrangements widely seen as oppressive towards them. In the early twentieth century, significant numbers of European women did not support the female suffrage movement while many people of predominantly gay or lesbian sexual orientations have opposed the gay rights movement. Therefore, while forcing someone to wear a garment which tends to limit their ability to interact with others is quite clearly conduct that a liberal society can prohibit, it is the position of those who voluntarily seek to wear the veil for reasons that they themselves find compelling that raises more difficult and therefore more interesting questions for a European public order committed to liberal democratic rights and values such as equality, freedom of religion and freedom of expression.⁸

Matters of religion such as the relationship between church and state, as well as the regulation of dress codes and offensive speech, are generally under the jurisdiction of individual European states,⁹ though, as Doe notes, national approaches overlap significantly.¹⁰ However, although these matters are within the legislative competence of individual states, a decision to use such competence to ban the veil indirectly touches on European law through its impact on the areas, such as employment law, that are European competences and, most importantly, through potential conflict with principles which form part of the moral commitments required of states who are members of pan-European organisations.

7 For discussion of the degree to which those who wear the niqab *choose* to do so, see Amghar, 'Le niqab pour s'affirmer?' Ceras – Revue Project No 314, janvier 2010, see: <http://www.ceras-projet.com/index.php?id=4165> [last accessed 15 January 2013].

8 The issue of minors wishing to wear the veil raises different issues as a state can attach less weight to the autonomy of minors and may justifiably seek to ensure that the decision to wear a veil is genuinely voluntary by prohibiting individuals from wearing it until they are mature enough to take an informed and mature decision. This article will focus only on the questions raised by prohibitions on decisions by competent adults to wear a veil.

9 See Robbers (ed.), *State and Church in the European Union*, 2nd edn (Baden-Baden: Nomos, 2005).

10 Doe, *Law and Religion in Europe* (Oxford/New York: Oxford University Press, 2011).

This article first sets out the European level legal rights and principles that may be infringed by a ban before examining whether the offensiveness of the veil can legitimise the restrictions on fundamental rights that such a ban involves. I then examine whether the legal case for prohibition may be stronger in the specific context of social life. Finally, I consider some of the issues raised by regulating dress in a context as broad as this and the particular issues that arise in relation to the European Union (EU) anti-discrimination law. I conclude that the fate of veil bans under the EU and European Convention on Human Rights law is uncertain. European commitments to free speech and freedom of religion cannot accommodate an absolute ban justified solely on grounds of the offensiveness of the veil. However a ban that applies to public face-covering in general (rather than a ban that only targets the veil), that relates to the specific (though admittedly broad) context of social life and that provides some exceptions allowing the veil to be worn in specific religious or expressive contexts, has a reasonable chance of being upheld by European courts despite the significant infringement of personal autonomy it would involve.

2. The European Public Order: The European Union and the European Convention on Human Rights

Granting pan-European institutions the power to make political and legal decisions that will bind all Member States means that each state will, in some areas, be bound by political decisions taken by their partners with which they may not agree. As Weiler correctly argues, in order to ensure that submission to such decisions does not require a state to violate its most basic and cherished values, European states have had to commit themselves to respecting certain fundamental principles.¹¹ It is only when a state can be confident that its partners share and respect its fundamental values, and that therefore the EU's powers will not be used for unacceptable ends, that it can take the risk of agreeing to be bound by political decisions made by those partners. It is for this reason, the need to be confident that European partners are trustworthy recipients of pooled sovereignty, that the European public order has progressively come to demand that European states undertake moral commitments, chiefly a duty to respect certain fundamental principles, even in areas that do not fall within the sphere of competence of European institutions.

These moral commitments are defined and upheld by two separate sets of laws and institutions: the European Convention on Human Rights 1950 (ECHR)¹² established by the Council of Europe and the founding treaties and

11 For discussion of the importance of fundamental rights protection to mutual trust in the Union, see Weiler, *The Constitution of Europe: Do the New Clothes Have an Emperor? And Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999).

12 ETS 5.

institutions of the EU, which are interpreted by the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU), respectively. The EU also has its own Charter of Fundamental Rights (2000) which is largely modelled on the ECHR but which is, in some respects, broader in scope.¹³ The CJEU has tended to follow the lead of the ECtHR and to give rights in the EU Charter substantially similar meanings to those given to the Convention by the Strasbourg Court. Therefore, most of the analysis in this piece focuses on the jurisprudence of the ECtHR. However, the EU law does deviate from the ECHR in some areas such as discrimination law where it is more restrictive of Member States than the Convention. Furthermore, the EU law operates differently. Unlike the duty to respect the ECHR, the obligation to respect the rights contained in the EU Charter does not apply in all situations but only when Member States act within the 'field of application' of the EU law, that is when they are implementing or derogating from the EU law.¹⁴ The EU also imposes some more general fundamental rights obligations in the form of a general duty to respect fundamental rights and liberal democratic norms backed up by the possibility of deprivation of voting rights within the EU institutions for Member States found to be in 'serious and persistent breach' such principles.¹⁵

A. Principles of the European Public Order Relevant to a Ban on the Veil

The public order defined by these two pan-European institutions contains a range of rights that may be affected by a ban on the veil. Both the ECHR and the EU law contain explicit commitments to freedom of religion.¹⁶ The Convention and the EU Charter also protect the right to privacy (including a right to define one's own identity) and the right to freedom of expression, both of which may be restricted by a prohibition of the wearing of the veil. Restricting the wearing of a symbol worn only by female Muslims involves significant scope for claims of discrimination. The EU legislation prohibits direct and indirect discrimination on grounds of religion in the context of employment¹⁷ and the Court of Justice has recognised non-discrimination as a general principle of law which all the EU and national law in the sphere of competence

13 Title IV of the European Union's Charter includes some socio-economic rights that are absent from the ECHR, see Charter of Fundamental Rights of the European Union, 2000/C 364/01, OJ 364/1, 18 December 2000.

14 Case C-260/89 ERT, ECR [1991] at I-2925.

15 See Articles 6 and 7 Treaty on European Union.

16 Article 9 ECHR; and Article 10 Charter of Fundamental Rights of the European Union. EU Directive 2000/78 on discrimination in employment, which, by prohibiting indirect religious discrimination in the labour market, indirectly protects the principle of religious freedom. See also Council Directive 2000/78/EC, 27 November 2000, OJ L 303/16, 2 December 2000, establishing a general framework for equal treatment in employment and occupation.

17 Council Directive 2000/78/EC, 27 November 2000, OJ L 303/16, 2 December 2000, establishing a general framework for equal treatment in employment and occupation.

of the EU must respect.¹⁸ Article 14 of the ECHR also prohibits discrimination in relation to the rights protected by its other articles while Protocol No 12 of the same Convention prohibits discrimination more generally.

On the other hand, the picture is not entirely one-sided and the European public order contains strong elements that may weigh in favour of the compatibility of a veil ban with European constitutional norms. The legal order of the EU is explicitly committed to promoting gender equality and to enabling Member States to protect their national cultural traditions,¹⁹ thus leaving some scope for Member States to take action to promote the interaction of men and women on equal terms as well as to protect cultural norms in relation to interactions in public spaces. The ECHR has been held by the Strasbourg Court to accommodate what has been termed ‘militant democracy’.²⁰ This is a doctrine that permits Member States to take illiberal measures such as suppression of political parties committed to overthrowing democracy, in order to protect liberal democracy. The Court of Human Rights controversially²¹ held in the *Refah Partisi* case²² that this right of states to defend liberal democracy encompasses measures to protect the secularity of the state and the separation of religion and politics. The EU institutions, particularly in their enlargement and immigrant integration policies, have also endorsed the idea that the separation of religion from law and politics, with the consequent restriction of religion’s public role, is an indispensable element of the liberal democratic nature of the European public order, which Member States may take measures to protect.²³

B. Possible Justifications of a Prohibition on the Veil under the European Public Order

None of the rights mentioned above is absolute. The ECHR makes it clear that it is permissible to place limitations on the freedom to manifest one’s religion, freedom of expression and privacy provided such limitations 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 the protection of the rights and freedoms of others’.²⁴ Similarly EU anti-discrimination law makes it

18 See Case C-260/89 *ERT* [1991] ECR I-2925.

19 For gender equality, see Article 23 Charter of Fundamental Rights of the European Union; and Articles 2 and 3 Treaty on European Union. For cultural autonomy, see Articles 3.3 and 4.2 Treaty on European Union.

20 See Boyle, ‘Human Rights, Religion and Democracy: The *Refah Party* Case’ (2004) 1 *Essex Human Rights Review* 1.

21 *Ibid.*

22 *Refah Partisi and Others v Turkey* 2003-II; 37 EHRR 1.

23 McCrea, *Religion and the Public Order of the European Union* (Oxford/New York: Oxford University Press, 2010) at Chapter 6.

24 Article 9 ECHR; see also Articles 8 to 10 ECHR.

clear that discriminatory measures can be justified if they are 'laid down by national laws which in a democratic society, are necessary for the maintenance of public order and the prevention of criminal offenses, for the protection of health and for the protection of the rights and freedoms others'.²⁵ The right to free movement can also be restricted on grounds of public policy, provided the restriction is necessary and proportionate.²⁶

I have identified three categories of possible justification of an absolute ban on wearing a veil in public that may be compatible with Europe's public order. These are (i) the right of states to counteract threats to secular, liberal democracy; (ii) the restriction of offensive (symbolic) speech or religious practices; and (iii) the right of states to impose in relation to public behaviour what might be called '*minimum social duties*' including the duty to respect cultural norms in relation to how one appears in public, to demonstrate a minimum level of openness to interaction with one's fellow members of society and an individual duty to respect one's own human dignity.²⁷

3. Symbols and the Issue of Meaning

The attribution of particular meanings to the veil is vital to the justification of bans on grounds of restriction of offensive speech or protection of secularism. These potential justifications rely to some degree on attributing particular meaning to the veil and the act of wearing it. Indeed, it is some of the very features that bring the act of veil wearing within the purview of European fundamental rights law that also provide some of the possible justifications for banning it.

The veil is a religious symbol. Moreover, it is a symbol that speaks to very fundamental elements of the social order: relations between the genders, religious beliefs and how those beliefs and practices relate to our duties to each other and one's broader duties as a member of society. Although each individual who wears the veil will have a specific set of reasons for doing so that are particular to herself, justifications for banning the veil rest to a very significant degree on the attribution to the wearing of the veil of certain meanings. As McGoldrick points out, context has an important role in the attribution of meanings to religious and political symbols.²⁸ In the contemporary European

25 Article 2(5) Directive 2000/78EC, 27 November 2000, [2000] OJ L 303/16, establishing a general framework for equal treatment in employment and occupation.

26 Article 45(3) Treaty on the Functioning of the European Union: see also Case C-441/02 *Commission v Germany* [2006] ECR-I 3449.

27 These justifications are separate from those that support laws that prohibit forcing a woman to wear a veil, which, as I noted above, do not pose problems for the European legal order.

