Changing Realities

Islamic Veils and Minority Protection*

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Abstract

Most of the immigrant communities in Europe do not show any signs of giving up their identity. Just the contrary, they seem to be more and more committed to preserving their culture, traditions, language and religion. Their growing numbers and adherence to their culture and traditions have raised the question of whether it would be necessary to accept them as permanent factors in the society, and consequently, to secure for them, beside equality and freedom of religion, other minority rights such as the right to preserve their cultural and language identity. This change might presuppose a renewal of the traditional understanding of the concept of the national minority. To raise the standards for minority rights of immigrants and at the same time to maintain the level of protection of homeland minorities is not an easy but a necessary solution. But even the accommodation of certain aspects of the freedom of religion of migrants is a problem in practice. As far as the public use of Islamic veils is concerned, the decisions of the European Court of Human Rights proved to be too lenient towards those state parties which put secularity of public institutions before the freedom of religion of the individual. The dissenting opinions correctly emphasize that the role of the authorities is not to remove the cause of tension by eliminating pluralism but to ensure that competing groups tolerate each other. If the Islamic veils are symbols of pressurization, oppression and discrimination, or proselytism, the intervention of state authorities may be justified but the law cannot presuppose that the aforementioned situations are the prevailing ones. If it does so, the collateral damage at the expense of a basic human right of certain true believers is too high.

Keywords: European Court of Human Rights, freedom of religion Islamic veils, minority protection.

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'Chaos is a name for any order that produces confusion in our minds.'
George Santayana

1. Introduction

Freedom of religion and belief has a double nature – it is a general human right and a cornerstone of democratic society; its role is comparable to freedom of expression and, at the same time, a highly important national minority right. (It actually began as a minority right.) The immigrant communities in Europe are more and more aware of the protection of the homeland minorities and they more and more require the same status; they are in the process of Hegelian 'struggles for recognition'. This might lead to demands for cultural and language minority rights on a much higher scale than before. This phenomenon poses questions concerning minority protection, the role and interpretation of freedom of religion as a minority right, especially in delicate situations such as the public use of Islamic veils.

2. Mind the Gap?

Large immigrant communities live in the countries of Western Europe. They have come from outside of Europe, in some cases from former colonies, and also from Central and Eastern Europe, taking advantage of the free movement of people in the EU. What do these groups have in common? They have left behind their original homes and long-standing ties as a consequence of their decision. Their motivations have been mainly, but not exclusively, economic, and they are only newly arrived in the new countries. They have obviously not been there for centuries, but for some years or in other cases for decades.[1] Many of them do not show any signs of giving up their identity and assimilating into the majority. It is not true, or not true any longer, that they abandon their specific culture. On the contrary, they seem to be more and more committed to preserving their culture, traditions, language and religion.

In post-modern Western European societies, identity is a delicate question: there are large immigrant communities and more and more other social groups identify themselves along the lines of a particular identity, and in some way or another the majority might seem to be disappearing. The 'super diversity'[2] in the West has become a characteristic feature of the society. Furthermore, in the identification of a minority group we can observe that the subjective elements are becoming increasingly important, as the UN Special Rapporteur has noted:

1 R. Medda-Windischer, 'Integration of New and Old Minorities in Europe: Different or Similar Policies and Indicators?', *Intergrim Online Papers*, 2015, p. 1.

2 S. Vertovec, 'Super-Diversity and Its Implications', *Ethnic and Racial Studies*, Vol. 9, No. 6, 2007, pp. 1024-1054.

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> Traditionally it has been accepted that the existence of a minority depends on a combination of one or more objective elements with one subjective element, namely the members' awareness of belonging to a minority. However, the subjective aspect is increasingly seen as complex and independent. The existence of a minority is not "static", since it always depends on the will of its members, on their will to continue to form a group distinct from the majority, and on their capacity to recreate their own identity. There are many minorities where the so-called "objective" aspects are insignificant and where subjective aspects, such as the awareness of belonging, are the determining factors.[3]

The visible signs of obvious 'otherness' on parade reconstitute the feeling of belonging to the majority, and the amorphous majority regains its shape by redefining itself against them, mainly against immigrants. In those states where the minority rights of the immigrant minorities are basically confined to non-discrimination and freedom of religion, the latter has a special position. That provides a kind of general protection of identity because there is a significant overlap between religious and other forms of identity, namely ethnic and cultural identities. In the last two decades, the strengthening of minority protection both at national and European levels has been a factor in the stronger manifestation of minority identities. The successful vernacular mobilization of different homeland ethnic groups and the ethnic conflicts led to inclusive legislation, and then the legislation itself proved to be an invitation to minority consciousness. After the end of the Cold War, the European system of protection of national minorities includes the OSCE, the Council of Europe, and to a very limited extent, the EU.

The system reflects the idea of European unity in the sense that it covers the whole continent. It was politically very difficult for Western Europe to limit the system to the countries of Central and Easter Europe, as they did after World War I in the context of the League of Nations because, in the meantime, the protection of minorities became an integral part of the international protection of universal human rights.[4] The idea of European unity also proved to be decisive. This development definitely very much helped from the point of view of the protection of national minorities traditionally living in Western, Central and Eastern European countries. It also hindered the unpleasant return of the past, although not completely, because the Western European states basically do not cooperate with the OSCE High Commissioner on National Minorities. The inherent logic of the EU law and/or the increasingly robust desire for equality led to the strengthening of anti-discrimination legislation in many European states as well as in EU law. It is not an overstatement to claim that the anti-discrimination legislation is the jewel in the crown of the EU human rights policy.

