

## РЕЦЕНЗИИ Reviews

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*Review*

### **Review of the Monograph: Cohen-Almagor R. The Republic, Secularism and Security: France versus the Burqa and the Niqab. Cham: Springer, 2022. 66 p.**



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**Abstract.** On October 11, 2010, France became the first European country to ban the full-face Islamic veil – the burqa and niqab, in public places. After France becoming a “pioneer” in this area, by contrast to the United States and Russia, facial veil prohibition acts have been adopted in several other European countries and discussed in even more. These acts and political debates have generated a colossal number of research papers – mostly on legal issues by lawyer-scholars, critical analyses and, I’m sure, will produce many more. They have mainly focused on different aspects of the right to religious and cultural freedom, the right to gender equality. However, the novelty of Professor Raphael Cohen-Almagor’s monograph “The Republic, Secularism and Security: France versus the Burqa and the Niqab” lies in a non-standard approach to the veil-ban issue – he investigates using different methodological instruments not only the legal core of the ban, but also (and mostly) the factors motivating the French legislator, what it symbolizes. Since the niqab and burqa wearers are extremely rare in France, as in almost all European Countries, one may agree that there surely isn’t an actual social problem, needing to be regulated by the government. Such disproportionality between practical importance and French legislative effort have urged Professor Cohen-Almagor to dwell on the reasons of such a high interest by the public administration to the religious facial veil. The study was carried out using various scientific methods: general scientific (analysis, synthesis, modeling, abstraction, etc.), empirical (observation, statistics), specifically legal (comparative legal, axiological, sociological, hermeneutics), historical (diachronic, ideographic). Huge practical experience, thorough, systemic knowledge of the regulatory material and practical aspects of its implementation allow the Author to analyze the symbolic and instrumental role of the facial veil in France’s pursuit for national identity building.

**Keywords:** burqa; niqab; veil ban; face-veil ban; veil prohibition; secularism; European Court on Human Rights; European Court; general will; freedom of religion; freedom of speech; freedom of culture; secular state.

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Рецензия

**Рецензия на монографию: Cohen-Almagor R. The Republic, Secularism and Security: France versus the Burqa and the Niqab. Cham: Springer, 2022. 66 p.**

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**Аннотация.** Франция явилась первой европейской страной, в которой на законодательном уровне 11 октября 2010 г. установлен запрет ношения в общественных местах закрывающей лицо исламской лицевой вуали – бурки и никаба. Впоследствии аналогичные запретительные нормативные правовые акты были изданы и другими государствами Европейского союза. Запрет ношения исламской лицевой вуали и ограничение свободы вероисповедания в странах, ставших для многих участников международных отношений эталонными с точки зрения модели правового демократического государства, породили большое количество исследовательских работ представителей европейского научного сообщества, в основном касающихся различных аспектов реализации прав на свободу вероисповедания и гендерное равенство. Однако новизна монографии профессора Рафаэля Козна-Альмагора «The Republic, Secularism and Security: France versus the Burqa and the Niqab» («Республика, секуляризм и безопасность: Франция против бурки и никаба») заключается в нестандартном подходе к изучению проблемы европейского запрета на ношение религиозной лицевой вуали в общественных местах. Исследование проведено с использованием различных научных методов: общенаучных (анализа, синтеза, моделирования, абстрагирования и др.), эмпирических (наблюдения, статистики), специально юридических (сравнительно-правового, аксиологического, социологического методов, герменевтики), исторических (диахронного, идеографического методов). Автор предпринял попытку не только провести юридический анализ нормативной правовой базы данного вопроса, но и определить историко-политические и государственно-культурные мотивы подобного отношения французского законодателя к указанному социальному явлению. Следует отметить, что во Франции, как и почти во всех европейских странах, представителей ислама, носящих бурки и никабы, крайне мало – менее 0,003 % от всего населения страны. В этой связи можно согласиться с тем, что реальной социальной проблемы, требующей правового регулирования со стороны публичной власти, не существует. Такая непропорциональная разница между степенью практической важности данного вопроса и усилиями французских законодателей побудила профессора Козна-Альмагора остановиться на причинах проявления столь высокого интереса французского государства к исламской лицевой вуали. Огромный практический опыт, доскональное, системное знание нормативного материала и социально-культурных, политических аспектов запрета позволили автору проанализировать символическую роль и практическую значимость лицевой вуали в стремлении Франции к построению единой национальной культуры.