28 McGoldrick, *supra* n 6 at 16–23, who notes (at 16), for example, that before the Iranian revolution of 1979 the wearing of the hijab was often an expression of opposition to the regime of the Shah.

context, such meanings include the idea that the veil represents gender apartheid and an uncompromising prioritisation of one's religious identity above all other elements, including one's attitude to one's duties as a citizen and duties towards other citizens as well as, perhaps more problematically,²⁹ a rejection of secular, liberal democracy.³⁰

While some may object to the attribution of such meaning to individuals who may or may not see their wearing of the veil in this way,³¹ it is not uncommon in legal situations for courts to adopt the perspective of the reasonable observer in determining the meaning a particular symbol involves. In assessing the compatibility of the presence of particular religious symbols in state buildings with the ECHR and the United States constitution, the ECtHR and US Supreme Court have both framed their analysis in terms of the message that a reasonable observer could deduce from the symbol and its presence in the location in question.³² Moreover, in relation to laws governing offensive expression or behaviour, a decision as to whether a particular word, action or image is offensive must to a significant degree rely on meanings reasonably attributed by the observer to the expression in question and does not focus exclusively on the meaning actually attributed by the person whose words, displays or actions are deemed offensive.³³

Much of the justification for banning the veil therefore rests on the idea that the veil has a particular meaning and that the meaning represents values that are repellent to the *mores* of liberal democratic societies. For example, it is argued that the fact that the veil covers the face of the wearer in its entirety means that wearing it can be seen as involving a negation of the equality of men and women by rendering women invisible in the public sphere. The veil is also associated with ideas of the ownership of women by men in the sense that it can be part of measures intended to render a woman invisible to all but her male relatives, thereby increasing the control of such men over their

29 See, for example, Badinter, 'Adresse à celles qui portent volontairement la burqa', *Le nouvel Observateur*, 13 July 2009.

30 Justification on the third ground, the duty to respect cultural norms or fulfil basic social duties, is less reliant on such attribution of meaning as the alleged harm is constituted by the violation of the relevant taboo or failure to fulfil the relevant duty rather than the reasons for the failure to do so. Displaying one's genitals in public is, for example, prohibited irrespective of the reason for doing so.

31 See, for example, 'A Feminist beneath the Niqab?' *The Innocent Smith Journal*, 13 June 2010, available at: <http://innocentsmithjournal.wordpress.com/2010/06/13/a-feminist-beneath-the-niqab/> [last accessed 15 January 2013].

32 See, for example, *Lautsi v Italy* Application No 30814/06, Judgment, 18 March 2011; *Stone v Graham* 449 U.S. 39 (1980); and *County of Allegheny v ACLU* 492 U.S. 573 (1989).

33 For example, in *Whitehouse v Lemon* [1979] 2 WLR 281 the defendant's argument that a poem describing a Roman centurion having sex with Jesus on the cross was from the author's perspective respectful towards Jesus, was dismissed. *Otto-Preminger-Institut v Austria* A 295-A (1994); 19 EHRR 34 and *Wingrove v United Kingdom* 1996-V; 24 EHRR 1, both focused on the reactions of individuals seeing artistic material deemed offensive to a significant degree and did not focus exclusively on the intention of the artists in question to offend.

female relatives.³⁴ Such meanings can render the wearing of the veil offensive in societies committed to the equality of the genders.

The act of covering her face also represents a choice on the part of the woman so doing to restrict the possibility of interaction with others. As such it can be seen as involving not only endorsement of a degree of gender apartheid but also the attribution of an absolute priority to one's religious identity or commitment to sexual modesty at the cost of one's identity as a social being or citizen who interacts with one's fellow members of society.³⁵ A perceived prioritisation of religious identity and duties over all others is central to another attributed meaning that raises difficulties for liberal democratic societies in which people of diverse religious views must share institutions and public space. As Habermas has pointed out,³⁶ for many missionary faiths such as Christianity and Islam, as the need to save the immortal soul is the most important aim of life, a degree of cognitive dissonance is required to live in liberal societies. This is because liberal society requires believers to permit others to exercise their right to individual choice in ways that such believers may believe will cause them to be deprived of eternal salvation even though the right to individual choice is, in the believer's logic, of manifestly lower importance than the imperative of salvation. Once the veil is seen as a prioritisation of religious identity over one's duties as a citizen and member of broader society, it then comes to be seen as representative of an approach to religion that is incompatible with secular liberal democracy and the cognitive dissonance which life in religiously-plural societies requires.

Therefore, perhaps counter intuitively, it is the very fact that the wearing of the veil relates to fundamental matters such as religious identity and the relationship of the individual and their identity to society, that provides grounds both to protect and to restrict the decision to wear it.

4. Restriction of the Veil on Grounds of Its Offensiveness

A. *The Veil as Offensive Expression Protected by the Right to Freedom of Expression*

In considering the justification of the prohibition of the veil on the grounds that it represents a form of symbolic speech that is offensive, the meaning

34 See Djavann, *Bas Les Voiles!* (Paris: Gallimard, 2003); see also Badinter, supra n 29.

35 See Badinter, supra n 29. Communication occurs through facial gestures so covering it represents, or is seen as representing, a turning of one's back on communication. A commitment to sexual modesty that was not religiously inspired, but which led an individual to cover his or her face in public, would have a different meaning although it may still be considered to be offensive or to violate cultural norms relating to how one appears in public.

36 Habermas, 'Intolerance and Discrimination' (2003) 1 *International Journal of Constitutional Law* 2.

attributed to the veil cuts both ways. If the decision to wear a veil is merely a sartorial choice, many fewer problems would be raised by the ban. Western liberal democracies do not permit their citizens to wear what they wish in all circumstances. Appearing in public naked, for example, is generally not permitted (apart from in very limited designated areas).³⁷ Neither, in many countries, is it permitted to wear clothing bearing obscene images or words. Face coverings have been prohibited in the context of Italian anti-terror laws since 1975³⁸ while clothing that mocks, insults or vilifies religion would be prohibited in several European states.³⁹ These are all limits on the right of the individual to express themselves through their clothing. If the veil is seen as offensive and the decision to wear it is merely a matter of fashion preference, then a ban is unlikely to fall foul of the European Convention.

Viewing the wearing of the veil as a statement of political or religious beliefs such as the endorsement of gender apartheid or the submission of women to men, or as a declaration of support for the Islamist political project, may in one way make it even more offensive and thus strengthen the case for its prohibition, just as the display of symbols of other movements with offensive goals and values are sometimes banned. On the other hand, seeing the veil in this way also renders the act of wearing it a symbolic act of political or religious speech, a statement by the wearer of her beliefs as to how life and society should be organised.⁴⁰ This category of expression, which I will term '*ideological expression*' for convenience, is one whose prohibition requires particularly weighty justification under the case law of the ECtHR. It is because the act of wearing the veil speaks to and symbolically represents fundamental elements of one's worldview, beliefs and identity that a decision to wear it will obtain the highest level of protection under Article 10 of the ECHR that expresses the commitment of the European public order to the freedom to express ideological beliefs.

European law does permit the prohibition of offensive symbols or displays.⁴¹ It has long been unlawful to wear or display Nazi symbols in Germany.⁴² Other forms of ideological speech are also banned, such as racist, sexist and

37 Theoretically, an ideological commitment to nudism involving, for example, a person who believed their conscience commanded them to appear naked in public while carrying out their day to day business in order to help rid the world of unhealthy taboos around our bodies and sexual organs, would raise substantially similar issues to those raised by individuals restricted from symbolically expressing their religious beliefs through wearing a veil. Whether such nudists exist in significant numbers is, of course, another issue.

38 See 'Police stop woman wearing Muslim veil in Italy', *BBC News*, 3 May 2010, available at: <http://news.bbc.co.uk/1/hi/8658017.stm> [last accessed 15 January 2013].

39 See, for example, Paragraph 140 Danish Penal Code; Chapter 10 563/1998 Finnish Penal Code; Paragraph 188 Austrian Penal Code; and Article 403 Italian Penal Code. See also Doe, *Law and Religion in Europe* (Oxford/New York: Oxford University Press, 2011) at Chapter 6.

40 As Laborde rightly notes, merely wearing a religious symbol is not in itself an act of proselytism: see Laborde, *supra* n 6 at 58. However, the fact that a symbolic act may not constitute proselytism does not deprive it of its character as symbolic speech.

41 See *supra* n 33.

42 See Article 86a German Criminal Code.

homophobic insults that are prohibited by the law of several European states.⁴³ The banning of art and literature deemed religiously offensive has been upheld repeatedly by the ECtHR in cases such as *Otto-Preminger-Institut v Austria*,⁴⁴ *Wingrove v United Kingdom*⁴⁵ and *I.A. v Turkey*.⁴⁶ Is it possible to place the veil within these categories? The ECtHR generally defers to national authorities in making factual and legal assessments, giving Member States what is known as a 'margin of appreciation'⁴⁷ Although each individual will have her own reasons for wearing the veil, given the fact that it precludes meaningful social interaction between men and women and given the deference shown by the Court to national authorities, it is highly unlikely that the Strasbourg Court would find that the conclusion of a Member State which viewed the veil as an endorsement of gender apartheid and the subjugation of women was so unreasonable and illogical that the Court would overturn this determination and substitute its own factual assessment for that of the state in question.

On the other hand, even if one accepts that the veil is an Islamicist symbol and that the meaning attributed to the wearing of the veil by the authorities is sufficiently reasonable to justify restricting the wearing of the garment for all who wear it, even those who are not committed to Islamicist ideals, in the area of ideological expression, the Court of Human Rights is particularly vigilant to ensure that states restrict such expression to the minimum extent necessary. In *Giniewski v France*⁴⁸ and *Klein v Slovakia*⁴⁹ the Court found against Member States whose laws restricted speech deemed religiously offensive while in *I.A. v Turkey*⁵⁰ three of seven judges argued strongly that the Court needed to reconsider its tolerance of blasphemy laws altogether. Most importantly in *Vajnai v Hungary*⁵¹ the Court ruled that Hungary was not entitled to prohibit the display of the red star on the grounds that it was an offensive totalitarian symbol.⁵² In this case the ECtHR was faced with an individual who, having worn a red star in public, was convicted under Hungarian legislation

43 See, for example, Décret No 2005-284 du 25 mars 2005 relatif aux contraventions de diffamation, d'injure et de provocation non publiques à caractère discriminatoire et à la compétence du tribunal de police et de la juridiction de proximité (France); Articles 137c and 137d of the Dutch Penal Code; and Section 135a of the Norwegian Criminal Code.

44 See supra n 33.

45 Ibid.

46 2005-VIII; 45 EHRR 703.

47 *Handyside v United Kingdom* A 24 (1976); 1 EHRR 737.

48 2006-I; 45 EHRR 589.

49 50 EHRR 15.

50 *I.A. v Turkey*, supra n 46.

51 50 EHRR 44; see also *Donaldson v United Kingdom* 53 EHRR 14.

