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COMMENT

Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights

Over the past decade, Europe has been the site of strident debates over integration and Islam. One major point of controversy is the trend toward enacting legislation to prohibit Islamic veils from public places. Laws banning face coverings, already in force in France and Belgium, are under consideration in a number of European countries, including the Netherlands, Italy, and Switzerland. Though few women in Europe wear the full veil,[1] the symbolic and political stakes of the legislation are high.[2] The laws raise fundamental questions about what it means to be French, Belgian, Dutch, or indeed European. But the bans are of special interest for another reason: they provide a likely testing ground for the nascent nondiscrimination jurisprudence of the European Court of Human Rights ("the Court") and a potential opportunity to bolster legal safeguards against discrimination at the regional level.

Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), which protects the right to religious freedom, has traditionally been the dominant analytical approach to religious symbols in the public space in the Court's jurisprudence and the academic literature. But previous cases concerning restrictions on religious

1. Statistics from 2009 placed the number of women wearing the veil in France at approximately 1,900. *Projet de loi interdisant la dissimulation du visage dans l'espace public* [*Proposed Law Forbidding Concealing the Face in Public*], ASSEMBLÉE NATIONALE 5 (2010), http://www.assemblee-nationale.fr/13/pdf/projets/pl2520.pdf [hereinafter *French Proposed Law*].

2. *See* Jennifer Heider, *Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights*, 22 IND. INT'L & COMP. L. REV. 93, 97 (2012) (noting that "only 2,000 women in France actually wear the burqa—an insignificant number given France has an estimated Muslim population of five to six million" and that "the law is more symbolic than practical" (footnote omitted)).

clothing have sharply narrowed that avenue for redress. This Comment argues, however, that Article 14 nondiscrimination protections can fill that void. The Court's Article 14 jurisprudence has long been criticized for its limited scope and application, but a recent line of cases in the education context evinces the emergence of a new doctrinal approach to discrimination. Properly applied and reinforced, that case law could mature into a general analytical framework for addressing the claims likely to arise from anti-burqa legislation and other discriminatory measures.

This Comment proceeds in three Parts. Part I surveys national anti-burqa laws promulgated or proposed in France, Belgium, and the Netherlands. Part II argues that Article 9 is a fundamentally inadequate mechanism for addressing the key issues that burqa bans raise. Part III explores recent developments in the Court's nondiscrimination jurisprudence and shows how Article 14 might help resolve questions relating to burqa bans that Article 9 cannot address.

I. BANNING BURQAS

National bans on face coverings in public places have been in force in France and Belgium since 2010 and 2011 respectively.[3] These bans establish criminal penalties for appearing in public with one's face concealed.[4] Despite a number of constitutional complaints against Belgium's burqa ban, the country's Constitutional Court has rejected requests to suspend the law.[5] The Netherlands has considered similar legislation.[6]

Although the bans are facially neutral, the legislative history and political context of the laws suggest they were conceived precisely to address Islamic

3. Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage [Law Forbidding the Wearing of Any Clothing Covering the Face Completely or in a Significant Manner] of June 1, 2011, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], July 13, 2011, 41734; Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 on Forbidding Concealing the Face in Public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18,344.

4. *See* sources cited *supra* note 3.

5. Cour Constitutionnelle [CC] [Constitutional Court] decision no 148/2011, Oct. 5, 2011, http://www.const-court.be/public/f/2011/2011-148f.pdf (Belg.).

6. Voorstel van wet, Instelling van een algemeen verbod op het dragen van gelaatsbedekkende kleding [Proposal of Law, Establishing a General Ban on the Wearing of Face-Covering Clothing], Tweede Kamer der Staten-General, Vergaderjaar 2011-2012, 33 165, nr. 2 (Neth.), https://zoek.officielebekendmakingen.nl/kst-33165-2.pdf [hereinafter Dutch Proposal].

veils.[7] In the Netherlands, a proposed 2007 amendment to the Penal Code would have specifically prohibited wearing the burqa or niqab in public.[8] The Council of State issued an advisory opinion finding that the proposal raised free exercise and discrimination concerns under the national constitution and the Convention.[9] A 2012 bill, perhaps in response to that opinion, does not address specific types of face coverings.[10]

Similarly, during the drafting process in Belgium, one legislator proposed that the law be renamed "Law Forbidding the Wearing of the Burqa or Niqab."[11] Though the proposal was rejected,[12] the legislative debates remained focused on the perceived tension between the burqa and Belgian values.[13]

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7. *See* Gerhard van der Schyff & Adriaan Overbeeke, *Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans*, 7 EUR. CONST. L. REV. 424, 426, 432-35 (2003).

