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THE EU AND THE FULL-FACE VEIL – AN OBSCURE RELATION

Full-face veil in the European Union as seen from the human rights
perspective

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ABSTRACT

This paper presents the approach of the European Union and the Council of Europe towards full-face veil as inferred from legal documents, judgements of the European Court of Human Rights and the European Court of Justice as well as EU-funded academic studies on this topic. It is argued this approach is very much inconsistent and often follows incoherent lines of argumentation, which is mainly due to incomprehensive data on fully veiled women in Europe as well as the lack of precise definition of “European values”. The paper analyses the phenomenon of full-face veiling not only from the perspective of freedom of religion but also takes into account other, often competing human rights, such as the freedom of expression, right to health or rights of the child. Since both the EU and the Council of Europe perceive veil as a “religious symbol” a discussion of its symbolic meaning in Islam is also included in the paper, exploring multiple cultural and social aspects of this piece of garment which are often omitted in national or EU debates on this subject.

LIST OF ABBREVIATIONS

CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIGE	European Institute for Gender Equality
EP	European Parliament
EU	European Union
FGM	Female genital mutilation
FRA	EU Fundamental Rights Agency
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MS	Member States of the European Union/Council of Europe
TEU	Treaty on the European Union (revised by the Treaty of Lisbon in 2007)
TFEU	Treaty on the Functioning of the European Union
Charter	Charter on Fundamental Rights of the European Union
UDHR	Universal Declaration of Human Rights

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1. Introduction

The discussion on full-face veil has been going on in Europe for more than two decades now and it still attracts a lot of attention due to controversies surrounding this topic. In France, for example, after a heated debate in 2004 a ban on headscarves, among other religious symbols, was introduced in schools, followed by a complete ban of full-face veils and other face coverings in public space in 2011. With the influx of Muslim migrants to Europe, as well as due to radicalisation of new generations of migrants and an increasing terrorist threat, this topic is no longer only a matter of interest from the perspective of human rights, but it also has high relevance in the context of national security and integration policies. Therefore, it provokes not only political responses, but engages a wide range of social groups in fierce public debates, including human right activists, jurists, academics, feminists, journalists and celebrities.

Essentially, the arguments for and against banning the full-face veil in public space across the European Union (EU) run along two lines: with sex discrimination, inequality and infringement of European cultural norms on the one hand and religious freedom, freedom of expression and self-determination on the other. There is no single line of reasoning and no common strategy among EU Member States (MS) which banned or are planning to ban veiling, and it is arguably the main weakness of the advocates of such measures. The EU also does not address this issue by, for instance, setting relevant standards or issuing recommendations. Even though forced veiling is mentioned, however rarely, in EU documents, it definitely lacks the importance it deserves. Issues such as the rights of the child, deprivation of identity, prohibition of inhumane treatment or integration are entirely ignored, or mentioned only briefly. It seems evident that the EU does not want to take a stand on this subject, which is surprising given that similar issues related to such cultural and religious practices as early marriages, female genital mutilation (FGM) or polygamy have been explored in detail at the EU level, with measures to regulate them introduced across the EU. This raises an important question concerning the general approach of the EU towards human rights: does it promote universalism of human rights or cultural relativism? And does a set of fundamental “European values” actually exist?

Interestingly, the nature and religious function of full-face veil in the context of Islamic law is mentioned neither in the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) nor in EU documents. At the same time, however, this piece of garment is constantly being described as a “religious symbol” by all these institutions. This lack of anthropological perspective as regards Islamic clothing is

especially surprising when compared with the debate in the European Parliament on the ban of Nazi and Communist symbols, in which the meaning of those symbols was discussed at length (Europarl.europa.eu, 2015). The EU's perceived resistance to explore the significance of full-face veil poses a problem when it comes to discussing this issue and designing relevant policies.

The aim of this paper is to analyse the approach of the EU and Council of Europe (CoE) towards full-face veil as well as legal documents issued on this matter in order to determine the main trends in reflecting on this phenomenon, as well as to indicate potential gaps in reasoning. The paper also looks at the religious meaning of full-face veil as this issue is most often addressed from the perspective of "freedom of religion". Therefore, it seems necessary to understand the religious connotations of Islamic face coverings. Lastly, the paper investigates the relation between full-face veil and human rights. Since there are already several academic papers focussing on human rights being infringed by the prohibition of veiling, the present paper approaches this subject from the opposite angle, i.e. which human rights might be violated by wearing the full-face veil. It also poses the question why the EU does not take these arguments into account when drafting new regulations or issuing recommendations.

For the purposes of this paper only human rights instruments adopted by the EU and the CoE will be examined. The focus of the paper is on the approach of the EU to the issue of full-face veil, hence the primary source of the human rights provisions analysed will be the EU Charter of Fundamental Rights (the Charter). In this context, it must be indicated that

"The provisions of the Charter are addressed to:

- the institutions and bodies of the EU with due regard for the principle of subsidiarity; and
- the national authorities only when they are implementing EU law" (Ec.europa.eu, 2017).

Therefore, in terms of national legislation, the primary source of human rights provisions will be the European Convention on Human Rights (ECHR) as adopted by the CoE. Since all EU Member States are at the same time members of the CoE, they are legally bound by the ECHR when implementing national law, and by the Charter when implementing EU law. It is also worth mentioning that both documents are consistent and "when the Charter contains rights that stem from (the) Convention, their meaning and scope are the same" (ibid.).

In order to analyse the jurisprudence concerning the ban of full-face veil the present paper will look into case law of the ECtHR and the CJEU.

The paper will examine only two kinds of Muslim female clothes which are considered to be full-face coverings: niqab (face covering with a part left open for the eyes) and burqa (full face

and body covering, including the eyes). However, since the EU debates and the jurisprudence focus mainly on the issue of Islamic headscarves, and there are hardly any references to full-face veil, the question will also be asked as to whether these two practices could be approached with the same or similar reasoning or, alternatively, if there are any issues that the headscarf debate did not address.

The terms *Islamic* and *Muslim* are used interchangeably in this paper. West or Western Culture is understood according to the definition of Western Culture by Huntington (1996), with direct reference to the culture of EU Member States.

2. The European Union and the Council of Europe: position towards full-face veil

Despite many years of heated debates in Europe on the issue of full face-veil as well as an ensuing evident change in the approach of the leading European politicians who nowadays advocate the introduction of more restrictive measures, the institutions of the European Union have remained silent on this topic. Indeed, as stated in Article 3 of the Treaty on the Functioning of the European Union (TFEU), the EU has exclusive competencies in a limited number of areas, from which religious affairs are excluded. At the same time, however, according to Article 4 of TFEU, the EU has shared competencies with its Member States in, among others, areas of “social cohesion, [...] freedom, security and justice” (European Union, 2012b), all of which are relevant in the context of full-face veil. Any topic connected with religion is usually dealt with on the level of individual MS. However, the burqa/niqab controversy is not exclusively a question of the freedom of religion, but a multidimensional phenomenon encompassing various, often competing human rights, touching upon such different aspects as integration, assimilation, anti-radicalization and counterterrorism. Ever since the Charter of Fundamental Rights became an integral, legally binding part of the Treaty of Lisbon, any issues regarding human rights are of interest to the European Union, but only when MS are implementing EU law (European Union, 2007). When regulation of certain areas remains under national jurisdiction, then MS have to follow ECHR, which is compatible with the Charter. At the same time, the case law of the CJEU and the ECtHR constitutes jurisprudence to be followed by all the MS. Despite the lack of direct competencies the EU, through CJEU and other tools, can influence national legislation, issue recommendations, set up standards and promote good practices, for instance through regulating on the content and the structure of the Visa and Schengen Information Systems and therefore, affecting the content of the documents. However, this does not seem to be the case with full-face veil. The EU has so far avoided taking a clear stance in the burqa controversy, especially when it comes to violence against women, sex discrimination and child’s rights regulations. In comparison, the CoE is much more vocative in this regard. The question is why the EU is so reluctant to make a stand on the issue of concern not only for individual MS, but also for a wide European public?

2.1. Europeanisation – vertical and horizontal dimension

The process of Europeanisation is based on the assumption that certain values on which the EU is founded should be shared not only by MS in terms of legislation, but most importantly by

citizens of the EU who should respect them. Article 2 of the Treaty of the European Union (TEU) lists those values:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the MS in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

In the changing social and demographic landscape the values listed above are subject to constant processes of renegotiation and redefinition, as they are socially constructed (Ataç et al., 2012, p.75). The discussion on the full-face veil focuses very much on the question if the set of shared European values actually exists, and is not simply an empty notion, and if it does exist, how those values are defined. The approaches of different MS towards the full-face veil issue show that the same values can be interpreted in a different manner and can be used in favour of or against burqa/niqab ban.

European values, rooted in human rights, are not to be understood as values exclusively belonging to the European Judeo-Christian culture. In fact, at least in theory, they are common to all countries with a democratic political order since the Universal Declaration of Human Rights (UDHR) and two Covenants from 1966 were ratified by the majority of countries in the world. Therefore, it appears justified to claim that human rights are values shared and applied worldwide. Universalism of human rights is in contrary to cultural relativism, which acknowledges regional differences in interpreting these rights. In this context, ‘European values’ are to be understood as values mentioned explicitly as the foundation stones of the European Union and having the power to be legally implemented and enforced on the EU and MS level.

The process of Europeanisation, defined as the process of integrating the MS to the political framework of the EU, has two dimensions: horizontal and vertical (ibid.). Vertical Europeanisation can be a top-down process, also called “Europeanisation from above”, when the EU norms are transposed into domestic policies and European actors engage in domestic affairs of MS (Koopmans & Erbe, 2004, p.101), or bottom-up – when policies on the national level are transferred to the European level and domestic actors get involved in European matters (Radaelli, 2004, p.4). “In contrast, ‘horizontal Europeanisation’ consists of communicative linkages between different member states, stressing convergence (or non-convergence) of public policies at national levels” (Ataç et al., 2012, p.76). As such,

Europeanisation can be viewed as a complex, multidirectional and interactive process by means of which legal and normative provisions gain their legitimisation. However, in order for the policy making process to be successful they need to be based on common and shared values. Therefore, Europeanisation means de facto adopting values through policies, but as mentioned above, the meaning of those values is being constantly renegotiated.

In case of full-face veil, we can observe that the process of Europeanisation seems to be inefficient. On the national level, as well as on the level of horizontal Europeanisation, the issue of the veil is very much present, and relevant measures are applied. However, it is difficult to find a common denominator or strong similarities between the approaches of individual MS towards this issue. As a result of subtle differences in cultural and political heritage, MS interpret the same values in different ways and consequently take different actions to regulate this phenomenon. At the same time, an intense debate on the national level could trigger a bottom-up mechanism of Europeanisation and lead first to an open discussion, and later to the development of a standardised approach on the EU level. Since the face-veil/headscarf debate forces interlocutors to reflect very deeply on the meaning of norms which are assumed to be paradigms within a clear framework of signification, an attempt to harmonise the definition of the “European values” could constitute an opportunity for the EU to reinvent itself. Indeed, notions such as “democracy”, “equality between women and men”, “pluralism” or “tolerance” have very different connotations in national contexts, and particularly in case of veil debate it is evident that the precise understanding of each of those norms can be extremely divergent. The European Commission is constantly receiving questions and petitions from the European Parliament as well as letters from the general public concerning the legality of wearing burqa/niqab in public space (European Union, 2011, p.27). But even though such actions represent attempts to bring the issue of full-face veil on the EU agenda, the EU remains silent and emphasises that this issue should be dealt with exclusively at the national level. Hence, the vertical, bottom-up process of Europeanisation does not take place.

2.2. Debates and status of full-face veil in the EU Member States

The origins of the pan-European debate on the Islamic veil can be traced back to the ban on religious symbols in French schools introduced in 2004, followed by a ban on face coverings in public in 2010. Interestingly, France, in contrast to other European countries which forbid full-face veils, based its decision on the concept of *laïcité* (secularism) – i.e. a clear division of

state from the church, translating into state neutrality. Since the early 1990s French republican tradition of *laïcité* has been threatened by the very visible, religiously affiliated sign, which was the Muslim veil. As a consequence of increasing controversies, in 2003 President Jacques Chirac established the so-called “Stasi commission”, comprising of experts from various academic fields, whose aim was to reflect on the meaning of *laïcité* principle in the multicultural society. The findings presented in the final report led to a ban on religious symbols in public schools. Members of the commission concluded that *hijāb* is a sign of gender inequality as it is a means to control women’s sexuality, a tool by which fundamentalist groups try to gain influence at schools and a symbol of radical Islam. It also infringes on the negative right to freedom of religion of other students, who have a right to expect neutrality in the public setting and not to be proselyted by others. Most importantly, *hijāb* was described as a carrier of values conflicting with constitutional principles of neutrality, liberty, fraternity and equality (Andreassen & Lettinga, 2012, p.24). The same reasoning was used to introduce a total ban on face coverings in public space, with an additional argument that the face veil creates a barrier to full integration of migrants into the French society.

The example of France demonstrates one specific approach based on the principle of secularism. In fact, according to Andreassen and Lettinga it is one of the least common approaches chosen by the MS. They distinguish three models of policy approaches (restrictive legislation, accommodating rules and non-regulated practices) and links them with country-specific traditions of state-church relations:

“First, the prohibitive approach advocating bans on all forms of Muslim body covering in public institutions. Second, the soft or selective approach that applies prohibitive measures only to certain kinds of body covering such as full-face veils. Third, the non-restrictive, tolerant model where the wearing of head and body covering is not restricted” (ibid., p.23).

Those approaches are intertwined with the state-church relation models which are: ‘separation’ or laic model (as in France or Turkey), a ‘cooperative model’ (Austria, Germany and the Netherlands) and a ‘state–church model’ (England, Scotland and Denmark) (Brocker et al., 2003, p.14).

According to Sabine Berghahn (2007), countries with the laic model tend to introduce the most restrictive measures and ban all religious symbols from the public sphere since their national identity is based on the principle of secularism, while religion is a purely private issue not to be manifested publicly. In contrary, countries with a long tradition of state cooperation with

churches, or with an official national Church, are more willing to accept the presence of religious symbols in the public sphere. Also, various Christian churches, besides advocating ecumenism, do not have any interest in limiting the freedom of religion, and hence they often do not support introducing restrictive measures, simply because they could also be affected.

Rosenberger and Sauer have described frames according to which national debates are structured. In this context, frames are defined as “organized ideas” which provide some “coherence to a designated set of elements” (Ferree et al., 2002, p.105). 11 major frames have been distinguished in the headscarf discourse: Citizenship; Europeanness / Westernism / modernity; Gender / emancipation; Identity; Islam as a political ideology; Participation; Protection; Rights; Racism; Religion (state–church relations); State–market relations, (Rosenberger & Sauer, 2012, p.233). For example, in the gender/emancipation frame the headscarf is presented as the symbol of female oppression which “victimises” women wearing it. On the other hand, the same frame can be used to present veil as a tool to “emancipate” or “liberate” women. In addition, there is no consensus among feminists on the question of veil as some of them support a total ban in the name of gender equality, while others claim that women should have a right to self-determination, hence they can wear whatever they want. Also, the ban would lead to the discrimination of Muslim women by state on the grounds of gender. Therefore, even from the feminist perspective gender frame is not coherent and consists of subframes which contradict one another. The same seems to be the case with other frames whose content and subframes can be used both pro and contra veil prohibition. In national debates, MS have been using various frames to justify their actions regarding veiling policies. Thus, it appears that the horizontal Europeanisation is not very relevant, as it would require a more harmonised approach.

However, in recent years, especially after the so-called “refugee crisis” and a series of terrorist attacks in Europe, as well as due to a failure of integration policies, MS are starting to change their strategies, regardless of whether their previous position on the full-face veil was based on the state-church relations or on specific frames and approaches. For instance, Austria, which Rosenberger and Sauer (2012, pp.6-7) describe as having non-regulating practices and accommodating rules towards headscarf, and representing inclusive state-church relations has turned in the meantime to a restrictive model, banning full-face veils in public and prohibiting the distribution of Quran in May 2017 (RT, 2017). Previous line of argumentation to allow veils was based on the notion of state neutrality and openness towards different religions. It was even emphasised that conflicting traditions and beliefs are an integral part of the society

(Avramopoulou et al., 2012 p.40). The recent ban was introduced as a part of integration package, initiated by Sebastian Kurz, Minister of Foreign Affairs and Integration, and justified by the argument that in Austria there is no place for symbols of a counter-society. The said integration package includes, among others, a wide offer of language courses, and courses about values of Austrian society (ÖVP, 2017). In this case, we can observe an interesting social process of renegotiating certain values and norms, which are redefined by politicians in response to the expectations of the society and as a result of a rapidly changing socio-political circumstances.

So far, only few European countries have followed the example of France and Austria and introduced restrictive measures, but the trend is increasing. Belgium introduced the ban on veils in 2011, and in 2012 the Belgian Constitutional Court confirmed that it is in line with the Constitution (Vrieling et al., 2016, p.143). This decision was structured mainly around three frames: security, Europeaness and rights. In terms of security, it was concluded that a veiled person might pose a risk while driving a car, carry explosives under their clothes or easily take part in robberies. Covering the face is not acceptable as it hinders identification, which is necessary on various occasions, e.g. when veiled women pick up children from school (ibid., p.153). Europeaness frame on the other hand invoked the European model of communication which requires face-to-face interaction. Covering the face and therefore rejecting the communicative conventions infringes the basic norms of living in the European society. In terms of rights, it was argued that burqa and niqab violate women's rights as they deprive them of dignity and symbolise discrimination on the grounds of gender. Also, other rights, such as the right to health violated by full body covering causing the deficiency of vitamin D, the freedom of movement and the right to hold an opinion were mentioned.

Other EU countries which have introduced a total ban on face veil in public are Bulgaria and Latvia, both in 2016. Latvia, despite the fact that presumably only a very small number of women wears niqab in the entire country, decided to prohibit this garment as a preventive measure in the face of a possible influx of Muslim migrants. Latvia's Justice Minister Dzintars Rasnacs said that apart from security measures the ban aims to protect local and European culture: "We do not only protect Latvian cultural-historical values, but the cultural-historical values of Europe" (Pells, 2017). The reference to common European values is very interesting since not many countries have used this argumentation so far. Again, it brings to the fore the question of how European values are defined by the EU, particularly in the context of the full-face veil. Bulgaria justified its decision solely by security reasons. The senior GERB lawmaker

Krasimir Velchev said: "The law is not directed against religious communities and is not repressive. [...] We made a very good law for the safety of our children" (Krasimirov, 2017).

