

The European Court of Human Rights and Face Veil Bans

Written by Eva Brems

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EVA BREMS, FEB 21 2018

In July 2017, the judgements of *Dakir v Belgium* and *Belcacemi and Oussar v Belgium* of the European Court of Human Rights ruled that nationwide and local bans on face covering in public ('burqa bans') in Belgium do not violate the rights protected by the European Convention on Human Rights. For many, this did not come as a big surprise, as three years earlier, a Grand Chamber of the same Court had ruled in the same manner in a case concerning the French face covering ban (*SAS v France*). Yet if until that time, there was still the possibility that the French legal and overall context might have determined the outcome in *SAS*, and that the human rights assessment might turn out differently for other contexts that might be differentiated from the French one, the Belgian cases effectively closed the discussion.

The French Face Veil Judgment of 2014: Mixed Messages

The *SAS* judgment was problematic, but also contained some positive features, in that it threw off the table two of the arguments that had been advanced by the French as well as Belgian governments in support of face covering bans. One is the argument of public safety, on which the Court ruled that a blanket ban was disproportionate, given that safety concerns

could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established, or where particular circumstances entail a suspicion of identity fraud (ECtHR, Grand Chamber, *SAS v France*, para. 139).

The other is the gender equality argument stating that the face veil is degrading to the women who wear it. The Court rejected that argument as unacceptably paternalistic, saying that

a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions (article 8 ECHR on private life and article 9 ECHR on religious freedom – EB), unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms. (ECtHR, Grand Chamber, *SAS v France*, para. 119)

However, the Court did allow the argument that *'the wearing of the full-face veil by certain women shocked the majority of the French population because it infringed the principle of gender equality as generally accepted in France'* (ibid.), as part of an argument that allows minority rights to be restricted in the name of 'living together' (ECtHR, Grand Chamber, *SAS v France*, para. 122).

The Belgian Face Veil Judgments of 2017: Adding More Problems

Harm that Does Not Count

In the Belgian cases, the Court repeated the 'living together' argument, accepting the ban as a 'choice of Belgian

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society'. (ECtHR, *Belcacemi & Oussar v Belgium*, para. 53). As in *SAS*, the Court thus chose to adopt an attitude of restraint, in the context of its subsidiary role, and hence to leave a wide margin of appreciation to the national authorities in this field. The Court's reasoning recognizes some of the harm that is caused by the bans. It includes the statement that

a state which enters into a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance (ECtHR, Grand Chamber, *SAS v France*, para. 149; ECtHR, *Belcacemi & Oussar v Belgium*, para. 52).

And while the Court goes along with the state's argument that the religious character of the face veil has nothing to do with it being banned, it does admit that the ban essentially affects certain Muslim women, who are no longer able to express their personality and their convictions in the manner of their choice (ECtHR, *Belcacemi & Oussar v Belgium*, para. 52). Yet in the end, the Court disturbingly sends the message that this harm does not count, when it concludes that

while it is controversial, and undeniably presents risks in terms of the promotion of tolerance in society, (the ban) can be considered as proportionate to the aim it serves, to know the preservation of the conditions of 'living together' (ECtHR, *Belcacemi & Oussar v Belgium*, para. 61, translation EB).

Clearance for Absent Parliamentary Human Rights Scrutiny

Another problematic feature of the *Belcacemi* judgment is that the Court justified its attitude of restraint by reference to the democratic decision making process behind the face covering ban in Belgium. The Court stated that *the decisional process that led to the ban, lasted several years and was characterized by an extensive debate in the Chamber of representatives, as well as an extensive and complete examination of all interests at stake by the Constitutional Court* (para. 54). However, while the face veil ban in France was preceded by extensive debates, including dozens of hearings (though it was rightly criticized for hearing only one face veil wearer), the Belgian debate was actually minimal. Formally, the process lasted several years, yet that is only because it had to be re-started after early elections. The 'extensive debate' in the Chamber was characterized by the absence of human rights considerations, and all measures that can be employed to provide more thorough discussion (expert hearings, advice of the Council of State, re-examination by the Senate) were rejected in this case. The Constitutional Court did engage in fundamental rights analysis, yet it has been criticized for blindly accepting all (three) arguments advanced by the government, two of which have since been discredited by the *SAS* judgment (*cf. supra*).

In particular, the reference to the parliamentary process is problematic, because the Court seems to legitimize 'pro forma' procedures, instead of requiring evidence that national decision makers have effectively engaged in a careful analysis of the compatibility of rights-restrictive measures with the European Convention on Human Rights. In principle, the doctrine of the 'margin of appreciation', on which the face veil judgments rely, is not intended to define topics for which there should not be human rights scrutiny. Instead, it is about a division of work between the supranational and the national levels, in the context of the principle of subsidiarity: in some fields, national authorities are considered 'better placed' than a supranational court to conduct the balancing of the different interests that are at stake. But in principle, there can be no doubt that it is their responsibility to conduct a serious human rights assessment. Judgments such as *Belcacemi* cast doubt on that requirement, by sending the message to states that any kind of parliamentary treatment of a matter will do and that the absence of domestic human rights control will not change the Court's attitude of restraint. This adds to the tendency in states to misinterpret judgments based on the margin of appreciation as Strasbourg clearance of a rights-restrictive practice, rather than as an invitation to conduct their own contextual human rights analysis of such practice.

Impact

It is not surprising that European enthusiasm for this type of bans has been revived since these judgments, with Denmark announcing in February 2018 its intention to introduce a general face covering ban. This is remarkable, as Denmark has already gone through its 'burqa debate' in 2009. Plans to introduce a ban were then shelved, after a

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government-commissioned study showed that the number of face veil wearers in Denmark was very small and that many of them were converts to Islam.

For Belgium's face veil wearers, the judgments by the European Court of Human Rights do not change anything. Wearing the face veil has been banned in Belgium by federal criminal law since 2011. Yet several years before that, municipalities had started to introduce local bans, assorted with administrative sanctions. The effect of the bans as such has been documented most extensively in France in a study by Open Society Justice Initiative. It shows that, while the ban may not dramatically reduce the (small) number of face veil wearers, it does have a strong impact on the lifestyle of these women. As they do not want to go out without their face veil, they stay in much more, and go out only by car. As a result, they have seen their outdoor activities, errands, activities with their children as well as their social contacts in their living environment much reduced. At first sight that seems to indicate that the ban does not reach its goal of improving the conditions for 'living together', as there is less instead of more interaction with these women. Yet if one considers that the Court has sanctioned a view of 'living together' as seen from the perspective of the majority, the cynical conclusion may be that the actual goal was always 'living without the disturbing sight of the otherness of the minority'. And this goal can be attained not only by removing face veils from the public sphere, but also by removing the women altogether.

About the author:

Eva Brems is a professor of human rights law at Ghent University, Belgium. She joined the Ghent University Law Faculty in September 2000 as the first holder of the then newly created chair of Human Rights Law. Before that, she studied law at the University of Namur (Bachelor, 1989), the University of Leuven (Master, 1992) and Harvard University (LL.M., 1995). She was a PhD Researcher at the University of Leuven (1995 – 1999) and a Lecturer at Maastricht University (1999 – 2000). At Ghent University, she founded the Human Rights Centre. Eva's research interests cover most areas of human rights law in European and international law as well as in Belgian and comparative law, with a particular emphasis on the protection of the rights of non-dominant groups and individuals. She has a keen interest in multi- and interdisciplinary research.