3 J. Bengoa, 'Existence and Recognition of Minorities', 3 April 2000, E/CN.4/Sub.2/AC.5/2000/WP.2, pp. 15-16.

4 J. Ringelheim, 'Minority Rights in a time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection on National Minorities', *Human Rights Law Review*, Vol. 10, No. 1, 2010, p. 107.

This is the challenge the immigrant communities are facing. They are more and more aware of the protection of the homeland minorities, and they require the same status – they are in the process of Hegelian 'struggles for recognition'. This can lead to demands for cultural and language minority rights on a much higher scale than before.

As a consequence of the recent massive influx of migrants and asylum seekers, raising questions about the 'absorption capacity of societies'[5] in Europe, the number of individuals belonging to these new minorities grows. Their growing numbers and adherence to their culture and traditions makes even more important the question as to whether it would be necessary to accept their culture and traditions as permanent factors in societies, *simply because they are there and to stay*, but of course not at the expense of their knowledge of the local language or culture and especially not at the expense of basic human rights, and the legal status of homeland minorities. Alongside equality and freedom of religion, other minority rights, such right as the right to preserve cultural and language identity may be secured for immigrants to consolidate their status. It is worth considering that better to give them wider recognition of their permanent existence, even if this recognition may be symbolic in many respects, than let them to go through the processes of deculturization and alienation, subsequently leading to a formal regaining of the religion and culture of their ancestors through revolt and terrorism.[6]

The inclusion of immigrants in minority protection might have advantages, such as higher levels of equality, and this would terminate the assimilation policy towards the immigrants, accepting the reality that they are permanent factors in the society. At the same time, there may be a higher risk for less cohesion in European societies and, as a consequence, growing fear from losing identity and a desire for homogeneity. Furthermore, there can be greater conflicts of redistribution.

This change presupposes a renewal of the traditional understanding of the concept of the national minority that has basically viewed those communities as fragments of nations or portions of nations that found themselves in the 'wrong state', in a state that embodied another nation than their own.[7] Is the answer to be found in international law? Two treaties of the Council of Europe – the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities – are the most significant instruments for the protection of minorities in Europe. The Charter *ab ovo* excludes the protection of the languages of migrants (Article 1, a, ii). If we accept that language is

5 W. Kymlica, *Politics in the vernacular: Nationalism, Multiculturalism and Citizenship*, 2001, Oxford University Press, New York, pp. 275-279.

6 As far as the French *burqa* ban is concerned, Agnès de Féo, a sociologist and filmmaker who has explored the subject for ten years and studied the impact of the 2010 law, says '[w]e created a monster, Those who have left to and fight in Syria say that this law is one of things that encouraged them' – B. McPartland, 'Burqa Ban Five Years On – "We Created a Monster"', 12 October 2015, *The Local*, available at: https://www.thelocal.fr/20151012/france-burqa-ban-five-years-on-we-create-a-monster (last accessed 28 March 2018).

7 Ringelheim, 2010, p. 101.

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a fundamental element of personal identity, it might lead to the conclusion that all individuals should enjoy a secure and supportive language environment.[8] Consequently, that exclusion in the Charter may be questioned.

As far as the scope of application of the Framework Convention is concerned, the treaty does not include the definition of a national minority, although Article 5 hints at the basic elements: "to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage," and leaves it to the states parties to establish the beneficiaries of the rights enshrined in the text. The states parties use different criteria to determine whose rights are protected under the Framework Convention: formal recognition, citizenship, length of residency, territoriality, substantial numbers, support by kin states, specific identity markers, and ascribed categories.[9] Without analyzing them in detail, it is clear at first glance that theoretically they might be useful for the inclusion of immigrant minorities among the beneficiaries of the protection. In reality, formal recognition and specific identity markers have been used for this purpose. In the Czech Republic and in Finland, based on self-identification, Somalis and Vietnamese were recognized and included into cultural consultation mechanisms, and they received support to finance their activities.[10] In the UK, externally defined markers are used to recognize the 'visible' minorities, such as Indian, Pakistani, Bangladeshi, Chinese, Black Caribbean and Black African communities.[11]

In its reports, the Advisory Committee – which deals with the supervision of the implementation of the Framework Convention – applies Article 6 (protection against discrimination) to all persons living in the territory of the country, underlining the promotion of mutual respect and intercultural dialogue. The Advisory Committee evaluates the role of education and media as tools for integration as well. The emphasis is given to an inclusive language policy, which should take care of the needs of immigrant minorities as well. This practice has been applied in many cases of immigrant minorities, for example, *vis-à-vis* Denmark, Ireland or Italy. The body also relies on Article 8, addressing the financial support for immigrants' religious organizations.[12]

Moreover, the Advisory Committee always requires that the states parties should consider the applicability of each article in the case of new minorities. Consequently, the message that is conveyed by the Advisory Committee is inclusiveness. It might be added that the Venice Commission – the European Commission for Democracy through Law, the Council of Europe's advisory body on constitutional matters – in its 2006 Report on Non-Citizen and Minority Rights indi-

8 R. Dunbar, 'Minority Language Rights in International Law', *International and Comparative Law Quarterly*, Vol. 50, 2001, p. 94.