Many European countries have introduced partial full-face bans (Switzerland, the Netherlands, Denmark, Lombardy region of Italy, Ticino region of Switzerland – total ban in the public spaces, the United Kingdom, Spain, Germany) mainly in public spaces such as courts of law, government offices or schools. One of the main reasons behind the prohibition is national security (BBC News, 2017).

An interesting example of changing entirely the attitude towards prohibiting Muslim face covering is Germany. Even though such a ban was already in place for police officers and state employees who are on duty, and some German states had their own regulations, German government was very reluctant to impose a general ban. In August 2016 Chancellor Angela Merkel

“in an interview with the German news organization Redaktions Netzwerk Deutschland [...] said she was opposed to a ban on the body-covering garment known as the burqa, which is worn by some female Muslims. When asked about the possibility of a ban, similar to the one imposed in France several years ago, Merkel responded by saying she fully supports the position of her interior minister, Thomas de Maiziere, who has come out against such a measure” (Deutsche Welle, 2016).

However, in the same interview she confirmed that in her opinion women who wear full body covering have a limited chance of integration. Four months later, in December 2016, Angela Merkel has taken the general public by surprise calling for the total ban of full-face veils “whenever it is legally possible”; she also added that Muslim face coverings are not compatible with the German culture and legal system: “We don’t want any parallel societies,” she said. “Our law takes precedence before tribal rules, codes of honour and sharia” (Faiola, 2016).

In general, in all EU countries which have witnessed a debate on full-face veils or even headscarves there is a strong fear of the fragmentation of society, decreasing national cohesion, separation and division (Ferrari & Pastorelli, 2016). This is also connected with the failure of integration policies and radicalisation of second and third generation of migrants born in European countries. In this regard, the EU could be expected to take a stand and make an effort to take national concerns about migration on board in order to develop a harmonised immigration policy or at least to address the gaps and weaknesses of the policies already in force. It is especially relevant for countries whose societies do not have any experience of coexisting with Muslim migrants. Such countries do not have relevant policies and strategies

in place, but still they are expected to take in migrants via the quota system imposed by the EU, as well as potentially as due to the second wave of refugee crisis. They could therefore expect some assistance as to how to create conditions in which migrants can be fully integrated, without, as Angela Merkel put it, risking the emergence of “parallel societies”.

2.3. European Union approach towards full-face veil

Even though the EU avoids voicing a direct opinion on the full-face veil, it does so indirectly through different legal acts and publications prepared by various EU agencies. First of all, legal acts, such as directives, regulations, opinions and resolutions, will be examined in order to establish what the EU is officially saying on the subject of burqa/niqab. Secondly, publications, action plans, initiatives of specialised agencies, such as the European Union Agency for Fundamental Rights (FRA), will be analysed to determine if the topic of Muslim coverings is present in their area of interest. Finally, EU-funded research papers on the issue of veil will be examined to see which aspects are most relevant from the EU perspective.

In terms of legal documents referring to women’s rights and gender equality, in 2013 the EU issued Regulation, a binding legislative act to be applied in its entirety across the EU—establishing a “Rights, Equality and Citizenship Programme” for the period 2014-2020. The Programme, with an overall budget of 439 473 000 euro, aims among others to

“Promote non–discrimination; Promote equality between women and men and gender mainstreaming; Prevent violence against children, young people, women and other groups at risk (Daphne); Promote the rights of the child” (European Parliament and the Council, 2013, preamble).

Those objectives should be achieved by “enhancing awareness and knowledge of Union law and policies as well as of the rights, values and principles underpinning the Union” (ibid., article 4a). With reference to gender equality, the Regulation states that

“Equality between women and men is one of the Union's founding values. Unequal treatment between women and men violates fundamental rights. Moreover, the promotion of equality between women and men also contributes to achieving the objectives of the Europe 2020 Strategy. The objective of promoting equality between women and men should be implemented in a mutually reinforcing manner with other Union or Member States activities that have the same objective, in particular with those referred to in the European Pact for gender equality for the period 2011 to 2020” (ibid., preamble).

Even though the motto of EU is “United in diversity”, the diversity refers to the “cultures, traditions and language” while the unifying elements is “work for peace and prosperity” - so in general terms, the values (European Union, 2017). However, as already explained in the previous section, enhancing awareness of values and principles of the EU, without a precise definition of what those values mean and how they are to be implemented, might be a difficult task, since MS have a different understanding of them. Those MS which are against the ban of Muslim veils would not perceive regulatory measures as promoting non-discrimination and equality between men and women, while those which are in favour of restrictive measures have a contrary opinion. In the Daphne III Programme (2007-2013) which was incorporated into the Rights, Equality and Citizenship Programme, one of the annual priorities was combating violence against children and women linked to harmful practices (European Commission, 2011).

“The Commission will fund practical projects related to combating and preventing violence linked to harmful practices, such as female genital mutilation, forced or early marriage or forced sexual relationships, so-called "honour crimes" committed against women, young people and children. This call will fund activities aiming at: • promoting an integrated approach, by developing multi-sectorial guides and protocols for child protection system actors and other actors in contact with victims or potential victims of harmful practices; • changing attitudes among relevant communities, including through dialogue, mutual learning and exchange of good practice” (European Commission, 2014, point 1.2.1).

Interestingly, forced veiling of women and children is not mentioned, but it could definitely be considered as a harmful practice, as it already is by some MS. The call for developing an integrated approach in this regard is very relevant, as it is still non-existent and individual MS take fragmented, not harmonised actions. Moreover, no efforts are visible on the part of those MS which introduced prohibition of veiling as discriminatory practice to follow the call for changing attitudes among relevant communities or to exchange good practices. It is not difficult to predict that such an action would cause negative reactions not only in the communities themselves, but also by the opponents of ban and advocates of a “tolerant” approach, quoting an infringement of the right to freedom of religion. The EU is currently preparing “Daphne Toolkit” with recommendations, training materials, reports etc. but it is hard to foresee if the veil issue will be tackled in these guidelines (Daphne Toolkit, 2017).

With regard to gender equality, the EU has issued a number of documents, e.g. “New European Pact for equality between women and men for the period 2011 – 2020” and “Strategic

Engagement for the Gender Equality 2016-2019”, just to mention two. Both of them set important priorities: inter alia to fight with gender stereotypes, to promote access to the labour market by women and equality in decision-making and to eliminate all harmful practices, such as early and forced marriage and FGM. The achievement of those objectives should be helped by “ongoing improved data collection with the support of Eurostat, the European Institute for Gender Equality (EIGE), Eurofound, the Council of Europe (CoE) and the Fundamental Rights Agency (FRA)” (European Commission, 2015, p.9). Surprisingly, none of the listed entities have ever conducted a survey on the participation of fully veiled women in the labour market, their equal status in the decision-making process or the level of forced veiling among Muslim population. Also, no actions have been taken to fight with gender stereotypes in the Muslim population and to empower Muslim women. Moreover, it is not clear what is meant by “gender stereotypes”. Can one perceive the Islamic ontological difference between women and men and hence their different social functions and responsibilities as a “gender stereotype”? Or is the fact that according to Islam only women have to cover their body in order to limit sexuality an example of “gender stereotype”? Those issues are not explained in any EU document. Despite the fact that the full-face veil triggers fierce debates and has been regulated on the national level by some MS, there is no comprehensive European data available on this subject. The data collected by Eurostat does not include ethnic origin or religious affiliation, therefore it is impossible to conclude if cultural stereotypes concerning various ethnic/religious groups influence their employment patterns in the EU (Eurostat, 2017). In the “European semester thematic fiche labour market participation of women” there is also no breakdown of data by ethnic origin and religion (European Commission, 2015). Therefore, the rate of participation of Muslim women, veiled or not veiled, in the labour market remains unknown.

In the European Parliament “Resolution from 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women” the EU is calling its MS to take action against violence against women, since “male violence against women shapes women's place in society: their health, access to employment and education, integration into social and cultural activities, economic independence, participation in public and political life and decision-making, and relations with men” (European Parliament, 2011, point F). The resolution mentions the fact that women are failing to lodge complaints against acts of gender violence against them due to social and cultural factors. It also refers to unequal distribution of power between men and women and lists several traditional harmful practices, which have not only physical, but also psychological effects. Seen from this perspective, the prohibition of full-face

veil could be considered as a response on the part of MS to that call, intended to protect vulnerable groups of women or girls who are forced to wear a veil either directly or indirectly, as a result of pressure coming from their social environment.

Interestingly, the European Parliament resolution of 13 March 2007 on “a roadmap for equality between women and men (2006-2010)” explicitly mentions the issue of veiling, which is omitted in the latest documents. The European Parliament

“calls on the Commission to treat gender equality policy not just as a priority for the EU, but also, and above all, as an indispensable requirement of respect for the rights of the individual; considers that such an approach should translate into an effort to coordinate and strengthen European and national measures providing for the legal protection of women and children, in particular:

— in cases where women have been reduced to slavery or in cases involving crimes in the name of honour or tradition, of violence, trafficking, female genital mutilation, forced marriage, polygamy, or deprivation of identity (for example when women are forced to wear the burka, the niqab, or a mask), the aim being zero tolerance;” (European Parliament, 2007a, point 4).

Deprivation of identity by forcing women to wear full-face covering is never mentioned again in any EU document, and despite the fact that in the above-mentioned resolution the European Parliament called to collect the data and set up indicators for all forms of gender based violence, FRA in its comprehensive report “Violence against women: an EU-wide survey” entirely ignores this form of violence and does not mention forced veiling even once. In the FRA report ‘European Union Minorities and Discrimination Survey. Muslims’ the issue of Muslim face coverings is also not present, however the report concludes that “Wearing traditional or religious clothing (such as a headscarf) did not have an impact on Muslim respondents’ experiences of discrimination” and that “This finding contradicts common assumptions about the negative impact of visibility through wearing traditional/religious clothing, such as headscarves, on the behaviour of mainstream society towards minorities” (FRA, 2009, pp.3,8). In general, FRA has never published any report, fact sheet, or article on the full-face veil in the whole history of its existence, but it did tackle the problem of other harmful practices, such as forced marriages (“Addressing Forced Marriages in the EU: legal provisions and promising practices”). In the “Handbook on European law relating to the rights of the child” prepared by FRA in cooperation with the CoE and the Registry of the ECtHR, the problem of early marriages and FGM is not mentioned, but a reference is made once to the headscarf/veil, namely when describing the case of *Dogru v. France* before ECtHR (wearing of Islamic headscarf at a state secondary school), in which the Court found no violation of Article 9 of

ECHR. Except for this brief mention, the handbook does not investigate the issue of veil nor does it describe how veiling could infringe human rights in terms of self-determination, expressing opinion, right to health etc.

The same is true in case of the European Institute for Gender Equality (EIGE) which has not published any studies nor conducted any surveys concerning the full-face veil or headscarf, even though as stated in its establishing Regulation, one of the main tasks of the Institute is to carry out surveys on gender equality and to collect, analyse and disseminate data, best practices from MS, research institutions and other relevant bodies on matters relevant for gender equality (European Parliament and the Council, 2006).

In the European Parliament's study "Religious practice and observance in the EU Member States" which aims to examine existing legislation and case law of ECtHR and CJEU regarding freedom of religion and to "underline best practices and put forward recommendations to promote both religious practice and observance and the respect of human rights" (European Parliament, 2013, p.8), the issue of veil is analysed only in the context of wearing religious symbols at school and at workplace and not in the context of deprivation of identity, harmful practices, right to health, discrimination on the ground of gender or rights of child. Therefore, recommendations refer only to schooling and employment: "To avoid indirect discrimination, states should offer more insightful arguments and evidence regarding the principle of secularism, gender equality, public order, health and security in public schools to justify anti-veiling legislation" (ibid., p.18).

This incomprehensible attitude towards a topic which is very present in the public debate, as well as the lack of any reference to the European Parliament Resolution on "equality roadmap" and systematic avoidance of addressing the veil issue in its full complexity in EU documents is more than surprising.

However, the EU funded two research projects, which examined the issue of veil. One of them is the VEIL project ("Values, Equality and Differences in Liberal Democracies. Debates about Female Muslim Headscarves in Europe") covering the period between 2006 and 2009. The results of the research are presented not only in the final report, but also in a book "Politics, Religion and Gender. Framing and regulating the veil" (Rosenberger & Sauer, 2012). "The VEIL project focused on the public debates, conflicts and regulations concerning head and body coverings of Muslim women in public institutions" in eight selected countries (Department of Political Science University of Vienna, 2009, p.2). In its analysis, it does not

distinguish a headscarf from full-face veil, which are indeed quite different cases when discussing human rights, and speaks of them interchangeably.

Another project addressing the phenomenon of Muslim head coverings in Europe is RELIGARE (“Religious Diversity and Secular Models in Europe: Innovative Approaches to Law and Policy”). It ran between 2010-2013, covered ten countries and focused only on the full-face veil. The findings of this research are presented in the book “The burqa affair across Europe. Between Public and Private Space” (Ferrari & Pastorelli, 2016).

“The project investigated and analyzed which legal frameworks and instruments are best suited to guarantee respect for the rights of all individuals to freedom of thought, conscience and religion and to non-discrimination on religious or belief grounds. The project mapped the often-divergent approaches in the target countries in these areas” (Foblets & Alidadi, 2015, p.2).

Both projects applied multidisciplinary methodology, including sociological interviews with key informants, like policy makers at the EU and national level, politicians, religious leaders, but at the same time they refer to any actual data on veiled women in the EU, which may be considered their main weakness. The projects lack any quantitative or qualitative data on the percentage of veiled women in the EU, the type of veiling (compulsory or voluntary), the reasons behind veiling (e.g. religious, political, cultural, preventive), the religious affiliation of veiled women (Shia, Sunni, denominations, radical groups), the consequences of veiling (e.g. level of integration, education, employment, fertility, equality in decision-making, domestic violence), all of which makes it impossible to gain deep understanding of this phenomenon in the EU and consequently undermines the analysis of measures taken by different MS to tackle the issue in question. More worryingly, the authors of both reports do not make any distinction between religion, religious fundamentalism, extremism and ideology. All veiled women are described as “Muslims” who are adherents to “Islam”, while the prohibition of veiling infringes their “freedom of religion”. One other perspective is that the veil is no longer a religious symbol, but a cultural habit (still within the scope of Islam) and therefore the ban infringes the “freedom of expression”. For the authors of the reports there is no difference between a Western convert who does not have any pressure from family to veil, Muslim feminist who wears a veil to express her political views, a 12-year-old girl from Wahabis family who is under social pressure to behave according to religious and cultural norms, a teenager who was recruited via social media by a radical Islamist group and her veiling is an expression of ideological affiliation, and a refugee woman from Afghanistan, who wears a veil not only because she had

to do that in her home country, but also out of the fear of being excluded from the diaspora, which in turn makes her integration in the host society virtually impossible.

Both reports assume that all veiled women have the same level of agency and that in the European context, veiling is not a matter of obligation, or if it is, then only marginally. The reports do not analyse at all which human rights could be infringed by wearing a veil, but only focus on which human rights are infringed by banning the veil. While the VEIL project does not analyse the meaning of veil in Islam, RELIGARE dedicates one chapter to explore the concept of veil from the Islamic perspective, even though the conclusions are entirely omitted in the remaining chapters of the book (Aluffi Beck-Peccoz, 2016). Aluffi Beck-Peccoz highlights the seclusive function of veil, and connects it with the notion of ‘awra and fitna (both explained in Chapter 3 of this thesis) highlighting that covering women’s body is an obligation to make them invisible when spatial seclusion is otherwise impossible to achieve (e.g. outside the house). She also argues that the main purpose of veil is to limit female sexuality in order to avoid fornication (zina) which leads to social disorder, and concludes that “women shoulder the entire responsibility for the social order” (ibid., p.16). At the same time, she stresses that the extent of veiling is debatable and that there is no consensus among Muslims on which part of the body should be covered. Beck-Peccoz also links the revival of veil with Islamic awakening movements, adding that in many Muslim countries full-face veil is forbidden. She also brings another aspect of full body covering to the fore, namely that it might facilitate crimes and unlawful behaviour (ibid., p.22). Finally, she concludes that

“... the burqa, as an act of non-verbal communication, can interfere or hinder other kinds of verbal or non-verbal communication. This is particularly relevant in the public space, where political decisions are taken, and public services provided to persons. In order to allow people to fully participate in that space, and in consideration of well-established general practices, restriction on burqa can reasonably be imposed” (ibid., p.23).

Those conclusions are ignored by the authors of other parts of the book. For instance, Letizia Mancini, in another chapter of the same book, states that “The direct or indirect reference to Islam and to ‘Islamic culture’ to state the contrast/opposition between burqa and niqab and women’s freedom and rights, which is so spread in the debate of burqa in Europe, fails to convince me from the theoretical, empirical and political points of view” (2016, p.13). In doing so, she undermines the findings of her fellow researcher. Symptomatically, the voice of women who chose to wear full-face veil or who are in a strong opposition to it remains unheard in RELIGARE project. Mancini’s statements confirm another surprising element to be found in

both reports, which is the fact that authors' preferences are very strongly expressed. This definitely affects neutrality, and hence the reliability and credibility of findings.

In this regard, VEIL is much more moderate than RELIGARE, although it uses the term "tolerant" while describing MS with no regulative measures, which automatically makes MS that introduced restrictive legislation "intolerant"; parties who are advocating for ban are "right wing" or "conservative", and feminists supporting ban are "mainstream feminists". In addition, judgments of ECtHR in headscarf cases are described as "often (mis)interpreted". In RELIGARE project judgemental and patronising statements are to be found throughout the whole publication. In the first sentence of the book Silvio Ferrari expresses his opinion that it is impossible to forbid full-face veil without violating the principles of liberal constitutionalism, and that he is not convinced by any argument of the advocates of ban, even the one about the existence of vulnerable groups of women forced to veil, however he acknowledges that such a possibility exists and then, according to him "public powers are obliged to protect the woman's freedom not to wear these garments" (Ferrari & Pastorelli, 2016, pp.5-6). Unfortunately, he does not explain how the state should protect women when such a situation happens, knowing that case-by-case interventions are unmanageable, could infringe the respect for private and family life and their legality would be questionable in general.

