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HARD COSMOPOLITANISM:
once again about the case law of the
european court of human rights**

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Athanasia Petropoulou

PhD in International Law at the Université Paris-1 Panthéon-Sorbonne.
athanasia_10@yahoo.fr

Resumo: As perspectivas política, metodológica e interpretativa duma visão cosmopolita estão na linha de ganhar cada vez mais legitimidade, também no meio específico da Carta Europeia dos Direitos Humanos. Este ensaio analisa decisões e interpretações da Corte e tenta estabelecer um paralelismo entre os princípios judiciais e os fundamentos éticos e filosóficos do pós-modernismo: sobretudo quanto às modalidades de transmissão de valores e princípios. O exemplo marcante é a construção da identidade nacional como resposta para a insegurança global. A autora desse ensaio tenta desconstruir analiticamente os fundamentos ideológicos dessa resposta regressiva.

Palavras-chave: véu islâmico; tolerância religiosa; laicidade; Corte Europeia de Direitos Humanos, cosmopolitismo.

Abstract: The political, methodological and interpretative perspectives of a cosmopolitan vision are in the process of gaining more and more legitimacy, also within the specific environment of the European Charter of Human Rights. This essay analyzes Court decisions and interpretations and attempts to establish a parallelism between the judiciary principles and the ethical and philosophical foundations of postmodernism: above all as to the modes of transmission of values and principles. The striking example is the construction of national identity as a response to global insecurity. The author of this essay attempts to analytically deconstruct the ideological underpinnings of this regressive response.

Keywords: Islamic veil; religious tolerance; laicism; European Court of Human Rights, cosmopolitanism.

1. Introduction

Drawing upon Kants' conception on a cosmopolitan society, regional mechanisms of protection of international human rights, such as the system of the European Convention of Human Rights (ECHR), participate in the shaping of what might be called "cosmopolitan constitutionalism". This vision of cosmopolitanism is central to the contemporary understanding of international law beyond the notion of State sovereignty, as a juridical legal order that would encompass non-state actors, as well as individuals. This cosmopolitan legacy of today's international human rights law regime is inherent in a human rights discourse that views cosmopolitan rights as part of a political project, whose justification rests on a moral universalism, according to which individuals are rights-bearing not only in virtue of their citizenship within States, but in the first place in virtue of their humanity. This is the basic contention of Seyla Benhabib, for whom cosmopolitanism involves "*the recognition that human beings are moral persons equally entitled to legal protection in virtue of rights that accrue them as human beings as such*"¹. The author associates this universalizing effect of the cosmopolitan dimension of human rights with a communicative freedom, which enables every individual to be recognized as active member of a constituted political order.

Multilevel cosmopolitan constitutionalism results in restricting modern national, and international legal systems through "*inalienable rights of all members of the human family (as) the foundation of freedom, justice and peace in the world*", based on a "*common understanding of these rights*", as specified in the 1948 UDHR, and progressively developed through national and regional human rights law, and especially the law of the ECHR². The emergence of the individual as an actor in the field of international law and the dethronement of unrestricted State sovereignty can be regarded as the basic tenets of such a trend that is inspired by Universalist claims concerning the ambit of the application of human rights. However, these claims, based also on the indivisible nature of human rights, as proclaimed by the Vienna Convention³, cannot always address the inherent tensions underlying the implementation of human rights in the national or regional level.

One of the challenges to contemporary notions of cosmopolitan human rights and one exacerbating the tension between the holistic and the particular is how to address issues arising from the need to accommodate the right in manifesting ones' religious beliefs in the context of secular liberal democratic regimes. The controversies surrounding the question of the nature

1 BENHABIB, S. *Dignity in Adversity, Human Rights in Toubled Times*, Polity press, 2014, p. 9.

2 PETERSMANN, Ernst-Ulrich *Human Rights Require 'Cosmopolitan Constitutionalism' and Cosmopolitan Law for Democratic Governance of Public*, European University Institute, Working Paper LAW, 2013/04, p. 4.

3 Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

and scope of the right to religious freedom as well as the possibility of the State to regulate the limits of legitimate religious expression were addressed by the European Court of Human Rights in a case of the so called “French burqa”, namely the prohibition for Muslim girls and women to wear the full face veil in the public space. The case is interesting in that it elucidates the position of the European Court in a highly contentious subject, such as the relationship between religion, personal autonomy and their expression in the public sphere. The case illustrates the ambiguities of national responses to what is conceived as a threatening reality, namely the rise of Islamism and the place of Islamic norms and practices in European secular nation-states.