52 It should be noted that the European Court of Justice refused to accept a reference from the Hungarian Courts on this issue on the basis that the criminalisation of the display of totalitarian symbols fell outside of the field of application of EU law.

that prohibited the public display of a totalitarian symbol. The Hungarian authorities sought to justify the law on the grounds that

twentieth century dictatorships had caused much suffering to the Hungarian people. The display of symbols related to dictatorships created uneasy feelings, fear or indignation in many citizens, and sometimes even violated the rights of the deceased. To wear the symbols of a one-party dictatorship in public was, in the Government's view, tantamount to the very antithesis of the rule of law, and must be seen as a demonstration against pluralist democracy . . . the measure in question [therefore] pursued the legitimate aims of the prevention of disorder and the protection of the rights of others.⁵³

Although recognising that the restriction on the applicant's Article 10 right to free expression was aimed at the protection of the rights and freedoms of others, the Court stated that

there is little scope under Article 10§2 of the Convention for restrictions on political speech or on the debate of questions of public interest. In the instant case, the applicant's decision to wear a red star in public must be regarded as his way of expressing his political views. The display of vestimentary symbols falls within the ambit of Article 10.⁵⁴

The Court concluded that there had been a violation of Article 10. The ban could not be said to meet a 'pressing social need', it was too broad in view of the multiple meanings of the red star⁵⁵ and although 'the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful . . . such sentiments, however understandable, cannot alone set the limits of freedom of expression.'⁵⁶

The Court was clear that 'vestimentary symbols', even those that are viewed as offensive, are therefore protected by European law. The intensity of the protection provided is increased by the fact that the veil is potentially a kind of ideological expression, ie as expressing particular ideological commitments. It is difficult to imagine an absolute prohibition on the wearing of the veil surviving the application of the Court's reasoning in *Vajnai*. The fact that many or most people may regard the veil as incarnating or representing offensive views '*cannot alone set the limits of freedom of expression*'. Indeed, if it is legal to advocate sharia law or gender inequality in words, why should it be prohibited to do so symbolically? Moreover, in *Vajnai* the Court placed significant weight on the fact that the red star had multiple meanings as a symbol, not all of

53 *Supra* n 51 at para 33.

54 *Ibid.* at para 47.

55 *Ibid.* at para 54.

56 *Ibid.* at para 57.

which could be seen as amounting to endorsement of communist totalitarianism. As McGoldrick notes, the wearing of the veil also admits to a range of meanings.⁵⁷ Some who wear it may not be advocating the establishment of sharia at all but may simply wish to express an extreme level of sexual modesty. Although the strong political support in many states for laws banning the veil may push the Court to accord a significant margin of appreciation to Contracting Parties with such laws, its decision in *Vajnai* suggests that it would hold that an absolute ban on wearing the veil in public that is justified on grounds of its offensiveness, amounts to an undue restriction of the right to freedom of expression.⁵⁸

B. Freedom of Religion and Offensive Religious Practices

The text of Article 9 makes it clear that individuals have the right not merely to hold religious beliefs but also to manifest those beliefs. The Court of Human Rights has not, however, required states to provide religious individuals with exemptions from laws or other special accommodations in order to allow them to adhere to their religious identities in public contexts. In *Arrowsmith v United Kingdom* the European Commission of Human Rights held that Article 9 did 'not give individuals the right to behave in the public sphere in compliance with all the demands of their religion or belief'.⁵⁹ It has repeatedly upheld laws challenged under Article 9 on the basis that they were 'generally applicable and neutral'.⁶⁰ This approach is in line with the decision of the US Supreme Court in *Smith v Employment Division*⁶¹ that religious freedom claims could not support the granting of exemptions from generally applicable laws (in this case, a prohibition on narcotics). The ECtHR has also made it clear that the right to manifest one's religion does not cover all acts related to one's faith. In *Pichon and Sajous v France* (in relation to a claim brought by pharmacists punished for refusing on religious grounds to dispense medication) it stated:

Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance . . . [it] does not always guarantee the right to behave in public in

57 McGoldrick, *supra* n 6 at 8–12.

58 This does not mean that a ban on appearing veiled in public that aimed at regulating the time, place and manner of the wearing of the veil may not be justifiable (see the discussion in relation to social duties below).

59 19 DR 5 (1978); 3 EHRR 218. See also *C v United Kingdom* 37 DR 142 (1983); see also *Kalaç v Turkey* 1997-IV; 27 EHRR 552. The decision of the European Commission of Human Rights in *Arrowsmith* also recognised pacifism as falling within the scope of Article 9.

60 See, for example, *C v United Kingdom*, *ibid*.

61 *Employment Division, Department of Human Services of Oregon v Smith* 494 U.S. 872 (1990). A limited doctrine of reasonable accommodation has subsequently been developed in the United States, see *Gonzales v UDV* 546 U.S. 418 (2006).

a manner governed by that belief. The word 'practice' used in Article 9(1) does not denote each and every act or form of behavior motivated or inspired by a religion or belief.⁶²

Indeed, many Muslim scholars believe that the veil is not a religious requirement but is rather a personal choice by individuals.⁶³ On the other hand, the Court has become more willing to defer to the assessment of individuals in relation to what that individual's faith actually requires so may be willing to regard the desire to wear a veil as the manifestation of religious belief for the purposes of Article 9.⁶⁴ The Strasbourg institutions have been willing to countenance restrictions on the right to manifest one's religion in several public contexts. In *Ahmad v United Kingdom*⁶⁵ and *Stedman v United Kingdom*⁶⁶ the European Commission of Human Rights held that employees were free to resign if they felt the requirements of their job clashed with their religious beliefs and that the failure to actively accommodate such beliefs did not amount to a violation of Article 9. Restrictions on wearing the Islamic headscarf have been upheld in schools and universities on the grounds of the need to protect the neutrality of schools and the secular nature of the state.⁶⁷

However, the justifications of these restrictions cannot readily accommodate a general ban on wearing the veil in public. The rationale of the decisions in *Ahmad* and *Stedman* that the individuals in question had chosen their employment and were free to leave does not apply to a ban that covers one's ability to appear in public to carry out everyday tasks. The decisions concerning schools and universities related to particular contexts where the secular nature of the state or the neutrality of the school system were at stake. These are limited contexts where the state interest in controlling the appearance of those working or using particular facilities is particularly strong. The state interest in relation to general public space is much weaker. Even if, as the French Constitutional Council required in its decision upholding French legislation prohibiting the wearing of the veil in public,⁶⁸ an exemption is given to individuals who are in religious buildings or are participating in religious ceremonies, a general ban on wearing the veil in public involves a much greater degree of interference with religious freedom than the Strasbourg Court has been asked

62 *Pichon and Sajous v France* 2001-X at para 371.

63 For a useful summary of debates around the obligatory nature of the veil in religious terms and the relevance attached to such characterisations of religious duties, see McGoldrick, *supra* n 6 at 8–12. See also *Agence France Presse*, 'Egypt Al-Azhar Scholar Supports French Niqab Ban', 25 September 2010, available at: <http://www.google.com/hostednews/afp/article/ALeqM5jNAnCNRui8FnoLVQ00SJ8Mj9Qm6Q> [last accessed 4 July 2012].

64 *Karaduman v Turkey* 74 DR 74 (1993); and *Şahin v Turkey* 2005-XI; 41 EHRR 8.

65 4 EHRR 126.

66 89-A DR 104 (1997); 23 EHRR CD168.

67 *Supra* n 51; see also *Dahlab v Switzerland* 2001-V.

68 Conseil constitutionnel Décision No 2010-613 DC du 7 octobre 2010 (Loi interdisant la dissimulation du visage dans l'espace public).

to uphold to date. Moreover, the Court has repeatedly made it clear that ‘in principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed.’⁶⁹ A ban that targets the veil specifically as a religious symbol (rather than, as the in the case of the French legislation of 2010, prohibiting in general terms the covering of the face in public)⁷⁰ amounts to the targeting of a particular religious practice, by virtue of its status as a religious practice, and would therefore seem to violate a requirement that the state refrain from assessing the legitimacy of the mode of expression of particular beliefs. Indeed, in *Ahmet Arslan and Others v Turkey*⁷¹ the Court of Human Rights found a violation of Article 9 in respect of the conviction of members of a group, who had gathered in front of a Mosque in the characteristic dress of their sect in order to participate in a religious ceremony. Members of the group were convicted for violating a law prohibiting the wearing of certain types of religious clothing in places open to the general public. The Court’s finding of a violation was based on a number of specific factors. It cited the facts that the individuals in question had gathered outside the mosque for religious purposes, that they were neither public servants nor in a public institution at the time and that their clothing did not threaten the public order or place pressure on others to justify its finding of a breach of Article 9.⁷² The Court did not therefore find that all laws restricting the wearing of religious clothing in public were necessarily in breach of the Convention (the fact that the members were gathered outside a mosque for the purposes of engaging in a religious ceremony was an important factor in the judgment). However, the decision must at least cast doubt on the compatibility of such laws with the ECHR.

Of course, the text of Article 9 explicitly envisages limitations based on the ‘protection of public order, health or morals or the protection of the rights and freedoms of others’. As will be discussed below, there is a strong cultural taboo in Western societies⁷³ against appearing in public with one’s face covered. Provided that scenarios such as that in *Ahmet Arslan*, where the religious expression targeted was linked to a religious ceremony and where the Court explicitly found the clothing worn had no impact on others, are avoided, offensive ways of appearing in public may be legally prohibited on the basis of a need to protect public order and public morals. A believer in one of the

69 *Metropolitan Church of Bessarabia and Others v Moldova* 2001-XII; 35 EHRR 306, at para 116.

70 Of course, many of those promoting such a prohibition may be motivated by dislike of a particular faith. However, if the law can also be supported by reasons independent of such dislike it would not be found to breach the duty of state’s to avoid assessing the legitimacy of religious beliefs.

71 *Ahmet Arslan and Others v Turkey* Application No 41135/98, Merits, 23 February 2010.

72 *Ibid.* at paras 48–52.

73 For discussion of the prohibition of the veil on grounds of the promotion of social duties, see below.

religions of the tribes of the Amazon who believed the covering the body displeases God would not be permitted to appear in public naked. Similarly, the devoted nudist whose conscience commands him or her that he or she should appear naked in public can be prevented from doing so on the basis that nakedness is considered offensive. If society can control the appearance of such individuals why then can the individual whose religious beliefs command her to appear with her face covered and is therefore dressed in a manner that is offensive not equally be prevented from doing so? A liberal society cannot treat the conscience rights of all with equal concern and respect if it grants to forms of conscience that are religious in nature, privileges that are not granted to equally deeply felt non-religious forms of conscience or which varies the degree of protection of religious freedom on the basis of the popularity of the religion in question.⁷⁴

It is therefore difficult to predict with certainty the outcome of an Article 9 challenge to a veil ban. The Court has been willing to accept restrictions of public expressions of religiosity. However, a veil ban that applies goes significantly further and is significantly more invasive of religious freedom than the restrictions previously upheld. Veil bans require the Court to choose between two competing trends in its jurisprudence. On the one hand it has seen religion as a private activity that must give way to the needs of communal life in public contexts. On the other hand, it has looked to the state to show a particular need for restricting religious expression, a test that has generally been satisfied by showing that the restriction applies in particular sensitive contexts such as schools where state interests are especially strong. The public wearing of the veil brings religious practice out of the private sphere by confronting others with the piety of wearers and restricting the ability to see and interact with fellow citizens. The ban on the veil brings the state out of its limited contexts of schools, courts and government offices and places the duties of citizenship to the fore in what have to date been seen as non-state contexts.

The act of wearing a veil in public is therefore both private and public and attempts to restrict it bring about a clash between demands of faith and obligations of citizenship both of which have been seen by the Court up to now as being demands and obligations that were containable to particular limited contexts.⁷⁵ These issues require, *inter alia*, important decisions in relation to the

74 The need to provide equal protection to non-religious forms of conscience is, for example seen in decisions of the British courts recognizing beliefs such as environmentalism (*Grainger plc and Others v Nicholson* [2010] IRLR 4 (EAT)), the need to treat animals ethically (*Hashman v Milton Park (Dorset) Ltd.* ET Case No 310555/09), and the importance of public service in broadcasting (*Maisty v BBC* ET Case No 1313142/10).

