

The 2018 Danish “Burqa Ban”: Joining a European Trend and Sending a National Message

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Abstract

In May of 2018, the strategy of law-making was utilized in the Kingdom of Denmark to respond to or, more to the point, respond against full-face garments along the lines of a democratic and secular society in which values like transparency inform and guide interaction, dialogue, and communication. The new legal norm and measure, law L 219, does not refer expressly to the veil, nor to women, or to Islam. Nevertheless, the national Parliament in the Kingdom of Denmark proceeded on the basis of premises that reveal, upon scrutiny, why the particular provision that prohibits full-face veils is widely known and referred to as the “burqa

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The authors note that Dr. Oriolo and Dr. Long are also participants in and contributors to the collective research project that resulted in the response article, *The Burqa Ban: Legal Precursors for Denmark, American Experiences and Experiments, and Philosophical and Critical Examinations*.

ban”. Like the niqab, the burqa is a full-face veil. Numerically speaking, between 50 and 200 Muslim women wear such a veil, a fact that enters them into a minority within a minority statistics of 0.1 or 0.2 percent. However, to trivialize the burqa ban would be an error. This point applies to all sides, including the stakeholders who assumed the responsibility of drafting the new norm and measure. As the Danish legislators see things, law 219 is not an instance of “shooting sparrows with a cannon”. After this, the need to legislate appears to be an instance of following a trend in Europe and, at the same time, sending a message about the prevailing (Danish) ideology in contradistinction to “political Islam” that gives rise to unwanted phenomena like gender inequality, religious extremism, and terrorism. The authors of *The 2018 Danish “Burqa Ban”: Joining a European Trend and Sending a National Message* attempt to give an in-depth account of the burqa ban and the political context for this, as provided by the negotiations that led up to the ban’s final adoption. One objective is to identify the various variables in the legal equation and, as another objective, capture the wider prescriptively-proscriptive direction of the Danish case, thereby also establishing a platform for further discussion, reflection, and response. (This part of the project – an intended component and outcome since the formulation of the original research task, labor division, and methodology – is published in the concurrent but separate article, *The Burqa Ban: Legal Precursors for Denmark, American Experiences and Experiments, and Philosophical and Critical Examinations.*)

Keywords: Law, Ban, Burqa, Denmark, European Law, Secularism, Hijab, Order.

**The 2018 Danish “Burqa Ban” :
Joining a European Trend and Sending a National Message**

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1. Introduction: Law L 219

There will be no bad incidents involving Muslim women – no

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“French trouble” –so the Danish Minister of Justice Søren Pape Poulsen reassured the citizenry when §134 c. of the Danish penal law, the provision for the so-called “*burqa* ban”, was adopted and signed into law.¹ In spite of the minister’s reassurance, however, the new prohibitive and legal measure is an instance of censorship in the public space. One general argument for the measure relies on the premise that “it is not Danish and will never become Danish to wear the *burqa*” or, for that matter, any other Islamic full-face veil.² At the same time, the inference that “it is (typical) Danish to legislate for the area of clothing” is impossible to substantiate with a reference to positive domestic law, legal precedent and/or the “the tradition of culture” for policymaking and rule-application, which influential Danish theorists like Alf Ross accommodates.³ Instead, the relevant freedom-restricting

¹ The “French trouble” refers to Muslim women who refuse to show their face in public or to non-Muslims’ attempts to rip off their veil. See Ritzau, TV2, 31 May 2018, available at <<http://nyheder.tv2.dk/politik/2018-05-31-folketinget-vedtager-et-tildækningsforbud>>; Peter Allen, *France has first ‘burqa rage’ incident*, The Telegraph, 18 May 2010, available at <<https://www.telegraph.co.uk/news/worldnews/europe/france/7735607/France-has-first-burka-rage-incident.html>>; Ben McPartland, *Burqa ban five years on – ‘we created a monster’*, Local (Fr), 12 October 2015, available at <<https://www.thelocal.fr/20151012/france-burqa-ban-five-years-on-we-create-a-monster>>; Folketinget [National Parliament], 3. Behandling af L 219: Om et tildækningsforbud. Endelig vedtagelse 2017-18 L 219 [3. Reading of L 219: Ban to Cover. Final Adoption], 31 May 2018, available at <<https://www.retsinformation.dk/Forms/R0710.aspx?id=201753>> [hereinafter National Parliament Ban of 31 May 2018]; Ministry of Justice, j.nr. 2017-0090-0233, 8 June 2018, available at <<https://www.retsinformation.dk/forms/R0710.aspx?id=201839>> (for Queen Margrethe II of Denmark’s royal consent (cf. “samtykke”) and confirmation (cf. “stadfæstelse”) “by the grace of God” in accordance with the 1953 Danish Constitution whereby Denmark is a constitutional monarchy (cf. Chapter I, § 2) with the Evangelic-Lutheran church as the state-sponsored Christian denomination (cf. Chapter 1, § 4) and with the Queen as the formal head of the executive branch of government; National Parliament, Danmarks Riges Grundlov af 5. Juni 1953 [Danish Constitution of 5 June 1953], available at <<http://www.ft.dk/da/dokumenter/bestil-publikationer/publikationer/grundloven/danmarks-riges-grundlov/kapitel-1/paragraf-2>> [hereinafter Danish Constitution of 5 June 1953].

² National Parliament, Retsudvalget, Betænkning over Forslag til Lov om Ændring af Straffeloven (Tildækningsforbud) [Parliamentary Report on Proposal for Amendment of the Penal Law (Cover Ban)], 24 May 2018, 2, available at <<https://www.retsinformation.dk/Forms/R0710.aspx?id=201598>> [hereinafter Parliamentary Report of 24 May 2018].

³ ALF ROSS, ON LAW AND JUSTICE, 97 (2004) (1959 1st ed.); Ministry of Justice, Forslag (og Bemærkninger) til Lov om Ændring af Straffeloven (Tildækningsforbud) [Proposal (and Commentaries) for Amendment of the Penal Law (Cover Ban)], 11 April 2018, 3 (for the non-existence (in Danish law) of a “general prohibition” against garments that cover the face in public places), 8-9 (for references to Ross’ interpretation of Danish constitutional law), available at <<http://www.ft.dk/da/search?msf=&q=tild%C3%A6kningsforbud&as=1>> [hereinafter Ministry of Justice Proposal (and Commentaries) of 11 April 2018].

Note that Ross’ general jurisprudence, namely Scandinavian realism, has influenced the →

norm, law L 219, seems to demonstrate the current Danish VLAK-coalition government's political selectiveness as regards areas, ways, and phenomena (such as women's garments) that *should* be subjected to regulation. The variable that has been inserted into the Danish legislative process and equation is called "value politics"; and the Danish Members of Parliament (MP) who swear allegiance to this support a Denmark for Danes vision. Ideology is the main element of this. Besides a negative appeal to Islamic ideology, the implicitly assumed progressive image of the (Danish) welfare state and its non-oppression of women co-determines the reasoning for a ban on full-face veils as opposed to, for example, short skirts and dresses that may otherwise be seen as objectification strategies and, *ipso facto*, oppressive.³ In one important sense, women in minimalist outfits constitute the (politically correct kind of) paradigm in the Kingdom of Denmark anno 2018. This is to say that the problem with the *burqa* or

←interpretation of various branches of Danish law for decades. Consequently, law is perceived as an area (of the prevailing ideology) where argumentation is the means whereby a particular legal outcome (that is appropriate on immanent premises) is rationalized. See generally Bronik Matwijkiw, *Opgøret om Forudsigelsen [The Prediction Controversy]*, 5 TIDSSKRIFT FOR RETTSVITENSKAP [JOURNAL OF LEGAL SCIENCE] 874-912 (1998).

1 Denmark is currently ruled by the VLAK-coalition government consisting of the following parties: the (center-right) Venstre (V), (libertarian and right-wing) Liberal Alliance (LA), and (right-wing) Conservative People's Party (K). Furthermore, the Speaker of the House, Ms. Pia Kjaersgaard, is the former leader and founder of the right-wing and nationalist Danish People's Party (DF). By virtue of being the largest party in the so-called Blue Bloc (consisting of V, LA, K, and DF), she secured this position with the support of Siumut (S) and the Social Democratic Party (SD) whereas the three other members *cum* parties of the so-called Red Block either voted against Kjaersgaard – with a reference to her polarization effect – or abstained from voting.