Authors of other chapters tend to express similar views by ridiculing opinions contrary to their own, for example by describing public concerns about the rise and growing influence of radical Islam in the EU as "Islamophobia" and "paranoid phantasies" (Grillo & Shah, p.200). Such views go very much against European Parliament Resolutions on "Combating the rise of extremism in Europe" (2007) and "Women and fundamentalism" (2002) according to which the EU is not only "seriously alarmed at the Islamic fundamentalist recruitment and violent propaganda campaign with terrorist attacks within the European Union, based on the hatred of European values and anti-Semitism" (European Parliament, 2007b, point B) and is

"expressing serious reservations with regard to regressive ideologies which are nostalgic for times past and claim to possess answers for women's role in the future based on retrograde positions from the past; [...]; stressing that the process of women's emancipation and liberation is an aspect of the historic progress of humankind; [...] denouncing the use of cultural practices and traditions such as genital mutilation, as being violations, punishments and attacks on women's physical integrity and life" (European Parliament, 2002, point N,O,V)

but also calls its MS to take legislative measures, including preventive ones, to fight with these developments.

In the chapter on “The Anti-Burqa Movement in Western Europe” Grillo and Shah describe the advocates of full-face veil ban as racist. “(Racism)... indeed could readily be demonstrated [for example through the speeches and publications of far right political parties and their leaders] that opposition to face-veiling, with its primal opposition to Islam and Muslims, rests on profound Islamophobia of culturally racist elements” (2016, p.213). In the same chapter, however, the two authors recall a meeting in the European Parliament organised by the Alliance of Liberals and Democrats on the issue of women’s right and burqa, during which Silvana Koch-Mehrin - the leader of the European Democrats in the EP - called for a Europe-wide ban, (ibid., p.203; Philips, 2010). Therefore, it is not accurate to associate the prohibition of face veil only with right-wing parties and racism. However, also in this case the authors have a justification for their claims: even when people who are not racist and sincerely believe that veil is penalising and subordinating women, their beliefs are an expression of “paternalism albeit often with racist undertones” and stem from “‘state feminism’ that acts as a proxy for the suppression of non-liberal practices among minority groups in the name of protecting women” (ibid., p.213). This line of argumentation is described by Guy Haarscher (2010, p.368) as unfair practice, often used by the opponents of banning the veil:

“Now in the argumentative process about veil, it often happens that interlocutors who want to rapidly get rid of their opponents will, unfortunately, try to confuse a racist rejection of Muslims with a reasonable position. If you want to weaken your opponent, you can – very unfairly indeed – try to give him very bad reputation, while forgetting that it is not because two currents of thought defend the same thesis on a particular point that they can be confused or even identified to each other. In short, there are democrats and racist against veil”.

What is more, the said book contains the “Declaration on the Issue of Burqa”, in which authors expressed their opinions on the topic and recommend avoiding a general ban of full-face veil and penalising women who wear it, as well as adopting case-by-case restrictions whenever necessary (Ferrari & Pastorelli, 2016, p.255).

In fact, RELIGARE project has also come up with a number of recommendations, which are supposed to be mainstreamed at the EU level to harmonise the attitude towards freedom of religion.

“The recommendations call for a more direct and active role for the EU Institutions in developing a coherent policy framework that would strengthen the combat in Europe against discrimination on the basis of religion or belief in a way that is compatible with a democratic understanding of the functioning of pluralist democracies and can therefore help overcome divisions and segregations” (Foblets & Alidadi, 2013, p.6).

In the RELIGARE report it is stated that in a limited number of cases (for example while driving the car)

“it appears to be legitimate to prohibit the wearing of the full-face veil in common areas, based on a pragmatic rather than an ideological approach. [...] In these cases, it is not the symbolic meaning of the full-face veil (which varies from person to person and can never be ascertained with certainty) that is at stake, but rather the social difficulties it may cause. This (functional) approach allows for measures to be adopted that are proportionate to the practical problems raised by the wearing of the full-face veil and that also take account, as far as possible, of the individual’s freedom of religion and expression” (ibid., p.25).

Even though one of the recommendations refers to “protecting women’s freedom to choose”, which calls for introducing measures to protect those who are forced to wear a veil, at the same time another recommendation is to avoid unnecessary prohibition:

“EU Member States should refrain from introducing a general ban on the full-face veil in all public spaces, in particular by recourse to criminal law provisions, and should assess the suitability of limiting the wearing of the full-face veil only in those places and situations where seeing the face of an individual is required for security purposes or where public or professional requirements demand that civil servants wear religiously neutral attire or that their face can be seen” (ibid., p.30).

In the light of the above, it is not clear what is meant by “protection measures” in favour of vulnerable groups if the ban is recommended solely for pragmatic reasons.

The recommendations of VEIL project are similar to the ones formulated in RELIGARE project, even if they refer only to headscarves and not the full-face coverings, which is incoherent since full-face veil was also discussed in the research. The VEIL is against introducing any restrictive measures and does not take into account the existence of vulnerable groups nor does it propose solutions for them. The recommendations are framed around improving anti-discrimination policies, whereas discrimination is understood as the prohibition of wearing headscarf. The conclusions do not mention radicalisation, fundamentalism or harmful practices, and naively link freedom to wear the headscarf with the concept of democracy:

“Furthermore, the perspectives in relation to which norms and values are discussed, need to be taken into consideration. For example, in regard to Turkey, the project’s results indicate that the recent debates on lifting the ban went hand in hand with proposals for a new and more “democratic” constitution in Turkey” (Department of Political Science University of Vienna, 2009, p.19).

As history has shown, the decision to partially lift the headscarf ban in Turkey was not connected to the democratic process, but in contrary, to a process of Islamisation of the country and strengthening the authoritarian rule of Erdogan by means of, inter alia, transforming the political system from a constitutional to a presidential one.

Interestingly, neither VEIL nor RELIGARE reports address the issue of the rights of the child, which may be violated by compulsory veiling, or even if the veil is worn voluntarily, infringing the right to health.

Even though the EU funded the research projects discussed above, they do not contribute to understanding the situation of veiled women in the EU or the implications of veiling on a number of human rights, not only the right to freedom of religion or the principle of non-discrimination.

2.4. Council of Europe regulations on full-face veil

The relations between the CoE and the EU are very much interlinked: the two bodies share the same values, the Charter is compatible with the ECHR, and CJEU relies on the jurisprudence of ECtHR to justify its judgements. The CoE has also set minimum legal standards to be followed by all MS, especially in the area of human rights, to which the EU often refers.

“The Lisbon Treaty increased the scope for European Union action in many areas where the Council of Europe already has significant experience and expertise. This has led to increased cooperation on issues such as fighting human trafficking, the sexual exploitation of children and violence against women” (COE, 2017).

The position of the Council of Europe on full-face veil is much more straightforward than that of the EU. In 2010, the Parliamentary Assembly adopted a resolution on “Islam, Islamism and Islamophobia”, in which the issue of Muslim face covering is directly addressed. First of all, the CoE makes a distinction between Islam – religion, and Islamism – “the view that Islam is not only a religion but also a social, legal and political code of conduct; [...] religiously disguised form of political extremism” (Resolution 1743, 2010, pp.1,3-4) which stands in

opposition to human rights and democratic values. Therefore, MS and European Muslim communities are encouraged by the CoE to combat any form of Islamic radicalism. Moreover, the CoE highlights that numerous Islamic organisations are set up and financed by countries outside of Europe for political, not religious reasons, and therefore their activities could be restricted by MS according to paragraph 2 of Article 11 of the ECHR. With reference to women, the CoE argues that they are the primary victims of radical Islam, and calls upon Muslim communities to abandon traditional interpretation of Islam which reinforces gender inequality, infringes women's rights and is not compatible with human rights and values of democracy. The CoE's opinion on the full-face veil is very comprehensive:

“In this respect, the veiling of women, especially full veiling through the *burqa* or the *niqab*, is often perceived as a symbol of the subjugation of women to men, restricting the role of women within society, limiting their professional life and impeding their social and economic activities. Neither the full veiling of women, nor even the headscarf, are recognised by all Muslims as a religious obligation of Islam, but they are seen by many as a social and cultural tradition. The Assembly considers that this tradition could be a threat to women's dignity and freedom. No woman should be compelled to wear religious apparel by her community or family. Any act of oppression, sequestration or violence constitutes a crime that must be punished by law. Women victims of these crimes, whatever their status, must be protected by member states and benefit from support and rehabilitation measures” (ibid., p.3).

While the CoE considers the legal restriction of wearing burqa/niqab as reasonable, especially for security reasons, at the same time it does not recommend introducing a general ban, as it would violate the rights of those who freely choose to cover their faces. Moreover, it could exclude women who wear it from the society and force them to stay at home (ibid.; Parliamentary Assembly, Recommendation 127, 2010). The CoE, however, does not explain if a voluntary decision to wear a full-face veil as a manifestation of belonging to an Islamic radical group would also be legitimate. What it does is calling to combat such organisations.

Interestingly, the “Council of Europe Convention on preventing and combating violence against women and domestic violence” (2011) does not refer to forced veiling, mentioned in the above Resolution and Recommendation, as a form of violence against women, even though other forms of harmful practices are listed. Contrary to the Recommendation and Resolution on “Islam, Islamism and Islamophobia in Europe” Parliamentary Assembly resolution “Women and religion in Europe” states that regardless of the nominal consent of the victim, some practices, such as FGM or forced marriages, should be forbidden, which means that “freedom of religion is limited by human rights” (Resolution 1464, 2005, p.1). Therefore, it could be assumed that the same rule should be applied to other “violations of women's rights, including when underage girls are forced to submit to religious codes (including dress codes)”

(ibid., p.2). In that case consent or voluntary decision to veil should not justify an exemption in combating “religious and cultural relativism of women’s human rights” (ibid., p.1).

Even though the CoE recognises the difference between Islam and Islamism, some definitional problems might occur when deciding which denomination or religious group belongs to which category. This confusion is strengthened by the fact that the CoE, as well as the EU condemn sharia law in very general terms as not compatible with human rights:

“sharia is incompatible with the fundamental principles of democracy, since principles such as pluralism in the political sphere and the constant evolution of public freedoms have no place in it and a regime based on sharia clearly diverges from Convention values” (*Refah Partisi and Others v. Turkey*, 2003); “Assembly regrets that some member governments of ISESCO and ALECSO have adopted national legislation based on an interpretation of Sharia law or have pursued national policies which are in conflict with the ICCPR and the ICESCR” (Parliamentary Assembly, Recommendation 1927, 2010, p.4); “*The European Parliament*, A. whereas a bill to introduce the sharia (Islamic law) into the country's legal system has been adopted in Pakistan, B. whereas Islamic law would be above the constitution, which would lead to the gradual 'Islamization' of the legal system and give wide powers of interpretation to Islamic scholars (ulema), C. whereas Islamic law sanctions punishments which are internationally considered as forms of torture, [...] 1. Expresses its deep concern over the introduction of Islamic law and the effects this could have on minorities, human rights, and in particular women's rights, the democratic future of Pakistan and its position in the international community;” (European Parliament, 1991).

In fact, sharia law is an integral part of Islam as it constitutes the legal system upon which Islam is built. Therefore, it is not possible to condemn sharia without condemning Islam itself. Moreover, sharia law is not a unified judiciary system, but it has two main interpretations: Sunni and Shia, which are then subdivided into several different legal schools followed by certain Islamic denominations (Ali, 2000, p.247).

Indeed, as CoE stated

“Sharia law is understood as being ‘the path to be followed’, that is, the ‘law’ to be obeyed by every Muslim. It divides all human action into five categories – what is obligatory, recommended, neutral, disapproved of and prohibited – and takes two forms: a legal ruling (hukm), designed to organise society and deal with everyday situations, and the fatwa, a legal opinion intended to cover a special situation. Sharia law is therefore meant in essence to be positive law enforceable on Muslims. Accordingly, it can be defined as ‘the sacred Law of Islam’, that is, ‘an all-embracing body of religious duties, the totality of Allah’s commands that regulate the life of every Muslim in all its aspects” (Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 2016).

Therefore, it is not clear how the CoE and the EU define “Islam” as opposed to “Islamic fundamentalism” and what is specifically meant by “Sharia law”. The definition of Islamism as found in the Resolution of Islam applies in fact also to “Islam”, since Islam is not only a religion but also a social system which was constructed by Muhammad (Roald, 2001, p.xii).

Some provisions of sharia law are already illegal in Europe, but could definitely be perceived as a part of Islam and not only of Islamic fundamentalism. Two examples are polygamy and early marriages, which are allowed in Islam due to the Prophet’s practice and direct references in Qur’ān. Death penalty is also accepted by Islam, but fully rejected by the EU and the CoE. These aspects of religion raise the question of how it should be decided and who should decide which parts of Islamic doctrine and practice are compatible with human rights – and therefore which Islamic groups should be classified as moderate and which as fundamentalist. The CoE states that “a religion whose doctrine or practice ran counter to other fundamental rights would be unacceptable” (Parliamentary Assembly, Recommendation 1804, 2007)). Following that statement are Wahhabism or Salafism acceptable denominations of Islam or do they fall under the category of “fundamentalism”? And if they are to be considered fundamentalist movements, then which provisions of their doctrine should be restricted or forbidden, or should they be banned altogether? If Salafists believe that women should fully cover their body including the face due to the fact that female gaze is “a message of fornication”, should this practice be prohibited in the EU as part of a strategy to combat radical Islamism?

Those questions are especially pertinent in the current CoE debate as to whether MS who are all signatories to the ECHR can also ratify the “Cairo Declaration on Human Rights in Islam”, which is the case for Albania, Azerbaijan and Turkey (Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 2016). The Cairo Declaration, which was proclaimed by member states of the Islamic Cooperation in response to the Universal Declaration of Human Rights, includes some provisions which are either not compatible with or contradictory to the UDHR. First of all, it states that the Islamic community and sharia law constitute the highest form of governance and the ultimate source of law, which stands in contrast with the democratic rule of separation of church from the state and the principles of pluralism and state neutrality.

“...the Islamic Ummah which Allah made as the best community; [...] Islam is the religion of unspoiled nature; [...] All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'a; [...] The Islamic Shari'ah is the only source of reference for the explanation or clarification to any of the articles of this Declaration” (Organization of Islamic Conference, 1990).

Moreover, the Declaration does not contain the right to freedom of religion, since Islam do not allow conversion. It also confirms stereotypical gender roles (“The husband is responsible for the support and welfare of the family”) and places all provisions in the Declaration, such as the right to life, to movement, to choose education of the children etc. within the framework of sharia, thus discriminating citizens who are not Muslims. The rapporteur on this subject has noticed that not only does the ratification of the Cairo Declaration by CoE MS constitute an instance of incoherent understanding of human rights, but also the fact that numerous states allow sharia to be exercised in some way or another poses a threat of a parallel legal system developing within one state. This is particularly true for Greece, Turkey, Russia and the UK, where some forms of sharia courts/councils already exist and pronounce judgements in the area of family law (Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 2016).

The definitional and practical issues bring also other questions: if sharia law, or at least some of its provisions, is incompatible with the ECHR, does it mean that Islam is incompatible with it as well? As discussed before, simply distinguishing between Islam and Islamic fundamentalism does not give any answer since methods of differentiating between the two are not clear and the majority of provisions of sharia law are common to both. So far, the Parliamentary Assembly of the CoE has not issued any official statement or report on the ratification of the Cairo Declaration by its Member States.

Interestingly, in the preface to “Compilation of Council of Europe standards relating to the principles of freedom of thought, conscience and religion and links to other human rights” Thorbjorn Jagland, Secretary General of the Council of Europe, refers to the problems Europe is facing with regard to Islamic fundamentalism and states that “We have already seen numerous calls by populists and petty nationalists for restrictions on Islamic practice and expression within our societies, as they attempt to exploit the current climate of fear” (Council of Europe, 2015, p.5). He also claims that “If we act in ways which suggest that Islam is the problem, we simply reaffirm terrorist propaganda and provide a boost to the extremists now scouring our communities in the search for angry and alienated recruits” (ibid.). What he fails to mention, however, is that many Islamic practices are already fully rejected in the European legal system, that the discussion within the CoE on the Cairo Declaration was initiated by the Alliance of Liberals and Democrats for Europe and not by nationalists, and that in all cases regarding full-face veil the ECtHR has legitimised further restrictions introduced by member states.

2.5. European Court of Human Rights and European Court of Justice – case law regarding full-face veil

So far only one case regarding full-face veil has been brought before the ECtHR (*S.A.S. v France*, 2014)¹, but there have been several cases concerning Muslim headscarves which demonstrate a pattern of reasoning on the Court's part similar to the one of the face veil. In the majority of these cases the Court referred to Article 9 of the ECHR "Freedom of thought, conscience and religion". It should be emphasised, however, that wearing religious symbols and clothes is also linked to Article 8 "Right to respect for private and family life", Article 10 "Freedom of expression" and Article 11 "Freedom of assembly and association" as well as to Article 14 "Prohibition of discrimination". As regards Article 9, the freedom to have or not to have a religion has an absolute character and has no derogations, but the freedom to manifest it has certain limitations:

"Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." In addition, Protocol 15 to the Convention has established the doctrine of a "margin of appreciation", according to which countries have a wide scope of discretion, especially in case of issues where there is no consensus among the member states, full-face veil being one of them (Council of Europe, 2015, p. 36).

In its judgements, the ECtHR refers to those limitations and in all the cases concerning restrictions imposed by states on wearing headscarves or full veil it has found no violation of Article 9 or other articles. At the same time, it has recognised that such restrictions might interfere with the right to manifest religion.

Interestingly, the argument of public safety, which is one of the leitmotifs in the European burqa/niqab debate, has not been invoked as justification for restrictions. Rather than that, the Court referred to the "protection of the rights and freedoms of others" and recognised specific values of each member states, e.g. secularism, as a basis for applying the margin of appreciation. In the case *Leyla Şahin v. Turkey* (2015), in which a woman wearing a headscarf was refused admission to lectures at a state university, the Court justified its decision that Articles 8,10 and 14 had not been violated by stating that "The regulations on the Islamic

¹ New judgement of ECtHR from 11 July 2017 in the case of *Belcacemi and Oussar v. Belgium* upheld the ban of full-face veil in public in Belgium. The justification of the Court's decision was based on the principle of "living together", "protection of rights and freedoms of others" and necessity of recognising each other in a "democratic society". Due to time constraints it was impossible to incorporate this judgement into the thesis.

headscarf were not directed against the applicant's religious affiliation, but pursued the legitimate aim of protecting order and the rights and freedoms of others and were manifestly intended to preserve the secular nature of educational institutions.”