9 Thematic commentary No.4, The Scope of Application of the Framework Convention for Protection of National Minorities, Council of Europe 2016, pp. 12-15.

10 *Ibid*., p. 13.

11 E. Craig, 'The Framework Convention for the Protection of National Minorities and the Development of a "Generic" Approach to the Protection Minority Rights in Europe?', *International Journal on Minority and Group Rights*, Vol. 17, 2000, pp. 317-318.

12 *Ibid*., p. 318.

cated a different opinion, claiming that the universal character of minority rights "does not exclude the legitimate existence of certain conditions placed on the access to minority rights."[13] By this, the Venice Commission approved restrictive legal techniques, such as citizenship or lengths of residency used by European states to define who the subjects of the protection of minority rights are, excluding migrants. The standpoint of the Venice Commission might be seen as covert criticism of the activity of the Advisory Committee, a warning to what was the *raison d'être* of the procreation of the Framework Convention: the protection of homeland national minorities.

The responses from the states parties to the policy of the Advisory Committee are mixed. Certain states promised to extend the protection, such as Ireland, others only promised to contemplate this possibility, for example, Sweden. Promises, even if they are vague, have their consequences. During a recent visit to Ireland, the Polish foreign minister Witold Waszczykowski indicated that the Polish government would like the Polish language taught in the country.[14] In Sweden, the Education Ordinance made it legally possible for the first six years of education to be available in immigrant languages.[15] The UK emphasized that it actually made the extension; Germany bluntly refused the inclusion, emphasizing that immigrant minorities do not have a traditional settlement in Germany where the protection would be concentrated, general human rights protect them, and the article-by-article approach would lead to the dilution of the protection of homeland minorities.[16]

As we have seen, the situation is contradictory as it stands. Looking for the most probable scenario for a solution, the article-by-article, step-by-step approach advocated by the Advisory Committee continues. This is simply because in the periodic reporting system new turns arrive, and the 'constructive dialogue' between the Advisory Committee and the scrutinized state party revisits the problem, and there may be changes in the behaviour of the reluctant states parties. This is the solution of the 'common but differentiated' treatment of the rights of the immigrant communities.[17] The process can be very slow, it does not produce a uniform practice, and it leaves state parties with a lot of room for manoeuvring, while at the same time it may draw the attention of the Advisory Committee away from the protection of homeland minorities.

There is a smaller chance for a separated solution, although it would clarify the case. There might be an additional protocol on the minority rights of immigrants added to the Framework Convention for the Protection of National Minorities. Why is this less probable? Because it would need clear political will, which would include not only commitment to protect those rights but also an agree-

13 As quoted by Ringelheim, 2010, p. 115.

14 J. Downing, 'Polish Government Want Polish Language Taught in Irish Schools', *The Independent*, 24 November 2016, available at: https://www.independent.ie/irish-news/politics/polish-government-want-polish-language-taught-in-irish-schools-35242943.html (last accessed 28 March 2018).

15 Swedish Report, 2016, ECRML, MIN-LANG (2016) PR 3, 27.

16 Craig, 2000, pp. 320-321.

17 Medda-Windischer, 2015, pp. 8-9.

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ment on what rights should be enshrined into the text and what should be the content of those rights.

A different but no less exciting question is what might be the effect of the emerging legal status of immigrant minorities on the protection of homeland minorities. You can imagine an optimistic scenario, 'the push ahead' scenario, producing an improvement, as the influx of Latinos has improved the status of African Americans in the United States.[18] I am afraid, however, that the conditions for this do not exist. In the previously mentioned case, only two communities were involved, and in Europe many homeland minorities exist under very different sociological and legal conditions regardless of the diversity of the immigrants. Furthermore, although it is possible to find similarities between the federal system of the United States and integrated Europe, the latter is not one state, having different and sometimes very different attitudes towards immigrants.

A fear arising from the 'the shade cover' scenario – meaning a possible deterioration or at least a standstill in the protection of homeland minorities in the shadow of the pressing needs of the immigrants – seems to be more founded. The main danger may be the detrimental East-West division over the issue: immigrant minorities and their protection is seen as Western European, and homeland minorities and their protection is seen as Central and Eastern European business. From the viewpoint of homeland minorities, the real danger would be 'the watering down' scenario, which would mean low-level equality by raising the standards for immigrants and lowering them for homeland minorities.

It is easy to say that the solution is to raise the standards for the minority rights of immigrants and at the same time maintain the level of protection or possibly raise it for homeland minorities, but this is a very difficult scenario to put into practice. Consequently, the Advisory Committee of the Framework Convention for the Protection of National Minorities really has taken up a huge responsibility, because they should adhere to the principle of *primum non nocere*, as far as the protection of homeland minorities is concerned. On the other hand, there is no doubt that "minority statutes and entitlements should reflect changing realities."[19]

Consequently, there is no perfect road ahead for us to take. But even the accommodation of certain aspects of the freedom of religion of migrants is a problem in practice in Europe. As the public use of Islamic veils is concerned, the decisions of the European Court of Human Rights proved to be too lenient towards those states parties which put the secularity of public institutions as an abstract concept above the freedom of religion of the individual.