Religious freedom far from being only a matter of personal belief or conscience is also a matter of symbols, group identity, rituals. Imposing a ban on religious clothing invoking the communal interest of “living together” and a vision of public morals promoting a specific understanding of communicative interaction in public raises concerns for the protection of minorities, gender equality, human dignity and ultimately the nature of the right to religious freedom and its ability in contemporary western secular democracies to embrace religious expression that challenges the predominant conception of neutrality in the public sphere. It is argued that in the *S.A.S v. France* case, the European Court of Human Rights adopted a particularly limited approach to the subject. Based on a controversial conception of public space, advocated by the Defendant State, the Court finally justified the ban relying on the wide margin of appreciation of the French legislator. The case also illustrates the difficulties faced by the Court in imagining and constructing nationally embedded notions, such as “secularism” or “*laïcité*”. Even if in terms of the European case law the right to freedom of religion is conceived primarily as a matter of personal belief and conscience, destined for a private expression, the *S.A.S* case shows that religious symbols and related practice remain an unsettling issue of shaping social and cultural identities.

The paper focuses primarily on the *S.A.S* case, associating it also with similar cases related to morals and religious issues, where a certain vulnerability and restraint of the Court can be detected. In these cases, the Court shows usually a deferential approach to State choices, relying on the doctrine of “margin of appreciation”. It is here alleged that this particular adjudicating stance can be also associated to what is called “securitization” of rights, which operates primarily on the national level and consists in legitimating and introducing limitations on the implementation of rights on the basis of perceptions of threat represented by particular individuals or groups. Even if this kind of approach is not expressly present in the argumentation of the ECtHR when adjudicating on these issues, security related preoccupations are not strange to its understanding of the legitimate aims served by the limitations introduced by national legislatures. As it has already been mentioned, this deferential approach can be also attributed to

the tendency of the Court to address similar issues, focusing on the need to safeguard nationally embedded notions, such as secularism or “*laïcité*”, as well as values central to the understanding of belonging in a constituted polity, as the concept of “living together” denotes. In the “age of subsidiarity”⁴, prompted by the legitimate concern of the ECtHR to pay deference to the “*reasoned and thoughtful assessment made by national authorities through the adoption of a democracy-enhancing approach*”⁵, it is questioned however whether the position of the Court is appeasing the tensions between, on the one side the protection of the rights of minorities and on the other side, the need to safeguard the majority’s rights and interests. In concluding, it is proposed that a return to the philosophical foundations of human rights, as well as the adoption of a “value-pluralist” approach in this field could provide a new basis for interpreting and understanding Convention’s rights and a means to embrace in a certain extent Universalist claims.

2. Shaping identities through (in)securitization

In recent sociological and international relationships’ oriented approaches the notion of “securitization”⁶ is central in understanding dominant trends and discourses on issues such as immigration, security, crime, liberty and development. According to the C.A.S.E collective⁷, insisting on practices as forms of social interactions which are derived from objective relations following French sociology doctrines developed by authors such as P. Bourdieu and M. Foucault⁸, the process of (in)securitization is central to the understanding of practices, both discursive and non-discursive, drawing lines between groups and categorizing what is threat, what is fear, what is protection, what is security. In that sense, for this school of thought, the label “security” “*appears rather to work as a slogan, as a method through which a dominant group justifies and imposes a political program by assessing who needs to be protected and who can be sacrificed, who can be designated as an object of fear, control, coercion*”.

One of the subjects analyzed through the lens of this process is the one related to Islam and its place in modern western secular democratic regimes. The notion of “securitization of Islam” has acquired increasing relevance⁹ during the last decade. The notion depicts different

4 Inspired from SPANO, R. “Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity”, *Human Rights Law Review*, 2014, p. 1-16.

5 *Ibid.*

6 Concept taken from the banking system, WAEVER O., “Securitization and Desecuritization”, in LIPCHUTZ, R.D. (ed.), *On Security*, NY, Columbia University Press, 1995; BALZACQ, T. and CARRERA, S., *Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policies*, Brussels, Centre for European Policy Studies, 2005.

7 BIGO, D.; BALZACQ, T. etc, *Security Practices*, International Studies Encyclopedia Online, 2010.

8 From a different approach on security studies see the Copenhagen School of Security.

9 In that sense, MAVELLI, L. “Between Normalization and Exception: The Securitization of Islam and the Construction of the Secular Subject”, *Millennium – Journal of International Studies*, 2013.

phenomena, which relate to the increasing perception in the West that Islam, and especially Islamic radicalization represents a threat to the liberal-secular order¹⁰. Similar approaches have also been used in order to justify ban or restrictions of the use of headscarves and burqas across Europe not only in public institutions, such as schools or universities, but also in the public space. In that sense, regulating the use of religious symbols in the public sphere is directly associated with the re-essentialized understanding of these symbols and cultural difference and with the shaping of the identity and communal values in the secular western contemporary society.

It is interesting to note that authors, like Seyla Benhabib, see in cases similar to the full face case in France, the return of Schmitt's political theology. She argues that "*under conditions of globalization 'political theology' is deployed as a complex term, capturing a space of instability between religion and the public square, between the private and the official, between individual rights to freedom of religion versus state considerations of security and public well-being*"¹¹. In terms of securitization, the return to political theology means that the state of exception and marginalization (as opposed to normality) is built on the idea of the Other, that is exemplified in contemporary discourse by Muslim religion and its followers, or in the headscarf case by the full veiled women's bodies.

