

Burqa bans and the control or empowerment of identities in European democracies

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Development of Article 8

- *'gone beyond...traditional meaning of private life...to cover a wide range of elements and manifestation of the individual's personality ... private life should be considered as co-extensive with the needs of the personality.'* L Loucaides 1990 61 BYIL 175 at 189
- *Pretty v the UK (2002) 35 EHRR at para 61. In Goodwin v the UK (2002) 35 EHRR 18 at para 90:*
- *'the very essence of the Convention is respect for human dignity and human freedom. Under Art 8...where the notion of personal autonomy is an important principle underlying the interpretation...protection is given to the personal sphere of each individual, including their right to establish details of their identity as individual human beings...'*

Living Together Being Ourselves

- Overall purpose of HR law – to respect the human dignity and human freedom of everyone (see, e.g., Preamble to various IHR treaties, judgment of Judge Martens in *Cossey*, and *in Goodwin v the UK 2002*)
- Interpreting HUMAN DIGNITY and HUMAN FREEDOM – Human Dignity as CONSTRAINT linked to Self Realisation of who we are and our freedom does not fit with fundamental rights and freedoms
- human dignity as EMPOWERMENT and freedom as self determining
- Link to living together and being ourselves



Through Whose Eyes?

- ◆ Much is made of the need for open communication (and seeing people's eyes and faces).
- ◆ Compare debates in UK private member's bill 2014:
- ◆ '...the difficulties that veiled women have in undertaking normal everyday human interaction with people who are not veiled, because part of the traditional British way of life is that when somebody passes somebody else in the street whom they recognise, or half recognise, they smile...It is difficult for somebody to do that if their face is covered and it also difficult for somebody else to do it to them, because there is no reaction....going around with their faces covered...will lead to a deterioration in the quality of life...'

The eyes of the majority?

- ‘[t]he voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of ‘living together’ in French society.’
- ‘[t]he systematic concealment of the face in public places, contrary to the ideal of fraternity,...falls short of the minimum requirement of civility that is necessary for social interaction.’ (see para 25 and 141 of Judgment)

Recognition and Empowerment



- Axel Honneth – development of self-confidence, self-respect and self-esteem
- Acquired and maintained intersubjectively, through being granted recognition by others

Of Our Identities

- Fits with the development of Article 8: subjective personality fluid, not fixed.
- In danger in the age of free identity and personality of constraining ways of living/existing: coercive state action. Failure accord us all equal recognition



Recognise Who We Want to Be

- make the woman involved feel valued; more in control and feel she is listened to and acknowledged for who *she* decides *she* wants to be in her life
- Respect her subjective human dignity
'respecting human dignity entails treating persons as capable of planning and plotting their future. Thus...respecting their autonomy...' J Raz 1979



Further Reading

J Marshall:

- 'S.A.S. v France: Burqa Bans and the control or empowerment of identities' (2015) *Human Rights Law Review* (forthcoming)
- 'The Legal Recognition of Personality: Full Face Veils and Permissible Choices' (2014) 10 *International Journal of Law in Context* 64-80
- *Human Rights Law and Personal Identity* (Routledge 2014)
- 'Conditions for Freedom? European Human Rights Law and the Islamic headscarf Debate' (2008) 30 *Human Rights Quarterly* 631-654
- 'Women's Right to Autonomy and Identity in European Human Rights Law: Manifesting One's Religion' (2008) 14 *Res Publica* (special issue) 177-192
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