Similarly, in the cases of *Kervanci v. France* and *Dogru v. France* (2008), in which teenagers were expelled from secondary school for refusing to take off their headscarves during physical education classes, the Court considered that such a restriction is justified by the “respect of pluralism and freedom of others [...] explained by the French secular model” and by safety and health reasons. Also the verdicts in cases when teachers refused to remove headscarves when teaching the children at school or students at university (*Kurtulmuş v Turkey*, 2006; *Dahlab v Switzerland*, 2001) show the same line of argumentation – limitations were justified by the need to protect the rights of others (pupils/students) and the secularity of institutions.

For the purposes of this paper, the most relevant case is *S.A.S. v France*, in which a Muslim woman

“complained that the ban on wearing clothing designed to conceal one's face in public places, introduced by Law no. 2010-1192 of 11 October 2010, deprived her of the possibility of wearing the full-face veil in public. She alleged that there had been a violation of Articles 3, 8, 9, 10 and 11 of the Convention, taken separately and in conjunction with Article 14 of the Convention” (2014b).

The applicant also stressed that she was wearing burqa or niqab out of her free will, and not systematically, and that she was ready to show her face whenever necessary for security purposes. The French government on the other hand argued that full-face veil blanket ban is justified by “public safety” and “respect for the minimum set of values of an open democratic society”, especially “respect for gender equality and for human dignity” and the principle of “living together” (ibid.). The Court rejected the admissibility of the claim concerning Article 3 (prohibition of torture and degrading treatment) and Article 11 (freedom of association) and focused only on Articles 8, 9 and 14, finding no violations of none of them. Interestingly, the Court rejected the arguments about public safety, human dignity and gender equality.

Francois-Xavier Millet (2015, p.417) argues that by putting aside the argument of dignity “the Strasbourg Court denied the absolute value of dignity principle, which is being used by some courts in the world to defend a certain morality limiting freedoms and individual autonomy.” This stance of the Court is quite surprising, also if one takes into consideration that the notion of human dignity is the central aspect of the universalism of human rights. The Court based its

decision solely on the argument of “protection of the rights and freedom of others”, focusing in particular on the aspect of “living together”:

“The Court was therefore able to accept that the barrier raised against others by a veil concealing the face was perceived by the respondent State as breaching the right of others to live in a space of socialisation which made living together easier” (*S.A.S. v. France*, 2014a).

The Court also stressed that “the State was seeking to protect a principle of interaction between individuals, which in its view was essential for the expression not only of pluralism, but also of tolerance and broadmindedness, without which there was no democratic society” (ibid.). In this regard, a straightforward access to the “other” is the right enshrined in the society and “face-to-face encounter” constitutes a fundamental condition for human communication as defined by Emmanuel Levinas (Millet, p. 417). In fact, the Council of Europe’s “Manual on the wearing of religious symbol in public areas” confirms this reasoning by saying that “the key point is that what justifies the response of the state to display the religious affiliation is not so much that display in itself, but the responses to that display in that particular context *by others*” (Evans, 2009, p., 68).

As regards the jurisprudence of the Court of Justice, so far there has been no judgement concerning full-face veil, but recent judgements from March 2017 in two headscarf cases show that wearing religious symbols at work can be subject to limitations when the aim is legitimate. According to the Directive 2000/78 establishing a general framework for equal treatment in employment and occupation:

‘The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment’ (Council of the European Union, 2000, Article 1).

In general, the Directive provides for a prohibition of direct and indirect discrimination. In cases *C-157/15, G4S Secure Solutions* and *C-188/15, Bougnaoui and ADDH*, women whose job positions required direct contact with customers refused to remove their headscarves and consequently were dismissed from work by private employers. Both companies had an internal rule of neutrality, which prohibited visible wearing of any political, philosophical or religious signs. The women had been informed about this rule before taking up employment and were several times requested to comply with it. After being dismissed, they brought cases to the Court as they considered their dismissal to be discrimination on the grounds of freedom to

manifest religion. The Court, however, found no direct discrimination in obliging all the employees to comply with internal rules establishing policy of neutrality, as the aim and purpose were legitimate, and achieved by necessary and appropriate means:

“Accordingly, such an internal rule does not introduce a difference of treatment that is directly based on religion or belief, for the purposes of the directive. [...] The Court therefore concludes that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of the directive” (C-157/15, *G4S Secure Solutions* and C-188/15, *Bougnaoui and ADDH*, 2017).

Even in case of indirect discrimination, when persons adhering to a certain religion are put at a disadvantage, the Court ruled that “such indirect discrimination may be objectively justified by a legitimate aim” (ibid.). At the same time, the Court concluded that

“the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of the directive” (ibid.)

Both judgements are in line with the jurisprudence of the ECtHR regarding headscarf/full-face veil (see also *Ebrahimian v France*, 2015 regarding the private sector): “Court decisions are usually in favour of the employer’s interest in preserving the neutrality of the workplace” (European Parliament, 2013, p.78). CJEU judgements are important especially in the context of harmonising labour market regulations and jurisprudence of courts since in the past it was not clear if religious symbols can be banned in the EU for reasons other than security. “The German broadsheet *Süddeutsche Zeitung* predicted that the ruling would fundamentally change how German courts assess similar cases, because the assumption since 2002 had been that religious symbols could not be banned from the workplace on anything other than safety grounds” (Rankin & Oltermann, 2017).

3. Full-face veil: layers of significance

However, in order to be able to determine if the real violation of human rights occurs in case of wearing or rather banning full-face veils, and which rights are breached, if any, first it is indispensable to see what full-face veil symbolises and what the reasons are behind its wearing. In order to do that, it is necessary to analyse primary sources of Islamic law and look into social and cultural customs in various Muslim countries as regards women's covering. It may also be advisable to look at the full-face veil not only as a piece of garment but rather as a marker of identity and a medium to convey a message.

3.1. Veil in Qur'ān and hadīths

The primary sources of Islamic law, i.e. Sharia (*sharia*) are Qur'ān, which final redaction goes back to the caliphate of 'Uṭmān (644–655 d.c.), and Sunna, the practice (*sunna*) of the Prophet and his companions (*ṣaḥāba*), initially transmitted orally in reports (*ḥadīth*) and then set down in writing. The secondary sources comprise *ijmā'* (juridical consensus, literally “agreeing upon”) and *qiyās* (judicial reasoning by analogy).

The Islamic law system is not a monolith and is characterised by a vast proliferation of interpretations of primary sources, which are different not only among diverse Islamic denominations, but also depend heavily on the socio-cultural and political context². As Judith E. Tucker (2008, p.14) pointed out,

“The vitality, and indeed the flexibility, of Islamic law is attributable, in part, to the fact that the sharia was not, throughout most of its history, a fixed legal code. The process of interpretation of the Qur'an and hadīth, and the use of consensus and analogy, was an ongoing and open-ended affair.”

With regard to the Qur'ānic provisions on women's dress there is no consensus among Islamic scholars as to what are the exact requirements. The relevant verses referring to what might be considered as a certain regulation of women's clothing are not very precise, and hence leave room for different interpretations.

² Main Islamic legal schools are: Hanafi, Maliki, Hanbali, Shafi'I, Shi'a. Hanafi school is not opposed unveiling, Maliki school does not consider veiling a religious requirement (Tucker, 2008, p.202)

There are four suras in the Qur’ān referring to women’s dress, but it is debatable if they have a metaphorical or rather literal meaning, and if literal, then which part of the women’s body they refer to.

1. “Say to the believers, that they cast down their eyes and guard their private parts; that is purer for them. God is aware of the things they work.
And say to the believing women, that they cast down their eyes and guard their private parts, and reveal not their adornment save such as is outward; and let them cast their veils (*khumur*) over their bosoms (*juyūb*, *sing. jayb*), and not reveal their adornment save to their husbands, or their fathers, or their husbands' fathers, or their sons, or their husbands' sons, or their brothers, or their brothers' sons, or their sisters' sons, or their women, or what their right hands own, or such men as attend them, not having sexual desire, or children who have not yet attained knowledge of women's private parts; nor let them stamp their feet, so that their hidden ornament may be known. And turn all together to God, O you believers; haply so you will prosper. (24:30-31)
2. Such women as are past child-bearing and have no hope of marriage -- there is no fault in them that they put off their clothes (*thiyāba-hunna*), so be it that they flaunt no ornament; but to abstain is better for them; and God is All-hearing, All-knowing. (24:55)
3. O believers, enter not the houses of the Prophet, except leave is given you for a meal, without watching for its hour. But when you are invited, then enter; and when you have had the meal, disperse, neither lingering for idle talk; that is hurtful to the Prophet, and he is ashamed before you; but God is not ashamed before the truth. And when you ask his wives for any object, ask them from behind a curtain (*hijāb*); that is cleaner for your hearts and theirs. It is not for you to hurt God's Messenger, neither to marry his wives after him, ever; surely that would be, in God's sight, a monstrous thing. Whether you reveal anything, or whether you conceal it, surely God has knowledge of everything. (33:53)
4. O Prophet, say to thy wives and daughters and the believing women, that they draw their veils (*jilbāb*) close to them; so it is likelier they will be known, and not hurt. God is All-forgiving, All-compassionate (33:59)” (Arberry, 1982).

While the first verses refer to men and women in general and call for modest behaviour, verses three and four refer directly to the wives of Muhammad, and guarantee them special protection. It is widely agreed among Islamic scholars that the word “*hijāb*” in this context means a curtain, not a piece of garment. Thus, it could be interpreted as an expression of gender seclusion and separation of sexes, or viewed as part of the Prophet’s house etiquette, but certainly not as an obligation to cover the face or wear any particular type of clothing. According to “Encyclopaedia of Qur’an”, “In the Qur’an *hijāb* denotes a curtain or separation rather than a

female head wrap of face-veil” (Toorawa, 2001). The need to differentiate the Prophet’s wives from other women in public comes from the socio-political context and was established not only to underline their prestigious status, but above all to ensure their protection and safeguard them from harassment on the streets of Medina.

Anne Sophie Roald (2001, p.256) highlights that as the verses about the Prophet’s wives indicate that they were given a special status, the unsolved question is whether injunctions imposed on Muhammad’s wives should be understood as obliging solely them, or whether possibly all Muslim women should follow the same requirements. Some prominent Islamic feminists, like Fatima Mernissi and Leila Ahmed, renowned especially in the Western intellectual circles, strongly emphasise that the verses concerning the Prophet’s wives refer exclusively to them and must be read in the socio-historical context. Mernissi dedicated a whole chapter of her book “Women and Islam. An Historical and Theological Enquiry” to analyse from the historical perspective the passage of Qur’ān advising the wives of the Prophet to wear veil when walking in public. She concludes that this recommendation was made in order to distinguish aristocrat women from slaves, and to protect them from sexual harassment in the environment of institutional prostitution among non-Muslim slave women. In fact, this division, contrary to Muhammad’s intention, did not establish the society in which every woman could walk freely around the city without being an object of violence and sexual desire, but it only contributed to an even greater division in Medina’s society: the aristocrats were protected by the veil – symbolising their different status, whereas slave women could still be harassed and the violence towards them was tolerated (Mernissi, 1993, p.180-188). According to Mernissi (ibid., p.191), due to traditional misogynous reading of Qur’ān and hadīths, the situation observed in Medina centuries ago is still valid for Muslim women until the present times: in order to avoid harassment, now from their own people, they have to protect themselves by wearing veils in public spaces.

Similarly to Mernissi, Ahmed highlights the socio-political context, but in addition she has analysed the pre-Islamic customs regarding veiling and seclusion. She claims that those habits were taken over and incorporated into Islam from conquered tribes and were not an original invention. As Qur’ān has obvious and literal borrowings from Judaism and Christianity (creation of the world, archangel Gabriel, Old Testament’s Prophets, Jesus and Mary etc.), the same process of integration concerned cultural customs:

“the adoption of the veil by Muslim women occurred by similar process of seamless assimilation of the mores of the conquered peoples. The veil was apparently used in Sasanian society, and segregation of

the sexes and use of veil were heavily in evidence in the Christian Middle East and Mediterranean regions at the time of rise of Islam. During Muhammad's lifetime and only towards the end of that, his wives were the only Muslim women required to veil. After his death and following the Muslim conquest of the adjoining territories, where upper-class women veiled, the veil became a commonplace item of clothing among Muslim upper-class women, by the process of assimilation that no one has yet ascertained in much detail" (Ahmed, 1993, p.5).

With regard to verses 24:30-31, it is clear that women should cover their private parts and bosoms while in the presence of male non-family members, however there is no precise prescription of the type of dress. One could argue that covering the head is not required at all, as bosom means breasts/chest, and private parts - genitals. This opinion is shared by Asma Barlas (2002, P. 158), who stresses that Qur'ān urges both men and women to observe modesty in their behaviour and outfit, but refers only to private parts of both sexes (in case of women additionally breasts), but neither face nor even hair are included in this requirement.

The analysis of hadīths in terms of full-face veil brings some formal difficulties. As hadīths arose from oral tradition, the very important factor to determine their authenticity is a strong chain of narrators (*isnād* - transmission chain). Many hadīths with a weak narrator chain are being questioned for their genuineness, and for being manipulated in order to legitimise some socio-political arrangements. This is valid especially in the context of legal system with a masculine bias, which evidently interpreted Qur'ān and hadīths not in a women-friendly way, but in contrary – in the way to legitimise and ensure the dominance of the patriarchal structure of the society. In the words of Mernissi (1993, p.34), "hadīths emerged as a formidable political weapon."

In her profound analysis of the veiling in hadīths Roald (2001, p. 263-266) highlights the fact that while male dressing is described fairly often, especially in regard to the Prophet's clothes, descriptions of female dresses do not play any important role in hadīths and are barely mentioned. What is recurrent is the prohibition of wearing artificial hair and tattooing. Even when some specific garments are mentioned in hadīths, such as skirts or the way of wrapping the cloth during the prayer, it is not described how exactly they should look, and which part of the woman's body should be covered or uncovered. Roald concludes that "The hadīth literature seems to give an impression that there are some basic rules about decency for both men and women, but nothing of what I have read gives any indication of uniformity of dress. What is described is a general style of dress rather than a fixed form" (2001, p. 267). There is, however one particular hadīth which clearly implies that full-face veil was not required by Muhammad:

“Asma', daughter of AbuBakr, entered upon the Messenger of Allah (ﷺ) wearing thin clothes. The Messenger of Allah (ﷺ) turned his attention from her. He said: O Asma', when a woman reaches the age of menstruation, it does not suit her that she displays her parts of body except this and this, and he pointed to his face and hands” (Abū Dāwūd, *Sunan, Kitāb al-libās, bāb fī-mā tubdī al-mar'a min zīnati-hā*, no. 3582, cf.).

The analysis of the traditional Islamic as well as contemporary legal writings shows that there is no agreement as to which parts of the female body should be covered. Roald presents various positions of traditional scholars and points out that the first work concerning women's dress by Ibn al-Jawzī's (d.1201), called “The Book of Jurisdiction for Women”, was advising women not to go out of home at all in order not to cause temptation (*fitna*). For Roald (2001, p.268) this is a strong indication that women did not use to cover their faces. Another example demonstrating that there was no requirement to wear full-face veil is the argument of at-Tabārī (d. 923) – in his comment to Qur'ānic verses 24:31 – which is based on the consensus (*ijma'*) among scholars:

“in prayer and during Hajj women expose their hands and their faces. That means [...], that the rest of the woman's body is her 'awra (that which should not be exposed). Thus, he concludes that it is not forbidden (*harām*) to show that part of the body which is not 'awra. As a woman's face and hands are not 'awra, this means that the Koranic passage in question refers to the face and hands. at-Tabari explains the sentence 'let them draw their coverings (*khumur*) over their bosoms' as meaning that women should cover their hair and their necks and their earrings” (ibid., p.269).

The same reasoning is presented by Ida Zilio-Grandi (2017), who claims that exposing what is 'awra during religious practice invalidates the prayer. Therefore, the face cannot be considered 'awra as it has to remain uncovered during prayers and the Hajj.

Interestingly enough, even within one Islamist group/denomination we can observe differences in the attitude towards full-face veil. For instance, *salafis* scholars from Saudi Arabia and Jordan often have diverging opinions in this regard (Roald, 2001). Another example is a schism in terms of face-covering within the Muslim Brotherhood, as represented by two prominent academics of this movement. While Yusuf al-Qaradawi, world-famous theologian whose programme “Sharia and Law” was broadcast on Al Jazeera with an audience of 60 million people, opposes face-covering, Muhammad Fuad al-Barazi, Syrian legal scholar and the main imam in Denmark, fully supports the full-face veil as a religious requirement (however, he allows for a derogation for women working as doctors, lawyers etc. in the European countries) (ibid., p. 281). Both of them refer to the same Qur'ānic passages to support their arguments.

During the debate on banning headscarves in France in 2004, many Muslim jurists were asked to issue a legal opinion (fatwa) on the obligation to wear or not to wear *ḥijāb*. Also in this case the opinions were not concurrent, even though – compared to the issue of full-face veils – there is a much greater consensus among Islamist scholars that some form of women’s covering, especially over the hair - is prescribed by Qur’ān. However, even this relatively less controversial issue caused heated debate and resulted in disagreement among jurists. This shows that even a widely recognised practise is not in fact obvious from a legal and theological point of view and is questioned by Muslim academics themselves. While some jurists stated that covering the head is obligatory according to sharia and does not constitute a merely religious symbol, others had an entirely contrary position. Fatwa issued by Dalil Boubakeur, speaking on behalf of the Institut Musulman de la Mosquée de Paris, gave a women-friendly interpretation. It “asserted that *ḥijāb* was recommended by Islamic law, but was not in fact, an absolute obligation: neglecting to wear it was not a sin, and in any event there was no punishment prescribed in the Islamic law” (Tucker, 2008, p.208).

