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Veils, Politics, and Constitutionalism

In the West, Muslim fashions are not in vogue. In 2004, France banned the hijab, or Islamic headscarf, from its public schools, and in 2011 banned wearing the face veil (*niqab*) and other face coverings. Belgium banned public wearing of the *burqa* in 2011, and the Netherlands plans to ban public wearing of the *niqab* in 2013. In 2010, the government of Quebec introduced legislation that would forbid public servants or those seeking to do business with government officials from wearing face-covering attire. At first blush, these policies seem to contradict nationally guaranteed rights to religious freedom. The oft-violent protests accompanying mosque and minaret construction in France, Italy, Austria, Greece, Germany, and Slovenia, and the recent outright ban on the construction of minarets in Switzerland, suggest that anti-Muslim animus in Europe may also be at play. Yet these bans have been justified on grounds of state interests ranging from promoting a national policy of secularism to women's' rights to national security.

Less well known is that Muslim countries, too, have struggled with issues involving Islamic dress and national identity. Tunisia banned headscarves in 1981, but has faced challenges by both Islamist and secular rights groups who claim this policy violates freedom of religion, even before the Arab Spring. In Egypt in 2007, a female student successfully challenged a *niqab* ban at the American University of Cairo in the Supreme Administrative Court of Egypt, establishing precedent followed by lower courts to overturn veil bans in public universities.¹ In October 2009, the Kuwaiti Constitutional Court held that female parliamentarians need not wear hijab, rejecting a challenge by Islamists under a Kuwaiti law that binds female parliamentarians by

¹ *Al-Zainy v. American University of Cairo*, Egyptian Supreme Administrative Court, 6 June 2007.

shari'a.² Turkey has long forbidden public officials and those on college campuses from wearing headscarves. The European Court of Human Rights (ECtHR) held in 2005 that Turkey's Headscarf Ban did not violate the European Convention.³ In 2008, the Constitutional Court of Turkey voted to strike down a constitutional amendment that would have had the effect of overturning Turkey's headscarf ban on university campuses.⁴

Veil bans have placed courts charged with mediating fundamental rights in the position of having to decide veiled political questions with enormous implications for national identity. These cases are so rich because courts are forced to define an appropriate balance between national security, women's rights, personal liberties, and religious freedom. Through these cases, courts are asked to define the relationship between religion and the state. To the extent that adherence to secularism is synonymous with being a citizen of a secular state and adherence to Islam is synonymous with being a citizen of an Islamic state, the courts are defining and redefining national identity through their jurisprudence.

In this ticket, I briefly present summaries of and commentary on four cases that I hope will become part of the comparative constitutional canon: The 2010 decision by the French *Conseil Constitutionnel* holding that a ban on covering one's face in public is constitutional; and the Egyptian, Kuwaiti, and Turkish decisions mentioned above.⁵ I hope to provoke discussion about the appropriate balance between constitutional liberties, and about whether freedom of religion and freedom from religion can indeed coexist.

² *Al-Nashi v. Rahman et. al.*, Kuwaiti Constitutional Court, 28 October 2009.

³ *Sahin v. Turkey*, Application no. 4474/98, Council of Europe: European Court of Human Rights, 10 November 2005.

⁴ E.2008/16, K. 2008/116, Turkish Constitutional Court, 2008 (hereinafter, "Turban Case")

⁵ In other work, I have translated the Egyptian, Kuwaiti, and Turkish decisions and discussed them, their political context, and implications for judicial independence of these courts. Jill Goldenziel, *Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendance of Courts* (forthcoming 2012).

1. France

In 2010, the French *Conseil Constitutionnel* held that parliament's preservation of public order trumped personal and religious liberties to wear face veils. The *Conseil* received a referral for abstract review from the presidents of the two chambers of the French parliament regarding the "Act Prohibiting the Concealing of the Face in Public."⁶ The court noted that Parliament:

"... has felt that such practices [i.e., the wearing of face-covering attire] are dangerous for public safety and security and fail to comply with the minimum requirements of life in society. It also felt that those women who conceal their face, voluntarily or otherwise, are placed in a situation of exclusion and inferiority patently incompatible with constitutional principles of liberty and equality."

