

The Belgian 'burqa ban': Legal state of play

HRWF (06.02.2017) - The so-called 'burqa ban' is a reality in Belgium. The legislative proposal was discussed – and approved with an overwhelming majority – only by the Chamber of Representatives. The Senate opted against discussing the bill. The 'Act of 1 June 2011 to institute a prohibition on wearing clothing that covers the face, or a large part of it', was published in the *Belgian Official Journal* on July 13 and entered into force 10 days later.

We present you hereafter the conclusions of this research and afterwards an analysis of the constitutionality of the burqa ban in Belgium.

The Belgian 'burqa ban': Legal aspects of local and general prohibitions on covering and concealing one's face in Belgium (1)

By Jogchum Vrielink, Saïla Ouald Chaib and Eva Brems

"A ban on face-veils in public places in Belgium affects few women, but raises fundamental legal questions. This chapter has served to clarify two issues. In the first place, publicly wearing a face-veil was already prohibited in many places in Belgium prior to the Act of 1 June 2011 being voted. There are indeed many local police ordinances that are interpreted and applied as (including) a 'burqa ban'. The number of women wearing face-veils, and who are living in a Belgian municipality in which there is no ban, can be regarded as being either minimal or even non-existent.

Secondly, the enormous political support incorrectly seems to suggest that a 'burqa ban' would be desirable or even allowed in a democratic state governed by the rule of law. An analysis of the parliamentary debates on the matter shows that these were unilaterally aimed at a prohibition. There was hardly any discussion on potential conflicts with fundamental rights, and to the extent that such conflicts were discussed, they were dismissed very quickly. Moreover, it was improperly presumed that face-veils are worn exclusively under duress. When the arguments supporting the prohibition proposal are examined closely, it appears that they are unable to justify a general prohibition, because the measure is either not relevant to achieving the objective in question or because it is not proportionate to the objective.

At the time when the Belgian Parliament discussed the legislative proposals on face-covering for the first time, in 2010, most international human rights actors had not yet expressed themselves on such a prohibition. Only Amnesty International had issued a statement, which held that a general prohibition on face-veils is contrary to the freedom of speech and of religion⁽²⁾. Human Rights Watch,⁽³⁾ and Thomas Hammarberg,⁽⁴⁾ the High Commissioner for Human Rights of the Council of Europe, later also spoke out against a ban, and a unanimous resolution against a general prohibition was passed in the Parliamentary Assembly of the Council of Europe.⁽⁵⁾ Nonetheless, these developments failed to influence the Parliamentary debates in 2011 in any significant way.

In conclusion, it seems conceivable that the Belgian 'burqa ban' may not pass constitutional challenges ⁽⁶⁾ or scrutiny by the ECtHR. In that case, an alternative approach to this issue will have to be decided upon. In this respect, we feel that legislative action on this subject would remain advisable, but mainly in order to put an end to the tensions and conflicts with fundamental rights brought about by the (application of the) local prohibitions. To this end, the legislator ought to clearly and exhaustively define the circumstances in which a prohibition on face-veils or face-covering is applicable or can be introduced, (implicitly) granting the freedom to wear such garments in (most) other contexts. The latter would *de facto* invalidate the local

ordinances, to the extent that these exceed the circumstances prescribed by the law. These circumstances must themselves be strictly delineated for actual safety risks and therefore be limited to certain places and times. In addition, it is also possible to adopt a prohibition that does not concern wearing face-covering garments, but rather the act of compelling or forcing a person to wear such clothing.⁽⁷⁾ In that way, the Belgian law could provide optimal protection for both the freedom of religion and women's rights."

(1) Jogchum Vrieling, Saïla Ouald Chaïb and Eva Brems (University of Ghent). The paper of the authors was published in the framework of the RELIGARE project, which received funding under the European Commission's Seventh Framework Programme (Socio-economic Sciences and Humanities) and with funding from the European Research Council for the project 'Strengthening the European Court of Human Rights: More Accountability through Better Legal Reasoning'. See full text at hrlnwf.org.

(2) Amnesty International, 'Bans on Full Face Veils Would Violate International Human Rights Law', 21 April 2010.