While analysing different positions in interpretation passages in Qur’ān on clothing, Shaheen Sardar Ali (2000, p.77) favours a modernist Muslim approach and highlights that in fact Qur’ānic statements on modesty imply that neither the veil nor segregation of sexes existed.

In the light of above it can be concluded that Qur’ān itself is not a misogynistic text and it does not contribute to discrimination, inequality on the basis of sex and gender segregation ordering women to fully cover themselves. Indeed, by reading and analysing this primary source it is hard to prove such a claim. According to many 19th century and contemporary Islamist scholars, it was the Muslim “male elite”, using the words of Fatima Mernissi, who has been interpreting Qur’ān in the way privileging men and ensuring their patriarchal domination in the socio-political setting. On the other hand, it is also difficult to prove that Qur’ān promotes gender equality or that it does not have any discriminatory provisions at all, since the ontological difference between men and women is one of the main pillars of the social order proposed by Muhammad. In her attempt to unread patriarchal interpretation of Qur’ān Asma Barlas (2002, p.6) noticed that

“However, recognising the existence of patriarchy, or addressing one, is not the same as advocating it. Moreover, the Qur’ān’s provisions about polygyny, ‘wife beating’, and so forth – which have been open to serious misinterpretation – were in nature of *restrictions*, not a licence.”

In terms of methodology of hermeneutics, Muslim jurist Khaled Abou El Fadl (2003, p.5) calls this approach authoritarian, i.e. one that usurps and subjugates the mechanism of producing meaning from the text to a highly subjective and selective reading. According to him this type of authoritarian hermeneutics has become widespread in the Muslim societies after 1975.

In this light, it seems more than reasonable to ask if the EU, by not addressing some provisions of Islam, or in fact allowing them to be practised on the grounds of principles of democratic countries, licencing the patriarchal, hence discriminatory fraction of Islam, acts in the name of freedom of religion? As discussed above, full-face veil cannot be considered as a religious requirement by any means. It could be recognised as a cultural or social practice, but then the question of limiting certain cultural practices arises. The EU has already banned many of those, just to name honour killing, polygamy or FGM. Why then is it so reluctant to introduce restrictions on the full-face veil – a conspicuous sign of discrimination, as evidenced by the simple fact that only women should wear it? The next section will look into different meanings of veil in order to examine if they are acceptable from the human rights' perspective.

3.2. Symbolism of veil – modesty discourse

In the EU's debates about full-face veil one of the main arguments against banning it, apart from violating the freedom of religion, is an unjustified interference in the freedom of expression. However, freedom of expression regarding clothes is not absolute. It is restricted mainly by public morals (it is for instance forbidden to walk naked or in a bikini in public spaces, except for dedicated areas) and by social practice. The rules of decorum forbid wearing certain clothes in certain contexts e.g. pyjama while giving lectures at the university. Decorum does not constitute an applicable law, but respecting social norms is expected from all members of the society, and is often regulated by internal rules of institutions or work places. Another reason behind the restrictions is the symbolism of clothing. Anthropology does not recognise clothes as simply clothes - any piece of garment has multiple layers of signification: it could be a marker of identity, carrier of message, determinant of socio-cultural status and finally an expression of gender relations and inequalities. Based on this concept, wearing clothes with Nazi or Communist symbols in public is now forbidden in many EU countries due to the values they represent, which are in opposition to democratic principles. Seen from this perspective, it is not possible to perceive full-face veil in the same way as other head coverings or pieces of

clothing, for instance a winter hat, as their actual functions and symbolic meanings are different.

Contrary to the Christian cross or Jewish star of David, headscarf, niqab or burqa are not religious symbols (as such we could consider star and crescent as a symbol of Islam). They have a very precise function, which is not to demonstrate religious affiliation, but to restrict women's sexuality in order to limit men's lust. There is a consensus among Muslim scholars that the purpose of women's covering is to limit sexual desire of men, as it is explicitly stated in Qur'ān in verses 24:31. Notwithstanding the individual motivations for covering the face or the body, Islamic primary sources and jurisprudence give no other justification of the necessity of covering "women's bosoms" than suppressing sexuality. According to "The Qur'an: an Encyclopedia" the main purpose of veil is the perpetuation of sexual attractions within the framework of the family. Thus, it is interpreted as a barrier that should be perceived as a sign of sexual modesty rather than a restraint on active participation of women in the society (Davary, 2006). Therefore, an analysis of the Islamic notion of modesty and of the symbolism of women's body is crucial in understanding the phenomenon of the veil and discussing it in the context of human rights.

"Codification and sexualisation are key mechanisms for qualifying human body – especially the female body – in Islamic tradition. (...) Underlying this codification is an understanding that the human body is fundamentally sexual. Such 'sexualisation' projects social values onto the adult body, with important gender ramifications" (Weibel, 2007).

The discourse of modesty and thus of human sexuality is built around two notions: 'awra (parts of body which should not be exposed due to their lustful potential) and fitna – among many signification: sexual desire or seduction, meaning also chaos. As mentioned before, the discussion on veil focuses mainly on what 'awra is in case of women's body. Conservatives, who advocate covering not only face but also hands and feet, claim that all female body is 'awra. However, the majority of scholars reject the idea that face is 'awra since it has to be uncovered during Hajj and prayers. While for many centuries until the present times the discussion on Islamic dress and notion of 'awra has been focused on women, surprisingly little attention has been given to men's dress, even though in the hadīths male clothes are mentioned much more often than women's. In addition, despite exact instructions given in hadīths on male outfit, Muslim men do not follow them and this fact is not contested, questioned or debated by Islamic scholars nor mentioned in Islamic law. Judith E. Tucker (2008, p.180) explores what is 'awra in relation to men's body according to Islamic teachings and confirms that there is

very little written in this regard. While, according to some scholars, part from men's navel to knees is 'awra, the overwhelming majority considers only men's genitals as 'awra. This striking disproportion in perception of male and female bodies and the resulting legal system built upon this concept could be an example of what Mernissi (1993) calls the "tradition of misogyny" and an attempt to maintain patriarchal social order. Indeed, according to Qur'ān modesty is required equally from men and women, but in the process of development of Muslim culture and law, the burden relating to restricting sexuality with all its consequences, just to mention social seclusion and no participation in political life, was shifted only to women.

In terms of fitna both sexes are equally responsible and equally vulnerable to sexual desire, according to Qur'ān. However, also in this case the discriminatory approach to constructing Islamic law and interpreting its primary sources puts a fault of temptation on women and makes men being more vulnerable to sexual desire. As a consequence, in order to save men from sinning it is necessary to cover the entire woman's body, and hence neutralise the source of temptation, as it is noted by Asma Barlas (2002, p.54) "Conservatives (...) justify such forms of veiling on the grounds that women's bodies are pudendal, hence sexually corrupting to those who see them; it thus is necessary to shield Muslim men from viewing women's bodies by concealing them."

The human sex drive and sexual relations outside of marriage are viewed in Islam as the main source of social disruption. Therefore, the Islamic legal system is focused on minimising the impact of sexual desire in the society. Criminalising sexual activity is not only manifested by introducing gender segregation and restrictions on clothing, but also in draconian punishments for zina (fornication) (Tucker, 2008, p.191). Significantly, flogging or stoning for zina were, and in some countries still are, in the overwhelming majority of cases executed on women rather than men, as it is easier to prove adultery of women (an evident example is pregnancy if the woman is not married). Similarly, the so-called honour killings are targeted only at women – as it is them, not the men, who bring disgrace on their families by engaging in illegitimate sexual acts (even in case of rape). These examples show how the legal system shifted gradually from proclaiming equality of sexes in terms of sexual desire and modesty as present in Qur'ān to inequality and discrimination revealed fully in the prejudiced concept of woman as a temptress who needs to be controlled more than a man.

Another shift from the original purpose of veiling lies in the fact that in Qur'ān women, specifically the Prophet's wives, were advised to cover themselves in order not to be molested

by men. Such a perspective shows that women were perceived as victims and men were actors. In the development of legal system on the other hand this concept became inverted: men have become victims and women – perpetrators, as from the victims subject to harassment they turned into temptresses sexually corrupting men (Roald, 2001, p. 272). There are many Islamic scholars who call this manipulation of using tradition against women as corrupting itself and in fact being “in the service of an effort to limit the public role of women” (El Fadl, 2001, p. 241-242).

Consequently, the fear of omnipresent fitna regulates religious practices in Islam but only in terms of men/women dichotomy. Interestingly, Islamic law does not tackle fitna from the homosexual perspective even though homosexual relations, while forbidden, are widely practiced in Muslim countries (Mernissi, 1975; extensive bibliography in: Simmons, 2011). Usually women cannot pray along men in mosque because they are said to trigger lustful thoughts. In case they are allowed to pray with men, they have to position themselves always behind the men so as not to disrupt them with their sexual appearance. The same justification is used to prohibit women from being the leaders of prayers. Tucker (2008, p.180) has analysed the reasons behind the opinion of most of jurists who claim that women cannot be imams. During her research she found out that such a provision is absent from the Qur’ān and in fact allowed in hadīths, but according to jurists it is a known practice that a woman cannot stand in front of men in order not to tempt them. Therefore, in Islam, in opposition to Christianity, the lack of female priests does not originate from theological reasoning, but is dictated by a very pragmatic argument: women body is ‘awra and cannot be perceived by men in a neutral way, but always leads them to lust and sin.

“The jurists seemed to agree that much of the problem originated in male desire. They acknowledged that women have sexual drives: they might caution women to lower their gaze should they find to be looking at men with desire. But overall it was male sexual impulse that framed the problem even if the necessary restrictions fell most heavily on women. This particular contradiction – that men’s inability to control their lust necessitated the restriction on women – coloured much of the discourse.” (ibid., p.184).

Salafi scholars have a similar point of view, stating that even though face covering is not required by religion, it still is highly recommended in order to avoid fitna. Additionally, Salafists highlight that full body cover prevents women from being sexually harassed, which is another significant and often repeated argument in favour of full-face veil (Roald, 2001, p.286). The idea, widely shared among Islamist scholars in general, that a woman, by exposing her body and even face, encourages or provokes men to rape or harass her stands in total opposition to the Western attitude towards

those crimes. It also contradicts the Western concept of individual moral and legal responsibility by affirming that men are not able of controlling their sexual instincts, and therefore cannot be held fully accountable for their deeds. In the EU legal system women cannot be blamed by any means for being raped, be that wearing “provocative” clothes, being drunk or on drugs, and it is the sole responsibility of perpetrator if he wields power over a victim in a criminal way.

Asma Barlas (2002, p.158) refers to the concept of women as the source of fitna with their gaze being the “messenger of fornication” and therefore forced to be segregated and veiled in order to protect men’s sexual virtue by making a very interesting observation:

“The problem with this view is that it assumes that Muslim men can only remain moral if they are deprived even of the sight of a woman. If this is the premise, then Muslim men will never develop morally since even if they cannot see their “own” women, women of the other cultures, especially of the West, always are visible to them” (ibid., p.228).

In fact, in case of Western countries veil cannot perform its main and only, from the religious point of view, function, which is to ensure harmony in society by controlling the woman’s body – a source of sexual desire, due to the simple fact that the majority of women in Western societies do not cover their faces or heads. Therefore, Muslim men are constantly exposed to sexual temptation. In this context, it could be more reasonable to encourage Muslim men to control their sexuality and adjust to the Western concept of individual responsibility rather than to expect the minority of Muslim women to cover their faces, since it cannot be by any means sufficient. On the other hand, controlling sexuality by covering women does not seem to be effective in general, even in case of countries where the majority of females are fully covered. One example could be Afghanistan, where burqa is a typical and most-often worn female outfit, but where sexual violence against women is one of the highest in the world and deeply rooted in the local culture (OHCHR, UNAMA, 2009). Hence, it cannot be proven that covering female body prevents from sexual harassment or is conducive to establishing harmony between the sexes. On the contrary, in her revolutionary survey on sexual behaviour in Morocco, Mernissi (1975) found out that restricting sexuality and sustaining gender division leads to many forms of anomalies in Muslim societies. Besides, as El Fadl points out, in the modern world fitna has its source not only in women’s bodies, but also in television, newspapers, poetry, music, commercials, movies etc. Thus, it is simply impossible to adapt this dubious concept, not present in the Qur’ān, to the reality of Western countries.

El Fadl (2001, p.233-234)³, strongly condemns the tradition of *fitna*, calling it “logically absurd” and demeaning not only to women but also to men (ibid, p.246). If we look closer at the ontological construction of men arising from the concept of *fitna*, we could indeed acknowledge that it is degrading: men are not able to function normally in the society due to their overwhelming sexual desire which does not allow them control their basic behaviour. In the presence of women men start losing their human dignity in favour of animalistic instincts, and can only gain it back when women disappear from their view or cover their womanhood in clothing. First of all, such a perception of men is in stark contrast to the concept of human dignity seen as a foundation of human rights, supposedly inherent to human nature and not subject to any conditions. Secondly, this concept assumes that men are somehow by nature different from women, hence other rules must be applied to them, which again contrasts with the Western perception of human being as expressed in the notion of gender equality and equality before law.

Another layer of significance of the various types of veils is their exclusive application to only one sex. Burqa, niqab or headscarf can be worn only by women and only women are instructed to wear certain clothes by Islam – as there are no requirements on men’s clothes according to Islamic law, despite the fact that men’s clothes are mentioned in hadīths – and in this regard the rule can be considered discriminatory. Significantly, there is no male piece of clothing which could be recognised as an “Islamic religious symbol”. There are different types of garments worn by Muslim men in different countries, but they are always a marker of their ethnic affiliation rather than expression of religious identity. It is not a rare view in Europe, or even in Afghanistan or Somalia, to see a Muslim man wearing t-shirt and jeans walking along his fully-covered wife.

However, in liberal societies the idea that only one sex can or is obliged to wear certain clothes, forbidden to be worn by the other sex, is considered to be discriminatory. The women’s emancipation was significantly marked by feminists starting to wear men’s garments and this way questioning the social norms and patriarchal system on which European societies were built (for example George Sand wearing trousers in Paris in the 19th century). It is no coincidence that adopting other sex’s style of clothing or rejecting one’s own was and still is considered to be an act of struggle with gender discrimination, strict division of gender roles

³ ‘The Quran, does use the word *fitnah*, but not to refer to sexual arousal or seduction. The Quran uses the word to refer to non-sexual temptation such as money, and to serve trials and tribunals.’ p. 233

and - in a wider perspective - an act of support for human rights (e.g. feminists burning bras, queer men wearing bras etc.).

As discussed in Chapter 3.1, clothes reflect and reinforce certain social and, in particular, gender relations. It is beyond doubt that full-face veil reinforces a patriarchal social system, as it represents the most conservative version of Islam in which on the one hand gender division and seclusion of women are important values, and on the other hand women are perceived as the source of temptation which has to be restricted, and men are unable to control their sexual desires. In this light, it seems reasonable to ask why the EU accepts this cultural custom and discriminatory perception of both sexes, which is obviously contrary to the EU policies promoting gender equality, individual responsibility and fight with any form of sex-based discrimination? The often raised argument of freedom of expression is not convincing due to the fact that self-expression promoting values which are not in line with the democratic ones might be subject to limitation.

3.3. Veil and fundamentalism

In the history of Islam the woman body has always represented an ideological field on which political battles for power have taken place. This is as much relevant to the reformist movements which wish to introduce Western ideas to the patriarchal and conservative societies, as to the orthodox movements which aim to regain the power by calling for moral and social rebirth by return to the 'roots of Islam'. In both cases, women are politicised and used as a weapon in the ideological struggle in which rejecting or re-establishing the veil and seclusion has been its most visible symbol.

Despite the various motivations of Muslim women in the EU for wearing full-face covering, there is arguably a very strong connection between veil and Islamic fundamentalism. It is no coincidence that all Islamic revival social movements or radical jihadists use veiling and restricting women as a core element in their programmes. This connotation, known to the EU audience, needs also to be taken into account and cannot be ignored or undermined while discussing the various dimensions of significance of the veil. As mentioned before, clothing is "the carrier" of a message: it reflects a specific vision of the world and incorporates a certain social structure and division of gender roles. Therefore, public recognition of certain pieces of garment as affiliated with certain ideology is not to be underestimated.

Shaheen Sardar Ali (2000, p.5) highlights the fact that, over the centuries, cultural practices discriminatory to women were reinforced, while those favouring them were conveniently ignored. This has consequently led to human rights abuses by undemocratic regimes in the name of revivalist “religious norms”. Tucker (2008, p.202) notices the same inclination within Islamic piety movements to use women as a tool for ideological struggle:

“In general, (...) outside of some small ultra-conservative Islamist circles, most Islamic jurists eventually abandoned seclusion and the face-veil in the first half of the twentieth century. Just recently however, we have seen the modest resurgence of the face-veil throughout the region as part of the early twenty-first-century Islamic piety movement.”

In fact, Islamic piety movements, also the ones which erupted in the 20th century, were in the overwhelming majority of cases outposts of various political regimes. They were politically driven in response to ‘Westernisation’ of Muslim societies or were/are aiming to legitimise a certain political power. In this regard, they cannot be considered “religious” movements since their agenda was not built on religious motives but rather on political and social ones, and the fundamental interpretation of religion has been used as a legitimisation tool.

Despite the egalitarian movements which arose within Muslim societies in the 19th and at the beginning of the 20th century, the end of the millennium witnessed a shift towards Islamic fundamentalism which, among other features, restricts women’s rights.

According to Ahmed (1993), it is the Qasim Amin’s book “Woman’s liberation” – published in 1889 in Egypt – which marks the beginning of feminism in the Arab culture. Amin was a fierce advocate of banning the veil and he considered unveiling women to be the key to the social transformation. Similar views were shared by many Islamic jurists of that time – e.g. the Iraqi scholar Jamil Sidqi al-Zahawi who in his article published in 1910 condemned the veil as cultural custom not prescribed by Qur’ān and causing severe social damages (Tucker, p.201). This call for social reforms led to the modernisation and secularisation of the societies in countries such as Iran, Afghanistan and Turkey. Here, discussions on women’s rights were coupled with banning/discouraging the use of full-face coverings, hence challenging traditional sex seclusion and empowering women to enter the labour market and the educational system. Those reforms were often marked by a spectacular rejection of Islamic female dress as a symbol of oppression. For instance, King Amanullah Khan of Afghanistan, who reigned in the 1920s, introduced a number of progressive laws regarding women, like the right to vote, compulsory education for both sexes, prohibition of polygamy, as well as ban on child marriages, slavery

and forced concubinage. He was also an advocate of female emancipation and did not support the veil. His wife, Queen Soraya, in a symbolic gesture to support the king, tore her veil off in public – an act that was later mimicked by all the king's entourage wives.

