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Reflections on the French Council of State's Ruling of 26 August 2016 "Banning the »Burkini«"

Abstract

The article offers an analysis into the French Council of State's ruling of 26 August 2016, which suspended a ban – imposed by a decision of a mayor of a coastal resort town – on wearing the burkini on local beaches. "The burkini issue" has been also dealt with in Belgium, which is why the analysis presented in this article and the accompanying reflections serve as a good opportunity to offer a brief comparison of the French and the Belgian specificities of the constitutional form of the relationships between the state and churches, and a range of relevant references to the ECHR's judicial decisions concerning the problem of the presence of symbols – being manifestations of one's beliefs – in the public sphere of a democratic state.

Keywords: burqa, niqab, burkini, principle of secularity, freedom of thought, conscience and religion, Constitution of France, Constitution of Belgium, judicial practice of the Council of State, judicial practice of the ECHR

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Introduction

In the era of threats of terrorism related to Islamic fundamentalism, more and more countries tend to defend themselves against the presence of garments symbolising Islam (burqa or niqab) in the public space.[2] The reason for this situation is, on the one hand, the fact that these countries' secular or worldview-neutral public sphere is being attacked (proselytic effect) by this religious or quasi-religious symbolism, and, on the other hand, the functional threats resulting from the inability (difficulty) to verify one's personal identity and from the likelihood of dangerous "artefacts" (cold steel, firearms, explosive belts, etc.) being carried. The bans in this area have been imposed to different extents in: France,[3] Belgium,[4] Denmark, Austria, Netherlands, Spain, Italy, in two cantons of Switzerland, and outside Europe – e.g. in Algeria (in work establishments for safety and effective communication considerations) and in the Canadian province of Québec.

The most special and broadest-defined restrictions are applied in France and Belgium. The French law of 11 October 2010 prohibits the concealing of one's face in public,[5] and the – quite similar – Belgian law of 1 June 2011 bans the wearing in public places of clothing which partially or totally covers the face.[6] In both the first and second case, the formula of the statutory prohibition is completely areligious, which appeared to be quite an awkward intention to prove the said states' neutrality regarding religious matters. The public did not have the slightest doubt regarding the nature of the restrictions since the very beginning.

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2 The exact date of the first appearance of the burqa – traditional attire of Afghan Pashtun tribes – is unknown. This garment was most likely created for women from wealthy families to let them leave the walls of their splendid residences where they were, in fact, closed in. A typical burqa is blue, covers the entire body with the face, with only a mesh screen at eyes' height, allowing the wearer to see in front of her. The niqab is worn usually in Orthodox environments, e.g. by women from the Salafi community. It is usually black and features a cut-out opening for the eyes.

3 M. Monot-Fouletier, *De la regulation du part de signes religieux dans les établissement et l'espace publics – l'exemple français*, "Revue trimestrielle des droits de l'homme" 2016, 105, p. 97.

4 X. Delgrange, M. El Berhoumi, *Pour vivre ensemble vivons dévisagés: Le voile integral sous le regard des juges constitutionnels belge et françois*, "Revue trimestrielle des droits de l'homme" 2014, 3, p. 639.

5 Loi nr 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, Journal Officiel issue 0237 of 12 October 2010, p. 18344.

6 Act of 13 July 2011, Moniteur Belge 2011, 202, p. 41734.

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More than ten years have passed since the world saw another type of Muslim-inspired women's clothing, which aroused much controversy – especially in France – ending with administrative bans and lawsuits. This concerns the so-called "burkini".

The burkini was designed in 2003 by a Lebanese-born and Australia-based fashion designer Aheda Zanetti. She is said to have been inspired by the problems her niece experienced when wearing a hijab and playing beach basketball, which could have been significantly bothersome to both her niece and other women in a similar situation as well as to those with a completely different outlook on life – especially in Australia, where beach and water sports are very popular. In such circumstances, the so-called "hijood" (a portmanteau of a hijab and hood) is a practical alternative for women wearing a hijab on a daily basis. The new product was first commercialised in 2004, and two years later, Zanetti established her business and registered the name "burkini" (a combination of burqa and bikini) in Australia and many other countries across the world.