Relying on specific representations of religious symbols and cultural practices as opposing, contradictory or even hostile to certain cultural patterns and a way of life that can be called majoritarian or dominant tells a lot not only about the process of essentialization of the first, but also about the process of constructing and shaping the second. Using a notion of Eric Hobsbawm, one can argue that in the era of migration and forced globalization, a destabilization of identities and traditions is taking place, and tradition is being "reinvented" or needs to be "reinvented". In this regard, Mavelli shows how the securitization of Muslim minorities in Western societies is a process of construction and reproduction of secular modes of subjectivity¹². For this author, the process rests on the Western/ European secular assumption that faith should be confined to the private sphere. European modernity and the modern western State are founded in fact on the division between the public and the private, between religion and politics, between theological truths and political certitudes, even though a strict divide can be difficult in practice. For the modern western thinking, Islam is perceived as a threat as it evokes the (problematic) image of an all-encompassing system of belief that conflates religion (pri-

10 MOLLER, Bjorn. "National, Societal and Human Security", in *Security and Environment in the Mediterranean: Conceptualizing Security and Environmental Conflicts*, ed. BRAUCH, Hans Günter and SILVESTRI, S. "Public Policies towards Muslims and the Institutionalization of 'Moderate Islam' in Europe: Some Critical Reflections", in *Muslims in 21st Century Europe*, CEPS CHALLENGE Research Paper n° 15, April 2009.

11 BENHABIB, Seyla. *Dignity in Adversity, Human Rights in Troubled Times*, John Wiley & Sons, 2013. p. 171.

12 MAVELLI, *op.cit.*

vate) and politics (public)¹³. For Mavelli, the process of securitization of Muslim subjectivities is central to upholding the primacy of secular subjectivity and to the self-understanding of the subjectivity in the West, as well as the values it represents.

3. SAS v. France: religion within the secular public sphere

Ideas about the distinction between the public and private sphere that were already present in Kant's work continue to be a powerful conceptual tool in the field of international human rights' doctrine. The communicative freedom associated with a particular conception of human rights cosmopolitanism insists on the right of individuals to have access to the public sphere, conceived as the space of deliberation and collective decision making, and thus to participate in the shape of the political and social order they have chosen to live. However, the place of religion in Kant's cosmopolitan vision has been a contentious issue. Whether the doctrine acknowledges that in his universe Kant places "*religion within the boundaries of mere reason*"¹⁴, it can be argued that his conception of religion is securitized, as he confines religion to the private sphere and contemplates the possibility of religion in the public sphere only if religion strengthens or does not undermine sovereign power¹⁵.

The case law of the ECtHR illustrates the inherent tensions governing the relationship between religion and the secular public order. Delimiting the notion of the public sphere and the values associated with it, can be seen as one of the central issues in the case of *S. A. S v. France*¹⁶. It is here alleged that the securitized vision of Islam and the practice of full face veil by the women of Muslim faith which culminated with the adoption by the French parliaments of the measure of the full face veil ban had a considerable implicit impact on the reasoning of the Court, which however explicitly denied attributing any symbolic meaning to the wearing of the full face veil, as suggested by the defendant government. It is also contended that the Court, in adjudicating on the proportionality of the law in question relied, implicitly at least, also on the understanding of secularism/*laïcité* as proposed by the French Government, which was mediated expressly on its reasoning by the 'neutral' principle of "*living together*" or *vivre ensemble*.

13 The divide between public and privation and the corresponding understanding of religion as a "*matter of privatized belief in a set of creedal propositions to which an autonomous individual gives assent*" (MAHMOOD, Saba. *Secularism, Sexual Difference and Religious Minorities: A Contested Genealogy*, July 2010) seems rather incompatible with a more non-Western religious traditions, such as Islamic notions of religious belonging and community, that define for many Muslims a way of life in which the individual does not own herself (SANDEL, Michael J., "Religious Liberty: Freedom of Choice or Freedom of Conscience" in BHARGAVA, Rajeev. ed. *Secularism and its Critics*. Oxford University Press, 1998.

14 See HABERMAS, J. *Between Naturalism and Religion: Philosophical Essays*, Cambridge, Polity Press 2008; KANT, I. *Religion within the Boundaries of Mere Reason and Other Writings*, Cambridge University Press, 1998.

15 See MAVELLI, *op.cit.*, p.12.

16 *SAS v. France*, [GC], n° 43835/11, 1 July 2014.