18 J. D. Skrentny, *The Minority Rights Revolution*, Cambridge, Mass., Harvard University Press, 2002, pp. 1-20.

19 M. Pentikainen, 'Integration of "Old" and "New" Minorities in Europe in Views of International Expert Bodies Relying on Human Rights: Contextual Balancing and Tailoring', *Journal on Ethnopolitics and Minority Issues in Europe*, Vol. 14, No. 1, 2015, p. 42.

3. Public Use of Muslim Veils: The Dilemma

Minority rights in general might be interpreted as signs of equal recognition by the majority. As we have seen in the case of new immigrants, minority rights are almost everywhere confined to non-discrimination and freedom of religion. The freedom of religion is the protector overlapping identities. Consequently, the use of religious symbols in public places indicates not only religious but ethnic and cultural identities. In the *Lautsi* case, the European Court of Human Rights accepted the argument of the Italian government as a part of its margin of appreciation that "the presence of crucifixes in State-school classrooms, being the result of Italy's historical development, a fact which gave it not only a religious connotation but also an identity-linked."[20] Moreover, in the *S.A.S.*, case, the Court accepted again the religious symbols as expressions of cultural identity.[21]

Essentially, the problem is the visibility of Islam in Europe, which is becoming more and more obvious. The visibility of Muslim veils in Europe is not necessarily related to recent immigration because the use of Muslim symbols might be a product of the religious revival of earlier generations. Identity has been imbued with an existential significance. Muslims might see the toleration of the use of their religious symbols[22] as signs of their equal recognition and the acceptance of their authentic existence. But the latter is an especially difficult question because the recognition of the authentic existence of minority communities may undermine the majority myths of the nation. In any case, Islamic veils are signs of authentic presence, they convey the message, "[w]e are from here, whether you like it or not."[23]

Under circumstances where there is demand for the recognition of authentic existence, on the one hand, and the stronger and stronger desire for homogeneity on the other, the dilemma for the European lawmakers and courts is how to react

20 *Lautsi v. Italy*, Application no. 30814/06, judgment of 18 March 2011, para. 67.

21 *S.A.S. v. France*, Application no. 43835/11, judgment of 1 July 2014, para. 120.

22 Under the circumstances of misunderstood political correctness, there is a general, in a way tragicomic, fear of religious symbols. The German Lidl supermarket chain erased the cross from Orthodox churches on the Greek island of Santorini for its marketing campaign 'Greek week' because it wants to exclude any religious beliefs; Prague archbishop denounces Lidl for erasing Greek cross, *Prague Daily Monitor*, 3 September 2017, available at: www.praguemonitor.com/2017/09/04/prague-archbishop-denounces-lidl-erasing-greek-cross (last accessed 28 March 2018).

23 Z. Krokovay, 'Rawlsian religious freedom and liberal secularism: Comments on Catherine Audard's *John Rawls and the Liberal Alternative to Secularism*', *Cahiers d'Études Hongroises et Finlandais*, Vol. 17, 2011, p. 264.

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to the visible signs[24] of the presence of Islam, especially the public use of Muslim veils: a *hijab*, or headscarf that covers the hair, ears and shoulders, or a *khimar*, a jacket-like veil reaching down to the waist, or *chador*, a full-body veil leaving open the face, or *niqab*, a veil covering the face but not the eyes, or *burqa*, a full veil with a mesh screen in front of the eyes.

To set a proper balance between the rights of the individual and collective values, which is the basic theoretical problem of the issue, is never easy. In searching for answers to this dilemma, so much depends on which right is at stake, how far it is seen as a fundamental guarantee of democracy, and also on the *Zeitgeist*. If the right is considered as having primary importance for the functioning of democracy, it is more difficult to justify any limitations on it even if they might seem to be proportionate and necessary.

European lawmakers and courts might invoke *universal* human rights texts and bodies, which are clearly inclusive when the question of religious clothes is addressed; here, there are only two illustrations. Article 6 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief says,

> [t]he right to freedom of thought, conscience, religion or belief shall include, *inter alia*, [the right]... (c) to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief.

The UN Human Rights Committee in its General Comment 22 on Article 19 of the UN Covent on Civil and Political Rights, clearly states:

> The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.[25]

24 The legality of the network of the Islamic *Sharia* Councils and the Muslim Arbitration Tribunal in England and in Wales is much more controversial than the public wearing of Islamic veils, but they are much less visible. Under the 1996 Arbitration Act, those bodies as consensual conflict resolution centres if both parties have agreed to be bound by their decisions. Consequently, the principles of *Sharia* serve as a base for an alternative conflict resolution in family and inheritance debates. One of the problems with those bodies is discrimination. For example, it can easily happen that male heirs receive double the amount inherited by females. On a higher level of abstraction, the issue is not only the legal equality of citizens, but the duplication of the legal system. On the other hand, British pragmatism prevails: the decisions of the *Sharia* Councils and the Muslim Arbitration Tribunal are binding, but the sanctions for the case of failure to comply should be taken from the law of England or Wales. This means that only those decisions can expect legally secured implementations that are in harmony with the law of the England or Wales. – 'Whose Law Counts Most?', *The Economist*, 14 October 2010, available at: https://www.economist.com/node/17249634 (last accessed 28 March 2018).