The "burkini" appeared in France in 2016. As a side note, it seems reasonable to add – quoting a relevant parliamentary information report – that while in the early 21st century it was rare to see burqas (niqabs) being worn in France, the data for the end of the first twenty years of this millennium speaks of about 1,900 women wearing such clothing, with about 200 such cases reported in Belgium – as a comparison,[7] which can be interpreted as a clear sign of radicalisation of the Muslim diaspora in the said countries. This is seen mainly among the younger generation of women, who wish to symbolically highlight their religious orientation, pay tribute to the religion of their ancestors or – quite often – express their defiance of the existing community rules.

In such circumstances, in the height of the tourist season, late July 2016, the mayor of Cannes, a well-known Mediterranean resort town, issued an administrative decision aiming, in essence, to prohibit the wearing of the "burkini" at the beaches of the commune. It needs to be said that according to the provisions of the code of local governments, the mayor is in charge of – and supervised by an appropriate representative of the state, the prefect in this case – the municipal police, whose duty is to e.g. ensure order, safety, and public health. As regards, in particular, the authority of the so-called beach police, the said code states that the mayor outlines one or more guarded zones along the coastline, where it is safe enough to bathe; the mayor is also obliged to inform the public of the rules of bathing and

[7] Parliamentary information report on the practice of wearing burqas/niqabs (voile integral) in the country (issue 2262 of 26 January 2010, p. 28), submitted and examined during parliamentary sessions on the law prohibiting the concealing of one's face in public (2010).

pursuing other waterbound activities by means of appropriate notices published at the mayor's seat and displayed in applicable locations.[8]

About 30 French communes, including Villeneuve-Loubet, followed in the footsteps of Cannes, issuing decisions not addressing the "burkini" directly, but implementing certain very obviously related rules. The mayor of Villeneuve-Loubet issued such a decision on 5 August 2016, superseding the regulations previously in force. It concerned the rules of the functioning of the police, rules of safety and the use of beaches entrusted to the commune by the state, and its Article 4.3 read as follows: "the access to beaches is prohibited on the territory of the commune, from the 15th of June till the 15th of September, to anyone not wearing adequate clothes in accordance with the usual standards of behaviour and with the principle of secularism, as well as respecting the hygiene and safety rules governing the use of public sea waters. It is strictly prohibited to wear, while bathing on the territory of the commune, clothing whose connotation violates the above-mentioned principles."[9]

Just a few days after the said decision entered into force, three community organisations (the Human Rights League, Association for the Defence of Human Rights, Association against Islamophobia in France) and two plaintiffs filed a motion to suspend Article 4.3 of the mayor of Villeneuve-Loubet's decision in the Administrative Tribunal of Nice.[10]

By way of the ruling of 22 August 2016, the Tribunal dismissed their motion, finding that the challenged prohibition was aimed at the observance and protection of public order, and was therefore justified. It needs to be added that the main "regulators" of the scope of public manifestation of religious freedoms – as available in France – are the constitutionally guaranteed secularity of the state on the one hand and public order – the protection of which is of constitutional rank as well – on the other.[11]

Following the official path, the plaintiffs appealed to the Council of State (FR: Conseil d'État) and requested to have the ruling of the Administrative Tribunal of Nice revoked, to have the appeal dismissed by the court of first instance examined, and that the state treasury be charged with court fees (Article 761-1 of the administrative code).

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8 See: Articles L2212-1; L2212-2; 2213-23 of the code of local governments. Code général des collectivités territorial https://www.legifrance.gouv.fr>affichC...

9 Decision of the mayor of Villeneuve-Loubet of 5 August 2016, superseding the decisions of 20 June 2014 and 18 July 2016, Article 4.3, https://www.legifrance.gouv.fr> affichC...