The case was introduced by a female French national claiming that the ban was violating her right to wear the niqab in public ‘*in order to express her religious faith, culture and personal convictions*’ (§ 11) and in this sense “*feel at inner peace with herself*”. Before the Court, she observed that she accepted showing her face when requested to do so for necessary identity checks, or when undergoing a security check, at the bank or in airports (§ 13). She alleged that the ban amounted to a violation of Articles 3, 8, 9, 10 and 11, taken separately and together with Article 14 of the Convention. The applicant criticized the ban as being irrespective to the culture of minorities and reflecting a chauvinistic logic and a paternalistic conception on gender equality, as it amounted to punishing the women who chose to wear the veil on their free will, thus were supposed to be protected from patriarchal pressure (§ 78). She claimed that it is disproportional imposing criminal sanctions to prevent women from veiling their faces in public and thus not “*necessary in a democratic society*”.

As regards the right to respect for private life, the applicant argued that wearing the full face veil was part of her social and cultural identity and that the ban could probably result in her encountering hostility and criminal sanctions when wearing the veil in public (§ 79). According to her, the measure was discriminatory on grounds of sex, religion and ethnic origin (§ 80).

In their submissions, the Government admitted that the ban could be considered as a “*limitation within the meaning of article 9 § 2 of the Convention, on the freedom to manifest one’s religion or beliefs*” but it pursued legitimate aims and it was necessary in a democratic society for the fulfilment of those aims. According to the Government, the measure, by its general phrasing¹⁷, was intended to ensure “*public safety*” by allowing identification in public and to protect “*the rights and freedoms of others*” by ensuring “*respect of the minimum set of values of an open and democratic society*”. In this regard, it contended that individualization by revealing ones’ face to the public is essential for human interaction, as 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 otherness*”. Concealing one’s face in public spaces can thus be considered, according to the Government, as a hostile attitude consisting in rejecting the principle of “*living together*” (le “*vivre ensemble*”) (§ 82). It further relied on considerations regarding gender equality and dignity, as the impugned Law was designed to combat gender discrimination as a result of women being effaced from public space through the wearing of full-face veil. This ‘*effacement*’, according to the Government, whether desired or not, was necessarily dehumanizing and could hardly be regarded as consistent with human dignity.

As Mavelli has argued it is clear that the rendering of the burqa was postulated on a

17 According to the contested law, section 1: No one may in public places wear clothing that is designed to conceal the face. Section 2: For the purposes of section 1, ‘public places’, comprise the public highway and any places open to the public or assigned to a public service.

gendered construction of threat and partly mobilized through visual securitization¹⁸. This is the process whereby ‘*images constitute something or someone as threatened and in need of immediate defense or when securitizing actors argue that images ‘speak security’*’¹⁹. The visual securitization of endangered female bodies is operating in the observations through the image of ‘effaced’ women, wearing the full veil. The moral justification provided is that a national legislature has the right to save the dignity of these women, even against their will, because, the covering of their body and faces is considered de-humanizing.

Regarding the principle of ‘*living together*’ the visual securitization relies on an inverted image of the full veil women, as they are no longer the oppressed and threatened group to be saved, but the group that poses a threat to the values governing the peaceful coexistence in a democratic society. The Government succeeded in associating the defense of the principle of ‘*living together*’, based on the respect “*for the minimum sets of value in an open democratic society*”, with the legitimate aim of protecting the rights of others provided for in both articles 8 and 9 of the Convention, an operation that is was finally accepted by the Court.

Even though the Government did not rely explicitly in their observations on the notions of *laïcité* or the values of French Republic it is hard to ignore that parliamentary debates, evoked by the Government were focused on the presumed incompatibility of the full face veil with the notion of *laïcité*. Moreover, it is clear that facial interaction as an irreducible condition of human interaction and communication can be associated with a specific, rather restrictive understanding of communication and co-existence within the public realm, one that is contrary to religious practices perceived as impeding this co-existence and even considered as dehumanizing. So, it can be argued that the “*living together*” principle reflects a secularist conception of public space, in the context of which interaction is open only to those adhering to the particular values of the majority, namely those who are willing to dispose of forms of their cultural or religious identity, regarded by this majority as hostile to communication. This principle is further premised on the secularist assumption that a strict distinction can be drawn between public and private reason and practices and that religious belief need to be relegated to the private space. Imposing the ban of the full face veil, can be thus regarded as a way for the French republic to assert a particular conception of the “*République*” and affirm its’ cultural identity as opposed to the *Other*.

4. “Living together” or living apart?

The Court examined the application on the grounds of articles 8 and 9, the right to respect for private life and freedom of religion, stating that “*personal choices as to an individual’s*

18 MAVELLI, *op.cit*, p. 172

19 HANSEN, L. “Theorizing the Image for Security Studies : Visual Securitization and the Muhammad Cartoon Crises”, *European Journal of International Relations* 17, n° 1 (2011), p. 51-74, spec. 51

desired appearance, whether in public or private places, relate to the expression of his or her personality and fall thus within the notion of private life” (§ 107). It is interesting to note that the Court was dismissive of the Governments’ arguments regarding the supposed gender equality aim of the measure, as it considered, paying attention to the subjective meaning of the veil for its bearers and not to the one projected by the Government, 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 rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms*” (§ 119). This is a notable and positive departure from previous case law concerning the wearing of the scarf, where the Court relied expressly on objectivized representations of the veil as a discriminatory practice against women, considered incompatible with the values underpinning the Convention²⁰.

