Troubles concerning the ‘burqa ban’: reflections from an outsider

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1. Introduction
This contribution is an updated and extended version of my comments on the keynote speech by Eva Brems, ‘Equality Trouble in Multicultural Human Rights Claims: the Example of the Belgian ‘Burqa Ban’, delivered by her at the Farewell Symposium entitled ‘Equality and Human Rights: Nothing but Trouble?’ for Professor Titia Loenen on 18 November 2013 in Utrecht. The contribution of Brems to this Liber Amicorum contains a slightly revised version of her speech. To understand my reflections, the reader is advised to read Brems’ contribution first. The most important new fact which is included in my contribution is the judgment of the European Court of Human Rights of 1 July 2014 in the case of S.A.S. versus France, in which the Court found the French burqa ban to be not inconsistent with Articles 8 (the right to respect for private life) and 9 (the freedom of religion) of the ECHR. This judgment fits quite well with my comments made at the Farewell Symposium.

This contribution reflects on three issues which are prominent in the burqa ban debate. Section 2 deals with the tension between fundamental rights protection and democracy. In section 3 the focus is on the concept of national identity in relation to fundamental rights protection in both the ECHR and the European Union legal order. Section 4 reflects on the question whether – as Brems submits – the insider perspective of women wearing a burqa

1 Hereafter: Brems 2015.
2 ECtHR, S.A.S. v. France, 1 July 2014 (Appl.no. 43835/11).
3 By the way, I am aware of the fact that full-faced veiled women in Western Europe virtually never wear a ‘burqa’, but a ‘niqab’. Nevertheless, I use the term ‘burqa ban’ because the discussion has been framed as such.
should more or less be decisive when assessing the burqa ban in the light of fundamental rights. My main findings will be summarized in section 5.

In the title of this contribution I have labelled myself as an outsider. With this disclaimer I try to prevent, in advance, any possible criticism by fundamental rights insiders that my reflections are not new and are superficial. Indeed, I am not a fundamental rights expert and I am certainly not specialized in equality rights and the freedom of religion, fundamental rights which lie at the heart of the burqa ban debate. However, as a European administrative lawyer I do have some ideas about the issue which might be valuable for the discussion.

And, finally for those who are interested, where do I stand in the burqa ban debate? Personally I am not fond of burqas, but I am also against a burqa ban. Such a ban is not an effective solution for a minor problem which a self-confident society can deal with in a less intrusive way and which will – in my opinion – disappear as time goes by. At the same time, I do think that a state should have the right to introduce a burqa ban if the vast majority of the people are of the opinion that such a ban is essential for reasons which, as such, are legitimate.

2. Fundamental rights and democracy

In her contribution Brems criticizes the decision of the Belgian Constitutional Court that the burqa ban is not unconstitutional because it can be justified by a pressing social need in a democratic society, because – very briefly – ‘individuality in a democratic society requires visibility of the face’.\(^4\) I will not go into every detail of her criticism, but a point that I missed in her argument was the fact that the Belgian Constitutional Court was confronted with a law which had been approved by an almost unanimous vote in the Belgian Parliament. The same happened in France where the burqa ban was

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\(^4\) Belgian Constitutional Court, Judgment 145/2012 of 6 December 2012, cited in Brems 2015, section 1, and in ECtHR, S.A.S. v. France, 1 July 2014 (Appl.no. 43835/11), at para. 42.
also supported by almost every political party and was declared constitutional by the French Constitutional Council as well.\(^5\)

Brems is not impressed by this huge democratic support for the burqa ban. On the contrary, this support is disqualified by labelling it as a bias of the dominant Christian majority culture against the non-dominant group of people with a non-Western background, and even as islamophobia in disguise.\(^6\) In this argument democracy is more or less considered to be an ‘enemy’ of fundamental rights. In my opinion such labelling is in principle unwise and in the end is detrimental to the protection of fundamental rights.