2 Mie L. Raatz & Jesper Hvass, *Venstre-landsmødestårskyggen af burqa og værdipolitik*, Jyllands - Posten, 7 October 2017, available at <<https://jyllands-posten.dk/protected/premium/indland/ECE9932678/venstrelandsmoede-staar-i-skyggen-af-burka-og-vaerdipolitik>> (for the Danish government's value politics); Freja E. Bang & Mie L. Raatz, *Jarlovindrømmer: Ja, maskeringsforbuder et burqaforbud*, Jyllands-Posten, 13 October 2017, available at <<https://jyllands-posten.dk/politik/ECE9949607/jarlov-indroemmer-ja-maskeringsforbuddet-er-et-burkaforbud>> (for the 2017 concession, as made by Danish MPs *cum* legislators, that the new masking ban is a *burqa* ban).

3 The assumption that objectification of women constitutes a wrongful practice is one of the characteristics of feminism, be it viewed as a theoretical development of historical materialism or psychological models that focus attention on (the prevailing ideology of) patriarchy. See Anja Matwijkiw & Bronik Matwijkiw, *Marx, Gender Issues, and Modes of Interpretation: Competing Outlooks on the Possibility of a Transition from Historical Materialism to Feminism: Recent Work on Marxism and Feminism* 49/1 THE PHILOSOPHICAL FORUM 83 (2018).

the *niqab* is the way that these *cover* the (face of the) women who wear it. From the perspective of Danish values, so the claim is, full-face veils are inappropriate by virtue of being inherently antagonistic to the goal of securing transparency. The face is “the foundation for recognition”, according to the parliamentary report that provided the justification for law L 219.¹ Transparency, that is, access to the face and, with this, facial expressions in (public) interaction, dialogue, and communication makes it possible to “read signals and feelings”, thereby giving rise to a more complete comprehension (in comparison to a verbal dialogue with a veiled individual).² While certain exceptions in the form of legally justifiable exemptions may be granted, covering one’s face (defined as “the part of the head that is demarcated by the forehead, the chin and the ears”) cannot and, stronger still, *should not* include religious grounds *unless* these “serve a recognizable purpose”.³ In public places, female followers of Islam have a duty to behave like Danes – or “go home”.⁴

The authors of this article address a number of important assumptions and implications of the Danish government’s legal antidote (*cf.* law L 219) to – from the Danish viewpoint – too multi-ethnic and multi-cultural co-existence. Prior to attempting to clarify these or, for that matter, point to the problems that follow in the wake of the incompatibility thesis that is applied to values, the authors would first like to complete the account of the new measure itself.

1 Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 2.

2 *Ibidem*.

3 The standard, *viz.*, “a recognizable purpose” [“et anerkendelsesværdigtformål” in Danish] is the result of a modernized terminology. It replaces expressions like “bad weather” [*cf.* “vejrligt” in Danish]), which nevertheless remain integral components of “a recognizable purpose” in the case of full-face covering clothing and various other types of (full-face covering) accessory, equipment and gear. *See id.*, at 1, 3, 7, 13, 17; Ministry of Justice, Draft of the Justice Minister, 6 February 2018, *available at* <http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2018/lovforslag_tildae_kningsforbud.pdf> [hereinafter Draft of the Justice Minister].

4 The ambiguity of the “go home” instruction is obvious in the case of Denmark and Muslim women, who typically come from the Middle East and North Africa. However, the geographical scope of the instruction is allegedly narrow, meaning that the relevant type of law-enforcement is intended – according to the Danish minister of justice – to apply to “women who live in the vicinity”, that is, near the public space, place or building where they violated the ban. *See* Staff Writer, *Pape: Politiet skal ikke tvinge burkaer af kvinder*, B.T., 18 April 2018, *available at* <<https://www.bt.dk/politik/pape-politiet-skal-ikke-tvinge-burkaer-af-kvinder>>.

II. Danish Law L 219: Fines for the Unfree

On 31 May of 2018, the government of the Kingdom of Denmark secured a majority vote in the national parliament at Christiansborg Castle in favor of law L 219. By imposing, through a legal codification process, a blanket ban on the practice of wearing the *burqa* or the *niqab* in public, law L 219 prohibits Islamic full-face veils in schools, universities and other (public) places of education and employment, just as access to (public) transportation, (public) streets, pavements, paths, parks and squares are regulated by the implied mandatory transparency measure, together with (public) shopping areas, services, municipalities, and all other (public) institutions that fall under the government's jurisdiction. Muslim women, who may for example wish to worship at their local Mosque in Copenhagen, have to be aware of the demarcation of private *versus* public that regulates their interaction with other people before actually entering the destination space, place, area or building of their choice (*cf.* Mosque). If they take a Danish Movia bus or a DSB train (both of which are state-owned and -controlled), they cannot wear the *burqa* or the *niqab* while traveling to the Mosque. If they collect their children from the nursery or kindergarten on the way home, they have to continue to obey by the law until they finally arrive at their own (private) residence or, alternatively, are offered a lift in a private car.

The new law comes into force on 1 August of 2018.³ If women

¹The parliament recorded a 75-30 vote with 74 absentees. See National Parliament, Afstemning nr. 452 [Vote no. 452], available at <<http://www.ft.dk/samling/20171/afstem/452.htm>>. For the wording of the law, see National Parliament Ban of 31 May 2018, *supra* note 1. Note that the ban was originally presented by the Danish People's Party (DF) in 2009. Note also that the same right-wing and nationalist party interprets law L 219 as a stepping stone for future proscriptions, which should include all (Islamic) headscarfs. See Steen A. Jørgensen & Michael Hjøllund, *DF er tilfreds med regeringens maskeringsforbud: "En sejr"*, Politik, 2 June 2018, available at <<https://jyllands-posten.dk/politik/ECE10283254/df-er-tilfreds-med-regeringens-maskeringsforbud-en-sejr>>.

²Ministry of Justice, Faktaakt [Fact Sheet], available at <http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2018/faktaark_tildækningsforbud_060218.pdf> (for examples of public *versus* private means of transportation) [hereinafter Fact Sheet of the Ministry of Justice]; Rikke Gjøll Mansø, *Nu er det vedtaget: Fremover udløser det en bøde at bære burka og niqab på gaden*, DR, 31 May 2018, available at <<https://www.dr.dk/nyheder/politik/nu-er-det-vedtaget-fremover-udloeser-det-en-boede-baere-burka-og-niqab-paa-gaden>>.

³National Parliament Ban of 31 May 2018, *supra* note 1; Ritzau, *Danish parliament passes ban on burqa and niqab*, The Local (Den.), 31 May 2018, available at <<https://www.thelocal.dk/20180531/danish-parliament-passes-ban-on-burqa-and-niqab>> [hereinafter Ritzau].

violate the Danish ban by covering their face with the *burqa* or the *niqab*, the illegal action will most likely not result in the forcible removal of the relevant type of garment or clothing, according to Denmark's Justice Minister Pape Poulsen.¹ Instead, fines will be the outcome; 1,000 DKK (USD \$156) for the first offence whereas repeat offenders could be fined up to (a ten times higher fine of) 10,000 DKK (USD \$1,568) for the fourth violation, as well as any additional violation/s that may be committed.² In response to opposition to harsher measures of punishment, a provision allowing prison sentences was removed in spite of a push – from the Danish People's Party – to negotiate an amendment to that same effect.³ Notwithstanding, the

¹Pape Poulsen also stated that “it will be up to the police officers to use their ‘common sense’” in situations where they are dealing with women who violate the ban. In practice, so the Danish justice minister claimed, police officers will tell women “to go home” although they can instruct women to remove their veil or, alternatively, take the violators to the police station. *See id*; James Hingle, *Denmark bans burqas and niqabs*, Talk Radio News, 31 May 2018, available at <<http://talkradio.co.uk/news/denmark-bans-burqas-and-niqabs-18053126412>>; Neil Baker & Sofia Petkar, *Lifting the Veil*, The Sun, 3 June 2018, available at <<http://anayemeni.net/show2514640.html>>; Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 6 (*cf.* 3.2.4. of L 209, which provides for forceful removal of garment or person (“Det foreslåede tildækningsforbud vil i praksis indebære, at politiet efter omstændighederne kan påbyde en person at bringe den ulovlige adfærd til ophør, det vil sige f.eks. fjerne en beklædningsgenstand, der skjuler ansigtet, eller at fjerne sig fra et offentligt sted, ligesom politiet vil kunne indbringe personen til en politistation”)); Nikolaj Rytgaard, *Jurister prygler Papes forbud mod burkaer*, Jyllands-Posten, 3 June 2018, available at <<https://jyllands-posten.dk/indland/politiretsvaesen/ECE10387970/jurister-prygler-papes-forbud-mod-burkaer>> (for legal experts' complaint to the Danish Minister of Justice that it is “unclear” if arrest practices are or are not expected).