8. Voorstel van wet, Voorstel van de leden Wilders en Fritsma tot wijziging van het Wetboek van Strafrecht in verband met een verbod op het dragen van boerka's of nikaabs in de openbare ruimte (boerkaverbod) [Proposal of Law, Proposal by Mr. Wilders and Mr. Fritsma To Amend the Penal Code in Connection with a Ban on the Wearing of Burqas or Niqabs in the Public Space (Burqa Ban)], Tweede Kamer der Staten-General, Vergaderjaar 2006–2007, 31 108, nr. 2 (Neth.), https://zoek.officielebekendmakingen.nl/kst-31108-2.pdf.

9. Advies Raad van State en reactie van de indieners, Voorstel van de leden Wilders en Fritsma tot wijziging van het Wetboek van Strafrecht in verband met een verbod op het dragen van boerka's of nikaabs in de openbare ruimte (boerkaverbod) [Advice of the Council of State and Petitioners, Proposal by Mr. Wilders and Mr. Fritsma To Amend the Penal Code in Connection with a Ban on the Wearing of Burqas or Niqabs in the Public Space (Burqa Ban)], Tweede Kamer der Staten-General, Vergaderjaar 2006–2007, 31 108, nr. 4, https://zoek.officielebekendmakingen.nl/kst-31108-4.pdf. The Council of State is the advisory body on legislation and the highest general administrative court in the Netherlands; its key functions include providing independent policy, legal, and technical analysis to the government and Parliament on legislation and governance. *See generally The Council of State*, RAAD VAN STATE, http://www.raadvanstate.nl/the_council_of_state (last visited Dec. 10, 2012) (describing the functions of the Council of State).

10. Dutch Proposal, *supra* note 6.

11. Amendements, Proposition de loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage [Amendments, Proposing a Law Forbidding the Wearing of Any Clothing Covering the Face Completely or in a Significant Manner], Doc. 53 0219/003, Chambre des représentants de Belgique (Mar. 30, 2011), http://www.lachambre.be/FLWB/PDF/53/0219/53K0219003.pdf.

12. Rapport fait au nom de la Commission de l'Intérieur, des Affaires Générales et de la Fonction Publique, Proposition de loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage [Report on Behalf of the Committee on the Interior, General Affairs, and the Civil Service, Proposing a Law Forbidding the Wearing of Any Clothing Covering the Face Completely or in a Significant Manner], Doc. 53 0219/004, Chambre des représentants de Belgique, at 23 (Apr. 18, 2011), http://www.dekamer.be/FLWB/pdf/53/0219/53K0219004.pdf.

13. *See, e.g.*, *id.* at 6 ("[I]l s'agit d'un débat fondamental sur la manière dont on considère le 'vivre ensemble' en Belgique. . . . Le port d'un voile représente pour . . . une rupture majeure

Meanwhile, in France, the draft law purported to protect national security and public order, noting that concealing the face may be "in certain circumstances, a danger to public security."[14] But here, too, the legislative debate made clear that the laws were designed to target the burqa and address the tension between concealing the face and "'living together' in French society."[15]

Given the highly charged political climate surrounding the passage of the bans, it is hardly surprising that challenges to the legislation have been brought before national courts and regional tribunals, including the European Court of Human Rights.[16]

II. THE LIMITS OF ARTICLE 9

By criminalizing the decision to wear a burqa in public, these bans infringe upon individuals' freedom to wear Islamic dress in manifestation of their religious beliefs. One of the most natural methods for addressing the bans is therefore the European Convention's protection of religious freedom under Article 9.[17] However, the Court's jurisprudence in a line of similar cases has sharply limited the viability of Article 9 claims. Further, even if the Court were to distinguish the bans from negative precedent, Article 9 remains a doctrinally unsatisfying means to address the laws.

des principes fondamentaux de la société, de 'vivre ensemble', de civilité et de sociabilité." ["It is a question of a fundamental debate on how 'living together' in Belgium is regarded. . . . Wearing a veil represents a major departure from the fundamental principles of society, of 'living together,' of civility, and of sociability."] (summarizing the remarks of Catherine Fonck)); *id.* at 10 ("La Belgique a énormément investi dans l'égalité des hommes et des femmes et a créé un Centre pour l'égalité des chances. En conséquence, il est essentiel que l'on puisse continuer dans la construction d'une société démocratique par le dialogue et la rencontre. Quelqu'un dont seuls les yeux sont visibles ne permet pas une dynamique démocratique." ["Belgium has invested enormously in equality between men and women and has created a Center for Equal Opportunity. Thus, it is essential that we be able to continue constructing a democratic society through dialogue and contact. Someone who is completely covered except for the eyes does not permit a democratic dynamic."] (summarizing the remarks of André Frédéric)).