The same gesture of removing face-veil in public, as an expression of women's liberation, was performed in 1923 in Egypt by Huda Sharawi, an Egyptian feminist, and followed by many women who shared feminist views.

One of Ataturk's reforms following the fall of the Ottoman Empire, was to ban face coverings and other religious clothes in 1934. This had been preceded by the prohibition of polygamy, by introducing sex equality in inheritance laws, and by granting voting rights to women.

In Iran, Reza Shah Pahlavi introduced the "Women's awakening project" (1935-1941), which apart from banning the veil and introducing dress-code policies had broader ambitions to change the whole perception and the role of women in the Iranian society. "... the removal of the veil was promoted as part of the renewalist vision that was to construct women as compatible spouses, educated professionals, and visible participants of civil society" (Mottahedeh, 2007).

However, these changes were often introduced in an abrupt way and forced upon the conservative societies who considered modernisation as anti-Islamic. This, in turn often fostered the rise of opposition movements which aimed not only to preserve the "Islamic identity", but also to overthrow the ruling government who was held responsible for implementing "Western values".

Significantly, in the all above mentioned countries after some progress towards gender equality and women's rights had been made, an ensuing social shift led to the adoption of retrogressive measures with regard to women. Even Turkey, with its well-established tradition of secularism, under the rule of Erdogan is now drifting towards islamisation and reconstruction of traditional social order where the role of women is very much restricted.

Not only all newly-established regimes who advocated Islamic revival have introduced women seclusion and veiling as a visible shift compared to their predecessors, but also various fundamentalist groups and jihadist movements have used the same strategy to underline their opposition to the ruling power. "(...) The patriarchal drive to control female sexuality repeatedly trumped the egalitarian impulse, as is nowhere more apparent than in few ways control and chastisement of the female body have surfaced as a key feature of Islamisation campaigns in recent times" (Tucker, 2008, p.222).

Describing gender role paradigms in Islam, Shahin Gerami (1996, p. 17) points out that “while post-war modernisation relaxed sexual segregation in some Muslim countries, the rise of Islamic fundamentalism has resurrected spatial separation as the core of its ideal society.”

Indeed, the reforms implemented by Ayatollah Khomeini in Iran led to the restoration of patriarchal society where women were forced to re-adopt “proper” domestic roles. In his rhetoric, the seclusion of females and compulsory veiling were part of not only religious piety but more importantly represented a symbol of ideology, political identity and an expression of anti-westernisation policies. In this case, the religious justification for the introduction of new laws was in fact an excuse to legitimise his political agenda.

“We [clergy] forcefully affirm that refusal to wear the veil is against the law of Allah and the Prophet, and a material and moral affront to the entire country. We affirm that the ludicrous use of the Western hat stands in the way of our independence and is contrary to the will of Allah. We affirm that coeducational schools are an obstacle to a wholesome life; they are a material and moral affront to the country and contrary to the divine will. We affirm that music engenders immorality, lust, and licentiousness, and stifles courage, valor, and the chivalrous spirit; it is forbidden by Qur’anic law and must not be taught in the schools. Radio Tehran, by broadcasting Western, Oriental, and Iranian music, plays a nefarious role by introducing immorality and licentiousness into respectable families” (Khomeini, 1985, p.5).

Interestingly, Islamic fundamentalism rejects modernisation and Westernisation in a very selective way: in the public domain modernisation is accepted and followed, but in the private sphere it is usually fully rejected, mainly with regard to women. Regressive measures are not introduced in the field of technology, economic development, military, social services, political structure etc., but in the family issues: restricting women’s access to the labour market, education, social life, choosing the spouse, freedom of movement and imposing the dress-code (Gerami, 1996, p.39). Yet, occasionally due to market conditions, fundamentalists are willing to allow women to work. This is especially true for Iran, where full denial to access the labour market for women was only temporary, though after it was lifted they were only allowed to perform “female” jobs.

Khomeini’s views on the role of women in society are shared by all fundamentalist Islamic groups, including the Salafists, Taliban, Boko Haram, ISIS, Al-Qaida, Al-Shabaab, Sudanese government. Furthermore, veil is the most visible symbol of their concept of womanhood and social structure, though many other forms of oppression are hidden from the public eye:

“A woman who has contracted a continuing marriage does not have the right to go out of the house without her husband’s permission; she must remain at his disposal for the fulfilment of any one of his desires, and may not refuse herself to him except for a religiously valid reason. If she is totally submissive to him, the husband must provide her with her food, clothing, and lodging, whether or not he has the means to do so” (Khomeini, 1985, p.56).

This reasoning places women as an inferior asset of men, and has been used by the Taliban to justify the severe laws regarding women in Afghanistan. Rosemarie Skaine (2002, p.5) quotes the opinion of Muslim Women’s League according to which the Taliban’s political agenda, legitimised by religion, is in fact not compatible with Islam: “Taliban’s stand on the seclusion of women is not derived from Islam, but, rather, from the cultural bias found in suppressive movements throughout the region.” Taliban not only forced all women to wear burqa and stay at home, but also deprived them of many other basic human rights like education, freedom of movement, listening to music, working outside the house, access to medical care, talking to not male relatives, riding bicycles. They also introduced public stoning for simply being accused of sexual relations outside of marriage etc. The obsession with female body led to a decree which ordered people to paint the window panes black in order to prevent the possibility of seeing women from outside of the house. Also, wearing bright coloured, thin, sound-producing clothes was forbidden because they were considered to be “sexually attractive” (Rawa.org, 2017). Some of Taliban’s laws targeted also men, but there is no doubt that laws regarding women were much more restrictive and cruel.

Very typical feature of Islamic fundamentalism is its spread from few main ideological centres to other countries - religion in those cases is instrumentalised in order to achieve goals other than religious.

In this regard, the Saudis’ campaign to spread Wahhabism in late 1970s was strategically used to legitimize their role as “spiritual guides” of the Muslim community and as the defenders of the holy places. Hence, religion became an instrument to maintain and expand their political dominance over the region and to “protect” the kingdom from the turmoil created by the Iranian Revolution, the siege of Mecca, and the threat posed by Saddam Hussain.

The results of this can be observed in many countries in which originally strict women seclusion or face veiling were not culturally practiced, but conservatism was imported at some point from Saudi Arabia, Libya or other countries along with financing extremist movements (e.g. in Yemen, Somalia, Mali). As a consequence, local culture and customs are being

destroyed in the name of returning to pure Islam, but this serves no other purpose than to control society and achieve political goals.

The same tactics is used by ISIS not only to impose strict laws on indigenous people, but also to legitimize slavery and the barbaric custom of seizing women from conquered regions as sexual captives. One of the most symbolic images showing the attitude of local people towards ISIS is a footage of Iraqi and Syrian women burning full-face veils, imposed by ISIS, while dancing in joy after liberation of their villages and towns by Iraqi forces (Pasha-Robinson, 2017).

Gerami (1996, p.29) notices that all fundamentalists aim to separate their group from outer-groups by creating an easily identified behavioural and communication code, with a detailed dress-code as one of its main elements. As for men, growing a beard can be a component of affiliation with Muslim extremism, whereas for women it is always some form of head/body covering. It is impossible to name any fundamentalist Muslim group which does not order women to fully cover their bodies and in some cases also faces.

Seen from this perspective, full-face covering can be considered as an inherent element of the Islamic fundamentalism occurring hand in hand with other forms of discrimination of women and symbolising paternalistic and antidemocratic concept of social order. In this regard, many secular Muslim feminists expressed their concerns about the rise of Islamic piety movements

“Fearing the loss of minor hard-earned human and civil rights the total institutionalisation of *Shariat* with its concomitant restriction on women, many cried for protection of women against fundamentalism. The appearance of widespread Islamic *hijāb*, either mandatory, like in Iran, or strongly urged, as in Egypt, public prosecution of women, imposed seclusion, and private abuse of women were major concerns. Indeed, many, including myself, feared the total dehumanisation and objectification of women.” (ibid., p.86).

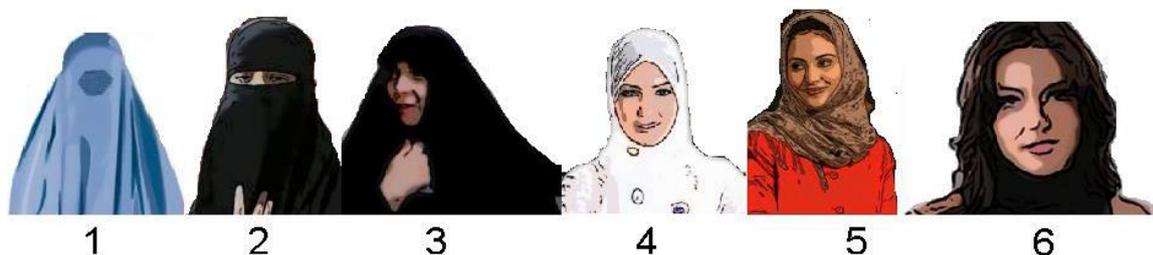
3.4. Practice of face covering in different Muslim countries

Another argument proving that full-face veil is not an Islamic religious requirement but rather cultural custom used nowadays as a political tool, is the fact that in the majority of Muslim societies female face coverings are not and have never been used. The local variations in dress codes in Islamic countries are endless and usually serve to differentiate the ethnic origin of people, rather than being associated with particular religious duties.

Interestingly, in the Islamic Republic of Iran, the only republic based on Islamic doctrine, there is no obligation or custom of face-covering, even though wearing *hijāb* is compulsory. In some Muslim countries, like Syria, Turkey, Tunisia, Kosovo, Morocco or Chad full-face covering is either forbidden in general or in public spaces. Morocco introduced, along with a ban of wearing, prohibition of production, sales and import of burqas and niqabs. Many of the listed countries consider full-face veils as a sign of political influence of radical movements, including the not welcomed Salafism, hence perceive them as a threat to public security and social order (Yazbeck & Esposito, 1998, p.51).

Ironically, in 2016, ISIS banned wearing burqa and niqab in Mosul due to security reasons after they suffered an attack by a group of veiled women.

Research conducted by professor Mansoor Moaddel from the University of Maryland on comparative assessment of Egyptian, Iraqi, Lebanese, Pakistani, Saudi, Tunisian, and Turkish publics, examined the attitude of societies towards different female head coverings. The respondents were asked the question “Which one of these women is dressed most appropriately for public places?”



“The style #1 is en vogue in Afghanistan; #2 is popular among both conservatives and fundamentalists in Saudi Arabia and other Persian Gulf Arab countries; #3 is the style vigorously promoted by Shi’i fundamentalism and conservatives in Iran, Iraq, and Lebanon; #4 and #5 are considered most appropriate by modern Muslim women in Iran and Turkey; and #6 is preferred by secular women in the region.” (Moaddel, 2013).

The #1 was chosen in all countries by less than 10% of respondents and only in Saudi Arabia by 11%; #2 gained 63% of support in Saudi Arabia and 32% in Pakistan, while in all other countries less than 10%. The most appropriate women’s dress in the majority of countries is #4. Only in Lebanon lack of any head covering is considered as appropriate by almost the half of respondents (49%) and in Turkey by 32%.

By analysing these findings, Moaddel observed that the preferences for woman's covering are not related to the country's economic development – taking into consideration that Saudi Arabia is the most developed country among the listed ones – but

“Rather, it reflects a country's orientations toward liberal values as well as the level of freedom people enjoy. In Lebanon, Tunisia, and Turkey, where people tend to be less conservative than the other four countries, the preferable style for women also tends to be much less conservative than the other four countries.” (ibid.).

Another reason for wearing or not wearing full-face veils, which is not linked to religious conservatism or official political agendas, is the already mentioned prevention of sexual harassment and expression of political views, not necessarily connected with fundamentalism. For instance, in Kuwait during Iraqi invasion in 1990 women started wearing abayas (which however expose the faces) in order to smuggle weapons and information and to avoid being harassed by soldiers (Haddad, 1998, p.195). In Iran, women started to wear *hijāb* on universities during the rule of Shah, even though it was forbidden, to contest his absolute power.

However, sexual harassment is arguably one of the leitmotifs of the Islamic discourse on veil not only in Muslim countries but also in the EU. In societies where sexual harassment of women is widespread and culturally accepted, women tend to wear full body coverings as a preventive measure. This function of veiling is mentioned by all scholars who analyse the phenomenon of female face covering. Sadly, it is also referred to by Muslim women themselves as the one of the main reasons to wear veil. Anne Sophie Roald in several interviews with women on the purpose of wearing veil observes this reasoning and quotes the opinion of a female Islamist from North Africa, who names prevention as the only justification of veil:

“Look at the reality, however, how many women are not raped? How many women are not sexually molested at work or on the street? This is the reality! Idealistic ideals (that women are masters of their own bodies, hence they can wear what they want) are marvellous, but reality is not always as we want it to be” (2001, p.290).

4. Human rights versus full-face veil

The relationship between the full-face veil and human rights has been explored by many scholars. The two surveys analysed in this paper, conducted as part of VEIL and RELIGIARE projects, focus exclusively on the issue of Muslim veils. However, while there is a wealth of literature on violations of human rights caused by the introduction of restrictive measures, such as burqa/niqab bans, there is a relatively limited number of publications dedicated to the analysis of which human rights might be infringed by imposing the obligation to wear full-face coverings (for instance Eva Brem in her book “The Experience of Face Veil Wearers in Europe and the Law” presents only opinions of academics who are anti face-veil ban). Despite negligible remarks in EU or CoE official documents on the veil standing in contradiction to some human rights, both institutions tend to avoid adopting a wider perspective and prefer to look at this phenomenon only from the point of view of freedom of religion. This chapter will investigate in more detail which rights might be potentially violated by wearing burqa/niqab so that more light can be shed on this multidimensional issue. The aim is also to present a different perspective, which should be taken into consideration when designing public policies – which so far lack consistency in their approach towards full-face veils.

4.1. The right to freedom of religion

Article 10 of the Charter and Article 9 of the ECHR guarantee the freedom of religion for everyone. As already mentioned in Chapter 2, the freedom to have or to change a religion (*forum internum*) is an absolute right, while the freedom to manifest religion (*forum externum*) is subject to a number of limitations listed in the ECHR. Those limitations should be “prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others” (European Court of Human Rights, 2013).

In case of full-face veil, the jurisprudence of CJEU and ECtHR shows that the line of argumentation based on the necessity to protect the rights and freedoms of others is the one most commonly taken to legitimise limitations such as a blanket ban of face coverings.

The notion of “rights and freedoms of others” refers mainly to the values and principles encompassed by the concept of “living together”, which is presented explicitly in the CoE

Resolution “Freedom of religion and living together in a democratic society” (Parliamentary Assembly, Resolution 2076, 2015). The CoE notes that

“Those values and principles, which are non-negotiable, consist mainly of profound respect for human dignity and the fundamental rights protected by our democratic constitutions and by the European Convention on Human Rights. [...] That right (freedom of religion) coexists with the fundamental rights of others and with the right of everyone to live in a space of socialisation which facilitates living together. That may justify the introduction of restrictions on certain religious practices” (ibid., point 5).

In this regard, full-face veil is considered to be an infringement of “living together” since it hinders socialisation by eliminating the possibility of non-verbal communication and, in case of burqa, even eye contact between members of the society. Interestingly, according to Islam it is forbidden to cover the face during trading, as face-to face communication is a prerequisite for making a fair business deal. This rule refers also to Muslim women who are allowed to trade since the first wife of Mohammed was an entrepreneur. Moreover, as it is argued by French feminist Elizabeth Badinter, full-face veil infringes upon the rights of others by inadvertently contributing to inequality: “Wearing the face veil represents a refusal to engage with the other people, or more precisely rejection of reciprocity; a woman wearing the veil assumes the right to look at me, but rejects my right to look at her” (Grillo & Shah, 2016, p. 207).

As argued in Chapter 3, full-face veil can be considered neither as a religious obligation nor as a religious symbol under Islam. This, however, does not change the fact that it is recognised as a “religious symbol” by CJEU and ECtHR, and consequently by the EU and CoE. For the both courts, self-assessment of each person on what is or is not required or what is religious manifestation is an ultimate argument. Wearing Christian cross is definitely not a religious obligation, but it is recognised as a manifestation of religious belief. However, “simply because something is considered to be religious symbol does not mean that there is a right for it to be publicly visible” (Evans, 2009, p.65). Evans argues that the context of wearing religious symbols, and the response of others to these symbols, have a crucial importance. Full-face veil, as discussed in Chapter 3.3, is without doubt associated with radical Islam and fundamentalist groups who introduce the veiling of women as part of their family law regulations. General public in the EU is aware of these connotations and might react with alert when individuals manifest their affiliation to such groups. In this context, the state should consider whether the face veil complies with the principles of pluralism and tolerance, or in contrary, if it increases fear and causes xenophobic reactions.

“What for the applicant might be a matter of personal piety might have a high degree of political significance for others, and irrespective of whether that political implication is justified or not, this alone might require that the state respond to the emergent situation in order to resolve any resulting tensions” (ibid., p. 67).

This is particularly valid with regard to combating any form of Islamic fundamentalism, an aim declared important many times by the EU and CoE.

The condemnation of fundamental Islam can also be found in the ECtHR judgement of *Refah Partisi v. Turkey* case (2003), where the ban to establish a political party was justified by the attempt of this party to set up a political system governed by sharia law. Therefore, it was considered undemocratic. In its report on “Living together” the CoE stresses that

“the existence of Islamic extremism – meaning not only actual terrorist plots or explicit advocacy of violence but also groups and preachers who denounce western values or call for ‘jihad’ (often, but not always accurately, translated as ‘holy war’) – is a serious threat to peaceful coexistence between Muslims and non-Muslims in Europe, if only because it reinforces, and appears to justify, fear and resentment of Muslims among the non-Muslim population” (Council of Europe, 2011, p.24).