10 The motion was filed with a reference to Article L.521-2 of the administrative code (see: https://www.legifrance.gouv.fr> affichC...), which lets the court dealing with urgent cases (the ruling is issued within 48 hours in appeal proceedings) apply all measures necessary to protect the fundamental rights and freedoms that have been grossly and clearly violated by a public corporation or a private law organisation in charge of public governance.

11 M. Monot-Fouletier, op. cit.

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The Council of State's ruling issued in the case in question on 26 August 2016[12] resounded in the media worldwide.

The Council of State, sitting and adjudicating in an unusual composition of three judges, decided, among others, that no provision of the challenged regulation implied that wearing the clothing specified in Article 4.3 of the mayor's decision on the beach could lead to the violation of public order. The Council of State found that despite the awareness of the state of agitation and social unrest caused by the bloody attacks, especially the attack that took place in Nice on 14 July 2016, the examined prohibition could not be sufficiently substantiated in the light of no justified threats of violation of public order. Since the prohibition was neither justified nor proven by a threat of the violation of public order nor by considerations related to hygiene or propriety, the Council of State decided that the challenged ruling had "seriously infringed, in a manner that was clearly illegal, fundamental liberties such as religious freedom and individual freedom."[13] Such a view and assessment of the analysed facts and circumstances led the Council of State to decide to revoke the ruling of the Administrative Tribunal of Nice and suspend Article 4.3 of the decision of the mayor of Villeneuve-Loubet.

It is important to stress that each instance adopted a different view of the idea of "threat of the violation of public order." While the Administrative Tribunal of Nice found that the fact of wearing the burkini was "a violation of the rules of the [French] Republic", the Council of State, following its standard judicial practice of more than one hundred years,[14] performed a close risk assessment according to which the threats in question need to be "direct in nature". This way, the Council of State resisted the temptation to easily create a temporary measure of public order for the time of the state of emergency,[15] thus preventing the social unrest caused by terrorist attacks and the related agitation from affecting the public's opinion on the alleged violation of the balance between public order and personal freedoms, maintained in France for over fifty years (except for the period of WWI and WWII). Exactly one month after the ruling in question was issued, the Council of State upheld the initiated judicial practice by issuing a decision suspending the provisions of a decision of the mayor of yet another seaside resort town, similar to the one mentioned earlier.[16]

12 Conseil d'État's rulings no. 4022742 and 402777 of 26 August 2016.

13 Ibidem, item 6.

14 E.g. Conseil d'État's ruling no. 27355 of 19 February 1909, case Abbé Olivier v. Marie du Sens.

15 The state of emergency declared in France because of terrorist threats lasted from 16 November 2015 to 1 November 2017, resulting in a much greater authority given to national security and public order services.

16 Conseil d'État's decision no. 403578 of 26 September 2016.

It seems that the greatest value of the Council of State's decisions is that they show both lower-tier administrative courts and legislative institutions, especially on the local government administration level, how to define public order properly, and – consequently – how to proceed in similar cases in line with the desired legislative point of view.

The statutory "burkini ban"

The implementation of the statutory prohibition of concealing one's face in public, resulting e.g. in burqas and niqabs becoming clothing unacceptable in public environments, was preceded by various individual administrative restrictions.

The question is then whether the Constitutional Council and, further, supranational courts approve of a situation in which the French legislator decides to implement a general and abstractly framed "burkini ban" in the future. The experience related – all things being relative – to the prohibition of concealing one's face in public shows that while the Constitutional Council did not oppose the adopted solutions, the ECHR had to perform a really skilful and convincing 'balancing act' in its judicial practice to eventually find that the challenged prohibition did not violate the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms.[17] When examining the compliance of the French law of 11 October 2010 prohibiting the concealing of one's face in public[18] with the Convention, the Grand Chamber of the ECHR approved of the legal purposes of the analysed legislation, but questioned the proportionality of the said purpose to the applied measure (i.e. the contentious prohibition). In effect, the ECHR found that the prohibition could be considered, in principle, justified in the scope in which it was to preserve the conditions of "living together". In the end, the Grand Chamber decided that the ban in question "can be regarded as proportionate" to the aim of the "preservation of the conditions of living together" as an element of the "protection of the rights and freedoms of others", and that "the impugned limitation can thus be regarded as "necessary in a democratic society."[19]

While the said judgement concerned a symbol of the Muslim religion only intermediately since the statutory ban was formulated in a completely areligious manner (it pertained to concealing one's face in general), the judgement issued in

17 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Journal of Laws of 1993, no. 61, item 284 as amended).