14. *French Proposed Law*, *supra* note 1, at 4.

15. *Id.* at 3.

16. *E.g.*, Exposé des faits et Questions aux parties, S.A.S. v. France, App. No. 43835/11 (Eur. Ct. H.R. filed Apr. 11, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110063.

17. Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] (protecting religious freedom, including manifestation of religious belief, subject to restrictions "prescribed by law and [] necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others").

Burqa bans are not the Court's first encounter with laws restricting Islamic dress. Legal challenges to regulations forbidding conspicuous religious symbols—including Islamic headscarves[18]—from public institutions have proceeded chiefly under Article 9.[19] In those cases, the Court deferred to national governments, declining to find Article 9 violations. The result is a significant precedential obstacle to successful challenges to burqa bans under Article 9. In *Dahlab v. Switzerland*, the Court declared inadmissible a teacher's Article 9 claim, explaining that students' right to a secular environment in a state school justified prohibiting instructors from wearing headscarves.[20] Four years later, in *Sahin v. Turkey*, the Court upheld a regulation forbidding students from attending lectures or examinations while wearing headscarves against an Article 9 claim.[21] In reaching this decision, the Court noted the absence of consensus among member states concerning the relationship between religion and society, and particularly on the wearing of symbols in educational institutions.[22] Based on *Sahin*, the Court has also upheld school rules banning headscarves from physical education classes[23] and from all classes.[24]

The Court's approach in the headscarf cases conforms to the doctrine of the margin of appreciation. This doctrine is rooted in the Court's recognition that national governments are often better placed than international judges to decide whether limitations on individual rights are justified in light of a particular state's political and social context.[25] The degree of deference accorded a national government—the width of the margin—depends on whether the

18. *See, e.g.*, Emelie A. Olson, *Muslim Identity and Secularism in Contemporary Turkey: "The Headscarf Dispute,"* 58 ANTHROPOLOGICAL Q. 161 (1985); Ellen Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41 LAW & SOC'Y REV. 699 (2007).

19. *See, e.g.*, Dogru v. France, App. No. 27058/05 (Eur. Ct. H.R. 2008), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90039; Kervanci v. France, App. No. 31645/04 (Eur. Ct. H.R. 2008); Sahin v. Turkey, App. No. 44774/98 (Eur. Ct. H.R. 2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956; Dahlab v. Switzerland, App. No. 42393/98 (Eur. Ct. H.R. 2001), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22643.

20. *Dahlab*, App. No. 42393/98, ¶ 123.

21. *Sahin*, App. No. 44774/98.

22. *Id.* ¶ 109.

23. *Dogru*, App. No. 27058/05; *Kervanci*, App. No. 31645/04.

24. Aktas v. France, App. No. 43563/08 (Eur. Ct. H.R. 2009), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61055 (declaring the applicant's claim inadmissible).

25. For an overview of the genesis of and justifications for the margin of appreciation doctrine, and a critique of its application to the headscarf cases, see Raffaella Nigro, *The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil*, 11 HUM. RTS. REV. 531 (2010).

challenged measure has a legitimate aim and is necessary in a democratic society.[26] Legitimacy and necessity may be reflected in the level of consensus among member states of the Council of Europe on the particular issue.[27] When there is no uniform practice, the Court tends to leave the matter to national discretion.[28]

The Court consistently recognized a wide margin of appreciation in the headscarf cases. That approach has attracted stinging criticism[29] for its vagueness[30] and lack of nuance,[31] both of which may betray an overly politicized view of the veil and its fraught relationship with secular values.[32] In the absence of sustained analysis of *how* the right of Muslim women to wear the headscarf interferes with the rights and freedoms of others, or of the question of the incompatibility of the Islamic veil and secularism, the consequence of the Court's reliance on the margin of appreciation has been "a clear perception of the Islamic veil as the symbolic enemy of democracy in Europe."[33] Similar tensions in the debates over the burqa make the transposition of the Court's sweeping approach a real possibility, threatening to foreclose successful Article 9 challenges to the legislation.