Recognizing these purposes, along with the parliament's desire to protect public order, the *Conseil* held that the act is not unconstitutional. The Act came into effect in 2011.

The court issued a surprisingly cursory, two-page opinion on this highly politicized topic, suggesting that the decision was an easy one. While the decision made no reference to *laïcité*, the French principle of secularism on which past headscarf jurisprudence has been based, the decision is impossible to understand without it. France defines "public order" as involving freedom from religious symbols, beginning with the complete banning of religious garb in public schools. The Act was publicly understood to ban the *niqab*; at least to my knowledge, no Frenchman has been arrested for wearing a winter scarf or a ski mask in the Pyrenees. Whether the decision can stand as France's Muslim minority grows remains to be seen.

2. Egypt

Egypt's High Administrative Court has chosen to interpret the role of Islam in its constitution to permit multiple interpretations of Islamic law. In 2007, an Egyptian High Court

⁶ Decision no. 2010-613 DC, October 7, 2010, *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010613DCen2010_613dc.pdf, visited 19 February 2012.

held that bans on the *niqab* at universities are unconstitutional under the personal liberties provisions of the Egyptian Constitution.⁷ In the case, a student at the American University of Cairo, a private, English-language university, was barred from entering the library while wearing a *niqab*. The security guards cited enforcement of a ruling by the Council of Deans of AUC banning *niqab* on the campus “as an issue of personal safety and security.”⁸ In addition to “the basic right” of all members of the AUC community “to know with whom they are dealing,” AUC officials expressed that use of the *niqab* contradicted the ideals of a liberal arts education by inhibiting “dialogue and intellectual interaction.”⁹ The student challenged the ban under Article 2 of the Egyptian Constitution, which states that Islam is a principal source of legislation.

On September 9, 2007, the High Administrative Court struck down the *niqab* ban.¹⁰ The court concluded that wearing the *niqab* is not obligatory according to Islamic law. The court explained that *shari'a requires* the clothing of Muslim women to cover the entire body except for the face and hands, per verse 33:59 of the *Quran*.¹¹ However, it noted that Islamic scholars from Salafis to modernists have interpreted the *Quran* to read that women are not required to cover their faces and hands, pursuant to verses 24:30¹² and 24:31¹³ of the *Quran*. Thus, the court held, because “the *niqab* is neither prohibited nor forbidden,” it may not be banned.¹⁴

⁷ Case No. 3219/48/High Administrative Court, Chamber of Unification of Judicial Principles (Egypt)(June 9, 2007)(El-Zeiny v. American University of Cairo)(trans. Allison Hartnett and Jill Goldenziel, on file with author).

⁸ Zvika Krieger, *Egyptian Court Overrules American University in Cairo's Limits on Religious Garb*, 53 CHRONICLE OF HIGHER EDUCATION A42 (June 2007).

⁹ Krieger, *supra* note 8.

¹⁰ The administrative court system in Egypt is designed to hear complaints by private citizens against governmental entities. A major issue in this case was whether AUC fell within the jurisdiction of the High Administrative Court. I discuss this fully in *Veiled Political Questions*, *see supra*. There is no appeal from the High Administrative Court.

¹¹ “O Prophet, tell your wives, your daughters, and women believers to make their outer garments hang low over them so as to be recognized and not insulted: God is most forgiving, most merciful.” THE QUR'AN 271 (M.A.S. Abdel Haleem trans., Oxford World's Classics).