If a large majority of the people – represented by almost all political parties from left to right – after years of discussion, at least in France, and on the basis of, as such, legitimate philosophical theories,\(^7\) have a strong opinion about a topic such as burqas, even fundamental rights lawyers have to take this opinion seriously and should not place it outside the legal discussion by labelling it as irrelevant, biased et cetera. Fundamental rights are not an exclusive area for lawyers and (political) majority opinions as regards (the limitation of) fundamental rights are at least as valuable as those of lawyers even if they are also or primarily based on a political ideology and even if they do not follow the assessment scheme which lawyers have designed to decide on the possible limitations of fundamental rights. Obviously, this does not mean that the majority political opinion should always prevail above the fundamental rights of minorities. But if a fundamental right – as in the case of the burqa ban, the freedom of religion and the right to respect for private life – can be restricted by the state on certain grounds ‘necessary in a democratic society’ and the justification for a limitation requires a balancing act, the political outcome of this balancing act is in my opinion an important fact. After all, it represents the opinion of the institution with the highest democratic legitimacy, the Parliament, as to what is necessary in a democracy. This outcome cannot be rejected or


\(^6\) Brems 2015, sections 1 and 3.3.

\(^7\) In the French discussion reference was made to the French philosophers Emmanuel Levinas and Elisabeth Badinter. See Brems 2015, section 2.
neglected by simply stating that there are some inconsistencies or weaknesses in the theories and visions which underpin the political outcome. After all, there are inconsistencies and weaknesses in every theory. If one wants to repeal a law that has been approved by an almost unanimous Parliament, one must have very strong arguments for this and I am not sure whether Brems provides such arguments. I will come back to this point in section 4.

As regards the balancing act between the fundamental rights of burqa wearers and the decisions of the French and Belgian Parliaments to ban the burqa, I favour the approach of the Belgian and French constitutional courts and of the European Court of Human Rights. When deciding on the burqa ban, at least the French and European courts availed themselves of legal opinions by authoritative advisors, such as the French Council of State and the Commissioner for Human Rights of the Council of Europe, rejecting the introduction of a burqa ban. These opinions are not very surprising, because they are in line with the vision, shared by most lawyers (and I am one of them), that the law is an inadequate instrument for solving a societal problem such as the wearing of burqas. Probably many judges in the three courts personally shared the same view.

However, in spite of the wise and authoritative legal advice, the Belgian and French Parliaments decided differently and introduced the ban. Because of these parliamentary decisions, the situation changed dramatically and the balancing act between the rights of burqa wearers and the right of Parliament to restrict these rights was decided by all three courts in favour of the latter. Especially in the judgment of the European Court the reluctance to arrive at this result is indeed visible. At several places in the judgment reference is made to the wide ‘margin of appreciation’ that France enjoys in this matter and to the democratic process in society that has resulted in the burqa ban.9

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8 See for a summary of their opinions ECtHR, S.A.S. v. France, 1 July 2014 (Appl.no. 43835/11), at para. 20 (French Council of State) and para. 37 (Commissioner for Human Rights of the Council of Europe). By the way, also the Dutch Council of State delivered four negative opinions on four separate Bills before Parliament which concerned a burqa ban. See ECtHR, S.A.S. v. France, 1 July 2014 (Appl.no. 43835/11), at para. 49.

9 ECtHR, S.A.S. v. France, 1 July 2014 (Appl.no. 43835/11), for instance at paras. 129-131 and 154-158.
Moreover, in order to come to its decision the Court was even forced to ‘invent’ a new sub-ground for restricting the freedom of religion and the right to respect for private life, namely ‘the respect of minimum requirements of life in society’ or ‘living together’ that can be linked – at least according to the Court – to the legitimate restrictive aim of the ‘protection of the rights and freedoms of others’.10

Obviously, it is not difficult to criticize the judicial ‘creativity’ of the Court which is necessary to arrive at a result probably determined in advance. However, in my opinion the Court made a wise decision not to set aside the almost unanimous vote of democratically legitimized Parliaments. Even the common opinion among lawyers (and, again, I am one of them) that ‘protecting fundamental rights is first and foremost about the protection of vulnerable groups’11 does not mean that the rights of these groups always have to prevail above democracy. In my opinion they should not, at least not in a case where the fundamental rights at stake are not absolute and may be restricted, and virtually all Members of Parliament are of the opinion that a certain measure is necessary in a democratic society. If lawyers do not take account of such vast majority opinions, I fear that Parliaments in future will not listen to lawyers when even more fundamental rights than those of the burqa wearers are at stake. Fundamental rights protection in general is not favoured by too many serious confrontations with democracy, because at the end of the day politicians are more powerful than lawyers. Or, to rephrase a Dutch proverb, if one wants to win the war (on fundamental rights) one sometimes has to accept defeat in an individual battle (in this case on the burqa ban).