The Court finally accepted that the State could invoke the ‘*living together*’ principle as a legitimate aim for introducing the impugned restrictions and stated that: “*... under certain conditions the ‘respect for the minimum requirements of life in society’ referred to by the Government— or of ‘living together’, as stated in the explanatory memorandum accompanying the Bill...— can be linked to the legitimate aim of the ‘protection of the rights and freedoms of others’*” (§ 121). However, in Convention terms, the interpretation of the majority can be considered as problematic, as the same majority, had observed that articles 8 and 9 do not refer expressly to ‘*the minimum set of values*’, as legitimate grounds for restricting individual rights (§ 114). The Court further observed that “*...it can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialization which makes living together easier. That being said, in view of the flexibility of the notion of ‘living together’ and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation*” (§ 122).

As the Court called for careful examination, the reasoning concerning the necessity of the measure under the ‘*living together*’ principle was rather extended, even though it ultimately

20 See EVANS, C. “The ‘Islamic Scarf’ in the European Court of Human Rights”, *Melbourne Law Journal*, (2006) 7; *Leyla Sahin v. Turkey*, [GC], n° 44774/98, ECHR 2005-XI. In her dissent in *Sahin*, Judge Tulkens expresses concern that the majority invokes the margin of appreciation and the abstract principles of secularism and equality in Turkey as being essential in democracy in a way that reverses the usual logic of the right to freedom of religion and belief, according to each it is for the State to show that a limit is ‘necessary’ and does not impose excessive burdens. Her critic focuses, among others, on the equation by the majority of the scarf to a symbol of alienation of women.

failed to elaborate further on its meaning and interpretation. It is worth to note here that the Court opposed to another securitized vision of the veil, by dismissing on necessity grounds the public safety argument, suggested by the Government, as it had failed to link the ban with a “*general threat to public safety*” (§ 139) and the associated objective could be attained with less restrictive means. The Court finally uphold the ban relying on its proportionality and the legitimacy of the purpose of the State to guarantee conditions of ‘*living together*’, as “*it falls within the powers of the State to secure the conditions whereby individuals can live together in their diversity*” (§ 141). By relying on the broad scope of the ban, which was not expressly targeting religious practices, as it concerned all places available to the public, and considering that the “*question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society*” (§ 153), the Court recognized that the measure was within the breadth of the wide margin of appreciation afforded to the State in this case and thus was “*necessary in a democratic society*” (§ 158).

The Court took into consideration the fact that “*little common ground (exists) amongst the member States of the Council of Europe, as to the question of the wearing of the full-face veil in public*” (§ 156) for granting to the defendant government a wide margin of appreciation. Even though it admitted that France is in a minority position actually in Europe, the absence of an European uniform conception on the subject legitimized finally the national point of view. As a result, the Court validated a national majoritarian tradition, which is shown negative towards religious diversity and pluralism²¹.

It is worth noting that while the majority tried to adopt a rather neutral position by adopting the “*living together*” principle, it endorsed in reality a nationally embedded understanding of public space and interaction within its context, which further shaped its conception on the limits of legitimate intervention of the State on the right to expression of religious faith and personal autonomy. As it has already been shown, the Courts’ reasoning is based also on the understanding that when someone is communicating in public, he shouldn’t manifest in any way any forms of religious expression that are conceived as impairing this interaction. Dissenting judges Nussberger and Jäderblom criticized the decision basically for “*... sacrific(ing) concrete individual rights guaranteed by the Convention to abstract principles*”²² and as irrespective of the right “*not to enter in contact with others in public places-the right to be an outsider*”. It is truth that whereas the principle of ‘*living together*’ is not explicitly mentioned in the Conven-

21 AUGENSTEIN, D. “Normative Fault-lines of Transnational Human Rights Jurisprudence: National Pride and Religious Prejudice in the European Legal Space”, *Global Constitutionalism*, vol. 2, issue 3, November 2013, p. 469-497, spec. p. 479.

22 The two dissenting judges rightly stated that the concept of living together is “*far-fetched and vague*”. Even though the majority warned against the dangers of the malleable living together notion by conceding that “*in view of the flexibility of the notion of ‘living together’ and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation*” (§ 122).

tion and its translation into the “*protection of rights and liberties of others*” can be considered problematic²³, it can be alleged that this principle, however vague and undetermined, can be linked, even though not expressly referred to by the Court on the present case, to the secularist modernist heritage of the Convention, to which the Court has referred to in many cases.