18 Cf. footnote 5.

19 ECHR Grand Chamber's judgement of 1 July 2014, case SAS v. France, appeal no. 43835/1.

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the case Vajnai v. Hungary shows how the ECHR could approach a hypothetical statutory burkini ban. The ECHR's judgement pertained to the prohibition of wearing a "red star", as interpreted under Article 269B of the Hungarian Criminal Code, banning the "use of totalitarian symbols." This provision served as the grounds to convict the plaintiff – Attila Vajnai, a citizen of Hungary, Vice-President of the Workers' Party, a political party not sitting in the Hungarian Parliament – to suspended imprisonment and a fine for wearing a red star with a diameter of 5 cm (a symbol of the international workers' movement) on his jacket while participating in a demonstration. In this case, the ECHR found that the respondent state violated Article 10 of the Convention. The Court found that the challenged ban was too general, taking the multitude of meanings related to the symbol of the red star into consideration. The contentious ban could thus – according to the Court – affect actions or ideas being elements of the matter protected under Article 10 of the Convention, and there was no satisfactory, objective way to tell the differences between each meaning attributed to those elements. The relevant provisions of the Hungarian law do not serve such a purpose anyway. Even if there were some differences, there would surely be some uncertainties that could affect the exercise of the right to freedom of expression, leading to self-censorship. As for the relationship between the prohibition of wearing a red star and the harmful totalitarian ideology symbolised by this star, then – in the context of this particular case – the possibility to disseminate this ideology may not encourage to applying a questionable measure in the form of a criminally sanctionable ban against acts of an officially and legally operating political party without any totalitarian aspirations. Moreover, it is impossible to accept that the fact of wearing a symbol of many meanings by the said activist is equivalent to dangerous propaganda. Article 269B of the Hungarian Criminal Code does not require finding that using the symbol of a red star refers to (in this particular case) totalitarian propaganda. On the contrary, the provision equates the sole use of the symbol with propaganda except for cases in which this is done for scientific, artistic, information- or education-related purposes. The ECHR found this non-specificity related to the use of the symbol in the analysed context as proof of the overly general nature of the prohibition.[20] The Court adjudged satisfaction to the injured.[21]

[20] ECHR judgement of 8 July 2008, case Vajnai v. Hungary, appeal no. 3362906, pp. 54, 56. The judgement was fiercely criticised by the Hungarian authorities.

[21] Article 41 of the Convention explains the notion of "just satisfaction" as follows: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

It appears reasonable to recall the conclusions of the ECHR Grand Chamber's judgement issued in the highly controversial case of Lautsi v. Italy,[22] concerning a forced display of crucifixes in Italian public schools, which the plaintiff found to be in violation of Article 2 of Protocol 1 to the Convention in relation to Article 9 of the Convention.

The Grand Chamber, doing an about-face with respect to its previous judgement,[23] relativised the effects of the religious symbol displayed in the classroom of a public school, finding that a passive symbol could not have an influence on pupils comparable to that of didactic speech, all the more so because the disputable display did not involve any coercion to learn religion, any acts of proselytism or intolerance, with the system of public education remaining following the principles of pluralism, making it possible for pupils to manifest different religious views (no bans on wearing religious symbols, celebrating holidays, etc.). In the end, the appeal was dismissed as no violation of the Convention was found.