(3) L. Gertholtz and G. van Gulik, 'Beyond the Burqa', www.hrw.org

(4) T. Hammarberg, 'Rulings anywhere that women must wear the burqa should be condemned - but banning such dresses here would be wrong', says Commissioner Hammarberg', *Viewpoint*, 8 March 2010, www.coe.int

(5) Resolution 1743 of the Parliamentary Assembly of the Council of Europe (23 June 2010), §16-17. See also Recommendation 1927 of the Council of Europe Parliamentary Assembly, 'Islam, Islamism and Islamophobia in Europe'. 37

(6) Several constitutional challenges were filed against the ban with the Belgian Constitutional Court (see cases 5191, 5204, 5244, 5289 and 5290 at <http://www.const-court.be>). At the time at which this chapter was concluded, the Court was yet to issue its final ruling(s) in these cases.

(7) Naturally, with the exception of circumstances in which such obligation can be legitimate, such as when imposing safety clothing and the like.

The constitutionality of the Belgian burqa ban

By Jelle Flo and Jogchum Vrieling

Open Democracy (14.01.2013) - On 6 December 2012, the Belgian Constitutional Court held that the 2011 so-called "burqa ban" does not violate the Belgian Constitution. A boundary is crossed when rights of individuals are simply sacrificed to majority sentiments; a boundary which should be protected by institutions such as the Court.

Following France, Belgium was the second European country to introduce a general prohibition on covering one's face in public, or "burqa ban". The Act of 1 June 2011 renders it an offence to publicly "cover or conceal one's face in whole or in part, so that one is unrecognisable". Exceptions are limited to "legal provisions", "labour regulations", and "local ordinances regarding festivities", which impose or allow for face covering.

The Act was intended to guarantee public safety. Other stated purposes include considerations of a societal nature, including "promoting 'living together'", with an emphasis on communication and recognisability, and protecting women's rights.

Several appeals were filed with the Belgian Constitutional Court. Applicants argued that the prohibition violated several rights and principles, including the principle of legality, the freedom of religion, and the right to non-discrimination. Save for one minor proviso, the Court rejected all these arguments.

Principle of legality

Applicants argued that the scope of application of the law is unpredictable and potentially boundless, while there are only limited exceptions. This would render it impossible for citizens to ascertain whether their behaviour is in compliance with the law. This is all the more problematic, since intent is not required: mere negligence is sufficient to be punishable. All of this was claimed to violate the principle of legality, which requires laws to be clear, ascertainable and sufficiently precise.

The Court finds that this principle has not been breached. Concepts such as "recognisability", "covered in part" and "places accessible to the public" are all deemed sufficiently clear to allow a citizen to determine their scope. Any remaining margin of appreciation for the judge does not pose problems of legality.

These general statements by the Court however in no way clarify the reach of the burqa ban, and they certainly do not limit the prohibition in any way. As such, it will have to be assumed that all types of partial concealment of one's face, which impede "recognisability", regardless of intent, are forbidden in Belgium. It follows that somebody who wears a scarf and a winter hat to protect himself from the cold is punishable. The same goes for cyclists wearing dust masks, human mascots at sports events, veiled brides, and Boy Scout leaders who disguise themselves during a game.

Safety

The Court devotes most of its attention to the alleged violation of applicants' freedom of religion. The Court finds that the stated purposes of the law are all legitimate, and that the ban also meets the proportionality standard.

The Court accepts, for instance, that the legislator has good reason to fear that facial covering may indeed harm public safety. In doing so, the Court acknowledges that in Belgium, thus far, the Islamic full-veil has not in fact given rise to any actual safety issues yet. However, the Court reasons that it does not follow from the fact that there are no problems (yet), that the legislator should not be allowed to act. The latter is allowed to 'anticipate'.

The American author Philip K. Dick described in his dystopian short story "*The Minority Report*" (written in 1956 and adapted into a feature film in 2002) how, in a future totalitarian society, clairvoyants ('precogs') were able to predict crimes. Potential criminals were pre-emptively apprehended, until it turned out that not all potential criminals would in reality commit crimes. The difference between the 1956 fiction and present-day Belgian reality is that the antidemocratic measures in the fictional short story were at least effective in improving public safety.