²Fact Sheet of the Ministry, *supra* note 12; Ritzau, *supra* note 13.

³Steen A. Jørgensen, *Regering dropper fængselsstraf for at gå med burka*, Jyllands-Posten, 2 June 2018, available at <<https://jyllands-posten.dk/politik/ECE10282352/regeringen-dropper-faengselsstraf-for-at-gaa-med-burka>>.

Note that the Danish People's Party proposed an amendment whereby violators, who “had already been fined” should be imprisoned for 5 to 14 days *qua* repeat offenders, with a reference to the argument that “political Islam” should be rejected and that there ideally should be “no consideration” of Muslim culture. *See* Parliamentary Report of 24 May 2018, *supra* note 2, at 2.

While the new ban provides for fines, *cf.* § 134 c. of L 219 whereby “den, som på offentligt sted bærer en beklædningsgenstand, der skjuler vedkommendes ansigt, straffes med bøde”, various other penal norms are also applicable in certain circumstances. More precisely, prison sentences of up to 6 months may result for individuals who obstruct (justice by obstructing) the public officials' identification of them (under § 134 b. 1) in public places, and 2 to 4 years may be given to those who force (with the use of violence or threats) other people (under § 260 1 and 2) to wear the *burqa* or the *niqab*, thereby illegally restricting personal freedom with “negative social control” measures. *See* Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 6; Hingle, *supra* note 14; The Associated Press, *Denmark Joins Some European Nations in Banning Burqa, Niqab*, The New York Times, 31 May 2018, available at <<https://www.nytimes.com/aponline/2018/05/31/world/europe/ap-eu-denmark-burqa-ban.html>>.

general argument that the prohibition's simplified deprivation of liberty was necessary in order to prevent the loss of an even greater number of rights, *inter alia*, to individual freedoms, united the supporters, which included the Danish People's Party as well as the Social Democratic Party. The shared effort to combat "extremism" in terms of "Islamism," *i.e.*, the Islamic ideology of oppression constituted, therefore, a key motivation for the censorship response.¹

The women who choose to wear the *burqa* or the *niqab* belong to a minority or, perhaps more correctly, a "subculture" within a minority -- consisting of 50 to 200 individuals. The individuals in question are "conservative" Muslim women with preferences for modesty in public places, as based on their interpretation of the Qur'an.³ However, those

1 Parliamentary Report of 24 May 2018, *supra* note 2, at 2; AFP, *Denmark bans full-face veil in public spaces*, The Peninsula: Qatar's Daily Newspaper, 31 May 2018, available at <<https://www.thepeninsulaqatar.com/article/31/05/2018/Denmark-bans-full-face-veil-in-public-spaces>>.

2 According to a 2013 report, the number of wearers corresponds to about 0.1 or 0.2% of Muslim women in Denmark. In its 2018 response (on the ban) to the Ministry of Justice, Amnesty International states that the number is "50 to 200" (full-face wearers). See Margit Warburg, Birgitte Schepelehn Johansen & Kate Østergaard, *Counting niqabs and burqas in Denmark: Methodological Aspects of Quantifying Rare and Elusive Religious Sub-cultures*, 28 JOURNAL OF CONTEMPORARY RELIGION 33 (2013); Amnesty International, Høringssvar over Forslag til Lov om Ændring af Straffeloven (Tildækningsforbud) [Response to Proposal for Amendment of the Penal Law (Cover Ban)], Sagsnr. 2017-0090 0233, 6 March 2018, available

at <<http://www.ft.dk/samling/20171/almdel/REU/bilag/201/1864820.pdf>> [hereinafter Amnesty International Response to Proposal]; Index Mundi, Denmark's Demographics Profile 2018, available

at <https://www.indexmundi.com/denmark/demographics_profile.html> (for 4% Muslim population in Denmark); World Population Review, Denmark 2018, available at <<http://worldpopulationreview.com/countries/denmark-population>> (for 90% Danish population and 10% immigrants and/or descendants of recent immigrants "most of whom came from Turkey, Somalia, Iraq, South Asia, the Middle East, and Bosnia and Herzegovina. About 34% of the non-Danish citizens have a Western background").

An admission to the small number of *burqa* or *niqab*-wearing women came from the justice minister in February of 2018. In an interview, he stated that "I don't think there are many who wear the burqa here in Denmark. But if you do, you should be punished with a fine". See Staff Writer, *Denmark Bans Full-Face Veil in Public Spaces*, The Globe Post: News That Matter, 31 May 2018, available

at <<https://www.theglobepost.com/2018/05/31/denmark-bans-veil>>; Carol Kuruvilla, *Danish Government Proposes Ban On Full-Face Veils*, HuffPost, 2 February 2018 (updated 2 June 2018), available at <https://www.huffingtonpost.com/entry/denmark-full-face-veil-ban_us_5a7b778ae4b0c6726e0f0ba6> (for an estimated number of *burqa* or *niqab* wearers of 200).

3 The Associated Press (The New York Times), *supra* note 16.

same preferences clash with the values in Denmark defined as a democratic and secular society.¹ The implied lack of consideration could arguably be said to be (politically-)religiously selective, *inter alia*, because turbans are *not* banned. Apparently, these do not subtract sufficiently from transparency to make them a priority, although it is undeniable that turbans “are not Danish”. Furthermore, the Jewish skullcap (*cf. kippah* or *yarmulke*) is non-controversial by virtue of leaving the entire face open. It is the combination of the coverage factor *cum* extent (*cf.* full-face) and the exoticness of the garment (*cf.* “not Danish”) that makes the difference. It does not follow from this, of course, that other people who are not permitted to wear their garments will feel – upon comparison – as equals. What is more, if law-making is an instance of value politics, the neutrality premise is precluded beforehand. By logical extension, *our* comprehension of law L 219 is bound to be a matter of *their* negative signal to us.

The new legislation does not mention, *expressis verbis*, Islam, Islamic veils and/or Muslim women. Law L 219 states that “anyone who wears a garment that hides the face in public will be punished with a fine”.² Thus, people who wear false beards are also subject to punishment.³ Consulting the Fact Sheet from the Danish Ministry of Justice, only three types of garments are mentioned by name, though, in connection with examples of violations. These are as follows: the *burqa*, the *niqab*, and *balaclavas* – which the Danes primarily associate with bank robbers and burglars.⁴ Concerning interpretation or, *per* the Danish government’s terminology, comprehension as facilitated by

1 While the Danish MPs explicitly debated Denmark as a “democratic” society in the course of negotiating the new law, no specific and written reference was made to the country’s secular as opposed to sectarian orientation. It appears that secularism is a tacit premise whereby religion should be treated as a private matter. See Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 10; Emil Gjerding Nielson & Teis Jensen, *Danish Parliament bans the wearing of face veils in public*, Reuters (World News), 31 May 31 2018, available at <<https://www.reuters.com/article/us-denmark-religion/danish-parliament-bans-the-wearing-of-face-veils-in-public-idUSKCN1IW115>>.

2 National Parliament Ban of 31 May 2018, *supra* note 1; Staff Writer, BBC News, *Denmark passes ban on niqabs and burkas*, 31 May 2018, available at <<https://www.bbc.com/news/world-europe-44319921>> [hereinafter BBC News].

3 Camille Bas-Wohlert, *Denmark bans Islamic full-face veil in public spaces*, The Times of Israel, 31 May 2018, available at <<https://www.timesofisrael.com/denmark-bans-islamic-full-face-veil-in-public-spaces/>>; Staff Writer, *Denmark passes law banning burqa and niqab*, The Guardian, 31 May 2018, available at <<https://www.theguardian.com/world/2018/may/31/denmark-passes-law-banning-burqa-and-niqab>>.

4 Fact Sheet of the Ministry of Justice, *supra* note 12.

signals, it is difficult therefore to *not infer* that law L 219 is targeting Muslim women who wear the *burqa* or the *niqab*.