It therefore needs to be acknowledged that regardless of the context of the case, the sole fact of displaying a religious symbol referring to banned ideas or inspiring undesirable conduct is too little of a reason for the ECHR to legitimise the application of a criminal-legal sanction (despite the national law absolutely prohibiting the display of such a symbol – Vajnai) on the one hand, and to consider a violation of rights and freedoms on the other (Lautsi).

An apparently very similar classification of religious symbols was offered by the Human Rights and Youth Rights Commission of Quebec, who distinguished between symbols of heritage value and those of regulatory function. The Commission claims that a symbol or ritual stemming from religious habits does not infringe on fundamental liberties if it is not accompanied by any constraint on individuals' behaviour.[24]

It seems therefore impossible to offer a generally and abstractly formulated ban resulting in the elimination of wearing the burkini on the beaches of France that would win the approval of the Constitutional Council, not to the mention the European Court of Human Rights, which – to quote the spectacular judgement of 2014 – actually dismissed the case of the so-called "Naked Rambler" from Scotland, but conducted a very in-depth analysis to see if the repression (over 7 years of prison time spent in total) he experienced for his views on nudity expressed by appearing naked in public did not violate Articles 8 and 10 of the Convention.[25]

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22 ECHR Grand Chamber's judgement of 18 March 2011, case Lautsi v. Italy, appeal no. 30814/06.

23 ECHR Grand Chamber's judgement of 03 November 2009, case Lautsi v. Italy, appeal no. 30814/06.

24 J. Maclure, Ch. Taylor, *Laicité et liberté de conscience*, Paris 2010, pp. 65–67.

25 ECHR judgement of 28 October 2014, case Gough v. Great Britain, appeal no. 49327/11.

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Further decisions of the French Council of State dealing with the local government authorities' application of legislation regarding the "burkini ban" have been much talked about, especially in European countries where the Muslim diaspora is a significant religious minority, which to a large degree concerns France's direct neighbour, Belgium, where the problems experienced by France are discussed quite often as they coincide much with those Belgium faces itself. In some Belgian communes, some swimming pools have a ban on swimsuits covering the full body – for hygienic reasons, but no mayor of any coastal town – like Ostenda or Zeebrugge – has followed in the footsteps of French mayors and implemented a ban on such swimsuits on local beaches. The discussion taking place in Belgium focused rather on the possibility of implementing such restrictions on the federal level – in the form of a law similar to that of 2011, called the "anti-burqa law".[26] The issue was addressed, among others, by the minister of the federal cabinet,[27] and the members of his political party (New Flemish Alliance; *Nieuw-Vlaamse Aliantie, N-VA*),[28] petitioned for a ban on the burkini, which they suggested to define as a swimsuit covering the entire body from the head (including the hair) – to ankles for religious reasons. The key issue in the quoted definition is the reference to religious reasons, which motivate a given person to wear such a swimsuit. Without this characteristic it would be difficult to distinguish a burkini from other standard known swimsuits. But no formal legislative initiative has been taken thus far regarding this matter.

Different models of relationships between the state and religions in France and Belgium

It needs to be stressed that from a strictly legal-constitutional point of view, France and Belgium have very different models of relationships between the state and religions. Article 1 of the French Constitution reads: "France shall be an indivisible, secular, democratic and social Republic",[29] with secularity being among the funda-

26 Cf. footnote 6.

27 This concerns a statement made on the radio by Théo Francken (N-VA), State Secretary for Asylum Policy and Migration, quoted by the "Le Soir" daily in an article of 25 August 2017, where Francken clearly said that in the name of equality between women and men he was against the burkini, favoured its prohibition on the beaches of Belgium, but also mentioned that it was not that simple to implement such a prohibition from the formal-legal point of view.

28 The New Flemish Alliance is the biggest centre-right party in Belgium, known for its outright anti-immigrant rhetoric. N-VA belongs to the European Conservatives and Reformists group, together e.g. with the Polish Law and Justice party.

29 *Konstytucja Francji*, translation and introduction by W. Skrzydło, Warszawa 2005.

mental constitutional principles with a guarantee of the preservation of freedom and the equality of religions (beliefs).