3. Fundamental rights and national identity

My second reflection is about the importance of the concept of national identity in the fundamental rights debate. In this respect the question can be raised whether it might be possible that certain values which are considered by a large political majority of a state to be part of its national identity can

10 ECtHR, S.A.S. v. France, 1 July 2014 (Appl.no. 43835/11), at para. 121.
in principle justify a limitation of fundamental rights, such as the freedom of religion and the right of respect for private life in the burqa ban cases. I pose this question because the judgments of the constitutional courts of France and Belgium and of the ECtHR, in which they approve of the burqa ban, are at least partly based on values connected to the national identity of Belgium and France, although they are neatly framed in the wording of the fundamental rights restrictions’ assessment scheme. In France the court referred to the constitutional principles of freedom and equality, but there obviously exists a connection with the French laïcité principle. In Belgium the court referred to individuality which requires the face to be visible, a line of thinking which is more or less embraced by the ECtHR as well. Or, as the Dutch saying goes, national identity is the elephant in the courtroom. Everyone knows that it is prominent in the debate, although nobody explicitly refers to it.

Although I am not completely certain, I think that Eva Brems is not in favour of such value-based argumentation, because those values, based as they are on the national identity of a state, reflect by definition the dominant majority culture of a state and may therefore be detrimental to the fundamental rights of minorities. If this assessment is correct, it gives rise to two remarks.

First, as a European Union lawyer, I witness a possible incoherence as regards the role that national identity can play when discussing the protection of fundamental rights. As is probably well known, the Court of Justice of the EU has, in the case of Melloni, limited the possibility of the Member States to apply, in cases that fall within the scope of Union law, national fundamental rights that offer more protection than the Union equivalent. Such application is only possible if it does not compromise the ‘primacy, unity and effectiveness’ of Union law.\textsuperscript{12} In the case of Melloni itself, the issue in question – whether the surrender from Spain to Italy of Melloni, who had been convicted in Italy \textit{in absentia}, could be made conditional upon a

\textsuperscript{12} Case C-399/11, Melloni, [2013]. See also Case C-617/10, Akerberg Fransson, [2013].
retrial – was completely determined by Union law.\textsuperscript{13} Therefore Spain was not allowed to apply its national, more generous, fundamental right according to which such a possibility for a retrial was mandatory. In other cases, where Union law does not completely determine the situation, Member States might be offered more leeway in applying more generous fundamental rights in Union cases. Nevertheless, also in these cases such application can be scrutinized by the CJEU as to primacy, unity and effectiveness.\textsuperscript{14}

The \textit{Melloni} judgment, although not very surprising from an EU law perspective, has been criticized by many constitutional lawyers.\textsuperscript{15} Interesting for the current debate is that many of them have now ‘embraced’ national constitutional identity as a possible alternative justification for a Member State to apply, in Union cases, at least those more generous fundamental rights that are part of the national identity of that Member State.\textsuperscript{16} The basis for their recommendations is Article 4(2) TEU, which imposes on the Union the obligation to respect the national constitutional identity of the Member States. How the CJEU will respond to these recommendations remains to be seen. In my opinion the Court might be susceptible to them, at least in respect of those national fundamental rights that, according to a Member State, are undoubtedly part of its national constitutional identity. This would be a next step in its case law in which the Court has already accepted the possibility of national identity being a justification for a national derogation from a right to free movement.\textsuperscript{17}

Returning to the burqa ban debate, the question can be raised whether it is consistent that lawyers favour the possibility that national identity is a

\begin{thebibliography}{9}
\bibitem{14} For instance \textit{Case C-617/10, Akerberg Fransson}, [2013].
\bibitem{15} For instance \textit{Sarmiento} 2013; \textit{Reestman} and \textit{Besselink} 2013; \textit{Besselink} 2014. Especially in Germany the reactions to Melloni and Akerber Fransson have been quite fierce. See, for instance, the Internet Blog by Thomas Stadler, ‘Abschied von den Deutschen Grundrechten?’, available at: www.internet-law.de/2012/01/abschied-von-den-deutschen-grundrechten.html. See also the opinion of the Bundesverfassungsgericht stating that the Akerberg Fransson judgement is ultra vires, available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-031en.html.
\bibitem{16} Cf. \textit{Bogdandy} and \textit{Schill} 2011; \textit{Besselink} 2010; \textit{Torres Pérez} 2013; \textit{Preshova} 2012.
\end{thebibliography}
justification for a higher level of fundamental rights, on the one hand, but may have their doubts as to the possibility that national identity might be a ground for limiting fundamental rights, on the other. In my opinion it is not. If national identity is accepted as a legal norm, it can in principle work in both ways.