¹² The court refers to verse 24:31 of the *Quran*: “And tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond [what is acceptable] to reveal; they should let their headscarves fall to cover their necklines and not reveal their charms except to their husbands, their fathers, their husband's fathers, their sons, their husband's sons, their brothers, their brothers' sons, their sisters' sons, their womenfolk, their slaves, such men as attend them who have no sexual desire, or children who are not yet aware of

The court then held that wearing the *niqab* is a matter of personal freedom guaranteed by the Egyptian Constitution. The Court then cited various articles of the Egyptian Constitution that provide a “protective fence” around personal liberty, rights, and public freedoms, including the right to education,¹⁵ the guarantee of equality and non-discrimination before the law,¹⁶ personal freedom,¹⁷ freedom of religion and religious practice,¹⁸ and criminalization of any assault on personal liberty, freedom of life of citizens, and other public rights and freedoms guaranteed by the constitution and the law.¹⁹ For Muslim women, wearing the *niqab* or any other uniform that they feel preserves their modesty is “one of the manifestations of this freedom.” Thus, the court held that any absolute ban on the *niqab* violates constitutional guarantees of personal liberty.

In the AUC case, the High Administrative Court in Egypt chose to interpret the relationship between Islam and state broadly. The Court thus expounded on Egypt’s version of Islamic constitutionalism, finding multiple interpretations of Islam acceptable under state law. The Court also opened the door for it to use the vague notion of “personal liberties” to resolve future cases involving religion and state.

3. Kuwait

In 2009, the Kuwaiti Constitutional Court issued a broad opinion in a headscarf case, holding that personal liberties are paramount to Islamic law when interpreting state law.²⁰ In

women’s nakedness; they should not stamp their feet so as to draw attention to any hidden charms. Believers, all of you, turn to God so that you may prosper.” *Id.* at 222.

¹³ Full verse: “Prophet, tell believing men to lower their glances and guard their private parts: that is purer for them. God is well aware of everything they do.” *Id.* at 222.

¹⁴ El-Zeiny, at 6.

¹⁵ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, art. 18, *as amended* March 26, 2007.

¹⁶ *Id.*, art. 40.

¹⁷ *Id.*, art. 41.

¹⁸ *Id.*, art. 46.

¹⁹ *Id.*, art. 57.

²⁰ *Al-Nashi v. Dashti et. al*, 2009.

Kuwait's 2009 elections, when women won political office for the first time, two Kuwaiti women who did not wear *hijab* were elected to Parliament. A private citizen affiliated with Islamist groups sued the two women and several government officials to invalidate their election. He argued that the rule that women must wear the *hijab* and modest clothing around men who are not their immediate relatives²¹ is well established by the *Quran*, the *Sunnah*,²² and consensus of the imams, and therefore should be part of Kuwaiti law pursuant to Article 2 of the Kuwaiti Constitution.²³

The Kuwaiti Constitutional Court chose to rule on the merits, despite the opportunity to dismiss the case on technicalities, as it had done with prior contentious cases. Its discussion focused on the interpretation of the requirement of Law 17 (2005) that required women “in their candidacy and after election to comply with the rules and provisions adopted in Islamic Law.”²⁴ The Court interpreted this restriction broadly to “accommodate[s] the meaning of the provisions of all religions, and those relating to faith and morals and actions of taxpayers and their actions as contained in the *Quran* and *Sunnah* and inferred based on evidence from other legitimate sources.” The KCC then held that Islamic Law that is part of Kuwaiti law encompasses various, divergent, personal interpretations of Islamic law, and not just one rigid meaning. The Court held that the legislature may consider sources besides *shari'a* when considering what is in the public interest, including constitutional guarantees of personal freedom, freedom of expression,

²¹ The word used is “mahram,” which refers to relatives with whom sexual intercourse would be considered incestuous. See THE QURAN (al-Baqara trans.) 2:221; MUHAMMAD SAED ABDUL-RAHMAN, ISLAM: QUESTIONS AND ANSWERS – JURISPRUDENCE AND ISLAMIC RULINGS 22–23 (2007).

²² *Sunnah* refers to the customs kept by the Prophet Mohammed and his companions, which Muslims strive to emulate.

²³ Article 2 states that “Islam is *the* source of legislation in Kuwait.” (emphasis mine)

²⁴ *Al-Nashi v. Dashti et. al.*, at 3.

and freedom of religion.²⁵ They noted that Kuwaiti law does not permit distinctions to be made between the rights and duties of citizens on the grounds of religion or sex.