Moreover, in France the separation of churches and state has been in force since 5 December 1905,[30] and, in consequence, "the Republic does not recognize, pay, or subsidize any religious sect."[31]

Secularity is a principle of public order, where the state – secular – and church – religious – domains must not mix. The said principles leads to an order where the state's political and administrative governance is in the hands of secular authorities, without the participation or even agency of religious authorities, and without the state's interference with religious matters. This model solution, of course, was never fully respected, and became modified over time, which allowed the French relationship between the state and church to no longer be considered as hostile.

In contemporary Belgium, in turn, the adopted model can be described as "friendly neutrality",[32] or "moderate separation." The Belgian "secularity" does not stem from any written rules. It is rather a functional quality of a state of law, a state which does not place God in the centre of its chief values. This "selectively secular" model of relationships between the state and church is not grounded in any specific concept or a consistent system of legal regulations, but is rather an effect of the accumulation of legal acts from subsequent eras being in force, and an outcome of the entirety of experience and practice of the different political elites in power throughout this time. On the one hand, we are dealing with an emphasis of the independence of state law from church law (e.g. the principle of civil marriage anteriority) and with an omission of the matter of collaboration of both institutions. On the other hand, there is the maintenance of a solution adequate to the so-called relationship system e.g. by providing clergymen with state benefits and a pension (the provision mainly concerns the Catholic Church) under a constitutional guarantee (Article 181, § 1 of the Constitution of Belgium).[33] Incidentally, in 1993, an amendment to the Constitution introduced § 2 to Article 181, which extended the said guarantee to include representatives of organisations recognised by the law as providing moral assistance according to a non-denominational philosophical concept. The year 2002 saw the Act on the Central Council of non-confessional philosophical commu-

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30 *Ustawa o rozdziale kościołów i państwa z 9 grudnia 1905 r.*, Journal Officiel de la République Françoise of 11 December 1905, p. 7205 [in:] L. Duguit, H. Monnier, R. Bonnard, *Les constitutions et les principales lois politiques de France depuis 1789*, Paris 1952, p. 331.

31 Article 2 of the law of 9 December 1905 on the Separation of Churches and State.

32 L.L. Christians, *Le financement des cultes en droit belge – Bilan et perspectives*, "Quderni di Diritto e Politica Ecclesiastica" 2006, p. 83.

33 *Konstytucja Belgii*, translation and introduction by W. Skrzydło, Warszawa 2010; A. Czohara, *Stosunki państwo – Kościół. Belgia, Francja, Hiszpania, Włochy*, Warszawa 1994, pp. 70–72.

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nities, representatives, institutions dealing with the management of the material and financial interests of non-confessional philosophical communities come into force.[34] Providing the state with the authority to (or not to) acknowledge similar organisations depends, however, on whether there are general comprehensive legal measures implemented by a federal act to determine the criteria that shall apply in the course of such a procedure. As long as such an act is not in force, the formal acknowledgment of new confessional and non-confessional organisations is not possible.

This was an obstacle faced by e.g. the association of Belgian Buddhists, who have been trying to gain the status of a non-confessional philosophical organisation since 2006. Buddhists were given a promise to be given such a status, but the problem is that there are no appropriate regulations for this to take effect. The short-term subsidy offered to their association, which was to be paid by virtue of a decision of the Minister of Justice of the time, is now blocked for budget considerations. It is therefore fair to say that the declarations under Article 181, § 2 of the Constitution of Belgium have remained a dead letter so far.

Such solutions do not function in France except for Alsace and Lorraine (Bas-Rhin, Haut-Rhin, and Moselle departments), where a concordat system was adopted by way of exception.[35] The constitutional guarantees of financial benefits provided to Belgian clergymen are some kind of compensation offered to them for the mass confiscation of church assets – including fixed property of considerable value – in the 17th and 18th centuries. The Vatican declared – with a great and undisguised reluctance – a possibility to acknowledge this historic act, but required Belgium to oblige itself, in exchange, to cover the costs of operation of the institution of the Catholic Church in Belgium, including paying relevant benefits to the local clergymen.