Of course, burqa bans do differ in important ways from headscarf regulations. Previous cases concerned regulations that were limited to schools or public establishments; the new laws apply in all public places. Indeed, in *Arslan v. Turkey*, the Court specifically distinguished a general ban on religious

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26. *See* Handyside v. United Kingdom, App. No. 5493/72, 24 Eur. Ct. H.R. (ser. A) at 22-23, ¶¶ 48-49 (1976).

27. *See id.* at 21-24, ¶¶ 47-50 (1976) (articulating the margin of appreciation doctrine); *see also* Sunday Times v. United Kingdom, App. No. 6538/74, 30 Eur. Ct. H.R. (ser. A) at 35-37, ¶ 59 (1979) (elaborating upon the role of regional consensus in determining the degree of discretion granted to national authorities).

28. Nigro, *supra* note 25, at 533.

29. *See id.* at 542.

30. *See, e.g.*, Natan Lerner, *How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance*, 13 WILLAMETTE J. INT'L L. & DISP. RESOL. 65, 83 (2005) ("[T]he Court did not . . . compare the social risk involved in using a religious symbol on the university campus with the blow inflicted to the freedom to manifest religion by the comprehensive prohibition."); Cindy Skach, *International Decisions:* Sahin v. Turkey*;* "Teacher Headscarf" Case, 100 AM. J. INT'L L. 186, 192 (2006) (criticizing the reasoning in *Sahin* as "thin and unsatisfying").

31. *See* Nigro, *supra* note 25, at 544.

32. *E.g.*, Isabelle Rorive, *Religious Symbols in the Public Space: In Search of a European Answer*, 30 CARDOZO L. REV. 2669, 2697 (2009); Christopher D. Belelieu, Note, *The Headscarf as Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the* Sahin *Judgment*, 12 COLUM. J. EUR. L. 573, 617 (2006).

33. Nigro, *supra* note 25, at 542-43.

dress in public from regulations on religious symbols in public establishments.[34] While the interest in preserving religious neutrality in schools or the civil service could be seen to supersede the right to the manifestation of religious belief, that interest is less compelling where a ban applies in all public spaces. Determining that a narrower margin should apply to bans covering all public spaces,[35] the *Arslan* Court found an Article 9 violation. Applying this logic to generally applicable burqa bans might result in a finding of a similar violation of the Convention.

But although *Arslan* presents grounds for cautious optimism for future Article 9 challenges to burqa bans, the decision may be narrow in scope. *Arslan* turned on the fact that Turkey had not offered persuasive arguments that such broad restrictions were "necessary in a democratic society;" thus, the Court concluded, the restrictions could not qualify as an exception to Article 9's protection of religious freedom.[36] While Turkey cited secularism and the prevention of "acts of provocation, proselytism, and propaganda" to justify the regulation,[37] the government had not provided real evidence of abuse or proselytizing in public.[38] The Court, however, left open the possibility that sufficient factual evidence could support a general ban,[39] though it stopped short of describing what evidence would suffice. Given the dominance of margin of appreciation analysis in the Court's jurisprudence, this opening may result in deference to national governments in future cases. Article 9 thus presents a possible but ultimately limited vehicle through which to challenge burqa bans.

More fundamentally, even a successful finding of an Article 9 violation would skirt the issues at the heart of the bans. The freedom to wear the veil is certainly, at least for some women, a genuine question of religious manifestation, but it is also steeped in symbolism and sociopolitical meaning that extend far beyond religious freedom. The issue centers on competing visions of equality and social participation. The bans can be seen as either a society's rejection of the oppressive practices that the full veil has come to

34. Arslan v. Turkey, App. No. 41135/98 (Eur. Ct. H.R. 2010), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97380.

35. *Id.* ¶ 49.

36. European Convention, *supra* note 17, art. 9, § 2 (permitting limitations on the right to religious freedom that are "prescribed by law and are necessary in a democratic society"); *see also Arslan*, App. No. 41135/98, ¶¶ 44-52 (considering and finding unpersuasive Turkey's arguments as to the necessity of the regulation).

37. *Arslan*, App. No. 41135/98, ¶ 49.

38. *Id.* ¶ 51.

39. Malcolm D. Evans, *From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression Before the European Court of Human Rights*, 26 J.L. & RELIGION 345, 367-68 (2010-2011).

represent or a reflection of deep societal currents of exclusion and intolerance. With both sides laying claim to the banner of nondiscrimination, Article 9 cannot fully address the key terms of the debate and the most troubling implications of the new legislation.