On condition that full-face covering serves “a recognizable purpose” exemptions may be granted, as already alluded to in the Introduction.¹ The nature of these cover, *inter alia*, carnivals, Halloween, cold weather, and compliance with other legal requirements, such as traffic rules in the case of helmets for motorcyclists.² The use of full-face Islamic veils may also be deemed reasonable and therefore permissible, *e.g.*, in the case of a wedding or a funeral or, more broadly, a religious ceremony or ritual. If that which is reasonable in a concrete situation concerning the use of garments and, *ipso facto*, the new standard is in dispute, the Danish courts are the appropriate bodies to resolve the issue.⁴

Setting aside the challenge of conceptualizing the concept of public places *in contradistinction to* religious ones like Mosques, the ban on full-face Islamic veils is substantiated by the assumption that that particular individual is “one of us” *if and only if* she agrees to public *cum* face-recognition interaction, dialogue, and communication strategies. Hence, failure to satisfy the relevant transparency requirement is fatal in the sense that it determines one’s membership. People who are hiding (their face) cannot be counted. And, people who cannot be counted, do not wish to co-exist. Instead, they are assumed to prefer alternative, underground and non-participatory (read: undemocratic) life forms, if not cells (*cf.* extremist types of Islamic parallel society). The point is that the distinction between *our* suspicion and *their* sincerity of commitment is mediated by conduct and behavior that, in the final analysis, serve to confirm the cultural (ly supreme) authority of the Danish people within their own territory. For the same reason, no promise of being counted as an equal follows from a decision to unveil.⁵ That said, to *not discontinue* value clashes (like veiling) that, as a minimum, question the mentioned authority is tantamount

¹*Infra* p. 1.

²Fact Sheet of the Ministry of Justice, *supra* note 12.

³Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3.

⁴Fact Sheet of the Ministry of Justice, *supra* note 12.

⁵For the Danish cultural norm called the Law of Jante and its non-tolerance effect on the other, see Anja Matwijkiw & Bronik Matwijkiw, *International Relations Begin at Home: A Humanitarian Learning Lesson from the Kingdom of Denmark*, forthcoming in INTERNATIONAL STUDIES JOURNAL (2018) [hereinafter *International Relations Begin at Home*].

to “taking on the Danes”, *i.e.*, to (signal that one is actually or potentially) working against the conservation of a homogenous society, as established by democratic consensus. The leap to a declaration of hostility is a matter of formality. In turn, this means that the distinction between wearing the *burqa* and (different types of) terrorism is blurred. In the negotiations that led up to the adoption of law L 219, Danish MPs made reference to terrorism in the context of “other forms of criminality”, without further qualification.¹

The above account makes it possible to understand and explain why law L 219 is widely referred to in terms of the *burqa* ban.² What is more, while the threat the Islamic dress code poses to “Danish culture and the foundations on which Denmark is built” is qualitative in nature, it can allegedly evolve into a quantitative rights-elimination tool for ordinary Danish citizens (*cf.* ideology of oppression).³ This suggests that Muslim women’s *niqab* or *burqa* undermine the various democratic freedoms of mainstream society by virtue of misusing or, worse still, abusing personal autonomy to express themselves in an inappropriate way.⁴

¹Parliamentary Report of 24 May 2018, *supra* note 2, at 2.

Note that the necessity and effectiveness of the *burqa* ban has not been confirmed. To the contrary, studies from other European countries show that “the burqa bans increase isolation for many women and in fact may push an alienated minority further away. In some cases, the bans may contribute to security problems rather than help solve them”. In Georgia, U.S.A., a bill to ban full-face veils was withdrawn amidst controversy and recommendations like “We should not aid and give to the radicals a gift”. See Adam Taylor, *Banning Burqas isn’t a sensible response to terrorism*, The Washington Post, 12 August 2016, available at <https://www.washingtonpost.com/news/worldviews/wp/2016/08/12/banning-burqas-isnt-a-sensible-response-to-terrorism/?utm_term=.b5c06a23c0b2>; Ralph Ellis, *Georgia Lawmaker withdraws bill to restrict burqas*, CNN, 17 November, 2016, available at <<https://www.cnn.com/2016/11/17/us/burqa-ban-bill-georgia-trnd/index.html>>.

²As the paradigm for impermissible face veils, the *burqa* covers the eyes with a mesh whereas the *niqab* leaves them uncovered. Alternatives for Muslim women include the *hijab*, the *dupatta*, and the *chador* – all of which show the wearer’s face. Given that law L 219 is drafted on the assumption that the face is defined as “the part of the head that is demarcated by the forehead, the chin and the ears”, the listed alternatives may be disqualified too because they cover the ears. See Draft of the Justice Minister, *supra* note 9.

³Ritzau, *supra* note 13.

⁴The distinction between “misusing” and “abusing” is terminologically subtle in so far as it depends upon another distinction, *viz.*, the one between victims (who misuse their personal autonomy because they (unintentionally) do not know how to use their autonomy in the first instance (which is why they are victims)) and exponents of so-called political Islam, → ← including potential terrorists, who (intentionally) abuse their personal autonomy to counteract the Danish values, social cohesion, and respect for the society and community. Theoretically and practically, defenders of the ban seem to have an explanation problem to the extent that they accommodate both sides of the distinction while, at the same time,

In 2010, the Danish Prime Minister Lars Løkke Rasmussen formulated the problem that the Danish government “wants to fight” by using law as an instrument:

[T]he *burqa* and the *niqab* do not have their place in the Danish society. They symbolize a conception of the woman and of humanity to which we are fundamentally opposed...¹

Besides the principle of gender equality, the argument about “intolerance” towards (*our*) values that conflict with political Islam is emphasized.² That said, the drafters and defenders of law L 219 concede that the new instrument and piece of legislation comes with a value-oriented tension (*cf.* “modsatrettedekriterier” in Danish).³ To be resolved, the interest in avoiding violations of constitutional provisions, especially §67 (that guarantees freedom of religion), §70 (that precludes discrimination in the case of civil and political rights) and §77 (that protects freedom of expression) has to be balanced with public order (*cf.* “sædeligheden eller den offentlige orden” in Danish) through consideration of social interaction and co-existence.⁴ Furthermore, at the international level, the Kingdom of Denmark’s stakes in the

placing an emphasis on the oppression of Muslim women, meaning that they (primarily) claim that they possess no personal autonomy.

1 Library of Congress, *available at* <<https://www.loc.gov/law/help/france-veil.php#t15>>.

Note that the “passionate” nature of the debate in Denmark is mentioned in connection with the country’s emphasis on the “principle of gender equality”, thereby also signaling that women are not less than men in terms of humanity.

Note also that Amnesty International considered the fact that “[k]ey arguments from proponents of the new law centered on an alleged need to ensure that no Muslim women or girls are being forced to cover their faces”. See Amnesty International, Press Release, 31 May 2018, *available at* <<https://www.amnesty.org/en/press-releases/2018/05/denmark-face-veil-ban-a-discriminatory-violation-of-womens-rights>>.

2 Parliamentary Report of 24 May 2018, *supra* note 2, at 2 (for intolerance and political Islam); Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 6 (for “honor-related crimes” as examples that affect not only Muslims but also Danish stakeholders by virtue of entailing a de- or resocialization risk which, in turn, cause Danish values to erode).

3 Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 4.

4 *Id.*, at 8-9; Danish Constitution of 5 June 1953, *supra* note 1 (for preclusion of discrimination on religious grounds, *cf.* § 70: ”Ingen kan på grund af sin trosbekendelse eller afstamning berøves adgang til den fulde nydelse af borgerlige og politiske rettigheder eller unddrage sig opfyldelsen af nogen almindelig borgerpligt”); Nicolas S. Nielsen, *Jurister skriver sort på hvidt Burkaforbud strider mod grundloven*, DR, 2 February 2018, ←*available at* <<https://www.dr.dk/nyheder/politik/jurister-skriver-sort-paa-hvidt-burkaforbud-strider-mod-grundloven>> (for legal experts’ claim that the ban has to go beyond the *burqa* and the *niqab* to avoid violations of the Danish Constitution).

European Convention of Human Rights, more precisely, Article 8 (interpreted as a right (to privacy, family life, home and correspondence) that encompasses the freedom to determine one's own physical appearance), Article 9 (interpreted as a right (to freedom of thought and religion) that protects the use of religious garments) as well as Article 10 (interpreted as a right (to freedom of expression) that may be, *de jure*, restricted in a democratic society with a reference to, *inter alia*, public safety, protection of health or morale or the rights (and freedoms) of other people ("den offentligt tryghed, beskyttelse af sundheden eller sædeligheden eller beskyttelse af andres rettigheder" in Danish) on condition that the measure fulfills Article 14 (whereby discrimination is prohibited).¹ Key parts part of the substantiation, as provided by the Danish Ministry of Justice, draws directly on the judicial reasoning that the ECtHR presented in its decisions of, respectively, *S.A.S. v. France*, *Belkacemi/Oussar v. Belgium*, and *Dakir v. Belgium*.² It follows that *it is, in particular, the right of the Danes* to "live in a public space that makes interaction easier" which is infringed by Islamic full-face veils.³

Hence, as a choice of society, the rationale for law L 219 derives from teleological outlooks, more precisely utilitarianism. Ethically, this creates a contrast with deontological doctrine whereby the rights of that particular individual should not be sacrificed for the sake of the majority in place P. On the premises of utilitarianism, however, dignity on the basis of humanity should *not* be allowed to trump social utility.⁴ That said, if an auxiliary methodology integrates a negative notion of humanity, *viz.*, the idea or rather ideology of (Islamic) intolerance, the split between *us* and *them* becomes a matter of good and bad rather than merely alien values that are accompanied by (Danish) incapacitation

¹Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 9-10.