Prior to the introduction of the burqa ban, Belgian legislation already allowed for identity checks to be performed by the police. It is hard to see why this would be deemed insufficient from a public safety perspective. Moreover, most types of face covering pose no security risk whatsoever. And it seems rather unrealistic to assume that those who intend to rob a bank would refrain from doing so out of fear of committing the additional infraction of wearing a mask in public.

'Living together'

The Court also considers the promotion of 'living together' (*'le vivre ensemble'*) to constitute a legitimate aim. In this context, the Belgian legislator referenced the French philosopher Emmanuel Levinas who according to the legislator has stated that "our humanity is expressed through our face". The legislator moreover declared that a person of whom only the eyes are visible would be "unable to participate in democratic dynamics".

It is remarkable, to say the least, that the Belgian Constitutional Court would accept that a violation of the freedom of religion would *de facto* be justified by a violation of the right to privacy. Freedom of religion is, after all, restricted in order to pursue an invasion of people's privacy, as the State wishes to force people to communicate with each other when in public, with the State deciding how such communication should take place in order to be valuable or 'democratic'. Would it not be more respectful of democratic values to leave it up to individual citizens to determine whether and when they want

contact with their fellow citizens in the streets? Even if one were to consider it a legitimate purpose to promote such contacts, criminal punishment does not seem a fitting means to do so.

Women's rights

The Constitutional Court also finds in favour of the legislator's concerns about gender equality in justifying the burqa ban. Following the legislator, the Court makes a distinction between women who are forced to wear a face-veil and women who do this of their own free will.

The Court indicates that, in the hypothesis that women are *forced* to wear the full-veil, the legislator may assume that the "fundamental values of a democratic society" oppose such coercion, and justify a ban. In doing so, the Constitutional Court disregards the fact that the law punishes not those who are *exerting* the coercion, but those who are the *victims* of such coercion. The Court responds to this objection with a mere reference to article 71 of the Belgian Criminal Code, which excludes criminal liability in cases of *force majeure* or coercion. Not only does this contradict the Court's preceding statement that punishing the wearer is legitimate even if coercion is involved, but the Court also fails to take into consideration that a woman who is repressed to such an extent that she may be coerced into wearing a full-veil, is highly unlikely to invoke this defence, in view of the social sanctions this would entail.

The Constitutional Court accepts that gender equality also justifies a ban if wearing the full-veil is instead a "well-considered choice by the woman". The reasons why the Court allows for this are twofold. To begin with, the Court points out that the requirement to wear such clothing is limited to *women*, and additionally the full-veil serves to deprive its wearers "of a fundamental element of their individuality". The Court thus accepts that the legislator can or even should 'emancipate' women against their own well-considered and informed opinion. This despite the fact that all available empirical research (carried out in Denmark, France, the Netherlands and also in Belgium) shows that the women who are affected by the ban experience the full-veil not as something that *deprives* them of their individuality, but instead as a means to *express* their individuality.

This may seem counterintuitive to many of us, but – as pointed out by the German philosopher Andrea Roedig – by the same token that the full-veil can be interpreted (and prohibited) as a symbol of oppression, the crucifix could, viewed by an uninformed outsider, be taken as a sign of veneration of torture and inhumane treatment.

Rule of law

The only restriction the Constitutional Court imposed is that the 'burqa ban' may not apply in "places of worship", as this would unduly restrict the freedom of religion. A similar reservation was made by the French Constitutional Council (*Conseil Constitutionnel*) in respect of the French ban. Government interference in religious matters has gone far indeed when it has become necessary to point out that there should still be a right to cover one's face in a place of worship.

All in all, the decision of the Belgian Constitutional Court seems regrettable. Fundamental rights ultimately exist to protect minorities, unpopular minorities in particular, against the tyranny of the majority. A boundary is crossed when rights of individuals are simply sacrificed to majority sentiments; a boundary which should be protected by institutions such as the Court. In other matters, the Constitutional Court has not hesitated to fulfil this role. In the case of the burqa ban, however, these boundaries seem to have evaporated, making for the constitutional equivalent of a Schengen area.

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