75 This is the approach of the French legislation of 2010 that permits veiling as long as it is for specific purposes and limited to certain occasions. Thus, veiling for the purposes of traditional carnivals or sport is permitted as individuals who veil for such purposes, unlike those who veil on the basis of a religious belief that requires them to remain concealed in the presence of man, will, once the particular event is over, revert to revealing their faces

drawing of the precise boundary between the public and private spheres. The Court has been supportive of public morals laws as long as they have protected private autonomy so it may well decide that states are entitled to restrict the public wearing of forms of dress considered offensive notwithstanding that the relevant forms of dress are religious in nature.⁷⁶ It may also be keen, particularly in the light of the very widespread political support for veil bans, to give a relatively broad margin of appreciation to state authorities in this area. However, given that the ECHR was in part a reaction to the all encompassing nature of totalitarian states, it must be possible that the Court will react against the extension of state power to control individual appearance from limited discrete state contexts to all non-private space. The *Ahmet Arslan* case can be distinguished from general bans on the full veil but, at the very least, it gives a powerful indication that objecting to a message attributed to a religious symbol may not suffice to ground the total prohibition of the public display of such a symbol. It is therefore difficult to give a firm prediction in relation to the chances of success of a challenge based on Article 9. The French ban is not clearly contrary to Article 9 as it has been interpreted to date but goes well beyond restrictive measures previously upheld. At the very least, the *Ahmet Arslan* decision indicates that the Constitutional Council's requirement that religious buildings be exempt from the ban will have to be read as covering religious ceremonies outside such buildings and other dedicated 'expressive occasions' if the law is to comply with the ECHR. There is therefore at least a reasonable possibility of the Court finding a violation of Article 9, particularly if the French authorities do not interpret the law in this way.

5. The Veil as Representative of a Threat to Liberal Democracy

If the offensiveness of the message attributed to a garment is a doubtful basis to justify restriction of Article 9 and Article 10 rights, some other justification may be required by states introducing such bans. Article 17 of the European Convention provides:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth

when in public. As discussed below, legislation that prohibits the wearing of face-coverings in public on grounds that the veil is inappropriate at particular times or in particular places poses significantly fewer problems in terms of European law.

76 For criticism of spatial notions of privacy, see Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 *Modern Law Review* 912.

herein or at their limitation to a greater extent than is provided for in the Convention.

In *Refah Partisi v Turkey*,⁷⁷ the Court characterised a desire to establish a legal system based on sharia law as inconsistent with Convention values stating that ‘a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention’,⁷⁸ noting that sharia rules in relation to ‘the legal status of women’ were particularly problematic in this regard.⁷⁹ This rejection of a legal system based on sharia was, for the Court, part of a broader commitment to a secular legal and political order which Member States are entitled to protect. Again in *Refah* the Court stated that

the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention.⁸⁰

Such an attitude has not been restricted to the Council of Europe. The EU has been equally clear that acceptance of the secular nature of the legal and political orders of Member States is a core element of its public order and a prerequisite of membership. The EU requires limitations on the degree of influence exercised by religion over the law of potential Member States. It required Romania and Turkey not to accept religious pressure to criminalise homosexuality and adultery, respectively while the Commission stated that separation between religion and politics and ‘democratic secularism’ were entry conditions.⁸¹ It is therefore possible that, if the wearing of the veil can be characterised as an element of a broader theocratic and anti-democratic agenda that aims at the overthrow of the secular political order, then both the ECtHR and the EU law may be willing to uphold a ban notwithstanding the impact on religious freedom as part of their commitment to the protection of the secular nature of the public order.

Protecting the secular nature of the state or public order can involve restriction on religious expression, including the wearing of religious symbols in particular contexts such as schools or government offices where a religiously diverse citizenry are required to come together for particular common

77 *Supra* n 22.

78 *Ibid.* at para 123.

79 *Ibid.*

80 *Ibid.* at para 93.

81 See McCrea, *supra* n 23 at Chapters 5 and 6.

purposes. Such restrictions have repeatedly been upheld by the Court of Human Rights.⁸² However, as noted above, an outright ban on the wearing of the veil goes significantly further. Secularism is about the religious neutrality of the *state* and the French ban, at least, goes beyond state contexts. While the state may have a clear interest in ensuring that controversial symbols do not appear in certain state contexts such as schools and government offices, it has no similar interest in restricting symbols in non-state public spaces. No serious threat to the secular nature of the state can be discerned by the wearing of a symbol thought to be inconsistent with the values of the state in non-state contexts. The state's interests in the smooth running of its functions and the protection of its identity are unaffected by symbols and statements made or worn in such non-state contexts. This was certainly the view of the Court of Human Rights in *Ahmet Arslan* where its finding of a violation of Article 9 was founded, *inter alia*, on the fact that the individuals in question were neither public servants nor within public institutions when wearing the garments in question.⁸³ In order to rescue a prohibition on wearing the veil in public through Article 17, something beyond a mere inconsistency between the symbols an individual chooses to wear and the values of the state must be shown. To hold otherwise renders the state all encompassing by inserting it into a vast range of private activities and giving it a degree of control of private life, which is inconsistent with the anti-totalitarian impulses which the European Convention on Human Rights was intended to protect against.

Nevertheless, there is some scope for using Article 17 to uphold measures taken to defend the liberal democratic and secular nature of the state that are not restricted in their application to state contexts. What would be necessary is for the wearing of the veil to be shown to be part of a broader campaign that seeks to undermine the liberal democratic and secular political order. Thus, if one views the wearing of the veil as giving support to or promoting the establishment of a political and legal order based on Islamic religious law, it may well be found to fall outside of the protection of the Convention.⁸⁴

The Court has been unclear as to the extent to which expression which is regarded as endorsing Convention-non-compliant aims must be part of a genuine and serious threat to the democratic system, or whether expression which is hostile to the values of the Convention but not part of a broader substantial threat to democratic values will also be excluded from the protection of the Convention by Article 17. In *Garaudy v France* the punishment of expression

82 See *Şahin v Turkey*, supra n 64; *Dahlab v Switzerland*, supra n 67; and *Dogru v France* 49 EHRR 8.

83 Supra n 71 at paras 48–50.

84 See Boyle, supra n 20.

that amounted to holocaust denial was upheld by the Court on the grounds that the applicant's statements represented an attempt

to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention.⁸⁵

Thus, the Court applied Article 17 to remove the expression in question from the protection of Article 10 notwithstanding that a serious threat of neo-fascist overthrow of the French state had not been shown. On the other hand, in *Refah Partisi v Turkey*, the Court placed emphasis on the fact that the political party, which was challenging the Turkish state's decision to dissolve it as a threat to secularism, had won the largest number of votes in the most recent election in order to characterise the threat it posed as sufficiently serious to override the party's Convention rights.⁸⁶ Even more clearly, in *Vajnai* the Court placed significant emphasis on the fact that 'there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship. The Government have not shown the existence of such a threat prior to the enactment of the ban in question'⁸⁷ to hold that the ban on the wearing of the red star was disproportionate.

If the Court sees the veil as an endorsement of an Islamicist agenda, committed to the overthrow of secular democracy, there is scope for it to uphold a ban on the basis that the wearing of the veil falls within the kind of action that Article 17 envisages should fall outside of the protection of the Convention. If the Court follows the approach in *Garaudy*, it may not be necessary to show a serious threat to the liberal democratic order from such Islamist groups. However, even in the context of Turkey, where the threat to the secular system has caused the Court to grant considerable leeway to the authorities,⁸⁸ the ECtHR indicated in *Ahmet Arslan* that merely wearing items of clothing in public could not provide sufficient grounds to justify restrictions on the basis of the need to protect secularism.⁸⁹ It is therefore more likely to follow its reasoning in *Refah* and *Vajnai*, and to require some evidence of such a threat in order to place expression in non-state contexts outside the protection of the Convention on the basis of Article 17. While there are groups dedicated to the establishment of a sharia-based legal order in Europe and while such an order may involve serious violations of Convention values in areas such as respect for private sexual autonomy, gender equality and the

85 *Garaudy v France* Application No 65831/01, Admissibility, 7 July 2003.

86 *Refah Partisi*, supra n 22 at paras 107–11.

87 Supra n 51 at para 49.

88 *Refah Partisi*, supra n 22 at paras 100–110 and 130–136.

89 *Ahmet Arslan*, supra n 71 at paras 48–52.

prohibition of inhuman and degrading treatment, it is not possible to view such movements as posing a *'real and present danger'* of establishing such a regime. Islamacist movements in Europe have negligible electoral support and, while they may pose a threat in terms of individual acts of terrorism, they have no serious prospect of overturning the constitutional order. Indeed, advocacy of sharia law and a theocratic state is not a crime in most European states. It is therefore unclear why the state should find it necessary to ban symbols to which endorsement of such goals is attributed without banning advocacy of the goals themselves.

A further difficulty in sustaining a prohibition of the veil on the grounds of the need to protect liberal democracy or, indeed, the need to restrict offensive speech, is posed by the possibility that, as noted above in relation to Article 10, the veil may have multiple meanings. In *Vajnai* the Court stated that 'utmost care must be observed in applying any restrictions, especially when the case involves symbols which have multiple meanings'.⁹⁰ The star, it held, 'cannot be understood as representing exclusively Communist totalitarian rule, [but also] symbolises the international workers' movement, struggling for a fairer society, as well certain lawful political parties active in different Member States'⁹¹.

Some may wear the veil to signal, *inter alia*, their commitment to a legal and political order based on sharia.⁹² Others may simply wear it as a command of conscience which requires them either to adhere to and possibly also to demonstrate their commitment to an extreme level of sexual modesty. Given that even the latter meaning involves a commitment to a degree of gender apartheid, this may nevertheless be considered offensive to those who believe in the need for citizens to be open to communication with each other. However, it is less than clear that, in so far as political speech (which presumably includes vestimentary statements in relation to the desirability of modesty) attracts a very high level of protection, the Court would be willing to countenance an absolute curtailment of the ability to make such a statement. Citizens may legitimately be prevented from asserting their particular viewpoints in the context of shared institutions such as schools but they also have the right under the European Convention to be illiberal and to express their illiberal beliefs unless a pressing social need to prevent such expression can be identified. In the light of the low likelihood of an Islamist take over and the need to tolerate even offensive political expression, it is unlikely that, in so far as the act of wearing a veil can be regarded as political speech, an absolute ban can be justified by either Article 17 or the need to prevent offensive speech.

90 *Supra* n 51 at para 51.

91 *Ibid.* at para 52.

92 See McGoldrick, *supra* n 6.

6. The Non-State Public Realm: Rights in the Context of Duties of Everyday Life in Society

The analysis so far suggests that a wide-ranging veil ban may well struggle to survive challenges on the basis of Articles 9 and 10 of the ECHR for the reason that the exceptions to these articles are too narrow to encompass legislation that involves a general prohibition. Accordingly, neither the offensiveness of the beliefs, which the veil is regarded as representing, nor any threat to the secular state can justify absolute prohibition.

It is also clear that an absolute prohibition on wearing the veil in any circumstances whatsoever would violate the right to privacy protected by Article 8. The Court has held that Article 8 includes a right to define one's own personality and identity and has protected those who wish to pursue and construct in private identities disapproved of by the majority.⁹³ It is difficult to imagine a veil ban that applied to private residences being found to be Convention-compliant. The mere knowledge that individuals are, in private, dressing themselves in ways that the authorities or others in society may not like cannot be considered to be a harm that a liberal society can legislate against. To hold otherwise would destroy the essence of private autonomy and would clearly violate the Convention.

