

## The Ban on Face Covering and the Religious Liberty in France

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### Introduction

This paper deals with the problem of a ban on veil worn by Muslim women in France. In recent years, the French parliament passed three acts to regulate the Islamic veils in public space. This legislation is always a very controversial topic in France.

As a social background of these legislation, there is an expansion of Islamic fundamentalism in French society. Especially, some young generations of immigrants from Arab or Maghreb countries have sympathy with this fundamentalism as a consequence of pursuit of their own identity. According to this young fundamentalism, the movement of Islamophobia is also increasing in France. Probably, there is a vicious cycle of Islamic fundamentalism and Islamophobia.

Other background is the European integration. In the process of European integration, France has been forced to limit its own sovereignty and has lost some authority about own policymaking. It is a kind of identity crisis of France. What is the rest as proper and original factor of France? What is the last and inalienable identity of French republic? Most of the French people will answer that it is *laïcité*, the French principle of secularity. In other words, this is also the problem of affection toward the France.

I'd like to analyse and survey the legal situation about these bans on veil and the way of justification of these prohibition.

### 1. Three Bans every six years

The first act in 2004 prohibits to “wearing of symbols indicating religious affiliation in public educational establishments.” In other words, the girl Muslim student in France can not wear the headscarf in a public school. If she goes to public school with an Islamic veil like hijab and refuses to take off it, there is a possibility of withdrawing her from school at the worst case, because in French republic, the public school is considered as the most important secular space for training and cultivating the spirit of French republicanism which core is a secularity, in French, *laïcité*. But at this stage, the restriction on religious liberty was limited to a certain range, only a Muslim girl student in a public school.

But, the second act in 2010 prohibiting concealment of the face in public space, widely expanded an object and a space of wearing prohibition. This act, so-called anti-burqa law, outlawed the wearing of clothing that covers one's face in any public space, which consists of public road, open place to the public, and place for public service according to this act. This is the general prohibition. So, all Muslim women in

France must give up wearing the burqa or niqab covering their faces, otherwise they will be arrested and liable to fines of up to 150 euros and mandatory to attend the classes on French republican citizenship.

Furthermore, the third legislation in 2016 enabled French company to provide an internal regulation for prohibiting workers from wearing a headscarf in the workplace. The trigger of this revision was the so-called *Baby Loup* case in 2008 where a female teacher of private nursery school has been dismissed because of her wearing a headscarf. If she was a government worker, this case would not be received public attention. In fact, she was a worker of private nursery school to where the constitutional principle of secularity has not been expected to apply. But the government of Nicolas Sarkozy and French public opinion expressed their strong support for her dismissal and strongly opposed the judgment in 2013 by the French supreme court of cassation who ruled against this dismiss because of its discriminative nature. After all, the same court changed its judgment and confirmed her dismiss as legal in 2014 and French public opinion welcomed this final decision.

Thus, beyond the public space, the ban on veil is now expanded into the labor space situated between public and private. The government of François Hollande after 2012 took a cautious stance on new legislation on veil, considering a lot of criticism from other country especially the United States and the Arabian countries. But as part of a big reform of labor regulation in 2016, the French labor code was revised by proposition of a senator, not by government, who allowed a ban by internal rule in company. For changing the internal regulation in company, the agreement of workers is required. So, we cannot say now what kind of legal influence will this revision make in the future. However, it may be certain that Muslim workers who want to work with veil will be under social pressure to undress her headscarf.

## 2. Reasons of ban

But what is the legal reason for justifying these ban on Islamic veil, especially fullface veil? Justifying the ban on veil in public school is easier because the secularity is the constitutional principle that must be respected in public educational system. But it is difficult to justify the ban on all fullface veil in public space because of the religious liberty who has also the constitutional value. So, the French government abandoned this way of justification invoking the principle of secularity. In fact, the French government was afraid of being judged unconstitutional by the French Constitutional Council in the future.

The first possible reason is gender equality and human dignity. A lot of French women and some feminists consider an Islamic veil as the expression of discrimination against women and modern slavery of women. Former president, Nicolas Sarkozy has also said that "*The problem of the burka is not a religious problem, it's a problem of liberty and women's dignity...the burka is not welcome in France. In our country, we can't accept women prisoners behind a screen, cut off from all social life, deprived of all identity.*" This is the typical reaction according to this way of justification.

But this justification was denied by judgment of European court of human rights in 2014. In fact, most of the Muslim women wear a veil or a burqa by their own will, not by force and arms. So, the European court of human rights said *“the State party cannot invoke gender equality in order to ban a practice that is defended by women.”* And *“respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full face veil in public places.”*

The second possible reason is public safety. The public safety is one of the legitimate aims enumerated in the European convention of human rights. The European court admitted that it is possible to ban a fullface veil for purpose to prevent danger for the public safety. However, at the same time, the European court denied the general risk of danger to public safety about the fullface veil. The court said that a blanket ban on the wearing in public places *“can be regarded as proportionate only in a context where there is a general threat to public safety.”* But, *“the government have not shown that the ban introduced”* in 2010 *“falls into a such context.”*

Finally, the last possible reason is an abstract idea of *“living together,”* in French *“vivre ensemble.”* According to the French government, *“the face plays a significant role in human interaction: more so than any other part of the body, the face expresses the existence of the individual as a unique person, and reflects one’s shared humanity with the interlocutor, at the same time as one’s otherness. The effect of concealing one’s face in public places is to break the social tie and to manifest a refusal of the principle of “living together.”*

Surprisingly, the European court of human rights has accepted this way of justification: *“ban on fullface veil for living together.”* The first reason, *“the ban is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face.”* Second, *“the sanctions provided by the Law’s drafter are among the lightest.”* Third, it is the question of responding to a practice that France considers incompatible with the ground rules of social communication and more broadly the requirements of *“living together.”* Forth, France has a wide margin of appreciation because of a lack of European consensus against a ban.