25 UN Human Rights Committee, UNHRC General Comment 22, 30 July 1993, CCPR/C/21/Rev.1/Add.4, para. 4.

In the case of *Raihon Hudoyberganova v. Uzbekistan*, the UN Human Rights Committee confirms its interpretation:

> The freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation.[26]

In the *Ranjit Singh v. France* case, the UN Human Rights Committee went as far as to decline to approve that a Sikh was prohibited to wear a turban on the identity photograph.[27]

On a continent that has been cherishing the freedom of religion after centuries of bloody religious conflicts, the phenomenon should not pose such a difficult question if we expect that the users of Muslim symbols *as a rule* behave according to true religious conviction, and indirectly their cultural identity. If the law presupposes that the dominant case is true conviction, the problematic cases as exceptions might be forbidden. If Muslim veils are seen as symbols of community pressure, oppression and discrimination, or proselytism, the intervention of state authorities seems to be justified. However, the law cannot presuppose that these situations are the prevailing ones. They can only be conceived as exceptions because if they are not, the collateral damage at the expense of a basic human right of certain true believers is too high.

You may argue, quoting numbers, that wearing veils in practice is an issue only for a part of the Islamic community, especially that the public use of a *burqa* is a marginal problem. Consequently, only a number of Islamic women can run into difficulties if the law forbids or restricts this practice, and in the case of *burqa* it is only a tiny number. But religious pluralism should be protected even inside a minority community; the minority special practice should be accommodated. In the *Cha'are Shalom VE Tsedek*[28] case, no less than seven of judges of the European Court of Human Rights presented a joint dissenting opinion, correctly arguing and underscoring that differential treatment for a minority inside a minority would have been objectively reasonable and proportionate. While they accepted that states enjoyed a margin of appreciation in this area, they emphasized that

> [i]n delimiting the extent of the margin of appreciation concerned it had to have regard to what was at stake, namely the need to secure true religious pluralism, which is an inherent feature of the notion of a democratic society.[29]

26 *Raihon Hudoyberganova v. Uzbekistan*, UN Human Rights Committee, 18 January 2005, UN Doc. CCPR/C/82/D/931/2000, p. 6.2.

27 *Ranjit Singh v. France*, UN Human Rights Committee, 26 September 2013, UN Doc. CCPR/C/108/D/1928/2010, p. 9.4.

28 *Cha'are Shalom VE Tsedek v. France*, Application no 27417/95, judgment of 27 June 2000.

29 *Ibid*., para. 84.

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However, extreme situations like *obvious* proselytism, the disturbance of public organs, an imminent terrorist threat, a need of identification,[30] or if there is no reasonable doubt that community pressure has taken place to wear such clothes, may justify interference by state authorities to limit public use. As far as the refusal of Western culture or integration is concerned, that is clearly tolerable behaviour in a democratic society, even if it raises questions about the inclusion policy of the state *post facto*. Under the circumstances of the horrific plots and the constant threat of the Islamist terrorism of Al-Qaida and the so-called Islamic State, the majority society in Europe might see the public use of Muslim veils as a sign of radicalization or identification with radicalism. Even if this were the case, the law should tolerate this behaviour, while interfering with this practice would need a clear situation in which this intention is beyond any reasonable doubt.

It is also clear that there should be protection against intolerant doctrines, including intolerant religious doctrines, which seriously endanger the rights of others, public order and public safety. That was the reason in the European Court of Human Rights *Refah Partisi*[31] case. Although a right providing a fundamental guarantee for political democracy was involved, the Court considered the dissolution of that political party legitimate, because the political party proposed a fundamentally undemocratic action: among other things, *jihad* is a method to capture political power. The Court correctly came to the conclusion that although the leaders of the party avoided openly calling people to indulge in violence, they did not make any effort either to distance themselves from those party members who manifested approval towards this possibility. The Court in this decision, in a way, accepted the doctrine of militant democracy connecting it to Article 17 – on the prohibition of abuse of rights – of the European Convention on Human Rights.

In certain European states like France, Switzerland and Turkey, the ruling interpretation of the state–church relationship not only requires the state to separate itself from the church, but also protects the individual from the claims of the religion.[32] This interpretation emphasizes the secularity of public institutions, and places 'in public' are considered broadly to include government buildings, public transportation, private businesses, entertainment venues, and also all streets and markets. The concept of active secularism needs not only the rolling back of religious influences, but a kind of horizontal effect as well, requiring pub-

30 There are brave but controversial decisions of national courts. The Federal Court of Canada went so far as to rule it as unlawful to order new citizens to remove their face-covering veil when taking the oath of citizenship – N. Keung, 'Niqab Ban at Citizenship Ceremony Struck Down by Court', *Toronto Star*, 6 February 2015, available at: https://www.thestar.com/news/immigration/2015/02/06/niqab-ban-at-citizenship-ceremony-struck-down-by-court.html (last accessed 28 March 2018). In the *Phull v. France* case, the European Court of Human Rights rightly approved that a Sikh was compelled by security staff at Entzheim Airport of Strasbourg to remove his turban for inspection – Application no. 35753/03, decision of 11 January 2005.

31 *Refah Partisi v. Turkey*, [GC] Application no. 41340/98, 41342/98, 41343/98 *et al*, judgment of 13 February, 2003.