The impact of securitization discourse and of an essentialized understanding of cultural symbols and difference can thus be seen as one of the underlying rationales of the argumentation of the majority of the Grand Chamber, as suggested by the minority: “*It seems to us, however, that such fears and feelings of uneasiness are not so much caused by the veil itself- which unlike perhaps certain other dress-codes-cannot be perceived as aggressive per se, but by the philosophy that is presumed to be linked to it. Thus the recurring motives for not tolerating the full-face veil are based on interpretation of its symbolic meaning*”. It is at least disquieting that the Court endorsed such a vision and did not consider the personal vision of the applicant on the issue. In any case, as the dissident judges rightly suggested, even assuming that such “objective interpretations” of the full face veil were correct, in terms of the Convention “*there is no right not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the tradition French and European life-style*”.

Danchin argues that the case law dealing with Muslim minorities living in European nation-states reveals more about the Court’s anxiety and prejudices toward what is perceived to be the rise of Islamic fundamentalism in Europe and beyond than about any coherent theory of religious freedom under the ECHR²⁴. Adjudicating in a context of diffused risk was apparent also in the *SAS* case, as the Court was alarmed by the indications of third party interveners “*to the effect that certain Islamophobic remarks marked the debate which preceded the adoption of the Law of 11 October 2010*” (§ 149). Although the Court acknowledged the fact 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, when it has a duty, on the contrary to promote tolerance*”, it didn’t apparently sufficiently pondered the consequences of its’ own judgment upon such restrictive measures, which was criticized by part of the doctrine for validating “*assimilation policies*”²⁵ against minorities, as well as for restricting considerably the right to manifest one’s

23 As the dissenting judges observed: “*The Court’s case law is not clear as to what may constitute ‘the rights and freedoms of others’ outside the scope of rights protected by the Convention. The very general concept of living together does not fall directly under any of the rights and freedoms guaranteed within the Convention. Even if it could arguably be regarded as touching upon several rights, such as the right to respect for private life (article 8) and the right not to be discriminated against (Article 14), the concept seems far-fetched and vague*”.

24 DANCHIN, P. G. “Islam in the Secular Nomos of the European Court of Human Rights”, *Michigan Journal of International Law*, vol. 32, p. 741.

25 YUSUF, H. “*SAS v. France, Supporting Living Together or Forced Assimilation?*”, *International Human Rights Law Review*, (2014), 2.

religion within the meaning of the Convention²⁶.

In the *SAS* case, as the Government did not allude to any concrete danger emanating from extremist fundamentalist groups, in order to justify the necessity of the ban of the full face veil, the Court did not need to take into consideration any similar argument. However, in a case concerning the wearing of hijab in Turkish universities, the Court subscribed to the arguments of the Government that the rise of extremist political movements could be invoked for justifying a ban²⁷, accepting thus implicitly that the wearing of a veil can be regarded as a fundamentalist religious practice, contrary to the constitutional order of the secular State.

5. Defending secularism or restricted pluralism?

The case is indicative of the Court's position and understanding of the relation between the rights protected by the Convention that is the right to freedom of religion, the principle of gender equality and individual autonomy, understood as the central values of Western/democratic rule of law, and Muslim religion. Whereas the case of the French full veil ban should not be easily associated with other cases examined by the Court and concerning the use of religious symbols in public institutions, such as schools or universities, it is argued that a certain continuity characterizes the approach of the Court, even though its reasoning can vary, in cases involving ethnocentric conceptions of secularism and the position of Muslim culture within the secularist public sphere.

As a principle, *laïcité* and/or secularism can be understood as denoting a separation of the State from religions, so that each remains autonomous vis-à-vis the other. However, secularism can obtain different forms and contends depending on the specific historical, political or social contexts, within which is implemented²⁸. For example, the French concept of *laïcité* can be understood as the State's "neutrality" towards all kinds of religious practices, manifested through the removal of religious symbols from the official public sphere. Nevertheless, even within the French example different trends and types of *laïcité* can be identified. It would be thus rather simplistic to attribute to secularism a unidimensional and definite meaning.

On the other hand, it has been argued that the social cohesion model promoted on the

26 BERRY, S. "SAS v. France: Does Anything Remain of the Right to Manifest Religion?", *EJIL: Talk*, 2nd July 2014; CHAIB, Saïla Ouald. "S. A. S v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil", *Strasbourg observers*, 3rd July 2014; HOWARD, E. "SAS v. France: Living Together or Increased Social Division?", *EJIL: Talk*, 7th July 2014.

27 *Leyla Sahin v. Turkey*, [GC], November 2005, (§ 115) "... The Court does not lose sight of the fact that there are extremist movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts... It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (see *Refah Partisi (the Welfare Party) and Others*, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university".

28 BAUBEROT, J. and MILOT, M., *Laïcités sans frontières*, Paris, Seuil, 2011.

basis of the principle of *laïcité* rests on a form of “*institutional blindness to the fact of religious and cultural diversity*”²⁹. Still *laïcité* is difficult to be conceived as a neutral principle, as Augenstein has claimed, because ultimately it cannot be neutral between religious and secular worldviews, which often present themselves as another majoritarian doctrine, and secondly the notion was shaped under the influence of the Christian, non-muslim, tradition on the first place and its understanding of private and public divide³⁰.