III. THE PROMISE OF ARTICLE 14?

A more suitable vehicle for judicial engagement with the dominant discourse surrounding burqa bans may be found in an unlikely source: the Convention's nondiscrimination provision, Article 14. That provision states that "[t]he enjoyment of rights and freedoms set forth in th[e] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[40] Although the Court's nondiscrimination jurisprudence is comparatively underdeveloped, recent developments in its approach to Article 14 signal new analytical possibilities.

Commentators have described Article 14 as "parasitic," pointing out its basic structural "weaknesses."[41] The Court itself has long stated that "Article 14 has no independent existence."[42] Because Article 14 protects "[t]he enjoyment of the rights and freedoms *set forth in th*[*e*] *Convention*,"[43] the Court hears Article 14 claims only in conjunction with claims of violations of other Convention provisions.[44] Although the success of a nondiscrimination claim does not hinge on the merits of the underlying claim,[45] in practice, the Court

40. European Convention, *supra* note 17, art. 14.

41. Rory O'Connell, *Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR*, 29 LEGAL STUD. 211, 212 (2009).

42. Moscow Branch of the Salvation Army v. Russia, App. No. 72881/01, 2006-XI Eur. Ct. H.R. 1, 30, ¶ 100 (2006).

43. European Convention, *supra* note 17, art. 14 (emphasis added).

44. PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 399 (3d ed. 2011). Recognizing the limited scope of Article 14, the Steering Committee for Human Rights drafted an additional Protocol to the Convention, which removes the limitation to Convention rights. However, only eighteen member states have ratified the Protocol to date. *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUR., http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=7&DF=03/06/2012&CL=ENG (last updated Mar. 6, 2012). It thus remains a limited vehicle for redressing discrimination claims. *See* Samantha Besson, *Evolutions in Non-Discrimination Law Within the ECHR and the ESC Systems: It Takes Two To Tango in the Council of Europe*, 60 AM. J. COMP. L. 147, 162 (2012).

45. Thlimmenos v. Greece, App. No. 34369/97, 2000-IV Eur. Ct. H.R. 263, 278, ¶ 40 (2000); Rasmussen v. Denmark, App. No. 8777/79, 87 Eur. Ct. H.R. (ser. A) at 12, ¶ 29 (1984) ("Although the application of Article 14 does not necessarily presuppose a breach of [the

often declines to consider Article 14 allegations after deciding the principal claim.[46] The Court often applies Article 14 in a narrow fashion, drawing an artificial distinction between "direct" and "indirect" discrimination claims—i.e., formal discrimination versus disparate impact—and generally preferring to address only the former. Nothing in the text of Article 14 precludes indirect discrimination claims, but vagueness in the Court's concept of indirect discrimination has made such arguments difficult to articulate and substantiate in practice.[47]

A recent line of cases, however, represents an important shift in the Court's approach to Article 14.[48] The Court has long alluded to the possibility of proving discrimination through evidence of disproportionate effects of facially neutral measures.[49] But in 2007, for the first time, the Court recognized explicitly—and articulated a clear test for—an Article 14 violation on the ground of indirect discrimination.

The applicants in *D.H. v. Czech Republic* challenged the Czech government's practice of placing Roma children in special schools.[50] In the absence of an official policy of discriminatory placement, the applicants presented statistics showing that Roma children were far more likely than other students to be placed in special schools and, thus, were systematically

underlying Convention provisions] . . . there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter." (citation omitted)); *see also* ODDNÝ MJÖLL ARNARDÓTTIR, EQUALITY AND NON-DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 35-36 (2003) (describing the "autonomous meaning but accessory scope" of Article 14).

46. *E.g.*, Metro. Church of Bessarabia v. Moldova, App. No. 45701/99, 2001-XII Eur. Ct. H.R. 82, 120, ¶ 134 (2001) ("[T]he allegations relating to Article 14 of the Convention amount to a repetition of those submitted under Article 9. Accordingly, there is no cause to examine them separately."); *cf.* Gütl v. Austria, App. No. 49686/99 (Eur. Ct. H.R. 2009), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91724 (holding that Austria violated Article 14 and finding it unnecessary to consider the underlying Article 9 claim); *Thlimmenos*, App. No. 34369/97 (finding a violation of Article 14 and declining to address the Article 9 claim).