32 G. Halmai, 'Comments on Catherine Audard's *John Rawls and the liberal alternative to Secularism*', *Cahiers d'Études Hongroises et Finlandais*, Vol. 17, 2011, p. 269.

lic places to remain free from religious symbols.[33] In France, the concept of *laicité* is interconnected with the republican tradition, and the French "insist that the state requires the full participation of each citizen in its basic secular tradition"; or formulated differently, "traditional republican line demands secular conformity."[34] This political culture helps to prevail the reasoning that sees the public appearance of Islamic clothes as a misuse of freedom of religion, although the protection of public order is far from equal with secular conformity under the aegis of an assimilationist governmental policy, which is hardly reconcilable with the individual's capacity to decide on his or her life.[35] Other reasons can also be identified to explain why France displays sensitivity towards this issue: the debate on national identity or "the context in which face-veils are discussed is not limited to our contemporary era, but extends at least as far back as the French Revolution."[36]

The case law of the European Court of Human Rights on secularism seems to prove that "the Court generously accepts" the prohibition of various forms of religious expressions, precluding them from public places.[37]

4. Hijab Cases in Front of the European Court of Human Rights

The decisions in the *Dahlab, Sahin* and *Dogru* cases clearly demonstrate how the Court has conceived the problem, although only in a school context. Unfortunately, schools are good examples of social places where legal norms replace cultural norms.[38]

In the *Dahlab*[39] case, relying on a margin of appreciation, the Court dismissed the application of an elementary school teacher who had converted to Islam and who complained because she was not allowed to wear her Muslim headscarf during instruction. The Court found that the Muslim headscarf was a powerful external symbol with a proselytizing effect under the aforementioned conditions. It also decided that wearing it was not reconcilable with gender equality. The Court emphasized that in the case of a teacher at a state school, operating under denominational neutrality, that proportionate restriction was justified. As far as the elements of the reasoning of the Court are concerned, the reference to the proselytizing effect may be acceptable in theory, but no complaints have been

33 A. Steinbach, 'Burqas and Bans. The Wearing of Religious Symbols under the European Convention on Human Rights', A Gwilym Gibbon Centre for Public Policy Working Paper, July 2015, p. 15.

34 J. Goody, *Islam in Europe*, Oxford, Polity Press, 2004, pp. 96, 101.

35 E. Daly, 'Religious Liberty and the Rawlsian Idea of Legitimacy: The French *Laicité* Project between Comprehensive and Political Liberalism', *Religion and Human Rights*, Vol. 5, No. 1, 2010, p. 29.

36 D. Barton, 'Is the French Burka Ban Compatible with International Human Rights Law Standards?', *Essex Human Rights Review*, Vol. 9, No. 1, 2012, p. 6.

37 Steinbach, 2015, p. 5.

38 R. McCrea, 'The Ban on Veil and European Law', *Human Rights Law Review*, Vol. 13, No. 1, 2013, p. 58.

39 *Dahlab v. Switzerland*, Application no. 42393/98, judgment of 15 February 2001, pp. 12-14.

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made by the pupils or the parents. Moreover, taking all circumstances into consideration, the proselytizing effect seems to be far from reality.[40] Unlike a headmaster, a teacher is not a representative of a school – a teacher should not display the denominational neutrality of the place of work.[41] As far as the gender equality issue is concerned, the Court interpreted the headscarf as objective evidence of gender inequality, not taking seriously the self-determination of the woman. According to the Court, the use of the *hijab* "is hard to square with the principle of gender equality." Moreover, the reliance on the big powerful nature of the symbol might indirectly be discrimination, because the powerful symbols belong to Islam, and the smaller symbols of other religions seem to be classified separately.

In the *Sahin*[42] case, the Court was ready to agree with the prohibition in the case of a university student, accepting again that the prohibition was based on the equality of the sexes and on the wish of the authorities to preserve the secular nature of the institution. The Court gave special importance to social pressure:

> [t]he Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.

In a disturbing way, the Court added that the secular way of life in Turkey leads to pressing social needs to prohibit the use of Muslim symbols, "especially since this religious symbol has taken on political significance in Turkey in recent years."[43]

There are at least three problems with the ruling. Even if a teacher is seen by the Court as representing the secular nature of the institution, a student obviously might not be seen the same way, because a student cannot undermine the secular nature of her school. The argument of social pressure gives priority to an alleged social fact over the right of an individual in a case where the applicant was obviously a true believer having rational autonomy. Finally, if a secular way of life and the political significance of symbols are not concretized and are too broad,

40 As Carolyn Evans points it out, although children are generally considered particularly vulnerable to intellectual or emotional manipulation and the student–teacher relationship has an element of power that is open to being abused, but the behaviour in this case was far from being a clear case of proselytism. Ms Dahlab did not even tell the children that she was a Muslim. The school was presumably filled with Christian teachers. 'Those families that were religious would have given explicit religious teaching to their children, attended religious ceremonies and participated in religious celebrations. Is there any reason to believe that children are so in the thrall of a particular teacher, who only teaches them for one year, that they will ignore or defy all the other authority figures and cultural influences in their lives, will actively seek out information about the religion of their teacher (as the teacher has not given any information herself) and will then feel pressured to convert to that religion?' – C. Evans, 'The "Islamic Scarf" in the European Court of Human Rights', *Melbourne Journal of International Law*, Vol. 7, No. 1, 2006, p. 62.

41 In the case of *Eweida and others v. United Kingdom*, the British Airways as employer placed restriction on wearing a headscarf. The European Court of Human Rights accepted that employer's desire to project an image of neutrality towards customers is legitimate – Application no. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013, pp. 79-84.

42 *Leyla Sahin v. Turkey*, Application no. 44774/98, judgment of 29 June 2004.