²*Id.*, at 10-11.

Note that the Danish Prime Minister Lars Løkke Rasmussen's speech for the European Council's Committee of Ministers – on 18 May 2018 – highlighted the objective of using the Danish Chairmanship of the Committee of Ministers (from November 2017 to May 2018) to reform the European Human Rights Court and Convention, with a view to limiting rights-conferring articles. See Statsministeriet [Ministry of the State], Statsminister Lars Løkke Rasmussens tale ved det årlige møde i Europarådets Ministerkomité i Helsingør den 18. Maj 2018 [Danish Prime Minister's speech at the European Council's Committee of Ministers], available at <<http://www.stm.dk/p/14687.htm>>.

³Parliamentary Report of 24 May 2018, *supra* note 2, at 10.

⁴This is also why a liberal democracy may be defeated by authoritarian or totalitarian in "public interest" arguments masquerading as instances of paternalism.

and, *ipso facto*, resentment. The difference that this makes – in terms of the extra-legal or, *per* Ross, extra-systematic judgment of the ban – is a subtle but significant one.¹

More generally, the Danes cannot function well with *burqa*-wearers. This is also why, according to the Danish center-right VLAK-coalition government, the important distinction between appropriate *versus* inappropriate is mediated by two other sets of categories *cum* contradictions, namely Western and non-Western, and Muslim and non-Muslim.² Hence, the specific criteria that determine inappropriateness are “non-Western” and “Muslim”. In turn, these categories refer to stakeholders from the Middle East and North Africa.

These two parts of the world describe the asylum-seekers and refugees which Denmark has a “desire to avoid”, according to Danish foreign policy observer and commentator Thomas Gammeltoft-Hansen.³ Despite the fact that asylum-seekers and refugees from third-party conflicts have fled their country for humanitarian reasons, the Kingdom of Denmark has an uncompromising record of illiberal and restrictive policies which are tailored to two main objectives: (1) to make the protection conditions, again according to Gammeltoft-Hansen’s description, as “unattractive” or “unappealing” as possible for

1 To be a *burqa*phobe is wrong, but to claim our own room or space is not. Notwithstanding, the general jurisprudence that underpins the legal reasoning cannot but be construed as an instance of instrumentalism which, following the premises of Judith Shklar, relies on illiberal rather than (as it should) liberal premises. See Anja Matwijkiw, *Introduction. On the Philosophy of International Criminal law*, in (special issue entitled) PHILOSOPHY OF INTERNATIONAL CRIMINAL LAW, 14/4-5 INTERNATIONAL CRIMINAL LAW REVIEW 669, 683(2014).

2 Proof of this was even delivered by high-ranking politicians, such as the Danish Minister of Housing, Integration and Immigration Inger Støjberg, the single most popular MP in Denmark. She decided to republish a satirical cartoon of Prophet Mohammed on her own iPad in spite of the fact that it had caused a foreign policy crisis when it was originally published. See AFP, *Denmark’s immigration minister uses cartoon of Prophet Mohammad as iPad background*, The Independent, 26 September 2017, available at <<https://www.independent.co.uk/news/world/europe/denmark-immigration-minister-prophet-mohammad-ipad-background-inger-stojberg-a7968121.html>>.

3 Thomas Gammeltoft-Hansen, *Refugee policy as ‘negative nation branding:’ the case of Denmark and the Nordics*, 99 DANISH FOREIGN POLICY YEARBOOK: 99, 109 (2017).

asylum-seekers and refugees, and (2) to make the transition from status as asylum-seekers and refugees to immigrants as difficult as possible.¹ It follows that the *burqa* ban is just another deterrence strategy.² As pointed out by Sarah Marsh in *The Guardian*, the conclusion that “faith communities are not welcome” seems to follow automatically.³

Defenders of the ban counter-argue that “[t]his is *not* a ban on religious clothing, this is a ban on masking”.⁴ However, the lack of a clear demarcation line between the *burqa* and associations with alien and un-Danish beliefs, customs and ways is undeniable. Consequently it is difficult, if not impossible, to separate a criticism of “masking” practices from a criticism of *them*.

In the words of Justice Minister Pape Poulsen:

[S]ome people do not want to be a part of Danish society and want to create parallel societies with their own norms and rules.

We want to live in a society where we can see each other in the eyes. Where we see each other's faces in an open democracy. As Danes, this

Id., at 100, 108, 118.

Note that the fact and paradox that the Danish VLAK-coalition government includes self-proclaimed “liberal” parties as supporters of economic inequality, a reverse “Robin Hood” agenda, and a “gradual loss of freedom” has been pointed out in the media. See Sebastian Abrahamsen, Morten Frich & Morten Wulff, *Trekloeverregeringen springer us som liberal*, Information, 1 December 2016, available at <<https://www.information.dk/indland/2016/11/trekloeverregeringen-springer-liberal>>; Søren Kenner, *Burkaforbuddet og det gradvise tab af frihed i det danske demokrati*, Ræson, 3 June 2018, available at <<http://raeson.dk/2018/soeren-kenner-burkaforbud-og-det-gradvise-tab-af-frihed-i-det-danske-demokrati>>.

² For an analysis of the recent measures to reduce the number and cost of asylum-seekers, refugees and immigrants in general, see Matwijkiw & Matwijkiw, *International Relations Begin at Home*, *supra* note 28.

³ Sarah Marsh, *Faith communities are not welcome in Europe*, *The Guardian*, 14 March 2017, available at <<https://www.theguardian.com/world/2017/mar/14/faith-communities-are-not-welcome-in-europe-views-on-the-headscarf-ban-ruling>>.

One woman, Ayesha Haleem, said that “I’d rather leave the country than take my veil off”. See AFP, *Denmark becomes latest European country to ban the burqa*, *Herald Sun*, 31 May 2018, available at <<https://www.heraldsun.com.au/news/world/denmark-becomes-latest-european-country-to-ban-the-burqa/news-story/460291df932a963cdb7e830ddee8a9b1>>.

⁴ Eivind Jensen, *Denmark set to ban the burqa despite fears for religious freedom*, *The Independent*, 6 October 2017, available at <<https://www.independent.co.uk/news/world/europe/denmark-ban-full-face-covering-burqa-jakob-ellemann-jensen-a7986561.html>>; Bang & Raatz, *supra* note 5 (for the Danish government’s inconsistency as an outcome of its own concession – that the new masking ban is a *burqa* ban).

is the way we must be together.¹

The use of “must” entails necessity. There is no choice, no alternative.

III. What’s Wrong with *Them?* The Problem as Seen by *Us*

In international criminal law, prominent thinkers and experts have warned against the idea of value neutrality as a too naïve notion in the contemporary era. While Danish value politics, by definition, makes no assumptions to the contrary effect, it is still not exempt from the area of ideology, as will also be detailed in this section. Consequently, talk about *them/us* becomes inescapable, albeit also a clarification tool for the interpretation of the consideration or toleration that *should* or, as the case may be, *should not* be extended.

The Danish stakeholders in the *burqa* controversy can be divided into the following: (1) the center-right VLAK-coalition government whose political stake consists in the conservation of Danish values (*cf.* value politics); (2) pro-government citizens who embrace a strict anti-refugee and anti-immigration program, in addition to law L 219; (3) stakeholders with liberal, humanist and universalist pro-human rights convictions that compete and contrast with the otherwise popular(ist) ideas about (cultural, political, legal) non-representation and non-inclusion on the basis of diversity;² and (4) marginalized Muslim women without much, if any, support outside of their own and narrow circle-concentric environment.

Danish MPs, who are members of the VLAK-government or who back its policymaking, interpret values along the lines of the

1 Søren Kern, *Denmark approves burqa ban*, Gastone Institute, 1 June 2018, available at <<https://www.gastoneinstitute.org/12420/denmark-approves-burka-ban>>.

2 M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS* 178 (2008).

Note that the implications of a so-called policy of neutrality in employment and occupation that the European Court of Justice (ECJ) has recently ruled on (*e.g.* Samira Achbita, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, Case C-157-15, Grand Chamber, Judgment, 14 March 2017) and, in the case of Denmark, the argument that veiled Muslim women are unemployable would have to be reconsidered in the light of Bassiouni’s doctrine --- without any naïve assumptions about the substantive and procedural aspects of the law – for (regarding the latter) legal values like impartiality and objectivity cannot but gravitate towards other familiar values, including neutrality.