The KCC further held that the precepts of Islamic law do not have the force of legal norms in Kuwait unless the legislature specifically enacts a precept of *shari'a* as state law. The Court found that it is “inconceivable” that the legislature would have intended to leave individuals in charge of the application and implementation of rules and provisions that were subject to interpretation. Doing so might lead to “disorder and contradiction” between these provisions due to the variety of permissible interpretations of Islamic law.

Through this decision, the Kuwaiti Constitutional Court went farther than perhaps any other High Court in the Islamic world in secularizing *shari'a*. By establishing that *shari'a* must be legislatively enacted in order to be state law, the court suggested that democratic actors, not the Amir or Ministry of the *Awqaf*,²⁶ determine the relationship between religion and state in Kuwait.

4. Turkey

In 2008, the Turkish Constitutional Court (CCT) sealed its own demise by upholding Turkey's unpopular headscarf ban. Parliamentary opposition members asked the CCT to review the constitutionality of the “Turban Amendment,” a facially neutral amendment that would have had the effect of overturning the headscarf ban in Turkish universities and administrative buildings. The applicants argued that the amendment contradicted the irrevocable principle of

²⁵ Articles 30 and 35 of the Kuwaiti Constitution guarantee freedom of religion and belief. The court decision refers only to general principles and does not cite specific articles of the constitution.

²⁶ The Ministry of the *Awqaf* is a government entity, currently controlled by Salafis, that had issued a *fatwa* stating that the *hijab* is mandatory under Islam.

secularism established by Article 2 of the Turkish Constitution. Respondents argued that the Constitution did not allow the court to rule on the substance of the amendment, only its form.²⁷

On June 5, 2008, the CCT held that it did have power to interpret the substance of the constitutional amendment. They struck down the amendment, holding that parliament had no power to amend the unamendable provisions of the constitution. In its reasoning, the CCT noted that despite its facially neutral language, the aim of the legislation was clearly “. . . the recognition of the freedom to cover for religious reasons to those who enjoy the right to higher education as a public service.”²⁸ The CCT also stated that secularism is necessary for democracy, reaffirming its prior position on complete separation of Islam from the political realm.

To support its reasoning, the CCT took the extraordinary step of citing the ECtHR opinions in *Sahin v. Turkey* and *Dahlab v. Switzerland*²⁹ at length. The Court emphasized that these two decisions reinforce the principle that European states have broad discretion to regulate the use of religious symbols in the public sphere. The *Sahin* decision held that the “headscarf ban is a necessary precaution in a democratic society in terms of ‘the protection of the rights and freedom of others’ and ‘providing the public order and security.’”³⁰ *Dahlab*, in which the ECtHR upheld the rejection of a job application by a *hijab*-wearing primary school teacher, was cited by the CCT as support for the notion that the headscarf may be seen as a symbol of coercion and

²⁷ See Mehmet C. Uzun, *The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education*, 28 PA. STATE INT'L L. REV. 383, 384–87 (2010), at 416.

²⁸ Uzun, *supra* note 27, at 418 (translation).

²⁹ *Dahlab v. Switzerland*, European Court of Human Rights Appl. Nr. Appl. Nr. 42393/98 (15 January 2001).

³⁰ Turban Case, at 16.

antithetical to gender equality.³¹ Thus, the CCT held that banning the headscarf was in the public interest.³²

Previously, the CCT had been criticized for not considering ECtHR decisions at all, particularly those dealing with Turkey's treatment of its Kurdish minority, and for failing to discuss those decisions at length on the rare occasions that it mentioned them.³³ But on the headscarf issue, the CCT and the ECtHR are in complete agreement that the Turkish historical context requires a strong secularist stance against the vestiges of Ottoman Islamic fundamentalism, and that the wearing of headscarves have the potential to generate coercion in the university context. Thus, where headscarves were concerned, the state's interest in protecting the rights of others trumped the right to religious freedom. The CCT likely saw the headscarf issue as an the opportunity to deflect the expected controversy over its ruling by claiming its decision was in line with the wishes of the ECtHR, and by implication, the European Community which the Turkish public overwhelmingly wishes to join.