Recognising such a threat should be an argument enough for banning visible signs of those movements, even when the person wearing them is not in fact affiliated with those groups.

One of the main arguments of advocates of non-restrictive measures is that women are free to choose to fully cover their face or body and that by veiling they do not express support for radical Islam. However, both of these arguments do not seem to be fully convincing. Consent itself does not necessarily equal a right. Many religious and cultural practices are banned in the EU in spite of the potential consent of individuals practicing them, just to name early marriages, polygamy or FGM. For instance, the case of *Laskey, Jaggard and Brown v. United Kingdom* (1997) has shown that the consent of adults to practice homosexual, sado-masochistic encounters in privacy does not lift the responsibility of the state to protect the citizens’ health and that it is up to the state to decide what level of psychological and bodily harm is accepted between consenting adults. In the case of *Khan v. the United Kingdom* (1986) the consent of a 14-year-old Muslim girl to marry a 21-year-old man, as well as the fact that under Islamic law a girl can marry without the consent of her parents at the age of 12, was not justification enough to prevent the authorities from convicting the man for abduction and having sexual relationship with a juvenile. The prohibition of this marriage, which was concluded in accordance with

Islamic law but contrary to the civil code, was not considered by the court as the breach of Articles 9 and 12 of ECHR.

Moreover, as stated in the EU resolution on ‘a roadmap for equality between women and men (2006-2010)’ (2007a), full-face veil constitutes deprivation of identity for pragmatic reasons: it strips individuals of age, sex, unique features and the possibility to communicate non-verbally. If we agree that a person is defined as “a human being regarded as an individual” (Oxford Dictionaries. English, 2017), one has to conclude that the veil is turning a human being into an object and not a subject. In this regard, individual consent does not justify face covering, since it undermines the very basis of the society, which is a collection of individuals, not dehumanised objects with a limited possibility of expression.

The reasoning that the full-face veil might be worn for various reasons, as a result of which it loses its symbolism, is logically doubtful. The symbol preserves its force despite the intentions of an individual who uses it. The imitation of the Nazi uniform worn by Prince Harry during a private costume party still invokes the mass atrocities and criminal regime of Nazis, even though it appeared in the context of a joyous event whose purpose was to lift social norms. This event triggered a fierce debate in the EU not because Prince Harry had expressed his affiliation to Nazism, which was not the case, but because this particular piece of garment represents values which are rejected in the EU (Kallenbach & Tweedie, 2005; BBC, 2005). Christian cross remains the symbol of Christianity even when worn exclusively as a piece of jewellery or displayed in different contexts and for various reasons. The same applies to full-face veil. Even if women wear it for multiple reasons, its religious function, and in consequence its symbolism remains intact.

As discussed in Chapter 3, there is a wide consensus among Islamic scholars that veiling has only one function in Islam, which is to restrict female sexuality. It is also true, as mentioned before, that full-face veiling is practiced mainly by radical Islamic denominations and imposed by extremists who consider restricting the behaviour of women as a key element of social harmony and a way to exercise power over them. To say so is to conclude that the full-face veil symbolises a certain understanding of social order, which stands in contrast with a European understanding of open and pluralistic society based on human rights and equality. The same reasoning was used by ECtHR in the *Leyla Şahin v. Turkey case*, in which the court concluded that

“the issue of the Islamic headscarf could not be assessed in the context of Turkey without considering the potential impact of this symbol, presented or perceived as a mandatory religious duty, on those who did not wear it; according to the Turkish courts wearing the headscarf had taken on a political meaning in the country; Turkey had extremist movements endeavouring to impose on society as a whole their religious symbols and conception of a society founded on religious precepts. Against such a background, the impugned regulations constituted a measure geared to attaining the aforementioned legitimate aims and thereby preserving pluralism in the university” (Council of Europe/ European Court of Human Rights, 2015a, p.27).

4.2. The right to freedom of expression

The full face-veil issue could also be considered under Article 10 of ECHR or Article 11 of the Charter if it is not perceived as religious practice but a way of self-expression (also an expression of cultural identity). The freedom to expression is not an absolute right but is subject to even more limitations than the freedom of religion, namely:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary” (European Court of Human Rights, 2013).

In this regard, banning burqa/niqab is usually connected with the general ban of covering the face for the purposes of national security, public safety and prevention of crime.

In terms of rights of others, the same line of argumentation as for the freedom of religion can be used in case of freedom to expression. Individual expression cannot infringe upon the rights of other people, whereas covering the face and hence limiting social interaction does so. In terms of expressing cultural identity, it should be borne in mind that any harmful cultural practices are forbidden and forced veiling can be considered as one such example.

4.3. Non-discrimination and gender equality

One of the most commonly used arguments against full face-veil is discrimination on the grounds of gender. Indeed, as discussed in the previous chapter, the concept of female veiling

came from the misogynist interpretation of the Qur'ān and has as its main function to control women's sexuality. This provision, combined with the fact that only women are obliged to cover their face and body in order to preserve social harmony, constitutes the background against which the veil could be considered as a sign of sex discrimination and an infringement of the principle of gender equality. While discussing Muslim veil in the EU, the meaning of female covering in Islam cannot be ignored, since this phenomenon is inseparably connected with a religious vision of the world and a certain set of values. Even in case of voluntary veiling and self-discrimination (in the sense that some people freely choose to live in a system which is per se discriminatory) the veil still remains the expression of gender discrimination. In the case of *Leyla Sahin v Turkey* the ECtHR refers to the case of *Dahlab v Switzerland* to describe its stand on headscarf worn by a teacher in a primary school:

“powerful external symbol’ which her wearing a headscarf represented and questioned whether it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality. It also noted that wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination...” (2005, p.27).

If in the Court's opinion headscarf cannot be reconciled with the principles of gender equality and non-discrimination, it is even more so for the full-face veil. Since the MS have a positive obligation to ensure that non-discriminatory provisions are in place and that gender equality is mainstreamed throughout all policies, the lack of regulations in case of full-face veil might be seen as a failure on the part of the state to fulfil its duties. The VEIL project highlights that “Interestingly, particularly secular Muslim feminists warned of the accommodation of the headscarf as a form of pseudo-tolerance that jeopardized Muslim girls' rights to freedom and equality” (Andreassen & Lettinga, 2012, p.21).

Another aspect of veiling, often left out in the debates and EU/CoE official documents, is that it is more or less directly connected with “honour crimes” and violence against women in general, and should be combated as such. In the EP's briefing on “Combating 'honour' crimes in the EU”, there is one remark on compulsory clothing, but not explicitly on veiling:

“The dishonour brought by the victim's behaviour may take several forms and can relate to, for example, **dressing** in a manner considered inappropriate by the community, not accepting or wishing to terminate an **arranged marriage**, engaging in **sexual relations** outside of marriage, or engaging in **homosexual relations**” (European Parliament, 2015, p.2).

This reference is not present in any other document or survey on the topic. The EP considers patriarchy as a root cause of violence against women and recognises that in the EU such crimes occur mainly in Muslim immigrant communities. The communitarian type of social relations, as well as the low importance of individualism are also mentioned as factors facilitating honour crimes: “The environments where these types of crimes do occur are cultures in which the family dominates the individual, and therefore personal choices against the wishes of the family are perceived as shameful or dishonourable” (ibid. p.3). As argued by Carolyn Evans (2001, p.27),

“Unlike the Christian Churches, the idea of free will is a weak one in Islam, which rather emphasises on that the object of human life is submission to God and that the State (in so far as this is meaningful concept of Islam) and individuals should dedicate themselves to this purpose.”

Interestingly, the same position is expressed by Mernissi (1975, p.22) who asks why Islam, in contrary to Christianity and Judaism, has failed to combine modernity, democracy and religious tradition, in short, to integrate the past into the present. Her answer is simply the lack of recognition of the individual:

“our traditional identity hardly acknowledges the individual, whom it abhorred as a disturber of the collective harmony. In Islam, the idea of the individual in the state of nature, in the philosophical meaning of the world, is non-existent. Traditional society produced Muslims who were literally ‘submissive’ to the will of the group.”

The main reason to kill a woman or a girl for the sake of defending the honour of the family is that she was “too Western”, which includes the refusal to wear the headscarf or veil. This was also the case of Hatun Surucu, age 23, shot dead in 2005 in Germany by her brothers after she escaped a forced marriage and refused to wear a head-scarf (Honor diaries, 2013).

In spite of criticising the patriarchal structure, harmful cultural practices, honour crimes and violence against women the CoE and the EU tend to excuse such phenomena by making contradicting statements, in particular by reaffirming cultural diversity. One of the main counter-arguments to ban burqa/niqab is that such a ban will prevent a large group of women from leaving their houses, as the only way for them to interact with the society is by being physically secluded by veiling. In the CoE resolution on “Islam, Islamism and Islamophobia” a general ban is not recommended precisely for this reason:

“...a general prohibition might have the adverse effect of generating family and community pressure on Muslim women to stay at home and confine themselves to contacts with other women. Muslim

women could be further excluded if they were to leave educational institutions, stay away from public places and abandon work outside their communities, in order not to break with their family tradition” (Parliamentary Assembly, 2010, p.3).

This demonstrates not only a lack of coherence in reasoning, but also an implicit agreement to have a group of non-integrated women who are literally hostages of their community, deprived of equal access to the labour market, education and basic social interactions in the name of tradition. As such, it contradicts the policies of integration and combating violence against women.

This position is all the more surprising if one takes into account that forced seclusion is recognised by the EU as one form of psychological violence against women. In FRA’s report “Violence against women: an EU-wide survey” the set of questions to determine if psychological violence occurs is focused mainly on the controlling behaviour of men (e.g. How often does your current partner/Did any previous partner ever... prevent you from making decisions about family finances and from shopping independently? forbid you to work outside the home? forbid you to leave the house, take away car keys or lock you up?) (FRA, 2014b, 72).

The results show that the most common form of psychological violence is in fact controlling behaviour (“trying to keep the respondent from seeing her friends or visiting her family or relatives, insisting on knowing where she is, getting angry if she speaks to other men [or women], suspecting her of being unfaithful”), followed by economic violence (“preventing the respondent from making decisions on family finances or shopping independently, or forbidding her to work outside the home”) and abusive behaviour (“belittling or humiliating the respondent in public or in private, forbidding her to leave the house or locking her up, making her watch pornographic material against her wishes, scaring or intimidating her on purpose, threatening her with violence or threatening to hurt someone else the respondent cares about”) (ibid., p.72-73).

Clearly, wearing the full-face veil, compulsory or voluntarily, constitutes discrimination in access to the labour market, as many professions cannot be performed with a covered face, especially with a limited vision and a limited possibility of being heard. According to the jurisprudence of the ECtHR and the CJEU, the restrictions at the workplace on covering the face cannot be considered discriminatory, and even if indirect discrimination occurs, then it is

excused by a legitimate aim. Therefore, it is on the individual to make sure that he or she is able to perform work duties properly and to adjust to the obligatory dress codes.

Since there is no data on the access of full-face veiled women to the EU labour market or their level of literacy and professional skills, it can be assumed that their participation is low, mainly due to pragmatic reasons. For instance, face-veiled women cannot work in the European Commission due to security considerations:

“The Commission received a question from the European Parliament regarding the wearing of the burqa or veil in official premises of the EU. It replied that the entry into Commission buildings is subject to an identity check for security reasons. The Commission security guards must be able to verify that the physical appearance of the person seeking entry corresponds to the photograph on the identity card or other means of identification. When any person is dressed in such a way that all identifying characteristics, in particular the face, are hidden, a proper security check cannot be carried out. In such cases, access to the Commission’s buildings could be denied, following a proportionality assessment taking into account religious freedom, non-discrimination and the need to ensure the security of the Commission’s officials, visitors and guests” (European Union, 2011, p.34).

In terms of accessing the labour market Gerami argues that

”Like the functional order, the Islamic spatial system is part of a social system of roles, responsibilities, and distributive rewards. It, too, limits and rejects women’s equal right to political and economic resources. Furthermore, since the formal job sector is all in the public domain, particularly in cities, spatial segregation restricts women’s economic opportunities more than the functional order. Yousseff (1974) suggests that seclusion of Muslim women has affected their participation in the non-agricultural sector. Gerami (1988), in a cross-cultural study, has shown that after controlling for the effects of economic growth and modernization, Muslim women have lower labour force participation and higher fertility than Catholic women in Latin American countries” (1996, p.16).

Ali (2002, p. 232) emphasises that non-discrimination on the basis of sex is an integral part of international customary law, and under the main human rights instruments like ICCPR, ICESCR, CEDAW and CRC it constitutes a non-derogable right. The same applies to local instruments such as the Charter and ECHR. In this context, Ali proposes that non-discrimination on the grounds of sex should be considered *jus cogens*, with no derogations permitted. At the same time, however, he notices the discrepancy between the legal standard and its application in practice in this regard. This gap is also emphasised by Tucker (2008, p.175) who highlights that by refusing to intervene in the family domain, which is restricting veiled women and depriving them of various opportunities, including entering the labour

market, the state abdicates the whole responsibility of protecting women and consequently subjects them to patriarchal control. This is also relevant to the position of the EU who is simply shying away from taking responsibility for vulnerable groups of veiled women, and thus contradicts its policies of gender equality, non-discrimination and combating gender-based violence.

4.4. The right to health

Another issue almost entirely omitted in the burqa/niqab controversy is the influence of those garments on health and, respectively, their implications for the right to the integrity of person (Article 3 of the Charter) and prohibition of torture (Article 3 of ECHR).

First of all, one very visible impact of full-face covering on the human being is the limitation of all senses. A person entirely covered has limited hearing and smelling capacities, as well as a restricted capacity of speaking and being heard. The motoric aspect is also restricted and, in case of burqa, vision is extremely confined. Seen in this light, the right to respect one's physical and mental integrity is infringed, since people wearing full coverings cannot use their senses to their full capacity. Moreover, there are several scientific publications proving that veiling of the body leads to vitamin D deficiency, which is a result of the lack of exposure to sunlight, considering a European/Western metropolitan context. A survey on pregnant veiled women in Australia shows that they "are at high risk of vitamin D deficiency because of their garments' impairment of absorption of ultraviolet B light from the sun. Children born to such mothers are also at greater risk of rickets and growth impairment" (Awofeso, 2006). Additionally, the survey has stressed that the problem lies also in insufficient supplementing of vitamin D:

"A recent study indicated that a quarter of vitamin D deficient postnatal women attending an Australian hospital were not prescribed vitamin D supplementation as per existing policy, and half did not take prescribed medication correctly. About 90% of the vitamin D deficient women in this study were Muslims, and it was determined that noncompliance was partly because of the belief among the women that the vitamin supplements contained pork products" (ibid.).

Another medical study conducted in Australia on veiled Muslim women shows that 68.1% of them had severe vitamin D deficiency, which had led to development of high bone turnover (Diamond et al., 2002). In Great Britain, the re-emergence of rickets after 100 years has been caused by strict Muslim dress codes among the Muslim minority (BBC, 2001). The spokesman of the UK Department of Health stated that:

"For ethnic groups there is an increased risk of vitamin D deficiency as people with dark and pigmented skin are less efficient at making vitamin D in their skin. They need to spend longer outside to make similar amounts and those who wear concealing clothing are unlikely to make enough. Studies have shown low vitamin D levels in Asian women in the UK - particularly among those who cover most of their skin for cultural reasons" (Pipes, 2015).

Many medical doctors link full-body covering with an increased risk of obesity as such an outfit makes it impossible to perform physical exercises. According to "The Encyclopaedia of Women & Islamic Cultures" "High obesity prevalence among women may be partially due to cultural prohibitions against physical activity" (Suad & Afsaneh, 2007). In the ranking of countries with the highest percentage of obese women published in The Economist magazine, Muslim countries were the top four (Qatar, Saudi Arabia, Gaza Strip and West Bank and Lebanon) (The Economist, 2007).

It is also argued that wearing full-body coverings might cause rashes, headaches, multiple sclerosis and respiratory diseases (Pipes, 2015). The impact of burqa on the eyesight has not been mentioned in any report, but it is easy to imagine that the mesh in front of the eyes and constant changing of the focus may have serious health consequences. Similarly, there are no studies on the instances of fainting and the number of miscarriages among veiled women, both of which are potential consequences of overheating the body while wearing clothes fully covering the body in high temperatures.

Interestingly, there is no comprehensive study conducted among veiled women in the EU on the influence of burqa/niqab on their health and well-being. In the EP study "Religious practice and observance in the EU Member States" (2013), in the section on the prohibition of torture and physical integrity only male circumcision, FGM, blood transfusion, abortion and euthanasia are discussed, whereas forced veiling is not mentioned in the whole research. However, this practice can be definitely perceived as inhuman treatment, as well as an infringement of physical integrity, especially when the limitation of senses and severe health consequences are taken into account. Deprivation of identity might also fall under the category of mental integrity, as it reduces the person's individuality to minimum, in particular in relations with others.

4.5. The rights of the child

The rights of the child are rarely mentioned in any judgement on burqa/niqab and are barely present in the public debate on this topic. Courts of law look at the issue of veil/headscarf only from one perspective, namely whether the right to freedom of religion of the child or the right of parents to choose the education and belief for their child were infringed – and never whether the right of the child was violated by a certain type of education or as a result of following certain cultural or religious traditions. This is contrary to the approach of the EU and CoE towards other cultural and religious practices, such as FGM or early marriages, which are recognised as violating the rights of the child. As mentioned before, “Handbook of the European law relating to the right of the child” (2015a) issued by FRA mentions veil only once: in its judgement in case of *Dogru v. France and Kervanci v. France* the ECtHR concluded that the prohibition of wearing the veil during physical education classes was justified by health and security reasons. The issue of compulsory veiling of children and the impact of veiling on their mental and physical integrity are mentioned neither in the FRA’s report, nor in any judgement of ECtHR or CJEU.