**Ключевые слова:** бурка; никаб; запрет на ношение исламской лицевой вуали; секуляризм; Европейский Суд по правам человека; Европейский Суд; общая воля; свобода вероисповедания; свобода слова; свобода культуры; светское государство.

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Over the past two decades, the European states have been the site of massive debates over integration, racism and discrimination of religion, specifically Islam. A key topic of controversy is the trend toward the banning of wearing Islamic veils (Burqa, Niqab) in public places. Legal acts prohibiting face coverings, already in force in many states of the European Union, are under consideration in a number of other European countries. Though statistically not many women in Europe wear the burqa or niqab<sup>1</sup>, the political quintessence of this issue has raised much debates and massive social and legal discussion, especially in questions as the correlation of “European cultural values” and fundamental European standards in the field of human rights and freedoms – the freedom of religion.

The above question of the relationship between European cultural values and freedom of religion, being quite relevant in many democratic countries of our time, attracted the attention of Professor Raphael Cohen-Almagor, a respected scholar in the field of social and legal policy, particularly in the field of human rights and freedoms. The published in the beginning of 2022 monograph of Professor Raphael Cohen-Almagor [1], undoubtedly, not only evokes academic interest, but also explores deep social-legal issues relating to the modern democratic public policy, in particular that of France. Firstly, because it is devoted to a very acute social and legal problem which was imposed on September 14, 2010 by the French Parliament after drafting the law of 2010-1192 “Act prohibiting con-

cealment of the face in public space”. As a result, France became the first European country enforcing a nationwide ban on the Burqa, Niqab and other types of facial veils. Also, the mentioned act provides that “no person is allowed to wear in public spaces a clothing hiding his face”. Additionally, Art. 3 of the Act establishes a penalty for the failure to comply with this obligation in the form of an administrative fine of up to 150 Euro and/or mandatory attendance to citizenship courses for immigrants.

Moreover, France’s legislative and law enforcement practice has served as a catalyst for the imposition of similar prohibitions by other Member States of the European Union. For example, on June 1, 2011 the Belgium’s Parliament passed an Act providing for an amendment of the national Criminal Code that establishes a fine and/or imprisonment for appearing in public spaces with the face fully or partly covered so that the person is unrecognizable<sup>2</sup>. In 2017, a legal ban on face-covering clothing for soldiers and state workers during work-time were approved by the German Parliament<sup>3</sup>. A similar ban was approved in the same year for car drivers by the Ministry of Traffic of Germany<sup>4</sup>. In July 2020, the German government banned full-face coverings for all primary and secondary educational institutions<sup>5</sup>. On 31 May 2018, the Danish Parliament adopted a law that prohibits clothing masking the face in such a way that it impairs recognizability<sup>6</sup>.

Secondly, this book allows, as they say, to get acquainted first-hand with the theoretical views of, in my opinion, one of the leading

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<sup>1</sup> For example, at the time for drafting the veil ban act, legislative documents supporting the ban reported that 1,900 Muslim women wore the face covering burqa and niqab – less than 0.003% of the general population of France. URL: <https://theconversation.com/so-few-muslim-women-wear-the-burqa-in-europe-that-banning-it-is-a-waste-of-time-82957>

<sup>2</sup> Art. 563 of the Belgian Criminal Code. URL: <https://legislationline.org/Belgium>

<sup>3</sup> URL: <https://www.n-tv.de/politik/Bundestag-beschliesst-Sicherheitspaket-article19813154.html>

<sup>4</sup> URL: <https://www.waz.de/politik/verkehrsminister-dobrindt-will-offenbar-burka-verbot-im-auto-id210777025.html>

<sup>5</sup> URL: <https://www.waz.de/politik/verkehrsminister-dobrindt-will-offenbar-burka-verbot-im-auto-id210777025.html>

<sup>6</sup> URL: <https://www.independent.co.uk/news/world/europe/denmark-ban-full-face-covering-burqa-jakob-elle-mannjensen-a7986561.html>

European minds on political science and sociology in the field of the enforcement of the freedom of religious beliefs – Professor Raphael Cohen-Almagor.