43 *Ibid*., para. 104.

then almost everything, including the complete ban on the public use of certain religious symbols, could be inevitable.

The Court in its reasoning underlies the margin of appreciation approach:

> Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance.[44]

However, the issue at stake is basically the question of free practice, although it has relevance for the state and religion relationship. The dissenting opinion presented by judge Tulkens criticizes the large margin of appreciation left to the Turkish authorities. Turkey's specific historical background does not properly justify the state's interference. She correctly observes that European supervision is quite simply absent from the judgment, and there is a need for the harmonization of standards on that question. She emphasizes that merely wearing the headscarf cannot be associated with fundamentalism, and it is vital to distinguish between those who wear the headscarf[45] and 'extremists' (Islamic radicals), who seek to impose the headscarf as they do other religious symbols.[46]

In the *Dogru*[47] case, in which a grammar school girl was the applicant, the Court upheld its approach, emphasizing diverse European practices, as justification to leave the question to a margin of appreciation, and the importance of protecting the rights of others, and refers to possible social conflict and the importance of avoiding such a phenomenon. (In the *R v. Headteacher and Governors of Denbigh High School* case, the British House of Lords, in a similar school context, echoed the standpoint of the European Court of Human Rights,[48] as far as the possibility of conflict was concerned. However, in the UK practice British pragma-

44 *Ibid*., para. 109.

45 Wearing religious clothes, if the applicants were on their way to their place of worship and had to dress in the manner of their faith, was neither representing a threat to public order, nor proselytism, as the Court concluded in the *Ahmet Arslan* case. In that case, the members of the *Aczimendi tarikaty* group wore their distinctive dress (turban, *salvar* – baggy trousers – tunic and stick) – *Ahmet Arslan and Others v. Turkey*, Application no. 41135/98, 23 February 2010, pp. 31-52.

46 *Leyla Sahin v. Turkey*, Application no. 44774/98, judgment of 29 June 2004. Dissenting Opinion of Judge Tulken, paras. 1-13.

47 *Dogru v. France*, Application no. 27058/05, 4 December 2008, paras. 63-64.

48 *R v. Headteacher and Governors of Denbigh High School*, [2006] UKHL 15.

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tism[49] was not completely lost, because in other cases headscarves were allowed by the school administration if they displayed the school colours.[50]

5. Niqab in Front of the Court: The S.A.S. Case

Although there has hardly been a pressing social need,[51] the French lawmaker addresses the public wearing of *burqas* and *niqabs*. Section 1 of the French law of 11 May 2010 states, "[n]o one may, in public places, wear clothing that is designated to conceal the face," and according to Section 2 public places comprise any places open to the public or assigned to the public. The violation of the law has been inserted into the Criminal Code as a second class petty offence with a maximum 150-euro fine. President Nicolas Sarkozy justified it in the following way:

> The problem of the *burqa* is not a religious problem. It is a problem concerning the freedom of women, the dignity of women. The *burqa* is not a religious symbol but a sign of subservience, of abasement. I want to say solemnly that it is not welcome on the territory of the French Republic. We cannot accept in our country women who are prisoners behind a grill, cut off from all social life, deprived of any identity. This is not the French Republic's idea about the dignity of women.[52]

The lawmakers made efforts to avoid discrimination against Islamic believers, neutral words are used to describe the forbidden behaviour, but they failed. The law is discriminatory indirectly or in a covert way because the

> religion that prescribes the wearing of religious dress seems to be more deeply affected by a wholesale ban than a different religion or belief that places no particular emphasis on clothing.[53]

49 In practice, it is better to find a *modus vivendi*, if the danger is limited and principles are upheld. To illustrate this, I would like to recall an early legal case from the 1970s. An Indian Sikh living in the UK turned to the court because he was required by the High Way Code to wear a crash helmet when he was riding his motorcycle, and it violated his religious beliefs which required wearing a turban. The British courts, and subsequently the European Commission of Human Rights, favoured the state interests in health over the right of the individual, and clearly stated that any interference with the person's freedom of religion was justified on the grounds of the protection of health. Later on, upholding the general rule and the health considerations standing behind it, the UK Government granted an exemption to the members of the Sikh community – R. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion, A Human Rights Model for Minority Integration*, Nomos, Baden-Baden, 2009, p. 105.

50 Goody, 2004, p. 96.

51 Barton, 2012, p. 23.

52 'Nicolas Sarkozy: Burqa Not Welcome in France', 22 June 2009, *The Telegraph*, available at: www.telegraph.co.uk/news/worldnews/europe/france/5603070/Nicolas-Sarkozy-burqa-not-welcome-in-France.html (last accessed 28 March 2018).

53 Barton, 2012, p. 23.

In the *S.A.S.*[54] case, the applicant was a French citizen, who wore a *niqab* in public places but not systematically; she didn't wear it, for example, when visiting a doctor or meeting friends.

In this case, the applicants emphasized that the state interference into her right did not have a legitimate aim because it was not a measure intended to address specific safety concerns in places of high risk such as airports. Furthermore, she stated that her right to exist as an individual in public places was denied; she was forced to choose between staying at home and breaking the law by following her religious convictions. The French government emphasized that the interference pursued a legitimate aim, because public safety required the identification of an individual in public and reversed the argument of the applicant claiming that if women must conceal their faces in public, it amounted to denying their right to exist as individuals and its effect was dehumanizing, violating the equality of sexes. The government emphasized that concealing the face in public breaks social ties and manifests the rejection of the principle of 'living together'.