47. *See* ARNARDÓTTIR, *supra* note 45, at 79-84.

48. *See* Jennifer Devroye, *The Case of* D.H. and Others v. the Czech Republic, 7 NW. U. J. HUM. RTS. 81, 81 (2009) (describing the case as a "landmark decision").

49. *See, e.g.*, Zarb Adami v. Malta, App. No. 17209/02, 2006-VIII Eur. Ct. H.R. 305; Jordan v. United Kingdom, App. No. 24746/94, 2001-III Eur. Ct. H.R. 537, ¶ 154, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450 (finding no violation of Article 14); *Thlimmenos*, App. No. 34369/97; *see also* Hoogendijk v. Netherlands, App. No. 58641/00 (Eur. Ct. H.R. 2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68064 (finding the applicant's claim inadmissible).

50. D.H. v. Czech Republic, App. No. 57325/00 (Eur. Ct. H.R. 2007), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256.

denied access to higher quality education in mainstream schools.[51] In a significant break from previous cases,[52] the Court accepted those statistics as establishing a prima facie case of discrimination. The burden then shifted to the government to show that the "difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin."[53] The government asserted that the special-school system was intended to serve the needs of students with special needs. While the Court recognized that aim as legitimate, it was not persuaded that the differential treatment of Roma children sent to the special schools was justified[54] or that the means—de facto racial segregation—were proportionate to that aim. It therefore found a violation of Article 14 in conjunction with the right to education under Article 2 of Protocol No. 1,[55] holding that the applicants had been subject to discrimination with respect to their enjoyment of the right to education.

Subsequent cases have built upon the *D.H.* decision, offering insight into the Court's developing approach to indirect discrimination cases. They confirm that statistical evidence, though useful, is not required to show a prima facie case of discrimination and to shift the burden to the government to provide objective and reasonable justifications for the discriminatory measures in question. In *Sampanis v. Greece*,[56] the Court found that Greece had violated Article 14 in conjunction with Article 2 of Protocol No. 1 by failing to provide adequate schooling for Roma children, placing them in special classes located away from the main school building. Noting that these classes included only Roma children, the Court found sufficient evidence to establish a presumption of discrimination[57] and was unpersuaded by the government's efforts to show objective justifications for the policy.[58]

51. *Id.* ¶ 134.

52. *Cf. Jordan*, App. No. 24746/94, ¶ 154 (finding that statistics alone are insufficient to establish discrimination under Article 14).

53. *D.H.*, App. No. 57325/00, ¶ 184.

54. The Court noted that the aptitude tests the government used were of dubious objectivity and that parental consent was also insufficient.

55. Article 2 of Protocol No. 1 to the European Convention, *opened for signature* Mar. 20, 1952, 213 U.N.T.S. 262, 264, protects the right to education and the right of parents to ensure teaching in conformity with their own religious and philosophical convictions.

56. Sampanis v. Greece, App. No. 32526/05, ¶ 68 (Eur. Ct. H.R. 2008), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86797.

57. *Id.* ¶¶ 77-83.

58. The Court noted that no reliable or objective tests had been conducted to determine which students to place in the special classes. *Id.* ¶¶ 89-90. Moreover, although the stated purpose for the special classes was to prepare the students for reentry into mainstream education, none of the Roma children subsequently entered ordinary classes. *Id.* ¶ 91.

Most recently, in *Oršuš v. Croatia*,[59] the Court found that the statistics submitted on the general enrollment of Roma and non-Roma children in two schools did not show an official policy of automatically placing Roma children in separate classes. In only one of the two schools at issue were a majority of Roma children placed in a Roma-only class.[60] The Court found that this did not constitute sufficient prima facie evidence of discrimination. Nevertheless, the Court noted that the policy of placing students in separate classes based on an insufficient command of Croatian had been applied *only* to Roma children, which indicated a difference in treatment.[61] The Court thus appears willing to accept evidence of a pattern or practice of discriminatory action resulting from facially neutral measures, even if that evidence does not amount to reliable statistical proof of a general government policy of discrimination.