The work is distinguished by originality, non-standard approaches of the Author to the study of France's legislative ban of the burqa and niqab based on a thorough, in-depth analysis of a large number of literary sources and materials. It contains many new, carefully substantiated theoretical conclusions and provisions. Due to the limited scope of this review, chapter-by-chapter I will mention only a few of them.

Divided into three main chapters (chapters 1 and 5 being an introduction to the problem in hand and conclusions made by the Author), the book analyzes not only French cultural policies in the face of what the French government perceives as a challenge to its Republican secular *raison d'être*, but how legal concepts are interpreted by the state regarding the individual rights of Muslim women. Islamic ways of life seem to challenge existing conventions relating to freedom of religion and to the distinction between private and public. Such an indescribable paradigm is frustrating. In the words of the Author: "How can Western democracy, said to be one of the foremothers of liberalism, be so obsessed with how people dress?" (p. 2).

Chapter 1 "Introduction" is opened with background facts about the formation in France of the veil ban as coverings worn by Muslim women. The Author in short gives the reader a sense on such terms and concepts as "multiculturalism" (p. 4), "justice", "reasonableness" (pp. 4–5), the differences between hijab, niqab and burqa (pp. 5–7).

It should be noted that in some European countries, in particular in the Netherlands, the issue of the veil ban is so politicized that at the legislative level a significant mistake was made in the taxonomy of religious

veils – instead of the niqab, the term burqa is used [2].

The Author asks a number of hypothetical questions that make the reader contemplate and be critical of the focus of the monographic study: how can a western democracy, said to be one of the foremothers of liberalism, be so obsessed with how people dress? Does this obsession go hand in hand with the values of the French Revolution, etc. (pp. 1–2). In my personal understanding, one of the main pillars of today's European cultural and legal standards are the French post-revolution culture and legal doctrine, which have been a subject to intensive investigation and studies by scholars of many western and eastern countries with Russia not being an exception,

Chapter 2 "The Underpinning Values of the French Republic" is devoted to the analysis of the Declaration of the Rights of Man and the Citizen and elucidate the alternative trinity that the French offered to replace the Father, Son and Holy Spirit: *liberté, égalité, fraternité* (pp. 9–20), which traditionally has become the motto of the French Republic.

Citing Article 4 of the Declaration of Human and Civic Rights (26 August 1789)<sup>7</sup>, the Author elucidates the meaning of liberty, saying: "Liberty consists in being able to do whatever does not harm another. Thus, the exercise of each man's natural rights has no limits other than those which guarantee to the other members of society the enjoyment of these same rights" (p. 9).

Indeed, freedom of religion is vital. For a correct understanding of the essence of the freedom of religion the Author directs us to Article 10 of the Declaration (1789), which postulates: "No man must be penalised for his opinions, even his religious opinions, provided that their expression does not disturb the public order established by the law".

Moreover, it is correctly noted by the Author that in accordance with Rousseau's teachings minorities were incorporated into

<sup>7</sup> Declaration of Human and Civic Rights Of 26 August 1789. URL: <https://www.conseil-constitutionnel.fr/en/declaration-of-human-and-civic-rights-of-26-august-1789>

society and had to accept the general will once it was articulated. Interventionism and coercive Catholicism that penetrates all spheres of life was perceived as an obstacle to this desired articulation (p. 11).

Thus, Article 6 of the Declaration (1789) had set forth the principle of *égalité*: The law is the expression of the general will; all citizens have the right to participate in lawmaking, personally or through their representatives; the law must be the same for all, whether it protects or punishes.

As noted in the book, the idea of “the general will” stems from the philosophy of Jean-Jacques Rousseau, who’s academic teachings were and still are essential in understanding of French social and political life.

The state is the master of all the goods of the community guaranteed for by the social contract which is the basis of all rights within the state. Rousseau (1755, p. 3) explained that the citizens are the sovereign. The citizens administer justice and govern the State. They all commit themselves to observe the same conditions and they all should have the same rights.