3 popular(ist) ideas covers so-called symbolic politics that aspire to satisfy the lower instincts in voters, as well as ideas that appeal to the majority on the basis of the “important interests” that they themselves wish to see accommodated.

incompatibility thesis, as presented in philosophical value-theory.¹ This is to say that they believe that it is necessary to make a choice between Danish and un-Danish values --- for the logic that underpins the incompatibility thesis is one that cannot but distribute values along the lines of either winners or losers. To remain passive in the face of challenges to the prevailing ideology is to allow *their* values to checkmate *our* interests to the extent that the power balance is reversed, to *their* advantage. If so, the new losers cannot expect representation and inclusion --- for the incompatibility factor will prevent this. The point is that representation and inclusion are *on the basis* of values. To the extent that the rulers *cum* controllers in Denmark explicitly subsume their own approach under the value politics phenomenon, there seems to be no escape from a tentative conclusion about *realpolitik* as a realist and radical strategy that uses justice as a bargaining chip for *status quo*-conserving values, *inter alia*, peace or a homogenous society or “social interaction and coexistence”.²

In the light of this, it is understandable that Danish MPs and their supporters and voters (*cf.* 2) consider Danish values to be the key to “social cohesion”. As a society, Denmark must therefore try to control, limit and censure what amounts to asocial values and their carriers (*cf.* the other) in public places, especially if these are perceived to be or go

1 Anja Matwijkiw & Bronik Matwijkiw, *Biolaw Stakes, Activist Jurisprudence, and (Presumed) Limits for Protected Interests*, in (special issue) PAVING THE BIOLAW PATH IN INTERNATIONAL CRIMINAL LAW, 17/6 INTERNATIONAL CRIMINAL LAW REVIEW 1070 (Anja Matwijkiw ed., 2017).

2 Nielson & Jensen, *supra* note 20.

3 Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 3-4 (for social interaction and coexistence as the goal and value that should be secured), 8 (for the reference to social interaction and coexistence as a relevant consideration (“saglighedenssyn” in Danish) to justify the prohibition under the Danish Constitution, 10-11 (for the Danish government’s comparison with France and Belgium); Giuliana Ziccardi Capaldo, *The Law of the Global Community: An Integrated System to Enforce “Public” International Law*, 1 GLOBAL COMMUNITY YILJ 71, 75, 77, 104, 115, 119 (2001) (for the distinction between controllers (rulers) and the controlled (the ruled) in the area of international law and international relations and the way that a “directorship” negatively affects the verticality pillar (*cf.* democracy), thereby transforming the original distinction into a separation (ideology). The (illiberal) Right is Might component this entails is an analogy to the superpower philosophy or, to accommodate the national level, an authoritarian or totalitarian regime.

4 Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 2.

against “respect for *our* community”.)¹

In and of itself, law L 219 is evidence of the (alleged) link between masking and disrespect. Citing Minister of Justice Pape Poulsen:

In terms of value, I see a discussion of what kind of society we should have with the roots and culture we have, that we don't cover our face and eyes, we must be able to see each other and we must also be able to see each other's facial expressions, it's a value in Denmark.²

Obviously, the statement has to be interpreted in the context of the incompatibility thesis, meaning that a zero-sum outcome (*necessarily*) follows. Respect for the Danish community or society not only requires transparent (read: unveiled) communication, dialogue, and interaction. To wear the *burqa* or the *niqab* is tantamount to a breach of the transparency/human trust(value) constellation. By directing the implied

¹*Ibidem*. [authors' emphasis].

²BBC News, *supra* note 21.

³Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 3.

On the premises of stakeholder jurisprudence, values presuppose reciprocity as a protection against illiberal Right is Might implications. Hence, rulers/controllers as well as the ruled/controlled should respect the transparency requirement. Notwithstanding, the Danish Prime Minister Lars Løkke Rasmussen has been criticized for his own lack of transparency, just as the country and its government is faced with an ethics scandal in the making. According to Transparency International, Denmark has very few measures of scrutiny and oversight in place and, consequently, Danish MPs can get away with impunity. Furthermore, the absence of scrutiny and oversight enables Denmark to maintain a high ranking (as no. 2) on the world index for transparency, although this is an inaccurate reflection of the real state of affairs. Bad practices include corruption and *not making it legally compulsory* for MPs to register their business interests to avoid (unethical) pay-to-play politics. In the case of the Danish PM, he was also quoted for stating that when he accepted the office, he was honoring the (Danish) “tradition whereby the Prime Minister of Denmark must be named Rasmussen” (as opposed to a non-Danish or, if descending from a too alien part of the world, un-Danish name). The implied type of political nepotism Løkke Rasmussen wants to uphold may be one of the root-causes for the government's willingness to embark on policymaking that marginalizes and disempowers stakeholders that potentially threaten to upset the power balance of the *status quo*. See Transparency International, available at <[https:// www.transparency.org/ country/DNK](https://www.transparency.org/country/DNK)>; Stephen Gadd, *Straight, No Chaser: Transparency Getting → ← Murky*, CPH Post, 31 March 2018, available at <[http:// cphpost.dk/ opinion/straight-no-chaser-transparency-getting-murky.html](http://cphpost.dk/opinion/straight-no-chaser-transparency-getting-murky.html)>; Martin Højen, *Lars Løkke Rasmussen forsømt familien*, Danmarks

reciprocity conditionality (with respect and trust), the argument is elevated to the *meta*-level where democracy is supposedly tested by principles. If Muslim women use full-face veils, they not only suspend the basic rules; they also add a suspicion on behalf of the respectful members of the civil community at the national level --- for only individuals with bad intentions are assumed to cover their face. Worse still perhaps, the message Muslim women send *if and when* they choose to wear the *burqa* or the *niqab* is that “I don’t want to be a part of the Danish society ... I reject its values!”³ After this, the surrounding society has no choice but to interpret the veil as a serious, if only potential, risk factor. Together with the survival of *our way*, the national security of Denmark is at stake.⁴

Besides functioning as a measure against political Islam and, more broadly, the “Islamicisation of Denmark” in terms of values,⁴ law L 219

Royale Ugeblad: Billedbladet, 24 December 2009, *available at* <<https://www.billedbladet.dk/kendte/danmark/lars-loekke-rasmussen-forsoemte-familien>>; Ritzau, *Antikorruptionsgruppe: Løkkebøråbne op om gaverfratfisker*, Berlingske, 18 January 2018, *available at* <<https://www.b.dk/politiko/antikorrupsionsgruppe-loekke-boer-aabne-op-om-gaver-fra-fiskere>> (for the Danish PM’s refusal to be transparent about gifts received in the course of conducting political negotiations); Johan Blem Larsen & Morten Henriksen, *Samrådotsommerhus: Løkkepåanklagebænkeni 60 minutter*, DR, 31 January 2018, *available at* <<https://www.dr.dk/nyheder/politik/samraad-og-sommerhus-loekke-paa-anklagebaenken-i-60-minutter>> (for the Danish PM’s refusal to be transparent about his personal business associations and legal experts’ criticism of his unwillingness to answer without making “incorrect or deceptive” statements).

If full-face veils signal danger and a corresponding need to be alert, it is arguably an advantage (for public safety/security) that Muslim women wear these to enable the relevant public officials and authorities (police, *etc.*) to be optimally prepared for any criminal consequences of political Islam. For the criminalization effect that emerges from listing the *burqa* and the *niqab* next to *balaclavas* – which the Danes primarily associate with bank robbers and burglars, *see supra* note 23.

²The rejection proves the existence of or, alternatively, helps to establish “a parallel society with its own values and norms”. *See* Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 2.

³Sasha Ingber, *Denmark Bans The Burqas And Niqabs*, National Public Radio (npr), 31 May 2018, *available at* <<https://www.npr.org/sections/thetwo-way/2018/05/31/615758652/denmark-bans-the-burqa-and-niqab>>.

⁴Hillary Margolis, *Denmark’s Face Veil Ban Latest in Harmful Trend*, Human Rights Watch, 1 June 2018, *available at* <<https://www.hrw.org/news/2018/06/01/denmarks-face-veil-ban>>.

is presented, by its drafters and defenders, as an indirect integration strategy, which is particularly geared towards the objective of combatting oppression of women (*cf.* Muslim women who wear the veil). In Denmark, women do not exist or, more to the point, *should not* live in “anonymity”.¹ Instead, they have a personal identity, which neither should be deconstructed nor cancelled in the public space on account of their gender.