While these important cases arose in the education context, the Court's reasoning in *D.H.* and its progeny suggests a promising new approach to cases involving discrimination, including those involving religious freedom. Of course, it is possible the Court might decline to extend the reasoning of the education cases to other contexts. The *Oršuš* Court took care to note the "specific position of the Roma population" as a highly vulnerable minority group.[62] While Muslims in Europe have faced significant prejudice, their level of disadvantage differs qualitatively from the racism and pervasive deprivation the Roma have experienced. Furthermore, the controversy surrounding the burqa bans might dissuade the Court from jurisprudential innovations in the religious freedom context. These factors may push the Court to assess the bans on pure Article 9 grounds rather than extend its new nondiscrimination jurisprudence.[63]

But *D.H.* did not emerge in a vacuum. In articulating for the first time a test for indirect discrimination, the Court in *D.H.* explicitly invoked an existing and well-developed body of law in the European Community. It drew upon European Directives from the late 1990s and early 2000s prohibiting indirect sex or race discrimination, as well as European Court of Justice case law recognizing the concept of indirect discrimination as early as the 1970s.[64]

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59. Oršuš v. Croatia, App. No. 15766/03 (Eur. Ct. H.R. 2010), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97689.

60. *Id.* ¶152.

61. *Id.* ¶¶ 153-155.

62. *Id.* ¶¶ 147-148.

63. The Court often declines to consider Article 14 claims after deciding on the merits of the underlying Convention violation. *See supra* note 45-46.

64. *See* D.H. v. Czech Republic, App. No. 57325/00, ¶¶ 81-91 (Eur. Ct. H.R. 2007), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256 (giving an overview of relevant European Community law and practice, including instruments established in the

Moreover, scholars have noted that the Court has expanded the reach of its general nondiscrimination jurisprudence in recent years, deciding cases on domestic violence, religious instruction in schools, and family life in terms of nondiscrimination principles.[65] Expanding the recognition of indirect discrimination beyond the education context would accord with these jurisprudential trends.

Equally important, the education cases set forth an analytical framework that can easily be transposed to other Article 14 cases.[66] An Article 14 challenge to a national burqa ban would allege discrimination on the basis of religion with respect to the applicant's Article 9 right to religious freedom.[67] Based on *Oršuš*, a showing that the laws have been virtually exclusively enforced against Muslims, such as through statistics showing that a majority of prosecutions involve Muslim women, would establish a prima facie case of differential treatment.[68] The burden would then shift to the respondent state to show a legitimate aim and proportionate means for the differential treatment.

1990s prohibiting indirect sex discrimination, and European Court of Justice case law articulating the principles of indirect discrimination); Besson, *supra* note 44, at 164 ("[T]he [European Committee on Social Rights's] and the ECHR's decisions on indirect discrimination . . . have developed by reference to each other.").

65. Marta Cartabia, *The European Court of Human Rights: Judging Nondiscrimination*, 9 INT'L J. CONST. L. 808 (2011); Carmelo Danisi, *How Far Can the European Court of Human Rights Go in the Fight Against Discrimination? Defining New Standards in Its Nondiscrimination Jurisprudence*, 9 INT'L J. CONST. L. 793, 795 (2011).

66. Although *Dogru* was decided after *D.H.*, the applicant filed the complaint in 2005, before the Court's articulation of the concept of indirect discrimination. Dogru v. France, App. No. 27058/05, ¶ 1 (Eur. Ct. H.R. 2008), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90039. This likely explains why the applicant did not plead—and the Court did not evaluate—the case in terms of Article 14.

67. Alternatively, applicants could assert *gender* discrimination with respect to Article 9 religious freedom. The two strategies would be largely identical in form, particularly if the law challenged is facially neutral. A religious discrimination argument would be simpler, in part because the Court found inadmissible a gender discrimination claim in *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur Ct. H.R. 447, 457, 464 (2001). Moreover, that one main justification for prohibiting the burqa is to combat gender discrimination might undermine or at least contradict a gender-based argument.

68. Data on enforcement is sparse, but the Ministry of the Interior announced that, in the year since the law came into force, 354 checks had been conducted, resulting in 299 citations. Cyrille Vanlerberghe, *Premier anniversaire de la loi sur le voile intégral*, LE FIGARO (Apr. 11, 2012, 3:02 PM), http://www.lefigaro.fr/actualite-france/2012/04/11/01016-20120411ARTFIG00473-premier-anniversaire-de-la-loi-sur-le-voile-integral.php. There were no official indications as to the proportion of those enforcement actions conducted against women wearing burqas. An independent organization reported that 367 women had been cited and interrogated, suggesting that the vast majority of enforcement actions have been against veiled women. *See 11 avril 2012 à 11h30 devant l'Assemblée nationale: Bilan de la Loi anti-Niqab: un an après*, ASSOCIATION TOUCHE PAS À MA CONSTITUTION (Apr. 11, 2012),