According to Rousseau, sovereignty is unlimited and absolute. It requires total alienation of individual rights to the whole community. Thus, in Rousseau’s conception, individuals immerse themselves in the collective without losing their identity. Because they are part of the general will, they contribute to it and feel that it represents them.

The third part of the Republican motto, the principle of *fraternité* is, on the one hand, at odds with *liberté* and *égalité*, which are defined according to rights, statutes and contracts. On the other hand, however, *fraternité* depends on the extent of liberty and equality that exists in a given community. An understanding emerged that rights should be accompanied by a consideration for rights of others, and also by a willingness to accept reasonable adjustments.

*Fraternité* implies a general sense of societal cooperation, depicts a picture in which

members of society create, in the spirit of the family, a common framework – both material and mental – which is a necessary condition for the good life. *Fraternité* instructs that others should be treated not simply as though they have rights equal to ours, but with a loving concern for people’s welfare, aiming to promote other’s happiness, thus building a united family of mankind.

For a correct understanding of the essence of the veil ban Professor Cohen-Almagor analyzes the stated prohibition through the new French trinity of state management – *indivisibilité, sécurité, laïcité*.

Chapter 3 “The Shaping of the Republic: The Influence of Colonialism, Immigration and Terrorism” contains the foundations of social, cultural and legal research, the conduct of which is promised by the Author in the title of the monograph. Referring to 3 old and 3 new principles of state administration of French power, described in the previous chapter of the reviewed work, the Author outlines the features of the development of the French state at the peak of the colonial era and the cultural struggle it went through: the closing of Muslim religious schools and libraries (p. 21). A moral mission was declared by the French to list the colonial people to its standards through Christianity, which was an aspect of national patrimony and an instrument of colonial rule.

The Author’s penetrating gaze does not leave out of the research another relevant tool for the assimilation of Muslim colonial population by the French – the liberation of Muslim women with the French cause (p. 21). Franz O. Fanon explained that in the French colonialist program the woman was the key to shaking up the Muslim man – the French believed if they were able to win over the women, then the rest of society would follow and accept assimilation. As Fanon wrote: “Convening the woman, winning her over to the foreign values, wrenching her free from her status, was at the same time achieving a real power over the man and attaining

a practical, effective means of deconstructing Algerian culture”<sup>8</sup>.

That is the main reason, as Professor R. Cohen-Almagor lays down, why the foulard (veil) became a key issue (p. 21), perceived by many Europeans as a symbol of the inferior status of the Muslim woman and by banning them – a way to liberate and assimilate. As the Author investigates the assimilation process and the prohibition of the veil in Modern day France through the immigration policy of France by opening its gates and becoming a polyethnic state (p. 24), the reader starts to understand the origins of the considered social and political issue in modern-day France.

Chapter 4 “In the Name of the Republic: Banning the Burqa and the Niqab” focuses on the legal foundation of the veil ban. The Author in a detailed manner analyzes such institutions as the freedom of women, the restoration of their violated rights (p. 37), the preservation of French identity and unity (p. 40), the relationship between the ban and public order (p. 43), the main arguments of the supporters of the ban (pp. 45–48).

I support the Author’s view that “concealment of the face as such is not the problem. The reason for it is” (p. 35). A closer look at this statement demonstrates the fragility of maintaining harmonious conditions for the prosperity of social relations while maintaining one’s freedom of culture, religion, will in general. As said by the Author, “People concede that sometimes there are legitimate and reasonable reasons for covering one’s face. Covering the face seems legitimate when the reason is ecological or in the interest of one’s safety. There seems to be no problem in France about wearing ecological masks. Following the outbreak of the COVID-19, face masks became mandatory. People cover large parts of their faces on very cold winter days. Many French

people wear “passe-montagne”, a balaclava, when they jog in winter. Thus, concealment of the face as such is not the problem. The reason for it is. In the spirit of *laïcité*, France does not accept concealment for religious reasons. The same reasoning – the national interest and good citizenship – serve to justify this duality. During the pandemic all are required to show ‘good citizenship’ and adopt ‘barrier gestures’ to protect the national community. The fact that the scrutinized religion is Islam makes the debate more heated and hostile as deep-seated prejudices against Islam, as evinced by the de Tocqueville statement (*supra*), linger on” (p. 35).