These considerations may not, however, be conclusive. The prohibitions of the veil enacted to date do not cover wearing of the veil in private (or in the French case, in religious buildings). More importantly, potential justifications, other than the offensiveness of the veil, may justify the restrictions on rights to free expression and freedom of religion that a veil ban involves.

The most defensible limitations relate, in fact, to the context of the wearing of the veil as much as to the offensiveness of the veil itself, that is, to social duties; one's duties to one's fellow citizens rather than to the state.⁹⁴ The strongest justification for laws prohibiting the wearing of the veil in public are based on a vision of the individual in society and the duties that are incumbent upon us all when we place ourselves in public in places shared with others.

The main duty that is relevant in this regard is a social one and relates to the manner in which one exercises one's fundamental rights when in public. These justifications relate to our shared life and speak to a non-libertarian view of society where individuals may not appear or use public space entirely in a manner of their choosing but must, when in public, conform to certain norms. It sees the act of appearing in public as something that is not merely

93 *Dudgeon v United Kingdom* A 45 (1981); 4 EHRR 149.

94 These duties were characterised as 'non-substantive public policy' goals by the Conseil d'Etat in its 'Study of Possible Legal Grounds for Banning the Full Veil: Report adopted by the Plenary General Assembly of the Conseil d'Etat, Thursday 25 March 2010', 2010, Conseil d'Etat, Reports and Studies Section, at 28–9; see also Badinter, *supra* n 29.

individual but which has a collective element and is based on a recognition that human life is, to a degree, a life in society with others.⁹⁵

Even if we do live in society with others, how can this render our clothing the legitimate subject of communal control? One major reason for this is the idea that how one appears and behaves in public may affect how others experience public space. Just as the right of an individual to decorate their business premises or home the way they wish may be limited in order to maintain certain characteristics of public space, so an individual's right to appear how they wish in public may be regulated to preserve certain characteristics of shared social space and interactions. This is not a limitation that one can say is certainly justifiable or Convention-compliant; the choice of one's own clothing is considerably more intimate and more closely linked to one's individuality than the external design of a home or commercial premises that one may own. However, justifications for the legal measures based on the enforcement of particular social norms in order to ensure that others can enjoy social space and social life cannot be dismissed out of hand.

The basic idea underlying restriction on social grounds is that, although an individual may have the right to free expression or free practice of religion, the fact that we live in society may mean that individuals may be required to exercise those rights in a manner compatible with our fundamental duties to each other as members of a society. Some such duties are obvious. My duty not to kill my neighbour will supersede any right to follow a religion that tells me to do so. Others are more context dependent. One may have the right to ring church bells or to call the faithful to prayer but that duty may be limited by the need to avoid making noise in particular places at particular times of day. Indeed, as noted above, the need to restrict controversial expression has been recognised by the Strasbourg Court in the specific context of state institutions such as schools.⁹⁶

The kind of duties that may support a veil ban that applies in the context of public spaces generally are perhaps less obvious. However, it is true that legally-enforced social duties are not limited to concrete harms such as sleep deprivation nor to specific contexts such as state institutions. Prohibitions on public nudity enforce a taboo around exposing parts of the body in public in order to prevent upset to others who are distressed by the breach of this taboo. There may also be public health reasons behind such laws but that is not their sole basis. A nudist who was willing to wear see-through plastic over their genitals to satisfy health concerns would not evade criminalization under public nudity laws.

95 These considerations were prominent features of the debate on the legislative ban in France: see Badinter, *supra* n 29.

96 *Dahlab v Switzerland*, *supra* n 67; and *Dogru v France*, *supra* n 82.

The advice provided by the Conseil d'État to the French Government in relation to the legal basis for a ban on face-covering in public argued that 'the act of concealing [one's face] is in no way comparable to the sexual exhibitionism punishable under . . . the Penal Code, which is considered by its very nature to be a form of aggression against the persons exposed to it'.⁹⁷ However, many European countries maintain prohibitions on nudity that are not restricted to sexually-charged nudity. Even in France nudists who have no sexual purpose in exposing themselves in public are not permitted to do so. The prohibition is based on the fact that nudity is, for cultural reasons, considered offensive. Like prohibitions on wearing the veil in public, restrictions on public nudity involve legal restrictions on individual autonomy and self-expression (and depending on the reasons for which an individual wished to appear naked in public, possibly free conscience rights too) in order to uphold collective cultural norms in relation to the appropriate way of appearing in public. The question of what kinds of clothing or lack of clothing which are to be considered sufficiently offensive for their public appearance to be regulated—whether, for example the full veil is as offensive as the bare chest or uncovered genitals—is the kind of question that is generally the province of popularly-elected legislatures. Analysing veil bans in these terms, there are two major potential social duties, which a ban may enforce. The first is the duty to respect a cultural taboo in relation to covering one's face in public. The second involves a duty to behave in a way that is considered dignified.

A. Social Duty to Respect Taboos around Face-Covering in Public

Generally, European societies have a taboo against covering one's face in public.⁹⁸ At least part of this is likely to be linked to the fact that communication in European societies occurs to a significant degree through facial gestures such as smiles. This is particularly the case between strangers and in public places where possibilities for verbal communication are more limited. Many legal systems attribute significance to non-verbal communication by requiring, for example, witnesses to testify in open court so that their non-verbal signals can be assessed by the fact-finder.⁹⁹ Covering one's face in

97 Supra n 94 at 28.

98 There are exceptions to this which apply to specific activities and occasions for limited times in the case, for example, of particular festivals or for safety, for example, wearing a helmet when riding a motorcycle.

99 See, for example, the 6th Amendment of the United States Constitution guaranteeing the right of an accused to confront witnesses against them. In *Mattox v United States* 156 U.S. 237, 242 (1895) the Supreme Court noted that a key reason for the amendment was in order to allow juries to assess the demeanour of witnesses. In *R v N.S.* (2010) ONCA 670, the Ontario Court of Appeal held that whether a witness is to be required to remove her niqab while giving evidence must be decided on the basis of the interests of justice on a case-by-case basis. UK courts are instructed to make decisions on a case-by-case basis as determined by the interests of justice.

public cuts one off from the possibility of visual communication with one's fellow citizens. It also places one in a position where one is able to see one's fellow users of public space without being seen one's self. Breaching this taboo is perceived by many as rude and as rejecting interaction with one's fellow citizens and disturbs and upsets many individuals. Of course, in a liberal society, individuals do not have the duty to refrain from doing anything that might upset others. However, one may have the duty to limit one's offensive or taboo-violating expression to appropriate occasions such as the religious ceremony and march that was the subject of the case in *Ahmet Arslan*¹⁰⁰ in order to facilitate our communal life. This idea seems to have underpinned the approach of the French Constitutional Council which, in upholding the constitutionality of legislation prohibiting the hiding of one's face in public, characterised the imposition of a duty not to cover one's face as a legitimate requirement to respect 'the minimal requirements arising from the social nature of life'.¹⁰¹

The approach of European judicial institutions to the imposition of social duties leans both ways. On the one hand, European law places significant value on the right to be left alone and to define one's own identity. In *Dudgeon v United Kingdom*¹⁰² the ECtHR held that privacy rights meant that cultural or religious disapproval of homosexuality could not justify criminalizing sexual conduct that occurred in private. In *Sorensen and Rasmussen v Denmark* it acknowledged an individual right not to associate with particular groups¹⁰³. In EU law, the opinion of Maduro AG in *Coleman v Attridge Law*¹⁰⁴ underlined how the large and growing body of EU anti-discrimination law is based on recognition by the EU legal order of the importance of respect for individual autonomy.

On the other hand, European law allows member states to promote cultural values at the expense of individual autonomy and free expression. Both the ECtHR and the Court of Justice have given Member States a degree of leeway and allowed them to curtail individual autonomy in order to promote particular national views of public morality, cultural norms or notions of public policy. In *Her Majesty's Customs and Excise v Schindler*¹⁰⁵ the Court of Justice permitted restriction on gambling partly on the basis of national religious,

100 Supra n 71. Other examples might be artistic performances, political protest marches and debates all of which are forums within which it may be considered particularly important for individuals to be able to engage in expression considered shocking by the majority.

101 The original French phrase is 'les exigences minimales de la vie en société'. It should be noted that the Conseil d'État's advice to the French government (supra n 94 at 28) was that such a justification may not provide a sufficient basis for legislation banning the face-covering in all public places.

102 Supra n 93.

103 46 EHRR 29.

104 C-303/06 [2007] IRLR 88.

105 C-275/92 [1994] ECR I-1039.

social and cultural norms. In *Torfaen Borough Council v B & Q plc* it upheld restrictions on Sunday trading to enable working arrangements ‘to accord with national, regional socio-cultural characteristics’.¹⁰⁶ Most famously, in *SPUC v Grogan* the Court of Justice upheld Irish restrictions on access to abortion information on the basis that this was ‘a policy choice of a moral and philosophical nature the assessment of which is a matter for the Member States and in relation to which they are entitled to invoke the ground of public policy’.¹⁰⁷ The Strasbourg Court has also been willing to defer to state assessments and to uphold legal measures enforcing majoritarian cultural norms. In a series of cases, starting with *Handyside v United Kingdom*, the Court has accorded a margin of appreciation to national authorities sufficient to uphold a conviction for possession of an obscene article on the grounds that this limitation was necessary for the ‘protection of morals’ on the basis that

[b]y reason of direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements [of protecting morals] as well as on the ‘necessity’ or a ‘restriction’ or ‘penalty’ intended to meet them.¹⁰⁸

The Court stressed that this margin of appreciation was not unlimited and that the Court is empowered to give a final ruling on whether the restriction in question is compatible with the Convention. However, the Court has given significant leeway to states in this regard and has upheld restrictions on expression that is offensive to those of particular faiths,¹⁰⁹ as well as sexually-explicit material (including artistic material)¹¹⁰ on the grounds of their offensiveness.

These cases need to be reconciled with the holding in *Vajnai*, which held that the offensiveness of the red star was not a sufficient ground to prohibit its display, and with the decision in *Ahmet Arslan* where punishment for wearing the costume of a religious sect in public was held to violate Article 9 of the ECHR. However, unlike the prohibition in either of these cases, which imposed a content-based ban on the symbols in question due to their allegedly offensive natures, a prohibition on the wearing of the veil on the basis of a social duty relates to the (admittedly broad) context in which the symbol is worn, not to the offensiveness of the message imputed to the symbol. Both the ECtHR and the United States Supreme Court have on occasion attempted to balance the right of the state to promote cultural taboos and communal

106 Case C-145/88 [1989] ECR 3851.

107 Case C-159/90 [1991] ECR I-4685 at para 26 (Opinion of Advocate General Van Gerven).

108 Supra n 47; see also *Wingrove v United Kingdom*, supra n 45 at para 62.

109 *Otto-Preminger-Institut v Austria*, supra n 33.