The premise that Muslim women are oppressed raises questions about justice in the sense that – if true – victims (of oppression) are made to *suffer more* in circumstances where they are criminalized, as a direct consequence of law L 219. This is a paradox, of course, and one which is not made smaller by the fact that the reasoning pertaining to integration may turn out to be counter-productive. Muslim women may stay at home from 1 August 2018, the date that the new ban enters into force.² They may avoid all public places, including places of education that have historically contributed to the emancipation of women in Denmark. While making this “free choice”, the women in question cannot but interpret law L 219 as a harsh penalty --- for (the crime called) “being Muslim” in the first instance.

Zainab Ibn Hssain, a twenty-nine old member of the so-called parallel society (in Copenhagen) that the Danish government wants to integrate, denied the truth of the claim that wearing the veil symbolizes the rejection of Danish values or oppression of women. In an interview, she said:

It has nothing to do with integration or that we’re oppressed. For me it is a war on Islam...³

Ms. Hssain, who also reported that she has been yelled at and spat at in public for wearing the *niqab*, concluded:

I feel what they deep down want is for Muslims to leave Denmark.⁴

Assuming that integration does not belong in the legal equation after all, the various critics of the Danish ban (*cf.* 3) may be correct in their

latest-harmful-trend>.

1Ministry of Justice Proposal (and Commentaries) of 11 April 2018, *supra* note 3, at 2.

2According to researchers, there are Muslim women in France who “never go outside” after 2011, the year France introduced its ban. *See* Taylor, *supra* note 29.

3Nielson & Jensen, *supra* note 20.

4*Ibidem*.

Note that the goal of repatriation as opposed to integration is (ideologically) linked with Denmark’s deterrence strategies. *See* Gammeltoft-Hansen, *supra* note 43, at 117.

otherwise strong commentaries. For example, an online discussion in the Danish newspaper *Information* showed that its readers were aware of the fascist or Nazi-style (mis)treatment and humiliation of Muslim women (*cf.* yelling and spitting at them in public) --- something that may escalate and evolve into an even more abusive and violent state of affairs.¹ Interestingly enough, one alternative to the yelling and spitting in public is best described as a reversed analogy to Jean-Paul Sartre's glance of recognition, since (Danish) people may pretend to *not even see them* and, therefore, look away... thereby withholding *their* recognition of The Other. Ethically, this type of conduct and behavior is *incompatible* with respect for an individual as an end in herself, just as it negates all the need-based elements that Abraham H. Maslow deem essential for the self-realization project, including recognition, belongingness, love, *etc.*² To the extent that needs ground human rights

¹ Some readers commented that 31 May 2018 was “a day of shame” whereas others remarked that the ban was “a slippery slope”. Yet other readers stressed that it was “absurd” to the extent that the exercise of freedom of religion should count as an exemption to a law that prohibits masking, meaning that the *burqa* or the *niqab* should have been listed under “a recognizable purpose” by virtue of being religious garments. The fact that the *burqa* and the *niqab* are interpreted – by the Danish MPs and drafters of the ban – as types of masking that represent political Islam means that the intention of their wearers is culturally, socially and legally controlled on the assumption that wearing the *burqa* or the *niqab* is harmful (ideology) for others and/or limits the freedom/s and right/s of others. Finally, readers cited the Danish writer Martin Niemöller (1892-1984), who was arrested and sent to a concentration camp by the Nazis. His famous poem contains a subtle warning against apathy, indifference and passivity in circumstances where The Other is attacked and persecuted:

First they came to take the communists, but I didn't protest, for I wasn't a communist.
Then they came to arrest the union members, but I didn't protest, for I wasn't a union member.

When they imprisoned the socialists, I didn't protest, for I wasn't a socialist.

When they imprisoned the Jews, I didn't protest, for I wasn't a Jew.

When they came for me, there was nobody left to protest.

See Ritzau, *Folketinget gør det ulovligt at bære burka of niqab fra august*, *Information*, 31 May 2018, available at <<https://www.information.dk/telegram/2018/05/folketinget-goer-ulovligt-baere-burka-niqab-august>>.

² JEAN-PAUL SARTRE, *L'ÊTRE ET LE NÉANT. ESSAI D'ONTOLOGIE PHÉNOMÉNOLOGIQUE* (1994) (1943).

³ On Maslow's account of needs, there is a distinction between “basic” *cum* physiological needs (to food, water, sleep, *etc.*) and “higher level needs” (to safety, security, belongingness, self-esteem, respect by others, love, *etc.*). Foundationally speaking, the various types of needs are ordered to constitute a pyramid with basic needs at the bottom → ← and self-actualization at the top. Furthermore, the higher the need is placed in the pyramid, the more distinctly human it is. See ABRAHAM H. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* 23 (1962); Anja Matwijkiw & Willie Mack, *Making Sense of the Right to Truth in Educational*

mediated by principles like the Stakeholder Principle of Harm that prescribes avoidance of serious harm as a reciprocal stake, exponents of stakeholder jurisprudence disallow behavior, policymaking, and any form of governance that does not conform to the most fundamental elements of the Ethics Pillar, however politically convenient or popular(ist) or, for that matter, procedurally democratic or widespread the implied action, expression or manifestation may be.¹

Consulting representatives of leading human rights organizations, the stance that many of them take is in the form of a very negative verdict: Denmark's illiberal ban (as introduced by Liberal Alliance and other self-proclaimed "liberal" parties in the VLAK-coalition government) cannot be substantiated by rational and ethical argument, nor by a descriptive fact-finding mission as regards the alleged threat that Muslim women pose for the Danish society. In Denmark, Muslim women belong among the single most vulnerable stakeholders who are, therefore, deserving of special protections, at least if the United Nations are consulted.² According to Amnesty International, a prohibition that deprives women of the freedom to wear clothing that expresses their identity or beliefs is a "discriminatory violation of women's rights" (because it is (too) easily predictable that the new ban will disproportionately impact Muslim women).³ Critics from Human Rights

Ethics: Toward A Theory and Practice That Protects the Fundamental Interests of Adolescent Students, 2 INTERCULTURAL HUMAN RIGHTS LAW REVIEW 329-424 (2007) (for a needs/rights constellation that relies on ethical principles).

- 1 Anja Matwijiw & Bronik Matwijiw, *Bahrain Anno 2017: Peace or Regime Change? Bahrain Anno 2017: The Ongoing Human Rights Dilemma and the Ethics Pillar as a Measurement*, forthcoming in 17 GLOBAL COMMUNITY YILJ (Giuliana Ziccardi Capaldo gen. ed., 2018).
- 2 The Secretary-General, Report of the Secretary-General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004) (prepared by Kofi A. Annan), ¶2, 15, 25; C. J. Werleman, *Denmark's burqa ban: A lurch towards secular extremism*, *The New Arab*, 6 June 2018, available at <<https://www.alaraby.co.uk/english/comment/2018/6/6/denmarks-burqa-ban-a-lurch-towards-secular-extremism>> (for the way that Denmark has worsened the protection conditions and "exploited fears over refugees and terrorism for right-wing political gain", thereby also confirming that the burqaban cannot be supported by rational and ethical argument).
- 3 Nielson & Jensen, *supra* note 20; Bas-Wohlert, *supra* note 22.
Note that Amnesty International's point is about the phenomenon called indirect discrimination. Hence, the reason for the ban on other types of masking such as false beards

Watch concurs while issuing a warning about structural violence, because (it is also (too) easily predictable that) the new ban will disproportionately “block opportunities to integrate. Hence, the racism-sexism constellation and response would be combined with a systematic exclusion effect on behalf of a minority group that is already vulnerable because of numerical and religious factors (*cf.* only conservative Muslim women wear the *burqa* or the *niqab*). In the words of a senior fellow at The Brookings Institution, “[t]here is only one minority group that is affected by this — Muslims” and, as a consequence, “further” stigmatization, alienation and polarization effects will result.² The fact that there is no political will to find multi-stakeholder strategies whereby the stakes (*cf.* public safety/security and civil/political rights – for *them*) are not regarded and treated as mutually exclusive (*cf.* incompatibility) suffices to demonstrate that the real (read: unveiled) agenda is about protectionism, about *us* and *our* interests, values, beliefs. Unless too foreign influences are controlled, *we* cannot continue to be the way we are and to live the way we do.