Personally, for me – a lawyer-scholar who specializes in the law of the European Court of Human Rights, the Author’s attempt to analyze the case law of the European Court of Human Rights deserves respect (p. 36). Here my dear colleague brings up the case of *S.A.S. v. France*<sup>9</sup> – a French woman of Pakistani origin filed a complaint against France because of the state ban on the wearing of the niqab in public places. She argued that in such her rights under articles 3, 8, 9, 10, 11, 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms had been violated. It is said in the book of review by the Author that “...the Court upheld the burqa and niqab ban” because it agreed with the French state that by covering one’s face a woman breaches the right of others to live in a space of socialization which makes living together easier” (p. 36). It’s also said that the Court gave wide latitude to the French government by using the “margin of appreciation” doctrine<sup>10</sup>, which allows countries discretion in adopting laws in the “grey area”.

However, as I’ve said many times before, “the devil is in the details”, which, unfortunately, the Author did not reflect in his

<sup>8</sup> *Fanon F. A Dying Colonialism*. New York : Grove Press, 1965. P. 39. URL: <https://abahlali.org/wp-content/uploads/2011/04/Frantz-Fanon-A-Dying-Colonialism.pdf>

<sup>9</sup> *Case of S.A.S. v. France* (Application no. 43835/11) : judgment of the European Court of Human Rights, 1 July 2014. URL: [https://hudoc.echr.coe.int/eng/#/%22itemid%22:\[%22001-145466%22\]\)](https://hudoc.echr.coe.int/eng/#/%22itemid%22:[%22001-145466%22]))

<sup>10</sup> *Ibid.* Paras. 155, 161.



research (probably due to page-publishing limitations).

Indeed, the Court ruled for the prohibition by fifteen votes to two – the two judges expressed their opinion in writing (I shall later describe their position on the case). Even though the Court upheld the ban, it emphasized in its ruling that the ban had many serious and, partly, unfair consequences for women who wished to wear the veil as it limited their right to express their religious belief, thus, pushing them to the edge of betraying their religion or isolating them from the outside world<sup>11</sup>. The Court also noted that the wider, more social French debate regarding the ban had to an uncertain degree included islamophobic arguments<sup>12</sup>.

In fairness the Court also stated that the ban was on all kinds of face covering and not specifically for religious reasons. Moreover, the Court made a primitive and, as I see it, an absurd case of which that the penalties for not complying with the veil ban were as mild as possible (a small fine or a mandatory citizenship course)<sup>13</sup>.

Nonetheless, what many have overseen is the joint partly dissenting opinion of judges Nussberger and Jäderblom of the Court decision (also known as a minority opinion or Opinion), which disagrees with the conclusion and states the decision a code of abstract principles having nothing to do with the human rights guaranteed by the European Convention<sup>14</sup>.

The Opinion found that even if French principle of “living together” should be considered a legitimate aim within the meaning of paragraph 2 of Articles 8 and 9, the ban was still disproportionate because very few women wear full-face veil, thus, most of the state’s population would seldom or never meet anybody with the veil even without

a ban. The opinion stated that “...it can hardly be argued that an individual has a right to enter into contact with other people, in public places, against their will. Otherwise such a right would have to be accompanied by a corresponding obligation. This would be incompatible with the spirit of the Convention. While communication is admittedly essential for life in society, the right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places – the right to be an outsider”<sup>15</sup>.

Therefore, in contrast to the majority, the minority opinion found that the individual state’s “margin of appreciation” should be less broad than the 15 judges of the Court had accepted<sup>16</sup>.

According to the Opinion the main motive for banning the veil by the French government was based on an interpretation of the cultural symbolism of the full-face religious veil – representing subservience and self-confinement of the woman. However, for those few women, who use the veil by their own free will, the consequences of a ban make them choose between being confined to their home or violating their own religious or cultural practice.