The intention of the French government to protect 'living together' is not clear because it may be interpreted from contradictory angles. It can mean securing responsibility, but securing conformity or homogeneity as well.[55] If the second interpretation plays a certain role in the attitude of the French government (and it does), the compulsion for good, a concept advocated by Jean-Jacque Rousseau, seems to return. Moreover, it has been endorsed by the Court.

The Grand Chamber of the Court in its decision did not accept the reference to public safety and the equality of sexes but embraced the argument of the violation of the 'living together' principle, emphasizing the negative effect of isolation and the important role the face plays in social interactions. The Court accepted the broad ban, emphasizing that the ban was not expressly based on religious connotations but exclusively on the ground that the clothing concealed the face. The ban can be seen as proportionate to the legitimate aim pursued – 'living together' as an element of the protection of rights and freedoms of others as guaranteed in Article 9 (2) of the European Convention on Human Rights – and inside the margin of appreciation afforded to the French state.[56]

The Court's reasoning is disturbing in a way:

> It can understand the view that individuals who are at present in places open to all *may not wish to see* (my highlight) practices or attitudes … which would fundamentally call into question the possibility of open personal relationships by virtue of established consensus… .[57]

54 *S.A.S. v. France*, Application no. 43835/11, judgment of 1 July 2014, paras. 10-12, 53-64, 76-80, 80-85.

55 I. Trisplotis, 'Case Comment. Two Interpretations of "Living Together" in the European Human Rights Law', *Cambridge Law Journal*, Vol. 75, No. 3, 2016, p. 600.

56 *S.A.S. v. France*, Application no. 43835/11, judgment of 1 July 2014, paras. 106-163.

57 *Ibid*., para. 122.

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This argument seems to legally establish the principles of a legitimate European expectation of a dress code for public places.

Judges Nussberger and Jaderblom came to different conclusions in their joint and partly dissenting opinion. They claimed that the Court sacrificed the rights of the individual to abstract principles. The fears and uneasiness are not caused by the veils themselves but by the philosophy that is presumed to be linked to them, such as subservience and dehumanization. The applicant emphasized that wearing the full-face veil depended only on her spiritual feelings. Furthermore, there is no right not to be shocked or provoked by different models of cultural or religious identity. The face plays an important role in human interactions, but it does not mean that such interactions are impossible if the full face is not visible, such as when skiing, motorcycling or at carnivals. Their dissenting opinion,[58] on the basis of the case law of the Court, underlined that the role of the authorities is not to remove the cause of tension by eliminating pluralism but to ensure that competing groups tolerate each other as it was stated by the Court in the *Serif*[59] case.

6. And Central and Eastern Europe?

Although the overwhelming majority of immigrant communities live in Western Europe, the protection of minority rights is a pan-European issue, and the protection of the minority rights of members of immigrant groups is a part of it. Anyway, the *burqa* problem is there. In Bosnia, two thousand women protested against the legal ban on wearing Islamic headscarves in courts and other legal institutions in 2016.[60] But it is true that the *burqa* is a homeland minority issue there. Was it a pressing social need to introduce a general ban on the *burqa* in nearby Austria? It does not seem probable. Central and Eastern Europe are not without impatience and fear as well.

7. Instead of Conclusions: Ceterum censeo

Many European intellectuals and lawyers are proud of the European protection of human rights, of the high standards maintained by the European Court of Human Rights. Although this pride is well justified in most cases, as far as the protection of a minority practice in a religious community is concerned, and especially concerning the public use of Islamic veils, the decisions of the Court proved to be too generous towards those states parties that put the secularity of public institutions and places above the freedom of religion of the individual. Pluralism should always be protected inside a religious community, and the margin of appreciation should be delimited with regard to the weight of the question

58 *Ibid*., Joint Partly Dissenting Opinion of Judges Nussberger and Jaderblom, paras. 1-26.

59 *Serif v. Greece*, Application no. 38178/97, judgment of 14 December 1999, para. 53.

60 'Bosnian Women Protest the Ban on Headscarves'. 7 February 2016, *BBC News*, available at: www.bbc.com/news/world-europe-35518768 (last accessed 28 March 2018).

directly related to religious pluralism. The public use of Islamic veils is a delicate question of the accommodation of human and minority rights of many immigrants in Europe. At present in most European states, the minority rights of the immigrants are confined to equality (non-discrimination) and freedom of religion, although it is clear that many of them would like to preserve their language, culture and tradition. It is easy to say that the solution is to raise the standards for minority rights of immigrants and at the same time maintain the level of protection or possibly raise it for homeland minorities, but this is probably the most difficult scenario to put into practice.

The Explanatory Report of the 2012 Ljubljana Guidelines on Integration of Diverse Societies of OSCE captures the message of this article very well:

> Recognizing that diversity enriches society implies that States should not define themselves in exclusivist and (mono-) ethnic terms as the 'property' of one or several specific ethnicities. In addition, members of majorities and minorities should accept that their identities – like the one of the State – may change and evolve, including through contact and exchange with other groups.[61]

61 OSCE, The Ljubljana Guidelines on Integration of Diverse Societies, November 2012, available at: https://www.osce.org/hcnm/ljubljana-guidelines?download=true (last accessed 28 March 2018), p. 15.

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