



LEGAL SCHOLAR

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Is the French veil ban 'unconstitutional'?

Question: *This week France becomes the first country to ban the Islamic face veil in public. President Sarkozy has said the veils imprison women and run counter to the country's sense of equality; detractors say the ban suppresses cultural and religious expression. What's the best way for leaders to balance their responsibility to promote a nation's values while making sure they respect individual differences?*

Is the French ban on wearing a full veil in public places invalid under the "free exercise of religion" provisions of the European Union Human Rights Convention? Just as laws of states in the United States may be void under the higher law of the U.S. Constitution, so French laws may be invalid under higher European Community law.

First, a thought experiment. What if the state of Florida had passed such a law? Would the U.S. Supreme Court declare it unconstitutional under the First Amendment's free exercise of religion clause (as applied to the states through the 14th amendment)? The key question in the United States is whether the law was intended to be one of general applicability affecting a broad cohort of citizens regardless of their religion, or whether it had the purpose of suppressing a particular religion. If the law was aimed at prohibiting Muslim exercise of religion--in particular the wearing of a *naqib* (face veil) as a religious obligation--Florida would have to show that the law was narrowly tailored to a compelling state interest. Under that stringent test, virtually all state laws do not pass constitutional muster and are held invalid.

Although French legislators claimed that the law against fully covering one's face in public was written in general terms and applied to all in France, the European Court of Human Rights will evaluate whether, in fact, the intent of the law was aimed solely at the wearing of the niqab by Muslim women. If so, it could run afoul of Article 9 of the EU Human Rights Convention, which provides that "everyone has the right to freedom....of religion...either alone or in community, with others and in public or private."

But a second part of Article 9 provides that freedom to “manifest one’s religion or beliefs” is subject to limitations in law “necessary in a democratic society in the interests of public safety, for the protection of public health, order or morals...” And mindful of this language, the French have attempted to justify its supposedly “neutral” law on grounds that it was necessary to promote “public safety.”

In a similar recent case, the European Court of Human Rights in 2004 and 2006 upheld a Turkish rule that women in universities could not wear headscarves. In essence, the Court ruled that the ban was justified to avoid giving preference to any religion (neutrality) and to maintain order. (The current Turkish government under Recep Erdogan subsequently sought to allow headscarves in universities and was rebuffed by a Turkish constitutional court; but has worked out a compromise with university authorities that now allows the wearing of scarves).

Whether the European Court of Human Rights will view the French arguments for the veil ban as a pretext--the ban is aimed, in fact, at Muslim women and does not promote public order (there are only 2,000 *naqib*-wearing women in France)--will be resolved in the future.

But, to observers from afar without the benefit of a record in a human rights case, the French law does, in fact, appear to be a pretext and to single out and suppress the free exercise of a particular religion. Rather than upholding one of the bedrock principles of Western Democracies--individual freedom to practice one’s religion without state limits aimed exclusively at that religion--the French have instead undermined the need for pluralism and tolerance, which will also be a bedrock principle for relations Western nations have with the great body of moderate Muslims around the world.

View [all panel responses](#) to the discussion [France’s veil ban: Libert ,  galit , fraternit ?](#)

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