The minority opinion also indicated that the fine for not complying with the ban was small, but women who used veils on a regular basis would risk having multiple fines.

In conclusion the opinion declares: “we find that the criminalization of the wearing of a full-face veil is a measure which is disproportionate to the aim of protecting the idea of “living together” – an aim which cannot readily be reconciled with the Convention’s restrictive catalogue of grounds for interference with basic human rights”<sup>17</sup>.

Starting from p. 37 Professor Almagor-Cohen examines the veil ban in France

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<sup>11</sup> *Case of S.A.S. v. France* (Application no. 43835/11) ... Para. 47.

<sup>12</sup> *Ibid.* Para. 149.

<sup>13</sup> *Ibid.* Para. 152.

<sup>14</sup> *Ibid.* Para. 15 of the Opinion.

<sup>15</sup> *Ibid.* Para. 8 of the Opinion.

<sup>16</sup> *Ibid.* Para. 16 of the Opinion.

<sup>17</sup> *Ibid.* Para 61–68.

through the prism of “liberating women and re-establishing their dignity” – a political argument made by many supporters of the ban in Europe. In this structural element of the book in question, in my humble opinion, the reader may encounter the Author’s main arguments against the veil ban and his vision on this acute socio-political and legal question (which I absolutely share and support).

One cannot but agree with the Author’s statement, that “For some women, religion comes first. For some women, modesty is the ticket to paradise and to eternal life (Journeyman Pictures 2016). Some women feel happy and secure when they cover themselves. By enforcing the dress ban, they feel that France denies them choice, denies them liberté, infringes the value of égalité and certainly betrays fraternité. French paternalism gives Muslim women very limited credit, very little trust in their abilities to decide for themselves what is good for them.” (p. 38).

The Author continues: “...freedom of choice is important. We should engage with what women are saying, their concerns, their individuality and the way they express themselves. Many Muslim women accept the religious reasoning. They perceive the upkeep of tradition as more important than the personal freedoms they are asked to sacrifice... respect for women means respecting their wishes and inhibitions. I cannot expect Muslim (and also some Jewish, see Kenna 2018) women to accept what I wish for them, and identification with a certain religion does not diminish women’s universal entitlement to dignity and respect. People are endowed with dignity and have the right to be treated with dignity” (p. 39). As said by the Author, “The legislators failed to recognize the possibility that the burqa and the niqab might be a liberating force for women... Thus, the ban... inflicts distinct harm on some women because of their religious beliefs while they themselves did not inflict harm on others. The ban that was designed to liberate women actually increases their isolation.” (p. 47).

While analyzing “The Republic, Secularism and Security: France versus the Burqa and the Niqab”, comparing this work with the numerous scientific works of Russian, European and American legal scholars in the field of the implementation of religious freedom, I could not help but recall the scientific work of Professor Cohen-Almagor “Just, Reasonable Multiculturalism” [3], in which one of the Author’s conclusions struck me and continues to do so: “Freedom of religion is as valuable as freedom from religion.” And in this regard, the Author should be fully supported, emphasizing that: “Imposition of secularism on people who wish to retain their religion subverts unity and restricts one’s identity. Modesty is an important value that must be reckoned with.” (p. 42).

The conclusions and provisions of Chapter 5 “Conclusion” (pp. 49–51), in my opinion, testify to the undoubted contribution of Professor Cohen-Almagor to the understanding of the legal, socio-cultural and political values of France, expressed in the regulation of the Islamic face-veil in public places. “This book argues for reasonable multiculturalism, for the recognition that societies are composed of multiple conceptions of the good. Just and reasonable multiculturalism assumes that society members have good will to make living together possible and that they are willing to make reasonable accommodations. The mechanisms of compromise, tolerance and deliberative democracy are preferable to coercion as means to achieve peace and societal cohesiveness” (p. 50).

The foregoing, I hope, will convince the reader of the innovative nature of the monograph under review. The special significance of this kind of work (unfortunately, not numerous) is that they serve as a kind of catalyst for scientific discussion on the correlation of unity and freedom of religion and the right to preserve culture, through which legal science and administrative law on public governing, in fact, can move forward and develop in a positive way.



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