My second remark concerns a warning. As a relative outsider I have the impression that fundamental rights lawyers do not become sufficiently engaged in the current discussions on national identity and fundamental rights. And if they do become engaged, they sometimes tend to exaggerate the possible inclusion of national identity as a ground of justification for limiting the fundamental rights of a minority group by claiming that this would lead to a tyranny of the majority. Or, they try to reconcile fundamental rights protection with national identity by claiming that social-cultural diversity – and thus the protection of minority rights – is (or should be) a part of national identity.18 Obviously, nobody favours a tyranny of the majority and also in my opinion diversity is a hallmark of Western democracies, such as the Netherlands.

However, in some discussions – and the debate on the burqa ban is one of them – I do not believe that the tension between fundamental rights and national identity can be resolved by the win-win argument that national identity implies diversity. On the contrary, the burqa ban is based on a strong belief by a vast majority of citizens in Belgium and France that the burqa is fundamentally inconsistent with the national identity of their state and that these strong beliefs deserve to be protected by law. Of course, one can disqualify these beliefs as a biased view of the dominant and tyrannous majority. But in doing so, one more or less affirms the vision of somebody such as Thierry Baudet, who in the Dutch debate has quite successfully ‘framed’ the fundamental rights protection by the courts as an attack by the cosmopolitan lawyer elite against the values and national identity of the vast majority of ordinary citizens.

So, in my opinion, fundamental rights lawyers should engage more in the current debate on national identity and fundamental rights. They should acknowledge the possibility that national identity might not only offer a justification for more fundamental rights protection, but sometimes for a restriction of the fundamental rights of a minority group as well. In the burqa ban cases the constitutional courts of Belgium and France and the ECtHR have de facto accepted this possibility. If this is accepted as a ground of restriction, in future certain questions have to be addressed such as under which circumstances national identity may prevail and who (Parliament or the judiciary) is entitled to determine what does and what does not belong to a country’s national identity? Obviously, the answer to such questions will to a large degree depend on the circumstances of the case in question. However, I do defend the possibility that sometimes – for instance in the burqa ban cases – the opinion of Parliament may prevail. At the same time, I am of the opinion that the content of what constitutes national identity is not unchangeable. In practice the national identity of a state is constantly developing and the majority opinion of today may be quite different from the majority views of tomorrow. In the Netherlands one can witness such a change in the Black Peter discussion which is gradually developing from the view that ‘Black Peter is black by definition’ to ‘a Clown Peter is also acceptable’. However, I do not expect that such a change will take place in the years to come in respect of the burqa discussion.

4. The insider’s perspective

In section 3 I expressed some doubts as regards Eva Brems’ arguments against the burqa ban. The point of departure in her view are the personal experiences of women wearing a burqa – or the insider’s perspective. The empirical research by Brems and by others such as Annelies Moors in the Netherlands from this internal perspective has shown that the assumptions on which the burqa ban is based – the burqa is oppressive as it is being

19 Of course, neatly framed in the grounds of restriction of the ECHR, interpreted in the light of the wide margin of appreciation of the state.
forced upon the women concerned and the ban will liberate these women – are false according to the women concerned. Furthermore, Brems calls into question the symbolic function of the burqa ban, because for these women the wearing of a burqa has no symbolic function at all (it is their personal choice) and it certainly does not indicate that they approve of or promote male dominance. I have two remarks about this research.

In the first place, I am somewhat surprised by Brems’ starting point that in emancipation matters the personal opinion of the group concerned should be decisive. In my perception – but, as stated in section 1, I am an outsider in these matters – the strength of the feminist movement has always been that it was not afraid to force institutions to adopt equal treatment between men and women, also when the women who were supposed to benefit from this actually rejected any feminist involvement.

This strategy was very clear in the Dutch SGP case, in which a feminist NGO successfully forced the SGP (a Dutch orthodox Christian party), by means of judicial actions, to depart from its religiously inspired party rule that women could not be elected as representatives. This, although the women concerned rejected the action unanimously, either because they agreed with the party rule on religious grounds, or because they wanted to fight this battle themselves and not with the assistance of feminist outsiders. A more or less similar situation existed when the feminist movement favoured the policy of positive discrimination towards women, although many women who benefited from this policy did not agree with it, because they wanted to be assessed on the basis of their merits (and not of gender).