The Danish policymaking philosophy is so conservative, in the opinion of Amnesty International’s Europe Director Gauri van Gulik, that it tilts the domestic weight-scales, thereby giving rise to a contradiction in terms. Law L 219 “flies in the face of those freedoms Denmark purports to uphold” (*cf.* rights to freedom of expression and religion) and “is neither necessary nor proportionate”.³ On reasonable grounds – the criterion for fair law-making (*cf.* rights-restriction) – measures short of a blanket ban can be implemented to address public

relies on a technicality, to *not be accused* of discrimination. In turn, this is why Amnesty International calls law L 219 a “smoke screen” for the real agenda, namely to ban the *burqa* for the sake of banning it (together with other Islamic full-face veils). See Amnesty International Response to Proposal, *supra* note 18.

Note also that a much more cautious and hypothetical statement was made by other and Danish human rights commentators. “If it [the ban] turns out to focus only on women in the *niqab* or *burqa*”, then the ban would become a discriminatory measure. In other words, the outcome (*cf.* discrimination) that Amnesty International and Human Rights Watch predict cannot be taken for granted after all. See The Associated Press (Jan M. Olsen), Bloomberg, 31 May 2018, available at <<https://www.bloomberg.com/news/articles/2018-05-31/denmark-joins-some-european-nations-in-banning-burqa-niqab>>.

¹ Margolis, *supra* note 61.

² Ingber, *supra* note 60.

³ *Id.*; Bas-Wohlert, *supra* note 22; Laura Smith-Spark, *Denmark’s Parliament bans wearing of face veils in public*, CNN, 31 May 2018, available at <<https://www.cnn.com/2018/05/31/europe/denmark-face-veil-ban-intl/index.html>>.

safety/security concerns. Examples include allowing covered women to unveil in private spaces and to be checked by female security officers. Given that the most accurate form of modern identification of individuals is provided by biometric methods, measures like *iris* and *retina* scans are arguably preferable --- and not prevented by the *burqa* or the *niqab*. The more precarious the distinction between Islamophobia and law L 219 is, the truer it becomes, of course, that the new ban is inspired and driven by *our* ideology and its antagonistic relationship to *their* pollution effect on Danish society.

Here it is noteworthy that a contemporary discussion about relativism is becoming increasingly complex. In terms of general ethics, relativism is a position that requires tolerance for the ways and beliefs of other groups without censuring *their* values in the process of confirming the underpinning equality of different and mutually exclusive outlooks. In other words, the test of ethical relativism is (value) incompatibility. In principle, the same is true for pluralism, although one trend is to introduce various sub-distinctions between respectively ideological-political pluralism, cultural pluralism and religious pluralism; with religious pluralism as the *least relativist* position on comparison.¹ From the point of stakeholder jurisprudence, which synthesizes basic human rights as global imperatives with tolerance for context-specific modalities for enforcement, the implied subtraction of consideration of the *most affected* stakeholders is problematic. Transferred to the *burqa* ban, the counter-argument emphasizes that a restrictive approach to the group of Muslim women is not rendered fair simply because democracy defined as the “choice of society” has been made.²

In the case of the Kingdom of Denmark’s 2018 ban on full-face veils like the *burqa* and the *niqab*, the country follows in the footsteps of other European states, such as France, Belgium, Latvia, Austria, Bulgaria, the southern German state of Bavaria, parts of Italy (e.g., Lombardy), and parts of Spain (e.g., Barcelona) and Russia (e.g., the

1 Marcella Ferri, *Belkacemi and Oussar v Belgium and Dakir v Belgium: the Court again addresses the full-face veil, but it does not move away from its restrictive approach*, Strasbourg Observers, 25 July 2017, available at <<https://strasbourgobservers.com/2017/07/25/belkacemi-and-oussar-v-belgium-and-dakir-v-belgium-the-court-again-addresses-the-full-face-veil-but-it-does-not-move-away-from-its-restrictive-approach>>.

2 Thus, majority tyranny overrules procedural justice. *See id.*

region of Stavropol), just as the Netherlands is currently considering a ban.¹ It should be observed that this is not a business-as-usual position for Denmark when it comes to asylum-seekers and refugees from the Middle East and North Africa. Since 2001, Denmark has made a U-turn from liberal to illiberal and restrictive policies – policies that various other countries also adopted. Furthermore, the Danish government’s implied effort to drastically reduce the number and cost of people fleeing third-party war or armed conflict in places like Syria – has produced the desired outcome with the use of deterrence and “Beggar Thy Neighbour” strategies.² The incompatibility between humanitarian protection in accordance with needs and the survival of the Danish welfare state seems therefore to have been resolved. Nevertheless, the domestic fight against un-Danish *cum* Islamic values and beliefs is a high priority for policymakers. Together with protectionism, Denmark’s politically nationalist and anti-globalization responses to a discussion about tolerance (inclusion, equality, diversity, otherness, *etc.*) may become further emboldened by the growing *burqa* ban trend in Europe. After all, there is strength in numbers – in a democracy. The fact that infallibility is not secured thereby suggests that democracy comes with an in-built risk of “majority tyranny”.³ Nevertheless, it is more likely than not that Denmark will be exempt from having to

¹ If adopted by the Senate in the Netherlands, the prohibition will apply for “public transport, education, healthcare and government buildings”. See Lizzie Dearden, *Muslim women banned from wearing headscarf in court*, *The Independent*, 19 July 2017, available at <<https://www.msn.com/en-ca/news/world/muslim-woman-banned-from-wearing-headscarf-in-court/ar-AAosFzY?li=AAgfIYZ>>; Staff writer, *The Islamic veil across Europe*, *BBC News*, 31 May 2018, available at <<https://www.bbc.com/news/world-europe-13038095>>.

² In 2017, 3,479 persons applied for asylum in Denmark, and 2,390 cases were opened. This is around 300 per month, and this level has been very stable since spring 2016. It is the lowest number in 9 years, and a steep fall compared to the previous years. See Michala C. Bendixen, *How many are coming, and from where*, *Refugees.DK. Information on Refugees in Denmark*, 9 March 2018, available at <<http://refugees.dk/en/facts/numbers-and-statistics/how-many-are-coming-and-from-where>>; Matwijkiw & Matwijkiw, *International Relations Begin at Home*, *supra* note 28.

³ For the Danish Social Democratic Party’s internal decision to declare liberal responses towards immigrants in general for incompatible with the welfare state ideology, see *id.*; Nielson & Jensen, *supra* note 20 (for commentators’ observation of Denmark’s “struggle” pertaining to non-Western immigrants and the welfare state).

⁴ For this Might is Right factor, see FELIPE FERNÁNDEZ-ARMESTO, *TRUTH: A HISTORY AND GUIDE FOR THE PERPLEXED* 165-66 (2001).

address any explanation problems that go beyond the legal framework and interpretation for the country-specific cases and precursors it relies on.

IV. Conclusion: The Uncertainty of Tomorrow's Developments

Because the Danish value politics phenomenon is disassociated from assumptions about (value) neutrality, the incompatibility thesis simply cements the prevailing ideology without any controversy, at least in one sense. If analyzed philosophically, however, studies would show that the thesis is tailored for the task of separating social/economic values *cum* rights and civil/political values *cum* rights, ascribing the status of real *cum* negative rights to the latter, and, consequently, sacrificing welfare for freedom. In the case of Denmark, the welfare state ideology gets in the way of (too) liberal lines of reasoning. The point is that the sacrifice of freedom is not necessarily a culturally problematic step. Certainly, to censure alien values for the good of the larger group is considered both appropriate and required, especially since the accompanying claim is that the values in question negate *ours*, with intolerance. If false, the Danish legislators are in the pursuit of a Denmark for Danes vision that competes with President Trump's America First policy. Thus, together with closed borders, the Danes will not share their domestic territory and welfare with *them*. If (the accompanying claim is) true, the Danish legislators are making themselves guilty of the "Two wrongs do not make a right" fallacy. That is the (ethically-)logical implication – while setting aside developments at the national and international levels. – Ethics is the testing stone for law; and *not* the other way around.

Legislators do not typically legislate for the trivial. Will conservative politicians, who have already introduced many other restrictive and illiberal measures that adversely affect asylum-seekers, refugees and immigrants in general continue their "fight" against a few conservative Muslim women just to show them who is in charge, or is this symbolism – here borrowing Amnesty International's terminology – a "smoke screen" for the realization of something more sinister and systematic?¹ Is the *burqa* ban a slippery slope? – Is religion *per se* on the Most

¹See *supra* notes 33 and 71.

Wanted List? These are some of the concerns, which members of the civil society at the national and international levels may have. Until answers are provided, they should prepare themselves with M. Cherif Bassiouni's international justice wisdom: "[C]ontemporary gains... *must not* be taken for granted".¹

¹M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50/2 VIRGINIA JOURNAL OF INTERNATIONAL LAW 269, 272 (2010) [authors' emphasis].