110 *Müller v Switzerland A 133* (1998); 13 EHRR 212; and *Perrin v United Kingdom* Application No 5446/03, Merits, 18 October 2005.

moral standards through law against free expression rights by focusing on the time, place and manner of the controversial expression. In *Barnes v Glen Theatre*¹¹¹ the Supreme Court upheld as not being a violation of freedom of expression a ban on nude dancing in an adult theatre on the basis of an Indiana statute banning all public nudity. The Court found that 'public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude amongst strangers in public places'. It went on to uphold the law on the basis that 'the governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself'.¹¹² In doing so the Court applied a series of earlier rulings that held that 'content neutral time, place and manner restrictions are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication'.¹¹³

On this analysis, while nudists are permitted to be naked in one's home, in private venues or particular designated nudist areas, they have the legal duty to exercise their right to express themselves in such a way as to respect a (legally-reinforced) social and cultural taboo against public nudity. Following this logic, a law that permits an individual to cover their face in private venues, in religious buildings, or perhaps on a demonstration in favour of veils or Sharia, may represent an acceptable time, place and manner restriction on rights of expression aimed at ensuring respect for cultural norms and protecting the interests of those who will unwillingly be exposed to the sight of someone dressed in this way. Such an approach, which imposes a general duty to obey a social norm in public contexts that are not connected to artistic performance, acts of ideological expression or religious practice can be distinguished from the scenario in *Ahmet Arslan* and *Vajnai*, where the individuals wearing the forbidden items were participating in religious ceremonies and protests respectively and where the law specifically targeted the message expressed by the garments in question. The carving out of particular contexts, such as protests or religious buildings, within which individuals are able to violate collective taboos is vital both to protect individual private autonomy and to ensure that the law is not used to prevent the possibility of social change and challenge to existing norms. It ensures that social duties do not become so stifling that they close off all opportunities to dissent from and to attempt to change collective cultural norms while maintaining such norms in the context of everyday life.

111 501 U.S. 560 (1991).

112 Ibid.

113 *Renon v Playtime Theatres* 475 U.S. 41 (1986). It is important to note that such a rationale for limitation of expression is only applicable to legislation that applies a general prohibition on face covering rather than a prohibition specifically targeting the Islamic veil.

The importance of time, place and manner in relation to public expression of offensive matter seen in *Ahmet Arslan* has also featured in other decisions of the Court of Human Rights. In *Scherer v Switzerland*¹¹⁴ it held that restrictions on the showing of sexually explicit gay films in a private cinema which required members of the public to pay a fee before entering, amounted to a breach of the Convention on the basis that there was no possibility of members of the public unwittingly being exposed to the films in question. In *Müller v Switzerland*,¹¹⁵ on the other hand, the Court upheld the temporary confiscation of sexually explicit artworks partly on the grounds that individuals might unwittingly be exposed to them as they were part of an exhibition generally open to the public.

This approach is consistent with that of the French Constitutional Council, which held that a prohibition on public-face covering was only constitutional if it included an exemption permitting the covering of the face in religious buildings. From the perspective of those who oppose the constitutionality of such laws, providing what is in the terms used by the US Supreme Court an ‘alternative means of expression’ does not actually lessen the severity restriction of the rights as, for many who choose to wear the veil, their reasons for doing so are not related to a desire to express any kind of message but rather to adhere to the commands of their religion. That said, as noted above, the ECtHR has consistently held that Article 9 does ‘not give individuals the right to behave in the public sphere in compliance with all the demands of their religion or belief’¹¹⁶ and that the practice of one’s religion may in public contexts have to give way to other rights and duties. The Court has also been clear that curtailments of rights must be proportionate and curtail the relevant right to the minimum degree necessary to achieve the relevant social goal. If upholding taboos around face-covering and restricting the public appearance of forms of dress that are considered offensive is found to be a legitimate goal, then the fact that the French ban does not apply to religious buildings may help it to meet such a test (though, as noted above, the exemption would need to be interpreted to cover religious ceremonies outside such buildings).

The categorisation of the decision to wear the full veil as equivalent to a decision to appear naked in public is contested.¹¹⁷ It is also likely, as a matter of fact, that for devout Muslim women who feel required to wear the veil, being

114 A 287 (1994); 18 EHRR 276.

115 See supra n 110 at para 36. It is, however, notable that in *Otto-Preminger-Institut v Austria*, supra n 33, the restriction on free expression was upheld notwithstanding the fact that the film in question was being shown in a private cinema.

116 *Arrowsmith v United Kingdom*, supra n 59; see also *C v United Kingdom*, supra n 59; and *Kalaç v Turkey*, supra n 59 at para 27.

117 The report of the Conseil d’État on the legality of a veil ban argues that the two are not equivalent as public nudity combats sexual aggression. This argument is ill-founded given that, as noted above at supra n 94, non-sexual public nudity is prohibited under the laws of many European states.

forced to unveil may represent much more of burden than the imposition of a duty to cover up represents for most nudists.¹¹⁸ However, as noted above, if it is to treat the conscience rights of all with equal concern and respect, a liberal society should not place a higher value on the autonomy and conscience of an individual on the basis that his or her acts of conscience are religious in origin than it does when those acts, though equally deeply felt, are not religious. Even the most devoted nudist, one who, for example feels that covering up in public helps to sustain wrongful and unhealthy attitudes to our bodies and sexuality, is not exempted from the duty to be clothed in public. Indeed, as also noted above, religiously-motivated public nudity is unlikely to be protected by the Convention. If one accepts that how one appears in public may be a legitimate site of regulation by the state and that some control of offensive ways of being clothed (or not being clothed) is permissible, then it is difficult to argue that it should not primarily be for the legislature to decide what kinds of clothing or lack thereof, should be considered sufficiently offensive to warrant prohibition.

The act of veiling one's face is considered to be offensive by many. As a full veil prevents even incidental communication, it can reasonably be perceived as a rejection of interaction with one's fellow citizens. Furthermore, the fact that the veil wearer can see others without being seen may well produce feelings of unease amongst one's fellow users of public space. Whether the European judiciary will perceive such feelings of offense as sufficiently important to outweigh the very significant burden placed on individuals prevented from obeying what they see as the requirements of their faith is not entirely clear. However, in the light of their case law to date, including the refusal to allow Article 9 to be used to claim exemptions from generally applicable laws and the importance of the margin of appreciation in matters related to cultural norms, it would not represent a major departure for the Strasbourg Court to uphold the determination of the French legislature in this regard.

B. A Duty to Public Dignity?

The second duty that may serve to justify a ban on the veil under European law is the protection of human dignity. This was repeatedly cited by the French

118 Indeed, viewing religious practice in terms of beliefs and regarding religiously motivated actions as symbols of particular beliefs and opinions may represent a very Christian way of perceiving religion that fails to recognize that other faiths place greater importance on rituals and actions than beliefs. However, reconsideration of predominant European conceptions of the nature of religion and the kind of values and conduct that should be the primary focus of protections of religious freedom is beyond the scope of this article.

authorities in the debate around the 2010 law.¹¹⁹ As McCrudden notes, the concept of dignity in European law is ‘slippery’.¹²⁰ However, it is well established that individuals have a right to respect for their human dignity under European law.¹²¹ However, it is also the case that the European public order accepts that there is, in some countries, not merely a right to one’s own dignity and a duty to respect the dignity of others but also a duty on the part of individuals not to compromise their own dignity publically, even voluntarily. This duty involves public adherence to collective notions of dignity, which may not coincide with, and may indeed conflict with, an individual’s perception of what their dignity requires.

One can appreciate how such arguments apply to prohibition of the veil. The veil, it is argued, demeans women by removing them from sight and represents a profoundly inegalitarian view of relations between men and women. Thus rendering women invisible in public can be seen as an attack on the equality and dignity of women. One can readily appreciate the potentially totalitarian potential of requiring adherence to dignity. In some societies it may be considered degrading and undignified for women to show their faces or for people of the same gender to engage in consensual sexual relations with one another.¹²² However, Europe’s public order is liberal, not libertarian in the sense that it provides space, albeit limited, for laws enforcing notions of dignity, at least in so far as public behaviour is concerned.

Veil bans embody a particular concept of dignity in the context of an egalitarian society that envisages open interaction of the genders as an inherent part of the good life. Such laws are obviously not culturally neutral, nor do they claim to be. Indeed they are manifestly in tension with cultural traditions of gender segregation which prevail in much of the world.¹²³ A state which

119 See, for example, letter of Prime Minister Fillon to the Conseil d’État requesting its view on the legality of a veil ban cited in the *Study of Possible Legal Grounds for Banning the Full Veil: Report Adopted by the Plenary General Assembly of the Conseil d’État*, 25 March 2010, supra n 94 Annex 1.

120 McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655.

121 See, for example, Article 1 Charter of Fundamental Rights of the European Union; see also Case C-36/02 *Omega Spielhallen* [2004] ECR I 960 at paras 34 and 35, where the Court of Justice recognised respect for human dignity as compatible with EU law. The prohibition of degrading treatment in Article 3 European Convention on Human Rights is also linked to the protection of human dignity.

122 The European Court of Human Rights has made it clear that private autonomy covers the right to private consensual same-sex sexual activity: see *Dudgeon v United Kingdom*, supra n 93. Whether a ban on public same-sex activity would be consistent with the Convention is unclear though the Court has demanded particularly strong reasons to justify laws that explicitly discriminate against individuals on grounds of sexual orientation: see *Schalk and Kopf v Austria* Application No 30141/04, Merits, 24 June 2010.

123 McGoldrick, supra n 6 at 16–23, points out that, for many who wear it, the hijab is seen as a feminist statement. The full-face veil may, however, be harder to characterise in feminist terms.

prohibits public face veiling by law is obviously not neutral in relation to all cultures, but thereby rejects not only libertarianism¹²⁴ but also cultural norms inconsistent with ideas of gender equality and free interaction of the sexes which may have thrived within contemporary Western culture but which are also valued for their own sake not just their cultural lineage.

The legal advice provided by the Conseil d'État to the French government argued that the principle of protection of human dignity was not applicable in this area. It reached this conclusion on the basis that 'human dignity implies, by its nature respect for individual freedom'.¹²⁵ Although it concedes that there is a second version of dignity, *vis* 'the collective moral requirement to protect human dignity, perhaps at the expense of freedom of self-determination',¹²⁶ it concludes that protection of dignity as a basis for a law is 'legally debatable, given the range of circumstances to be taken into account and particularly in the event that a person who has reached the age of majority deliberately chooses to wear the full veil'.¹²⁷ The Conseil's view is based partly on its view of the 'thrust of the judgement' in *K.A. and A.D. v Belgium*¹²⁸ in which the Strasbourg Court made strong pronouncements in relation to the importance of individual autonomy.¹²⁹ It is debatable how relevant the statements in this case really are to the issues raised by a ban on wearing the veil in public. The judgement in *K.A. and A.D.* related to sado-masochistic sexual activity that took place in private. The Court upheld the convictions on the basis that there had been doubts in relation to the consent of one of the alleged victims. The remarks of the Court on the importance of protecting individual autonomy related to behaviour that had taken place in private. Such a scenario raises issues that differ significantly from those that arise in the context of a ban on allegedly degrading behaviour that takes place in public. The Strasbourg Court certainly protects the right of individuals to behave in private in ways found shocking by the majority.¹³⁰ It is much less clear that it extends the same right to public behaviour.

Indeed, both the French courts and the United Nations Human Rights Committee have endorsed the enforcement of collective notions of dignity on individuals who wished to behave in public in a manner held to be contrary

124 In so far as a libertarian approach would regard how an individual chooses to appear in public as a matter for that individual alone.

125 Study of Possible Legal Grounds for Banning the Full Veil, *supra* n 94 at 21.

126 *Ibid.*

127 *Ibid.* at 22. There seems to be some tension between this conclusion (that a ban justified on this basis is 'legally debatable' and the statement on the previous page of the report that the protection of human dignity is 'not readily applicable').