Meanwhile, it is clear that full-body covering can infringe children rights to an even greater extent than for adults. First of all, health repercussions connected with wearing face coverings are more severe for children than for adolescents. Babies born to veiled women “are more prone right after birth to serious complications such as seizures, growth retardation, muscle weakness and fractures. Subsequently, as toddlers, carrying the weight of the torso can force the development of a bow-legged appearance and a waddling gait” (Pipes, 2015). Children who are veiled since their early childhood are also exposed to several diseases mentioned in the paragraph on health-related issues. “Girls approaching puberty who are adhering to traditional dress are also at risk, say experts, as more vitamin D is needed during this growth spurt.” (BBC, 2001). Burqa or niqab can also be convenient instruments to hide the evidence of domestic violence exercised on children. This was the case of a 15-year-old girl from New Zealand whose family forced her to wear burqa in order to cover up her facial injuries, like broken nose and extensive bruises (NZ Herald, 2013). Another detrimental aspect of covering the face of children for religious purposes is that it prevents integration with their peers and therefore hinders the development of social skills, as not only face-to-face contact is made impossible, but also participation in many sports and entertainment activities is limited.

Taking into consideration the function of the veil in Islam and the concept of fitna, veiling children turns them automatically into sexual objects and active agents of temptation, whose sexuality should be limited in order not to provoke lustful thoughts and actions of men. Since in Islam there is no fixed eligible age for marriage, the accepted threshold is puberty, which is the case of girls getting married without the consent of their parents at 12 of age, as mentioned in case of *Khan v. the United Kingdom*. Therefore, after reaching puberty a girl is considered to be a woman, ready for sexual intercourse and maternity. However, in many cases girls are veiled even before reaching puberty in order to make them “modest”. This aspect and function of veil was confirmed in the in the case of *R (on the application of X (by her Father and Litigation Friend)) v Headteachers and Governors of Y School*:

“X, the claimant is a 12-year-old Muslim girl who is a pupil at Y school (“the school”) which is a selective all-girls grammar school. She entered her second year there in September 2006. By that time, the claimant had reached puberty and in line with her own genuinely held religious faith she wished to wear the niqab when she attended the school and while she was being taught by male teachers or likely to be seen by men” (2007, point I.2).

In the EU child marriages are illegal since national civil codes prescribe the minimum marriageable age of 18 years old, and in some cases 16 subject to the consent of parents or court. At the same time, many EU countries accept marriages of migrants or refugees even when spouses are below 16 years old to the extent that national courts recognise such marriages as legal, which was the case for Sweden and Germany (Wendle, 2015; Edmunds, 2016). The issue of child marriages has gained importance with the influx of refugees to the EU, triggering fierce debates on how such marriages should be treated on the legal basis (BBC News, 2016). “The German Interior Ministry, responding to a Freedom of Information Act request, recently revealed that 1,475 married children are known to be living in Germany as of July 31, 2016 — including 361 children who are under the age of 14” (Deutsche Welle, 2017). In order to combat child marriages, especially among Muslim migrants, German government has initially agreed to introduce a law annulling all marriages in which one person was below 18 and define the minimum marriageable age of 18 (ibid.).

However, combating child marriages does not go hand in hand with the discussion on the role of veiling of the children, the latter leading to their sexualisation and viewing young girls as “women” able to sexually attract men and inflame desire, and therefore obliged to cover. The practice of covering the girls’ bodies is also connected with honour crimes, as any type of

behaviour which is perceived as “not modest and Western” in many cases triggers violence from members of the family or a peer group, sometimes ending up in killings.

According to Article 2 of the First Additional Protocol of ECHR and to Article 14 of the Charter, parents have a right to ensure education of their children in conformity with their religious conviction, in accordance with the national law. At the same time, according to Article 24 of the Charter the state has a positive obligation to guarantee child’s “right to such protection and care as is necessary for their well-being” and “In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration”. However, this does not apply to Muslim veiling of children, as according to the jurisprudence of ECtHR the ban on wearing the veil at schools is legitimised first and foremost by an infringement “of rights and freedoms of others”, and not by the rights of those who wear such garments.

Courts and other institutions, as it seems, do not to consider veiling as harmful for children, regardless of the fact that compulsory or voluntary veiling can be seen as such for reasons listed above. Therefore, it would be justifiable for the states to evaluate the impact of veiling on children and fulfil their positive obligations towards them even if it interferes with parents’ rights, as it is the case for compulsory education which might be in contrast with parents’ wishes (cf. the case of US Supreme Court *Wisconsin v. Yoder*, 1972, in which an Amish family was granted exemption for their children from compulsory education as it was in contradiction with free exercise of religion). In the case of *Casimiro v. Luxembourg* (1999), the ECtHR decided that parents’ refusal to allow their child to attend state school on Saturday, their religious day of rest, is violating the rights of others, in this case their own child’s right to education (Evans, 2009, p.19). However, in case of headscarf/veil this kind of justification has never been used in courts’ judgements. In case of *R (on the application of X (by her Father and Litigation Friend)) v Headteachers and Governors of Y School* (2007), the High Court of Justice dismissed the claim of a 12-year-old girl who was forbidden to attend school in niqab by saying that her right to freedom of religion was not infringed because the school had a legitimate aim to expect pupils to follow its uniform policy and because there is a need to protect the rights and freedoms of others, that is, non-covered pupils. In his judgement, Justice Silber stressed that he was dealing with one particular case – not the broader issue of whether the niqab should be worn in schools or anywhere else (2007, point I.1) In the end, the girl changed the school for one in which wearing the niqab was allowed.

Surprisingly, the Court did not ask a number of very pertinent questions: e.g. why a 12-year-old girl attending classes at school is fully covered including the face; what kind of influence this practice has on her right to personal integrity, health and integration with other pupils; what the level of agency has a child of this age to decide on such an issue; and why some schools allow children to attend classes with covered faces, which obviously limits their level of participation and therefore violates their right to education. Also, the issue of sexualisation of the child by veiling her in order to avoid gaze of male teachers was not raised. In this regard, it should be the state's responsibility to investigate such cases and to involve, if necessary, child protection experts in order to determine if veiling is in fact in the best interest of the child and if the family belongs to a religious fundamentalist movement.

The veiling of teenagers can be also a sign of their radicalisation since jihadist groups are using the social media for recruitment and propaganda, targeting also young girls. In an interview published by BBC Newsnight in March 2015, a twenty-year old British woman recalled how an "attractive" ISIS fighter approached her on Facebook when she was only seventeen. The man had sent her a private message that she "was very attractive," further telling her: "Now's the time to cover that beauty because you're so precious" (BBC News, 2015). BBC reported how Ayesha – a fictitious name to safeguard her identity – claimed that this "was the 'best way I could have been targeted' because it played on her religious beliefs and told her she would 'end up in hell' if she did not obey" (ibid.). This approach was only possible because the recruiter had the chance to access her personal profile, her pictures and personal details to tailor his recruitment strategy accordingly.

It could be also argued that the child has a right to face-to-face interaction with the mother as the non-verbal communication has a higher importance than the verbal and is necessary in all stages of child's development. The practice of picking up children from preschools and schools by veiled mothers is already forbidden in some countries due to the security reasons. However, this behaviour is not analysed from the perspective of the rights of the child.

Taking into account numerous harmful effects of veiling on children and putting the issue in a wider context of radicalisation, domestic violence and honour crimes, it would be reasonable to expect the EU to consider revising its policies on the rights of the child and to at least recognise forced veiling as one of harmful cultural/religious practices, rather than simply ignoring this problem.

4.6. Integration

The argument of integration is one of the main ones in the burqa/niqab debate. Covering the face is regarded as undermining the principle of living together and a sign of refusal to integrate with the society. Indeed, integration constitutes one of the key frames in the full-face veil controversy. As described in Chapter 2, an increasing number of politicians use this frame to advocate the introduction of restrictive measures in order to avoid fragmentation and stratification of the society. In Austria, the burqa ban is part of the so-called integration package and in Germany such a prohibition will be imposed to prevent the development of “parallel societies”.

In her analysis of women in Islam, Anne Sophie Roald, Muslim herself, applied a model of two oppositional cultural patterns: “Arab cultural based pattern” and “western cultural based pattern” and defined them as *patriarchal* versus *equality*. Describing European Muslims, she has noted that the length of time spent in a European country does not necessarily facilitate the adoption of values of the host community. What counts more is the degree of contact with the majority society (Roald, 2001, p. 294). She noticed that

“those who remain within the Muslim community and have little contact with non-Muslims tend to reproduce cultural interpretations from their native lands. The Swedish suburbs in which most of the inhabitants are Muslims are good examples of how traditional attitudes towards women and family life are reproduced in a ‘ghettoised’ world within a new cultural context. Many Islamists with primary or secondary contact with the majority society, on the other hand, show attitudes more compatible with majority society” (ibid, p.296).

At the same time, Roald claims that the most important factor hindering a change in behaviour is group affiliation. According to this finding, women and men belonging to groups such as the Muslim Brotherhood or the Islamic Liberation Party tend to strictly follow their ideologies, and therefore limiting their level of acceptance toward other views.

In this regard, the question of how the EU and CoE distinguish between “Islam” and “Islamic ideologies’ and how they intend to implement different approaches towards these two categories seem to be pertinent, especially in the context of full-face veil which is prescribed mainly by radical Islamist groups.

The CoE report on “Living together” highlights the difference between ghetto and parallel societies and calls them two distinct phenomena. The term *ghetto* is applied

“when a district becomes largely separated from the rest of the city, in conditions of social and economic exclusion (or self-exclusion). The typical ghetto is a run-down, inner-city area with high rates of unemployment and juvenile crime. Alternatively, it may denote an area whose inhabitants keep themselves to themselves, hardly speaking the main language of the country; where members of the ‘indigenous’ population, if they stray into it at all, feel unwelcome and insecure” (Council of Europe, 2011, p.22).

Ghetto is not mono-ethnic, but comprises of minority groups of different ethnic origins which often have antagonistic relationships. The same applies to parallel societies which “can sometimes be geographically spread-out, living intertwined with the wider community but minimising real social contact with it” (ibid., p.23).

According to this report, parallel societies are much more dangerous than ghettos:

“First, social and economic deprivation can lead to unrest, which is not necessarily related to cultural or religious grievances. Second, members of the new, better educated middle class, growing up in a closed society within an open one, become increasingly indignant at the lack of upward social mobility, and may suffer from a kind of ‘cultural schizophrenia’. Members of this group are prone to radicalisation. Third, due to their closed nature, parallel societies often provide cover for criminal activities, and in some cases for terrorist networks” (ibid.).

The results of a survey conducted by the Münster University’s Cluster of Excellence “Religion and Politics” on “Integration and Religion as seen by People of Turkish Origin in Germany” (Pollack et al., 2016) show that despite the very good personal well-being of the first, second and third generations of Turkish migrants and their willingness to integrate (90% of respondents feel very good in Germany, 70% want to integrate without reservation), in reality the adoption of “Western values” is superficial. The main prerequisite for integration according to the respondents is to learn the German language (91%) and obey German laws (84%). Only 34% consider adoption of German culture to wider extent as a condition for integration and 76% believe that standing self-confidently by one’s own culture is necessary for successful integration. While the majority of respondents experience a lack of recognition in the German society, they do not feel discriminated. Patriarchal views are common in all generations. 39% of respondents believe that men should work and women should stay at home, while 64% consider working mothers as harmful to their babies. 23% believe that Muslims should not shake hands with the opposite sex and 33% that Muslim women should wear headscarves in public. Fundamentalist and dogmatic opinions are also relatively common, which is contrary to a high willingness to obey German law.

“The percentage of people of Turkish origin who express attitudes that can hardly be regarded as compatible with the basic principles of modern ‘Western’ societies like the one in Germany is partially considerable. 47% of respondents agree with the statement, ‘It is more important for me to follow the commandments of my religion than the laws of the country I am living in’. 32% of respondents think that Muslims should aspire to return to a social order the way it was in the days of Prophet Muhammad. 50% of the people of Turkish origin agree strongly or agree somewhat with the statement, ‘There is only one true religion’. 36% are convinced that only Islam is capable of solving the problems of our times. The percentage of those with a thorough and firmly established Islamic fundamentalist world view (agreement with all of the four statements) amounts to 13% of respondents” (ibid., p.13).

These results also show a difference between the attitude of the first generation of migrants who tend to be more orthodox, and the second and third generation whose answers are more moderate. The authors of the report predict that fundamentalist views can be limited if the integration policy will be successful and add that “factors counteracting a fundamentalist attitude that emerge from the study are frequent contact with the majority society, a good command of the German language and integration into the labour market” (ibid p. 14).

Taking the arguments above into consideration, it becomes very clear that exposure to and regular contacts with the majority society prevent radicalisation, hinder the emergence of parallel societies and ghettos and enable better integration. Hence, it seems justified to consider face veiling as an obstacle to integration since it limits the possibility of face-to-face communication and is per se a barrier in interaction.

5. Conclusions

Even though in theory the European Union is founded on common European values and human rights, the reality seems to be far from it. As argued by Andrew Williams (2004, p.160), the EU has failed to define what is meant by human rights and how they should be applied and promoted in a coherent fashion. According to him, the myth of human rights as the founding principle of the Community is no longer relevant:

“Due to the lack of substance, its lack of certainty, the narrative of founding principle has become a vapid construction, a wistful statement repeated as law without any certain content or appreciation of practice. It ignores the considerable differences between the attitudes of Member States to rights. It has been incapable of providing the framework for any kind of consistent human rights activity. Instead, the myth has lost its validity and relevance and has left human rights to the vagaries of context and inherent discrimination” (ibid.).

Indeed, this is particularly true when analysing the attitude of the EU towards full-face veil from the perspective of human rights. The most conspicuous aspect is the lack of consistency towards burqa/niqab and, consequently, towards related issues, such as Islam, Islamic fundamentalism, radicalisation, rights of the child or violence against women.

On the one hand, the EU once described forced veiling as the “deprivation of identity” and called for “zero tolerance” (European Parliament, 2007a). On the other hand, this attitude has not been translated into any action and is consequently avoided in EU legal documents as well as in reports, surveys and studies. The right to equality and non-discrimination is the most strongly protected in the EU, but it is impossible to find direct references to veil in the legislation. According to the TFEU

“In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women [...] guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health [...] combat discrimination based on sex...” (Article 8-10),

Even though the veil is a very visible sign of discrimination and social exclusion, it is not perceived as such by the EU. Interestingly, the EU does not classify forced veiling as a harmful cultural practice nor as a sign of sex discrimination or as a form of violence against women. It also does not bring up the rights of the child in this regard. Moreover, despite the constant calls to fight with Islamic radicalisation and the condemnation of sharia law, the EU is not able to differentiate between Islam and Islamic fundamentalism or to define which practices and

provisions of those two should be rejected or accepted in the EU (such as spatial and physical seclusion of women or patriarchal reading of Qur'ān). This lack of a clear stance as to which religious practices should be deemed unacceptable leads to a variety of approaches presented by individual MS towards full-face veil and, consequently, to contradicting interpretations of human rights.

Also in terms of voluntary veiling the EU position is not clear. This lack of profound reflection on the function of veil in Islam and hence on the complex meaning of this “religious symbol” hinders any thorough discussion on this subject and is not conducive to efficient and informed decision- and policy-making. At the same time, it seems that notions such as “living together” and “rights of others” concur in limiting the freedom of religion and expression. This attitude is reflected in the jurisprudence of CJEU and ECtHR. The European model of relations between the individual, the state, religion and the law

“protects individual private religiosity but recognises that religious freedom can negatively impact on the rights of others and therefore can be limited in areas outside the private sphere. EU legislation may well bring about the greater pressure to facilitate a greater degree of religious expression in the workplace but the leeway given by Strasbourg to Member States to limit religious expression in state context and to limit religious actions that impact negatively on the rights of others is unlikely to be disturbed by the Charter” (Peers et al., 2014, p.309)

The most surprising consequence of the EU's attitude is the fact that issues such as the impact of full-face veil on the participation in the labour market, its links to various human rights (not only the freedom of religion), or the position of full-face veil cover in a more general context of policies relating to equality and non-discrimination remain largely unexplored. Lack of any data on full-face veil seems difficult to comprehend, especially taking into account the prominence of this topic in the public debate and given the mandate of FRA and EIGE, which is supposed to be focused on the collection of data and on conducting research on human rights related issues. Instead, a researcher in an EU-funded project on full-face veil calls the ban of burqa “medieval pattern of persecution” (Malik, 2016, p.251) and ridicules any position which is not in favour on this garment: “it is nearly impossible for a counter-case to be made or taken seriously; anti-face-veiling discourse is like a closed system, impervious to argument” (Grillo & Shah, 2016, p.212.). Clearly, such an attitude does not contribute to strengthening pluralism and to encouraging an open discussion on the topic.

The full-face veil example shows how the EU is torn between cultural relativism and universalism of human rights. Evidently, the existence of a vulnerable group of females who

are not only forced to veil, but are also deprived of the possibility to integrate is not enough for the EU to take action, as these practices are perceived to be inherent to Islamic culture, and therefore enjoy protection. Another vulnerable group – children – is not even taken into account while discussing the veil, with the result being that positive obligations of the EU and MS to ensure their development and to act always in their best interest are not fulfilled. In case of voluntary covering the face, the EU is also willing to accept the infringement of European consensus, which sees social interaction as based on face-to-face encounters.

In this context, the EU might consider the debate on full-face veil as a chance to redefine its understanding not only of human rights but also of “European values”, as well as an opportunity to reinforce the idea of the human being as an individual having inherent dignity expressed among others by face-to-face relations with the Other. Thus, it seems necessary to return to the philosophical tradition of the West and to place the person in the centre of ethical and ontological reflection. As Emmanuel Levinas (1998, p.9) put it, the ethical meaning of the other is that through face the being faces another being, and therefore establishes the human bond. “The being as such (and not as an incarnation of universal being) can only be in a relation in which he is invoked. That being is man, and it is as a neighbour that man is accessible: as a face.”

For Levinas recognising the other as a human being is possible only through a relationship which involves the face. By doing so, it is possible to preserve humanity and avoid the risk of dehumanisation of a person. “The temptation of total negation, which spans the infinity of that attempt and its impossibility—is the presence of the face. To be in relation with the other face to face—is to be unable to kill” (ibid., p.10).

Indeed, the face is the ultimate marker of humanity:

“The face is the very identity of a being; it manifests itself in it in terms of itself, without a concept. [...] The face as de-sensibilization, as de-materialization of the sense datum, completes the still encumbered movement in the figures of mythological monsters in which the body, or the animal half-body, allows the evanescent expression on the face of the human head they bear to break through. The particularity of the other in language, far from representing his animality or the remains of an animality of it, constitutes the total humanization of the Other” (ibid., p.33).

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