While the examination by the Court of the conformity of restrictive measures on the exercise of the rights and freedom guaranteed by the Convention need not to rely on the compatibility of “secularism” invoked by the defendant State, the Court in the case of *Leyla Sahin v. Turkey*, relied considerably on the conception of secularism promoted and defended by the Turkish government. The Court argued that: “*the notion of secularism appears to ... be consistent with the values underpinning the Convention and it accepts that upholding that principle may be regarded as necessary for the protection of the democratic system in Turkey*” (§ 114). In this case, the applicant, a fifth-year medical student, had been denied access to lectures, examinations and enrolment in a Turkish university, and was eventually suspended, because she was wearing a *hidjab*. Acknowledging the conformity of such restrictions, as legitimate measures adopted by the Government in order to defend secularism in a country where the majority of the population adheres to the Islamic faith, the Court also endorsed an essentialized representation of Muslim culture and faith, according to which the wearing of the headscarf is contrary to gender equality and can ultimately be equated, as already shown, with political extremism (§ 115).

The Court followed a similar reasoning in a series of cases, which were rejected as manifestly ill-founded or no violation was found on merits³¹. In these cases, the basic tenet of the reasoning of the Court was that “*In France, as in Turkey or Switzerland secularism (laïcité) is a constitutional principle that is supported by the whole population and its protection is of paramount importance*” (*Kervanci v. France*, §72). Even though the Court in *SAS* pursued, according to the dissenting judges, a “*balanced approach*”, trying to distance itself from its previous jurisprudence concerning namely the signification of wearing a headscarf or a burqa in terms of gender equality, the implied rationale of the judgment seems though to follow such a path, as it justifies a total ban of a basically cultural practice performed by a women of Muslim faith,

29 AUGENSTEIN, D. “Normative Fault-lines of Transnational Human Rights Jurisprudence: National Pride and Religious Prejudice in the European Legal Space”, *Global Constitutionalism*, vol. 2, issue 3, November 2013, p. 469-497, spec. p. 455.

30 AUGENSTEIN, *op. cit.*, p. 456.

31 Already four years before the Sahin judgment the Court in *Dahlab v. Switzerland* (n° 42393/98, ECHR 2001-V), dismissed the application brought by a primary school teacher, who had been fired for wearing a headscarf, as manifestly ill-founded” In *Kurtulmus v. Turkey* (n° 65500/01, 24 January 2006), the applicant, a university lecturer, had been sanctioned, and then fired for wearing a headscarf, in *Dogru v. France* and *Kervanci v. France* (n° 31645/04, 4 December 2008), the Court found no violation of Article 9 in the fact that the applicant, a pupil in a French public school, had been expelled for wearing a headscarf in a gymnastics class.

which can be interpreted as “*a sign of selective pluralism and restricted tolerance*”, according to the dissenting judges.

5. Conclusion: the way to embracing pluralism

The case law of the Court is revealing of the tensions underlying the efforts of Western Nation-States to find new forms of coexistence with diverse groups which do not share necessarily the same values. The difficulty of the Court to dissociate itself from the majoritarian perspective, in cases concerning the right to freedom of religion within the public sphere, is indicative of its reluctance to construe an autonomous understanding of the notion of secularism and delineate the proper limits of what can be regarded as interaction within the public sphere. By adopting ethnocentric and vague notions, such as the “*living together*” principle as legitimate grounds for restricting the right to freedom of religion and the right to personal autonomy and at the same time by granting States a wide margin of appreciation to accommodate majoritarian religious sensibilities, the Court renounces its role as the protector of small minorities against disproportionate interferences of the majoritarian rule and the guarantor of pluralism within a democratic society.

It has already been argued that within a cosmopolitan understanding of human rights, communicative freedom is central to the recognition of individuals as members of the specific political order they have chosen to live. Restricting the right of individuals to accede to the public space within this political order, because they seem to be hostile to communication, runs counter to this cosmopolitan understanding and results in exclusions and marginalization, amounting ultimately in negating their quality as human beings. The Court could have opted for a more integrationist approach, promoting “*pluralism, tolerance and broadmindedness, all hallmarks of a ‘democratic society’*”. As it has been shown by the dissenting judges, the Court has elaborated on the State’s duty to ensure mutual tolerance between opposing groups and has affirmed that “*the role of the authorities ... is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other*” (see *Serif v. Greece*, n° 38178/97, § 53, ECHR 1999-IX). Eliminating a cause of tension, the full face veil, cannot be seen, as these judges argued, as an attempt to ensure tolerance between the vast majority and the small minority.

It is suggested that the Court need to further reflect on the premises on its’ jurisprudence on the right to freedom of religion and better understand the historical, political and social contexts of secularism and its’ evolving forms. As it is suggested by Danchin, “*the right to religious freedom is not a singular, stable principle existing outside of culture, spatial geographies, or power, but is a contested, polyvalent concept existing and unfolding within the histories of con-*

crete political orders”³². It has been also claimed that the Court needs to challenge the nationally advocated idea of the suppression of religious diversity as a necessary factor for assuring social peace and cohesion and embrace the vision of western civilization and secularisation as the product of a conflictive and diverse process, rather than that of a peaceful evolution³³.