While the abovementioned solutions are in force in the entire Kingdom of Belgium, their application in France is limited to Alsace and Lorraine only, which still gives rise to big controversy in such a secular country. In order to consolidate these "non-standard" solutions in the constitutional context, on 5 August 2011 the French Constitutional Council issued a crucial decision according to which the local legislation in force in the departments of Bas-Rhin, Haut-Rhin, and Moselle was acknowledged a new fundamental principle recognised by the laws of the Republic.[36]

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34 "Moniteur Belge" of 22 October 2002.

35 J. Falski, *Ewolucja statusu prawa lokalnego (szczególnie wyznaniowego) Alzacji-Mozeli w porządku konstytucyjnym Francji*, "Przegląd Sejmowy" 2015, 4, p. 111 et seq.

36 Constitutional Council's decision no. 2011-157 QPC of 5 August 2011, case Interdiction du travaile le dimanche en Alsace-Moselle, "Journal Officiel" 2011, p. 1347C; C. Guedan, *Disposition particulières en Alsace-Moselle: un nouveau principe fondamental reconnu par les lois de la République à parteé limitée*, "Revue française de droit constitutionnel" 2012, 89, p. 158.

In another decision, issued on 21 February 2013, the Constitutional Council found as follows in the context of the said departments having adopted local solutions for the relationship between state and religion: "The arrangements laying grounds for the draft of the Constitution of 27 October 1946, especially in the scope of its Article 1, as well as the arrangements made for the draft of the Constitution of 4 October 1958 assuming the said provision, proclaiming that 'France shall be a [...] secular [...] Republic' do not lead to challenging particular regulations included in acts or ordinances in force in several parts of the Republic at the moment of the Constitution entering into force and concerning the issues of faith, especially of remunerating clergymen."[37]

It is hard to say once and for all that neither the Constitutional Council nor the Council of State[38] see the disparity between particular legal solutions in the scope of religion-related legislation, applied in Alsace, Lorraine, and Moselle and the constitutional principle of secularity. However, both have been long trying to legitimise this local legal regime being in force as it reflects the will of the legislator, who is essentially and eventually in power to decide on the potential elimination of any obvious contradictions in this scope.

Legal justification of disputable bans

Coming back the bans implemented in France and Belgium, which were clearly aimed at eliminating the traditional burqas and niqabs and the new-fashion burkinis worn by Muslim women from public environments – including from public (communal) beaches – despite no strict references in this respect, it is necessary to consider their juridical justification.

While the religion-related reason was not taken into consideration in the decision of the mayor of the Villeneuve-Loubet commune (minus the reference to the principle of secularity), the course and the content of the public debate that ensued from the decision proved that it was to "prohibit the wearing of clothing that expresses one's religious affiliation ostentatiously during bathing and, in consequence, on beaches."[39]

The officially areligious nature of the disputable decision of the mayor followed in the footsteps of the French (2010) and Belgian (2011) laws. None of them – as

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37 Constitutional Council's decision no. 2012-297 QPC of 21 February 2013, case Association pour la promotion et l'expansion de la laicïté.

38 See e.g. Conseil d'État's decisions no. 231290 of 17 May 2002, no. 359735 of 4 July 2012, and no. 360724 of 19 December 2012.

39 See: footnote 12.

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mentioned before – made explicit references to the said type of clothing, but both aimed at imposing a ban on wearing burqas and niqabs in public. The said Belgian law of 1 June 2011 prohibiting the wearing of clothing which partially or totally covers the face in public places[40] was found compliant with the Constitution by the Constitutional Court of the Kingdom of Belgium.[41]

The main objectives of the draft law intended to improve public safety, equality between men and women, and satisfy the concept of "living together" in the society, were already raised at the stage of the initial parliamentary works.