In my opinion the burqa case is quite similar to especially the SGP case. In both cases women of a minority group are, against their will, ‘liberated’ from a religiously inspired oppressive rule. In the SGP case (a part of) the feminist movement enhanced the liberation without taking into account the experiences of the SGP women. In the burqa case Brems and others do take account of the burqa wearers’ experience and arrive at defending the rule.

22 See on this matter, Oomen, Guijt and Ploeg 2012 and ECtHR, Staatkundig Gereformeerde Partij v. The Netherlands, 6 October 2010 (Appl.no. 58369/10).
To me this comes as a surprise. But perhaps I miss some essential differences between both cases.

My second question is concerned with the research itself. In the research by Eva Brems, and also in the research of the Dutch situation by Annelies Moors, the opinions of burqa-wearing women are mainly or exclusively derived from two groups of women, namely Belgian and Dutch women who have converted to Islam and first or second generation women of Moroccan origin. Both groups have voluntarily chosen to wear a burqa and for both groups the findings of Moors and Brems – that the burqa is not oppressive and that it does not indicate that they approve of male dominance – are undoubtedly correct.

But do the opinions of these groups also reflect the situation and opinions of women who are religiously or culturally forced by a male-dominated culture to wear a burqa in Afghanistan, Pakistan, Saudi Arabia, Yemen, Somalia and so on? I truly doubt this. Nevertheless, some of the burqa-enforced women coming from these countries do live in the Netherlands and Belgium and others (or their husbands) might plan to come to our countries for whatever reason. And my rhetorical question is: would it not be a blessing for these women that our countries send a clear message to them and their husbands that they are welcome, but only if the woman is freed from her burqa? And, if this is not a blessing for the women concerned, perhaps it is for their daughters? I pose this question because the equality arguments in favour of a burqa ban – at least in my opinion – do not only or primarily aim at the situation of Dutch converts and first or second generation women of Moroccan origin, but to the potentially much larger group of women in the countries mentioned who are forced to wear a burqa.

I realize that this point of view might negatively affect the position of the Dutch converts and women of Moroccan origin who have voluntarily chosen to wear a burqa. However, the SGP judgment will probably have similar intentions.

23 The group of women interviewed by Moors solely consisted of converts (60%) and women of Moroccan origin (40%). In the research by Brems et al. 2012, section 1, the number is not completely clear, but ‘most of’ the 27 women interviewed were second generation immigrants of Moroccan origin and of the remaining group ‘a few’ were first generation Moroccan and 5 were converts.
consequences in the sense that a group of orthodox Christian women (and men) will not be able to exercise their right to vote as there is no party left that, in accordance with their religious vision, discriminates against women. And, do we really care about that?

5. Concluding remarks
On 1 July 2014 the ECtHR in the case of S.A.S. versus France decided that the French burqa ban was consistent with the freedom of religion and the right to respect for private life. In my opinion this is a wise decision. Not because I am personally in favour of a burqa ban, but because I do think that a state should have the right to introduce it if – as was the case in France and Belgium – the vast majority of the people are of the opinion that such a ban is essential for reasons which are, as such, legitimate. Although I adhere to the opinion that protecting fundamental rights is first and foremost about the protection of minorities, this does not mean that minority rights have to prevail over and above democracy by definition. Sometimes – and the burqa ban case provides a good example – democracy prevails, also because the ban reflects the national identity of the states (and the peoples) concerned.

I do not think that my contribution will change the opinion of Eva Brems. This was also not my intention, because her strong and well-founded opinion is very welcome in the societal and academic debate. Furthermore, I am also quite certain that Titia Loenen will not agree with everything I have stated in the foregoing.24 Nevertheless, Titia, I hope that my contribution to the debate is still welcome and may provide some inspiration in your current and future activities at Leiden University. Titia, thanks for your great efforts for the benefit of Utrecht University in the past and I wish you a great deal of success in Leiden.

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24 As a member of a Dutch expert committee which advised the government on the legal possibilities for a burqa ban, she was of the opinion that a ban, only aimed at Islamic full-face veils, was contrary to the freedom of religion. Cf. Vermeulen et al. 2006.
BIBLIOGRAPHY