The Court needs further to rely on the principles it has already elaborated in its case law and opt for a more integrated approach to pluralism, which can be called “*value pluralism*”. According to Danchin *value pluralism* is best perceived as “*an attempt to reach political settlements and forms of reconciliation between the claims, values and practices of diverse religious and cultural communities*”³⁴. In this respect, as this author argues, “*a genuinely pluralist ‘culture of justification’ adopts an ethos of cultivation animated not by a comprehensive moral theory governing all ways of life, but rather by the search for a peaceful coexistence between different ways of life*”. This approach is in conformity with the principles underpinning the case law of the European Court, consisting in protecting the interests of antagonistic groups within a democratic society and attributing specific regard to the protection of rights of minorities from majoritarian encroachments³⁵. Pluralism is founded, according to an inclusive approach, on the coexistence of rival cultural forms and ways of life, and not on the uniformisation of religious and cultural practices in conformity with a majoritarian vision or the exclusion of ‘dissenting’ ways of life³⁶.

In recent years, human rights activists and European Muslims groups are trying to resist the pressure of essentialized representations of the Muslim faith and the wearing of religious symbols circulating by the dominant political discourses and measures questioning their right in equal citizenship by increasingly asserting human rights. As Edmunds has shown, even though the phenomenon is not entirely new, what distinguishes this new activism is that European Muslims associations are pitching their religious rights within universalistic principles of equality, freedom and individual rights³⁷. This trend has been held by some authors as evidence of ‘*a recasting of national citizenship rights as human rights facilitated by transnational connec-*

32 DANCHIN, *op.cit.*, p. 746.

33 AUGENSTEIN, *op.cit.*, p. 488.

34 DANCHIN, *op.cit.*, p. 742.

35 *Young, James and Webster v. the United Kingdom*, 13 August 1981, (§63) “*Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position*”.

36 On the question of the relationship between pluralism and human rights from a philosophical perspective, see the very interesting article of CORRADETTI, C. “*What does Cultural Difference Require of Human Rights?*”, in *Human Rights, the Hard Questions*, HOLDER, C. and REID, C. (eds), 2013, p. 136-150.

37 EDMUNDS, J. “*The New Barbarians: Governmentality, Securitization and Islam in Western Europe*”, *Contemporary Islam* (2012), p. 67-84, spec. p.79.

tions”³⁸. They thus seem to be re-appropriating the revolutionary heritage of human rights and its’ emancipatory dynamics, an aspect that is being neglected or even contradicted by national bureaucracies and parliamentary debates in the national fora. It is in that respect telling, that before the European Court the defendant State, was rather disrespectful and even ironic of the claims of the applicant- it even alleged that the applicant was used as a cover (§ 64) , submitting a preliminary objection to the effect that the application should be regarded as abusive³⁹- and expressed its surprise at the applicant’s statements consisting in considering the practice of full face veil as an emancipatory practice, and even tried to contest the scientific credibility of reports and studies submitted by the applicant in supporting her claims.

This appropriation of human rights as an instrument for winning religious rights is being illustrated by the rise of litigation on similar cases before the ECtHR. It is thus important that these questions are transferred from the local level to the international human rights litigation arena, where they can be judged by a cosmopolitan-rather than local-cultural standard⁴⁰. It is however quite disappointing and controversial that the ECtHR fails, in a way, to preserve religious freedoms by upholding national bans on the hijab in public institutions and on the full face veil in the public domain. As it has been argued it is, paradoxically, hindering the groups that are making these claims. It is hoped that the ECtHR could reconsider its position as new cases on the subject are already pending before it⁴¹, so as to embrace universalist claims and promote a truly pluralist vision of democratic liberal society.

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38 SOYSAL, Y.N. “Changing Parameters of citizenship and claims-making: Organized Islam in European public spheres”, in *Theory and Society*, 1997, 26 (4), 509-527.

39 *SAS v. France*, *loc.cit.*, (§ 62) “They described the application as containing ‘a totally disembodied argument, lodged on the very day of the prohibition on concealing the face... and of whom nothing was known”.

40 EDMUNDS, J. *op.cit.*

41 *Belkacemi and Oussar v. Belgium*, n° 37798/13, the applicants complain about the ban in Belgian law on wearing the full-face veil, cases pending.

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SOBRE A AUTORA:

Athanasia Petropoulou

Hold a PhD in International Law from the University of Paris 1 Panthéon-Sorbonne and the University of Athens. She has taught International law, European Law and Constitutional Law in the University of Lille II, Law and Health, France and has been working as a lawyer at the Registry of the European Court of Human Rights, in Strasbourg, France. She is the author of many articles on international law, human rights law, European law, migration and asylum law.

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