128 Application No 45558/99, Judgment, 17 February 2005.

129 *Ibid.* at paras 79–84.

130 See *Dudgeon v United Kingdom*, *supra* n 93.

to human dignity. In the *Commune de Morsang sur Orge* case¹³¹ the French courts and UN Committee found there was no violation of France's human rights obligations in a complaint brought by a dwarf who was rendered unemployed by a ban on 'dwarf tossing' (large men throwing dwarves around for public entertainment) which was justified by the French authorities on the grounds of the need to protect human dignity. The ban was upheld notwithstanding the applicant's argument that for him, the indignity of unemployment was greater than any alleged indignity said to be inherent in dwarf tossing. Thus, collective notions of dignity were permitted to prevail over those of an individual, even when the result of the imposition of this notion of dignity was, as the applicant saw it, the imposition of even greater indignity upon him.

The European Court of Justice, which, as noted, tends to follow the lead of the Strasbourg Court on human rights issues, has also upheld national laws which restrict individual rights in order to protect collective notions of human dignity. In the *Omega* case the Court upheld the restriction of the freedom to provide services (effectively a fundamental right under the EU law) in relation to a prohibition of a game involving players simulating killing by shooting lasers at each other. The ban had been justified on grounds that the game 'was contrary to values prevailing in public opinion',¹³² in particular, the respect for human dignity required by the German constitution. Interestingly, the Court of Justice first looked to see whether the goal of the protection of human dignity was 'appropriate' and recognised within the EU's legal order. Having concluded that it was, it then held that, as this value was one that was also pursued by the EU's legal order, the restriction was legitimate.¹³³

Thus, provided that the Court is satisfied that a prohibition on the veil is pursuing human dignity, it is likely to find that, so long as it pursues this goal in a proportionate way, it falls within the competence of Member States to so prohibit. Comparisons with conduct in private are not really relevant. The aim of a law that seeks to protect the value of human dignity is significantly more threatened by public acts of self-degradation than by equivalent acts in private which are less likely to be seen by others and whose impact on collective notions of dignity is accordingly much more limited.

131 *Commune de Morsang-sur-Orge v Société Fun Production et M. Wackenheim* Case No 136727, Conseil d'Etat, 27 octobre 1995, AJDA 1995 Jurisprudence 942; United Nations Human Rights Committee, *Wackenheim v France* (854/1999), CCPR/C/75/D/854/1999 (2002); 10 IHRR 16 (2003).

132 Case C-36/03 *Omega Spielhallen*, supra n 121 at para 7.

133 *Ibid.*

C. Duties Arising from the Social Nature of Life beyond the Private Realm

A ban on the veil can essentially be seen as a majoritarian measure that attempts to restrict public conduct that offends collective notions in relation to openness to others, gender equality and human dignity. Such laws seek to buttress cultural traditions in relation to how individuals appear in public by making a cultural norm a legal obligation. One should not underestimate the degree to which such a law may be burdensome for those who choose to wear a veil. Speaking generally, religion is more central than nudism to individual identity and autonomy. Women who feel it is morally wrong to appear unveiled may be faced with agonizing choices.¹³⁴

However, in the light of the ECtHR and Court of Justice decisions upholding limits on public offensive expression (*Müller*) and enforcement of compliance with collective notions of dignity in relation to public behaviour (*Omega*), and as long as the relevant prohibitions contain exceptions that provide alternative means and venues for the expression of any messages that the relevant clothing is intended to impart, then bans on public veiling may well pass muster in terms of free expression rights. Privacy rights are also protected once individuals remain free to wear what they wish in their own homes or on private occasions. Exemptions in relation to religious ceremonies and religious buildings and probably other expressive occasions such as protests, are certainly necessary to give such a law a chance of surviving a challenge on grounds of the right to freedom of religion. Whether such exemptions will be found sufficient by the European Courts is difficult to say with certainty.

Veiling bans seek to force individuals to engage in a compartmentalisation of their religious identity so that it does not overwhelm other duties. Such compartmentalisation has long been required by many liberal societies in particular civic contexts such as in lawmaking.¹³⁵ More general bans on public face-veiling do however significantly extend this obligation from the political arena to the social arena. There is no doubt that a libertarian political order would find the idea of the state dictating what people can and cannot wear wrong. But Europe is not a libertarian legal space but a liberal one which seeks to reconcile a strong tradition of individual liberty with collective existence under which the Strasbourg court has consistently ruled that states are entitled to limit rights in order to uphold cultural norms or particular conceptions of public morality. Even if a ban is found to serve legitimate goals there

134 Although the ECtHR has not always taken this position, in general my arguments in this article are premised on the view that it is for individuals to decide what their religion requires, not for the state and that, therefore, once an individual asserts that she regards it as a religious duty to cover her face in public, it is no answer to argue that veiling is not required by mainstream theology of the faith in question. The Grand Chamber in *Sahin v Turkey*, supra n 64, effectively proceeded on this basis.

135 Such a requirement is implicit in the requirement for legislation to have a secular purpose set out in the US Supreme Court decisions *Board of Education of Kiryas Joel Village School District v Grumet* 512 U.S. 687 (1994) and *Stone v Graham* 449 U.S. 39 (1980).

is still the prospect that a general ban may be held to be disproportionate and the bans must surely be vulnerable in this regard. However, if the goal of such laws is to ensure public respect for human dignity by preventing public behaviour that flouts the majority's ideas of dignity then it is difficult to see how a more limited ban could effectively serve this goal, especially once exceptions for religious buildings and other expressive occasions are included in the relevant laws. Veil bans, in short, can be seen either as significant expansions of the demands made by the state on the individual, particularly the religious individual, or as an adaptation of existing restrictions on individual behaviour in public to changing circumstances. The sustainability of bans is likely to depend to a significant degree on which of these views the Courts find more compelling.

7. European Union Law, Free Movement and Equal Treatment

As noted above, the European Court of Human Rights is not the only pan-European judicial institution that may be required to rule on a veil ban. Indeed, should the ban be found to breach EU law it will immediately be dis-applied due to the direct effect and supremacy of EU law within national legal orders.¹³⁶ In determining the requirements of the EU's fundamental rights commitments, the Court of Justice of the European Union, as noted, generally follows the jurisprudence of the ECtHR. However, in some respects the EU law is significantly more restrictive of Member State autonomy than the relevant articles of the ECHR. It accords individual EU nationals the right to reside and to exercise the right to work in other Member States. The Court of Justice has taken a broad view of the contours of this right and has required that all measures tending to make the exercise of this right more difficult must be justified.¹³⁷ Justification requires Member State authorities to show that a challenged national measure pursues a legitimate public policy goal and is non-discriminatory.

An individual who wears a full-face veil may, therefore, argue that her EU law rights are violated by a national ban because such ban renders it more difficult for her to exercise her right to seek work in that Member State. The use of EU law to challenge the imposition of majoritarian moral norms is not unprecedented. The EU legal order places significant moral value on both non-discrimination and individual autonomy¹³⁸ and in cases such as *R.*

136 See Case 26/62 *Van Gend en Loos* [1963] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585; and Case C-260/89 *ERT* [1991] ECR I-2925.

137 See Case 55/94 *Gebhard* [1995] ECR I-4165; see also Case 140/03 *Commission v Greece (Opticians)* [2005] ECR I-3177.

138 *Coleman v Attridge Law*, *supra* n 104.

(*Blood*) v *Human Fertilisation and Embryology Authority*¹³⁹ and *SPUC v Grogan*¹⁴⁰ EU law was used to seek to allow individuals to overcome national restrictions on in-vitro fertilisation and abortion information respectively that reflected predominant national moral norms. Veiling prohibitions are also problematic in the EU law terms due to their potentially discriminatory nature. Equal treatment is a fundamental principle of the EU law and the Court is likely to require Member State authorities to show that the ban pursues weighty public policy goals in order to justify the fact that such a ban inevitably impacts more severely on women and Muslims than other groups.

On the other hand, EU law is sympathetic to Member State rules that curtail EU law rights in order to maintain national cultural traditions and has ruled that upholding national traditions and ideas of public morality are legitimate public policy goals that can justify indirectly discriminatory restrictions of the EU law rights. This was seen not only in *Omega*¹⁴¹ where national ideas of dignity trumped individual economic rights but also in *Grogan* where the Advocate General concluded that the Irish state was entitled to restrict the freedom to provide services in order to effect its strongly held notions of public morality in relation to abortion¹⁴² and in *Schindler*¹⁴³ and *B & Q*¹⁴⁴ where restrictions on gambling and Sunday trading were upheld on the basis that Member States were entitled to promote particular national traditions and ideas of public morality. The *Omega* decision did make it clear that the public policy goal in question must be one that is 'appropriate'¹⁴⁵ by the standards of the EU legal order. Provided the Court is willing to regard veiling bans as serving legitimate goals such as protecting gender equality and human dignity and are not seen as gratuitous Muslim-bashing by the Court (and the Court is unlikely to be willing to characterise the decision of a large majority of the French legislature in these terms), then a successful challenge on this basis may be unlikely.

It is certainly true that veil-bans are motivated by concerns specific to Islam and are, without doubt, promoted by many whose agenda is xenophobic and anti-Islam.¹⁴⁶ However, such laws are also supported by some people who are neither xenophobic nor anti-Islam but who are sincerely concerned to promote egalitarian values and mutual respect. As I have written elsewhere:

139 [1997] 2 All ER 687.

140 C-159/90 [1991] ECR I-4685.

141 *Supra* n 135.

142 *Supra* n 140 at Opinion of Advocate General Van Gerven, paras 27–29.

143 Case C-275 *Her Majesty's Customs and Excise v Schindler* [1994] ECR-I 1039.

144 Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR I-3851.

145 *Omega Spielhallen*, *supra* n 121 at Opinion of Advocate General Stix-Hackl, para 101.

146 A notable example is the French *Front National*, which had previously been, at best, lukewarm in its support of the gender equality that it now espouses as a definitional characteristic of French life.

The religious make-up of European states is in the process of change and the large-scale presence of religions that were previously only marginal presences may raise new issues and challenges. In a changing religious environment, maintenance of existing approaches and societal norms may require new principles and laws relating to religion and its role in society that did not arise in the religious environment of the past. In France for example, as the large-scale presence of Muslims in metropolitan France is a relatively recent phenomenon, issues surrounding the interaction of manifestations of the Muslim faith with the principle of secularism and with broader cultural values in France would not have been prominent considerations when laws establishing norms for the regulation of religion were decided upon. Therefore, new laws may well be required to maintain existing norms and approaches. The fact that changes made to French law may have been motivated by concerns relating to Islam to a greater a greater degree than other faiths does not mean that such changes cannot claim to be genuinely seeking to defend the principles and rights upon which the French state wishes to base its social and public order.¹⁴⁷

Accordingly, though such a veiling ban is supported by many for discriminatory reasons and will undoubtedly have a greater impact on Muslims (and therefore will be indirectly discriminatory), provided it can be shown to serve the maintenance of appropriate national goals, the CJEU may well be content to let it stand. After all, if the Court is willing to recognise that the right to provide services can be restricted in order to uphold the view of a majority of Germans in relation to human dignity or of a majority of Irish people in relation to the rights of the unborn, it is likely to also recognise a desire to maintain national ideas of gender equality or the need for citizens to be open to communication in public as legitimate reasons to restrict the right of free movement.