Prior Article 14 cases indicate that while legitimate-aim analysis is often deferential, the Court has been willing to subject state action to more searching review when considering the proportionality of the measures at issue.[69] The Court's recent indirect discrimination cases have inquired closely into the justifications offered by governments in defense of allegedly discriminatory measures. In *D.H.*, the Court questioned the reliability of the tests used to assign children to schools and weighed the validity of parental consent to the discriminatory assignments.[70] The Court employed a similar approach in *Sampanis*, evincing a willingness to examine the details and structure of the programs in question; in *Oršuš*, it conducted a stringent analysis of procedural safeguards.[71] For burqa bans, even presuming some legitimate aim—such as protecting public security or preserving social equality and dignity—the Court could still find that the bans are not necessary and are therefore disproportionate. For instance, instead of a blanket ban, a state could instead require individuals to temporarily remove their veil upon request for security checks. Further, although in some cases banning the full veil may allow women coerced into covering themselves to participate in society as equal citizens, other women wear the full veil voluntarily. Banning the veil from public spaces might undermine women's dignity and result in isolating some women from society. The bans therefore cannot be necessary to protect women's equality and dignity.

There remains a lurking danger that the margin of appreciation doctrine[72] may encroach on the Court's review of the merits of Article 14 claims. In contrast to the notion of equal access to education, which formed the foundation of the education cases, the relationship between the state and religion is far more contested. Given the lack of consensus among member states about that relationship[73] and the heavily politicized nature of the debates

http://touchepasamaconstitution.wordpress.com/2012/04/11/11-avril-2012-a-11h30-devant-lassemblee-nationale-bilan-de-la-loi-anti-niqab-un-an-apres.

69. *See* Religionsgemeinschaft der Zeugen Jehovas v. Austria, App. No. 40825/98, ¶ 98 (Eur. Ct. H.R. 2008), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88022; Thlimmenos v. Greece, App. No. 34369/97, 2000-IV Eur. Ct. H.R. 263, 279, ¶ 47 (2000).

70. D.H. v. Czech Republic, App. No. 57325/00, ¶¶ 199-204 (Eur. Ct. H.R. 2007), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256.

71. *See also* Zarb Adami v. Malta, App. No. 17209/02, 2006-VIII Eur. Ct. H.R. 305, 326, ¶ 82 (expressing doubt as to the Maltese government's stated justifications for the discrepancy in the distribution of mandatory jury service between men and women and finding a violation of Article 14 in conjunction with Article 4 § 3(d)).

72. *See supra* notes 25-28 and accompanying text.

73. *See, e.g.*, Cha'are Shalom ve Tsedek v. France, App. No. 27417/95, 2000-VII Eur. Ct. H.R. 231, 259, ¶ 84 (2000) (applying a wide margin of appreciation "with regard to establishment of the delicate relations between the Churches and the State").

over the burqa, the Court might fall back on the margin of appreciation as a way to avoid making legal decisions with undesirable political consequences. The margin of appreciation problem is endemic to the Court's jurisprudence, and how best to cabin it can perhaps only be determined through a systemic inquiry into the proper balance of authority and responsibility between the Court and the member states.

But the text of the Convention does suggest a preliminary limiting principle. Whereas other substantive Convention provisions, including Article 9, contain explicit subsections carving out exceptions for measures "necessary for a democratic society," Article 14 contains no such language. To the extent that the margin of appreciation—already a judge-made doctrine with no textual basis in the Convention itself—enjoys even less textual support in the Article 14 context, the Court should decline to employ it as a means of avoiding or concealing politically sensitive decisions, particularly in the area of nondiscrimination.

CONCLUSION

Burqa bans present a distinct doctrinal challenge for the Court. They chafe against the limits of Article 9, which has always been an inadequate mechanism to address what critics find most troubling about these laws. It is difficult to ignore the bans' potential for exclusion and marginalization, even as they are brandished as a key to equality and liberation from oppression. Whether the Court will see the bans as an occasion to fill in the Article 14 mechanism it has begun to sketch may ultimately involve difficult political and normative judgments about the Court's institutional role. Nonetheless, a workable Article 14 jurisprudence would provide a more substantively satisfying means of approaching the difficult questions at the heart of the legislation. A vital nondiscrimination framework is both desirable and necessary to ensure that member states comply with their human rights obligations under the Convention. Foundations for that framework should not be left fallow.

SALLY PEI*

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