By issuing its ruling of 26 August 2016 the French Council of State focused on a classically grounded assessment of threats to public order and safety and of the infringement of rights and freedoms. It did not, however, address religious matters, which were targeted by Villeneuve-Loubet's authorities' decision referring to the constitutional principle of secularity to legitimise the implemented burkini ban. In this respect, the Council of State's ruling in question contrasts the judgements issued by both the French and Belgian courts and the ECHR in complaints lodged against the so-called "anti-burqa laws."

These judgements place a smaller emphasis on the necessity to enable the identification of persons present in public environments, motivated by public safety considerations. Instead, the focus is on the respect of equality of men and women, personal dignity, and preservation of the conditions of "living together", taken from the *travaux preparatoire* of the said laws.[42]

In the sensational judgement issued by ECHR Grand Chamber in 2014 in case SAS v. France,[43] the ECHR found it difficult to pinpoint such legal purposes of the law of 2010 which would correspond to the grounds enumerated in the Convention (Article 9, § 2 and Article 8, § 2) to justify the imposition of restrictions in the domain of the freedom to express one's religion or beliefs. There is also no doubt that only the grounds enumerated in the Convention could justify the imposed statutory restrictions in the context at issue. These grounds include: interests of national security, public safety or the economic well-being of the country, prevention of disorder or crime, protection of health or morals, and protection of the rights and freedoms of others.

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40 See: footnote 6.

41 Constitutional Court of Belgium's judgement no. 145/2012 of 6 December 2012.

42 E.g. Documents parlamentaire Chambre, sess. 2009–2010 nr 52-2289/001, pp. 6–7 i sess. extra 2010 issue 52-0219/001, pp. 6–7; *Étude relative aux possibilité d'interdiction du part du voile intégral*, "La documentation française" 2010, p. 26 et seq.

43 ECHR Grand Chamber's judgement of 1 July 2014, case SAS v. France, appeal no. 43835/11.

Since the Grand Chamber did not found that the respect of the equality of men and women or personal dignity could sufficiently legitimise the restriction of rights granted under Article of the Convention in this case,[44] it resorted to a creative argument according to which "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",[45] which ultimately led the conclusion that if the breadth of the margin of appreciation afforded to the respondent state is taken into account, the challenged ban "can be regarded as proportionate" to the aim of the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others", and therefore the impugned restriction can be regarded as "necessary in a democratic society."[46]

In its ruling of 26 August 2016, revoking the ban on wearing the burkini on Villeneuve-Loubet's beaches, imposed by way of the resort's mayor's decision, the Council of State clearly stated that the disputable ban was not based on justified threats to the public order nor on any considerations for the protection of health or morals. This is why the challenged decision was found to have "seriously infringed, in a manner that was clearly illegal, fundamental liberties such as [...] religious freedom and individual freedom."[47]

The very nature of the clothing under analysis, almost identical, after all, to certain types of commonly used swimwear or beach clothing for people who need to avoid excessive exposure to sun rays, clearly shows that it has no potential to be a threat to the public order, which may be considered in the case of the face-concealing burqas (niqabs).

The Council of State also avoided questions concerning the legitimacy of certain behaviours and the classification thereof as religious or non-religious, which seems to be hard to grasp more often than not. Such an approach is in line with the ECHR's usual judicial practice, according to which the obligation of neutrality and impartiality imposed on the state "cannot be reconciled with any kind of the state's authority to assess the legitimacy of religious beliefs."[48]

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44 Ibidem, § 117–121.

45 Ibidem, § 157.

46 Ibidem, § 158.

47 Conseil d'État's rulings no. 4022742 and 402777 of 26 August 2016, p. 6.

48 E.g. ECHR judgement of 8 April 2014, case Magyar Keresztény Egyház et al. v. Hungary, appeal no. 70945/11, 23611/12, 26998/12 § 76; ECHR Grand Chamber's judgement of 07 July 2011, case Bayatan v. Armenia, appeal no. 23459/03 § 120.

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