The consequences of this decision for the Turkish Constitutional Court were severe. The Islamist-oriented AKP party sponsored an amendment, which passed narrowly in a public referendum, that would have the effect of packing the Court. As of this writing, the amendment was still stalled in committee. Meanwhile, the headscarf ban *de facto* has been lifted at many Turkish universities.

³¹ *Id.*

³² *Id.*

³³ See Esin Orucu, *The Turkish Experience with Judicial Comparativism in Human Rights Cases*, in JUDICIAL COMPARATIVISM IN HUMAN RIGHTS CASES 134–37, 140–41 (Esin Orucu ed., 2003). For a comparative perspective on this resistance to transnational law, confer VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

Conclusion

Thus, regardless of regime type or religious orientation, judicial concerns over Islamic veils are the same: balancing freedom of religion, women's rights, personal liberties, and security.³⁴ In the French case, the *Conseil Constitutionnel* held that public order trumped religious liberty and personal freedoms to ban the veil. In Egypt, Kuwait, and Turkey, personal liberties held the day. Perhaps surprisingly, the democracy I discuss is most concerned with preserving public order, while courts in the more authoritarian countries I discuss are most concerned with personal liberties and coercion. The Turkish Court, in a regime somewhere in-between, is also concerned with coercion and personal liberties, and believes that only secularism can command them.

These decisions raise the question of whether freedom of religion and freedom from religion can coexist. The Turkish and French courts appear to say no. In Turkey, secularism trumps democratic processes because, according to the Court, secularism is fundamental to democracy, and secular education cannot tolerate headscarves. In France, public order trumps individual liberties, because freedom from religion is inherent in national identity. In Egypt and Kuwait, however, freedoms of and from religion do coexist, although perhaps uncomfortably so. Women in these countries have the right not to wear headscarves, and also the right to wear the *niqab*, regardless of what religious authorities in those countries may say. These courts have struck a delicate balance between competing political concerns as well as constitutional ones.

In the U.S., where we arguably believe in freedom of and from religion, we have created an excessively messy jurisprudence that strives to achieve the appropriate balance between the two. So far, few free exercise challenges involving Islamic veils have reached our federal courts. In one notable case, the Third Circuit held that a public school's firing of a headscarf-wearing

³⁴ I equate "security" with "public order" for the purposes of this article.

teacher was justified under a Pennsylvania statute requiring neutrality in religious garb.³⁵ But this decision has been seriously called into question by more recent opinions, including the Supreme Court's decision in *Good News*.³⁶ In several EEOC cases, uniform policies have been upheld, and RLUIPA cases have led courts to uphold prison policies prohibiting headscarves. As Muslim immigration to the U.S. increases, free exercise challenges based on Islamic veils may become more common, but not quite yet.

Holding to twin values of freedom of and from religion³⁷ often seems untenable, but a look abroad reveals no good alternative. While debates over the appropriate relationship between religion and the state have become politicized in the U.S., our debates pale in comparison to those in countries in which Islam or secularism is ensconced in constitutional law. In the U.S., the Supreme Court's word will reign. Elsewhere, this is less certain. France's jurisprudence seems stable for now, but its growing Muslim minority may force reexamination of its policies in the not-too-distant future. It remains to be seen whether the Egyptian High Courts will use personal liberties and liberal interpretations of Article 2 to overcome legislation passed by its new Islamist parliamentary majority. The Kuwaiti Constitutional Court's position on the relationship between Islam and state is likely to be contested increasingly as Islamists continue to gain parliamentary power. And the Turkish Constitutional Court's decision to advance an outdated interpretation of national identity in the face of changing political realities led to its discredit and likely its demise. The balance between judicial and legislative power in determination of national identity is likely to be a key comparative constitutional question in the coming decades. Determination of the relationship between religion and state may well determine the survival of courts and even constitutions themselves.

³⁵ *U.S. v. Board of Educ. For School Dist. Of Philadelphia*, 911 F.2d 882 (3d Cir.) 1990.

³⁶ *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

³⁷ If, indeed, these our are values.