Despite of a lot of criticism, as a result of approval of ban on fullface veil by European court, showing the face to others in public space became the legal duty in France and some other European countries starts to make same ban like France, for example, Belgium, Bulgaria, Netherlands, and now German. But it is certain that there are increasing fears that these bans in France may have a repressive effect to the religious minority and make their assimilation difficult rather than easy.

### 3. Ban on burkini

On August 2016, another dispute about a necessity of ban on burkini. A burkini is a kind of swimsuit created by Australian designer for Muslim women covering the whole body except the face, the hands and the feet. After the terrorist attack on 14 July 2016 in Nice, about 30 mayors of town in the Mediterranean coast banned this kind of swimsuits. This ban was supported by public opinion and also numbers of politicians. For example, the socialist prime minister at the time, Manuel Valls considered burkini as “*expression of enslavement of women*”. The president of National Front, Marine Le Pen said “*it is the problem of secularity and public order; but beyond that the problem of soul of France.*”

Under the ban on burkini, dozens of women were ordered to pay some fines for not respecting good morals and secularism and this ban became the focus of international concern or criticism.

But this time, in same August, the State council, the French supreme court for administrative justice suspended this ban because there was no clear danger about a burkini to violate a public safety, nor danger to public hygiene, nor danger to decency, and concluded that this ban “*seriously, and clearly illegally, breached the fundamental freedoms to come and go, the freedom of beliefs and individual freedom.*” Besides, the State council added that “*In the absence of risks, the emotions and the concerns resulting from terrorist attacks are insufficient grounds to legally justify the contested ban.*”

From a point of view of a Rules of law, the French State council tried to stop the another restriction to liberty of Muslim women, but it remains possible that the French parliament enact another legislation for prohibiting a burkini. Because the State council goes no further than the court to apply the current law.

### Conclusion

In France, an Islamic veil or swimsuits in public or labor space always continue to be a matter of severe dispute and it is a conflict between the national identity and the individual identity. It seems that the majority of French people still desire the reinforcement of republic secularity and behind this, there is an anxiety over the Islamic extremists and another terror. But these repeated legislation for the reinforcement and the redefinition of national identity look like endless, and I don't know if these French way as ban on veil are so effective to restrain an Islamic fundamentalism from spreading.

I think that the most important thing is the balance of two liberalism, a French one is the liberalism to determine the minimum way of life for living together in the same society, another is an Anglo-Saxon's liberalism to not interfere in each individual way of life for assuring the pluralism of society. The French liberalism has a risk of getting into a narrow nationalism, on the other hand, the Anglo-Saxon liberalism has also a risk of leaving a discrimination or violation of human rights. Seeking a good balance of these two liberalism seems to be a big issue in our modern society.

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本稿は、フランスにおける近年の宗教的着衣規制を概観するものである。

フランスにおいては、6年毎にイスラム・スカーフやブルカといった衣服の着用を禁止する立法が行われている。背景として、移民系フランス人の増加と、それに伴うイスラム原理主義およびイスラム嫌悪の拡大等がある。2004年は公立学校におけるスカーフの着用が禁止され、2010年には公共空間におけるブルカ等の着用が禁止された。さらに2016年の労働法大改正により、私企業においても労働者のスカーフ着用を禁止することが可能となった。

このような規制のうち、特にブルカ禁止の正当化理由が問題となる。立法過程においては、男女平等、人間の尊厳、そして「共生」という価値概念が援用されていた。これに対してヨーロッパ人権裁判所は、男女平等および人間の尊厳の援用を排除しつつ、他者との「共生」を確保するための禁止として、ブルカ禁止が正当化されるとの判断を下した。ヨーロッパ人権裁判所による承認により、禁止はヨーロッパに普及しつつある。

さらに2016年には、ムスリム女性向けに開発された水着、「ブルキニ」の着用禁止が問題となった。フランス南部におけるテロ事件をきっかけとして、自治体による「ブルキニ」禁止命令が相次いだ。しかしフランス最高行政裁判所は、「ブルキニ」に公共の安全を侵害する明らかな危険性を認めることはできないとして、命令を差し止めた。行政による禁止に歯止めが加えられたことになるが、議会による新立法が不可能となったわけではない点が指摘されている。

個人と国民のアイデンティティ対立の中で、宗教的着衣を禁止する欲望はとめどなく強くなっているように思われる。共生社会における最低限の作法の強制を前提とするフランスのあり方と、多元社会における個人の生き方には干渉しないアングロ・サクソンのあり方との間に、どのような均衡がとり得るであろうか。