The EU employment law also bans both direct and indirect discrimination in the context of employment.¹⁴⁸ It might be possible to argue that an employer who (in the light of national legislation banning the public wearing of the face veil) prevents an employee from being fully veiled at work could be sued on the basis that in upholding the national law he or she breached an EU right to be free from discrimination on grounds of religion. However, given that the legislation in question permits indirectly discriminatory measures to be justified by a legitimate aim and given that courts of several Member States

147 McCrea, *supra* n 23 at 250–1. While much of the support for many of the measures relating to religious dress also came from those motivated by racist or other improper motives, this does not mean the law itself is racist. Opportunistic embrace of potentially worthy principles by those with unworthy motives is, sadly, a recurrent fact of political life.

148 See above at *supra* n 16.

and the ECtHR¹⁴⁹ have found that limitations on religious freedom in the workplace can be justified by the needs of the employer, such a challenge is unlikely to succeed.

The approach of the ECHR to discrimination is more limited than that of EU law. The Convention has no freestanding equality guarantee but, as noted above, Article 14 protects equal treatment in relation to the rights protected by the Convention.¹⁵⁰ Provided that the national legislation challenged sets out a general ban on face-covering in public rather than specifically prohibiting the Islamic veil, it may be difficult for an applicant to prove direct discrimination as non-Muslims wishing to cover their faces would be similarly restricted. An Article 14 based challenge on grounds that public veiling bans are indirectly discriminatory is possible¹⁵¹ but, in general, the Strasbourg Court has been less active on the issue of indirect discrimination than the Luxembourg Court.¹⁵² Furthermore, if the Court has found that restrictions on religious freedom rights are justified by public policy, it is unlikely to find that any indirect discrimination is not similarly justified.¹⁵³

8. Conclusion

Laws that ban covering one's face in public in order to prevent individuals from wearing the full Islamic veil certainly raise serious issues in terms of European law. Such laws may be deeply unwise. As Laborde notes, fundamentalist Islam 'feeds precisely on a sense of paranoid victimization and it is hard to see how legal prohibition [of the face-veil] would not give it further ammunition.'¹⁵⁴ Legislation of this kind also goes against the strong tradition of

149 See, for example, France: *Marteaux*, Conseil d'Etat, Decision 217017, 3 May 2000; in the United Kingdom: *Stedman v United Kingdom*, supra n 66; *Ahmad v United Kingdom*, supra n 65; and *Eweida v British Airways* [2010] EWCA Civ 80.

150 Protocol No 12 to the Convention does provide such a freestanding anti-discrimination clause which, being of general application, may provide an even more wide ranging prohibition on discrimination than EU law. The Protocol has, however, been ratified by only 20 of the 47 Member States.

151 *D.H. v Czech Republic* 47 EHRR 3.

152 The Court of Justice has long required justification of indirectly discriminatory measures in the context of free movement rights guaranteed by EU law and in relation to questions of equal pay: see, for example, Case 96/80 *Jenkins v Kingsgate (Clothing Productions) Ltd.* [1981] ECR 911; see also Craig and de Burca, *EU Law, Text, Cases and Materials*, 5th edn (Oxford/New York: Oxford University Press, 2011) at Chapters 19, 21, 22 and 24. In contrast, the European Court of Human Rights has rarely done so and did not even recognise that indirect discrimination came within the terms of Article 14 of the Convention until the 2007 decision in *D.H. v Czech Republic*, supra n 151.

153 It should be noted that a law banning the veil specifically, rather than merely the practice of face covering in general, would be much more vulnerable in this regard. Such a law is not entirely unlikely. Some German states have banned the wearing of the headscarf by teachers in the educational system, but permit the wearing by nuns of their habit: see McCrea, supra n 23 at Chapter 6.

154 Laborde, supra n 2 at 15.

liberal individualism in European culture that is reflected in a deep commitment to individual autonomy and equal treatment in European law. These laws represent very significant restrictions of an individual's right to follow the dictates of their conscience, to define their identity and choose the manner in which they will present themselves to the world. The fact that they are intended to address the manifestation of the religion of a particular group may also raise problems in terms of rights to equal treatment, particularly as they have been introduced against the background of significant societal discrimination against European muslims.

However, it is not correct to portray such laws solely as discriminatory attacks on human rights that inevitably violate pan-European commitments to fundamental rights. Prohibitions on public veiling are without doubt supported by significant numbers of people for reasons of xenophobia, racism and hostility to migrants. However the issues raised by the phenomenon of public veiling are complex and many who are not xenophobic, racist or anti-immigration are legitimately concerned about the consequences for society, social life and for important principles such as gender equality of radical religious practice in general and the growth in numbers of women concealing their faces while in public.

Europe's public order is liberal not libertarian. It protects individual autonomy and privacy but does not conceive of the individual as existing in isolation and envisages a role for the law in promoting collective cultural norms. European law's protectiveness of privacy rights would prevent laws regulating what people can wear in their own homes just as it prohibits laws regulating private adult sexual conduct. However, it does accommodate laws that limit individual choice in terms of how one appears or behaves in public by prohibiting certain kinds of conduct such as nudity or particularly offensive language in every day public contexts. The offensiveness of the face veil is unlikely to be a sufficient ground to support a general prohibition. The Court of Human Rights has been clear that free speech in matters of political opinion (including expression through garments and symbols) cannot be restricted simply because the views expressed are offensive and there is no reason to think that a desire to express adherence to particular forms of Islam should be accorded any less protection than the desire to show one's support for Communism. The ban is also vulnerable to challenge on grounds of religious freedom, particularly in the case of legislation that prohibits the Islamic veil alone rather than imposing a more general restriction on covering one's face in public. European law has recognised the right of states to ban religious symbols in particular contexts but prohibitions on the veil are significantly more restrictive and an attempt to construe the entire public space as an area from which particular religious symbols deemed offensive can be excluded seems bound to fail as violations of rights to religious freedom, freedom of expression and equal treatment.

The strongest defence of veil bans in European legal terms lies in the idea that such laws legally reinforce social duties rather than duties to the state; the duties we all have towards each other in certain contexts as a consequence of the social nature of humankind. This defence is based on the idea that while one has an almost absolute right to private autonomy, once we enter public space certain requirements can be placed upon us. While no one has the right to invoke the law merely because of the mere knowledge that others are behaving in private in a way which is thought to be offensive, there is a stronger legal case to regulate conduct that takes place in public that others may unwillingly be exposed to or which publicly undermines cherished social norms. Thus, the public wearing of the veil can be restricted, it is argued, not simply because the veil is offensive, but because the public wearing of the veil causes offense and distress to individual users of public space who cannot avoid being exposed to it. Similarly, though individuals have the right to act in ways incompatible with mainstream views of human dignity when in private, by publicly degrading themselves they undermine the societal goal of promoting respect for human dignity. Such laws maintain some degree of free expression and individual autonomy by permitting the regulated activities to take place in private while preventing them from distressing others or undermining public policy by restricting their public manifestation. They distinguish between everyday life and expressive occasions by imposing a duty to refrain from advocating shocking and offensive opinions in our everyday life while allowing for the expression of such views in specific contexts. Thus, on this analysis, one may have the right to produce an unflattering cartoon of the Prophet Mohammed and even to show it on occasions such as protest rallies, but one does not have the right to put such a cartoon on a t-shirt and wear it while going about one's everyday business in public. Such laws undoubtedly increase state regulation of our appearance in public. Establishing everyday life as a context in which expression of individual identity can be restricted and in which individuals can be required to 'lay off politics' raises fundamental issues in relation to the reconciliation of our expression of our ideological commitments to each other in shared spaces and the definition of what is to be considered public and private in liberal societies.

All religiously plural societies require a degree of give and take, particularly in public contexts. Individuals with particular views on religion may reasonably be required to internalise the reality, legitimacy and permanence of religious pluralism by refraining from arguing for laws that will bind all on the basis of arguments that depend on their particular religious viewpoint. Similarly, states may require civil servants to refrain from displaying symbols of their faith while exercising state powers because they recognise the controversial nature of religion and because the very point of wearing uniforms for officials such as judges and police officers is to demonstrate a willingness to separate one's personal identity from one's public functions.

Uniforms may, of course, not be entirely neutral in the sense that they may be closer to the traditions of the majority, but that is an inevitable result of the fact that societies are not at year zero but are always engaged in writing the next chapter of a particular cultural story rooted in a particular imagined shared past. To permit individual judges or public officials to wear those particular clothes that they feel fit their personal identity is to destroy the idea of the public altogether, to collapse the distinction between individuals and the office they hold and to refuse to accept the kind of links to an imagined shared past required to sustain a cultural community. Cultures must be open to change and to enrichment through migration but they must also maintain some links to a particular imagined shared past. The individual who will not hold back from expressing their religious convictions on any occasion or who refuses to offer generally accessible political arguments in debates on law and policy can arguably be accused of seeking to take tolerance from pluralist societies without offering reciprocal tolerance for those who do not share their faith.

However, the payback for agreeing to hold back on religiously specific expression in public contexts such as law making has generally been the willingness of the state to permit religious individuals to live out their religion in areas away from the public sphere. Viewed through this prism, legislation that banned religious symbols in all contexts could be seen as taking concessions in relation to behaviour in public institutions and offices while offering nothing in return. Of course, as noted above, national legislation has not generally banned the veil specifically or banned it altogether. French legislation prohibits generally the covering of one's face in public and does provide some exemptions, most notably in respect of veiling in private and in religious buildings. Whether the European Courts will accept this as a proportionate response is unclear. Permitting private veiling does not really assist those whose beliefs are that they should be veiled in public.

Such laws do seem to reduce personal choice to limited contexts rather than having liberty and choice as the default position and seem to place the right not to be offended while going about one's day-to-day business above the right to express one's self in one's day-to-day life. On the other hand, whether such an approach is or is not normatively desirable, our public appearance has long been regulated by laws restricting public nudity and, as French dwarves and German players of combat simulation games will confirm, the imposition of a duty to avoid publicly flouting collectively-defined notions of dignity is equally well-established in European, international and national law.

The fate of laws banning the public wearing of the full-face veil under European law is therefore difficult to predict with certainty. These laws provoke passionate argument and strong feelings and raise fundamental questions about our legal systems and societies. They involve the imposition of serious burdens on individuals from groups, which already suffer from significant

discrimination and exclusion. They also highlight the degree to which European law struggles to accommodate the vast range of conduct that can be regarded as religious. This is most noteworthy in relation to the centrality of ideas of belief, conscience and acts associated with the same, to European law's view of what is valuable in religious freedom, a view that is more heavily influenced by Christian models of religiosity than faiths that place greater emphasis on repeated adherence to dress and dietary codes and the like.¹⁵⁵ On the other hand, veil-bans address a mode of dressing which can reasonably be seen as inconsistent with deeply held and worthy values such as gender equality, community and openness to others and regulate behaviour that has always been the concern of the law to some degree. The legal questions are finely balanced and, in the context of rising hostility to pan-European courts and institutions in many European states, one may wonder if the European judiciary, whatever their view of the merits of the issues in terms of European law, may do their utmost to enable such conflicts to be resolved at national level rather than risking involving European institutions in such politically-fraught debates.

155 As noted above, a full analysis of the issues raised by the cultural particularities of European legal conceptions of what is and is not religious and what kind of conduct and actions freedom of religion should aim to protect is beyond the scope of this article.